261 N.C. App.—No. 3 Pages 311-540

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 28, 2020

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
DONNA S. STROUD
CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
PHIL BERGER, JR.
HUNTER MURPHY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
REUBEN F. YOUNG[1]
CHRISTOPHER BROOK[2]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL. JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK DAVIS[3]
ROBERT N. HUNTER, JR.[4]

[1]Sworn in 30 April 2019. [2]Sworn in 26 April 2019. [3]Resigned 24 March 2019. [4]Retired 1 April 2019.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Jaye E. Bingham-Hinch

Assistant Director
David Alan Lagos

Staff Attorneys
Bryan A. Meer
Eugene H. Soar
Michael W. Rodgers
Lauren M. Tierney
Carolina Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy

ADMINISTRATIVE OFFICE OF THE COURTS

Interim Director
McKinley Wooten

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Jennifer C. Peterson
Alyssa M. Chen

COURT OF APPEALS

CASES REPORTED

Filed 18 September 2018

Barrett v. Coston 311
Burton Constr. Cleanup & Landscaping, Inc. v. Outlawed Diesel Performance, LLC 317
Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer 325
Glover v. Charlotte-Mecklenburg Hosp. Auth. 345
Haarhuis v. Cheek 358
In re J.B. 371
Nationstar Mortg., LLC v. Dean 375
Quevedo-Woolf v. Overholser 387
Smith v. N.C. Dep't of Pub. Instruction 430
Sneed v. Sneed 448
State v. Edwards 459
State v. Enoch 474
State v. Gray 499
State v. White 506
State v. Williams 516
Town of Carrboro v. Slack 525

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Apperson v. Intracoastal Realty Corp. 537
Blumenschein v. Blumenschein 537
Cabarrus Cty. Bd. of Educ. v. Bd. of Trs., Teachers' & State Emps.' Ret. Sys. 537
In re De Luca 537
In re Foreclosure of SDS Invs., LLC . . . 537
In re V.P.M.A. 537
Johnston Cty. Bd. of Educ. v. Bd. of Trs. Teachers' & State Emps.' Ret. Sys. 537
Johnston Cty. Bd. of Educ. v. Dep't of State Treasurer, Ret. Sys. Div. 537
LeTendre v. Currituck Cty. 537
Malone v. Hutchison-Malone 537
Mitman v. Shipley 537
Smith v. N.C. Bd. of Funeral Serv. 537
State v. Barnes 538
State v. Brown 538
State v. Bryant 538
State v. Cataldo 538
State v. Eriksen 538
State v. Fowler 538
State v. Gainey 538
State v. Hill 538
State v. Hollifield 538
State v. Inman 538
State v. Jilani 538
State v. Kelly 538
State v. Lunsford 538
State v. Mazur 538
State v. McGill 539
State v. McKoy 539
State v. Miller 539
State v. Ogles 539
State v. Rinehart 539
State v. Smith 539
State v. Spivey 539
State v. Thabet 539
State v. Traub 539
State v. Vickers 539
State v. White 539
State v. Whitehead 539
Union Cty. Bd. of Educ. v. Bd. of Trs., Teachers' & State Emps.' Ret. Sys. 539
Union Cty. Bd. of Educ. v. Dep't of State Treasurer, Ret. Sys. Div. 539
Wilkes Cty. Bd. of Educ. v. Bd. of Trs., Teachers' & State Emps.' Ret. Sys. 540
Wilkes Cty. Bd. of Educ. v. Dep't of State Treasurer, Ret. Sys. Div. 540

HEADNOTE INDEX

ADMINISTRATIVE LAW

Administrative Procedure Act—adoption of retirement benefits cap factor—applicability—legislative intent—The Board of Trustees of the Teachers' and State Employees' Retirement System was required to adhere to the rule-making provisions of the Administrative Procedures Act (APA) before adopting a cap factor to limit retirement benefits for certain members, pursuant to N.C.G.S. § 135-5(a3), based on the intent of the legislature as evidenced by the plain language of the relevant statutes. Statutory interpretation reveals neither an express nor an implied exemption from the APA in Chapter 135, and the cap factor falls within the APA definition of a "rule." The requirement that the cap factor must be based upon professionally determined assumptions and projections does not implicate an alternative procedure to that found in the APA. **Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, 325.**

State agency—rule interpretation—deference—In an action to determine whether the adoption of a cap factor limiting the retirement benefits of certain members of the Teachers' and State Employees' Retirement System needed to comply with the rule-making procedures of the Administrative Procedures Act (APA), the Court of Appeals did not need to determine whether the trial court gave proper deference to the agency's interpretation of the authorizing statute because it is the Court's duty to interpret administrative statutes. **Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer, 325.**

APPEAL AND ERROR

Findings of fact—challenged—inconsequential to outcome—In a child custody case, a mother's challenges to certain findings of fact were overruled where an expert's testimony (which she had challenged as inadmissible in a previous argument) supported several of the findings, and the other challenged findings had no bearing on the outcome of the case. **Sneed v. Sneed, 448.**

Preservation of issues—full faith and credit—out-of-state child custody order—In an action to modify a child custody order entered in Florida, plaintiff (the child's mother) failed to preserve for appellate review the issues that North Carolina applied the wrong law and did not give full faith and credit to the Florida order where she sought to modify custody pursuant to North Carolina law, not Florida law. The trial court erred in considering plaintiff's arguments on these issues in her purported Rule 59 motion for a new trial because she failed to preserve them by raising these objections at trial. **Quevedo-Woolf v. Overholser, 387.**

Preservation of issues—Rule 59 motion—sufficiency of allegations—The Court of Appeals elected to treat plaintiff mother's appeal in a child custody action as a writ of certiorari where she failed to timely appeal from the trial court's custody order and her purported Rule 59 motion did not contain sufficient allegations to toll the thirty-day period for appeal. **Quevedo-Woolf v. Overholser, 387.**

Preservation of issues—waiver—objection to limiting instruction on evidence—failure to object to evidence itself—Defendant waived an argument that the trial court erred in his first-degree murder trial by admitting evidence of defendant's prior assaults against the murder victim to show identity, where defendant objected only to the court's limiting instruction to the jury and not to the evidence, its limited admissibility, or its use in proving identity. **State v. Enoch, 474.**

APPEAL AND ERROR—Continued

Record on appeal—omission of summary judgment order—preclusion of appellate review—Plaintiffs' argument regarding the trial court's denial of their motion for summary judgment was dismissed where plaintiffs failed to include a copy of the order denying summary judgment in the record on appeal, precluding appellate review. **Burton Constr. Cleanup & Landscaping, Inc. v. Outlawed Diesel Performance, LLC, 317.**

Record on appeal—omission of trial transcript—preclusion of appellate review—Plaintiffs' failure to include the trial transcript in the record on appeal precluded appellate review of their argument concerning entry of directed verdict. **Burton Constr. Cleanup & Landscaping, Inc. v. Outlawed Diesel Performance, LLC, 317.**

ATTORNEY FEES

Nonjusticiable claims—frivolous and malicious claims—false affidavit—The trial court did not abuse its discretion by awarding attorney fees and costs to defendants where plaintiff swore in an affidavit that his truck was undriveable when it left defendants' shop but admitted at trial that the allegation was not true. The false affidavit was the only reason the case proceeded to trial, and plaintiffs' claims were frivolous and malicious. **Burton Constr. Cleanup & Landscaping, Inc. v. Outlawed Diesel Performance, LLC, 317.**

CHILD CUSTODY AND SUPPORT

Custody modification—conduct inconsistent with protected status as parent—sufficiency of findings and conclusions—In an action to modify a child custody order entered in Florida, the trial court's determination that plaintiff mother acted inconsistently with her constitutionally protected status as parent to her daughter was supported by clear and convincing evidence that the mother did not maintain meaningful contact with the child for several years and did not make any formal attempt to regain custody from the child's grandmother (defendant), aside from one abandoned court filing, for over six years. **Quevedo-Woolf v. Overholser, 387.**

Jurisdiction—prior orders on appeal—subsequent order void—In an action to modify a child custody order entered in Florida, the trial court's entry of an order modifying custody was invalid for lack of jurisdiction because prior custody orders were on appeal; as a result, the child was improperly removed from defendant grandmother's custody. **Quevedo-Woolf v. Overholser, 387.**

Jurisdiction—subsequent order—different judge—In an action to modify a child custody order entered in Florida, a second North Carolina trial judge had no jurisdiction to enter an order on multiple bases: first, as previously decided, plaintiff mother's purported Rule 59 motion for a new trial was not a valid Rule 59 motion; and second, the subsequent judge had no subject matter jurisdiction to consider plaintiff's motion for a new trial where the initial trial court judge properly entered the order from which plaintiff sought relief, because a trial judge who did not try a case may not rule upon a motion for a new trial. Since the second judge had no subject matter jurisdiction, it was also improper for the judge to issue rulings regarding the choice of law in the case. **Quevedo-Woolf v. Overholser, 387.**

Jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—modification of out-of-state order—The trial court had jurisdiction to modify a

prior child custody order entered in Florida pursuant to the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), based on undisputed findings that North Carolina was the child's "home state" and that none of the relevant persons were residents of Florida during the period of time at issue. Florida ceased to have exclusive, continuing jurisdiction once the jurisdictional requirements for modification were met in North Carolina. Further, any violation of a Florida statute that may have occurred as a result of the grandmother (defendant) moving the child to North Carolina did not affect North Carolina's jurisdiction under the UCCJEA. **Quevedo-Woolf v. Overholser, 387.**

CHILD VISITATION

Orders entered pending appeal—prior order controls—In an action to modify a child custody order entered in Florida, where several orders were deemed void and vacated by the Court of Appeals, the last prior order regarding visitation of the child with plaintiff mother controlled. **Quevedo-Woolf v. Overholser, 387.**

Temporary suspension of parent's visitation—purposeful alienation of children by one parent—children's best interests—The trial court did not abuse its discretion by ordering a conditional, temporary suspension of a mother's visitation rights to her children where the mother had purposefully alienated the children from their father and thereby had caused a detriment to the children's welfare. **Sneed v. Sneed, 448.**

CONSTITUTIONAL LAW

First-degree murder—juvenile offender—life without parole—In a case of first impression, the Court of Appeals determined that the Eighth Amendment required a trial court to consider, as a threshold matter, whether a juvenile offender convicted of first-degree murder qualified as an irreparably corrupt individual before imposing a sentence of life imprisonment without the possibility of parole. Where a trial court found that a juvenile offender's likelihood of rehabilitation was unknown or speculative, the imposition of life without parole was constitutionally invalid as applied to that individual. **State v. Williams, 516.**

EASEMENTS

By prescription—rebuttable presumption of permissive use—regular use and upkeep—In an action to establish access to a gravel road separating adjacent properties, a private citizen neighbor established a prescriptive easement claim by rebutting the presumption that his use of a private road across defendants' property was permissive by showing that he maintained a private right of way across the eastern edge of defendants' property through regular use to access his own property and regular physical maintenance of the road. However, the trial court erred by entering a permanent injunction enjoining defendants from taking any measures that would prevent trespassers from using the road. **Town of Carrboro v. Slack, 525.**

Express easement by reservation—necessary language in deed—In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show that an express easement by reservation was created where none of the deeds in the defendants' chain of title contained any reservation or exception. Although all the deeds in defendant landowners' chain of title referenced a "private road" on the eastern edge of their property, none had language indicating an intent to withhold

a portion of the conveyance so as to create an easement by reservation. **Town of Carrboro v. Slack, 525.**

Implied easement by dedication—public use—sufficiency of evidence—In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show possession of an implied easement by dedication by which deeds referencing a "private road" could be construed to create an easement for public use where the recorded instruments themselves did not indicate an intent to create such an easement, no public authority expressly or implicitly accepted a dedication, and the actions of the landowners were not consistent with an intent to create one. **Town of Carrboro v. Slack, 525.**

Implied easement by estoppel—equity arguments—inducement and reliance required—In an action to establish access to a gravel road separating adjacent properties, government plaintiffs failed to show they possessed an implied easement by estoppel because they could not show they were innocently and ignorantly induced by defendants to believe they possessed an easement before making plans for development of their land. Further, government plaintiffs' own actions in approving defendants' request to build a bioretention basin in the path of the purported easement undermined its argument for equitable consideration. **Town of Carrboro v. Slack, 525.**

Implied easement by plat—conveyance necessary—In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show an implied easement by plat because defendants never conveyed any property to them, undermining the argument that defendants should be estopped from denying the existence of an easement plaintiffs relied on when purchasing their property. **Town of Carrboro v. Slack, 525.**

Prior transaction—third parties—intent to create express easement appurtenant—valid only between owners—In an action to establish access to a gravel road separating adjacent properties, a prior transaction by a landowner granting an easement to non-landowner third parties merely created an easement in gross as to those third parties, and not an easement appurtenant running with the land. To create an easement appurtenant, the easement must be granted by the owner of the servient estate and accepted by the owner of the dominant (benefiting) estate. **Town of Carrboro v. Slack, 525.**

EQUITY

Constructive trust—proper basis—necessary elements—Plaintiff failed to state a claim that her deceased brother's sister-in-law (defendant), to whom he devised his house, held the house in constructive trust for plaintiff due to an apparent oral agreement that the brother intended plaintiff to have the house. A constructive trust cannot be based on an unenforceable oral agreement to devise real property, and plaintiff failed to show that defendant acquired the house through fraud, breach of duty, or other wrongdoing. **Barrett v. Coston, 311.**

Reformation of deed of trust—unclean hands—collateral matters—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the doctrine of unclean hands did not bar the reformation claim asserted by the holder of the note, where the alleged oral agreements with the mortgagors to restructure and modify the loan were made years after the

deed of trust was executed and were therefore wholly collateral to the transaction for which relief was sought. **Nationstar Mortg., LLC v. Dean, 375.**

EVIDENCE

Cross-examination—limits—matters raised during direct examination—In a trial for multiple offenses arising from the abduction and assault of a six-year-old girl, the trial court abused its discretion by limiting defendant's cross-examination of the State's witnesses about his post-arrest interrogation after the State elicited evidence regarding defendant's questioning the night before he was arrested. The trial court did not adhere to Rule of Evidence 611, which does not limit cross-examination to relevant matters raised during direct examination. However, the error was not prejudicial to defendant's case given the overwhelming evidence of defendant's guilt and the fact that the jury heard the evidence defendant sought to admit when he testified on his own behalf. **State v. Edwards, 459.**

Expert testimony—reliability—relevance—forensic custody evaluation—The trial court did not abuse its discretion in a child custody action by admitting a forensic custody evaluator's testimony and report regarding her evaluation of the family. The testimony and report were relevant and reliable pursuant to Rule of Evidence 702(a) where the evaluator spent approximately one year conducting her evaluation, issued a 43-page report, and explained the principles and methods used in conducting the evaluation. **Sneed v. Sneed, 448.**

Hearsay—exceptions—then-existing mental, emotional, or physical condition—letter concerning assaults by defendant—In a first-degree murder trial, the trial court did not abuse its discretion by admitting a document hand-written by the victim listing things she wanted to tell defendant regarding defendant's assaults upon her, including an assault with frozen meat four months earlier. The trial court reasonably concluded that the document was relevant to show the victim's state of mind around the time of the murder and was not unfairly prejudicial. **State v. Enoch, 474.**

Motion to strike—affidavits—prejudice analysis—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, even assuming arguendo the trial court erred by overruling motions to strike affidavits supportive of the holder of the note (the party seeking reformation), borrowers were not prejudiced because the holder of the note was entitled to summary judgment on its reformation claim. **Nationstar Mortg., LLC v. Dean, 375.**

Other crimes, wrongs, or acts—prior abusive relationships—similar patterns of assaults—time gap—In a first-degree murder trial, the testimony of two women regarding their prior abusive relationships with defendant was admissible pursuant to Rule of Evidence 404(b) to show motive, intent, modus operandi, and identity. The murder victim had been in an abusive relationship with defendant and was found stabbed to death in an isolated area, and the two witnesses testified to similar patterns of assaults by defendant. A nine-year gap between the assaults and the murder did not render the testimony inadmissible. **State v. Enoch, 474.**

Relevance—danger of unfair prejudice—skeletal remains—The trial court in a first-degree murder trial did not abuse its discretion by admitting the skeletal remains of the victim. The remains were relevant and more probative than prejudicial where the skull proved the victim's identity and illustrated the testimony of the

hunter who found the remains, the rib bones showed the nature and number of the victim's fatal wounds, and the femur showed the biological item used to establish the victim's identity through DNA testing. Further, defendant failed to show that any prejudice resulted from the alleged error. **State v. Enoch, 474.**

HOMICIDE

Identity of perpetrator—relevant circumstances—motive and opportunity—sufficiency of evidence—The State presented sufficient physical evidence and testimony regarding defendant's motive and opportunity from which the jury could reasonably infer he was the person who fatally shot the victim, or that he was present when the victim was shot, to overcome defendant's motion to dismiss his charges for first-degree murder and discharging a weapon into an occupied dwelling. **State v. Gray, 499.**

JURISDICTION

Reformation of deed of trust—standing—holder of instrument—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the bank holding the note had standing to seek reformation even if it did not own the note, since the holder of a note qualifies as a real party in interest which may enforce the note and the deed of trust. **Nationstar Mortg., LLC v. Dean, 375.**

JURY

Rehabilitation—noncapital murder trial—trial court's discretion—During jury selection for a noncapital first-degree murder trial, the trial court properly exercised its discretion when it denied defendant's request to rehabilitate certain jurors in order to keep them on the jury, where the trial court stated that rehabilitation was "potentially allow[ed]" but "generally not done" in noncapital cases. **State v. Enoch, 474.**

JUVENILES

Delinquency—adjudication—right against self-incrimination—statutory mandate—The trial court erred in a juvenile delinquency adjudication by failing to advise the juvenile of his constitutional right against self-incrimination before he testified. The trial court's violation of the statutory mandate in N.C.G.S. § 7B-2405 required reversal where the juvenile's testimony admitting that he threw a pint of milk at his teacher was incriminating and therefore prejudicial. **In re J.B., 371.**

MEDICAL MALPRACTICE

Wrongful conception—child with cystic fibrosis—dismissal of complaint—Where plaintiffs filed a medical malpractice action for a doctor's negligence in misinterpreting plaintiff mother's cystic fibrosis (CF) genetic testing results, which led to the conception and birth of a child with CF, plaintiffs' complaint stated a claim upon which relief may be granted for medical malpractice, negligent infliction of emotional distress, and economic damages. **Glover v. Charlotte-Mecklenburg Hosp. Auth., 345.**

PUBLIC OFFICERS AND EMPLOYEES

Career status—dismissal—just cause—Where a career status State employee engaged in a pattern of petulant, inappropriate, and insubordinate behavior throughout several years of his employment, his unacceptable personal conduct gave rise to just cause for his dismissal. The administrative law judge's factual findings supported this conclusion, including findings concerning the employee's work history that were not expressly referenced within the dismissal letter. **Smith v. N.C. Dep't of Pub. Instruction, 430.**

Career status—dismissal—unacceptable personal conduct—A dismissed career State employee's behavior constituted unacceptable personal conduct under the Human Resources Act where he engaged in a loud confrontation with a female colleague over his dissatisfaction with a planned "Ugly Christmas Sweater" contest; he behaved inappropriately while conducting an interview by, among other things, expressing his dissatisfaction with his supervisor to the interviewee and stating that he was considering filing a lawsuit against his employer; and by "liking" two sexually suggestive social media posts while using an account in which he identified himself as an employee of the Department of Public Instruction. **Smith v. N.C. Dep't of Pub. Instruction, 430.**

RAPE

First-degree—sufficiency of evidence—The State presented sufficient evidence to withstand defendant's motion to dismiss the charge of first-degree rape where multiple eyewitnesses identified defendant as the man straddling the victim in an alley and there was debris and a small black hair inside the victim's vaginal canal. **State v. White, 506.**

REAL PROPERTY

Statute of Frauds—applicability—agreement to devise house—Plaintiff did not prevail in her argument that her deceased brother intended to leave her his house pursuant to an oral agreement, or in her request for equitable relief on multiple bases, because the Statute of Frauds requires any agreement to devise real property to be in writing. **Barrett v. Coston, 311.**

RECEIVERSHIP

Standing—non-parties to underlying action—The trial court erred in a receivership hearing by considering the arguments of third parties (an auto insurer and its attorney) against whom the judgment debtor (defendant) had unliquidated legal claims. The third parties were not parties to the action between plaintiff and defendant, and they had no standing to object to the appointment of a receiver. **Haarhuis v. Cheek, 358.**

Unliquidated legal claims against third parties—judgment debtor's refusal to pursue—In a case arising from the death of a pedestrian whom defendant hit and killed while driving impaired, the trial court erred by denying plaintiff estate administrator's Motion for Appointment of Receiver over defendant's unliquidated legal claims against third parties. Equity required appointment of a receiver where the third parties (defendant's auto insurer and its attorney) allowed a $50,000 settlement offer from plaintiff to expire, which led to defendant being encumbered with a $4.3 million judgment; defendant had no ability to satisfy the judgment; and

defendant refused to pursue legal claims against the insurer and attorney for their actions. **Haarhuis v. Cheek, 358.**

REFORMATION OF INSTRUMENTS

Deed of trust—mutual intention to encumber property—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, borrowers did not present evidence to rebut the presumption that the deed was intended by both borrowers and the bank to encumber the property as a first lien. **Nationstar Mortg., LLC v. Dean, 375.**

Mutual mistake—sufficiency of facts—Plaintiff failed to show that her deceased brother's 2016 deed conveying his condominium to his sister-in-law (defendant) should be reformed based on mutual mistake where he made an oral agreement to give plaintiff his house upon his death but never changed his 2012 will, which left the house to defendant. Plaintiff did not rebut the presumption that her brother understood the consequences of the deed, which was only effective to convey the condo to defendant but not to convey the house to plaintiff, nor did she show that any other mistake was made in the property conveyances. **Barrett v. Coston, 311.**

SATELLITE-BASED MONITORING

Constitutionality of search—hearing required—The trial court erred by ordering defendant to enroll in satellite-based monitoring (SBM) upon his release from imprisonment without first conducting a hearing to determine the constitutionality of subjecting defendant to SBM, requiring the order to be vacated and the case to be remanded for a hearing on the matter. **State v. White, 506.**

SENTENCING

Aggravating factors—sufficiency of notice—statutory procedure—In a case involving multiple offenses arising from the abduction and assault of a six-year-old girl, the Court of Appeals rejected defendant's arguments that aggravating factors must be alleged in an indictment, and that the jury instruction for the aggravating factor of "heinous, atrocious, or cruel" was unconstitutionally vague. The State complied with N.C.G.S. § 15A-1360.16 by giving defendant written notice of the aggravating factors it intended to prove, a procedure that conforms with U.S. Supreme Court precedent. The latter argument has been rejected previously by the N.C. Supreme Court. **State v. Edwards, 459.**

STATUTES OF LIMITATION AND REPOSE

Medical malpractice—continuing course of treatment doctrine—misinterpretation of genetic testing results—last act giving rise to claim—A medical malpractice action for negligence in misinterpreting a patient's cystic fibrosis (CF) genetic testing results was not barred by the four-year statute of repose in N.C.G.S. § 1-15(c) where defendant OB/GYN doctor's last act giving rise to the claim was not the initial misinterpretation of the CF test results but rather a later preconception appointment before plaintiffs' child with CF was conceived. The continuing course of treatment doctrine applied because the doctor had a continuing professional duty to care for plaintiffs, based on their ongoing family planning and health needs, and he continued the wrongful treatment over time without correction after his initial

misinterpretation of the CF test results. **Glover v. Charlotte-Mecklenburg Hosp. Auth., 345.**

Reformation of deed of trust—applicable statute of limitation—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the applicable statute of limitations was the more specific statute regarding sealed instruments (N.C.G.S. § 1-47(2), a ten-year time period), rather than the more general statute regarding fraud or mistake (N.C.G.S. § 1-52(9), a three-year period), because the explicit language of the disputed deed of trust indicated it was a sealed instrument; between two possible statutes, the specific controls over the general. **Nationstar Mortg., LLC v. Dean, 375.**

UNJUST ENRICHMENT

Proper basis—benefit conferred—Plaintiff failed to state a claim that her deceased brother's sister-in-law (defendant) was unjustly enriched when she was deeded the brother's condominium and then inherited the brother's house upon his death despite an apparent oral agreement that plaintiff would receive the house. Plaintiff failed to make the necessary showing that she conferred a benefit on defendant since she did not own the house or otherwise have any legal right to it. **Barrett v. Coston, 311.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

PAMELA C. BARRETT, individually and as executor of the Estate of Donald Collins Clements, Jr., Plaintiff
v.
NANCY COSTON, Defendant

No. COA18-16

Filed 18 September 2018

1. Real Property—Statute of Frauds—applicability—agreement to devise house

Plaintiff did not prevail in her argument that her deceased brother intended to leave her his house pursuant to an oral agreement, or in her request for equitable relief on multiple bases, because the Statute of Frauds requires any agreement to devise real property to be in writing.

2. Unjust Enrichment—proper basis—benefit conferred

Plaintiff failed to state a claim that her deceased brother's sister-in-law (defendant) was unjustly enriched when she was deeded the brother's condominium and then inherited the brother's house upon his death despite an apparent oral agreement that plaintiff would receive the house. Plaintiff failed to make the necessary showing that she conferred a benefit on defendant since she did not own the house or otherwise have any legal right to it.

3. Equity—constructive trust—proper basis—necessary elements

Plaintiff failed to state a claim that her deceased brother's sister-in-law (defendant), to whom he devised his house, held the house in constructive trust for plaintiff due to an apparent oral agreement that the brother intended plaintiff to have the house. A constructive trust cannot be based on an unenforceable oral agreement to devise real property, and plaintiff failed to show that defendant acquired the house through fraud, breach of duty, or other wrongdoing.

4. Reformation of Instruments—mutual mistake—sufficiency of facts

Plaintiff failed to show that her deceased brother's 2016 deed conveying his condominium to his sister-in-law (defendant) should be reformed based on mutual mistake where he made an oral agreement to give plaintiff his house upon his death but never changed his 2012 will, which left the house to defendant. Plaintiff did not rebut the presumption that her brother understood the consequences of the deed, which was only effective to convey the condo to

defendant but not to convey the house to plaintiff, nor did she show that any other mistake was made in the property conveyances.

Appeal by Plaintiff from an order entered 21 September 2017, as amended 25 September 2017, by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 8 August 2018.

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

Sumrell, Sugg, Carmichael, Hicks and Hart, P.A., by Ross T. Hardeman, for the Defendant-Appellee.

DILLON, Judge.

Pamela C. Barrett ("Plaintiff") appeals from an order granting Nancy Coston's ("Defendant") motion to dismiss and denying Plaintiff's motion for summary judgment as moot. After careful review, we affirm the decision of the trial court.

I. Background

This case concerns two pieces of real property, (1) a house in Atlantic Beach ("the House") and (2) a condominium unit in Indian Beach ("the Condo"), each formerly owned by Donald C. Clements, Jr. (the "Decedent"), who died in 2016.

Plaintiff is the Decedent's sister. Defendant is the Decedent's wife's sister.

The Decedent and his wife did not have children. They owned the House and the Condo. At some point, the Decedent's wife died, at which point the Decedent became the sole owner of the House and the Condo.

In 2012, the Decedent executed a will (the "2012 will") which expressly left the House to Defendant (his wife's sister) and which left the residue of his estate (which, as of 2012, would have included the Condo) to Plaintiff (his sister).

There was evidence that sometime after 2012, but prior to the Decedent's death in 2016, the Decedent had verbal communications with Plaintiff and Defendant to change who would ultimately receive the House and who would receive the Condo. There was evidence that the Decedent gave Defendant the choice between the House and the Condo and that Defendant told the Decedent that she preferred

the Condo. There was evidence of an oral agreement or understanding that Defendant would receive the Condo and Plaintiff would receive the House, contrary to the terms of the Decedent's 2012 will.

In any event, in June 2016, five months before his death, the Decedent executed and delivered a deed conveying the Condo to Defendant (the "2016 deed"). But the Decedent never executed a deed conveying the House to Plaintiff nor did he ever amend his will to leave the House to Plaintiff rather than to Defendant.

In December 2016, the Decedent died. Therefore, as a result of the 2012 will, Defendant received the House. And as a result of the deed, Defendant also received the Condo. Plaintiff only received the property that remained in the residue of the Decedent's estate.

Plaintiff commenced this action claiming that she is entitled to the House, as this was the Decedent's intent.

Defendant moved to dismiss Plaintiff's action, and Plaintiff moved for partial summary judgment. After a hearing on the matter, the trial court entered an order granting Defendant's motion to dismiss and denying Plaintiff's motion for partial summary judgment. Plaintiff timely appealed.

II. Discussion

On appeal, Plaintiff challenges the trial court's order dismissing her claims. At the outset, we note that the trial court, in its order, stated that it considered not only the pleadings, but also other materials presented by the parties, which included a number of affidavits. Accordingly, Defendant's Rule 12(b)(6) motion to dismiss is more properly characterized as a Rule 56 motion for summary judgment. See N.C. R. Civ. P. 12(b) (stating that if "matters outside the pleadings" are presented and not excluded by the court, the motion [to dismiss] shall be treated as one for summary judgment and disposed of as provided in Rule 56"). Our standard of review of an appeal from summary judgment "is de novo; [and that] such judgment is appropriate only when the record shows that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal marks omitted).

[1] Plaintiff argues that there is an issue of fact that she is entitled to the House, notwithstanding the 2012 will where the Decedent left the House to Defendant. Plaintiff bases her argument on three separate legal theories discussed below. However, all three theories are based on parol evidence, namely, oral communications among Plaintiff, Defendant, and

the Decedent in which there was allegedly some agreement or understanding among the three that Plaintiff would receive the House and Defendant would receive the Condo. It may be quite probable that the Decedent *intended* for Plaintiff (his sister) to receive the House and Defendant (his wife's sister) to receive the Condo, and *not* for Defendant to receive both. But, for the following reasons, we must affirm the order of the trial court, which concluded that Defendant is the lawful owner of both properties.

First, we conclude that Plaintiff's arguments all run counter to our Statute of Frauds, codified in N.C. Gen. Stat. § 22-2. Defendant's title to the Condo and title to the House are based on written instruments signed by the Decedent; namely, her title to the Condo is based on the 2016 deed, and her title to the House is based on the 2012 will. However, Plaintiff's title to the House, according to her complaint, is based entirely on parol evidence. Our Statute of Frauds, though, requires that "[a]ll contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." N.C. Gen. Stat. § 22-2 (2015). As it has been said:

> There is no stake for which men will play so desperately. In men and nations there is an insatiable appetite for lands, for the defence or acquisition of which money, and even blood, sometimes are poured out like water. The evidence of land title ought to be as sure as human ingenuity can make it. But if left to parol, nothing is more uncertain, whilst the temptations to perjury are proportioned to the magnitude of the interest. The infirmity of memory, the honest mistakes of witnesses, and the misunderstanding of parties, these are the elements of confusion and discord which ought to be excluded.

James A. Webster, Jr. et al., *Webster's Real Estate Law in North Carolina* § 9.06 (2018), (quoting *Moore v. Small*, 19 Pa. 461, 465 (1852)).

Our Supreme Court has held that an agreement to devise real property falls within the Statute of Frauds. *Jamerson v. Logan*, 228 N.C. 540, 542, 46 S.E.2d 561, 563 (1948). As such, as our Supreme Court has held, "an oral contract to convey or to devise real property is void by reason of the statute of frauds." *Pickelsimer v. Pickelsimer*, 257 N.C. 696, 698, 127 S.E.2d 557, 559 (1962).

[2] Plaintiff claims she should receive the House based on a theory that Defendant has been unjustly enriched. Our Supreme Court has held that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56 (1988). Plaintiff contends that Defendant has been unjustly enriched at her expense because Defendant received the House which should have been left to Plaintiff.

Our Supreme Court, though, has held that to make out a claim for unjust enrichment, the plaintiff must show that she conferred a benefit on the other party. *Id.* But, here, all the evidence showed that Plaintiff did not confer any benefit on Defendant. Plaintiff did not own the House. She had no legal right to the House based on some oral promise by the Decedent that he would leave it to her. Rather, the benefit was allegedly conferred upon Defendant by the Decedent.

We therefore conclude that Plaintiff's claim based on unjust enrichment fails as a matter law.

[3] Plaintiff next claims that Defendant merely holds the House in constructive trust for her. Generally, a constructive trust is "imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder *acquired* through fraud, breach of duty or some other circumstance making it inequitable for [her] to retain it against the claim of the beneficiary of the constructive trust." *Roper v. Edwards*, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988) (emphasis added) (citation omitted). But a constructive trust cannot be based upon an unenforceable oral agreement. *Walker v. Walker*, 231 N.C. 54, 56, 55 S.E.2d 801, 802 (1949). Here, Plaintiff's evidence failed to show that Defendant *acquired* the House through fraud, breach of duty, or other wrongdoing. Rather, she received it through a legacy in the Decedent's 2012 will. When the Decedent executed the 2016 deed, conveying the Condo to Defendant, the Decedent still owned the House. The House was his to do with as he pleased. He could have given it or left it to Plaintiff. He chose not to deed it to Plaintiff during his lifetime, and he chose not to modify his 2012 will. We, therefore, conclude that the trial court correctly determined that there was no constructive trust imposed through the 2012 will as a matter of law.

[4] Finally, Plaintiff argues that the 2016 deed should be reformed based on mutual mistake. We have held that "[m]istake as a ground for relief should be alleged with certainty, by stating the facts showing mistake." *Van Keuren v. Little*, 165 N.C. App. 244, 249, 598 S.E.2d 168, 171 (2004). Our Supreme Court has held that:

> The party asking for relief, by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties to be incorporated in the deed or instrument as written; and, second, that such stipulation was omitted from the deed or instrument as written by *mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draftsman.* Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument, because of the mistake, does not express the true intent of both parties. The mistake of one party to the deed or instrument alone, not induced by the fraud of the other, affords no ground for relief.

Matthews v. Shamrock., 264 N.C. 722, 725, 142 S.E.2d 665, 668 (1965).

Here, Plaintiff does not allege that the Decedent had intended to include in the 2016 deed a stipulation conveying the House to Plaintiff and that such stipulation was left out by mistake. Indeed, only Defendant is listed as a grantee. She only alleges that the Decedent was somehow mistaken that executing the 2016 deed was all he needed to do to carry out the entirety of the purported agreement between the parties.

We conclude that the evidence raises no genuine issue of fact to rebut the presumption that the Decedent knew that the 2016 deed was only effective to convey the Condo to Defendant and that it did not convey the House to Plaintiff. All the evidence shows that he intended to convey the Condo to Defendant and that this conveyance was not a mistake. Rather, the "mistake" might have been that the Decedent *thought* his 2012 will already left the House to Plaintiff; or the mistake might have been that the Decedent never got around to amending his 2012 will. Maybe the Decedent made no mistake at all, but that he simply changed his mind and decided to leave both the House and the Condo to Defendant. In any case, Plaintiff has failed to create an issue regarding her claim based on mutual mistake.[1]

III. Conclusion

We are certainly sympathetic to Plaintiff's position. It seems likely that the Decedent meant to leave Plaintiff the House but that he simply

1. Plaintiff also made a claim for punitive damages. But as she has failed to prove compensatory or nominal damages, her claim for punitive damages must fail. N.C. Gen. Stat. § 1D-15(a).

never got around to change his will or execute a deed to carry out this intent. It may be that her brother thought that he already had taken care of it. But, under the facts of this case, there is simply no remedy available to Plaintiff. Through the 2016 deed, Defendant became the legal owner of the Condo, as was the clear intent of the Decedent. And when the Decedent died later in 2016, Defendant became the legal owner of the House, by virtue of the Decedent's 2012 will. There is no evidence that Defendant, otherwise, acquired the House through fraud or the breach of some duty. Our law and strong public policy demand that we enforce the 2012 will and the 2016 deed as written, notwithstanding parol evidence suggesting that the Decedent, at some point late in his life, had expressed an intention that Plaintiff would receive his House at his death.

AFFIRMED.

Judges DAVIS and INMAN concur.

BURTON CONSTRUCTION CLEANUP & LANDSCAPING, INC. AND CHARLES BURTON, PLAINTIFFS

v.

OUTLAWED DIESEL PERFORMANCE, LLC, AND WILLIAM DANIEL BROWN, AND GRANT BROWN, DEFENDANTS

No. COA17-1424

Filed 18 September 2018

1. **Appeal and Error—record on appeal—omission of summary judgment order—preclusion of appellate review**

   Plaintiffs' argument regarding the trial court's denial of their motion for summary judgment was dismissed where plaintiffs failed to include a copy of the order denying summary judgment in the record on appeal, precluding appellate review.

2. **Appeal and Error—record on appeal—omission of trial transcript—preclusion of appellate review**

   Plaintiffs' failure to include the trial transcript in the record on appeal precluded appellate review of their argument concerning entry of directed verdict.

3. Attorney Fees—nonjusticiable claims—frivolous and malicious claims—false affidavit

The trial court did not abuse its discretion by awarding attorney fees and costs to defendants where plaintiff swore in an affidavit that his truck was undriveable when it left defendants' shop but admitted at trial that the allegation was not true. The false affidavit was the only reason the case proceeded to trial, and plaintiffs' claims were frivolous and malicious.

Appeal by plaintiffs from judgment entered 1 September 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 9 August 2018.

Smith Law Group, PLLC, by Matthew L. Spencer, for plaintiffs-appellants.

Bennett & Guthrie, P.L.L.C., by Joshua H. Bennett, for defendants-appellees.

BERGER, Judge.

Burton Construction Cleanup & Landscaping, Inc. and Charles Burton (collectively "Plaintiffs") appeal from a directed verdict judgment entered September 1, 2017 in favor of Outlawed Diesel Performance, LLC, William Daniel Brown, and Grant Brown (collectively "Defendants"). Plaintiffs assert that the trial court erred by (1) denying their motion for summary judgment which was filed and heard prior to trial, (2) granting Defendants' motion for directed verdict, and (3) granting Defendants' motion for costs and attorney's fees. We disagree.

Factual and Procedural Background

On April 27, 2016, Plaintiffs filed a complaint in Forsyth County Superior Court against Defendants. The complaint was related to repairs Defendants were to undertake on a vehicle owned by Plaintiffs. Plaintiffs alleged that they were initially provided an estimate of $5,300.00 for the repairs, but Defendants submitted a bill in the amount of $8,258.21 for work performed on the vehicle. Defendants refused to release the vehicle until full payment was made by Plaintiffs.

Plaintiffs eventually obtained the vehicle, but had concerns about the quality of work done. Plaintiffs had the vehicle towed to a local dealership for inspection. Plaintiffs claimed that many of the repairs had not been completed.

Defendants filed a motion for summary judgment on April 21, 2017. Defendants' motion was denied, and the case was tried in Forsyth County Superior Court in May 2017. At trial, Plaintiff Charles Burton admitted that he lied in an affidavit concerning the condition of the vehicle, and Plaintiffs were also unable to provide evidence of damages to support their claims. The trial court entered a directed verdict in favor of Defendants as to all of Plaintiffs' claims for relief. In deciding Defendants' counterclaims, the jury found that Plaintiffs failed to perform as required by the contract, and awarded Defendants the sum of $5,677.03.

On June 2, 2017, Defendant filed a motion for attorney's fees and costs, accompanied with an affidavit by a Forsyth County attorney attesting to the skill level required to handle this type of civil case and the customary hourly rate for comparable attorneys in Forsyth County. There was also attached to the motion an affidavit from attorney Joshua H. Bennett attesting to the time he dedicated to Defendants' case, his hourly rate, and the total expense incurred by Defendants in legal fees defending Plaintiffs' claims through entry of the directed verdict.

The trial court ordered Plaintiffs to pay costs associated with mediation in the amount of $495.00, and awarded $21,692.50 in attorneys' fees. Plaintiffs appeal.

Analysis

[1] Initially, we note that Plaintiffs are not entitled to appellate review of the trial court's denial of their motion for summary judgment. Plaintiffs have failed to include a copy of the order denying summary judgment in the record on appeal, which precludes review by this Court. N.C.R. App. 9(a)(1)(h); *see also Beneficial Mtge. Co. v. Peterson*, 163 N.C. App. 73, 79, 592 S.E.2d 724, 728 (2004) ("The omission from the record on appeal of any order denying summary judgment thus precludes review.").

Even if Plaintiffs' motion for summary judgment was improperly denied, a trial court's ruling

> [on] a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.
>
> To grant a review of the denial of the summary judgment motion after a final judgment on the merits would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict.

> This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

WRI/Raleigh, L.P. v. Shaikh, 183 N.C. App. 249, 252, 644 S.E.2d 245, 246-47 (2007) (*purgandum*[1]). Therefore we cannot consider Plaintiffs' argument concerning the trial court's denial of their motion for summary judgment, and it is dismissed.

[2] Additionally, Plaintiffs have declined to include a transcript of the trial court proceedings in the record.[2] "The burden is on the appellant to commence settlement of the record on appeal, including providing a verbatim transcript if available." *Li v. Zhou*, ___ N.C. App. ___, ___, 797 S.E.2d 520, 524 (2017) (*purgandum*). Plaintiffs' failure to include the transcript is fatal to their arguments on appeal concerning entry of directed verdict by the trial court.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). In addition,

> in determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

---

1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to mean simply that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

2. Counsel for Plaintiffs included as part of the record a copy of a letter he sent counsel for Defendants dated December 20, 2017. The letter states in relevant part, "[w]e have not ordered, nor do we plan to order portions of the transcript to include with the record."

Without the benefit of a verbatim transcript, this Court is not able to conduct a review of the trial court's directed verdict to determine if the evidence was insufficient as Plaintiffs assert, and we must affirm the trial court. *See* N.C.R. App. P. 9(a) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.").

[3] Finally, Plaintiffs contend the trial court erred in granting Defendants' motion for attorney's fees and costs pursuant to N.C. Gen. Stat. §§ 6-21.5 and 75-16.1.

> In any civil action, . . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of . . . a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, . . . is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

N.C. Gen. Stat. § 6-21.5 (2017).

In determining if an award of costs and attorney's fees is proper under N.C. Gen. Stat. § 6-21.5,

> [f]irst, we must determine whether or not the Plaintiffs presented a justiciable issue in their pleadings. Our case law has held that "in reviewing an order granting a motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5, the presence or absence of justiciable issues in the pleadings is a question of law that this Court reviews *de novo*.
>
> Second, the trial court's decision to award or deny attorney's fees under section 6-21.5 is a matter left to the sound discretion of the trial court. 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.
>
> Next, we examine the award of costs and expenses to the prevailing party. Whether a trial court has properly

> interpreted the statutory framework applicable to costs is a question of law. We therefore review the trial court's interpretation *de novo*. However, the reasonableness and necessity of costs is reviewed for abuse of discretion.

McLennan v. Josey, 247 N.C. App. 95, 97-98, 785 S.E.2d 144, 147 (2016) (*purgandum*).

The trial court found that Plaintiffs' claims were not justiciable. We agree.

> In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. Under this deferential review of the pleadings, a plaintiff must either: (1) reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue; or (2) be found to have persisted in litigating the case after the point where he should reasonably have become aware that pleading he filed no longer contained a justiciable issue. Section 6-21.5 was enacted to discourage frivolous legal action and that purpose may not be circumvented by limiting the statute's application to the initial pleadings. Frivolous action in a lawsuit can occur at any stage of the proceeding and whenever it occurs is subject to the legislative ban.

Credigy Receivables, Inc. v. Whittington, 202 N.C. App. 646, 655, 689 S.E.2d 889, 895 (*purgandum*), *review denied*, 364 N.C. 324, 700 S.E.2d (2010).

Here, the trial court found that Plaintiffs had instituted an action against Defendants for failure to make necessary repairs which caused Defendants' vehicle to be undriveable. Plaintiffs subsequently filed a motion for summary judgment which included an affidavit by Plaintiff Charles Burton asserting the truck was undriveable and had sustained $22,750.00 in damages. The trial court specifically found, "[b]ased on the issues of fact surrounding Plaintiffs' damages, whether the truck was driveable or not, the Court denied Defendants' Motion for Summary Judgment on the issue of Plaintiffs' damages."

Without the benefit of a verbatim transcript, we are only able to review the documents in the record, which include the trial court's

directed verdict judgment and the order for attorney's fees and costs. A review of the record establishes, at a minimum, that Plaintiffs persisted in litigating the case after the point where they should have reasonably been aware that the pleadings no longer contained a justiciable issue.

The trial court found that at trial, "Plaintiff Charles Burton admitted during cross-examination that he knew the truck was 'driveable' when it left Defendants' shop" and that his statement in the affidavit that the truck was "undriveable" was incorrect. The trial court also found that Plaintiffs' false affidavit was the only reason they were able to proceed to trial, and ultimately found Plaintiffs' claims to be frivolous and malicious. Moreover, the trial court found Plaintiffs were unable to prove their purported damages with any "reasonable certainty."

In awarding attorney's fees and costs, the trial court found

> An award of attorney's fees against the Plaintiffs in this case would not amount to sanctioning a party for pursuing a good faith claim simply because they ultimately did not prevail. In this case, the Plaintiffs knew or should have known before they instituted this action that they lacked – and could not obtain – evidence to support the crucial element of their claim that they had been damaged in any way by any act or omission of the Defendants. Plaintiffs provided the sworn affidavit of Plaintiff Burton to defeat summary judgment in which he claimed his truck was 'undriveable' when it left the Defendants' shop. However, under cross-examination at trial, Burton admitted that allegation – which was the basis for Plaintiffs' damages claim – was false.
>
> . . .
>
> [T]he Plaintiffs' claim was not simply unmeritorious, but also frivolous and malicious under N.C.G.S. §75-16.1.
>
> Defendants have provided evidentiary support indicating that their fees were reasonable, including the Affidavit of their lead counsel Joshua H. Bennet and the affidavit of . . . a leading litigator in Forsyth County and the surrounding area. . . .
>
> The services performed by Bennett & Guthrie, PLLC on behalf of the Defendants in this litigation were highly skilled, reasonable[,] and necessary.

> Bennett & Guthrie, PLLC attorneys, paralegals, and legal assistants worked a total of 116.9 hours and billed $21,692.50 during the defense of the litigation. The requested fees do not include any amounts that the Defendants incurred after the entry of directed verdict on May 23, 2017, including those fees incurred in the recovery of their attorney's fees and costs. This amount was appropriate, reasonable[,] and necessary.

Based upon the record before us, the trial court did not abuse its discretion by awarding attorney's fees and costs to Defendants.

In an action for unfair and deceptive trade practices,

> the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2017).

Again, based upon the findings of the trial court and the limited record before us, the trial court did not abuse its discretion by awarding attorney's fees to Defendants pursuant to N.C. Gen. Stat. §75-16.1.

Conclusion

The trial court's directed verdict is affirmed. We affirm the award of attorney's fees and costs by the trial court because the Plaintiffs have failed to demonstrate the trial court abused its discretion.

AFFIRMED.

Judges DIETZ and TYSON concur.

CABARRUS COUNTY BOARD OF EDUCATION, Petitioner
v.
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER (in official capacity only); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (in official capacity only), Respondents

No. COA17-1017

Filed 18 September 2018

1. Administrative Law—Administrative Procedure Act—adoption of retirement benefits cap factor—applicability—legislative intent

The Board of Trustees of the Teachers' and State Employees' Retirement System was required to adhere to the rule-making provisions of the Administrative Procedures Act (APA) before adopting a cap factor to limit retirement benefits for certain members, pursuant to N.C.G.S. § 135-5(a3), based on the intent of the legislature as evidenced by the plain language of the relevant statutes. Statutory interpretation reveals neither an express nor an implied exemption from the APA in Chapter 135, and the cap factor falls within the APA definition of a "rule." The requirement that the cap factor must be based upon professionally determined assumptions and projections does not implicate an alternative procedure to that found in the APA.

2. Administrative Law—state agency—rule interpretation—deference

In an action to determine whether the adoption of a cap factor limiting the retirement benefits of certain members of the Teachers' and State Employees' Retirement System needed to comply with the rule-making procedures of the Administrative Procedures Act (APA), the Court of Appeals did not need to determine whether the trial court gave proper deference to the agency's interpretation of the authorizing statute because it is the Court's duty to interpret administrative statutes.

Appeal by Respondents from judgment entered 30 May 2017 by Judge James E. Hardin, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 14 May 2018.

Tharrington Smith, LLP, by Deborah R. Stagner; and Michael Crowell, Attorney, by Michael Crowell, for Petitioner-Appellee.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak, Deputy General Counsel Blake W. Thomas, Deputy Solicitor General Ryan Y. Park, and Special Deputy Attorney General Joseph A. Newsome, for Respondents-Appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson; and North Carolina School Boards Association, by Legal Counsel Allison Brown Schafer, for North Carolina School Boards Association, amicus curiae.

McGEE, Chief Judge.

I. Procedural History

The Cabarrus County Board of Education ("Petitioner"), filed a "Request for Declaratory Ruling" pursuant to N.C. Gen. Stat. § 150B-4 (2017) and 20 N.C. Admin. Code 01F.0201 *et seq*. on 18 October 2016. Pursuant to this filing, Petitioner requested the Retirement Systems Division (the "Division") of the Department of State Treasurer (the "Department") (along with State Treasurer at that time, Janet Cowell,[1] and Steven C. Toole, Director of the Division ("Director Toole"), in their official capacities, ("Respondents")) to enter a declaratory ruling that the Division's adoption of a "cap factor" for the Teachers' and State Employees' Retirement System ("TSERS") pursuant to N.C. Gen. Stat. § 135-5(a3) (2017) was "void and of no effect because the [Board of Trustees of TSERS (the 'Board')] did not follow the rule making procedures of . . . the Administrative Procedure Act [(the 'APA').]"[2] Director Toole denied Petitioner's request by letter dated 17 November 2016, and Petitioner filed a "Petition for Judicial Review" of Director Toole's decision in Superior Court, Cabarrus County, on 16 December 2016. Petitioner moved for summary judgment on 25 April 2017, the matter was heard on 10 May 2017, and the trial court granted summary judgment in favor of Petitioner by judgment entered 30 May 2017. Respondents appeal.

---

1. By the time of the order granting summary judgment, Dale R. Folwell had become the State Treasurer, and had been substituted as a named Respondent.

2. TSERS is established and controlled by the provisions of Article 1 of Chapter 135 of the General Statutes ("Article 1") – N.C. Gen. Stat. §§ 135-1 through 135-18.11 (2017). The APA is found in Article 2A of Chapter 150B – N.C. Gen. Stat. §§ 150B-1 through 150B-52 (2017).

II. Facts

In 2014, the General Assembly enacted new legislation (the "Act"),[3] establishing a cap factor for certain employees covered by TSERS ("members"). 2014 N.C. Sess. Laws 88, sec. 1.(a). The purpose of the Act, in relevant part, was to "adopt a contribution-based benefit cap factor" (the "cap factor"), in order to limit retirement benefits paid by TSERS for certain members, whose State salaries had greatly increased in the latter years of their State employment, thereby significantly increasing their retirement benefits in disproportion to their overall contributions to TSERS. *See* N.C.G.S. § 135-5(a3).[4]

Dr. Barry Shepherd ("Dr. Shepherd") was superintendent of Petitioner for a period of time until his retirement on 1 May 2015. Because of Dr. Shepherd's employment history with the State, he was eligible for TSERS retirement benefits, but was also subject to having his benefits capped pursuant to the provisions of the Act. Generally, once the Division determines that a member's benefits will be capped pursuant to the Act, the following actions are required:

> If a member's retirement allowance is subject to an adjustment pursuant to the contribution-based benefit cap established in G.S. 135-5(a3), the [Division] shall notify the member and the member's employer that the member's retirement allowance has been capped. The [Division] shall compute and notify the member and the member's employer of the total additional amount the member would need to contribute in order to make the member not subject to the contribution-based benefit cap. This total additional amount shall be the actuarial equivalent of a single life annuity adjusted for the age of the member at the time of retirement . . . that would have had to have been purchased to increase the member's benefit to the pre-cap level. Except as otherwise provided in this subsection, the member shall have until 90 days after notification regarding this additional amount or until 90 days after the effective date of retirement, whichever is later, to submit a lump sum payment to the annuity savings fund in order for

3. "AN ACT to enact anti-pension-spiking legislation by establishing a contribution-based benefit cap[.]" 2014 N.C. Sess. Laws 88, preamble and sec. 1.(a).

4. This is a simplified explanation of the Act, but an in-depth explanation is not required for our analysis of the issues on appeal.

> the retirement system to restore the retirement allowance to the uncapped amount.

N.C. Gen. Stat. § 135-4(jj) (2015);[5] *see also* N.C.G.S. § 135-8(f)(2)(f). Upon Dr. Shepherd's retirement, the Division informed him and Petitioner that, pursuant to the Act, a contribution of $208,405.81 would be required to restore Dr. Shepherd's benefits to their pre-cap amount. Petitioner submitted this amount to the Division on behalf of Dr. Shepherd, but also initiated this action, as indicated above, to challenge the validity of the cap factor "adopted" by the Board and applied in this case to determine the $208,405.81 amount.

Because the Division and the Board, as subdivisions of the Department, are subject to the contested case provisions of the APA, Petitioner requested a declaratory ruling from the Division that the cap factor as adopted by the Board was invalid for two reasons: (1) "because the [B]oard did not follow the rule making procedures of [the APA];" and (2) that because the cap factor "is not an actuarial assumption under 20 N.C. Admin. Code 02B.0202[,]"[6] it was "not exempt from the rule making procedures of the APA[.]" Petitioner further asked for a ruling that the invoice sent by the Division for $208,405.81 was void since the cap factor used to calculate this amount had not been properly adopted pursuant to APA rule making requirements. As noted above, the Division denied Petitioner's requested rulings and Petitioner petitioned for judicial review, which ultimately resulted in the 30 May 2017 summary judgment in favor of Petitioner that is currently before us on appeal.

We note that there are seven additional appeals by the Department – and certain of its subdivisions and employees – currently before us that involve identical issues and arguments. The resolution of this appeal will also determine the resolution of those seven additional appeals, because

---

5. We note that the language of N.C.G.S. § 135-4(jj) (2017) references "G.S. 128–27(a3)" instead of "G.S. 135–5(a3)." We are unable to determine why "G.S. 128–27(a3)" is included in the 2017 version of the Statute. N.C.G.S. § 135-4(jj) (2015), the version effective when this matter was heard by the trial court, references "G.S. 135–5(a3)," not "G.S. 128–27(a3)." The Session Laws do not indicate that there existed any intent to amend the statute to replace "G.S. 135–5(a3)" with "G.S. 128–27(a3)". *See* 2015 N.C. Sess. Laws 168, sec. 7.(a), effective 1 January 2016; 2017 N.C. Sess. Laws 128, sec. 2.(a), effective 20 July 2017. The section including "G.S. 128–27(a3)" was amended, or corrected, to again cite "G.S. 135–5(a3)" by 2018 N.C. Sess. Laws 85, sec. 14., effective 25 June 2018. We use the 2015 version of the statute because it was in effect during the time period relevant to this appeal.

6. 20 N.C. Admin. Code 02B.0202 includes rules adopted by the Division, including the procedures for adopting tables, rates, and assumptions recommended by the Division's actuary.

our holdings in this appeal will apply equally to the seven additional appeals.[7] Additional relevant facts will be included in our analysis below.

III. Analysis

Respondents argue that the trial court erred in granting summary judgment in favor of Petitioner, because the rule making provisions of the APA do not apply to N.C.G.S. § 135-5(a3) and, therefore, the Board acted within the law and its authority in adopting the cap factor outside of the APA rule making process. We disagree and affirm summary judgment.

Summary judgment is properly granted "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). " 'On appeal, this Court reviews an order granting summary judgment *de novo*.' " *Manecke v. Kurtz*, 222 N.C. App. 472, 475, 731 S.E.2d 217, 220 (2012) (citations omitted). Findings of fact and conclusions of law are not required in an order granting summary judgment, and " '[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.' " *Save Our Schools of Bladen Cty. v. Bladen Cty. Bd. of Educ.*, 140 N.C. App. 233, 237–38, 535 S.E.2d 906, 910 (2000) (citation omitted). This Court is, however, limited to Respondents' arguments on appeal when considering whether to overturn the trial court's decision.[8] *Ahmadi v. Triangle Rent A Car, Inc.*, 203 N.C. App. 360, 363, 691 S.E.2d 101, 103 (2010) (on appeal from grant of summary judgment, pursuant to N.C. R. App. P. 28(b)(6), arguments the appellant failed to make in its brief were considered abandoned and not considered by this Court).

Respondents make two arguments in support of their position that the Board acted properly in the procedure it used to adopt the cap factor and, therefore, summary judgment in favor of Petitioner was granted in error: (1) "The legislature chose to have the cap factor adopted by resolution, not by rule[;]" and (2) "[t]he superior court erred by failing to give weight to the [Division's] interpretation of its enabling statute." We address each argument in turn.

---

7. The seven additional appeals are COA17-1018, COA17-1019, COA17-1020, COA17-1021, COA17-1022, COA17-1023, and COA17-1024.

8. Because in this case Respondents are the appellants.

A. *The General Assembly's Intent – Application of Rule Making*

[1] The trial court found and concluded that "[t]he cap factor meets the [APA] definition of a rule in that it is a regulation or standard adopted by the Board . . . to implement G.S. 135-5(a3). As such, the cap factor is subject to the rule making requirements of [the APA] unless otherwise exempted." Although findings of the trial court on summary judgment do not control our *de novo* review, we note that Respondents do not argue on appeal that the cap factor fails to meet the APA definition of a "rule." Instead, Respondents argue: "The General Assembly has distinguished functions that require rule[ ]making from functions that do not[,]" and further argue that determination of a cap factor by the Board is a "function" that the General Assembly intended to exempt, by implication, from the rule making provisions of the APA.

1. Express Exemption

As our courts have repeatedly noted:

> The purpose of the APA "is to establish as nearly as possible a uniform system of administrative rule making and adjudicatory procedures for State agencies," and the APA applies "to every agency as defined in G.S. 150B-2(1), except to the extent and in the particulars that any statute, including subsection (d) of this section, makes specific provisions to the contrary." N.C. Gen. Stat. § 150B-1(b), (c) (1989). . . . . As our Supreme Court has held, the "General Assembly intended only those agencies *it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly." Vass [v. Bd. of Trustees of State Employees' Medical Plan*, 324 N.C. 402, 407, 379 S.E.2d 26, 29 (1989)].

North Buncombe Assn. of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 28, 394 S.E.2d 462, 465 (1990) (emphasis added).

There is no dispute that the Division, as a sub-agency of the Department, is subject to the APA. The "Policy and scope" section of the APA states its purpose: "This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same

person in the administrative process." N.C.G.S. § 150B-1(a). Some agencies or sub-agencies are *completely* exempted from the APA by N.C.G.S. § 150B-1(c): "Full Exemptions[,]" "[t]his Chapter applies to every agency except" those specifically exempted by direct reference. N.C.G.S. §§ 150B-1(c)(1) through (7). Neither the Department, nor any of its subdivisions, are granted total exemption from the provisions of the APA. *Id.* N.C.G.S. § 150B-1(d) – "Exemptions from Rule Making" – states: "Article 2A of this Chapter does not apply to the following" enumerated agencies or subdivisions thereof.[9] N.C.G.S. §§ 150B-1(d)(1) through (28). Neither the Department, nor any of its subdivisions, are exempted from the rule making provisions of the APA pursuant to N.C.G.S. § 150B-1(d). Article 2A includes nothing that indicates any legislative intent to exempt the Board from the rule making process for any purpose. Further, no part of N.C.G.S. § 135-5(a3), or N.C.G.S. § 135-5 as a whole, references the APA – much less includes any express language exempting its provisions from the rule making procedures of Article 2A.

As noted above, N.C.G.S. § 135-5(a3) is found in Article 1, "Retirement System for Teachers and State Employees," of Chapter 135. N.C.G.S. §§ 135-1 through 135-18.11. Pursuant to Article 1: "A Retirement System is hereby established and placed under the management of the Board . . . for the purpose of providing retirement allowances and other benefits under the provisions of this Chapter for teachers and State employees of the State of North Carolina." N.C.G.S. § 135-2. "[A]ll contributions from participating employers and participating employees to this Retirement System shall be made to *funds* held in trust" by the Division. N.C.G.S. § 135-2 (emphasis added). N.C.G.S. § 135-6 concerns the "Administration" of the Retirement System. It establishes that the Board is responsible for the "general administration and responsibility for the proper operation of the Retirement System and for making effective the provisions of the Chapter[.]" N.C.G.S. § 135-6(a). Other duties required of the Board include:

> **Rules and Regulations**. – Subject to the limitations of this Chapter, the Board . . . shall, from time to time, *establish rules and regulations* for the administration of *the funds* created by this Chapter and for the transaction of its business. The Board . . . shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Chapter.

---

9. Article 2A is the section of the APA that governs rule making.

N.C.G.S. § 135-6(f). There is no dispute that the rule making provisions of the APA apply to the Board when it "establish[es] rules and regulations for the administration of the funds created by" Chapter 135 – including "all contributions from participating employers and participating employees . . . made to funds held in trust" by the Division. *Id.*; N.C.G.S. § 135-2.

The portion of N.C.G.S. § 135-5(a3) relevant to Respondents' arguments states:

> **Anti-Pension-Spiking Contribution-Based Benefit Cap**. – Notwithstanding any other provision of this section, every service retirement allowance provided under this section for members who retire on or after January 1, 2015, is subject to adjustment pursuant to a contribution-based benefit cap under this subsection. *The Board . . . shall adopt a contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped*. The Board . . . shall modify such factors every five years, as shall be deemed necessary, based upon the five-year experience study as required by G.S. 135-6(n).

N.C.G.S. § 135-5(a3) (emphasis added). All "retirement allowances" are paid from funds held in trust, which are maintained in solvency by contributions from participating employers and employees (or "members"). N.C.G.S. § 135-2. Absent clear contrary direction from the General Assembly, management of the funds from which retirement allowances are disbursed must be accomplished pursuant to rules adopted pursuant to the rule making provisions of the APA. N.C.G.S. § 135-6(f); N.C.G.S. § 150B-1(a); *Rhodes*, 100 N.C. App. at 28, 394 S.E.2d at 465.

The most clear and direct means available to the General Assembly whereby it could have expressed its intent to exclude the Board's adoption of a cap factor from rule making procedures was to include an express exemption in either the APA, N.C.G.S. § 135-5(a3), or some other relevant statute. The General Assembly did not make this choice, and enacted N.C.G.S. § 135-5(a3) without any associated statutory exemptions from the rule making provisions of the APA with respect to adoption of the cap factor, or for any other of the Board's duties. This, despite the fact that the General Assembly has done so for specific tasks of other agencies. *See, e.g.*, N.C.G.S. § 150B-1(d)(7) (specifically exempting "The State Health Plan for Teachers and State Employees in administering the provisions of Article 3B of Chapter 135 of the General

Statutes" from APA rule making requirements); N.C.G.S. § 150B-2(8a)(j.) ("The term ['rule'] does not include" "[e]stablishment of the interest rate that applies to tax assessments under G.S. 105-241.21."). According to the reasoning in *Vass* and *Rhodes*, the rule making provisions of the APA should apply whenever the Board adopts a "rule," because the General Assembly has not expressly exempted the Board from the rule making provisions of the APA. *Rhodes*, 100 N.C. App. at 28, 394 S.E.2d at 465.[10]

2. Exemption by Implication

However, as Respondents have noted, this Court, and our Supreme Court, have held that exemption from the APA can be recognized by *implication* rather than express language in certain limited circumstances. *See Bring v. N.C. State Bar*, 348 N.C. 655, 501 S.E.2d 907 (1998); *N.C. State Bar v. Rogers*, 164 N.C. App. 648, 596 S.E.2d 337 (2004) (recognizing, in turn, that by creating express statutory procedures, for rule making and hearing of contested cases, different from those of the APA, the General Assembly intended the North Carolina State Bar (the "State Bar") to operate outside APA requirements). Respondents have directed this Court to no agency or sub-agency, other than the State Bar, that has been determined to have been exempted from the APA by *implication*, and we have found none.

Nonetheless, Respondents compare the wording used in N.C.G.S. § 135-5(a3) to wording used in other parts of Article 1, contending: "This case turns on a particular feature of statutory language: the use of the word 'rule' in some places but not in others." Respondents' argument is that the General Assembly's intent to exclude adoption of the cap factor from APA rule making is evident once we apply the maxim *expressio unius est exclusio alterius*, because the General Assembly used the word "rule" in some parts of Article 1, but not in others, and thereby indicated a clear intent that APA rule making only applies when the actual word "rule" is used. We resort to rules of statutory interpretation only if the meaning of some portion of the relevant statute is legally ambiguous. Assuming, *arguendo*, that the challenged language of N.C.G.S. § 135-5(a3) is ambiguous, Respondents' argument still fails.

Our Supreme Court has rejected an *expressio unius est exclusio alterius* argument in similar circumstances. *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 592–93, 447 S.E.2d 768, 782 (1994) (citation and parentheses omitted) ("[The relevant organic] statute

---

10. We again note that Respondents make no argument on appeal that the cap factor does not fall within the APA definition of a "rule."

makes no provision for petitioner to commence a contested case hearing, nor does it expressly deny him that right. Respondents, however, would have us apply to it the maxim *expressio unius est exclusio alterius*, mention of specific circumstances *implies* the exclusion of others, and conclude that the legislature intended, albeit by implication, to exclude persons aggrieved, other than the permit applicant or permittee, from those entitled to a contested case hearing under the []APA."). The Court in *Empire Power* held that the organic statute, N.C.G.S. § 143–215.108(e), had to be interpreted *together with* the relevant provisions of the APA:

> N.C.G.S. § 143–215.108(e) and N.C.G.S. § 150B–23, however, are *in pari materia*, and we must give effect to both if possible. Respondents basically contend that the organic statute amends, repeals, or makes exception to the []APA *by implication*. "The presumption is always against an intention to [amend or] repeal an earlier statute." We thus should not construe the silence of N.C.G.S. § 143–215.108(e) . . . as a repeal of any . . . rights expressly conferred upon [the petitioner] under the []APA. The legislature has not expressed or otherwise made manifestly clear an intent to deprive petitioner of any right . . . he might have by virtue of the []APA; moreover, there is not such repugnancy between the statutes as to create an implication of amendment or repeal "to which we can consistently give effect under the rules of construction of statutes."

Id. at 593, 447 S.E.2d at 782 (citations omitted). The Court explained that if there is "a fair and reasonable construction of the organic statute that harmonizes it with the provisions of the []APA, . . . it is our duty to adopt that construction. *Id.* (citation omitted). The Court further reasoned:

> "Ordinarily, . . . the enactment of a law will not be held to have changed a statute that the legislature did not have under consideration at the time of enacting such law; and implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be. *An intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation; and an amendment by implication, or a modification of, or exception to, existing law by a later act, can occur only where the*

> *terms of a later statute are so repugnant to an earlier statute that they cannot stand together*."
>
> The []APA entitles petitioner to an administrative hearing; the organic statute, respondents contend, denies him that right. The question thus is whether the legislature intended, in enacting the air pollution control administrative review provisions, to deprive petitioner of the right it expressly conferred upon him in the []APA. Applying the foregoing rules of statutory construction, we conclude that because the organic statute *did not expressly provide otherwise*, the legislature did not intend to deprive petitioner of his right to an administrative hearing.

Empire Power, 337 N.C. at 591–92, 447 S.E.2d at 781–82 (citations and footnote omitted) (some emphasis added). The Court concluded: "Considering the unequivocal 'language of the statute [the []APA], the spirit of the act, and what the act seeks to accomplish,' we conclude that the legislature intended that the []APA should control unless the organic statute *expressly* provides otherwise." *Id.* at 594–95, 447 S.E.2d at 783 (citations omitted). The Court thus held that, because the organic statute involved in *Empire Power* did not *expressly* amend the APA to withdraw the petitioner's right of appeal pursuant to the APA and, because there was not "*such repugnancy between the statutes as to create an implication of amendment or repeal* 'to which we can consistently give effect under the rules of construction of statutes[,]' " the provisions of the APA controlled. *Id.* at 593, 447 S.E.2d at 782 (citation omitted) (emphasis added); *see also Id.* at 595, 447 S.E.2d at 783–84 (plenary citations in accord).

Respondents cite *Bring* and *Rogers* in support of their argument that the General Assembly expressed a clear intention to remove adoption of the cap factor from APA rule making requirements by omitting the word "rule" from the relevant language of N.C.G.S. § 135-5(a3). *Bring* and *Rogers* do both recognize an "exemption" from provisions of the APA of an agency – the State Bar – by implication rather than specific exemption. *Rogers* involved an appeal from the suspension of an attorney's ("Rogers") license to practice law. *Rogers*, 164 N.C. App. 648, 596 S.E.2d 337. Rogers argued in part that "he should have had a hearing before an administrative law judge under the [APA]" instead of being forced to conduct his hearing before the Disciplinary Hearing Commission of the State Bar (the "DHC"). *Id.* at 652–53, 596 S.E.2d at 341. This Court rejected Rogers' "contention that he should be entitled

to a hearing before an administrative law judge under the APA." *Id.* at 654, 596 S.E.2d at 341. In addressing Rogers' argument, this Court stated:

> The APA is a statute of general applicability, and does not apply where the Legislature has provided for a more specific administrative procedure to govern a state agency. *See Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 586-87, 447 S.E.2d 768, 778-79 (1994). The Legislature has *expressly and specifically given* the State Bar Council and DHC the power to regulate and handle disciplinary proceedings of the State Bar. *See* N.C. Gen. Stat. § 84-28 (2003) (powers of the State Bar Council to discipline attorneys); N.C. Gen. Stat. § 84-28.1 (disciplinary hearing commission powers). As such, defendant is not entitled to application of the APA to his State Bar disciplinary proceeding in this case.

Id. (emphasis added). Although in *Rogers* this Court did not make an explicit holding that the organic statutes involved – N.C. Gen. Stat. § 84-15 *et seq.* (2017) – expressly amended the APA, we determined, by examining the organic statutes themselves, that the clear intent of the General Assembly was to exempt the DHC from APA contested case provisions. *See Id.*; *Empire Power*, 337 N.C. at 593, 447 S.E.2d at 782. The clear implication is that this Court based its determination on reasoning that, by creating an entirely independent procedure and reviewing authority within the State Bar, with authority to identify, investigate, prosecute, and rule upon alleged violations, the "the terms of [the] later [organic] statute [we]re so repugnant to [the APA] that they [could not] stand together"[11] and, therefore, the General Assembly intended to exempt DHC disciplinary proceedings from APA contested case procedures:

> The Legislature has expressly and specifically given the State Bar Council and DHC the power to regulate and handle disciplinary proceedings of the State Bar. *See* N.C. Gen. Stat. § 84-28 (2003) (powers of the State Bar Council to discipline attorneys); N.C. Gen. Stat. § 84-28.1 (disciplinary hearing commission powers). As such, defendant is not entitled to application of the APA to his State Bar disciplinary proceeding in this case.

Rogers, 164 N.C. App. at 654, 596 S.E.2d at 341.

---

11. *Id.* at 591, 447 S.E.2d at 781 (citations and quotation marks omitted).

In essence, this Court recognized that the General Assembly enacted a distinct, thorough, complete, and self-contained disciplinary process by which the State Bar – through the DHC – was mandated to initiate and pursue investigations and hearings as required to police and regulate attorney conduct. This process includes procedural rules – such as a right of direct appeal from any final order of the DHC to this Court. *See* N.C.G.S. § 84-21 ("(a) The Council shall adopt the rules pursuant to G.S. 45A-9." "(b) . . . . Copies of all rules and regulations and of all amendments adopted by the Council shall be certified to the Chief Justice of the Supreme Court of North Carolina . . . .: Provided, that the [C]ourt may decline to have so entered upon its minutes any rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article."); *see also*, *e.g.*, N.C.G.S. § 84-23; N.C.G.S. § 84-28; N.C.G.S. § 84-28.1. Therefore, the organic statute left no room for application of APA procedures, and this Court held APA contested case provisions did not apply.

Bring is fully consistent with our analysis of *Empire Power* and *Rogers*. We first note in general: "When a dispute between a state agency and another person arises and cannot be settled informally, the procedures for resolving the dispute are governed by the Administrative Procedure Act (APA), N.C. Gen. Stat. §§ 150B-1 to -63." *Rhodes*, 100 N.C. App. at 28, 394 S.E.2d at 465 (citation omitted). In *Bring*, our Supreme Court held that the General Assembly clearly intended the State Bar to adopt rules without resort to APA rule making provisions:

> It was not necessary to adopt the rule in accordance with the requirements of the APA. *N.C.G.S. § 84-21 gives specific directions as to how the Board shall adopt rules. These directions must govern over the general rule-making provision of the APA*. We note that, in her appeal, the petitioner followed N.C.G.S. § 84-24 dealing with appeals of decisions of the Board of Law Examiners and not the provisions of the APA.
>
> The Board's rules, including Rule .0702, were submitted to this Court as required by N.C.G.S. § 84-21 and published at volume 326, page 810 of the North Carolina Reports. This complies with the statutory requirement. Rule .0702 was properly adopted.

Bring, 348 N.C. at 660, 501 S.E.2d at 910 (citation omitted) (emphasis added). The organic statute at issue in *Bring*, N.C. Gen. Stat. § 84-21 (2017), established a rule making procedure completely independent

from that contained in the APA. Therefore, the General Assembly's intent was clear that the specific rule making provisions enacted for proceedings governed by the State Bar controlled, not those contained in the APA. The Court held "there are adequate procedural safeguards in the statute to assure adherence to the legislative standards" and noted that "N.C.G.S. § 84-24 and N.C.G.S. § 84-21 require that the Bar Council and this Court must approve rules made by the Board." *Id.* at 659, 501 S.E.2d at 910. The Court further held that there was "a sufficient standard to guide the Board" in rule making pursuant to Article 4, Chapter 84. *Id.*

Article 1 includes nothing approaching the level of independent rule making mandated by the General Assembly for the State Bar in Article 4, Chapter 84. We note that Respondents have utilized the procedures of the APA throughout this action without objection, including obtaining appeal to this Court pursuant to the right of appeal granted by the APA. N.C.G.S. § 150B-52.

Additionally, when read together, *Rogers* and *Bring* effectively hold that the APA simply does not apply to Article 4, Chapter 84. N.C.G.S. § 150B-1(a) (emphasis added) ("**Purpose**. – This Chapter [the APA] establishes a uniform system of administrative *rule making* and *adjudicatory procedures* for agencies."); *Bring*, 348 N.C. at 660, 501 S.E.2d at 910 (APA rule making provisions do not apply to the State Bar); *Rogers*, 164 N.C. App. at 654, 596 S.E.2d at 341 (APA adjudicatory procedures do not apply to the State Bar). In contrast, Article 1 expressly recognizes the general application of the APA. *See*, *e.g.*, N.C.G.S. § 135-8(d)(3a) ("Notwithstanding Chapter 150B of the General Statutes [the APA], the total amount payable in each year to the pension accumulation fund shall not be less than . . . ."). Respondents make an argument very different than the analyses behind the holdings in *Bring* and *Rogers*, which served to exempt the *entire* State Bar from the requirements of the APA. Respondents contend that the application of APA rule making should be determined *on a line-by-line basis*, based upon the *implied intent* of the General Assembly, as determined by analyzing each individual sentence or clause of a statutory provision. Respondents cite to no authority in support of this argument, neither *Bring* nor *Rogers* support Respondents' argument, and the other opinions cited by Respondents do not involve the APA and are, therefore, easily distinguishable.

Respondents also focus on the requirement that the cap factor adopted by the Board is one "recommended by the actuary." N.C.G.S. § 135-5(a3). However, the inclusion of a specific requirement concerning the *source* of the proposed cap factor in no manner serves to remove the entire cap factor adoption process from general APA requirements. As

part of its administration of Retirement System funds, the Board "shall keep in convenient form such data as shall be necessary for actuarial valuation of the various funds of the Retirement System, and for checking the experience of the System." N.C.G.S. § 135-6(h). The Board is required to "designate an actuary who shall be the technical adviser of the Board . . . on matters regarding the operation of the funds created by the provisions of this Chapter[.]" N.C.G.S. § 135-6(l). Respondents contend that N.C.G.S. § 135-6(l) establishes "a specific procedure for how the [Board] adopts actuarial recommendations" from the designated actuary. N.C.G.S. § 135-6(l) states in relevant part:

> For purposes of the annual valuation of System assets, the experience studies, and all other actuarial calculations required by this Chapter, all the assumptions used by the System's actuary, including mortality tables, interest rates, annuity factors, and employer contribution rates, shall be set out in the actuary's periodic reports or other materials provided to the Board[.] These materials, once accepted by the Board, shall be considered part of the Plan documentation governing this Retirement System; similarly, the Board's minutes relative to all actuarial assumptions used by the System shall also be considered part of the Plan documentation governing this Retirement System, with the result of precluding any employer discretion in the determination of benefits payable hereunder[.]

N.C.G.S. § 135-6(l). Respondents contend that the above "statutory procedures vary significantly from the requirements of the APA[, *s*]*ee* [N.C.G.S.] §§ 150B-21.1 to 21.7," because of the requirement that the Board adopt a cap factor from cap factor recommendations provided by its actuary.

Sections 150B-21.1 to 21.7 of the APA constitute the "Adoption of Rules" section of the APA. Non-exempted agencies must comply with the provisions of N.C.G.S. § 150B-19.1, *see* N.C.G.S. § 150B-21.2(a), which include in relevant part:

> (a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:
>
> . . . .
>
> (5) When appropriate, *rules shall be based on sound*, *reasonably available scientific*, *technical*,

> *economic, and other relevant information.* Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).

N.C.G.S. § 150B-19.1 (emphasis added); N.C.G.S. § 150B-21.2(a) ("[b]efore an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1"); N.C.G.S. § 150B-21.2(c)(2a) (the "notice of the proposed text of a rule must include" a "link to the agency's Web site containing the information required by G.S. 150B-19.1(c)"); N.C.G.S. § 150B-19.1(c)(5) (the posting required by N.C.G.S. § 150B-21.2(c)(2a) shall include "[a]ny fiscal note that has been prepared for the proposed rule"); N.C.G.S. § 150B-19.1(e) (before submitting "a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission"); N.C.G.S. § 150B-19.1(f) (emphasis added) ("[i]f the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency *shall consider at least two alternatives* to the proposed rule"); N.C.G.S. § 150B-21.4(b1) (when an agency proposes adoption of a rule "that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency shall prepare a fiscal note for the proposed rule change and have the note approved by the Office of State Budget and Management[,]" "the term 'substantial economic impact' means an aggregate financial impact on all persons affected of at least one million dollars ($1,000,000) in a 12-month period"). The APA regularly requires supporting documentation based on factual data that is prepared by an actuary – including prior to the adoption of certain rules. As a further example:

> Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of *funds* subject to the State Budget Act, Chapter 143C of the General Statutes,[12] it must submit the text of the proposed rule change, an analysis of the proposed rule change, and a fiscal note on the proposed rule change to the Office of State Budget and Management and obtain certification from the

---

12. N.C. Gen. Stat. § 143C-1-1(b) (2017) ("The provisions of this Chapter shall apply to every State agency, unless specifically exempted herein[.]"); N.C. Gen. Stat. § 143C-1-3(a)(10) (2017) (Definition: "**Pension and Other Employee Benefit Trust Funds**. – Accounts for resources that are required to be held in trust for the members and beneficiaries of defined benefit pension plans, defined contribution plans, other postemployment benefit plans, or other employee benefit plans.").

> Office of State Budget and Management that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change *and explain how the amount was computed*. The Office of State Budget and Management must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

N.C.G.S. § 150B-21.4(a) (emphasis added).

Contrary to Respondents' arguments, what N.C.G.S. § 135-6(l) requires is that "the assumptions used by the [Division's] actuary [to determine cap factor recommendations], including mortality tables, interest rates, annuity factors, and employer contribution rates," "shall be set out in the actuary's periodic reports or other materials provided to the Board[.]" The requirement that the actuary submit proposed cap factors to the Board for adoption does not constitute a separate procedure for rule making purposes. This requirement merely insures that the cap factor adopted by the Board is based upon professionally determined assumptions and projections, and that there will be sufficient documentation to satisfy the requirements of Chapter 135, the APA,[13] and the State Budget Act – N.C. Gen. Stat. §§ 143C-1-1 *et seq.* (2017).

Further, we presume the General Assembly enacted Article 1 with full knowledge of the relevant provisions in the APA, and intended for those provisions to apply to Article 1 absent express legislation to the contrary – which they declined to enact. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 189, 594 S.E.2d 1, 20 (2004) (citations omitted) (we presume " 'the legislature acted in accordance with reason and common sense,' and 'with full knowledge of prior and existing law' "). We hold that there is nothing to support a finding that " 'the terms of [N.C.G.S. § 135-8(3a)] are so repugnant to' " the rule making requirements of the APA such that the General Assembly intended to remove adoption of the cap factor from APA rule making requirements by implication. *Empire Power*, 337 N.C. at 591, 447 S.E.2d at 781 (citations omitted) (emphasis removed).

3. Statutory Language

In further support of our decision, we look to the language of the relevant statutes when considered *in pari materia*. Because the Division

---

13. *See*, *e.g.*, N.C.G.S. § 135-6(l) to (n), concerning the purposes and duties of actuaries.

is subject to the APA and the procedures of the APA apply to Petitioner's "action," the definitions found in N.C.G.S. § 150B-2 apply to N.C.G.S. § 135-5(a3) unless specifically supplanted by definitions included in Article 1. *See Izydore v. City of Durham*, 228 N.C. App. 397, 399–401, 746 S.E.2d 324, 325–26 (2013).

The definitions section of Article 1, N.C.G.S. § 135-1, does not define the word "adopt." However, the word "adopt" is defined in the APA: " 'Adopt' means to take final action to create, amend, or repeal *a rule*." N.C.G.S. § 150B-2(1b) (emphasis added). We hold that the word "adopt" in N.C.G.S. § 135-5(a3) has the same meaning as that set forth in N.C.G.S. § 150B-2(1b). Further, Article 1 contains no definition for the word "rule." The APA defines "rule" as follows:

> "Rule" means *any* agency regulation, standard, or statement of general applicability that *implements* or interprets *an enactment of the General Assembly* . . . or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee *and the amendment or repeal of a prior rule.*

N.C.G.S. § 150B-2(8a) (emphasis added). The General Assembly has included certain specific exceptions for regulations or standards that would otherwise fall under the definition of rule, for example, the "[e]stablishment of the interest rate that applies to tax assessments under G.S. 105-241.21" is expressly excluded from the APA definition of "rule." N.C.G.S. § 150B-2(8a)(j.). The APA includes no exemption for the N.C.G.S. § 135-5(a3) "cap factor." " 'Policy' means any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule." N.C.G.S. § 150B-2(7a). The cap factor is clearly not a "policy" as defined by the APA, as it is binding and non-interpretive. We agree with the trial court and hold that the cap factor falls within the APA definition of a "rule."

Further, pursuant to the APA definition of "adopt," any time the word "adopt" is used, it expressly and necessarily *requires an associated rule*. N.C.G.S. § 150B-2(1b) (emphasis added) (" 'Adopt' means to take final action to create, amend, or repeal *a rule*."). Pursuant to the APA definition of adopt, the *only* thing that the Board in N.C.G.S. § 135-5(a3) could have possibly "adopted" was a "rule." N.C.G.S. § 150B-2(1b). Therefore, treating the cap factor as a "rule," the contested portion of N.C.G.S. § 135-5(a3) can be understood as stating:

> The Board . . . shall adopt a [*rule*, namely a] contribution-based benefit cap factor recommended by the actuary,

> based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped. The Board . . . shall modify such [rules] every five years, as shall be deemed necessary, based upon the five-year experience study as required by G.S. 135-6(n).

The language of N.C.G.S. § 135-5(a3), considered *in pari materia* with the APA, does not support a finding that the General Assembly, by enacting N.C.G.S. § 135-5(a3), intended to modify or amend the APA by implication.

B. *Deference to the Board's Interpretation of N.C.G.S. § 135-5(a3)*

[2] Respondents further argue that the trial court "erred by failing to give weight to the [Division's] interpretation of its enabling statute." We disagree.

Initially, our review on summary judgment is *de novo*, and we will uphold a grant of summary judgment upon any legitimate basis. *Manecke*, 222 N.C. App. at 475, 731 S.E.2d at 220; *Save Our Schools*, 140 N.C. App. at 237–38, 535 S.E.2d at 910. Therefore, even assuming, *arguendo*, the trial court failed to give proper deference to the Division's interpretations of Article 1 and the Division's rule making powers, this fact would be irrelevant to our *de novo* review. *Id.*

Concerning Respondents' arguments, we first note that, despite the deference we may give an agency's interpretation of statutes that agency is required to implement and enforce, "it is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes." *Wells v. Consolidated Jud'l Ret. Sys. of N.C.*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001) (citing *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E.2d 435 (1983)). Respondents argue: "Since 1981, the [Division] has held that the [Board] will adopt actuarial 'tables, rates, or assumptions' by resolution. 20 N.C. Admin. Code 2B.0202 (2016)." Respondents contend that the cap factor is an actuarial "rate" or "assumption," and is therefore governed by 20 N.C. Admin. Code 2B.0202, a rule adopted by the Division pursuant to the authority granted it by Article 1.[14] First, we disagree with Respondents' argument that the cap factor is itself an actuarial assumption or rate that is

---

14. The question of whether the provisions of 20 N.C. Admin. Code 2B.0202 conform with the requirements of Article 1 is not before us, and we do not consider that question here.

governed by provisions of 20 N.C. Admin. Code 2B.0202. The cap factor must be *based upon* valid actuarial assumptions and rates in order for it to comply with the requirements of N.C.G.S. § 135-5(a3), but the cap factor itself is not an actuarial assumption or rate. We have held above that the cap factor is a rule that, *inter alia*, helps determine limits on the retirement benefits of affected State employees. Because the cap factor is a rule for the purposes of APA rule making, and the Board must comply with APA rule making provisions when adopting the cap factor, the Division is without the authority to enact rules, regulations, guidelines, or any other directives that would remove adoption of the cap factor from the requirements of APA rule making.

It is not at all clear that the Board understood the cap factor to be an actuarial assumption or rate, or that it adopted the cap factor pursuant to the provisions of 20 N.C. Admin. Code 2B.0202. Therefore, this Court cannot state with any conviction that the Board, or the Division, interpreted N.C.G.S. § 135-5(a3) in the manner Respondents suggest – *i.e.* in a manner allowing the Board to adopt the cap factor pursuant to the rules set forth in 20 N.C. Admin. Code 2B.0202. Even assuming, *arguendo*, the Division has interpreted N.C.G.S. § 135-5(a3) as argued by Respondents, we hold that such an interpretation is erroneous and contrary to the law. It is this Court, not the Division, that must ultimately decide the issue now that it is before us, and we have done so.

C. *Policy Arguments*

Respondents' contention that "public comments will not improve the actuary's recommendation," even if correct, does not factor into our analysis. Assuming, *arguendo*, Respondents are correct that application of the rule making procedures of the APA to the adoption of a cap factor is unnecessarily inefficient, and will serve no beneficial purpose, this Court is not the proper entity to address those arguments. Appellate courts will not imply amendments to a statute based " 'merely out of supposed legislative intent in no way expressed, *however necessary or proper it may seem to be.*' " *Empire Power*, 337 N.C. at 591, 447 S.E.2d at 781 (emphasis added) (quoting *In re Assessment of Sales Tax*, 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963)). "Weighing . . . public policy considerations is the province of our General Assembly, not this Court [.]" *Wynn v. United Health Servs./Two Rivers Health-Trent Campus*, 214 N.C. App. 69, 79, 716 S.E.2d 373, 382 (2011) (citations and quotation marks omitted); *see also Empire Power*, 337 N.C. at 595–96, 447 S.E.2d at 784.

IV. Conclusion

We hold that APA rule making provisions apply to the Board's adoption of a cap factor. The Division erred in invoicing Dr. Shepherd or Petitioner for any additional contributions pursuant to N.C.G.S. § 135-5(a3) because the cap factor adopted by the Board, and applied in determining the amount of the additional contribution Petitioner was required to pay "in order to make [Dr. Shepherd] not subject to the contribution-based benefit cap[,]" N.C.G.S. § 135-4(jj), was not properly adopted. "An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if [it] has not been adopted as a rule in accordance with this Article." N.C.G.S. § 150B-18. We affirm the trial court's grant of summary judgment in favor of Petitioner.[15]

AFFIRMED.

Judges BRYANT and STROUD concur.

BRIANA WASHINGTON GLOVER, and husband, RANDIE JANSON GLOVER, Individually, Plaintiffs
v.
THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, a North Carolina Hospital Authority, d/b/a and Glen Ellis Powell, II, MD, Individually, Defendants

No. COA17-1398

Filed 18 September 2018

1. Statutes of Limitation and Repose—medical malpractice—continuing course of treatment doctrine—misinterpretation of genetic testing results—last act giving rise to claim

A medical malpractice action for negligence in misinterpreting a patient's cystic fibrosis (CF) genetic testing results was not barred by the four-year statute of repose in N.C.G.S. § 1-15(c) where defendant OB/GYN doctor's last act giving rise to the claim was not the initial misinterpretation of the CF test results but rather a later

15. We reiterate that the reasoning, holdings, and directives in this opinion apply with equal weight to the seven related appeals in COA17-1018, COA17-1019, COA17-1020, COA17-1021, COA17-1022, COA17-1023, and COA17-1024.

preconception appointment before plaintiffs' child with CF was conceived. The continuing course of treatment doctrine applied because the doctor had a continuing professional duty to care for plaintiffs, based on their ongoing family planning and health needs, and he continued the wrongful treatment over time without correction after his initial misinterpretation of the CF test results.

2. Medical Malpractice—wrongful conception—child with cystic fibrosis—dismissal of complaint

Where plaintiffs filed a medical malpractice action for a doctor's negligence in misinterpreting plaintiff mother's cystic fibrosis (CF) genetic testing results, which led to the conception and birth of a child with CF, plaintiffs' complaint stated a claim upon which relief may be granted for medical malpractice, negligent infliction of emotional distress, and economic damages.

Appeal by Plaintiffs from order entered 19 September 2017 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 August 2018.

Brown, Moore, & Associates, by R. Kent Brown, Jon R. Moore, and Paige L. Pahlke, for plaintiffs-appellants.

Parker, Poe, Adams, & Bernstein LLP., by John H. Beyer and Katherine H. Graham, for defendants-appellees.

Glenn, Mills, Fisher & Mahoney, P.A., by Daniel N. Mullins and William S. Mills, for amicus curiae North Carolina Advocates for Justice.

North Carolina Medical Society, by Associate General Counsel William Conor Brockett, for amicus curiae North Carolina Medical Society.

Roberts & Stevens, P.A., for Phillip T. Jackson, for amicus curiae North Carolina Association of Defense Attorneys.

HUNTER, JR., Robert N., Judge.

I. Factual and Procedural Background

On 6 January 2017, Plaintiffs-Appellants Brianna Glover ("Ms. Glover") and Randie Glover ("Mr. Glover") sought and received an Order

pursuant to N.C. R. Civ. P. 9(j) extending the statute of limitations in a medical malpractice matter to 5 May 2017. The trial court extended the statute of limitations to 5 May 2017. Plaintiffs filed their summons and complaint on 3 May 2017.

Plaintiffs' medical malpractice complaint alleged the following events. Plaintiffs are married and have two children, "M.G." and "J.G." Ms. Glover became a patient of both Greater Carolinas Women's Center and Glen Ellis Powell, II, M.D. ("Dr. Powell") on or before 6 January 2011. After becoming pregnant with Plaintiffs' first child, M.G., Ms. Glover met with Dr. Powell on 13 January 2011 "for a physical exam and to discuss pregnancy related issues including testing for genetic abnormalities and/or mutations." On 9 February 2011, Ms. Glover underwent routine, voluntary testing for cystic fibrosis ("CF"). Prior to doing so, she signed a consent form from Defendants stating, in pertinent part:

> CF is a debilitating respiratory and digestive disease that requires lifelong medical care and often shortens [the] lifespan of affected individuals. CF is a genetic disorder . . . .Couples in whom both partners are carriers have a 1 in 4 chance of having a child with CF . . . If screening reveals that you are a carrier for CF, then your partner **must** be tested. If he is also a carrier, then your baby has a 25% chance of developing CF. You **will be** referred for genetic counseling and offered amniocentesis or chorionic villus sampling to test the baby for CF[.]

On 11 February 2011, the test results revealed Ms. Glover was a carrier of the cystic fibrosis mutation. The test results further "recommended that carrier testing by mutation analysis and genetic counseling be offered to the carrier (i.e. Briana Glover), relatives and reproductive partners (i.e. Randie Glover) along with appropriate genetic counseling[.]" On or after 11 February 2011, Dr. Powell "failed to review and/or incorrectly interpreted the above referenced positive testing for CF and incorrectly entered into Briana Glover's medical Patient Chart/Antepartum record that the above testing was negative." Contemporaneously with Dr. Powell's incorrect entry into Ms. Glover's chart, the electronic medical record utilized by Dr. Powell and Greater Carolinas Women's Center allowed for repopulation of the same information into Ms. Glover's chart until after the birth of their second child in December 2015.

On or about 10 March 2011, Dr. Powell "advised both Plaintiffs the CF testing was negative[.]"Plaintiffs thereafter relied upon this information in making decisions about future childbearing and conception issues.

On 14 March 2011, Plaintiffs' first child, M.G., was born "a healthy baby girl without CF." Ms. Glover continued postpartum care with Defendants at Greater Carolinas Women's Center, including an appointment with another physician, Dr. Pressley, on 24 August 2011. On 15 September 2011, Dr. Powell provided Ms. Glover with family planning and "advice of contraceptive management." On 5 February 2013, Ms. Glover saw Dr. Powell at Greater Carolinas Women's Center for OB/GYN care. Ms. Glover continued her OB/GYN care with Defendants on 17 March 2014, when she again saw Dr. Powell for medical care and received advice on family planning and birth control. Ms. Glover again saw Dr. Powell on 19 March 2015 for "OB/GYN care, advice and counseling which included discussions of the health of her child and husband . . . ." Ms. Glover further discussed with Dr. Powell additional health issues related to birth control measures.

On 6 April 2015, Ms. Glover went to Greater Carolinas Women's Center OB/GYN, again seeing Dr. Pressley, because she believed she was pregnant, and she sought advice regarding a dental treatment and the welfare of her baby she believed she was carrying. Plaintiff was in fact pregnant, and she continued her care with Defendants. On 21 May 2015, Defendants ran tests to determine the existence of genetic abnormalities of Plaintiffs' baby. All such tests were negative. Defendants did not test to determine if Ms. Glover was a cystic fibrosis carrier, "due to the incorrectly reported and recorded CF testing from her 2011 pregnancy."

Plaintiffs' second child, J.G., was born on 5 December 2015. The delivery was "uncomplicated," and delivery records noted "no fetal conditions abnormalities." On 9 December 2015, routine screening tested their newborn to rule out cystic fibrosis. On 11 December 2015, results from that test returned as "abnormal newborn screen." Defendant Carolinas Medical Center and Novant Health Pediatrics performed follow up testing, which further suggested cystic fibrosis; however, on 7 January 2016, Ms. Glover "refuted such results" based on Dr. Powell's ongoing representation such tests were negative. On 13 January 2016, Plaintiffs were again advised that cystic fibrosis was a high probability, which Ms. Glover again refuted based on Defendants' previous tests and a lack of family history. On 28 January 2016, Plaintiffs were advised of J.G.'s diagnosis of cystic fibrosis. J.G. was subsequently referred to specialists due to several indications of cystic fibrosis. On 18 January 2016, test results ordered by Dr. Black revealed abnormalities indicating cystic fibrosis. On 28 January 2016, Dr. Black confirmed to Plaintiffs J.G.'s cystic fibrosis diagnosis. J.G.'s chart "was documented with a diagnosis of CF" on 6 February 2016.

Plaintiffs continued care with Defendants. On 22 June 2016, Plaintiffs had an appointment with Dr. Powell, where he "honorably acknowledged his error." He documented in the chart he had not correctly informed Plaintiffs regarding the cystic fibrosis test.

Plaintiffs' complaint alleged "[a]t all times relevant . . . Plaintiff Brianna Glover was under the continuous care of Defendants for issues relating to family planning including but not limited to relevant and applicable genetic testing." Further, "[a]t all times relevant . . . Defendants knew or should have known that both Plaintiffs relied on the continuous care of Defendants to provide accurate advice and counsel for issues relating to family planning including but not limited to relevant and applicable genetic testing." Defendants had a "duty to provide appropriate, accurate and reasonable care and counseling regarding reproductive issues and the risks attendant with the same." Plaintiffs asserted proper testing and information would have provided the opportunity to make informed decisions about childbearing. Defendants knew or should have known Plaintiffs could "suffer severe emotional distress should they have a child with CF," "bear unanticipated and dramatically increased costs of child rearing due to medical needs and expenses of a child with CF."

Plaintiffs' complaint also asserted Defendants' negligence was the "direct and proximate" cause of Plaintiffs' damages, including "hardships," "extraordinary expenses," "stress," "severe emotion[al] distress," "loss of wages," and "other "injuries and damages as may accrue, all of which were reasonably foreseeable by Defendants." Plaintiffs sought damages for "extraordinary past and prospective care, treatment and hospitalization(s)" for J.G., compensation for "pain, and suffering from the severe emotional distress" suffered, expenses related to the care and emotional distress, lost wages, and pregnancy expenses.

On 30 June 2017, pursuant to N.C. Gen Stat. §1A-1, Rule 12(b)(6), Defendants collectively filed a motion to dismiss Plaintiffs' complaint for failure to state a claim upon which relief can be granted. In their motion, Defendants stated Plaintiffs' claim for wrongful birth and damages related to " 'the extraordinary expenses for their son's care' " are not recognized by North Carolina law. Defendants further asserted Plaintiffs' complaint was "barred by the applicable four (4) year statute of repose set forth in N.C. G. S. § 1-15(c)."

On 6 July 2017, the trial court filed notice of the hearing for Defendants' motion to dismiss. On 28 July 2017, the trial court filed an amended notice of the hearing.

On 5 September 2017, the trial court heard Defendants' motion to dismiss. Defendants first addressed the court asserting the statute of repose barred Plaintiffs' claims, since Plaintiffs filed the lawsuit "more than six years after the negligent act" of which they complained. Defendants noted Dr. Powell treated Ms. Glover during her first pregnancy under the "belief that she has this negative test for cystic fibrosis." Subsequently, Ms. Glover received "no intervening care for 18 months" after the birth of her first child, M.G. While Ms. Glover consulted with Dr. Powell for gynecological care in a "nonpregnant state," her pregnancy care in April 2015 was "more than four years from when Dr. Powell initially interpreted this cystic fibrosis test." Defendants noted Plaintiffs filed the complaint "more than six years beyond the negligent act at issue." Additionally, Defendants asserted Plaintiffs relied on a "continued course of treatment" theory in order to extend the statute of limitations. Because of the "18-month gap between delivery of the first child[,] then following up for routine gynecological care," Defendants argued "this is about a continuous course of treatment[,]" rather than "continuing the [doctor/patient] relationship." Defendants argued "we have one negligent act[,] [a]nd it's interpreting one test during one pregnancy." Further, there was "an entirely separate, distinct, second pregnancy[,]"with treatment provided to Plaintiffs "unrelated to the [first] pregnancy, unrelated to the genetic testing[.]" Defendants argued accordingly, the complaint was filed outside the statute of repose and should be dismissed.

Plaintiffs next addressed the trial court. Plaintiffs stated Ms. Glover's first appointment with Dr. Powell on 13 January 2011, while Ms. Glover was pregnant, included cystic fibrosis testing. The purpose of the test, according to Plaintiffs, was not only to look at this child, "but to look -- prospective to look at any children she and her husband may have." Plaintiffs asserted, "doctors would certainly not have given [Ms. Glover] advice on contraception and family planning . . . if they had thought she had a positive cystic fibrosis test." Ms. Glover received advice and consultation about birth control in 2014. In March of 2015, Ms. Glover came in again for counseling for birth control. Defendants "stopped [Ms. Glover's] birth control pills." At the time, Ms. Glover was "barely pregnant" or "7 to 10 days pregnant." In December 2015, Ms. Glover gave birth to her second child, J.G, who was born with cystic fibrosis. Plaintiffs argued the statute of limitations had not run, and they "have a valid cause of action for the negligent infliction of emotional distress occasioned by these events."

After hearing arguments from both sides, in its 13 September 2017 order the trial court dismissed Plaintiffs' complaint with prejudice

because the complaint failed to state a claim upon which relief may be granted based on: (1) the running of the statute of repose; (2) any claim for wrongful birth, to the extent Plaintiffs alleged such a claim; and (3) any claim for wrongful conception, to the extent Plaintiffs asserted such a claim, as to damages for extraordinary costs associated with rearing a child with cystic fibrosis.

Plaintiffs filed written notice of appeal on 29 September 2017.

II. Jurisdiction

This Court has jurisdiction over a final order of the trial court. N.C. Gen. Stat. § 7A-27(b)(1) (2017). The trial court's order as to the statute of repose was final; accordingly, we have jurisdiction over the court's ruling as to that issue. *See id.* The trial court's order as to Plaintiffs' claims for wrongful birth and wrongful conception were partial, and thus not final. *See id.* Because we reverse on the issue of the statute of repose, we do not have jurisdiction on the two subsidiary issues as to availability or extent of damages.

III. Standard of Review

This Court reviews a 12(b)(6) motion to dismiss considering "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB Nat. Bank of North Carolina*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). "A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of [a plaintiff's] claim so as to enable [them] to answer and prepare for trial." *McAllister v. Ha*, 347 N.C. 638, 641, 496 S.E.2d 577, 580 (1998) (citation omitted). Further, "when the allegations in the complaint give sufficient notice of the wrong complained of, an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory." *Id.* at 641, 496 S.E.2d at 580 (citation omitted). "On appeal of a [Rule] 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (citation omitted). We decide a question presented on a Rule 12(b)(6) motion to dismiss on the basis of factual allegations in the complaint, taking them as true.

Hargett v. Holland, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citing *Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986)).

Whether a statute of repose has run is a question of law. *Glens of Ironduff Prop. Owners Ass'n v. Daly*, 224 N.C. App. 217, 220, 735 S.E.2d 445, 447 (2012) (citation omitted). It is well settled "[q]uestions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo." *In re Summons of Ernst & Young*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted).

IV. Analysis

[1] On appeal, Plaintiffs assign error to the trial court for (1) dismissing their complaint based upon the improper application of the statute of repose, and (2) dismissing their damages claim in a wrongful conception action for extraordinary expenses of raising a child with cystic fibrosis.

This appeal presents the question of whether a claim for professional malpractice against a doctor for alleged negligence in interpreting and/or communicating test results is barred by the four-year statute of repose contained in our professional malpractice statute of limitations, N.C. Gen. Stat. § 1-15(c) (2017), when the claim is filed more than six years after the doctor interpreted and/or communicated the results. Section 1-15(c) provides:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. *Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action*: Provided further, that where damages are sought

> by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

Id. (emphasis added). Medical malpractice is, in pertinent part, a "civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (2)(a) (2017).

A defense under a statute of limitations or statute of repose may be raised via a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. *Hargett*, 337 N.C. at 653, 447 S.E.2d at 786 (citations omitted). "Unlike statutes of limitations, which run from the time a cause of action accrues, 'statutes of repose . . . create time limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant.' " *Id.* at 654, 447 S.E.2d at 787 (quoting *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985). Further, "[a] statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained." *Id.* at 654, 447 S.E.2d at 787 (citation omitted). Differing from a limitation provision that makes a claim unenforceable, section 1-15 (c) establishes, therefore, a time period in which a claim based on professional malpractice

> must be brought in order for that cause of action to be recognized . . . [and] if the action is not brought within the specified period, the plaintiff literally has *no* cause of action . . . [t]he harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.

Id. at 655, 447 S.E.2d at 787 (emphasis original) (internal quotations and citations omitted).

Our Supreme Court has provided guidance for calculating the statute of repose, explaining it begins

> when a specific event occurs, regardless of whether a cause of action has accrued or whether an injury has

> resulted . . . . Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.

Id. at 655, 447 S.E.2d at 788 (quoting *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985). Moreover, "[r]egardless of when plaintiffs' claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim." *Id.* at 655, 447 S.E.2d at 788 (citations omitted).

Using this guidance, the *Hargett* Court held defendant, an attorney who contracted to prepare a will after which defendant was an attesting witness to the will, had a duty to prepare and supervise the execution of the will. *Id.* at 655, 447 S.E.2d at 788. Such arrangement did not, however, "impose on defendant a continuing duty thereafter to review or correct the prepared will, or to draft another will." *Id.* If an ongoing relationship between the attorney and client had been alleged to exist between the testator and defendant, or if factual allegations led to such an inference, then the complaint might have been sufficient to survive the motion to dismiss. *Id.*

Key to the Court's reasoning was the concept of "continuing professional duty." *See id.* at 656, 447 S.E.2d at 788. Such a concept arises in medical malpractice claims in which a continuous course of treatment occurs of the patient by the physician. While "an attorney's duty to a client is . . . determined by the nature of the services he agreed to perform[,]" likewise, "a physician's duty to the patient is determined by the particular medical undertaking for which he was engaged[.]" *Id.* at 656, 447 S.E.2d at 788.

Under this theory, malpractice is viewed as a continuing tort based on the physician's actions in continuing and repeating the wrongful treatment without correction. *Ballenger v. Crowell*, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978) (citations omitted). Thus, "the 'continuing course of treatment' doctrine has been accepted as an exception to the rule that 'the action accrues at the time of the defendant's negligence.' " *Stallings v. Gunter*, 99 N.C. App. 710, 714, 394 S.E.2d 212, 215, *rev. denied* 327 N.C. 638, 399 S.E.2d 125 (1990) (quoting *Ballenger v. Crowell*, 38 N.C. App. at 58, 247 S.E.2d at 293). The *Stallings* Court announced:

> Because the "continuing course of treatment" doctrine affects determination of the accrual date, and the accrual date under § 1-15(c) is the starting date for the running of the statute of limitation and statute of repose, it is correct to use the "continuing course of treatment" doctrine to determine the start date for running of the statute of repose. It is only by using the doctrine that a court can determine defendant's relevant "last act."

Id. at 715, 394 S.E.2d at 216. The Court further ruled "the action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action." *Id.* at 714, 394 S.E.2d at 215 (citation omitted). Moreover:

> To take advantage of the 'continuing course of treatment' doctrine, plaintiff must show the existence of a *continuing* relationship with his physician, and . . . that he received *subsequent* treatment from that physician. Mere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine. Subsequent treatment must consist of either an affirmative act or an omission [which] must be related to the original act, omission, or failure which gave rise to the cause of action. However, plaintiff is not entitled to the benefits of the 'continuing course of treatment' doctrine if during the course of the treatment plaintiff knew or should have known of his or her injuries.

Id. at 715, 394 S.E.2d at 216 (internal quotations and citations omitted, alterations in original).

On multiple occasions, our appellate courts have considered whether the "continuing course of treatment" doctrine applied in a particular case. *See e.g.*, *Horton*, 344 N.C. at 139, 472 S.E.2d at 782 (applying continuing course of treatment doctrine to plaintiff's claim for negligent insertion of a catheter to find action barred when brought more than three years after defendant's last act giving rise to action); *Stallings*, 99 N.C. App. at 716, 394 S.E.2d at 216 (finding patient did not have the benefit of the continuing course of treatment doctrine since more than four years had passed from date general dentist informed patient of dental problems). Under the doctrine, a plaintiff need not show the treatment rendered subsequent to the negligent act was also negligent, so long as the physician continued to treat the patient for the particular disease or

condition created by the original act of negligence. *See Horton*, 344 N.C. at 139, 472 S.E.2d at 782. Additionally, a plaintiff must allege the physician could have taken further action to remedy the damage caused by the original negligence. *See Webb v. Hardy*, 182 N.C. App. 324, 328, 641 S.E.2d 754, 757 (*rev. denied* 361 N.C. 704, 653 S.E.2d 879) (2007).

Here, Plaintiffs argue the trial court's factual finding that "the continuing course of treatment doctrine is inapplicable" is "completely contrary to the allegations" in their complaint. The time frame for filing their wrongful conception, negligent infliction of emotional distress, and economic damages claims was "tolled under the 'continuing course of treatment' doctrine," and Plaintiffs then timely filed their claims.

Dr. Powell does not deny having misread or misinterpreted the test results for cystic fibrosis; rather, Defendants assert Plaintiffs' medical malpractice action is statutorily barred and not excepted by the "continuing course of treatment" doctrine. Defendants argue Dr. Powell's treatment "was not continuous and did not relate back to the original negligent act" of the cystic fibrosis carrier test.

On *de novo* review, we must assess whether Plaintiffs' claims exist under some legal theory, *see Ha*, 347 N.C. at 641, 496 S.E.2d at 580, taking factual allegations as true, *see Hargett*, 337 N.C. at 653, 447 S.E.2d at 786. In order to assess whether the statute of repose bars Plaintiffs' claims, we must determine "the time of the occurrence of the last act of the defendant giving rise to the cause of action[.]" *See* N.C. Gen. Stat. § 1-15(c). To do so, we consider the particular medical undertaking for which Defendants' services were engaged. *See Hargett*, 337 N.C. at 656, 447 S.E.2d at 788.

From 6 January 2011, when Ms. Glover first became a patient of Defendants, and 13 January 2011, when she first met with Dr. Powell, to 22 June 2016, when Plaintiffs learned Dr. Powell had incorrectly informed Plaintiffs Ms. Glover was not a carrier of cystic fibrosis, Ms. Glover sought and received OB/GYN care, advice, and counseling. During that time, her care included, for example, information on family planning, child health, and birth control. Far beyond a general physician-patient relationship—one that might focus on health issues such as height, weight, or blood pressure screenings—Plaintiffs relied on family planning advice throughout the ongoing relationship. Dr. Powell affirmatively offered family planning advice, and Defendants' further omission—not correcting their error as to the cystic fibrosis test—was crucial to the family planning advice. *See Stallings*, 99 N.C. App. at 715, 394 S.E.2d at 216. Unlike the relationship described in *Hargett*, in which

an attorney had no continuing duty to plaintiffs once a will was drafted, Defendants here had a continuing duty to care for Plaintiffs, based on the ongoing family planning and health needs undergirding the relationship. *See Hargett*, 337 N.C. at 656, 447 S.E.2d at 788. Defendants continued and repeated the wrongful treatment without correction. *See Ballenger*, 38 N.C. App. at 58, 247 S.E.2d at 293. Further action taken to correct the test results could have remedied the danger caused by the original act. *See Webb*, 182 N.C. App at 328, 641 S.E.2d at 757.

Moreover, Plaintiffs did not know, nor should they have known, of the malpractice that had occurred—that of incorrect information regarding Ms. Glover being a cystic fibrosis carrier—until the birth of their son, J.G. It would be senseless to expect Plaintiffs would presciently know of the misinformation, before a problem arose, and would leave no recourse for Plaintiffs. As they moved forward with family planning decisions, such unknown abnormalities could have arisen many years later. No matter the number of years, the information would have been new to Plaintiffs. For the above reasons, we find the "continuing course of treatment" doctrine squarely applies.

Because the "continuing course of treatment" doctrine is an exception to the rule that the action accrues at the time of the defendant's negligence, *see Stallings*, 99 N.C. App. at 714, 394 S.E.2d at 215, our calculation of time limitations for Plaintiffs to bring their claims does not begin at the time of injury—when Dr. Powell incorrectly communicated to Ms. Glover regarding the cystic fibrosis carrier test results. Rather, the claim accrues from Defendants' last act giving rise to the claim—the treatment of Ms. Glover and advice to Plaintiffs for family planning. *See Hargett*, 337 N.C. at 655, 447 S.E.2d at 788; *see also Stallings*, 99 N.C. App. at 715, 394 S.E.2d at 216. Dr. Powell's original act of negligence misinterpreting the cystic fibrosis test results occurred on 11 February 2011. Plaintiffs concede if Ms. Glover was already pregnant during the 19 March 2015 appointment, during which she received "OB/GYN care, advice and counseling which included discussions of the health of her child and husband . . . [,]" then the last preconception appointment after which she could have made family planning decisions was on 17 March 2014.

We conclude Defendant's last act giving rise to the claim occurred on 17 March 2014, Ms. Glover's last preconception appointment. The 17 March 2014 appointment was within the three year statute of limitations, after obtaining the 120-day filing extension, and not more than four years after Plaintiffs received continuing care and advice regarding

family planning. Accordingly, Plaintiffs' claim is not barred by the four-year statute of repose set forth in N.C. Gen. Stat. § 1-15(c).

[2] We further conclude, taking the factual allegations as true, the complaint states a claim upon which relief may be granted. Plaintiffs alleged in their complaint medical malpractice, negligent infliction of emotional distress, and economic damages. Because the trial court dismissed Plaintiffs' complaint in error, we reverse and remand for further proceedings consistent with this decision.

REVERSED AND REMANDED.

Judges ELMORE and ZACHARY concur.

JORIS HAARHUIS, ADMINISTRATOR OF THE ESTATE OF
JULIE HAARHUIS, (Deceased), Plaintiff
v.
EMILY CHEEK, Defendant

No. COA17-1179

Filed 18 September 2018

1. **Receivership—standing—non-parties to underlying action**

   The trial court erred in a receivership hearing by considering the arguments of third parties (an auto insurer and its attorney) against whom the judgment debtor (defendant) had unliquidated legal claims. The third parties were not parties to the action between plaintiff and defendant, and they had no standing to object to the appointment of a receiver.

2. **Receivership—unliquidated legal claims against third parties—judgment debtor's refusal to pursue**

   In a case arising from the death of a pedestrian whom defendant hit and killed while driving impaired, the trial court erred by denying plaintiff estate administrator's Motion for Appointment of Receiver over defendant's unliquidated legal claims against third parties. Equity required appointment of a receiver where the third parties (defendant's auto insurer and its attorney) allowed a $50,000 settlement offer from plaintiff to expire, which led to defendant being encumbered with a $4.3 million judgment; defendant had no ability to satisfy the judgment; and defendant refused to pursue legal claims against the insurer and attorney for their actions.

Judge DIETZ concurring in separate opinion.

Appeal by plaintiff from order entered 25 July 2017 by Judge Elaine M. O'Neal in Chatham County Superior Court. Heard in the Court of Appeals 22 March 2018.

Copeley Johnson & Groninger, PLLC, by Leto Copeley and Drew H. Culler, for plaintiff-appellant.

Burton, Sue & Anderson, LLP, by Walter K. Burton and Stephanie W. Anderson, and Ivey, McClellan, Gatton & Siegmund, L.L.P, by Charles Ivey, IV, for defendant-appellee.

McAngus, Goudelock & Courie, PLLC, by John P. Barringer and Jeffrey B. Kuykendal, for Universal Insurance Company.

Poyner Spruill LLP, by Cynthia L. Van Horne, for Burton, Sue & Anderson, LLP.

ZACHARY, Judge.

Plaintiff Joris Haarhuis, as administrator of the estate of Julie Haarhuis, appeals from the trial court's order denying his Motion for Appointment of Receiver over defendant's unliquidated legal claims against third-parties. We reverse.

Background

Defendant Emily Cheek was driving while impaired in July 2013 when she hit and killed pedestrian Julie Haarhuis. Ms. Haarhuis's husband, Joris Haarhuis, qualified as administrator of his wife's estate.

At the time of the crash, Universal Insurance Company insured defendant's vehicle. Universal determined that the value of plaintiff's claim exceeded the limits of defendant's $50,000 policy. On 2 September 2014, pursuant to Universal's offer, plaintiff agreed to release its claims against defendant in exchange for payment of the $50,000 policy limit, on the condition that payment be made within ten days. Universal received plaintiff's acceptance that same day. Two days later, Universal retained an attorney from Burton, Sue & Anderson, LLP ("Burton") to represent defendant to the extent of the policy limits. Universal forwarded plaintiff's settlement demand to the attorney. However, by the time plaintiff's settlement offer expired on 12 September 2014, plaintiff had not received

a response from Universal or Burton. Plaintiff filed suit the next week, on 19 September 2014.

As the litigation proceeded, plaintiff again offered to settle, this time in exchange for a $2 million consent judgment, but plaintiff required Universal's approval. One week later, the attorney representing defendant on her exposure in excess of the policy limits wrote to Universal on defendant's behalf and demanded that it agree to settle the claims against her. This settlement would have permitted defendant to seek relief in bankruptcy. However, roughly one month later, plaintiff was informed that Universal would not approve the $2 million consent judgment. Plaintiff posits that Universal preferred that defendant not seek relief in bankruptcy, for fear that the bankruptcy trustee would pursue litigation on defendant's behalf against Universal for its failure to settle the case initially for $50,000. The case then went to trial, and on 28 April 2017 the jury entered a verdict against defendant for $4.25 million in compensatory damages and $45,000 in punitive damages. However, the Chatham County Sheriff's Office returned the writ of execution unsatisfied, as the deputy "did not locate property on which to levy" and "[d]efendant refused to pay."

One year later, with the judgment still unsatisfied, plaintiff filed a Motion for Appointment of Receiver pursuant to N.C. Gen. Stat. § 1-363. Plaintiff maintained that defendant possessed property in the form of unliquidated legal claims against Universal and Burton for their actions in causing defendant to be encumbered with a judgment of nearly $4.3 million. Specifically, plaintiff is of the position that defendant has legal claims against Universal, "including claims for breach of contract, breach of the duty of good faith and fair dealing, unfair trade practice, and tortious bad faith[,]" and against Burton for "breach of fiduciary duty and failure to meet the standard of care[.]"

According to plaintiff,

> [t]he potential choses in action described above must be sued upon promptly or the applicable statute of limitations may bar an action. Defendant is wasting valuable time by her failure to take prompt legal action to recover money for the choses in action. Defendant, by her delay in pursuing the choses in action, is in the process of causing irreparable harm to Plaintiff, as Defendant has no other apparent means of satisfying the judgment against her.

Plaintiff therefore sought to have a receiver appointed of defendant's choses in action against Universal and Burton.

The trial court heard plaintiff's Motion for Appointment of Receiver on 5 June 2017. Plaintiff's and defendant's counsel appeared at the hearing; however, counsel for Universal and Burton appeared as well. Plaintiff objected to the appearances of Universal and Burton for lack of standing as potential debtors of defendant, but the trial court nevertheless permitted Universal and Burton to argue against the appointment of a receiver. Following the hearing, the trial court entered an order containing the following findings and conclusions:

> 19. Defendant does not wish to have a receiver appointed for any purpose.
>
> . . .
>
> 1. N.C. Gen. Stat. § 1-502 specifies when a receiver may be appointed. The circumstances of this case do not apply as the appointment of a receiver in this case would not "carry the judgment into effect," it would not "dispose of the property according to the judgment," it would not "preserve [the property] during the pendency of an appeal" and this is not a case in which the "judgment debtor refuses to apply his property in satisfaction of the judgment." *See* N.C. Gen. Stat. § 1-502(2) & (3).
>
> 2. The appointment of a receiver is within the discretion of the Court. *See Barnes v. Kochar*, 178 N.C. App. 489, 500, 633 S.E.2d 474, 481 (2006).
>
> 3. The appointment of a receiver is an equitable remedy. *See Jones v. Jones*, 187 N.C. 589, 592, 122 S.E. 370, 371 (1924) ("[t]he appointment of a receiver is equitable in its nature and based on the idea that there is no adequate remedy at law, and is intended to prevent injury to the thing in controversy").
>
> 4. The court finds that the defendant has asserted that she has no property that, to a reasonable degree, could be subject to execution.

The trial court thereafter denied plaintiff's Motion for Appointment of Receiver. Plaintiff timely appealed.

Discussion

On appeal, plaintiff presents the following questions to this Court: (1) "Where a judgment creditor shows the court that a judgment debtor

has unliquidated legal claims that she refuses to pursue, may the trial court refuse to appoint a receiver?" and (2) "Did the trial court properly allow non-party debtors of Defendant-Appellee judgment debtor to oppose appointment of a receiver?" We first consider plaintiff's argument concerning standing.

A. Standing

[1] Plaintiff argues that the trial court erred when it heard and considered the arguments of Universal and Burton at the receivership hearing because "debtors of a judgment debtor have no standing to object to the appointment of a receiver in aid of execution[.]" We agree.

It is well settled that the debtor of a judgment-debtor lacks standing to object to the appointment of a receiver, as the debtor is not the "party aggrieved" in the underlying action. *Lone Star Industries, Inc. v. Ready Mixed Concrete of Wilmington, Inc.*, 68 N.C. App. 308, 309, 314 S.E.2d 302, 303 (1984). In *Lone Star Industries, Inc.*, the trial court appointed a receiver over certain property of the judgment debtor-corporation at the behest of the judgment-creditor. *Id.* at 308-09, 314 S.E.2d at 302-03. The judgment-creditor claimed that the judgment-debtor possessed unliquidated legal claims against one of its shareholders and one of its former shareholders. *Id.* at 309, 314 S.E.2d at 303. Upon appointment of a receiver over that property, the shareholders appealed. *Id.* With regard to whether the shareholder-appellants had standing to contest the receivership, this Court stated:

> That [the shareholder-debtors] are opposed to the defendant debtor receiving the benefit of that property is understandable; but that they were able to assert their opposition in this case for so long under the circumstances is not. The [shareholder-debtors] have no standing in this Court and should have had none in the court below. They are not parties to the case, and, even if they were, their interests are entirely antagonistic to the debtor corporation, whose own interests clearly require that any sums that are owed it by others be promptly applied to its debts.

Id.

The same is true in the instant case. Universal and Burton were not, and are not, parties to the action between plaintiff and defendant, and their interests are "entirely antagonistic" to those of defendant, being that they are her potential debtors. Nor would Universal or Burton be

legally aggrieved in the instant case by the appointment of a receiver. Accordingly, because Universal and Burton do not have standing to challenge the appointment of a receiver in the instant case, they were not properly before the trial court, and they are not properly before this Court. We do not consider their arguments, and the trial court erred in doing so.

B. Receivership

[2] Next, plaintiff argues that the trial court erred when it denied plaintiff's Motion for Appointment of Receiver. According to plaintiff, the particular circumstances at issue in the instant case entitled plaintiff to have a receiver appointed in order for the receiver to investigate prosecution of defendant's unliquidated legal claims against Universal and Burton so that those funds can be applied in satisfaction of the underlying judgment. Defendant, however, argues that North Carolina law "does not *mandate* appointment of a receiver[,]" and that the trial court did not abuse its discretion when it declined to do so in the instant case. (emphasis added). Specifically, defendant maintains that plaintiff's motion was properly denied first, because the causes of action that plaintiff wants placed in receivership are unassignable under North Carolina law, and second, because those claims are merely "potential or speculative." For the reasons explained below, we find plaintiff's arguments persuasive.

I.

Civil judgments for money damages are typically enforced through the process of execution. N.C. Gen. Stat. § 1-302 (2017). Execution is accomplished through the levying of the judgment-debtor's property, *i.e.*, its physical seizing and subsequent sale. Therefore, property that may be reached by execution typically includes only tangible property or property otherwise represented by instrument. *See* N.C. Gen. Stat. § 1-315(a) (2017). Instances may arise, however, in which a judgment-debtor has no such tangible property that can be reached by execution; therefore, the outstanding judgment remains unsatisfied. In such a case, Chapter 1, Article 31 of the General Statutes allows for the following supplemental proceeding:

> The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver . . . of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions.

N.C. Gen. Stat. § 1-363 (2017).[1] "[A]fter execution against a judgment debtor is returned unsatisfied[,]" receivership is allowed as a last-resort attempt "to aid creditors to reach the property of every kind subject to the payment of debts which cannot be reached by the ordinary process of execution." *Massey v. Cates*, 2 N.C. App. 162, 164, 162 S.E.2d 589, 591 (1968). Such a proceeding is "equitable in nature." *Id.* "[I]t is elementary that a Court of Equity has the inherent power to appoint a receiver, notwithstanding specific statutory authorization." *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 576, 273 S.E.2d 247, 256 (1981) (citing *Skinner v. Maxwell*, 66 N.C. 45, 48 (1872)).

Section 1-363 exempts only two classes of property from the scope of receivership: "the homestead and personal property exemptions" provided in N.C. Gen. Stat. § 1C-1601(a). Otherwise, Section 1-363 contemplates that a receiver may be appointed in order to facilitate prosecution of an unliquidated legal claim that a judgment-debtor might have against a third party. *See e.g.*, N.C. Gen. Stat. § 1-366 (2017); N.C. Gen. Stat. § 1-360 (2017); *Carson v. Oates*, 64 N.C. 115 (1870). For instance, N.C. Gen. Stat. § 1-366, "Receiver to sue debtors of judgment debtor," explicitly addresses the situation in which a judgment-debtor's property takes the form of a contested debt. That section provides:

> If it appears that a person . . . alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person . . . by the receiver[.]

N.C. Gen. Stat. § 1-366 (2017). Additionally, in analyzing the reach of Section 1-363, our Supreme Court has stated that "[i]t is an important part of the duties of the receiver to take possession and get control of the property of the judgment debtor, whether in possession or action, as soon as practicable, and to bring all actions necessary to secure and recover such property as may be in the hands of third parties, however they may hold and claim the same[.]" *Coates Bros.*, 92 N.C. at 380. In other words, as defendant concedes, both statute and case law "enable[] a receiver to sue those who owe the judgment debtor."

---

1. N.C. Gen. Stat. § 1-502 likewise addresses "the powers of the courts to appoint receivers generally[.]" *Coates Bros. v. Wilkes*, 92 N.C. 377, 383 (1885). Section 1-502(3) provides that a receiver may also be appointed "after judgment" when, *inter alia*, "an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment." N.C. Gen. Stat. § 1-502(3) (2017). The trial court primarily relied on this section in its order denying plaintiff's Motion for Appointment of Receiver.

The authority of a receiver to pursue a judgment-debtor's legal claims is not limited solely to those claims that are otherwise assignable. It is important to note that receivership is distinct from assignment. "The assignment of a claim gives the assignee control of the claim and promotes champerty[,]" and is therefore void as against public policy. *Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co.*, 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995) (citing *Southern Railway Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 318 S.E.2d 872 (1984)). On the other hand, a "receiver" is "[a] disinterested person appointed by a court . . . for the protection or collection of property that is the subject of diverse claims[.]" *Receiver*, Black's Law Dictionary, 1296 (8th ed. 2014). Specifically, a "judgment receiver" "collects or diverts funds from a judgment debtor to the creditor. A judgment receiver is usu[ally] appointed when it is difficult to enforce a judgment in any other manner." *Judgment Receiver*, Black's Law Dictionary, 1296 (8th ed. 2014). Thus, in the case of receivership, the judgment-creditor exercises no control over the judgment-debtor's legal claims. Rather, the *receiver* does so independently of the judgment-creditor and under the supervision and control of the court. *Lambeth v. Lambeth*, 249 N.C. 315, 321, 106 S.E.2d 491, 495 (1959) (citations omitted) ("The receiver is an officer of the court and is amenable to its instruction in the performance of his duties; and the custody of the receiver is the custody of the law."). The purpose of a receiver of legal claims is in essence to act as a trustee, and a claim being placed in receivership is, at most, analogous to an assignment of the *proceeds* of the claim, which are assignable. *Charlotte-Mecklenburg Hosp. Auth.*, 340 N.C. at 91, 455 S.E.2d at 657 ("The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid.").

Moreover, "many exceptions to the principles of champerty . . . have been recognized and . . . it has come to be generally accepted that an agreement will not be held to be within the condemnation of the principle[] unless the interference is clearly officious and for the purpose of stirring up strife and continuing litigation." *Wright v. Commercial Union Ins. Co.*, 63 N.C. App. 465, 469, 305 S.E.2d 190, 192-93 (1983) (citation and quotation marks omitted). Such concerns are clearly not at issue where a cause of action is in receivership for the purpose of satisfying an outstanding judgment. Nor is it true that the injured judgment-debtor would have no stake in the outcome of her claims against her own debtor by virtue of those claims being placed in receivership. Instead, the judgment-debtor's interests will "clearly require that any sums that are owed it by others be promptly applied to its debts." *Lone Star Indus., Inc.* 68 N.C. App. at 309, 314 S.E.2d at 303. The judgment-debtor would also have

an interest in any recovery that exceeds the amount of debt she owes to the judgment-creditor. Thus, if a receiver elects to pursue a cause of action held by a judgment-debtor and the judgment-debtor prevails thereon, the debtor receives the full benefit of the award. That a portion of that award would in turn be applied to satisfy a pending outstanding judgment simultaneously owed by the judgment-debtor is beyond the purview of the public policy concerns that prohibit claim assignment. *See*, *e.g.*, Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 131 (2011) ("The victim's right to assign her right to redress does not destroy the defendant's duty to make repair to her, even if the remedy does not go to her, any more than the fact that a victim may no longer be alive, and may be represented by an estate in a survivorship action alters the defendant's duty in corrective justice to repair the wrongful loss he caused.").

Likewise, defendant also notes that "compensation for personal injury" is exempt from enforcement of certain claims by creditors pursuant to N.C. Gen. Stat. § 1C-1601(a)(8) (2017). As discussed *supra*, however, the General Assembly included only two Section 1C-1601(a) exemptions into Section 1-363: "the homestead and personal property exemptions." N.C. Gen. Stat. § 1-363. The Section 1C-1601(a)(8) compensation for personal injury exemption is explicitly excluded from the Section 1-363 supplemental proceeding, and the General Assembly likewise made clear that property may be placed in receivership thereunder "*whether subject or not to be sold under execution*[.]" *Id.* (emphasis added). This language is clear and unambiguous, and we are "not at liberty to divine a different meaning through other methods of judicial construction." *State v. Hooper*, 358 N.C. 122, 126, 591 S.E.2d 514, 516-17 (2004) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). Our General Assembly has therefore sanctioned—via supplemental receivership proceedings—the application of personal injury proceeds toward the satisfaction of a judgment-creditor's outstanding judgment. Such a prerogative is immune from our tampering. *Fagundes v. Ammons Dev. Grp., Inc.*, ___ N.C. App. ___, ___, 796 S.E.2d 529, 533 (2017).

The limits on the scope of property that may be placed within the control of receivership in the event that execution is returned unsatisfied are found within the receivership statutes themselves. Quite plainly, no law in North Carolina provides that a receiver may only transfer a judgment-debtor's recovery so long as the underlying claim would have been assignable, and so long as the underlying claim is not a personal injury claim. In fact, the law in this State is precisely to the contrary. The

supplemental receivership proceeding operates to allow an otherwise helpless judgment-creditor to reach the judgment-debtor's property that cannot "be successfully reached by the ordinary process of execution[.]" *Coates Bros.*, 92 N.C. at 379.

In determining whether a judgment-creditor is entitled to have a receiver of this form appointed, the trial court need not be convinced that the defendant will prevail on her legal claim. "To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought to apply to the judgment[.]" *Id.* at 384. Rather, equity authorizes the appointment of a receiver so long as the party seeking the same "establishes an *apparent* right to property[.]" *Neighbors v. Evans*, 210 N.C. 550, 554, 187 S.E. 796, 797 (1936) (emphasis added). "[I]f there is evidence tending in a reasonable degree to show that [the judgment-debtor] probably has such property, this is sufficient[.]" *Coates Bros.*, 92 N.C. at 384. Once an apparent right to property is shown, it becomes the task of the *receiver*, rather than the trial court, to determine whether any given "apparent right to property" is indeed worth pursuing:

> The judgment debtor cannot complain at the appointment of a receiver. If [she] has property subject to the payment of [her] debt, it ought to be applied to it; if [she] has not such property, this fact ought to appear, with reasonable certainty, to the satisfaction of the creditor. The receiver proceeds to do this, not at the peril of the debtor, but at his own peril, as to costs, if he fails in his action. The purpose of the law in such proceedings is to afford the largest and most thorough means of scrutiny, legal and equitable in their character, in reaching such property as the debtor has, that ought justly go to the discharge of the debt his creditor has against him.
>
> It thus appears that supplementary proceedings are incident to the action, equitable in their nature, and that . . . a receiver may be appointed as occasion may require.

Id. at 381.

II.

That appointing a receiver of defendant's unliquidated causes of action against Universal and Burton was a potential remedy available to plaintiff as a judgment-creditor did not, as defendant puts it, mandate that plaintiff had an "absolute right to the appointment of a receiver"

in the instant case. Indeed, a trial court's decision whether to appoint a receiver is ordinarily reviewed under an abuse of discretion standard. *Williams v. Liggett*, 113 N.C. App. 812, 815, 440 S.E.2d 331, 333 (1994) (citing *Murphy v. Murphy*, 261 N.C. 95, 101, 134 S.E.2d 148, 153 (1964)). Nonetheless, courts are vested with the power to appoint a receiver "[b]y statute and under general equitable principles[.]" *Murphy*, 261 N.C. at 101, 134 S.E.2d at 153 (citation omitted). That equitable nature renders the abuse of discretion standard somewhat nuanced in receivership matters. For example, where a trial court appoints a receiver contrary to its statutory power to do so, it is said that the trial court has abused its discretion. *E.g.*, *Williams*, 113 N.C. App. at 815-17, 440 S.E.2d at 333-34. But where a receivership is otherwise permitted by law, whether one ought to be appointed must be adjudged according to the equities of the particular case at hand. *E.g.*, *Coates Bros.*, 92 N.C. at 385; *see also Lowder*, 301 N.C. at 576-77, 273 S.E.2d at 256; *Murphy*, 261 N.C. at 101, 134 S.E.2d at 153-154; *Hurwitz v. Carolina Sand & Gravel Co.*, 189 N.C. 1, 6-7, 126 S.E. 171, 173-74 (1925); *Oldham v. First Nat'l Bank*, 84 N.C. 304, 308 (1881). That equitable determination does not "rest[] solely in the discretion of the [trial court]," but is instead fully "reviewable by this Court upon appeal." *Coates Bros.*, 92 N.C. at 386, 387 (citations omitted).

For instance, while the compensation for personal injury exemption and the prohibition against claim assignment do not serve as a direct bar to the types of property over which a receiver may be appointed, that is not to say that the public policies underlying those rules would be wholly immaterial to the determination of whether it is *equitable* to appoint a receiver over a legal claim in any given case. Indeed, the purpose of receivership " 'is to afford the largest and most thorough means of scrutiny, legal and equitable in their character, in reaching such property as the debtor has, that ought *justly* to go to the discharge of the debt his creditor has against him.' " *Massey*, 2 N.C. App. at 166, 162 S.E.2d at 592 (quoting *Coates Bros.*, 92 N.C. at 381) (emphasis added). The hypothetical policy concerns posed by our concurring colleague would—if such cases were to arise—be appropriately considered in the examination of the particular equities at issue. *E.g.*, *Hurwitz*, 189 N.C. at 6, 126 S.E. at 173 ("The courts of equity are gradually adjusting themselves to modern conditions and look to what in good conscience is for the best interest of the litigants, without resorting to any hard or fast rule.").

Turning to that analysis in the instant case, we agree with plaintiff that the circumstances are such that equity calls to error the trial court's refusal to appoint a receiver.

As discussed *supra*, upon plaintiff's Motion for Appointment of Receiver after having completely "exhausted his remedy at law by the ordinary process of execution," *Coates Bros.*, 92 N.C. at 379, the relevant inquiry for the court became whether it appears that defendant might indeed be entitled to such unliquidated property, and if so, then whether the circumstances at issue are such that equity would warrant that the unliquidated claims and resulting judgments remain solely within defendant's control. *Neighbors*, 210 N.C. at 554, 187 S.E. at 797; *see Hurwitz*, 189 N.C. at 6-7, 126 S.E. at 173. Unless such equity-barring circumstances are present, it has been the law in this State for some time that plaintiff was entitled to have a receiver appointed "almost as of course[.]" *Coates Bros.*, 92 N.C. at 380, 379 ("In effectuating this purpose, it very frequently becomes necessary to grant relief by . . . the appointment of a receiver[.]").

In the case at bar, it is sufficient that the circumstances are such so as to indicate that plaintiff has potential causes of action against Universal and Burton. We need not express opinion as to the merits of those claims—that is for the receiver to decide. *Id.* at 381. Nor does the record reveal any equitable grounds on which the decision whether to pursue defendant's apparent claims against Universal and Burton ought to remain within her sole control. It is alleged that Universal and Burton are indebted to defendant as a result of acts in connection with the underlying litigation in the instant case, and that the proceeds of the claims could be used to satisfy plaintiff's injuries if defendant were to pursue them. Nevertheless, defendant refuses to do so, despite the fact that pursuit of the claims could benefit both parties. *E.g. Hurwitz*, 189 N.C. at 6-7, 126 S.E. at 173-74. If the receiver is able to prosecute defendant's claims to fruition, defendant will "be provided the protection afforded" therefrom; that is, defendant would be relieved of the burden of the judgment against her. *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 689, 413 S.E.2d 268, 272 (1992). Moreover, any judgment obtained against Universal or Burton would be compensation merely for a monetary loss suffered by defendant incident to the underlying action, rather than for an unrelated injury purely "personal" to her so as to render its transfer inequitable despite statutory authorization. *Cf. Brantley v. CitiFinancial, Inc.*, 2015 Bankr. LEXIS 129, *9 (citing *In re LoCurto*, 239 B.R. 314 (Bankr. E.D.N.C. 1999)) (It is true that "the definition of personal injury [under section 1C-1601(a)(8)] is not limited to a physical bodily injury under North Carolina law; however, in order to fall under the exemption, the injury leading to the compensation should rise to a level of severe emotional distress" where it does not otherwise involve bodily injury.). Nor would pursuit and transfer to plaintiff of defendant's

recovery from Universal and Burton result in plaintiff "receiving a windfall from another person's injury." *Herzig*, 330 N.C. at 689, 413 S.E.2d at 272. To the contrary, satisfaction of the outstanding judgment in the instant case and the potential recovery to defendant from Universal and/or Burton would be inextricably interwoven, with any transfer of the latter to plaintiff representing precisely that which the jury has determined plaintiff is owed. Indeed, plaintiff requested that the trial court appoint a receiver only over claims that are "related to matters that arose from the wreck which killed Julie Haarhuis[.]" Lastly, the outstanding judgment that defendant owes to plaintiff is significant, and there are no other apparent means by which defendant could satisfy the judgment. *See Oldham*, 84 N.C. at 308.

The confluence of these distinct factors "comes directly within the equitable principle[s] . . . which justif[y] and call[] for the appointment of a receiver" for the purpose of determining whether the merits of defendant's claims against Universal and Burton are worth pursuing and, if so, prosecuting the same. *People's Nat'l Bank v. Waggoner*, 185 N.C. 297, 302, 117 S.E. 6, 9 (1923). We therefore conclude that, in light of the circumstances at issue, it was error for the trial court to deny plaintiff's Motion for Appointment of Receiver. *See Coates Bros.*, 92 N.C. at 385 ("It is sufficient that we are satisfied that the facts were such as to warrant and require the appointment of a receiver as demanded by the plaintiffs."); *Oldham*, 84 N.C. at 308 ("And these [circumstances], in our opinion, entitle the defendant who is restrained from pursuing his legal rights, to the interposition of the Court in taking such action as [appointing a receiver]. The Court ought therefore to have granted the defendant's motion"); *cf. Hurwitz*, 189 N.C. at 7, 126 S.E. at 174.

Conclusion

For the reasons set forth herein, the trial court's order denying plaintiff's Motion for Appointment of Receiver is

REVERSED.

Judge HUNTER, JR. concurs.

Judge DIETZ concurs by separate opinion.

DIETZ, Judge, concurring.

The Court's holding in this case is compelled by the plain language of the applicable receivership statute enacted by our General Assembly.

The outcome, as the appellees point out in their briefs, is at odds with common law principles that prohibit the assignment or transfer of personal injury claims. *See Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 688, 413 S.E.2d 268, 271 (1992). But the General Assembly can reject the common law by statute, and I agree that the plain language of N.C. Gen. Stat. § 1-363 indicates that the legislature did so here.

The appellees also argue, compellingly, that it is bad policy to permit a receiver to take a debtor's personal injury claim against a third party, prosecute it, and give the proceeds to creditors. The most common beneficiaries of this statute are not sympathetic individuals like Mr. Haarhuis, who lost his wife in a tragic accident— they are banks, debt collectors, and other businesses that frequently seek to enforce money judgments against low-income debtors who have no other assets besides their personal injury claim against a third party. But this Court is "an error-correcting body, not a policy-making or law-making one." *Fagundes v. Ammons Dev. Grp., Inc.*, __ N.C. App. __, __, 796 S.E.2d 529, 533 (2017). Our role is not to weigh the merits of the policies underlying a statute, but to interpret and enforce the statute as it is written. Here, the General Assembly could have limited the types of claims subject to post-judgment receivership, but it chose not to. We must honor that policy decision by the legislative branch.

IN THE MATTER OF J.B.

No. COA17-1373

Filed 18 September 2018

Juveniles—delinquency—adjudication—right against self-incrimination—statutory mandate

The trial court erred in a juvenile delinquency adjudication by failing to advise the juvenile of his constitutional right against self-incrimination before he testified. The trial court's violation of the statutory mandate in N.C.G.S. § 7B-2405 required reversal where the juvenile's testimony admitting that he threw a pint of milk at his teacher was incriminating and therefore prejudicial.

Appeal by juvenile-appellant from orders entered 9 and 12 May 2017 by Judge David A. Strickland in Mecklenburg County Juvenile Court. Heard in the Court of Appeals 4 September 2018.

Geeta N. Kapur for juvenile-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.

BRYANT, Judge.

Where the trial court failed to advise juvenile-appellant of his right against self-incrimination before he testified and incriminated himself, we reverse the trial court's orders on adjudication and delinquency and order a new trial.

On 9 May 2017, the Honorable Judge David H. Strickland presided over an adjudication hearing in the matter of J.B. (hereinafter juvenile-appellant) in Mecklenburg County Juvenile Court. The Mecklenburg County Department of Juvenile Justice and Delinquency Prevention filed seven petitions alleging juvenile-appellant committed five counts of assault on a government employee, one count of simple assault and one count of communicating threats. At the hearing, the State elected to dismiss six petitions and proceeded on one petition for assault on a government employee, a teacher.

On the morning of Friday, 21 October 2016, Jessica[1], juvenile-appellant's teacher at Lincoln Heights Academy, supervised her students as they ate breakfast in the cafeteria. At the time of the incident, fourteen-year-old juvenile-appellant, had been a student in Jessica's class since August 2016. Jessica testified that during breakfast, she noticed juvenile-appellant had turned around from his table and was talking to a student at another table. When she asked juvenile-appellant to turn around, he responded "F**k you, b***h" and threw a pint-sized carton of milk at her. The carton was closed when juvenile-appellant threw it, but opened as it hit Jessica's face resulting in irritation to her eye from the milk. Jessica went to urgent care but suffered no major injuries. Jessica was the State's only witness, and the State rested after her testimony, offering no additional evidence.

Juvenile-appellant made a motion to dismiss at the close of the State's case, and the trial court denied his motion. Defense counsel asked if they could call juvenile-appellant as a witness. The trial court said "Yes sir" and had juvenile-appellant take the witness stand. On direct-examination, juvenile-appellant testified that while he was in the cafeteria, a

---

1. For privacy purposes, we do not use the last name of the teacher.

girl stepped on his shoe. When Jessica was made aware of the incident, her response was, "They [sic] just shoes." "I got mad and threw the milk carton," he stated, "[b]ecause they [sic] was new shoes, and then I was mad. I mean she—because she—the way she said it, she was like, 'Man, they [sic] just shoes.' And then I just got mad and just threw the milk carton." He further admitted that he intended to hit Jessica in the moment out of frustration. Juvenile-appellant rested his case and renewed his motion to dismiss, which was denied.

After closing arguments, the trial court informed juvenile-appellant that he had forgotten to advise him of his right against self-incrimination prior to his testimony. The trial court asked juvenile-appellant if he understood and juvenile-appellant replied "yes." Juvenile-appellant's defense counsel moved for dismissal on the grounds that the trial court should have advised juvenile-appellant of his right against self-incrimination prior to his testimony. The trial court denied the motion, and juvenile-appellant's counsel noted his exception for the record.

The trial court adjudicated juvenile-appellant delinquent as to the charge of assault on a government official and entered a Level III disposition order sentencing juvenile-appellant to six months of incarceration at a youth development center. Juvenile-appellant appealed.

On appeal, juvenile-appellant asserts that the trial court failed to advise him of his constitutional right against self-incrimination prior to allowing his testimony. Specifically, juvenile-appellant argues he was prejudiced by the trial court's violation of the statutory mandate in section 7B-2405 of our General Statutes because the testimony was incriminating, and therefore, the violation constituted reversible error. We agree.

N.C. Gen. Stat. § 7B-2405 delineates the judicial process to be followed in adjudication proceedings to ensure the protection of juvenile rights. "In the adjudication hearing, the court *shall* protect the [privilege against self-incrimination] . . . to assure due process of the law." N.C.G.S. § 7B-2405 (2017) (emphasis added). "The plain language of N.C. Gen. Stat. § 7B–2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication." *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011). "[A]t the very least, some colloquy [is required] between the trial court and juvenile to ensure the juvenile understands his right against self-incrimination before choosing to testify at his adjudication hearing." *Id.* at 209, 710 S.E.2d at 413. Thus, failure to follow the statutory mandate

when conducting an adjudication hearing constitutes reversible error unless proven to be harmless beyond a reasonable doubt. *See id.* at 208, 710 S.E.2d at 413.

Similarly in *J.R.V.*, the trial court failed to follow the statutory mandate to engage in a colloquy with the juvenile to protect his constitutional right against self-incrimination, and it was determined that the failure was error. However, in *J.R.V.*, our Court of Appeals held it was not prejudicial error where the juvenile's testimony denied the criminal allegations against him and was not incriminating. *See id.* at 209–10, 710 S.E.2d at 414.

Here, in the instant case, juvenile-appellant's testimony, which admitted that he committed an assault on his teacher, was incriminating and therefore prejudicial. The trial court had not inquired whether juvenile-appellant understood his right against self-incrimination before juvenile-appellant testified. It was only after juvenile-appellant offered his testimony that the trial court stated:

> You can stand up, please, sir. I forgot to advise you that—prior to your testimony that you do have the right to remain silent and that any statements you said in your testimony . . . . Just you understand that, in this type of hearing, that anything you say about the charge may be used against you as evidence. Do you understand that?

Directly asking whether juvenile-appellant understood those rights after his testimony was given is not sufficient to satisfy the requirements under § 7B–2405. Therefore, the trial court's actions were clearly erroneous.

Accordingly, in finding error in the trial court's failure to advise juvenile-appellant of his right against self-incrimination, we find the error was not harmless beyond reasonable doubt. Prior to juvenile-appellant's testimony, the State offered Jessica's testimony to establish the basis of the assault charge that juvenile-appellant threw the milk carton hitting her in the face. Here, during his testimony, juvenile-appellant made incriminating statements as he admitted to throwing the milk carton out of frustration. Not only was juvenile-appellant's admission to the assault charge incriminating, the State used the admission to further support the assertion that juvenile-appellate was a "disruptive student" deeming incarceration as the only suitable remedy for his actions. This confirms that juvenile-appellant's testimony and the manner in which the State attempted to use the testimony was prejudicial. Had juvenile-appellate been properly advised of his right, he quite possibly would not have implicated himself.

As the trial court failed in its affirmative duty to protect juvenile-appellant's constitutional right against self-incrimination, the trial court's orders of adjudication and delinquency are

REVERSED AND REMANDED FOR NEW TRIAL.

Judges HUNTER, JR., and ARROWOOD concur.

NATIONSTAR MORTGAGE, LLC, Plaintiff
v.
CLARENCE E. DEAN, JR. and KELLY ANN DEAN,
and WELLS FARGO BANK, N.A., Defendants

No. COA18-132

Filed 18 September 2018

1. Reformation of Instruments—deed of trust—mutual intention to encumber property

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, borrowers did not present evidence to rebut the presumption that the deed was intended by both borrowers and the bank to encumber the property as a first lien.

2. Jurisdiction—reformation of deed of trust—standing—holder of instrument

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the bank holding the note had standing to seek reformation even if it did not own the note, since the holder of a note qualifies as a real party in interest which may enforce the note and the deed of trust.

3. Statutes of Limitation and Repose—reformation of deed of trust—applicable statute of limitation

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the applicable statute of limitations was the more specific statute regarding sealed instruments (N.C.G.S. § 1-47(2), a ten-year time period), rather than the more general statute regarding fraud or mistake (N.C.G.S. § 1-52(9), a three-year period), because the explicit language of the disputed deed of trust indicated it was a sealed

instrument; between two possible statutes, the specific controls over the general.

4. Equity—reformation of deed of trust—unclean hands—collateral matters

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the doctrine of unclean hands did not bar the reformation claim asserted by the holder of the note, where the alleged oral agreements with the mortgagors to restructure and modify the loan were made years after the deed of trust was executed and were therefore wholly collateral to the transaction for which relief was sought.

5. Evidence—motion to strike—affidavits—prejudice analysis

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, even assuming arguendo the trial court erred by overruling motions to strike affidavits supportive of the holder of the note (the party seeking reformation), borrowers were not prejudiced because the holder of the note was entitled to summary judgment on its reformation claim.

Appeal by defendants from order and judgment entered 8 September 2017 by Judge Marvin K. Blount, III in Dare County Superior Court. Heard in the Court of Appeals 23 August 2018.

Burr & Forman, LLP, by William J. Long, Matthew W. Barnes and E. Travis Ramey, pro hac vice, for plaintiff-appellee.

Hornthal, Riley, Ellis & Maland, LLP, by M.H. Hood Ellis, for defendant-appellants.

TYSON, Judge.

Clarence E. Dean, Jr. and Kelly Ann Dean appeal from the trial court's order, which granted Nationstar Mortgage, LLC's ("Nationstar") motion for summary judgment on Nationstar's declaratory judgment claim, and alternatively granted Nationstar's claim to reform a deed of trust. We affirm.

I. Background

In 2003, Clarence E. Dean, Jr. and his brother-in-law, Jerry Shanahan, formed a limited partnership, 505 N Virginia Dare, L.P.

Mr. Dean and Mr. Shanahan purchased the Tanglewood Motel located at the address of 505 N. Virginia Dare Trail, Kill Devil Hills, N.C. and took title in the name of their limited partnership. After operating the Tanglewood Motel for a rental season, Mr. Dean and Mr. Shanahan demolished the motel and built two large beach cottages with financing acquired from First South Bank.

Approximately a year later, 505 N Virginia Dare, L.P. subdivided and conveyed one cottage and lot to Mr. Shanahan and the other cottage and lot to Mr. Dean ("the Property"). The subdivided property's previous address of 505 N. Virginia Dare Trail remained with the lot conveyed to Mr. Shanahan. The Property conveyed to Mr. Dean carried the street address of 507 N. Virginia Dare Trail, Kill Devil Hills, N.C. 27948-7828.

In June 2004, Mr. Dean and his wife, Kelly Ann Dean (collectively "the Deans"), pledged the Property as collateral to secure a $1,820,000 loan from First South Bank. The Deans retained an attorney, Charles D. Evans, to prepare a deed of trust and close the loan, and granted him a power of attorney to execute and record the loan documents on their behalf. The property description in the deed of trust stated "See Attached Exhibit A" and stated the property has the address of "**507 N VIRGINIA DARE TRAIL, KILL DEVIL HILLS**, North Carolina **27948-7828** ("Property Address")." (Emphasis original). Mr. Evans recorded the deed of trust ("First South Deed of Trust" or "Original Deed of Trust) on 1 June 2004 with the Dare County Register of Deeds, but failed to include "Exhibit A." Exhibit A contained the platted lot and block number of the Property. On 16 November 2004, First South Bank sent a letter to Mr. Evans advising him "The Deed of Trust was not recorded with the legal description. Please [add] the legal description and re-record the Deed of Trust."

Mr. Evans re-recorded the First South Deed of Trust on 24 November 2004 without the Deans' knowledge and attached Exhibit A. Mr. Evans noted the following on the first page of the re-recorded First South Deed of Trust:

> This deed of trust is being re-recorded to add the Exhibit "A" which was omitted
>
> s/ Charles D. Evans
> Charles D. Evans, Attorney
> 11/22/04

On 27 October 2004, the Deans granted a deed of trust ("Wachovia Deed of Trust") to Wachovia Bank, N.A in the amount of $500,000, which

was recorded with the Dare County Register of Deeds on 18 November 2004. The Deans allegedly granted Wachovia this deed of trust in exchange for a second-position lien on the Property. Wells Fargo Bank, N.A. ("Wells Fargo") later became the owner and holder of the Wachovia Deed of Trust.

In 2011, the Deans missed a payment on their loan with First South Bank. Aurora Bank FSB ("Aurora"), Nationstar's predecessor-in-interest, was servicing the Deans' loan at the time. The Deans asserted an employee of Aurora contacted them and advised them to miss another payment, so that "Aurora could work with [the Deans] and make some accommodation[.]" The Deans intentionally missed another payment and Aurora purportedly orally agreed to enter into a forbearance agreement.

Aurora mailed the Deans a proposed "Special Forbearance Agreement" with an attached cover letter. The cover letter instructed the Deans to:

> Please execute the attached Special Forbearance Agreement and return it along with . . . . your initial payment in the amount of $14240.24. This payment as well as the requested information must be received in our office *on or before 11/15/2011*. (Emphasis supplied).

The proposed "Special Forbearance Agreement" states the Deans had accrued a total arrearage of $65,444.07 on their loan as of 7 November 2011. According to the Deans, they did not receive the proposed "Special Forbearance Agreement" and cover letter until after the 15 November 2011 deadline for returning the document had passed. On 28 November 2011, Aurora sent the Deans a letter informing them that their "request for a foreclosure alternative option is considered closed" because "[w]e did not receive one of the req[uired] payments under your forbearance agreement."

On 6 December 2011, the Deans received notice Aurora was initiating foreclosure proceedings. On 15 June 2012, Aurora sent a letter to the Deans informing them the servicing of the loan was being transferred to Nationstar. During this time, the hearings in the foreclosure proceeding were continued.

According to the Deans, on 17 August 2012, a Nationstar representative, allegedly named "Lisa," contacted Mr. Dean and they purportedly orally negotiated the terms of a restructured and modified loan to avoid foreclosure. When the Deans received the modification documents from Nationstar, the terms stated in the documents were different from the

terms which had allegedly been negotiated over the telephone between Mr. Dean and "Lisa."

The Deans retained another attorney, Jane Dearwester, to communicate with Nationstar on their behalf. Ms. Dearwester sent a letter to Nationstar on 27 August 2012 and advised them that the terms contained in the modification documents were different than the orally negotiated terms. On 29 October 2012, Nationstar sent an additional set of modification documents to the Deans, but these documents were identical to the documents which were sent earlier in August 2012. Attorney Dearwester sent yet another letter to Nationstar expressing that the new set of modification documents was identical to the last set Nationstar had sent.

On 7 November 2012, an employee of Nationstar, Brittanee Clark, purportedly contacted the Deans to confirm that the terms set forth in the two previously sent sets of modification documents were not the same as to the terms Nationstar had allegedly agreed to over the phone on 17 August 2012. However, on 14 November 2012, Ms. Clark emailed the Deans to inform them Nationstar would not honor the terms discussed in the phone conversation between Mr. Dean and "Lisa."

On 1 July 2013, Nationstar filed a verified complaint against the Deans and Wells Fargo seeking: (1) a declaration that the First South Deed of Trust is a valid encumbrance on the Property; (2) in the alternative, judicial reformation of the First South Deed of Trust to include the legal description contained within Exhibit A and relating back to 1 June 2004; and, (3) in the alternative, an order quieting title; and, (4) a declaration that the First South Deed of Trust has priority over the Wachovia Deed of Trust. No further action was taken in the foreclosure proceedings against the Property once Nationstar's verified complaint was filed.

The Deans initially filed an answer, and later an amended answer on 13 June 2014. In their amended answer, the Deans asserted, in part, the doctrine of unclean hands and the statute of limitations against Nationstar's reformation claim.

On 29 September 2014, the trial court entered a consent order between Nationstar and Wells Fargo, which ordered:

> 1. That the First South Deed of Trust is a valid encumbrance on the Property having a priority date of June 1, 2004.
>
> 2. That the First South Deed of Trust has priority over the Wachovia Deed of Trust[.]

The consent order dismissed Nationstar's remaining claims against Wells Fargo.

Following discovery, Nationstar filed a motion for summary judgment on 21 March 2017. The Deans filed four affidavits in opposition to Nationstar's motion for summary judgment, including the affidavits of Mr. Dean; Jane Dearwester; Claire Ellington, an assistant to Jane Dearwester; and, Laura Elizabeth Ceva, an attorney who worked with Jane Dearwester.

Following a hearing on Nationstar's motion for summary judgment, the trial court entered an order granting summary judgment in Nationstar's favor. With respect to Nationstar's declaratory judgment claim, the trial court's order decreed that the street address for the Property listed in First South's Original Deed of Trust "is a legally sufficient description as of June 1, 2004 when said Deed of Trust was recorded." The trial court's order alternatively decreed that the First South Deed of Trust be "reformed as of June 1, 2004 to include 'Exhibit A' originally omitted, but subsequently included in the Deed of Trust as was re-recorded on November 24, [2004.]"

The Deans filed timely notice of appeal from the trial court's order granting Nationstar's motion for summary judgment.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Standard of Review

Summary judgment is appropriate where "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 trial court must deny a summary judgment motion if any genuine issue of material fact exists. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). An issue of fact is genuine where supported by substantial evidence, and "is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

"Moreover, . . . all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Page v. Sloan*,

281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972) (internal quotation marks and citations omitted). A verified complaint may be treated as an affidavit for summary judgment purposes if it: "(1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* at 705, 190 S.E.2d at 194 (citing N.C. Gen. Stat. § 1A-1, Rule 56(e)).

This Court reviews appeals from a trial court's grant of summary judgment *de novo*. *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011).

IV. Analysis

The Deans argue the trial court erred by granting Nationstar's motion for summary judgment. They assert genuine issues of material fact exist to preclude summary judgment on Nationstar's declaratory judgment and reformation claims.

We first address the Deans' argument with regard to the trial court's grant of summary judgment on Nationstar's reformation claim. The Deans contend their evidentiary forecast was sufficient to show a genuine issue of material fact exists on whether the applicable statute of limitations bars Nationstar's claim for judicial reformation of the First South Deed of Trust. The Deans also contend a disputed genuine issue of material fact exists on whether Nationstar and Aurora's prior conduct bars an award of equitable relief.

A. Judicial Reformation

[1] Nationstar seeks to reform the Original Deed of Trust, recorded on 1 June 2004, to include the omitted Exhibit A. "Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Metropolitan Property And Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) (citation omitted).

The trial court has the authority to reform a deed of trust. Deeds of trust are written instruments that are subject to reformation claims. *Noel Williams Masonry v. Vision Contractors of Charlotte*, 103 N.C. App. 597, 603, 406 S.E.2d 605, 608 (1991). "In an action for reformation of a written instrument, the plaintiff has the burden of showing that the terms of the instrument do not represent the original understanding of the parties . . . ." *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268,

270 (1981) (citations omitted). "If the evidence is strong, cogent, and convincing that the deed, as recorded, did not reflect the agreement between the parties due to a mutual mistake caused by a drafting error, a deed can be reformed." *Drake v. Hance*, 195 N.C. App. 588, 592, 673 S.E.2d 411, 414 (2009) (citing *Parker v. Pittman*, 18 N.C. App. 500, 505, 197 S.E.2d 570, 573 (1973)).

"There is a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety." *Hice*, 301 N.C. at 651, 273 S.E.2d at 270 (internal quotation marks, citation, and emphasis omitted). "[E]quity for the reformation of a deed or written instrument extends to the inadvertence or mistake of the draftsman who writes the deed or instrument." *Crews v. Crews*, 210 N.C. 217, 221, 186 S.E. 156, 158 (1936) (citation and internal quotation marks omitted).

No genuine issue of material fact exists that the Deans and First South Bank mutually intended for the First South Deed of Trust to encumber the Property as a first lien. The First South Deed of Trust would have contained the parties' intended legal description of the Property, but for the Deans' closing attorney's mistake of inadvertently failing to attach Exhibit A to the First South Deed of Trust when he initially recorded it on 1 June 2004.

The Deans failed to present evidence to dispute that they, along with First South Bank, mutually intended for the First South Deed of Trust to include Exhibit A and contain the legal description contained therein.

B. Standing

[2] The Deans contend a disputed genuine issue of material fact exists of whether Nationstar is a real party in interest and possesses standing to assert its reformation claim. They assert Nationstar has not produced evidence to show it is the owner or holder of the note secured by the First South Deed of Trust.

The Deans argue a supposed conflict of evidence exists between Nationstar's verified complaint and Nationstar's response to the Deans' request for admissions to foreclose summary judgment. In Nationstar's verified complaint, it averred it is "now the owner and holder of the Loan and the First South Deed of Trust." In Nationstar's response to the Deans' request for admissions, it stated "The owner of the promissory note is Wells Fargo[.]" However, Nationstar also stated in the Deans' request for admissions that it is the holder, and is in possession, of the original promissory note the Deans' granted to First South Bank.

This apparent conflict between whether Wells Fargo or Nationstar is the *owner* of the note is immaterial to Nationstar's standing to seek reformation of the First South Deed of Trust. As noted, there are multiple notes and deeds of trust on record which affect this Property.

Under the Uniform Commercial Code, the holder of an instrument may enforce it, even if the holder is not the owner of the instrument. N.C. Gen. Stat. § 25-3-301 (2017). Therefore, the holder of a note "qualifies as a real party in interest" in an action upon the note. *In re Foreclosure of Webb*, 231 N.C. App. 67, 69-70, 751 S.E.2d 636, 638 (2013). Under our precedents, "the holder of a note [secured by a Deed of Trust] can enforce both the note and the Deed of Trust." *Greene v. Tr. Servs. of Carolina, LLC*, 244 N.C. App. 583, 593,781 S.E.2d 664, 671-72 (2016) (citing N.C. Gen. Stat. § 47-17.2 (2013)).

Uncontradicted evidence in the form of Nationstar's verified complaint and admissions indicates Nationstar is the holder of the note secured by the First South Deed of Trust. The Deans assert no evidence to either refute or create a genuine issue of material fact regarding Nationstar's status as the holder of the original First South note. The Deans' argument is overruled.

C. Statute of Limitations

[3] The Deans also argue the statute of limitations bars Nationstar's reformation claim. The Deans assert the three-year statute of limitations of N.C. Gen. Stat. § 1-52(9) for claims based in "fraud or mistake" applies. N.C. Gen. Stat. § 1-52(9) specifies a three-year limitations period "[f]or relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2017).

Nationstar asserts the applicable statute of limitations is N.C. Gen. Stat. § 1-47(2), which provides ten years to commence an action "[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto." N.C. Gen. Stat. § 1-47(2) (2017).

According to well-established canons of statutory construction, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993) (quoting *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985)). "When two statutes apparently overlap, it is well established

that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *Id.* at 349, 435 S.E.2d at 533 (quoting *Trs. of Rowan Tech.*, 313 N.C. at 238, 328 S.E.2d at 279).

Here, the signature section of the First South Deed of Trust, as originally recorded on 1 June 2004, explicitly shows the instrument was signed under seal by the Deans' closing attorney, under the authority of the Deans' executed power of attorney, and on their behalf. It state's, in relevant part: "BY SIGNING UNDER SEAL BELOW, Borrower accepts and agrees to the terms and covenants contains in pages 1 through 12 of this Security Instrument . . . ." The word "Seal" is affixed in parentheses beside each signature line, including the signature lines for Clarence E. Dean, Jr. and Kelly A. Dean.

The Deans do not challenge that they intended for their closing attorney, Charles D. Evans, to prepare and sign the First South Deed of Trust on their behalf and under their power of attorney. The First South Deed of Trust is clearly a sealed instrument and is indisputably "an instrument of conveyance of an interest in real property." N.C. Gen. Stat. § 1-47(2); *see Allsbrook v. Walston*, 212 N.C. 225, 228, 193 S.E. 151, 151-52 (1937) (holding the word seal next to a signature line is sufficient to make the document a sealed instrument).

As between N.C. Gen. Stat. §§ 1-47(2) and 1-52(9), the former is the more specific statute of limitations that applies to Nationstar's reformation claim under the ten-year limitations period. No genuine issue of material fact exists that Nationstar filed its verified complaint on 26 June 2013, which is within ten years of the execution of the First South Deed of Trust on 1 June 2004.

D. Unclean Hands

[4] The Deans assert the doctrine of unclean hands equitably bars, or estops, Nationstar from bringing its reformation claim. The doctrine of unclean hands is based upon the premise, "he who comes into equity must come with clean hands." *S.T. Wooten Corp. v. Front St. Constr. LLC*, 217 N.C. App. 358, 362, 719 S.E.2d 249, 252 (2011).

The Deans base their unclean hands argument upon the allegation that Nationstar's predecessor-in-interest, Aurora, instructed the Deans to intentionally miss a payment on their loan to allow for a modification. Aurora allegedly agreed to loan modifications, but then sent the forbearance agreement too late for the Deans to return it by the stated deadline.

The Deans also contend Nationstar and Aurora reneged on oral agreements to restructure and modify the loan to avoid foreclosure.

If Nationstar and Aurora did make the alleged representations and oral agreements to modify the Deans' loan, such agreements would be barred by the statute of frauds. The Deans' loan under the note and First South Deed of Trust was $1,820,000. N.C Gen. Stat. § 22-5 requires a signed writing for all commercial loan commitments in excess of $50,000. N.C Gen. Stat. § 22-5 (2017).

Presuming, *arguendo*, Nationstar cannot equitably assert the statute of frauds, the doctrine of unclean hands would still be inapplicable to bar Nationstar's reformation claim.

This Court has held that equitable "relief is not to be denied because of general iniquitous conduct." *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985) (citation omitted). If "the alleged misconduct giving rise to the assertion of unclean hands arises out of matters which are merely collateral to the transaction for which equitable relief is sought, the equitable remedy is not barred." *S.T. Wooten*, 217 N.C. App. at 362, 719 S.E.2d at 252. Here, the transaction, for which Nationstar seeks equitable relief of reformation, concerns the execution and recordation of the First South Deed of Trust on 1 June 2004. The alleged oral promises of Aurora to modify the terms of the loan secured by the First South Deed of Trust were made years after the First South Deed of Trust was executed and are wholly collateral to the original transaction completed on 1 June 2004. *See id.*

Based upon uncontradicted "clear, cogent, and convincing evidence," the Deans and First South Bank intended for the First South Deed of Trust to encumber the Property. Except for the Deans' closing attorney's error, the First South Deed of Trust would have included the full legal description in Exhibit A. Nationstar has standing to assert its reformation claim, as successor-in-interest to First South Bank and as holder of the note secured by the First South Deed of Trust. *See* N.C. Gen. Stat. § 25-3-301; *Greene*, 244 N.C. App. at 593, 781 S.E.2d at 671-72. Nationstar brought its reformation claim within the applicable ten-year statute of limitations. N.C. Gen. Stat. § 1-47(2). The doctrine of unclean hands does not bar Nationstar's reformation claim. The Deans' arguments are overruled.

[5] The Deans also assert the trial court erred by overruling their motions to strike the affidavits of Siggle Shaw and Meredith Guns, submitted by Nationstar. Siggle Shaw's affidavit was offered by Nationstar to refute the Deans' affirmative defense of the three-year statute of limitations.

Siggle Shaw averred that Aurora and Nationstar had no notice of Exhibit A's absence from the original First South Deed of Trust until a title search was conducted in preparation for Aurora initiating foreclosure in December 2011. Presuming, *arguendo*, the trial court erred in overruling the Deans' motion to strike, because the ten-year, and not the three-year, statute of limitations applies, the Deans cannot show prejudice.

The affidavit of Meredith Guns was offered by Nationstar in support of its declaratory judgment claim to have the street address in the First South Deed of Trust declared a legally sufficient description. *See*, *e.g.*, 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 10.41 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 6th ed. 2011) ("While not advisable, buildings are sometimes described by reference to street and number in conveyances of city land."). Her affidavit concerns the street numbering system in the incorporated Town of Kill Devil Hills, N.C. Meredith Guns' affidavit raises no genuine issue of material fact with regards to Nationstar's reformation claim. Presuming, *arguendo*, the trial court erred in overruling the Deans' motion to strike, the Deans cannot show prejudice because Nationstar was entitled to summary judgment on its reformation claim.

V. Conclusion

The Deans have failed to show any genuine issues of material fact exists to preclude summary judgment for Nationstar. The trial court did not err by entering its order decreeing the First South Deed of Trust reformed to include the later recorded Exhibit A. Because the trial court was warranted in awarding Nationstar summary judgment on its reformation claim, it is unnecessary to address the Deans' remaining arguments concerning Nationstar's declaratory judgment claim. The order of the trial court granting summary judgment to Nationstar is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and BERGER concur.

CELINA QUEVEDO-WOOLF, Plaintiff
v.
MERRY EILEEN OVERHOLSER and DANIEL CARTER, Defendants

No. COA17-675 and COA17-1344

Filed 18 September 2018

1. Appeal and Error—preservation of issues—Rule 59 motion—sufficiency of allegations

The Court of Appeals elected to treat plaintiff mother's appeal in a child custody action as a writ of certiorari where she failed to timely appeal from the trial court's custody order and her purported Rule 59 motion did not contain sufficient allegations to toll the thirty-day period for appeal.

2. Child Custody and Support—jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—modification of out-of-state order

The trial court had jurisdiction to modify a prior child custody order entered in Florida pursuant to the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), based on undisputed findings that North Carolina was the child's "home state" and that none of the relevant persons were residents of Florida during the period of time at issue. Florida ceased to have exclusive, continuing jurisdiction once the jurisdictional requirements for modification were met in North Carolina. Further, any violation of a Florida statute that may have occurred as a result of the grandmother (defendant) moving the child to North Carolina did not affect North Carolina's jurisdiction under the UCCJEA.

3. Appeal and Error—preservation of issues—full faith and credit—out-of-state child custody order

In an action to modify a child custody order entered in Florida, plaintiff (the child's mother) failed to preserve for appellate review the issues that North Carolina applied the wrong law and did not give full faith and credit to the Florida order where she sought to modify custody pursuant to North Carolina law, not Florida law. The trial court erred in considering plaintiff's arguments on these issues in her purported Rule 59 motion for a new trial because she failed to preserve them by raising these objections at trial.

4. Child Custody and Support—custody modification—conduct inconsistent with protected status as parent—sufficiency of findings and conclusions

In an action to modify a child custody order entered in Florida, the trial court's determination that plaintiff mother acted inconsistently with her constitutionally protected status as parent to her daughter was supported by clear and convincing evidence that the mother did not maintain meaningful contact with the child for several years and did not make any formal attempt to regain custody from the child's grandmother (defendant), aside from one abandoned court filing, for over six years.

5. Child Custody and Support—jurisdiction—subsequent order—different judge

In an action to modify a child custody order entered in Florida, a second North Carolina trial judge had no jurisdiction to enter an order on multiple bases: first, as previously decided, plaintiff mother's purported Rule 59 motion for a new trial was not a valid Rule 59 motion; and second, the subsequent judge had no subject matter jurisdiction to consider plaintiff's motion for a new trial where the initial trial court judge properly entered the order from which plaintiff sought relief, because a trial judge who did not try a case may not rule upon a motion for a new trial. Since the second judge had no subject matter jurisdiction, it was also improper for the judge to issue rulings regarding the choice of law in the case.

6. Child Custody and Support—jurisdiction—prior orders on appeal—subsequent order void

In an action to modify a child custody order entered in Florida, the trial court's entry of an order modifying custody was invalid for lack of jurisdiction because prior custody orders were on appeal; as a result, the child was improperly removed from defendant grandmother's custody.

7. Child Visitation—orders entered pending appeal—prior order controls

In an action to modify a child custody order entered in Florida, where several orders were deemed void and vacated by the Court of Appeals, the last prior order regarding visitation of the child with plaintiff mother controlled.

Judge BRYANT concurring in the result only.

Appeal by Plaintiff from order entered 16 May 2016 by Judge Marshall Bickett and appeal by Defendant Overholser from order entered 17 November 2016 by Judge James F. Randolph in District Court, Rowan County. Heard in the Court of Appeals 19 February 2018. Appeal by Defendant Overholser from order entered 28 March 2017, *nunc pro tunc* 14 March 2017, by Judge James F. Randolph in District Court, Rowan County. Heard in the Court of Appeals 6 August 2018.

Woodruff Law Firm, PA, by Carolyn J. Woodruff and Jessica Snowberger Bullock, for Plaintiff.

Hoffman Law Firm, PLLC, by James P. Hoffman, Jr., for Defendant Overholser.

McGEE, Chief Judge.

I. Factual and Procedural History

A. *General*

Celina Quevedo-Woolf ("Plaintiff") and Daniel Carter ("Carter") had a brief romantic relationship that resulted in the birth of E.R.Q., a girl, on 19 July 2005. Carter has had minimal involvement in E.R.Q.'s life and is not a party to this appeal. Plaintiff's mother, Merry Eileen Overholser ("Defendant") has raised E.R.Q. since infancy. When Plaintiff realized she was pregnant she moved in with Defendant, who was living in Defendant's mother's house (the "house"), in Palm Beach County, Florida. After E.R.Q. was born, Plaintiff continued to live with Defendant. Though E.R.Q. initially slept in Plaintiff's room, for the majority of the time Plaintiff and E.R.Q. were living in the house, E.R.Q. slept in Defendant's room.

Plaintiff moved out of the house around the time of E.R.Q.'s first birthday, leaving E.R.Q. with Defendant, because, according to Plaintiff, Plaintiff was not getting along with Defendant, and for "stability for E.R.Q." Plaintiff testified she left E.R.Q. with Defendant because E.R.Q. already "kn[ew] my mother and kn[ew] that house, [so] it seemed like a logical thing at the time as opposed to me moving out into a friend's house, which I did, and [E.R.Q.] not being familiar with the situation or anything like that." Plaintiff's initial apartment was nearby, and Plaintiff testified she visited E.R.Q. but that "it was kind of sporadic," "weekly." Plaintiff never kept E.R.Q. overnight during this initial period.

In order for Defendant to have the authority to make decisions necessary for raising E.R.Q., such as decisions for medical care, Defendant

asked Plaintiff to give Defendant legal and physical custody of E.R.Q. Plaintiff agreed, and the Circuit Court of the Fifteenth Judicial Circuit for Palm Beach County, Florida (the "Florida court"), entered an "Order for Temporary Custody" on 2 November 2006 (the "Florida Order"), giving sole legal and physical custody of E.R.Q. to Defendant. E.R.Q. was one year old at the time. The Florida Order allowed Plaintiff to petition for the return of custody of E.R.Q. to Plaintiff. After Defendant obtained custody, Plaintiff continued to have semi-regular contact with E.R.Q., but E.R.Q. lived full-time with Defendant and Defendant made all relevant decisions related to the care of E.R.Q. In 2007, Defendant filed for, and obtained, an order for child support from Plaintiff.

In June of 2008, when E.R.Q. was approximately three years old, Defendant and E.R.Q. moved with Defendant's girlfriend at the time, Janet Kresge ("Kresge"), to Rowan County, North Carolina. Defendant had been a special education teacher since 1984, and continued working in that capacity in North Carolina. Plaintiff testified she did not want Defendant to leave Florida with E.R.Q., but Defendant testified that, when she discussed with Plaintiff the idea of moving to North Carolina, Plaintiff "thought it was a great idea and [Plaintiff] said she was coming" to North Carolina to be near E.R.Q. Plaintiff did not move to North Carolina, and did not visit E.R.Q. in Rowan County until October 2008, when Defendant purchased Plaintiff a plane ticket for that purpose. A note written by Kresge concerning that time period stated:

> April, 2008. Discussed moving [with Plaintiff]. Better standard of living, et cetera. Was told [Plaintiff] would follow in a few months. Looked for apartments. Sent info to [Plaintiff]. October, 2008 visit [–] three days. [Plaintiff] [s]pent most of time on computer or phone. Did not spend . . . quality time [with E.R.Q.]. Promised to be back for Thanksgiving. No contact.

Defendant testified that, based upon her own observations, what Kresge had written in the note was correct. Plaintiff's next visit with E.R.Q. did not occur until May of 2011, approximately two and a half years after the October 2008 visit. The May 2011 visit was a day visit that lasted only a few hours.

Defendant testified that she and Kresge offered to let Plaintiff live with them and E.R.Q., but Plaintiff did not take them up on that offer. Defendant further testified:

> A After [Plaintiff] came in October [2008] I did not hear from her for quite some time.

Q Was it true that [Plaintiff] didn't have your phone number when you lived in North Carolina?

A No.

. . . .

Q Do you know where [Plaintiff] was at during that period of time when she had no contact?

A No, I don't.

Q When you say no contact, do you mean no phone calls, no visits, or what?

A Correct. There were – there were no visits from – the next visit did not happen until [3] May, 2011. [Plaintiff] did call on – there were a couple of Christmases where she called. I remember one phone call at Christmas time, and it had been quite a while since I had spoken to her, where she – she told me that she was suicidal and some other things, and things surrounding why she felt that way. There was another phone call. She usually called like May. May and December. And I remember one May she called and I said something to her about [E.R.Q.]'s birthday the previous year. That she never called [E.R.Q.]. And I said, "Why didn't you do that? You didn't even call her?" And she said, "Mom, honestly I forgot." And then there was May of – I believe it was 2010, because [Kresge] was still there. And we were in the backyard and [Plaintiff] called and she just started screaming at me, "Give her back to me. You have to give her back to me. She's mine. I'm coming to get [E.R.Q.]." And I said, "[Plaintiff], you don't even know her." And she said, "Well, that's okay. I'll come for the weekend and I'll spend the weekend with her and then I'm taking her back with me." And I said, "No." And it was like I had to try to talk her down.

Q So we're talking about – and I want to make sure I'm right on this. We're talking [6] October, 2008, well into May of 2011 here [that Plaintiff had no physical contact with E.R.Q.], right?

A Yes.

. . . .

> Q Did you go through periods like that where you wouldn't hear from [Plaintiff] for a long time and then suddenly you would get demands to turn [E.R.Q.] over to her?
>
> A Yes.
>
> Q Do you even know where [Plaintiff] was living at that point in time or who she was living with?
>
> A No. I know at one point [Plaintiff] told me that she married Michael. And I didn't know – I don't believe I knew specifically where she lived.
>
> Q Did you know that [Plaintiff had] married a guy – or had moved to West Virginia for a while or something, or was that later?
>
> A That was Michael[.] And my recollection is that when we had – we had talked about moving – we had all talked about moving to North Carolina, and [Plaintiff] said it was a great idea and she was all gung-ho. And then – and then at that point I'm not sure if they were living – I know for a while [Plaintiff and Michael] were living in an apartment. For a little while I think they were living with Michael's mother. And we had looked at a house online [for Plaintiff in North Carolina]. So . . .
>
> Q When you say "we looked at a house online," who looked at a house online?
>
> A [Plaintiff] and I and [Kresge].

Uncontested findings of fact from the order Plaintiff appeals in this matter – Judge Marshall Bickett's 16 May 2016 Custody Order (the "Bickett Order") – show that Defendant moved to North Carolina with E.R.Q. in June of 2008, and that Plaintiff visited E.R.Q. in North Carolina in October of 2008.

On 1 June 2009, approximately eight months after Plaintiff's October 2008 visit with E.R.Q. in North Carolina, Plaintiff filed a motion in Florida requesting that the Florida Order be terminated and that custody of E.R.Q. be returned to Plaintiff. In that motion, Plaintiff alleged the following as grounds for regaining custody of E.R.Q.: "I have maintained steady employment and have proper housing for [E.R.Q.]. I am also recently married[,]" and that E.R.Q. "would be back with the birth mother, and [she] would be better off living back in Florida with me and her immediate family." Three months later, on 1 September 2009,

Plaintiff sent Defendant an email stating that she wanted to regain custody of E.R.Q. Plaintiff stated that signing custody of E.R.Q. over to Defendant "was the best thing for [E.R.Q.] at that time and I don't regret my decision but [E.R.Q.] belongs with me[.]" Plaintiff stated that sometimes she felt like Defendant did not love her, "[b]ut when I think that I always revert back to my past because if you didn't love me you wouldn't support me the way that you did." Plaintiff stated: "I am not going anywhere and I have every intention of fighting to get my wonderful daughter home with me."

Approximately eight months later, on 4 May 2010, the Florida court entered a "Notice of Lack of Prosecution" in which it informed Plaintiff that there had been "no activity" in the action "for a period of 10 months immediately preceding service of this notice" and that absent some action on the part of Plaintiff to move the matter forward within sixty days, a hearing would be held on 1 July 2010 "on the court's motion to dismiss for lack of prosecution[.]" Plaintiff did not respond to the "Notice of Lack of Prosecution," and the Florida court dismissed Plaintiff's Florida action for lack of prosecution by order entered 15 July 2010. Plaintiff did not visit E.R.Q. between the filing and dismissal of the 2009 Florida action.

In uncontested findings of fact from the Bickett Order, the trial court found as fact that "[in] October of 2008 [] Plaintiff visited with [E.R.Q.] in the state of North Carolina. After this visitation, [] Plaintiff stopped visiting with [E.R.Q.]," and that "during the years 2009 and 2010 [] Plaintiff had no physical contact with [E.R.Q.]" even though "Plaintiff had the ability to visit with [E.R.Q.] during this period of time." Plaintiff testified as follows concerning this period:

> Q Isn't it true that for a lengthy period of time for more than a year back in about 2010, 2011 you didn't have any contact with your daughter at all?
>
> A No, that's not true. *I tried to call my daughter several times.*
>
> Q What's the longest time you've went without seeing or talking to your daughter?
>
> A Seeing her has always been longer. I *think* there were a couple of years where I didn't see her.
>
> Q Do you remember when those years were?
>
> A 2008 – well, no, I think – I believe I saw her in 2008. I think maybe 2009 – I saw her in 2010, didn't I, or – I think

> it was 2009 and 2010 was the years that I didn't see my daughter. (Emphasis added).

Plaintiff met Jeff Woolf ("Woolf") in late 2010, and moved to New York in April 2011 to live with him. Plaintiff's May 2011 visit with E.R.Q. appears to have occurred by happenstance. Plaintiff was in Charlotte for reasons unrelated to E.R.Q., so she called Defendant and asked if she could come visit E.R.Q. Defendant agreed, Plaintiff took a train from Charlotte to Salisbury, and Defendant picked her up. Defendant testified that Plaintiff visited with E.R.Q. "for a few hours" then returned to Charlotte by train. Plaintiff's description of this visit was that it was "short, but it was fine."

Plaintiff and Woolf were married in New York in January 2012, and Woolf apparently paid for Defendant and E.R.Q. to attend. Plaintiff visited North Carolina to see E.R.Q. again in 2012, at some time close to E.R.Q.'s July birthday. In the approximately four-year period between June 2008 and the summer of 2012, Plaintiff had seen her daughter only four times: three times in North Carolina, and once in New York. For a brief period in 2011 and early 2012, it appeared that Plaintiff and Defendant were getting along reasonably well, and Plaintiff was maintaining regular phone contact with E.R.Q. However, email exchanges between Plaintiff and Defendant show that by at least May 2012 relations had become seriously strained. The strain in the relationship between Plaintiff and Defendant was likely caused or exacerbated by the fact that in May 2012 Plaintiff told Defendant that Plaintiff was going to regain custody of E.R.Q., move her to Texas to live with Plaintiff and Woolf, and that Defendant could not prevent that from happening.[1]

Defendant, who had naturally developed a very close bond with E.R.Q., was opposed to Plaintiff's plan. E.R.Q. was seven years old at this time, and Plaintiff had not been a consistent or reliable part of E.R.Q.'s life since Plaintiff had moved out of the house and left E.R.Q. in Defendant's care when E.R.Q. was one year old. Plaintiff recounted the 22 May 2012 phone conversation with Defendant concerning Plaintiff's desire for custody as follows:

> And [Woolf and I] actually moved into a two bedroom apartment, and we knew that we were moving into a two-bedroom apartment. And I had reached out to [Defendant], and it was the summer. And I had said to her, "You know,

---

1. At this time, Plaintiff and Woolf were living in Texas due to Woolf's job. By the time of the Bickett Order, Plaintiff and Woolf had moved to Northern Virginia.

> we're setting things up for [E.R.Q.] to come live with us, and I think it would be a great transition if [E.R.Q.] would stay with you the majority of the summer, then come up the month before schools starts, and that way we could get her into some programs in the area and get her into some friends and introduce her to the school and things like that, and then we can work on visitation." And I believe [Defendant's] response was something like over her dead body would [E.R.Q.] ever live with me.

Plaintiff emailed Defendant later that same day, stating:

> I want you to know that I love the both of you very much and that I hope that you will be able to take the next month and a half to two months to help [E.R.Q.] get ready for the move. I think that there are some things that we need to be on the same page about. But before we get started, there is something we need to address. You keep saying that you have custody of [E.R.Q.]. Back in 2006, I signed temporary custody. I didn't give up my rights. It was for a specific determined amount of time that I can revoke at any time, and it was never permanent. I really hope that you can take the time with [E.R.Q.] to talk to her about the move and all the great things about it such as soccer and getting to decorate a new room. I want you to have a relationship with your granddaughter. With this move to Texas, [E.R.Q.] will be in a great school district. She will be involved in all the things she loves like soccer and playing the violin. I would really like it if you could talk to her about a couple of things that would help her with the move such as looking forward to visits with you, camp, a new school, and new friends and a whole new place to discover and make her own. Just like you asked me not to speak to [E.R.Q.] about this and I said I wouldn't without speaking to you first, I expect as you guys have your conversations she is going to have some questions for me, and that is when I will talk to her about it.

B. *Procedural History for the Appeals in COA17-675*

Plaintiff filed a "Notice of Registration of Foreign Child Custody Order" with the Clerk of Court, Rowan County, on 25 October 2012, for the purpose of ensuring that the Florida Order could be enforced by the Rowan County district court (the "trial court"). N.C. Gen. Stat. § 50A-305

(2017). Plaintiff filed a "Motion in the Cause for Modification of a Prior Order" ("Plaintiff's Motion") on 15 November 2012, initiating this action ("Plaintiff's Action"). Plaintiff's Motion requested that the trial court modify the Florida Order pursuant to the provisions of the "Uniform Child-Custody Jurisdiction and Enforcement Act" ("UCCJEA") and N.C. Gen. Stat. § 50-13.7 (2017), which allows "upon [the North Carolina court] gaining jurisdiction, and a showing of changed circumstances, ent[ry of] a new order for custody which modifies or supersedes" an order originally entered in another state. N.C.G.S. § 50-13.7(b).

Defendant filed her responsive pleading to Plaintiff's Motion, Defendant's "Motion to Dismiss and for Permanent Custody," on 8 January 2013. In this motion, Defendant alleged in part:

> 9. . . . . [D]efendant took care of [E.R.Q.] in the evening and Plaintiff put her in day care and stayed out and partied all night. At some point she just stopped coming home. By January 2006 Plaintiff had abandoned child with Defendant and "took off." . . . .
>
> 10. Defendant and [E.R.Q.] moved to North Carolina June 2008[;] prior to that visitation was very sporadic and Plaintiff never asked to take [E.R.Q.] home, for even a night. . . . .
>
> 11. Defendant filed for custody in Florida in 2006 after [E.R.Q.] got hurt and she did not know where Plaintiff was living so [Defendant] could obtain emergency medical treatment for [E.R.Q.]. In September 2006, Plaintiff gave [Defendant] a child care power of attorney, but when Plaintiff stopped coming around at all Defendant requested that [Plaintiff] consent to a custody order and she agreed to this. . . . . Plaintiff is in arrears $7,408.06 on child support and Defendant last obtained child support from [Plaintiff] last week for $90.00. Plaintiff is supposed to be paying $90.00 per week. From January 2012 till October 2012 [Plaintiff] paid nothing.
>
> 12. Defendant and [E.R.Q.] moved to NC in June 2008 and Plaintiff was supposed to come with them; however [Plaintiff] never showed up because she decided to move with a boyfriend and his mom to West Virginia. [Plaintiff and her boyfriend] later married and divorced. Plaintiff's visits since 2008 were sporadic. In October 2008, Defendant paid $300.00 for airfare so Plaintiff could visit.

She stayed the weekend and stated she would return for Thanksgiving however never returned. She did not ask to take [E.R.Q.] home with her.

13. Defendant has never denied Plaintiff visitation. [Defendant] has paid for airfare once and even flew with [E.R.Q.] to New York for Plaintiff's wedding [to Plaintiff's] present husband. Defendant did not hear from Plaintiff at all for two and one half years and only received sporadic child support from Plaintiff's tax returns or frequently from unemployment compensation.

14. In May 2011, Plaintiff called from Charlotte and wanted to see [E.R.Q.] [] Defendant agreed. [Plaintiff] took the train from Charlotte[,] stayed 3 hours[, and] said she had moved to NYC. [Plaintiff] did not ask to stay and went back to Charlotte. [E.R.Q.] asked her to stay and [Plaintiff] was invited and did not stay. [Plaintiff and E.R.Q.] started talking more and Defendant started call[ing] every weekend and was pretty consistent. In November 2011, [] Defendant asked Plaintiff to come for Christmas and [Plaintiff] did [and] she stayed 3 days, then Plaintiff invited Defendant and [E.R.Q.] to NYC to her wedding in January 2012. . . . . The parties had a good time but they only got to see Plaintiff for small intervals over the weekend.

15. Plaintiff and [Woolf] moved to Texas in May . . . of 2012 and Plaintiff sent an email that they were moving to Texas and said "we are taking [E.R.Q.] with us and you need to take the next 4 to 6 weeks to prepare her." [] Plaintiff also told [Defendant] that the Florida Order was temporary, that [Plaintiff] could revoke it at any time and that Defendant had violated the [Florida] Order when she moved. Plaintiff also told Defendant that "unless [Defendant] cooperated, that she would never see [E.R.Q.] again." By November 2012, the pending motion was filed.

. . . .

18. Defendant is a fit and proper person to continue to have sole care custody and control of [E.R.Q.] in that:

a. [E.R.Q.] is now seven years old and has never lived with anyone else other than [Defendant] and that this is the status quo for [E.R.Q.]

> b. [] Defendant is highly educated and gainfully employed in the Cabarrus County School System as a Resource and Inclusion teacher for Disabled and Special Needs Children with a BS in Special Education. [E.R.Q.]'s condition is causing some learning issues and she is especially qualified to care for [E.R.Q.]
>
> c. [] Defendant has for the past seven years successfully cared, support and loved [E.R.Q.] with scant help or contact with the Plaintiff or the biological father, keeping a roof over her head, food in her stomach and dealing with a dangerous medical condition. [E.R.Q.] is happy, relatively healthy other than [what] has been stated and well-adjusted and making excellent progress in school.
>
> d. That a move at the age of seven years old to a mother that she does not really even know would likely be traumatic to [E.R.Q.] and not be in her best interests.

Defendant requested, *inter alia*, that the trial court award Defendant permanent custody of E.R.Q., and grant Plaintiff supervised visitation with E.R.Q.

Plaintiff and Defendant entered into an agreement, which was then entered by the trial court as a "Temporary Consent Order," on 1 May 2013. This order determined that "it [wa]s in the best interests of [E.R.Q.], pending further hearing in the matter, that Defendant [] maintain primary legal and physical custody of [E.R.Q.]." The order further granted Plaintiff rights of visitation, information sharing, and contact that were not provided for in the Florida Order. Although the May 2013 order did not grant Plaintiff the right to overnight visits with E.R.Q., Defendant apparently independently consented to allow E.R.Q. to visit Plaintiff in Virginia in October of 2014. This 2014 visit was the first time E.R.Q. had an overnight visit with Plaintiff without Defendant's supervision in over six years. A temporary order was entered on 5 November 2014 officially granting Plaintiff multi-day unsupervised visitation with E.R.Q., on specific dates, at Plaintiff's home in Virginia .

The hearing on Plaintiff's motion to modify the Florida Order commenced on 3 March 2015, Judge Bickett presiding, continued over ten non-consecutive days until 16 July 2015, and included the testimony of many witnesses. At the end of that hearing, Judge Bickett expressed his concern about the apparent animus between Plaintiff and Defendant, and between their counsel. The following exchange occurred between

Judge Bickett and Plaintiff's attorney concerning how Plaintiff had argued her case:

> BY THE COURT: I mean, you and [Plaintiff] . . . have filed a motion to register the [Florida Order] and ask that it be modified based upon substantial change of circumstances. And now you're here saying, well, best interest controls and substantial change of circumstances doesn't control.
>
> BY MR. CAMERON: Well, I don't think I've necessarily . . . said that. I think there has been a substantial change in circumstances affecting the welfare of the minor child. And I think . . . coupled with that, the best interests are that she needs to be with [Plaintiff].

Judge Bickett stated:

> I have no clue as to what I'm going to do still. I'm going to have to go back and read my notes and – I mean, I do know that you – that with your permission I talked to [E.R.Q.] in chambers and she expressed a preference as she wants to keep things the way they are. And I do know the suicide scares me to death. I mean, and you all presented absolutely minimal evidence as to that and that should have been one of the most important aspects of this case is what's going to happen to her if I move her. I mean, and you all just sort of, "Oh, no. It's no big deal there." It scares me to death.

Judge Bickett decided to continue the matter until 30 July 2015. A proceeding was held on 30 July 2015. In this hearing, Judge Bickett recounted some of the evidence before him, and discussed his concerns that, despite the lengthy trial, the parties had failed to focus on the relevant issues — change of circumstances and best interest of E.R.Q.:

> [F]or me to modify [the Florida Order], there has to be a material and substantial change of circumstances affecting the welfare of [E.R.Q.]. And you have to show that it's in the best interest of [E.R.Q.]. There's been marginal evidence, at best, on affecting the welfare of the child. And there's been less evidence on best interest. I mean, this has all been about "what is best for me," not what is best for this young child. However, and [Defendant's attorney] Mr. Paris's argument that this is the second motion with basically the same allegations – I've got a new husband,

I've got a new job, and I'm stable – I am going to find that there is substantial change of circumstances affecting the welfare of the child. It concerns me deeply that – as I said before, that this young lady came in and testified that she liked being with [Defendant] and that there is evidence of suicidal ideation or some type of psychological problem that you all just didn't bother to think should be a part of this trial, to the extent, I think the best interest is the most important portion of this trial, and you all just sort of – even though you took – this is probably one of the longest trials we've had in this county in the last ten years I've been a judge – you just have ignored best interest. So I'm going to do a temporary order. I'm going to make a finding that this is a high-conflict case and that both parents – both [Plaintiff] and [Defendant] have the means to pay for a parenting coordinator. I'm going to appoint Mary Blanton as a parenting coordinator. . . . . I think [E.R.Q.'s] relationship with [Plaintiff] needs to be repaired, and I think I would like nothing better [than] to give custody back to [Plaintiff]. But, ma'am [Plaintiff], Mr. Cameron [Plaintiff's attorney] argued that I should treat this as a juvenile case. If this was a neglect and abuse case, I would have terminated your parental rights eight years ago, or seven years ago. Because the key in that court is permanency. The child has to have a permanent plan. [Y]ou do one year of trying to repair things and get the relationship back with the mother, and if that doesn't work out, then you terminate rights and give the child to a parent or a person that will give the child some type of stability and permanency. And the only permanency [E.R.Q.] has had is with [Defendant]. Now, it concerns me that you all do not like each other, or you all are not getting along. I don't know that I can fix that, but we need to look at what's best for your daughter, and your granddaughter. And I don't – I think pulling her out of [Defendant]'s house when she expressed a preference, and when there's psychological issues that I don't know what they are. I do know that a ten-year-old, if you force her to do something, is going to do something drastic to do whatever she wants to do. And this young lady is a very smart young lady. I just don't want her to do something bad. I don't have confidence that you all can work it out between yoursel[ves] because you

> haven't done that because of the animosity that you have. But I do feel confident that we can do something, if you want your relationship repaired, to repair it. And then if you get it repaired, then I can look at best interest, and if – it may be in her best interest that she go back to you [Plaintiff]. But I don't know that now because you all – because of the evidence that's been presented.

Judge Bickett entered his first order in this matter on 30 July 2015, the same day as the proceeding. This temporary order was limited to visitation, stated that the "merits of this case are still pending, with the next hearing date to be scheduled in February or March, 2016[,]" and further stated that the order was "entered without any prejudice to either party." On 24 February 2016 Judge Bickett entered a second order based on the 30 July 2015 proceeding, in which he made findings and conclusions expressing the same concerns he had discussed at the proceeding, ruled that a parenting coordinator should be appointed, granted Plaintiff more access to E.R.Q., and left the matter open for further action. Judge Bickett made no conclusion in this order that there had been any change in circumstances affecting the welfare of E.R.Q.

The next hearing was conducted on the same day the 24 February 2016 order was entered. In this 24 February 2016 hearing, Plaintiff testified that she would like "the judge to allow [E.R.Q.] to come live with [Plaintiff] as soon as today[.]" Over Plaintiff's objection, E.R.Q., then approaching eleven years old, testified. E.R.Q. was clearly nervous initially, and Plaintiff and Defendant agreed to leave the courtroom so E.R.Q. would not have to answer questions in front of them. Judge Bickett attempted to calm E.R.Q., and let her know that her testimony was not going to determine with whom she was going to live. Judge Bickett told E.R.Q. he was "just trying to figure out what is best for you, and I'm trying to figure out a way for you to have a better relationship with [Plaintiff]. But . . . I want to find out just what you want. Okay?" E.R.Q. responded: "I want to live in North Carolina." E.R.Q. explained a number of the reasons she preferred to remain in North Carolina. When asked about her visits with Plaintiff, E.R.Q. testified that the visits went "[g]ood. I don't know why, but I always end up angry at the end." E.R.Q. testified that she would be happy to have more time to visit Plaintiff over the summer, but when Judge Bickett inquired: "Tell me, you used to not have a relationship with your mom. Do you like having one?" E.R.Q. responded: "Yes. But I think she pushed it too far when she put it in court." E.R.Q. testified that the reason she does not talk with Plaintiff on the phone sometimes is that she has a lot of schoolwork and

is otherwise busy, or because she has fallen asleep. She testified that Defendant never prevents her from talking to Plaintiff.

E.R.Q. testified that she is sometimes sad to leave Virginia because she has "such a good time" in Virginia. She stated that Plaintiff and Woolf "buy a lot of stuff for" her, and that her bicycle in North Carolina was broken. However, when asked if she was "getting as much time with [Plaintiff] as you want for right now," E.R.Q. answered: "Yes." When asked how her life was going at Defendant's house, E.R.Q. answered: "Good. I love it there. The only thing is that Henry [her dog] is wild. I love that dog though." When asked if it seemed that Defendant had less money than Plaintiff, E.R.Q. answered: "I've never cared or thought of that." E.R.Q. testified that she gave Defendant a necklace that was "a diamond crusted heart [that] says 'Mom[,]' " which she bought with money she earned and quarters she finds "laying on the ground my mom [Defendant] leaves there on purpose." E.R.Q. testified that she calls both Defendant and Plaintiff "mom," and that she was "lucky to have two moms." She reflected on having two moms, saying: "Oh, it's been the same since – when [Kresge] was around, and I didn't even know [Plaintiff], I had two moms. [Kresge] left, then I get [Plaintiff]. Two moms."[2] When asked if she would have any problems if the trial court decided she would have to live with Plaintiff and go to school in Virginia, E.R.Q. answered: "It would take me about three years to adjust to that, because that's how long it took me to make all my friends from Salisbury." E.R.Q. explained that she believed "[Defendant] and [Plaintiff] need to communicate more." Finally, E.R.Q. testified: "I love both my mothers equally."

Judge Bickett expressed concerns over "nuances to family law that you all haven't really argued here that really worried me to death on this case." Recognizing that, pursuant to N.C.G.S. § 50-13.7, he first had to find a change of circumstances affecting the welfare of E.R.Q., and only then consider the best interests of E.R.Q., Judge Bickett asked: "If I find that hasn't happened[3] then it reverts – then I dismiss your action. If I do that, what does it do to the temporary orders that are entered?" Defendant's attorney stated that he thought all the visitation orders would be "gone" if the trial court denied Plaintiff's underlying motion to modify custody pursuant to N.C.G.S. § 50-13.7. Judge Bickett responded:

---

2. The relationship between Defendant and Kresge ended sometime before Plaintiff filed this action, and Kresge moved out of the house.

3. That the requirements for modification pursuant to N.C.G.S. § 50-13.7 had not been met.

> I think they're gone, too. I mean, you all aren't – aren't conversing. I mean, it's obvious [E.R.Q.] expressed a preference. . . . . From 2005 to 2010 . . . [Plaintiff] was pretty much nonexistent. As I said from the last time, there are at least three grounds under North Carolina law where I could terminate [Plaintiff's parental] rights, and I would have terminated her rights if it were a neglect case. It's also, you know, since 2012 when she filed this lawsuit she's been totally in. I mean, she's really been doing what she's supposed to do. But a child needs permanency. They need to have the same thing from day to day and [Plaintiff] hasn't done that. I mean, she's gotten – she's very involved now. I'm going to take it under advisement. I need to figure out how to structure an order that is in [E.R.Q.'s] best interest. I mean, I could easily say your motion's denied and then I don't know where we're left. I don't think that it is in [E.R.Q.'s] best interest that she not have a strong relationship with her mother, and that's what I was trying to do. *That's why I tried to do this order to get you more and more time with her so to develop a strong relationship and to do something over the summer where your client had extended time with her. But obviously you []all didn't want that.* So I'll make a decision and I'll figure out how I can do my order. But I need to think about it and reread some of the North Carolina law to figure out how I can structure an order that will help her in the best interest. And I'm not exactly sure based upon the pleadings and what you all are asking for how I can do that. But I'll figure it out. (Emphasis added).

From Judge Bickett's remarks at the hearing, it appears to this Court that his opinion at that time was that Plaintiff had not met her burden under N.C.G.S. § 50-13.7, but that he did not believe E.R.Q.'s best interest would be met if the result of denial of Plaintiff's motion to modify custody might lead to Plaintiff losing all visitation rights, so he was going to review the relevant law and try and find a way to preserve visitation between Plaintiff and E.R.Q.

Plaintiff filed a motion in the cause on 22 April 2016 seeking to be allowed to present additional evidence to the trial court, and seeking a show cause order against Defendant for violating terms of the 1 May 2013 temporary consent order. A hearing was conducted on 12 May 2016, but Plaintiff's motions were not considered because Defendant's attorney informed the trial court that he no longer had a working

relationship with Defendant, and Judge Bickett continued the matters because he would not proceed on Plaintiff's motion's if Defendant did not have appropriate representation. The following day, 13 May 2016, Plaintiff filed a "Motion for Mistrial and Motion for Recusal," arguing, *inter alia*, that Judge Bickett demonstrated bias against Plaintiff during the prior hearings and had not acted in a timely fashion to the prejudice of Plaintiff. Plaintiff also argued that, during the 24 February 2016 hearing, "immediately after issuing a written order that stated that Plaintiff had shown a substantial change of circumstances . . . Judge Bickett announced that there had been no substantial change of circumstances." Review of both the 24 February 2016 order and the 24 February 2016 hearing show that Judge Bickett did not reach a conclusion on the issue of substantial change of circumstances affecting the welfare of E.R.Q. in either the order or the hearing. Plaintiff also stated in her motion that she was filing a complaint against Judge Bickett with the North Carolina Judicial Standards Commission. Plaintiff requested that a mistrial be declared in the matter, and that "a new judge be appointed to hear the merits of the case[.]"

Judge Bickett entered the custody order from which Plaintiff currently appeals – the Bickett Order – on 16 May 2016. The Bickett Order concluded that Plaintiff had "failed to meet her burden to show that there has been a substantial and material change of circumstances affecting the welfare of" E.R.Q., and that Plaintiff had "acted inconsistently with her constitutionally protected status to parent her child[.]" Judge Bickett denied Plaintiff's Motion to modify the Florida Order, and Plaintiff's Action was dismissed.

Plaintiff filed a "Motion for a New Trial" pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (2017), on 23 May 2016. Plaintiff filed an affidavit from Florida attorney Craig A. Boudreau ("Boudreau") on 22 August 2016, in which Boudreau cited to provisions of Florida law – including Florida's UCCJEA statutes – that Boudreau suggested demonstrated jurisdiction had remained with the Florida court. Boudreau further contended a Florida statute, not N.C.G.S. § 50-13.7, should have determined the proper standard to apply when considering whether to modify the Florida Order. The Boudreau affidavit appears to be the first record evidence challenging North Carolina's jurisdiction to act in Plaintiff's Action, and the first indication that Plaintiff was going to argue that Florida law controlled the outcome in Plaintiff's Action. Plaintiff's new argument was that the sole relief Plaintiff had requested in this matter[4] – modification

4. By filing her 15 November 2012 "Motion in the Cause for Modification of a Prior Order," which initiated the present action, and by arguing, exclusively, over years of

of the Florida Order based upon a change of circumstances as required by N.C.G.S. § 50-13.7 – was not justified under the law.

A new judge, Judge James Randolph ("Judge Randolph"), became involved in the case by at least 24 August 2016, as the record demonstrates that he presided over a hearing on that date. Judge Bickett recused himself from the matter by order entered 6 September 2016. If the 24 August 2016 hearing was recorded, it has not been included in the record, though we note that this hearing occurred after Plaintiff had filed her Rule 59 motion and the Boudreau affidavit, and therefore subsequent to the time Plaintiff alleges that she became aware that North Carolina had never obtained jurisdiction in this matter. Judge Randolph entered a temporary custody order on 7 September 2016, based upon the 24 August 2016 hearing, in which he concluded that the trial court had subject matter jurisdiction, North Carolina was E.R.Q.'s home state, and in which he ordered certain specific visitation provisions. This order did not acknowledge any jurisdictional or choice of law concerns raised by Plaintiff.

Plaintiff's Rule 59 motion for a new trial was heard on 7 September and 19 October 2016.[5] The order from which Defendant appeals was entered by Judge Randolph on 17 November 2016 (the "Randolph Order"). In the Randolph Order, the trial court addressed the new arguments raised by Plaintiff involving jurisdiction and Florida law. Judge Randolph ruled that the trial court had never obtained subject matter jurisdiction pursuant to UCCJEA requirements, and therefore, effectively, that all prior orders entered by the trial court were void. However, the trial court included conclusions of law unrelated to subject matter jurisdiction, namely: "The [trial court] finds that there exist sufficient grounds under North Carolina Rules of Civil Procedure Rule 59 to warrant a new trial, if this [c]ourt obtains subject matter jurisdiction. This [c]ourt should give Full Faith and Credit to Florida law." Based upon its findings and conclusions, the trial court ordered:

> 1. Plaintiff's Motion for New Trial is granted, if Florida releases subject matter jurisdiction to North Carolina.
>
> 2. [That Judge Randolph would contact the appropriate judge in Florida to seek release of jurisdiction.]

---

litigation and many days of hearings, that Plaintiff had met the requirements of N.C.G.S. § 50-13.7 for modification of the Florida Order.

5. Only the transcript for 7 September 2016 appears in the record.

> . . . .
>
> 4. As the [Florida Order] originated in Palm Beach County, Florida, Florida law applies to the interpretation of said order.

Following entry of the Randolph Order, the trial court entered a "Formal Order from Consent Judgment/Order" on 13 December 2016, in which it modified a visitation provision of the 7 September 2016 temporary custody order. Defendant filed notice of appeal from the Randolph Order on 16 December 2016. Plaintiff filed notice of appeal from the Bickett Order on 19 December 2016.

C. *Procedural History for Appeal in COA17-1344*

Plaintiff filed a "Verified Motion in the Cause to Terminate Order for Temporary Custody" on 4 January 2017 (the "Verified Motion"), under the same case number assigned to Plaintiff's prior action. In that motion, Plaintiff requested that the trial court make a determination that Plaintiff was "a fit parent and able to assume all parental responsibilities" for E.R.Q. and thereupon order the Florida Order "be terminated pursuant to Ch. 751.05(6), Florida Statutes." The Florida court entered an order purporting to "transfer" jurisdiction to North Carolina on 21 February 2017. A hearing was conducted on the Verified Motion on 14 March 2017. The trial court entered a "Child Custody Order" on 28 March 2017 (the "2017 Order") in which it found that the "State of Florida . . . transferred jurisdiction of this child custody matter to the State of North Carolina" on 21 February 2017. The trial court, applying Florida law, concluded that Plaintiff was "a fit parent" and "a proper person to assume legal and physical custody of" E.R.Q. Based upon these findings, the trial court "ordered, adjudged and decreed" that the Florida Order was terminated; that the 2017 Order "supersedes and vacates all other North Carolina Orders in this court file[;]" that "Plaintiff shall have legal and physical custody of" E.R.Q., and that E.R.Q. "shall transition to live with Plaintiff [] in Herndon, Virginia" on 2 April 2017. No provisions for visitation between E.R.Q. and Defendant were included in the 2017 Order. Defendant appealed the 2017 Order on 27 April 2017.

II. Appeal in COA17-675

A. *Plaintiff's Appeal*

1. Appellate Jurisdiction

[1] As an initial matter, we must determine whether this Court has jurisdiction to consider Plaintiff's appeal. Plaintiff's notice of appeal from the

16 May 2016 Bickett Order was filed on 19 December 2016, well beyond the thirty-day requirement set forth in Rule 3(c)(1). N.C. R. App. P. 3(c)(1). Therefore, the timeliness of Plaintiff's appeal hinges upon whether Plaintiff's 23 May 2016 "Motion for New Trial" pursuant to Rule 59 served to toll the thirty-day period as allowed by Rule 3(c)(3). *See Batlle v. Sabates*, 198 N.C. App. 407, 413, 681 S.E.2d 788, 793 (2009). In *Smith v. Johnson*, 125 N.C. App. 603, 481 S.E.2d 415 (1997), this Court dismissed the defendants' appeal based upon the following reasoning:

> To qualify as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must "state the grounds therefor" and the grounds stated must beamong those listed in Rule 59(a). N.C.G.S. § 1A-1, Rule 7(b)(1) (1990); N.C.G.S. § 1A-1, Rule 59(a) (1990); *see* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* 2d § 2811, at 132 (1995) (motion that "does not sufficiently state grounds has been treated as a nullity and ineffective" for extending time for taking appeal). The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1). The motion, to satisfy the requirements of Rule 7(b)(1), must supply *information* revealing the basis of the motion.
>
> In this case the defendants indicate in the motion that they rely on Rule 59(a)(2) & (7) as the bases of their motion. There are, however, *no allegations in the motion revealing any "[m]isconduct of the jury or prevailing party," N.C.G.S. § 1A-1, Rule 59(a)(2), or an "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." N.C.G.S. § 1A-1, Rule 59(a)(7).*

Smith, 125 N.C. App. at 606, 481 S.E.2d at 417 (citations omitted) (emphasis added); *see also Meehan v. Cable*, 135 N.C. App. 715, 721, 523 S.E.2d 419, 423 (1999).

Plaintiff's purported Rule 59 motion included bare allegations of errors pursuant to Rule 59(a), but did not allege any *actual conduct* that would support any of those bare allegations of error. For example, Plaintiff's motion alleged: "Plaintiff moves pursuant to Rule 59 . . . for a new trial on Plaintiff's Motion to Change Custody because . . . [of] insufficiency of evidence to justify the verdict, the verdict is contrary to law, errors in law occurring at trial and objected to by [] Plaintiff[.]" However, Plaintiff's purported Rule 59 motion included "no allegations

in the motion revealing . . . an '[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law[,]' " or any error of law objected to by Plaintiff. *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 (citation omitted). Plaintiff's motion, by simply reciting statutory language, included nothing more than bald allegations that certain statutory grounds existed – specifically those included in Rule 59(a)(1), (3), (4), (7), and (8). Plaintiff's mere recitation of grounds laid out in Rule 59(a) was insufficient to "qualify [her motion] as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure[.]" *Id.* (citations omitted). To the extent the Boudreau affidavit included allegations relevant to Plaintiff's Rule 59 motion, those allegations were not part of Plaintiff's Rule 59 motion because the affidavit was not filed until 22 August 2016, and was not incorporated into Plaintiff's motion. N.C.G.S. § 1A-1, Rule 59(c).

Because Plaintiff's 23 May 2016 motion did not qualify as a motion for a new trial pursuant to Rule 59, its filing did not toll the time Plaintiff had to file her notice of appeal from the 16 May 2016 Bickett Order and, therefore, Plaintiff's 19 December 2016 Notice of Appeal was not timely filed. N.C. R. App. P. 3(a)(1); *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. Absent a timely filed notice of appeal, this Court is without jurisdiction to consider Plaintiff's appeal. *Id.*

Although a lack of subject matter jurisdiction normally precludes an appellate court from considering the merits of an appeal, there is an exception when the lack of jurisdiction is based on failure to timely file a notice of appeal. "Our appellate courts have explained on multiple occasions that '[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of *certiorari*.' " *Am. Mech., Inc. v. Bostic*, 245 N.C. App. 133, 137, 782 S.E.2d 344, 346, *disc. review denied*, __ N.C. __, 784 S.E.2d 472 (2016) (citations omitted). Plaintiff has not petitioned this Court for review pursuant to writ of *certiorari*. However, we chose to treat Plaintiff's appeal as a petition for writ of *certiorari*, and address her arguments. *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997).

2. Plaintiff's Arguments

Plaintiff argues three issues on appeal from the Bickett Order: (1) that the trial court "erred by entering the [Bickett] Order as the [trial] court lacked subject matter jurisdiction;" (2) that the trial court "erred by applying North Carolina law, rather than Florida law in its custody order;" and (3) that the trial court "abused [its] discretion by finding and

concluding as a matter of law that Plaintiff [] had 'engaged in conduct inconsistent with her constitutionally protected status of a parent.' " We address each argument in turn, and affirm the Bickett Order.

a. <u>Subject Matter Jurisdiction</u>

[2] Plaintiff first argues that Judge Bickett lacked jurisdiction to enter the Bickett Order. We disagree.

The UCCJEA and the Parental Kidnapping Prevention Act ("PKPA") control whether courts of this State have jurisdiction to modify custody determinations entered by courts of another state. *See* N.C. Gen. Stat. §§ 50A-201 to 210 (2017); 28 U.S.C.A. § 1738A. It is the continuing duty of this Court to insure, even *sua sponte*, that the trial court had subject matter jurisdiction in every action it took. Although Plaintiff makes no argument concerning the PKPA, we have determined that the provisions of the PKPA were met in the present case. Plaintiff argues, however, that the jurisdictional requirements of the UCCJEA were not met prior to entry of the Bickett Order.

Although Plaintiff bases her argument on a different statute, the requirements for *obtaining* jurisdiction to modify a custody order entered in another state are found in N.C.G.S. § 50A-203 – "Jurisdiction to modify determination":

> Except as otherwise provided in G.S. 50A-204, a court of this State may not modify a child-custody determination made by a court of another state *unless* a court of this State has jurisdiction to make an initial determination under *G.S. 50A-201(a)(1)* or G.S. 50A-201(a)(2) *and*:
>
> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; <u>or</u>
>
> (2) *A court of this State* or a court of the other state *determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.*

N.C.G.S. § 50A-203 (emphasis added).

Pursuant to N.C.G.S. § 50A-201, a court of this State has jurisdiction to enter an initial custody determination if "[t]his State is the home state of the child on the date of the commencement of the proceeding[.]" N.C.G.S. § 50A-201(a)(1). In a 1 May 2013 "Temporary Consent Order," the

trial court found and concluded, that "*North Carolina is the home state* of [E.R.Q.] . . . *and none of the parties to this action presently reside in the state of the Prior Order* [Florida]." (Emphasis added). Plaintiff does not dispute either of these findings, and they are supported by the facts in this case. It is uncontested that North Carolina is the "home state" of E.R.Q. and, therefore, that the trial court had "jurisdiction to make an initial determination under G.S. 50A-201(a)(1)[.]" N.C.G.S. § 50A-203. The trial court correctly determined that none of the relevant persons – E.R.Q., Plaintiff, Defendant, or Carter – were residents of Florida at any time relevant to our jurisdictional analysis, which satisfies N.C.G.S. § 50A-203(2). Because both conditions for modification jurisdiction pursuant to N.C.G.S. § 50A–203(2) were met, the trial court had jurisdiction to consider Plaintiff's Action to modify the Florida Order, and to enter the various visitation and other orders entered in relation to the issue of E.R.Q.'s custody, including the Bickett Order. *In re J.H.*, 244 N.C. App. 255, __, 780 S.E.2d 228, 235–38 (2015).

Plaintiff, however, argues that the Florida court had "exclusive, continuing jurisdiction" ("ECJ") pursuant to N.C.G.S. § 50A-202 until the Florida court released jurisdiction to North Carolina. Plaintiff is correct that a court with ECJ over a custody matter is the only court with jurisdiction to act in that matter.[6] *See*, *e.g.*, *Matter of T.E.N.*, __ N.C. App. __, 798 S.E.2d 792 (2017). However, if the requirements for modification of a custody determination from another state pursuant to N.C.G.S. § 50A-203 are met, ECJ for that state will have ceased pursuant to the terms of N.C.G.S. § 50A-202. Relevant to this appeal, Florida lost ECJ because the trial court in North Carolina "determine[d] that [E.R.Q.], [E.R.Q.]'s parents, and [Defendant] d[id] not presently reside in [Florida]" at any time relevant to Plaintiff's Action. N.C.G.S. § 50A-202(a)(2). *Matter of T.E.N.*, __ N.C. App. at __, 798 S.E.2d at 794; *In re E.J.*, 225 N.C. App. 333, 336, 738 S.E.2d 204, 206 (2013); *In re N.R.M.*, *T.F.M.*, 165 N.C. App. 294, 298–301, 598 S.E.2d 147, 149–51 (2004).

Plaintiff also argues that Defendant's relocation to North Carolina violated a Florida statute and thereby caused jurisdiction to remain with the Florida court. When Defendant moved to North Carolina in July of 2008, violation of the statute in question, Fla. Stat. § 61.13001(3)(f) (2007), "subject[ed] the party in violation thereof to contempt and other proceedings to compel the return of the child[.]" *Id.*[7] Nothing in

6. With the exception of temporary emergency jurisdiction, which may be exercised by a court without ECJ when a child's welfare requires immediate action. N.C.G.S. § 50A-204.

7. This portion of the statute has since been amended.

the Florida statute itself served to deprive the trial court of jurisdiction in this case. The provisions of the UCCJEA relevant to Plaintiff's argument state:

> (a) Except as otherwise provided in G.S. 50A-204 or by other law of this State, if a court of this State has jurisdiction under this Article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:
>
> > (1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction[.]

N.C.G.S. § 50A-208. Even assuming, *arguendo*, Defendant was a "person seeking to invoke" jurisdiction in North Carolina, and that she engaged in "unjustifiable conduct" by moving with E.R.Q. to North Carolina, Plaintiff clearly acquiesced to the jurisdiction of this State by registering the Florida Order in North Carolina, and by filing her action here. *Id.* None of the orders entered prior to the Randolph Order, including the Bickett Order, were void for lack of subject matter jurisdiction.

b. Choice of Law and Full Faith and Credit

[3] Plaintiff argues that the trial court failed to afford full faith and credit to the Florida Order, and "erred by applying North Carolina law, rather than Florida law in" the Bickett Order. We disagree.

i. *Child Custody Law in North Carolina and Florida*

We first note that in North Carolina, as in Florida, trial courts are given very broad discretion in child custody matters – whether initially or upon a request for modification of a prior custody order – based upon the universal principle that the best interest of the child shall remain paramount. *See Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citations omitted) ("As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests."); *Castillo v. Castillo*, 950 So. 2d 527, 528 (Fla. Dist. Ct. App. 2007) (citations omitted) ("The trial court exercises broad discretion in making a child custody determination, and its decision is reviewed for a clear showing of an abuse of discretion. . . . . 'Decisions affecting child custody require a careful consideration of the best interests of the child.' "). This Court "has often reiterated that the jurisdiction of the

court to protect infants is broad, comprehensive and plenary." *Massey v. Massey*, 121 N.C. App. 263, 268–69, 465 S.E.2d 313, 316 (1996) (citations and quotation marks omitted). "Any judgment entered by consent or otherwise, determining the custody and maintenance of minor children, may be modified by the court at any time changed conditions make a modification right and proper." *Zande v. Zande*, 3 N.C. App. 149, 153–54, 164 S.E.2d 523, 527 (1968) (citations omitted); *see also In re Marlowe*, 268 N.C. 197, 199, 150 S.E.2d 204, 206 (1966); *Reed v. Reed*, 182 So. 3d 837, 840-41 (Fla. Dist. Ct. App. 2016). Under both North Carolina and Florida law generally, the provisions of a custody order remain susceptible to modification based upon a substantial change of circumstances affecting the welfare of the child and a finding that modification would be in the child's best interest. N.C. Gen. Stat. § 50-13.7 (2017); Fla. Stat. § 61.13(2)(c) (2017).

However, in both North Carolina and Florida, the burdens for modifying regular custody orders are dependent on whether the order is "temporary" or "final." *See Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003); *Jones*, 674 So. 2d at 774. Florida, unlike North Carolina, has a special proceeding for granting "temporary" custody of a child to an "extended family member" for the purposes of recognizing "that many minor children in this state live with and are well cared for by members of their extended families" because the "parents of these children have often provided for their care by placing them temporarily with another family member who is better able to care for them." Fla. Stat. § 751.01(1) (2007) (part of an act (the "Act") entitled: "Temporary Custody of Minor Children by Extended Family"). Through the Act, parents can relatively easily transfer both legal and physical custody of their children to certain relatives. Fla. Stat. § 751.05 (2007). The Act also provides a simple method for parents to regain full custody of their children – filing the appropriate petition to terminate the custody order and demonstrating to the court that they are "a fit parent," or demonstrating that all parties to the order consent to return of custody to the parent. Fla. Stat. § 751.05(6). It is through the procedures set forth in the Act that, with the consent of both Plaintiff and Carter, legal and physical custody of E.R.Q. was transferred to Defendant. North Carolina has no legislation similar to the Act.

ii. *Failure to Preserve Issues*

We first hold that Plaintiff has failed to preserve the issues of full faith and credit or what law controls for appellate review. Plaintiff's Action was initiated by Plaintiff's Motion to modify the Florida Order. Plaintiff's Motion expressly and solely requested the remedy of *modification*

pursuant to North Carolina law, specifically N.C.G.S. § 50-13.7. During the ensuing three and a half years, which culminated in a ten-day trial, additional hearings, and entry of the Bickett Order, Plaintiff sought modification of the Florida Order pursuant to N.C.G.S. § 50-13.7, and never gave the trial court any indication she believed the matter should be considered pursuant to Florida law. After her motion to modify the Florida Order was denied by the Bickett Order, Plaintiff filed her Rule 59 "Motion for New Trial."

As discussed above, Plaintiff's Rule 59 motion was not valid. Nonetheless, Plaintiff purported to request a new trial on the basis of, *inter alia*, the following: "the verdict is contrary to law, [and there were] errors in law occurring at trial and objected [to] by [] Plaintiff[.]" Plaintiff's language, "errors in law occurring at trial and objected [to] by [] Plaintiff[,]" tracks the language of Rule 59(a)(8).

> In order to obtain relief under Rule 59(a)(8), a defendant must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion. Neither defendant's post-trial motion nor the remaining record before us shows a proper objection at trial to any of the rulings at issue. Nothing else appearing, from the record before us, defendant failed to preserve his right to pursue a Rule 59(a)(8) motion.

Davis v. Davis, 360 N.C. 518, 522–23, 631 S.E.2d 114, 118 (2006). None of the other Rule 59 grounds for a new trial referenced in Plaintiff's motion are applicable to Plaintiff's choice of law argument. The "verdict is contrary to law" language, which tracks part of Rule 59(a)(7), refers to a verdict rendered after a proper proceeding, but that is still in some manner unlawful. *See, e.g.*, *Matter of Will of Leonard*, 71 N.C. App. 714, 718, 323 S.E.2d 377, 380 (1984) (citation omitted) (grant of a new trial was proper based upon unlawful verdict because "[t]he jury cannot find both for the plaintiff and the defendant on the same issue"). Plaintiff's arguments that the trial court did not give full faith and credit to the Florida Order, and applied the wrong law, were issues of law that Plaintiff was required to object to prior to or during trial. *Davis*, 360 N.C. at 522–23, 631 S.E.2d at 118. Because Plaintiff did not object based upon those issues at trial, those issues were not properly preserved as arguments for Plaintiff's Rule 59 motion for a new trial, and the trial court erred in considering them. *Id.*; *Barnett v. Security Ins. Co. of Hartford*, 84 N.C. App. 376, 380, 352 S.E.2d 855, 858 (1987).

Absent a proper objection at trial, Plaintiff has also failed to preserve these issues for *appellate* review.

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). Plaintiff did not simply fail to object to the trial court's application of N.C.G.S. § 50-13.7 at trial, she *affirmatively and solely requested* relief pursuant to N.C.G.S. § 50-13.7. Plaintiff may not base an appeal on an alleged error that she invited. *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) (a party has no right to appeal invited error: "A party may not complain of action which [s]he induced") (citations omitted). This argument is therefore dismissed on these bases as well.

iii. *Merits*

We further hold that the rulings in the Bickett Order gave full faith and credit to the Florida Order and properly applied the law of North Carolina. Plaintiff argues: " 'Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.' U.S. Const. art. IV, § 1." However, the United States Supreme Court has "declined expressly to settle the question" of whether "custody orders [a]re sufficiently 'final' to trigger [the] full faith and credit requirements" of U.S. Const. art. IV, § 1. *Thompson v. Thompson*, 484 U.S. 174, 180, 98 L. Ed. 2d 512 (1988) (citations omitted). The Court in *Thompson* reasoned:

> Even if custody orders were subject to full faith and credit requirements, the Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered. Because courts entering custody orders generally retain the power to modify them, courts in other States were no less entitled to change the terms of custody according to their own views of the child's best interest. For these reasons, a parent who lost a custody battle in one State had an incentive to kidnap the child and move to another State to relitigate the issue. This circumstance contributed to widespread jurisdictional deadlocks . . ., and more importantly, to a national epidemic of parental kidnaping.

Id. at 180, 98 L. Ed. 2d at 521 (citations omitted). Congress attempted to address this issue by enacting the PKPA, thereby severely limiting the circumstances in which a state could exercise *jurisdiction* to modify a custody order properly entered in another state:

> Once a State exercises jurisdiction consistently with the provisions of the [PKPA], no other State may exercise concurrent jurisdiction over the custody dispute, § 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree.

Id., at 177, 98 L. Ed. 2d at 518-19. The PKPA created a *statutory* requirement that states afford full faith and credit to custody orders initially entered in a different state. This full faith and credit requirement is *not* based upon U.S. Const. art. IV, § 1, the Full Faith and Credit Clause. *Id.*, at 181, 98 L. Ed. 2d at 521 ("[t]he context of the PKPA therefore suggests that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations"); *In re Craigo*, 266 N.C. 92, 95, 145 S.E.2d 376, 378 (1965) (Full Faith and Credit Clause does not apply to custody orders); *Williams v. Walker*, 185 N.C. App. 393, 400, 648 S.E.2d 536, 541 (2007).

As discussed above, because of the unique nature of child custody determinations, our Supreme Court has recognized that the rules governing regular civil foreign judgments are different than those governing child custody orders. Both Florida law and the terms of the Florida Order allowed modification of the Florida Order by the Florida court – so long as that court retained jurisdiction. The Florida Order awarded custody of E.R.Q. to Defendant conditioned upon the following relevant provisions: (1) Defendant "is awarded temporary physical and legal custody of . . . [E.R.Q.], until the child turns 18 years old or the parents petition for modification of custody under Section 751.05(7), Florida Statutes" and, (2) "**<u>RESERVATIONS</u>**: The [Florida court] retains jurisdiction to enforce *or modify the terms of this final judgment as may, from time to time, become necessary*." (Emphasis added).

As our Supreme Court held under similar circumstances, since the trial court in North Carolina had *obtained jurisdiction*, it could

> consider any change or circumstances that [arose] since the entry of the Florida decree . . ., and [it could] determine what [was] for the best interest of the child and [] award custody accordingly. But, in disposing of the custody of the minor child in controversy, the Florida decree awarding

> her custody to the petitioner is entitled to full faith and credit *as to all matters existing when the decree was entered and which were or might have been adjudicated therein*. "[W]here a decree . . . fixing the custody of the children . . . is rendered in accordance with the laws of another state by a court of competent jurisdiction, such decree will be given full force and effect in other states as long as the circumstances attending the rendition of the decree remain the same. *The decree has no controlling effect in another state as to the facts and conditions arising subsequent to its rendition*."

In re Marlowe, 268 N.C. 197, 199–200, 150 S.E.2d 204, 206–07 (1966) (emphasis added);[8] *Spence v. Durham*, 283 N.C. 671, 683–84, 198 S.E.2d 537, 545 (1973); *Spoon v. Spoon*, 233 N.C. App. 38, 44, 755 S.E.2d 66, 71 (2014). Further, in another case procedurally similar to the present case, our Supreme Court reasoned:

> Since this is a case involving modification of a custody order entered with the consent of both parties by a court in California, the controlling statute is N.C.G.S. § 50-13.7. That statute provides in pertinent part:
>
>> [W]hen an order for custody of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and a showing of changed circumstances, enter a new order for custody which modifies or supersedes such order for custody.
>
> N.C.G.S. § 50-13.7(b) (1995).

Pulliam v. Smith, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998).[9] In *Pulliam* our Supreme Court did not look to California law to determine whether modification of the existing California consent custody order was warranted, it applied the standard mandated by N.C.G.S. § 50-13.7(b).

---

8. The jurisdictional rules set forth in the UCCJEA supersede prior jurisdictional rules. However, the fact that a court with jurisdiction can always modify a custody order, whether from this State or another, upon a showing of substantially changed circumstances and in accordance with the best interests of the child, remains the law of this State.

9. N.C.G.S. § 50-13.7(b) has been amended to clarify that modification is "[s]ubject to the provisions of G.S. 50A-201, 50A-202, and 50A-204" of the UCCJEA.

It is true that the Florida Order granted custody to Defendant pursuant to a procedure not found in North Carolina, and that the Florida Order provided for modification of its terms by the procedure set forth in Fla. Stat. § 751.05. However, once the trial court in North Carolina obtained jurisdiction, it had the authority to modify the Florida Order; based upon findings of substantial change in circumstances affecting E.R.Q. and that modification would be in E.R.Q.'s best interest. *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 902. Full faith and credit, as well as the UCCJEA, required that the trial court *recognize and enforce* the custody determination made in the Florida Order – that Defendant had legal and physical custody of E.R.Q., and that any attempt to deprive Defendant of custody, absent modification of the Florida Order, would be in derivation of the UCCJEA, but only so long as the Florida Order was not validly modified or vacated.[10] Once the trial court obtained jurisdiction, it could only modify the Florida Order pursuant to N.C.G.S. § 50-13.7(b). This does not mean that the trial court was free to ignore the Florida Order, but the terms and intent of the Florida Order had to be considered based upon the circumstances in existence when that order was entered, and further considered within the context of everything that had transpired after entry of the Florida Order. The trial court has broad discretion with respect to custody matters, and is expected to consider all relevant factors when making any custody determination. Assuming, *arguendo*, Plaintiff's arguments were properly before us, we would reject Plaintiff's arguments concerning jurisdiction, full faith and credit, and application of North Carolina law to Plaintiff's Action, and affirm the trial court's denial of Plaintiff's Motion.

c. Conduct Inconsistent with Protected Status as a Parent

[4] Plaintiff argues that the trial court erred in finding and concluding "by clear cogent and convincing evidence that [] Plaintiff [] acted inconsistently with her constitutionally protected status to parent her child." We disagree.

"[W]e review [a] conclusion [that the natural parent's conduct was inconsistent with her constitutionally protected right] *de novo*, and determine whether it is supported by 'clear and convincing evidence.' " *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010) (citations omitted).

10. Again, excepting for emergency jurisdiction provisions as set forth in N.C.G.S. § 50A-204.

> "[T]here is no bright line beyond which a parent's conduct meets this standard. As we explained in *Price* [*v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997)], conduct rising to the 'statutory level warranting termination of parental rights' is unnecessary. Rather, '[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct . . . can also rise to this level so as to be inconsistent with the protected status of natural parents.' "

Id. at 549–50, 704 S.E.2d at 503 (citations omitted).[11] "[A] natural parent's execution of a valid consent judgment granting exclusive care, custody, and control of a child to a nonparent, may be a factor upon which the trial court could base a conclusion that a parent has acted inconsistently with his or her constitutionally protected status." *Yurek v. Shaffer*, 198 N.C. App. 67, 77, 678 S.E.2d 738, 745 (2009) (citations omitted); *see also Adams v. Tessener*, 354 N.C. 57, 61-62, 550 S.E.2d 499, 502 (2001) (when a parent voluntarily relinquishes custody to a nonparent for a significant period of time, this may constitute a basis for making a determination that the parent has acted inconsistently with her constitutionally protected status).

As our Supreme Court has determined:

> [T]he United States Supreme Court has also recognized that protection of the parent's interest is not absolute. . . . . The Court pointed out its traditional adherence to the principle that "the rights of the parents are a counterpart of the responsibilities they have assumed." In discussing this principle, the Court stated:
>
> > Thus, the "liberty" of parents to control the education of their children that was vindicated in [prior opinions] was described as a "right, coupled with the high duty, to recognize and prepare [the child] for additional obligations." The linkage between parental duty and parental right was stressed again . . . when the Court declared it a cardinal principle "that the custody, care and nurture of the child reside

11. When a natural parent loses her constitutionally protected status, custody of a child as between that parent and a non-parent is decided using the best interest of the child standard as stated in N.C. Gen. Stat. § 50–13.2(a) (2017). *Price*, 346 N.C. at 84, 484 S.E.2d at 537.

> first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.
>
> In *Lehr*, the Court stressed the linkage between parental duty and parental right and noted that the father in that case had "never had any significant custodial, personal, or financial relationship with [the child], and he did not seek to establish a legal tie until after she was two years old." The Court reasoned that
>
> > [w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection.
>
> The Court further stated, " '[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children as well as from the fact of blood relationship.' "

Price, 346 N.C. at 76–77, 484 S.E.2d at 533 (citations omitted).

In *Boseman*, our Supreme Court discussed *Price*, stating:

> Thus, under *Price*, when a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status.

Boseman, 364 N.C. at 550–51, 704 S.E.2d at 503 (citations omitted). In *Boseman*, upon the parent-mother's initiation, she and a nonparent boyfriend were *jointly* raising the child and participating *equally* in parenting decisions – resulting in a stable, long-term family unit. "As

such, the natural parent created along with the nonparent a family unit in which the two acted as parents, shared decision-making authority with the nonparent, and [by their actions] manifested an intent that the arrangement exist indefinitely." *Id.* at 551, 704 S.E.2d at 504; *see also Id.* at 552, 704 S.E.2d at 504.[12]

Although the Florida Order was "temporary" and included a provision whereby Plaintiff could regain custody pursuant to a simplified process, absent specific action taken by Plaintiff, Defendant was granted full legal and physical custody of E.R.Q. until E.R.Q. reached adulthood. We hold that Plaintiff's actions – and failure to act – after she "voluntarily [gave] custody of [E.R.Q.] to [Defendant]," *Id.* at 550–51, 704 S.E.2d at 503 (citations omitted), satisfies the requirement that Plaintiff did not "creat[e] an expectation that the relationship [between Defendant and E.R.Q.] would be terminated" at some point in the future. *Id.* at 550-51, 704 S.E.2d at 503. We base our holding in part on Plaintiff's lack of meaningful interaction with E.R.Q. for a period of years, and on the fact that, other than the Florida action Plaintiff filed in 2009 then abandoned, Plaintiff failed to make any formal attempt to regain custody of E.R.Q. for over six years.

Further, in *Boseman*, *Price*, and other opinions cited therein, the biological parent continued to "act as a parent," exercising control and providing support, but also decided to *share* those parental rights and obligations with a nonparent. In the present case, Plaintiff completely relinquished her parental responsibilities to Defendant for a period of years, and the only familial bond that occurred during those years was between Defendant and E.R.Q. *Price*, 346 N.C. at 76–77, 484 S.E.2d at 533-34.

We wish to make clear that Plaintiff's voluntary relinquishment of custody to Defendant pursuant to the Florida Order, standing alone, should not in any manner be considered an act contrary to her protected status as a parent. The Florida statutes provide that option for a salutary

---

12. "[W]e recognize that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment. However, to preserve the constitutional protection of parental interests in such a situation, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests. Such conduct would, of course, need to be viewed on a case-by-case basis, but may include *failure to maintain personal contact with the child or failure to resume custody when able*." *Price*, 346 N.C. at 83–84, 484 S.E.2d at 537 (emphasis added).

purpose, and the use of those statutes for voluntary temporary relinquishment of custodial rights no doubt demonstrate acts of parental love and responsibility in most instances. Plaintiff's recognition that Defendant was in a better position to care for E.R.Q. *at the time Plaintiff consented to entry of the Florida Order* is presumed by this Court to have been an act of parental responsibility. However, Plaintiff's actions subsequent to entry of the Florida Order reflect either a lack of ability, or desire, to take on even minimal continuing acts of parental love or responsibility. Our Supreme Court has "emphasized that evidence of a parent's conduct should be viewed cumulatively." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 267 (2003). The fact that Plaintiff, after years of inaction, eventually decided to make a concerted effort to regain custody of E.R.Q. should be considered in the analysis, but weighed in light of the many years in which Plaintiff fully relinquished her parental duties to Defendant. The relevant evidence presented in this case is exhaustively examined above, and we need not revisit it.

We hold, upon *de novo* review, that the determination that Plaintiff's conduct had been inconsistent with her constitutionally protected status as a parent was supported by clear and convincing evidence. *Boseman*, 364 N.C. at 549, 704 S.E.2d at 502; *Owenby*, 357 N.C. at 147, 579 S.E.2d at 268. The Bickett Order is affirmed and reinstated.

B. *Defendants' Appeal*

1. Jurisdiction to Enter the Randolph Order

[5] Defendant argues that Judge Randolph lacked subject matter jurisdiction to enter the 17 November 2016 Randolph Order. We agree.

We first recognize that once the district court obtains jurisdiction over a child custody matter, that jurisdiction continues until the child reaches the age of majority, or some other factor serves to divest the district court of jurisdiction. *See* N.C.G.S. § 50A-202; *Beck v. Beck*, 64 N.C. App. 89, 93, 306 S.E.2d 580, 582 (1983). Judge Bickett's recusal did not affect the continuing jurisdiction of the trial court over the subject matter of this action. However, the trial court may still lack jurisdiction to act in certain circumstances – for instance, as discussed below, when the matter is on appeal. As we discussed above in determining that Plaintiff had failed to timely file her notice of appeal from the Bickett Order, Plaintiff's purported Rule 59 motion for a new trial was not a proper Rule 59 motion.[13] Therefore, Plaintiff never presented any proper

13. See section II., A., 1. of this opinion.

Rule 59 motion to the trial court, and the trial court never obtained jurisdiction over the subject matter of Plaintiff's purported Rule 59 motion. *See Meehan v. Cable*, 135 N.C. App. 715, 721, 523 S.E.2d 419, 423 (1999). Absent jurisdiction to hear Plaintiff's Rule 59 motion, the trial court could not enter any valid order deciding Plaintiff's motion. *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 233 (2015).

In addition, the Randolph Order was heard "on [] Plaintiff's Motion for New Trial, filed in response to the May 16, 2016 [Bickett] Order." In Plaintiff's motion for a new trial, she limited the bases for granting a new trial to those set forth "pursuant to Rule 59 of the N.C. Rules of Civil Procedure[.]" It is axiomatic that "[o]ne superior court judge may not overrule another." *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 169, 459 S.E.2d 626, 627 (1995) (citations omitted). However, "[i]f Judge [Bickett] did not have jurisdiction to act . . ., his order was a nullity and Judge [Randolph] could strike it." *Id.* This Court has specifically held that a judge who did not hear a case may not hear a Rule 59 motion for a new trial. *Sisk v. Sisk*, 221 N.C. App. 631, 636, 729 S.E.2d 68, 72 (2012) (judge who did not preside at trial "was without jurisdiction to enter an order on plaintiff's motion for new trial" pursuant to Rule 59).

Because we have held that Judge Bickett did have jurisdiction to enter the 16 May 2016 order, it was error for Judge Randolph to consider Plaintiff's 23 May 2016 motion for a new trial. "[A] judge who did not try a case may not rule upon a motion for a new trial. Judge [Randolph] was without jurisdiction to hear [P]laintiff's Rule 59 motion for a new trial." *Sisk*, 221 N.C. App. at 633, 729 S.E.2d at 70 (citations omitted). Because Judge Randolph lacked subject matter jurisdiction to hear Plaintiff's Rule 59 motion, the Randolph Order is void. Plaintiff argues that the rule in *Sisk* should not apply because Judge Bickett recused himself from participating in Plaintiff's Action. Plaintiff cites no authority for this position. It is true that a different judge than the one who presided at a trial may step in and perform certain acts – such as entering the order of the prior judge – pursuant to N.C. Gen. Stat. § 1A-1, Rule 63 (2017). *See In re Savage*, 163 N.C. App. 195, 197, 592 S.E.2d 610, 611 (2004). However, this Court has held that "[t]he function of a substitute judge under [Rule 63] is 'ministerial rather than judicial.' " *Id.* (citation omitted). "Rule 63 does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process. It contemplates only . . . [performing] such acts as are necessary under our rules of procedure to effectuate a decision already made." *Id.* at 198, 592 S.E.2d at 611 (citations and quotation marks omitted). The trial court lacked jurisdiction

to hear and decide Plaintiff's Rule 59 motion for a new trial on the *two separate bases* discussed above. We therefore vacate the 17 November 2016 Randolph Order.

2. Additional Issues

We take this opportunity to stress that a court without subject matter jurisdiction can do nothing more than recognize its lack of jurisdiction and make rulings that are directly consequent to that determination. Any additional action taken would be a nullity and unenforceable. However, because the orders of a trial court are not likely to be ignored, the trial court should strive to avoid confusion by refraining from including findings, conclusions, or decretal statements that lack legal effect. Had the trial court been correct in ruling in the Randolph Order that it lacked subject matter jurisdiction, it would have therefore lacked jurisdiction to make any additional substantive rulings. Subject matter jurisdiction is a prerequisite to any binding judicial determination. Therefore, it was improper for the trial court, *after determining that it lacked subject matter jurisdiction*, to conclude "that there exist sufficient grounds under . . . Rule 59 to warrant a new trial, if this [c]ourt obtains subject matter jurisdiction. This [c]ourt should give Full Faith and Credit to Florida law." It was equally improper for the trial court to decree that "Plaintiff's Motion for a New Trial is granted, if Florida releases subject matter jurisdiction to North Carolina[,]" and that "Florida law applies to the interpretation of" the Florida Order. *See Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450, 453 (1942).

III. COA17-1344

[6] Defendant, by separate appeal in COA17-1344, appeals from the 2017 Order – Judge Randolph's 28 March 2017 "Child Custody Order." Defendant argues that the trial court lacked jurisdiction to enter the 2017 Order. We agree.

"An appeal is not 'perfected' until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction." *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011) (citation omitted). It is well established:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of

> Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (2017). There are certain exceptions to this rule: "Notwithstanding the provisions of G.S. 1-294, an order pertaining to child custody which has been appealed to the appellate division *is enforceable* in the trial court by proceedings for civil contempt during the pendency of the appeal." N.C. Gen. Stat. § 50-13.3 (2017) (emphasis added).

Subsequent to Defendant's 16 December 2016 filing of her notice of appeal in COA17-675, which was perfected, Plaintiff filed a 4 January 2017 "Verified Motion in the Cause to Terminate Order for Temporary Custody" (the "Verified Motion") in which Plaintiff requested termination of the Florida Order "pursuant to Ch. 751.05(6), Florida Statutes." The trial court heard arguments on the Verified Motion on 14 March 2017, and then entered the 2017 Order. In the 2017 Order, the trial court concluded that it "should give Full Faith and Credit to Florida law" and decide the matter based upon Florida law. The 2017 Order purported to terminate the Florida Order, and award full legal and physical custody of E.R.Q. to Plaintiff.

Plaintiff makes several unavailing arguments in support of her contention that the trial court had jurisdiction to enter the 2017 Order even though the Bickett Order and the Randolph Order were on appeal in COA17-675. Plaintiff argues that the language in N.C.G.S. § 1-294 that an appeal "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein," does not apply in this matter because the issues decided in the 2017 Order were not "matters embraced" by the Bickett and Randolph Orders. However, in order to reach its ruling in the 2017 Order, the trial court had to "affirm" its own 17 November 2016 order – the Randolph Order – by implicit rulings that (1) Judge Bickett lacked subject matter jurisdiction to enter the Bickett Order pursuant to the UCCJEA; (2) it had the authority and jurisdiction to rule on Plaintiff's Rule 59 motion; (3) Plaintiff had not forfeited her constitutionally protected status as a parent; (4) Plaintiff's conduct had not served to alter the original nature of the Florida Order; (5) Florida law controlled the North Carolina trial court's authority to modify the Florida Order, even after North Carolina obtained subject matter jurisdiction pursuant to the UCCJEA; (6) a North Carolina trial court can modify a custody order from another state without any finding of changed circumstances or a determination of whether modification would be in the best interest of the child – N.C.G.S. § 50-13.7(b)

notwithstanding; and (7) that Plaintiff's motion for a new trial should be granted. *See Carpenter v. Carpenter*, 25 N.C. App. 307, 308-09, 212 S.E.2d 915, 916 (1975) (the purpose of N.C.G.S. § 1–294 is to prevent the trial court from deciding the very matters that were embraced in a previous order). Our resolution of the appeal in COA17-675 includes holdings directly contrary to each of these implied rulings of the trial court in the 2017 Order.

Further, this Court has clearly held that an appeal from an order involving child custody removes jurisdiction from the trial court to consider *any* issues related to custody of the child involved:

> We find that the district court lacked the authority to issue the 31 October 1986 and 3 November 1986 orders, and, conclude that these orders are null and void for the following reason.
>
> N.C.G.S. § 1-294 states in part:
>
>> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.
>
> It is established that "[v]isitation privileges are but a lesser degree of custody." As a result, the 5 March 1986 order, extending visitation rights, appealed by defendant is directly related to and will affect the 31 October 1986 and 3 November 1986 orders determining custody, issued by the trial court. Therefore, N.C.G.S. § 1-294 removed jurisdiction on the issue of custody from the district court in the present case.
>
> Furthermore, the Supreme Court in *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962), specifically addressed the question of who has jurisdiction over a minor child when a custody matter is pending on appeal. In *Joyner*, the Court concluded that "North Carolina cases fit into the general rule that appeal removes the entire proceeding to the [appellate] Court and leaves the [lower] court *functus officio* until the cause is remanded."
>
> Consequently, under both statute and case law the district court lost jurisdiction over all custody matters in the

> present case when defendant appealed the 5 March 1986 visitation order.

Hackworth v. Hackworth, 87 N.C. App. 284, 286–87, 360 S.E.2d 472, 472-73 (1987) (citations omitted);[14] *see also Rosero v. Blake*, 150 N.C. App. 250, 252–54, 563 S.E.2d 248, 250–51 (2002), *rev'd on other grounds*, 357 N.C. 193, 581 S.E.2d 41 (2003).

Plaintiff argues "[i]t is logical that a 'matter' wherein the Court of North Carolina [sic] has subject matter jurisdiction is a separate 'matter' from one in which North Carolina does not have subject matter jurisdiction." The issue of subject matter jurisdiction was one of the central issues on appeal in COA17-675, which is enough to defeat Plaintiff's argument. Plaintiff's argument is further discredited by the fact that her assumption that this Court would determine that the trial court lacked jurisdiction to enter the Bickett Order in the COA17-675 appeal was not only an improper assumption to make, but incorrect as well.

Because prior orders involving the custody of E.R.Q. – the Bickett Order and the Randolph Order – were on appeal in COA17-675, the trial court was without jurisdiction to hear or decide any issues directly related to E.R.Q.'s custody during the pendency of the COA17-675 appeal. *Carpenter*, 25 N.C. App. at 309, 212 S.E.2d at 916 (citations omitted) ("[P]ending the appeal the trial judge is *functus officio*. Therefore, the [trial c]ourt in the present case had no jurisdiction to hear and pass upon defendant's motion filed on 19 November 1974 while the appeal of this case was pending in the Court of Appeals."). Because the matter of E.R.Q.'s custody was on appeal when the trial court entered the 2017 Order, that order is void and of no effect.

From the evidence included in the record concerning the 2017 Order, it appears E.R.Q. was erroneously removed from Defendant on 2 April 2017 by a court without jurisdiction to do so. This Court now holds that custody of E.R.Q. was never properly removed from Defendant and, based on our holdings, legal custody of E.R.Q. continues to reside with Defendant, and physical custody of E.R.Q. must be returned to Defendant.

---

14. The adoption of the provision in N.C.G.S. § 50-13.3 to allow a trial court to enforce custody orders pursuant to its contempt powers did not "overrule" *Joyner*, as Plaintiff argues. It simply created a new, specific, and limited right. The general principle acknowledged in *Joyner* survives, as evidenced by *Hackworth* and other opinions citing *Joyner* for this principle subsequent to adoption of the relevant provision in N.C.G.S. § 50-13.3.

IV. Visitation

[7] Of the orders appealed in COA17-675 and COA17-1344, only the Bickett Order survives – the Randolph Order and the 2017 Order are void and vacated. We note that though Defendant's 8 January 2013 responsive pleading to Plaintiff's initial motion in the cause – in effect, Defendant's answer and counterclaims – "prayed" the trial court order that "Defendant be given permanent custody of [E.R.Q.,]" and grant Plaintiff "supervised visitation" with E.R.Q., it does not appear from the record that the counterclaims in Defendant's responsive pleading have been decided by the trial court.

Plaintiff and Defendant have thus far handled the issue of visitation in this matter through temporary consent orders. Plaintiff and Defendant first "agreed on a temporary modification of child custody pending trial," and this agreement was entered as a temporary consent custody order on 1 May 2013. That consent order provided Plaintiff with certain visitation and other rights to which she had not previously been legally entitled. Additional consent orders modifying custody/visitation rights were entered prior to entry of the Bickett Order.

Following entry of the Bickett Order – and Plaintiff's motion for a new trial – Plaintiff and Defendant again agreed on a modified visitation schedule, which was entered as a "Temporary Custody Order" on 7 September 2016. The trial court entered an order on 13 December 2016 in which it, with the agreement of Plaintiff and Defendant, modified a visitation provision of the 7 September 2016 temporary custody order. It further ruled that, "[e]xcept as modified herein, the Temporary Custody Order filed 09/07/2016 remains in full force and effect, subject to the contempt powers of the [c]ourt." Defendant filed her notice of appeal from the Randolph Order on 16 December 2016, and Plaintiff filed her notice of appeal from the Bickett Order on 19 December 2016. Therefore, these orders establishing a visitation schedule were entered before jurisdiction over the matter was removed from the trial court to this Court by appeal. N.C.G.S. § 1-294.

Though the 2017 Order purported to "supersede[] and vacate all other North Carolina Orders in this court file[,]" the 2017 Order is void and of no effect. Neither Plaintiff nor Defendant have challenged the 13 December 2016 consent order on appeal. Therefore, the visitation provisions included and incorporated into the 13 December 2016 consent order are the last visitation provisions agreed upon by Plaintiff and Defendant and entered as a temporary consent custody order. Since the 2017 Order is a nullity, the 13 December 2016 consent order remains in effect until it is modified, vacated, or made permanent by the trial court.

V. Conclusion

Based upon our holdings above, we reach the following dispositions: (1) Although Plaintiff's appeal could be dismissed for failure to timely file notice of appeal from the 16 May 2016 Bickett Order, we grant *certiorari sua sponte* and address Plaintiff's arguments; (2) pursuant to our analyses above, we dismiss or reject Plaintiff's arguments on appeal and affirm the 16 May 2016 Bickett Order; (3) we vacate the 17 November 2016 Randolph Order on two independent grounds – (a.) Plaintiff's purported 23 May 2016 Rule 59 motion for a new trial was insufficient to confer subject matter jurisdiction on the trial court, and (b.) because Judge Bickett had subject matter jurisdiction when he entered the Bickett Order, Judge Randolph could not "overrule" the Bickett Order and substitute his own judgment for the prior judgment of Judge Bickett; (4) the Bickett Order is currently the controlling order in this matter, and any actions taken by the trial court that conflict with the rulings in the Bickett Order are rendered void and must be corrected; (5) the appeal in COA17-675 divested the trial court of jurisdiction to consider Plaintiff's Verified Motion, therefore the 2017 Order appealed in COA17-1344 is void and vacated; (6) Pursuant to the Bickett Order, legal and physical custody of E.R.Q. remains with Defendant as initially directed by the Florida Order; (7) because physical custody of E.R.Q. was improperly removed from Defendant, physical custody of E.R.Q. must be returned to Defendant; (8) the trial court shall use its discretion in weighing Defendant's right to immediate physical custody against E.R.Q.'s welfare when determining when and how to return E.R.Q. to Defendant's physical custody, *but the return of E.R.Q. to Defendant's physical custody shall not be unreasonably delayed*; (9) because the 2017 Order is void, legal custody of E.R.Q. has remained with Defendant since entry of the Florida Order, though the effect of entry of the 2017 Order was to deprive Defendant of the rights attendant to her legal custody of E.R.Q.; therefore, Defendant's right to exercise her legal custodial rights shall be immediately restored, with the following caveat; (10) the trial court may impose *temporary* restrictions on Defendant's legal custodial rights upon a determination that such restrictions are required to prevent unnecessary stress or hardship for E.R.Q.;[15] (11) the visitation orders

---

15. By way of example only, and not intended to be binding or limiting on the discretion of the trial court, the trial court could immediately transfer authority to make certain major decisions involving E.R.Q. – e.g. major medical decisions, or other decisions likely to significantly impact E.R.Q.'s physical, mental, or social welfare – to Defendant, but grant Plaintiff temporary authority to make necessary day-to-day logistical decisions concerning E.R.Q. until transfer of physical custody is achieved.

entered by the trial court, culminating in the 13 December 2016 order, remain in effect until modified or vacated by the trial court; (12) the trial court, preferably pursuant to a consent agreement, shall establish a temporary visitation plan that best serves the interests of E.R.Q. for the transition period prior to return of physical custody to Defendant;[16] (13) nothing in this opinion should be interpreted as interfering with the continuing jurisdiction of the trial court over this matter, and the trial court shall continue to resolve any custody-related issues that may arise, as long as they have not been finally resolved by this opinion or prior valid orders of the trial court; (14) the trial court may not revisit certain issues that have become the law of this case including, but not limited to, the correct law to apply if modification of the Florida Order is again sought, jurisdictional issues decided in this opinion, and prior rulings of the trial court that have either not been challenged or that have been upheld on appeal; and (15) that Plaintiff has lost her constitutionally protected status as a parent is an issue that has been finally decided and that may not be revisited by the trial court.

COA17-675: PLAINTIFF'S APPEAL DISMISSED, 16 MAY 2016 ORDER AFFIRMED; 17 NOVEMBER 2016 ORDER VACATED; REMANDED. COA17-1344: 26 MARCH 2017 ORDER VACATED; REMANDED.

Judge MURPHY concurs.

Judge BRYANT concurs in result only.

---

16. Of course, as long as the trial court retains jurisdiction, it may revisit custody/visitation issues concerning E.R.Q. when they are properly before the court.

DANIEL SMITH, Petitioner
v.
N.C. DEPARTMENT OF PUBLIC INSTRUCTION, Respondent

No. COA17-1361

Filed 18 September 2018

1. **Public Officers and Employees—career status—dismissal—unacceptable personal conduct**

   A dismissed career State employee's behavior constituted unacceptable personal conduct under the Human Resources Act where he engaged in a loud confrontation with a female colleague over his dissatisfaction with a planned "Ugly Christmas Sweater" contest; he behaved inappropriately while conducting an interview by, among other things, expressing his dissatisfaction with his supervisor to the interviewee and stating that he was considering filing a lawsuit against his employer; and by "liking" two sexually suggestive social media posts while using an account in which he identified himself as an employee of the Department of Public Instruction.

2. **Public Officers and Employees—career status—dismissal—just cause**

   Where a career status State employee engaged in a pattern of petulant, inappropriate, and insubordinate behavior throughout several years of his employment, his unacceptable personal conduct gave rise to just cause for his dismissal. The administrative law judge's factual findings supported this conclusion, including findings concerning the employee's work history that were not expressly referenced within the dismissal letter.

Appeal by petitioner from order entered 21 August 2017 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 8 August 2018.

Schiller & Schiller, PLLC, by David G. Schiller, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tiffany Y. Lucas, for respondent-appellee.

DAVIS, Judge.

In this case, a State agency dismissed a career status employee following a pattern of insubordinate and inappropriate conduct on the part of the employee that occurred over a period of years. The employee challenged his discharge in the North Carolina Office of Administrative Hearings, and an administrative law judge upheld the dismissal. Because we conclude that his discharge did not violate North Carolina law, we affirm.

Factual and Procedural Background

Daniel Smith was employed by the North Carolina Department of Public Instruction ("DPI") as a section chief in the Student Certification and Credentialing Section beginning on 18 January 2011. Throughout the time period relevant to this litigation, Smith was supervised by Jo Honeycutt, the director of DPI's Career and Technical Education ("CTE") Division. One of Honeycutt's duties as Smith's supervisor was to complete annual evaluations of his performance as an employee.

For the 1 July 2013 through 30 June 2014 review period, although Honeycutt gave Smith an overall rating of "Very Good" on his evaluation, she rated his performance on the "Client Focus" standard as "Below Acceptable." Honeycutt further noted on the evaluation that Smith needed to place "additional focus" on "improved communication with stakeholders and respect for others in the agency."

During that time period, Smith sent multiple inflammatory emails to employees of DPI partner organizations. In June 2013, Smith emailed a representative of the Association for Career and Technical Education ("ACTE") to inquire when an article Smith had submitted would be published in ACTE's trade publication. After the ACTE representative informed Smith that his article might not be published until the following year and asked him whether this was acceptable, Smith responded, "NO, I'm not good at all with the information nor your tone." In the same email, Smith wrote the following: "I'm not going away! Print the truth about credentialing or I'll take it down the street . . . . Threat, no. Promise, yes."

In November 2013, a vice-president of the National Institute for Automotive Service Excellence circulated information in an email that Smith read regarding a meeting about automotive programs and credentialing that was to take place at an upcoming ACTE conference. Smith replied to the email as follows: "Not a single member of the NC CTE staff will be attending this conference headed by corrupt persons out to enrich themseleves [sic] at the expense of our children!" He copied two DPI employees from his section on this email.

In July of 2014, Smith wore a tank top and shorts to a social event that took place during a professional conference. Honeycutt met with Smith after the conference to discuss DPI's expectations regarding appropriate attire for its employees both in the workplace and at work-related events. The following month, Smith expressed his opinion to Claire Miller, DPI's Assistant Human Resources Director, that DPI's dress code was discriminatory against men in that women were permitted to wear open-toed shoes while men were not. In response to Smith's concerns, DPI's existing dress code guidelines were withdrawn on 4 September 2014 while DPI leadership considered whether to issue new guidelines.

On 22 September 2014, Smith was scheduled to be a presenter during morning and afternoon sessions of a conference hosted by DPI at Wrightsville Beach. Although Smith was prepared to present at the beginning of the morning session, he left the conference after a few minutes because no conference attendees had yet come to his session. Because he failed to return to the conference that day, Smith did not give his scheduled presentation during the afternoon session even though conference attendees were, in fact, present at that session.

In October 2014, DPI staff learned from employees at the North Carolina Department of Labor ("DOL") that Smith had provided a reference to DOL staff for a former DPI employee whom he did not supervise during that individual's employment at DPI. Upon investigating the matter, Honeycutt determined that Smith had "misled another state supervisor" through his actions and issued him a written warning for misconduct.

Smith filed a complaint against DPI with the Equal Employment Opportunity Commission ("EEOC") on 30 September 2015. In his complaint, he alleged that DPI had retaliated against him for voicing his concerns about its dress code guidelines by, among other things, falsely accusing him of not attending the September 2014 Wrightsville Beach conference, giving him a written warning for misconduct, and moving his work cubicle to a new location.[1] Thereafter, Smith openly discussed with colleagues at DPI the fact that he had filed an EEOC complaint.

Revised dress code guidelines were made available to DPI employees on 9 October 2015. Smith subsequently printed the new guidelines on colorful paper and posted them in several places throughout his division. Upon discovering that the guidelines he posted had been taken

1. The EEOC dismissed Smith's complaint on 7 March 2016.

down and thrown away, Smith retrieved them from the trash can and hung them up again.

On 8 December 2015, Smith became involved in an argument with Carol Short, a female colleague at DPI, about an "Ugly Christmas Sweater" contest that was scheduled to take place at DPI's upcoming holiday party. During the exchange, which was overheard by several colleagues, Smith spoke in a loud and argumentative voice while making disparaging remarks about the contest and calling it discriminatory against men. He cited the contest as another example of how women "made all the decisions" at DPI.

Short was very upset by this exchange and reported to DPI Human Resources staff her concerns about the 8 December incident and her belief that Smith's behavior created a hostile work environment for female employees. From January to April 2016, a DPI review team (the "Review Team") comprised of Human Resources personnel and internal audit staff conducted an investigation into Short's allegations against Smith. As part of its investigation, the Review Team interviewed approximately 21 DPI employees, including Smith. During his interview with the Review Team, Smith repeatedly responded to questions about the 8 December 2015 incident by giving answers such as "I do not wish to discuss [it] with you at this time" and "I don't care to share."

On 1 February 2016, Christy Cheek, the CTE director for the Buncombe County Schools System, forwarded an email to Honeycutt that Cheek had received from an individual named Sharon Verdu. In her email, Verdu stated that she had applied for a health science consultant position with DPI in September 2015 and that Smith behaved unprofessionally toward her during the interview process. Specifically, Smith told Verdu that he and Honeycutt "did not get along well and that [Honeycutt] discriminated against him because he was male." Smith further informed Verdu that he might be filing a lawsuit for discrimination against DPI. In her email, Verdu wrote that she believed Smith was attempting to encourage her to remove her name from consideration for the position given his statement to her that "the first candidate hit it out of the ballpark in her interview" and the fact that Smith gave Verdu his personal cell phone number so that she could call and inform him if she decided to withdraw her application. Ultimately, Verdu did, in fact, withdraw her application from consideration for the health science consultant position.

On 29 March 2016, Honeycutt received an email from Trina Williams, the CTE coordinator for the Hickory Public Schools System, regarding

two postings that Smith had "liked" on his LinkedIn account. The first post was by an author of "erotic and paranormal romance." The caption for the post read, "Let's Talk Sex . . ." and the post contained a picture of a woman's breasts in a bra. The second post contained a picture of multiple scantily clad women.

Upon concluding its investigation into Short's allegations against Smith, the Review Team submitted a report to DPI's director of Human Resources on 11 May 2016. In its report, the Review Team found that Smith's behavior toward Short on 8 December 2015 was "intimidating to her" and that Smith "frequently engaged in a pattern of unwelcome behavior toward women, including . . . humiliating treatment of women in public professional settings. This behavior is especially egregious from a person in a leadership position." The report further stated that Smith's conduct in the workplace "had a detrimental impact on CTE staff and performance and disrupted the work of the division, even negatively impacting the brand of the division with its clients." The Review Team recommended that DPI leadership take "appropriate action" with regard to Smith.

On 18 May 2016, Smith received a pre-disciplinary conference notification letter from Honeycutt. Smith, Miller, and Honeycutt were present at the conference, which was held later that same day. During the conference, Smith was given an opportunity to respond to the issues set out in the notice, which included his (1) confrontation with Short; (2) accusations that DPI was discriminatory toward men and conduct in posting the revised dress code guidelines; (3) handling of Verdu's interview for the health science consultant position; and (4) LinkedIn account activity. Smith told Honeycutt and Miller that he believed his actions in posting the dress code guidelines were "beneficial to CTE staff" and denied the allegations concerning Verdu's interview with him. He further stated that he thought it was appropriate for him to "like" the first LinkedIn post because "as an educator [he] valued authors even if the author wrote about erotic, paranormal activity."

By means of a letter dated 19 May 2016 (the "Dismissal Letter"), Honeycutt notified Smith that his employment with DPI was being terminated. After discussing the fact that Smith had repeatedly and publicly "criticized [Honeycutt] and DPI leadership" and engaged in disrespectful and insubordinate behavior on multiple occasions, the letter listed the specific grounds forming the basis for his dismissal as follows:

1. *Showing disrespect to co-worker(s) or authorized supervisor that harms the cohesiveness in the*

organization or hinders the organization in carrying out effectively its tasks, goals, and mission according to [DPI] Human Resources Division Discipline Policy and Procedure, section 2[.]

a. On December 8, 201[5], you were disrespectful to Ms. Carol Short in the interchange you had with her in Dr. David Barbour's cubicle, by raising your voice, talking over her, and pointing your finger in her face and the effect of your behavior harmed the cohesiveness in our division.

b. As cited above, I recently learned that you have made critical statements about me to several others in our division most especially since the Fall of 2015 and that the pattern of your open and public criticism of me has harmed the cohesiveness of CTE.

c. In recent months, you have openly and with several CTE staff, noted that you have a "lawsuit" against [DPI] because [DPI] is discriminatory toward men. The statements you have made, your behavior such as posting the dress guidelines repeatedly has harmed the cohesiveness in CTE, and is unbecoming conduct of a CTE leader.

2. *Conduct unbecoming of a State employee that is detrimental to State service according to [DPI] Human Resources Division Discipline Policy and Procedure, section 2.*

a. As cited above, how you handled the search for the Health Consultant was in contradiction to Human Resources policy and unbecoming conduct of a state leader.

b. Posting or "liking" the 2 items on [your] Linkedin [sic] account as noted above when you were connected to other CTE professionals, is inconsistent with [DPI]'s mission and harms the reputation of you, CTE, and [DPI]. This is considered conduct unbecoming and is detrimental to state service.

On 6 June 2016, Smith filed an internal grievance with DPI that challenged his discharge. Following a hearing, he was notified by letter dated 1 September 2016 of DPI's decision to uphold his dismissal. Smith filed a petition for a contested case hearing in the North Carolina Office of Administrative Hearings ("OAH") on 27 September 2016 in which he argued that DPI had dismissed him without just cause in violation of the North Carolina Human Resources Act. *See* N.C. Gen. Stat. § 126-1 *et seq.* (2017).

A hearing was held in OAH that took place on 13 January 2017, 4 May 2017, 12 May 2017, and 13 May 2017 before Administrative Law Judge ("ALJ") Donald W. Overby. On 21 August 2017, the ALJ issued a Final Decision containing the following pertinent findings of fact:

> 40. On or about December 8, 2015, [Smith] was involved in a verbal exchange with a female colleague and fellow DPI Section Chief, Ms. Carol Short. During this verbal exchange, [Smith] became upset and raised his voice while expressing his dissatisfaction to Ms. Short about the "Ugly Christmas Sweater" contest which was planned as part of the Division's upcoming annual holiday party.
>
> 41. [Smith] was visibly and audibly upset during the exchange with Ms. Short, and was overheard by several colleagues speaking in a loud and argumentative voice to her. During the exchange with Ms. Short, [Smith] made disparaging remarks about the contest, calling it discriminatory against men, and cited it as another example of how women at DPI made all the decisions. [Smith] also incorrectly accused Ms. Short of being responsible for IT courses being moved from his section to hers.
>
> 42. Ms. Short was very upset by the exchange with [Smith] and discussed it with her supervisor, Ms. Honeycutt. In turn, Ms. Honeycutt suggested to Ms. Short that she discuss her concerns with HR staff.
>
> 43. Ms. Short reported her concerns about [Smith] to HR staff on December 15, 2015, and again on January 28, 2016. Ms. Short alleged that she was unlawfully harassed by [Smith] due to her gender, and that [Smith] had created a hostile work environment for her and other women at DPI. In addition, Ms. Short reported that [Smith]: (a) had asked her whether she "ratted" on him to the CTE Division Director; (b) openly and publicly criticized the

CTE Division Director; (c) discussed his performance and a disciplinary action he received; and (d) shared that he had a "lawsuit" against DPI. Ms. Short indicated that she believed these actions had a detrimental effect on the Division work force and were disruptive to the work environment.

. . . .

53. On February 1, 2016, Ms. Christy Cheek, the CTE Director with the Buncombe County Schools System, forwarded to Ms. Honeycutt an email sent to her (Ms. Cheek) from Ms. Sharon Verdu. Ms. Verdu stated in her email that she had applied for a Health Science consultant position at DPI in September 2015, and that as part of the interview process with [Smith], he had acted unprofessionally towards her. Among other things, Ms. Verdu stated that [Smith] told her that he and Ms. Honeycutt did not get along well and that Ms. Honeycutt discriminated against him because he was male. Ms. Verdu also stated that [Smith] told her that he might be filing a lawsuit for discrimination against DPI. Ms. Verdu stated that she felt as though [Smith] was trying to discourage her from staying in as a candidate for the Health Science consultant position because [Smith] had told her after her interview that, "the first candidate hit it out of the ballpark in her interview." Then he gave her his personal cell phone number so she could call him and let him know if she was going to withdraw her application. Ultimately, Ms. Verdu withdrew her application for the position from consideration.

54. At the hearing in this matter, Ms. Verdu maintained that, during the interview process, [Smith] criticized Ms. Honeycutt and the work environment within the CTE Division. He also indicated to her that he might be leaving DPI for another job and discouraged her from staying in the running for the position for which she had applied. Ms. Verdu explained why she had delayed in coming forward to report how [Smith] had acted inappropriately and unprofessionally toward her as part of the interview process. Ms. Verdu also explained that [Smith]'s conduct had a negative impact on her perception of DPI and influenced her decision, in part, about whether to stay in the application process.

> . . . .
>
> 59. On March 29, 2016, Ms. Honeycutt received email correspondence about [Smith] from the CTE Coordinator with the Hickory Public Schools System, Ms. Trina Williams. In the emails from Ms. Williams, she included two photos/images that were posted to [Smith]'s LinkedIn account. Both images were of women, some in scanty dress and one of a woman's breasts in a bra. The caption for one of the posts read, "Let's talk sex ..." Upon receiving the emails from Ms. Williams, Ms. Honeycutt sent them to Ms. Miller and expressed her concern to Ms. Miller that the posting of the images by [Smith] on his LinkedIn account demonstrated "unprofessional conduct or at least poor judgment when the profile has the employer name."

Based upon his findings of fact, the ALJ made the following pertinent conclusions of law:

> 14. Based on the preponderance of the evidence, [DPI] met its burden of proof that it had "just cause" to dismiss [Smith] for unacceptable personal conduct.
>
> 15. [Smith]'s conduct of engaging in a heated discussion with Carol Short on December 8, 2015 was unacceptable personal conduct justifying dismissal. During that conversation, he raised his voice at her, talked over her, argued with her about the Division's holiday sweater contest being discriminatory against men, accused her of stealing IT courses away from his Section, and became visibly and audibly angry.
>
> 16. As a Section Chief in the CTE Division, [Smith]'s conduct of openly and repeatedly making critical statements about the CTE Division Director to others in the Division, including complaining that the Division Director is an unfair and critical supervisor who targeted [Smith] for unfair treatment, was unacceptable personal conduct justifying dismissal.
>
> 17. As a Section Chief in the CTE Division, [Smith]'s conduct of openly sharing with others within the Division that he had a lawsuit or action against DPI based on the agency's alleged discriminatory dress code, and posting and reposting the dress code guidelines throughout the Division, was unacceptable personal conduct justifying dismissal.

> 18. As a Section Chief in the CTE Division, [Smith]'s conduct of making inappropriate comments to a prospective employee of DPI, including derogatory comments about DPI's CTE Division Director, and comments discouraging the candidate from continuing in the application and hiring process, was unacceptable personal conduct justifying dismissal.
>
> 19. As a Section Chief in the CTE Division, [Smith]'s conduct of posting or "liking" risqué images on his LinkedIn account was unacceptable personal conduct justifying disciplinary action.
>
> 20. To the degree that evidence has been admitted in this contested case hearing which is not articulated with particularity in the four-corners of the dismissal letter, that evidence is admitted in keeping with Heard-Leak v. N.C. State Univ. Ctr. for Urban Affairs, 798 S.E.2d 394, 398 (N.C. Ct. App. 2016)[.]
>
> . . . .
>
> 22. These multiple incidents of misconduct, which had a detrimental effect on the cohesiveness of the Division and the workplace environment, when viewed in their totality, and in light of [Smith]'s failure to respond positively to multiple past attempts by [DPI] to provide feedback and effectuate change in [Smith]'s workplace behavior, constitute unacceptable personal conduct justifying dismissal. [DPI] has met its burden to show that it had "just cause" to dismiss [Smith].

Smith filed a timely notice of appeal to this Court pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 126-34.02(a).

Analysis

Before we address the specific arguments made by Smith in this appeal, it is appropriate to review both the substantive provisions of law that govern the ability of State agencies to discipline career employees and the statutory framework applicable to appeals of such personnel decisions.

The North Carolina Human Resources Act provides that "[n]o career State employee . . . shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2017).

Our Supreme Court has explained that "[j]ust cause is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 591, 780 S.E.2d 543, 547 (2015) (citation and quotation marks omitted).

"There are two bases for the . . . dismissal of employees under the statutory standard for 'just cause' as set out in G.S. 126-35." 25 N.C. Admin. Code 1J.0604(b) (2018). First, a career State employee may be dismissed based on "unsatisfactory job performance." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 899 (2004). Second, an employee may be dismissed based on "unacceptable personal conduct." *Id.*

> This Court [has] delineated the difference between unacceptable job performance and unacceptable personal conduct and held that termination for engaging in the latter category is appropriate for those actions for which no reasonable person could, or should, expect to receive prior warnings. The State Personnel Manual lists, "careless errors, poor quality work, untimeliness, failure to follow instructions or procedures, or a pattern of regular absences or tardiness" as examples of unsatisfactory job performance. Unacceptable personal conduct includes "insubordination, reporting to work under the influence of drugs or alcohol, and stealing or misusing State property."

Leeks v. Cumberland Cty. Mental Health Developmental Disab. & Sub. Abuse Facil., 154 N.C. App. 71, 76-77, 571 S.E.2d 684, 688-89 (2002) (internal citations, quotation marks, brackets, and emphasis omitted).

The North Carolina Administrative Code defines "unacceptable personal conduct" as:

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> (b) job-related conduct which constitutes a violation of state or federal law;
>
> (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
>
> (d) the willful violation of known or written work rules;

(e) conduct unbecoming a state employee that is detrimental to state service;

(f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;

(g) absence from work after all authorized leave credits and benefits have been exhausted;

(h) falsification of a state application or in other employment documentation.

25 N.C. Admin. Code 1J.0614(8).

In *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 726 S.E.2d 920, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012), this Court articulated a three-part test to determine whether just cause exists to discipline an employee who has engaged in unacceptable personal conduct: (1) whether the employee actually engaged in the conduct the employer alleged; (2) whether the employee's conduct falls within one of the categories of unacceptable personal conduct; and (3) whether the misconduct constitutes just cause for the disciplinary action taken. *Id.* at 383, 726 S.E.2d at 925 (citation omitted).

"The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994) (citation omitted). Chapter 150B of the North Carolina General Statutes provides, in pertinent part, as follows:

> The Court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced by the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017). In situations "[w]here the asserted error falls under subsections 150B-51(b)(5) and (6), we apply the whole record standard of review." *Whitehurst v. East Carolina Univ.*, __ N.C. App. __, __, 811 S.E.2d 626, 631 (2018) (citation and quotation marks omitted).

> A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision. "Substantial evidence" is defined as "relevant evidence a reasonable mind might accept as adequate to support a conclusion."

Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (internal citations omitted).

Where the petitioner alleges that the agency decision "was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Souther v. New River Area Mental Health Developmental Disabilities & Substance Abuse Program*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752 (citation omitted), *aff'd per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

I. Specificity of Allegations in Dismissal Letter

Initially, Smith contends that two of the five stated grounds for his discharge contained in the Dismissal Letter were not sufficiently specific to meet the notice requirements of the Human Resources Act. He asserts that the following two statements of misconduct set forth in Paragraph 1 of the letter were not stated with the requisite particularity:

> b. As cited above, I recently learned that you have made critical statements about me to several others in our division most especially since the Fall of 2015 and that the pattern of your open and public criticism of me has harmed the cohesiveness of CTE.
>
> c. In recent months, you have openly and with several CTE staff, noted that you have a "lawsuit" against [DPI] because [DPI] is discriminatory toward men. The statements you have made, your behavior such as posting the dress guidelines repeatedly has harmed the cohesiveness in CTE, and is unbecoming conduct of a CTE leader.

N.C. Gen. Stat. § 126-35(a) provides that before a career State employee may be discharged, "the employee shall . . . be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the [termination]." N.C. Gen. Stat. § 126-35(a). This Court has stated that the purpose of the statute's notice requirement is to "provide the employee with a written statement of the reasons for his discharge so that the employee may effectively appeal his discharge." *Heard-Leak*, __ N.C. App. at __, 798 S.E.2d at 398 (citation and quotation marks omitted); *see also Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 687, 468 S.E.2d 813, 817 (1996) ("Failure to provide names, dates, or locations makes it impossible for the employee to locate the alleged violations in time or place, or to connect them with any person or group of persons, thereby violating the statutory requirement of sufficient particularity." (internal citations, quotation marks, and brackets omitted)); *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 351, 342 S.E.2d 914, 922 (N.C. Gen. Stat. § 126-35(a) "was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal"), *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). Consequently, "the written notice must be stated with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his or her discharge." *Heard-Leak*, __ N.C. App. at __, 798 S.E.2d at 398 (citation, quotation marks, and brackets omitted).

Smith argues that the above-quoted statements from the Dismissal Letter are insufficient under N.C. Gen. Stat. § 126-35(a) because they fail to provide "the names of the people [Smith] allegedly spoke to, the dates when he allegedly spoke to them or what he said." He does not, however, contend that the remaining grounds set out in paragraph (1)(a) and in paragraph (2)(a) and (b) of the Dismissal Letter were impermissibly

vague. Instead, his argument on this issue solely references the grounds listed in paragraph (1)(b) and (c) of the letter.

The Dismissal Letter — a single-spaced document that was over four pages in length — contained additional information elaborating on the specific grounds for dismissal identified in the letter. While it is true that the letter could have provided additional detail as to the grounds Smith references, we note that he does not argue that any such lack of detail actually prevented him from contesting the grounds for his dismissal.

In any event, even assuming *arguendo* that the grounds listed in paragraph (1)(b) and (c) of the Dismissal Letter were too vague, we conclude — as discussed in more detail below — that the remaining grounds set out in the letter were sufficient to support his discharge. *See Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 ("One act of [unacceptable personal conduct] presents just cause for any discipline, up to and including dismissal." (citation and quotation marks omitted)).

II. Existence of Just Cause For Dismissal

a. Whether Smith Engaged in the Alleged Conduct

Smith does not challenge Findings of Fact Nos. 40-43, 53-54, and 59 made by the ALJ. Thus, these factual findings are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("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."). Finding Nos. 40-43 concern Smith's 8 December 2015 altercation with Short while Finding Nos. 53-54 and 59 relate to Smith's conduct during Verdu's job interview and his LinkedIn account activity, respectively. Thus, because these findings have not been challenged by Smith, they establish that Smith did, in fact, engage in the conduct described therein. Accordingly, the first prong of the *Warren* test is satisfied with regard to these acts that formed the basis for Smith's discharge.

b. Whether Smith's Actions Constituted Unacceptable Personal Conduct

[1] We must next determine whether Smith's behavior rose to the level of unacceptable personal conduct. As noted above, unacceptable personal conduct under the Human Resources Act is a broad "catch-all" category that encompasses a wide variety of misconduct by State employees that can result in dismissal without the need for a prior warning. This Court has found the existence of unacceptable personal conduct in a number of different contexts. *See, e.g.*, *Robinson v. Univ. of*

N.C. Health Care Sys., 242 N.C. App. 614, 617, 775 S.E.2d 898, 900 (2015) (hospital employee displayed explosive behavior in meetings, showed disrespect for her supervisors, and repeated unsupported claims that employer was discriminating against her); *Hilliard*, 173 N.C. App. at 596, 620 S.E.2d at 16 (superintendent of correctional center improperly ate food from dining hall, accepted personal services from inmates and employees, and used State equipment to send personal faxes and make non-work related long distance telephone calls); *N.C. Dep't of Corr. v. Brunson*, 152 N.C. App. 430, 432, 567 S.E.2d 416, 418 (2002) (probation officer held in contempt of court for talking during proceeding after magistrate ordered silence). Furthermore, with regard to the "conduct unbecoming a state employee" prong of the unacceptable personal conduct definition, we have held that "no showing of actual harm is required . . . , only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer"). *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17 (citation omitted).

It is undisputed that on 8 December 2015 Smith became involved in a loud confrontation with Short that was precipitated by his dissatisfaction with a planned "Ugly Christmas Sweater" contest. During the altercation — which was overheard by several colleagues — he became "visibly and audibly upset," referred to the contest as "another example of how women at DPI made all the decisions," and accused Short of being responsible for the removal of Internet Technology courses from his section. This incident resulted in Short believing that Smith had harassed her because of her gender and had created a hostile work environment for female employees at DPI.

Smith also engaged in highly inappropriate conduct during Verdu's interview for the health science consultant position. He informed Verdu that he and Honeycutt "did not get along well and that [Honeycutt] discriminated against him because he was male." Smith also told Verdu that he was considering filing a lawsuit against DPI for discrimination, criticized the work environment at CTE, and gave Verdu his personal cell phone number so that she could immediately inform him if she decided to withdraw her application from consideration. Finally, his conduct in "liking" two sexually suggestive LinkedIn posts while using an account in which he identified himself as an employee of DPI represented yet another instance of inappropriate behavior.

We are satisfied that Smith's actions had the potential to adversely affect the mission of DPI and constituted conduct unbecoming a State employee that is detrimental to State service. Therefore, we hold that

the ALJ did not err in determining Smith's actions constituted unacceptable personal conduct under the Human Resources Act.

c. Whether Smith's Conduct Constituted Just Cause for His Dismissal

[2] The final question before us is whether Smith's improper conduct gave rise to just cause for his termination as opposed to a lesser form of disciplinary action. This Court has held that "[u]nacceptable personal conduct does not necessarily establish just cause for all types of discipline." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Thus, the final prong of the *Warren* test requires us to "balance the equities" by "examin[ing] the facts and circumstances of [the] case" in order to determine whether the "conduct constitutes just cause for the [specific type of] disciplinary action taken." *Id.* at 379, 382, 726 S.E.2d at 923, 925.

Here, Smith displayed a pattern of petulant, inappropriate, and insubordinate behavior at DPI that extended over the course of several years. Despite repeated attempts on the part of Honeycutt and others at DPI to convince him to behave more appropriately, Smith failed to make any meaningful changes to his workplace behavior.

Smith nevertheless argues that the ALJ erred in making certain findings of fact that were not directly connected to those grounds for his termination that were stated with specificity in his Dismissal Letter. Specifically, he contends that Findings of Fact Nos. 8-38, 44-52, 57-58, 60, 62, 64, 65, and 67 were made in error because they "deal with subjects that are not contained in the dismissal letter as reasons for the dismissal."[2] We disagree.

Although it is true that some of these factual findings concern events not expressly referenced within the four corners of the Dismissal Letter, we do not believe that their inclusion was improper. Our appellate courts have held that an employee's work history is a relevant consideration in reviewing the level of discipline imposed against a career State employee. *See, e.g.*, *Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 208, 784 S.E.2d 509, 518 ("[E]vidence of petitioner's prior disciplinary history was properly considered as part of the ALJ's review of the level of discipline imposed against petitioner."), disc. review denied, 368 N.C. 919, 786 S.E.2d 915 (2016); *see also N.C. Dep't of Env't & Natural Res.*, 358 N.C. at 670, 599 S.E.2d at 901 (determining that agency lacked

2. We note that the only finding of fact actually challenged by Smith as unsupported by substantial evidence in the record is Finding No. 64.

just cause to demote petitioner where petitioner had been "a reliable and valued employee . . . for almost twenty years with no prior history of disciplinary actions against him.").

In the present case, the factual findings made by the ALJ that Smith challenges as beyond the scope of the Dismissal Letter concern a number of incidents that occurred during his employment at DPI. Among other subjects, these challenged findings of fact reference (1) inflammatory emails sent by Smith to employees of DPI partner organizations; (2) inappropriate attire worn by Smith to work functions; (3) Smith's failure to give his scheduled presentation during the 22 September 2014 DPI conference; and (4) the misleading reference given by Smith to DOL staff and the official warning letter for misconduct that he received as a result. These findings serve to support the legal validity of DPI's determination that Smith's repeated misconduct warranted his dismissal.

* * *

Although the North Carolina Human Resources Act provides important protections for career State employees, it does not immunize workers from discharge after engaging in the type of longstanding insubordinate and highly inappropriate behavior that occurred here. Therefore, we affirm the ALJ's conclusion that just cause existed for Smith's dismissal.

Conclusion

For the reasons stated above, we affirm the 21 August 2017 Final Decision of the ALJ.

AFFIRMED.

Judges DILLON and INMAN concur.

JASON M. SNEED, Plaintiff
v.
CHARITY A. SNEED, Defendant

No. COA17-1169

Filed 18 September 2018

1. Evidence—expert testimony—reliability—relevance—forensic custody evaluation

The trial court did not abuse its discretion in a child custody action by admitting a forensic custody evaluator's testimony and report regarding her evaluation of the family. The testimony and report were relevant and reliable pursuant to Rule of Evidence 702(a) where the evaluator spent approximately one year conducting her evaluation, issued a 43-page report, and explained the principles and methods used in conducting the evaluation.

2. Child Visitation—temporary suspension of parent's visitation—purposeful alienation of children by one parent—children's best interests

The trial court did not abuse its discretion by ordering a conditional, temporary suspension of a mother's visitation rights to her children where the mother had purposefully alienated the children from their father and thereby had caused a detriment to the children's welfare.

3. Appeal and Error—findings of fact—challenged—inconsequential to outcome

In a child custody case, a mother's challenges to certain findings of fact were overruled where an expert's testimony (which she had challenged as inadmissible in a previous argument) supported several of the findings, and the other challenged findings had no bearing on the outcome of the case.

Appeal by defendant from order entered 12 January 2017 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 6 June 2018.

Jason M. Sneed, pro se, for plaintiff-appellee.

McIlveen Family Law Firm, by Angela W. McIlveen and David E. Simmons, for defendant-appellant.

ELMORE, Judge.

Defendant Charity A. Sneed ("Mother") appeals from an order essentially granting Mother and plaintiff Jason M. Sneed ("Father") joint custody of their teenaged children pending commencement of a reunification program designed to repair the children's relationship with Father, which the trial court found had been damaged by Mother's alienating behaviors. The order provides that Father shall have primary physical custody of the children upon commencement of the program, while Mother's visitation with the children shall be temporarily suspended pending completion of the program. The order further provides that the children attend public or private school rather than be homeschooled by Mother.

On appeal, Mother contends the trial court abused its discretion in denying her motion to exclude the expert testimony and report of the parties' consented to and court-appointed forensic custody evaluator; that it abused its discretion in suspending Mother's visitation with the children pending their completion of the reunification program with Father; and that nine of the court's findings of fact are unsupported by the evidence.

For the reasons stated herein, we affirm.

I. Background

There were three children born of the parties' August 1996 marriage, to wit: a daughter, born March 1999, and two sons, born January 2001 and May 2003.

Father initiated this action by filing a complaint for custody on 5 January 2015. That same day, Father hand-delivered Mother a copy of the complaint along with a letter from his attorney, which included the following relevant excerpts:

> [Father] is aware of your adulterous conduct. Having committed adultery and having been caught, it is appropriate that you vacate the marital residence. Please make arrangements to do so immediately, leaving the children in their home and in [Father]'s care. [Father] is willing to work with you to arrange a reasonable schedule of shared physical custody.
>
> Pending resolution of [Father]'s claim for child custody, demand is made that you not remove the children from the State of North Carolina.

Mother's response to the complaint and letter was to immediately remove the children to South Carolina without Father's knowledge or permission, and to cut off the children's contact with Father. On 6 January 2015, Father filed an *ex parte* motion for emergency custody relief in which he alleged that Mother had an ongoing relationship with a man who lived in Sweden; that Mother had plans to travel internationally with the children despite Father's objection; and that Father was concerned Mother would leave the United States with the children and not return. The trial court granted Father temporary and exclusive custody of the children in an emergency order dated 7 January 2015.

Upon Mother's return to North Carolina, and despite the terms of the January 2015 order, the parties agreed between themselves to a week-to-week rotating schedule of physical custody. However, on 19 August 2015, Father filed a motion for custody evaluation in which he alleged that Mother was not complying with the agreed-upon schedule; that Mother, who had homeschooled the children since birth, was alienating the children from Father; and that Father's relationship with the children was continuing to deteriorate.

Following a 1 September 2015 hearing, the trial court entered a consent order appointing Dr. Karen Shelton as a forensic custody evaluator. The court tasked Dr. Shelton with considering the mental health of the parties, their strengths and weaknesses, the parent-child relationships, the parents' behaviors that may affect that relationship, the children's needs, and any treatment recommendations, and it requested that Dr. Shelton provide the court with her custody recommendations.

The court also entered an updated "order on emergency child custody, temporary parenting arrangement" on 3 December 2015. The December 2015 order explained that the matter had been delayed from January to September 2015 and that an emergency no longer existed, and it provided that the parties share joint physical custody on a week-to-week rotating schedule "pending a hearing on permanent custody[.]" The order addressed such details as holiday visitation, exchange of the minor children, transportation to extracurricular activities, access to records, and communication between the parties.

On 10 March 2016, Father filed motions for contempt and custody modification in which he alleged that Mother was still refusing to comply with the week-to-week rotating schedule. Father specifically alleged that he had not visited with the parties' daughter since 1 September 2015, and that Mother had "undertaken a course of conduct designed to alienate" their sons from Father. Father's motions were denied following

a 24 May 2016 hearing in which the parenting coordinator, the parties' daughter, the children's therapists, and Mother all testified.

A permanent custody hearing took place on 16 and 17 November as well as 5 and 6 December 2016. On the morning of 16 November 2016, Mother filed a motion *in limine* "to exclude the custody evaluation report of Dr. Karen Shelton and trial testimony of Dr. Karen Shelton."[1] The trial court denied Mother's motion and subsequently accepted Dr. Shelton "as an expert in the field of child custody evaluation and child psychology." Dr. Shelton's expert testimony included her opinion as to the matters she had been tasked by the court to consider, and her August 2016 custody evaluation report was admitted into evidence.

In an order dated 12 January 2017, the trial court essentially granted the parties joint custody pending commencement of Family Bridges: A Workshop for Troubled and Alienated Parent-Child Relationships. The order specifically provides:

> 1. Plaintiff/Father and the minor children shall participate in the Family Bridges program as soon as administratively possible and in all events, this program shall be completed prior to March 25, 2017 when [the parties' daughter] turns eighteen (18). Pending the commencement of the reunification program, the parties shall continue to operate under the physical custody schedule set forth in the December 3, 2015 custody order.
>
> 2. As soon as administratively possible, Plaintiff/Father shall have primary physical custody of the minor children and [he] and the minor children shall attend the Family Bridges program.
>
> 3. Beginning on the commencement date of the Family Bridges program, and pending the completion of the requirements as set forth herein, Defendant/Mother shall have no contact with the minor children[.]
>
> . . . .
>
> 5. The parties are granted joint legal custody of the minor children.

1. Mother also filed motions to exclude the testimony "of the minor children's treating clinicians, counselors, therapists, and psychologists" and "of Kary Watson," the court-appointed parenting coordinator, but she did not appeal the denial of those motions.

> . . . .
>
> 13. Beginning January 1, 2017, [the parties' sons] shall cease homeschooling and shall be enrolled in a public or private school. Plaintiff/Father shall discuss the school choice in good faith with Defendant/Mother, but shall have final-decision making authority if the parties cannot come to a mutual decision.
>
> 14. This Order is subject to review pending the completion of the Family Bridges program and a period of consecutive no contact between Defendant/Mother and any of the minor children lasting for ninety (90) consecutive days. Should Defendant/Mother have contact with the children prior to the expiration of the no-contact period, the period of no contact shall begin again . . . until ninety (90) consecutive days have passed without parent-child contact. At the conclusion of the no-contact period, this Court will determine the conditions, timing, and nature of resumption of contact between Defendant/Mother and the minor children with the assistance of and input from any aftercare professional(s).

Mother entered notice of appeal from the order on 10 February 2017.

II. Analysis

Mother contends the trial court abused its discretion in denying her motion to exclude Dr. Shelton's expert testimony and report and in temporarily suspending Mother's visitation rights. She also argues that nine of the court's thirty-six findings of fact are unsupported by the evidence.

A. The trial court did not abuse its discretion in denying Mother's motion to exclude Dr. Shelton's expert testimony and report.

[1] Mother first contends the trial court abused its discretion in denying her motion to exclude Dr. Shelton's expert testimony and report because neither the testimony nor report were relevant or reliable as required by Rule 702(a) of our Rules of Evidence.

"When reviewing the ruling of a trial court concerning the admissibility of expert opinion testimony, the standard of review is whether the trial court committed an abuse of discretion." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004)). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason

or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citations, quotation marks, and brackets omitted).

Rule 702(a) "has three main parts, and expert testimony must satisfy each to be admissible." *State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 8 (2016). "First, the area of proposed testimony must be based on scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. This is the relevance inquiry." *Id.* Second, the witness must be qualified as an expert by skill, knowledge, experience, training, or education. *Id.* at 889, 787 S.E.2d at 9. And third,

> the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data. (2) The testimony must be the product of reliable principles and methods. (3) The witness must have applied the principles and methods reliably to the facts of the case.

Id. at 890, 787 S.E.2d at 9 (citations, quotation marks, and brackets omitted).

In the instant case, Mother specifically argues that Dr. Shelton's testimony and report were neither relevant nor reliable. As to relevancy, she contends Dr. Shelton's contributions did not provide insight beyond conclusions the trial court could readily draw from its ordinary experience. According to Mother, Dr. Shelton merely provided "a version of facts found . . . after interviewing many of the same people, and reviewing much of the same records, that came before the trial court." Regarding reliability, Mother argues that Dr. Shelton's opinion was "short on methodology"; "contains no order of operations, step by step analysis, or information regarding the principles or methods relied upon to create it"; and "never states the actual technique used." The record reveals that Mother's argument is meritless.

In this particular case, Dr. Shelton spent approximately one year conducting her custody evaluation, and she issued her forty-three page report on 15 August 2016. At trial, Dr. Shelton explained that a child custody evaluation is "a comprehensive evaluation that gathers information in order for the expert to form opinions related to the court's determination of child custody and parenting plans." She then proceeded to describe the general process of conducting such an evaluation as follows:

> After a court order is obtained, the [custody] evaluation includes multiple components. It includes a review

> of records. It includes interviews with the parents. It includes . . . parent-child observations and interviews with the children. It . . . often includes psychological testing of the parents. It includes obtaining collateral information [from] third parties that are familiar with the family, the children . . . that may . . . have observations or input about what's happening in this family dynamic.

Dr. Shelton went on to testify to and elaborate on the conclusions and analysis contained in her report.

Because Mother has failed to demonstrate how the trial court abused its discretion in admitting the expert testimony and report of Dr. Shelton—the consented-to and court-appointed forensic custody evaluator—this assignment of error is overruled.

B. <u>The trial court did not abuse its discretion in ordering a conditional, temporary suspension of Mother's visitation rights</u>.

[2] Mother next contends the trial court abused its discretion in suspending her visitation rights without finding that visitation is not in the best interest of the minor children as required by N.C. Gen. Stat. § 50-13.5(i).

The court has wide discretion to fashion an order which will best serve the interests of the child; thus, "[t]he decision of the trial court regarding custody will not be upset on appeal absent a clear showing of abuse of discretion, provided that the decision is based on proper findings of fact supported by competent evidence." *Woncik v. Woncik*, 82 N.C. App. 244, 247, 346 S.E.2d 277, 279 (1986).

"While a noncustodial parent has a right to reasonable visitation, that right is limited to avoid jeopardizing the child's welfare." *Id.* at 250, 346 S.E.2d at 280-81. Pursuant to N.C. Gen. Stat. § 50-13.5(i), the trial court, "prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the minor child." N.C. Gen. Stat. § 50-13.5(i) (2017) (emphasis added).

In the instant case, the trial court "had ample evidence before him to justify a conclusion that [Mother] had purposefully engaged in a course of conduct designed to alienate the child[ren]'s affections for [their] father, and that these actions were detrimental to the child[ren]'s welfare." *Woncik*, 82 N.C. App. at 250, 346 S.E.2d at 281. Moreover, the court did not permanently deny Mother the right of reasonable visitation;

rather, the court specifically found and concluded that "Defendant/Mother is a fit and proper person to exercise visitation with the minor children, however, it is in the minor children's best interests and welfare that Defendant/Mother's visitation with the minor children be suspended pending completion of the Family Bridges program[.]" The court's order thus complied with the requirements of N.C. Gen. Stat. § 50-13.5(i).

Because the trial court did not abuse its discretion "in fashioning an order designed to prevent further harm to the child[ren] from this type of behavior," this assignment of error is overruled. *Woncik*, 82 N.C. App. at 250-51, 346 S.E.2d at 281.

C. The trial court's findings of fact are supported by competent evidence.

[3] In her final argument on appeal, Mother challenges findings of fact nos. 23, 24, 25, 27, 28, 29, 31, 33, and 34 as unsupported by the evidence.

According to Mother, the only evidence to support findings 23, 27, 28, 29, and 31 came from Dr. Shelton's testimony. These findings read as follows:

> 23. During the trial of this matter, the Court heard from four neutral parties: Lucy Dunning and Maria Curran, the family's therapists; Kary Watson, the parenting coordinator; and Karen Shelton, the Court-appointed forensic evaluator. All four witnesses indicated, and the Court so finds, that since the date of the parties' separation Defendant/Mother has engaged in behaviors designed to alienate the minor children from Plaintiff/Father.
>
> 27. In her report to this Court, Dr. Karen Shelton, the agreed-upon and Court-ordered custody evaluator, testified and the Court so finds that Defendant/Mother exaggerated her concerns and allegations about Plaintiff/Father. Dr. Shelton described, and this Court so finds, that Defendant/Mother acted as a "gatekeeper," or a parent who designates or controls access to the other parent. Dr. Shelton testified and the Court so finds that the "gatekeeping" she observed by Defendant/Mother was severe and unhealthy.
>
> 28. Dr. Shelton further testified and this Court so finds that although the minor children's education has progressed satisfactorily under Defendant/Mother's homeschooling, Defendant/Mother has begun to use homeschooling as a

> weapon to diminish the relationship between the minor children and Plaintiff/Father.
>
> 29. Dr. Shelton further recommended the intervention of the Family Bridges program to repair the damaged relationship between Plaintiff/Father and the minor children. The Court finds that this program would be in the best interests and welfare of the minor children.
>
> 31. The minor children's behavior since separation reflects Defendant/Mother's efforts to alienate the relationship between the minor children and Plaintiff/Father. [The parties' daughter] has not spoken substantively with Plaintiff/Father in over one (1) year, and [the parties' sons'] behavior toward Plaintiff/Father is dictated completely by Defendant/Mother. Most recently, an application was submitted to Liberty Preparatory Academy in [the older son's] name. The application deceptively included what purported to be Plaintiff/Father's electronic signature, although Plaintiff/Father had never seen the application. Further, the application included an email address for [the older son] that listed [the older son's] last name as Johnston, Defendant/Mother's maiden name. Prior to the date of the parties' separation, Plaintiff/Father had a close and loving relationship with all of the minor children. Currently, as a result of Defendant/Mother's acts, those relationships are strained and damaged.

Mother makes no further argument as to the lack of evidentiary support for these findings other than to insist that Dr. Shelton's testimony was inadmissible.

Because Dr. Shelton's testimony was admissible as discussed above, we conclude that findings 23, 27, 28, 29, and 31 were supported by the evidence.

Mother also challenges finding 24, the final sentence of finding 25, finding 33, and finding 34, which read as follows:

> 24. The minor children . . . attended counseling with Ms. Dunning in the Spring of 2016. On May 24, 2016, Ms. Dunning testified at a Motion for Contempt hearing in this matter. At that hearing, Ms. Dunning recommended: that Plaintiff/Father and Defendant/Mother attend counseling for co-parenting; that the minor children attend

> reunification therapy with Plaintiff/Father; and that Defendant/Mother receive individual counseling to alleviate her anxieties about the minor children establishing a relationship with Plaintiff/Father. The Court finds that these recommendations were reasonable and appropriate and in the best interests of the minor children. Ms. Dunning testified and the Court so finds that instead of following those recommendations, Defendant/Mother unilaterally chose to terminate the minor children's relationship with Ms. Dunning.
>
> 25. Maria Curran supervised the children's therapy and conducted family therapy for the parties and the children. At the trial of this matter, Dr. Curran testified and the Court so finds that the minor children appeared unconcerned about the status of their relationship with Plaintiff/Father. Dr. Curran recommended the Family Bridges Program, which she testified has a 95% success rate.
>
> 33. Defendant/Mother is a fit and proper person to have visitation with the minor children. However, pending the minor children's completion of reunification therapy with Plaintiff/Father, such visitation shall be suspended as set forth below.
>
> 34. Since June of 2016, both [the parties' sons] have been more engaged in activities with Plaintiff/Father. [They] have been well-behaved, traveled to family events, and participated in family activities with Plaintiff/Father. However, this Court finds that they were "being deceptive" in their engagement with Plaintiff/Father.

As to finding 24, Mother contends the finding "is unsupported by evidence because it asserts that [Mother] chose to do something 'instead of' following recommendations of which she was unaware." She argues that the evidence does not support a finding that Ms. Dunning made any recommendations at the May 2016 hearing, and that Mother was therefore unaware of the recommendations. However, the evidence shows that Mother and her attorney had been informed of Ms. Dunning's recommendations as of May 2016.

Mother also challenges the final sentence of finding 25, stating that while "Dr. Curran testified she was 'familiar' with the [Family Bridges] program, she offered no recommendation."

Similarly, Mother's entire argument as to finding 33 consists of three sentences in which she takes issue with the trial court's reference to "reunification therapy." Mother states that, "[a]s 'reunification therapy' is not defined, [she] assumes this means the Family Bridges program. Dr. Shelton recommended Family Bridges, and testified it was not a therapeutic program, but an educational program."

As to finding 34, Mother contends there was "no evidence that [the parties' sons] were 'being deceptive' in their engagement with [Father]."

We conclude that Mother's specific challenges to findings 24, 25, 33, and 34 are inconsequential and do not warrant further review. *See, e.g.*, *Black Horse Run Prop. Owners Ass'n-Raleigh, Inc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987) ("Where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions."). This assignment of error is overruled.

III. Conclusion

The trial court did not abuse its discretion in denying Mother's motion to exclude the expert testimony and report of the parties' consented-to and court-appointed forensic custody evaluator, nor in temporarily suspending Mother's visitation with the children pending their completion of the reunification program with Father. Moreover, the trial court's findings of fact are supported by the evidence. Accordingly, the order of the trial court is hereby:

AFFIRMED.

Judges HUNTER, JR. and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DOUGLAS NELSON EDWARDS

No. COA18-337

Filed 18 September 2018

1. Evidence—cross-examination—limits—matters raised during direct examination

In a trial for multiple offenses arising from the abduction and assault of a six-year-old girl, the trial court abused its discretion by limiting defendant's cross-examination of the State's witnesses about his post-arrest interrogation after the State elicited evidence regarding defendant's questioning the night before he was arrested. The trial court did not adhere to Rule of Evidence 611, which does not limit cross-examination to relevant matters raised during direct examination. However, the error was not prejudicial to defendant's case given the overwhelming evidence of defendant's guilt and the fact that the jury heard the evidence defendant sought to admit when he testified on his own behalf.

2. Sentencing—aggravating factors—sufficiency of notice—statutory procedure

In a case involving multiple offenses arising from the abduction and assault of a six-year-old girl, the Court of Appeals rejected defendant's arguments that aggravating factors must be alleged in an indictment, and that the jury instruction for the aggravating factor of "heinous, atrocious, or cruel" was unconstitutionally vague. The State complied with N.C.G.S. § 15A-1360.16 by giving defendant written notice of the aggravating factors it intended to prove, a procedure that conforms with U.S. Supreme Court precedent. The latter argument has been rejected previously by the N.C. Supreme Court.

Judge MURPHY concurring in result only.

Appeal by defendant from judgments entered 21 September 2017 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Marilyn G. Ozer for defendant.

ARROWOOD, Judge.

Douglas Nelson Edwards ("defendant") appeals from judgments entered on his convictions for attempted first degree murder, statutory sex offense with a child by an adult, assault with deadly weapon inflicting serious injury ("AWDWISI"), first degree kidnapping, and taking indecent liberties with a child. For the following reasons, we find no prejudicial error.

I. Background

On 14 November 2016, a New Hanover County Grand Jury indicted defendant on one count of attempted first degree murder, one count of statutory sex offense with a child by an adult, one count of statutory rape of a child by an adult, one count of AWDWISI, one count of first degree kidnapping, and two counts of indecent liberties with a child. Additionally, on 20 February 2017, a New Hanover County Grand Jury indicted defendant on one count of intimidating a witness and one count of felony obstruction of justice.

Defendant's case was tried in New Hanover County Superior Court before the Honorable Phyllis M. Gorham beginning on 11 September 2017. The evidence at trial tended to show that shortly before 5:00 p.m. on 14 September 2016, defendant abducted a six-year-old girl (the "juvenile") from in front of her home in the Royal Palms Mobile Home Park. Defendant drove with the juvenile on his moped to a wooded area, assaulted the juvenile, and bound the juvenile to a tree with a chain around her neck. Based on witnesses who either saw the defendant in the mobile home park, saw the abduction, or recognized defendant when they saw him driving on the moped with the juvenile, law enforcement was quickly able to identify defendant as a suspect.

Within a short time from the abduction, law enforcement stopped defendant twice. During the second stop, defendant agreed to go to the sheriff's office to be interviewed. During the interview on 14 September 2016, defendant denied knowing anything about the abduction. When law enforcement became convinced defendant was not going to confess, law enforcement took defendant to his aunt's house and released him under surveillance with the hope that defendant would return to the location where he left the juvenile.

Law enforcement continued to search for the juvenile through the night. Based on witnesses' recollections, cell phone tracking, and gps

and video from a school bus that passed defendant while he was pulled to the side of the road, law enforcement was able to use canines to locate and rescue the juvenile the following morning.

After the juvenile was rescued, defendant, who was still being surveilled by law enforcement, was arrested. Defendant was unware the juvenile had been rescued at the time. During defendant's post-arrest interrogation on 15 September 2016, defendant admitted to the abduction and took law enforcement to the location where he left the juvenile and from where the juvenile was rescued. Defendant learned the juvenile had been rescued after he could not find the juvenile where he left her.

Acknowledging there was insufficient evidence of statutory rape, the State voluntarily dismissed the rape charge at the close of the State's evidence. The State also conceded there was no evidence of intent with deceit for felony obstruction of justice and requested that the jury be instructed on misdemeanor obstruction of justice.

On 20 September 2017, the jury returned verdicts finding defendant guilty of attempted first degree murder, statutory sex offense with a child by an adult, AWDWISI, first degree kidnapping, and two counts of indecent liberties with a child. The jury returned verdicts finding defendant not guilty of intimidating a witness and obstruction of justice. The trial court entered judgment on the not guilty verdicts on 20 September 2017.

Pursuant to a notice of aggravating factors filed by the State on 22 June 2017, the State argued to the jury on 21 September 2017 that the offenses were "especially heinous, atrocious, or cruel" and that "[t]he victim was very young." The jury determined both aggravating factors applied to each offense. The trial court determined an aggravated sentence was justified for each offense based on the jury's determination that each offense was "especially heinous, atrocious or cruel." The trial court arrested judgment on one of the indecent liberties with a child convictions and entered separate judgments for each of the other convictions sentencing defendant as a prior record level IV to consecutive terms, each at the top of the aggravated range for each offense, totaling 970 to 1,320 months of imprisonment. The trial court also ordered defendant to register as a sex offender for life following his release. The trial court postponed its determination on satellite-based monitoring. Defendant gave notice of appeal in open court following sentencing. Appellate entries were received on 25 September 2017.

Defendant subsequently filed a Motion for Appropriate Relief ("MAR") on 29 September 2017 challenging the aggravated sentences. By

order filed 13 November 2017, the trial court denied defendant's MAR. Appellate entries related to the MAR were received on 28 November 2017.

II. Discussion

On appeal, defendant challenges the trial court's decision to disallow cross-examination of the State's witnesses regarding his post-arrest interrogation and the trial court's denial of his MAR.

1. Cross-Examination

[1] Defendant first argues his constitutional rights to due process, a fair trial, and the right to silence were violated when the trial court limited his opening statement and prevented him from cross-examining the State's witnesses concerning his admission and his attempt to help investigators rescue the juvenile during his post-arrest interrogation. Defendant asserts that

> [b]ecause [he] was charged with attempted first degree murder and assault with a deadly weapon with intent to kill, both of which required the State to prove that [he] intended the child would die, it was critical to the defense to be able to show the jurors that [he] did tell the officers where she was located and actually led them to the site.

Defendant claims he was forced to testify because of the trial court's erroneous evidentiary rulings. As a result of the alleged errors and constitutional violations, defendant contends he is entitled to a new trial on the attempted first degree murder and assault with a deadly weapon with intent to kill charges. We disagree.

At the outset, we note that defendant was not charged with assault with a deadly weapon with intent to kill, as defendant asserts. Defendant was charged with and convicted of assault with a deadly weapon inflicting serious injury; therefore, intent to kill was not at issue for the assault offense.[1]

Moreover, a review of the record shows the trial court did not grant a motion by the State to limit defendant's opening statement and did not order defendant not to mention his post-arrest interrogation in his

1. A review of the records reveals the trial court entered judgment in count 3 of file number 16 CRS 6867 for "AWDW intent to kill" in violation of N.C. Gen. Stat. § 14-32(c). This appears to be a clerical error as defendant was indicted, the jury was instructed, and defendant was convicted of AWDWISI in violation of N.C. Gen. Stat. § 14-32(b). Both felony assaults have the same punishment class and remand is appropriate to correct the clerical error.

opening statement, as defendant avers. In fact, the State never made such a motion. Prior to the opening statements, the State indicated that it would not be introducing all of defendant's statements to law enforcement and argued it was not required to do so under Rule 106 because the pre- and post-arrest interviews were discrete. The State explained that it was raising the issue prior to opening statements because it did not want the defense to mention evidence that may not be introduced during the presentation of the State's case. Specifically, the State asserted that "while [the defense] certainly can make whatever opening they want to do, they do that at their peril of either not being able to back up what they say or having to put on a case that they might not otherwise have wanted to." After additional clarification of the State's position—that the State's presentation of evidence from the interview of defendant on 14 September 2016 did not open the door to cross-examination by the defense regarding the post-arrest interrogation of defendant on 15 September 2016—the State further explained that, preemptively,

> [it] just wanted to give [the defense] the warning that [it] believe[s], . . . that if [the defense] makes any opening statement to promises [the jury will] hear [evidence regarding defendant's post arrest interrogation], that's going to be requiring [the defense] to put on a case which they're not constitutionally required at this point to do. And I didn't want that trial strategy to be something that the defendant said he was forced into doing because of some utterance by his attorney during opening, which is, of course, not evidence.
>
> . . . . [The State didn't] want [defendant] to claim that this is a trial strategy that he did not endorse and agree with . . . and he is now forced to go down that road because he's been placed there by his attorneys.

Although the defense disagreed with the State's position that the post-arrest interrogation was a discrete interview, the defense acknowledged that it understood the State's argument that "unless [the defense is] prepared to put on some evidence, [it] [could not] say to the jury in [its] opening the [defendant] later took them to that scene." The trial court simply replied, "[y]ou would be doing that at your own risk."

Because the trial court did not actually limit the defense's opening statement, the issues to be addressed are whether the trial court erred by disallowing the defense's cross-examination of the State's witnesses and whether defendant was prejudiced thereby.

In this case, the State elicited testimony from law enforcement officer's about defendant's statements during road-side stops and an interview on 14 September 2016. The State, however, did not elicit any testimony regarding the post-arrest interrogation of defendant on 15 September 2016 and sought to prevent defendant from introducing any evidence from its witnesses regarding the post-arrest interrogation during cross-examination. The trial court sided with the State and disallowed the defense from questioning the State's witnesses concerning defendant's post-arrest interrogation. However, in order to fully address the issue, it is necessary to understand how the issue was repeatedly raised during defendant's trial.

The State called attention to the issue just prior to calling Detective Lisa Hudson to testify. The State informed the court that it "intend[ed] to introduce through Detective Hudson a recorded video and audio interview that was conducted by Detective Hudson of this defendant on the night of September 14, 2016." At that time, the State asserted the same argument that it did prior to opening arguments, that the questioning of defendant on 14 September 2016 was separate from the post-arrest interrogation of defendant on 15 September 2016. The State further argued that case law stood for the proposition that defendant is not entitled to elicit testimony from the State's witnesses as to self-serving declarations made by defendant during an interview on a later date about which the State had not questioned the witnesses. The State maintained that, "as long as we don't mention the fact that he was interviewed by New Hanover County sheriff's detectives after his arrest on September 15th, [the defense] cannot -- they cannot ask any of our witnesses on cross-examination about that even if we talk about the prior night's interview." After further discussion and disagreement, the parties agreed the State should proceed with its direct examination of Detective Hudson and that the issue would be revisited at a later time when the jury was not waiting.

Before the jury returned to the court room the following morning, the defense made an offer of proof. On *voir dire*, Detective Hudson testified that during the post-arrest interrogation of defendant on 15 September 2016,

> [defendant] admitted to what he done and he took us to the location where he took [the juvenile] and tied her to the tree and explained everything, told us on the way there everything that we needed to know as far as getting the locks off and what we needed. He gave us some specific directions exactly to where she was . . . .

Detective Hudson testified that defendant stated he hoped the juvenile was okay and that he was sorry. Upon conclusion of the *voir dire* testimony of Detective Hudson, the defense argued the State's Rule 106 argument was a red herring because this was not a Rule 106 issue. The defense asserted that "[w]hat the State is trying to do is circumvent [defendant's] right to cross-examine this witness" and "[defendant] has a right to ask [Detective Hudson] questions about what happened after he was arrested." The defense explicitly stated it "[was] not trying to admit statements or recording."

Upon hearing the arguments, the trial court ruled the defense could not cross-examine Detective Hudson regarding the post-arrest interrogation of defendant on 15 September 2016. The trial court explained, "I find that the [15 September 2016] interview was a separate interview from the [14 September 2016] interview; and, therefore, I will not allow the defense to ask this witness any questions . . . about the [15 September 2016] interview." The trial court noted the defense's objection, and when the defense questioned Detective Hudson how many times she interviewed defendant, the State's objection was sustained.

The State later called Detective Michael Sorg, who led the surveillance of defendant on the morning of 15 September 2016 until defendant's arrest, as a witness. Upon completion of the State's direct examination, the defense put on an offer of proof. Detective Sorg testified on *voir dire* that, on 15 September 2016, defendant took law enforcement to the location where he left the juvenile. Detective Sorg also testified that defendant stated he was planning to go back to the location to bring the juvenile water. After the *voir dire* testimony, the defense renewed its arguments that the defense should be able to cross-examine the witness regarding the post-arrest interrogation of defendant. In response, the State argued that defendant would be required to take the stand if he wanted the evidence admitted. The State argued the evidence was inadmissible because it was self-serving hearsay and because the post-arrest interrogation on 15 September 2016 was separate from the interview of defendant on 14 September 2016. The trial court again ruled the defense could not cross-examine the State's witness concerning the post-arrest interrogation.

Prior to the defense's cross-examination of Detective Sorg on the third morning of evidence, the defense again requested to question Detective Sorg about defendant taking law enforcement to the location where the juvenile was found. The defense argued that disallowing the evidence would mislead and deceive the jury. The trial court denied the defense's request and explained that, "[m]y understanding based

upon everything that I heard about that last interview on [15 September 2016], that there's not been any testimony about that last interview by Detective Sorg; therefore, you will not question him about anything that has to do with that interview."

Upon the conclusion of the State's evidence, the issue of the defense presenting evidence regarding the 15 September 2016 post-arrest interrogation of defendant arose again. The State argued the defense could not get around the trial court's prior rulings by calling Detective Sorg as a defense witness. The defense responded that it understood the trial court's prior rulings to exclude testimony of defendant's hearsay statements on cross-examination and explained that it was not seeking to introduce hearsay statements. Nevertheless, the trial court ruled that the defense could not question Detective Sorg on anything related to the post-arrest interrogation of defendant on 15 September 2016. The State reiterated that the testimony was a self-serving statement by defendant, was in a completely different interview, and is hearsay. The State also reasserted its position that "[i]f they want to present evidence about what the defendant said and did during those interviews, [defendant] is going to have to take the stand and testify himself." The trial court agreed and disallowed the defense from questioning Detective Sorg about anything related to the post-arrest interrogation on 15 September 2016. The defense made another offer of proof from Detective Sorg to preserve the issue.

Defendant then took the stand to testify in his own defense. Defendant testified about his post-arrest interrogation on 15 September 2016.

In arguing the trial court erred in disallowing cross-examination of the State's witnesses concerning defendant's post-arrest interrogation on 15 September 2016, defendant first contends the cross-examination should have been allowed under Rule 106 of the North Carolina Rules of Evidence in order to prevent the jury from being misled or deceived by the evidence presented of the 14 September 2016 interview. Defendant's argument is misplaced.

Rule 106 provides that, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." N.C. Gen. Stat. § 8C-1, Rule 106 (2017). This Court has explained that

> Rule 106 codifies the standard common law rule that when a writing or recorded statement or a part thereof

> is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted. The trial court decides what is closely related. The standard of review is whether the trial court abused its discretion. The purpose of the "completeness" rule codified in Rule 106 is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot, because of the inadequacy of repair work when delayed to a point later in the trial.

State v. Thompson, 332 N.C. 204, 219-220, 420 S.E.2d 395, 403-404 (1992) (internal quotation marks and citations omitted).

Below, the State argued, and the trial court determined, the post-arrest interrogation was discrete from the 14 September 2016 interview, from which the State introduced transcripts and recordings. Therefore, the trial court determined Rule 106 did not require the admission of evidence regarding the post-arrest interrogation of defendant.

Defendant argues the trial court erred in this determination because a break in time between the interview on 14 September 2016 and the post-arrest interrogation on 15 September 2016 is not determinative. Citing *Thompson*, 332 N.C. at 220, 420 S.E.2d at 404, defendant contends the trial court should have determined whether the post-arrest interrogation was explanatory or relevant and whether there was a nexus between the prior interviews and the post-arrest interrogation. In *Thompson*, however, the Court held there was no nexus between a prior exculpatory interview that the defendant sought to admit under Rule 106 at the time the State introduced tapes and transcripts of inculpatory telephone conversations between defendant and an informant. *Id.* 220-21, 420 S.E.2d at 404. Thus, the trial court did not abuse its discretion in denying the defendant's attempt to introduce a transcript of the prior exculpatory interview. *Id.* at 221, 420 S.E.2d at 404. The *Thompson* Court noted, "[i]t was defendant's responsibility, not the State's, to introduce evidence about his exculpatory interview." *Id.* at 220-21, 420 S.E.2d at 404.

Similarly, in *State v. Broyhill*, __ N.C. App. __, 803 S.E.2d 832 (2017), *disc. review denied*, 370 N.C. 694, 811 S.E.2d 588 (2018), which defendant also relies on, this Court held the trial court did not err in excluding transcripts of two custodial interviews that the defendant sought to have admitted contemporaneously with a tape and a transcript of a subsequent custodial interview. This Court explained in *Broyhill* as follows:

> the trial court correctly applied Rule 106 in its decision to exclude the first two statements at trial. After reviewing all three recorded statements and comparing the contents thereof, the court concluded that defendant made no statement during the first or second interview that under Rule 106 ought, in fairness, to be considered contemporaneously with the statements of April 26. The court found no instance where the statements in the April 26 interview require further explanation by any excerpts from the April 23 or the April 25 interview, and no instance where the statements in the [April 26] interview were rendered out of context or misleading in the absence of excerpts from the April 23 or April 25 interview. Defendant harps on the temporal connection and interrelated nature of the statements but fails to explain precisely how the first two statements would enhance the jury's understanding of the third. And upon our review of the interview transcripts, we conclude defendant has failed to show that the court abused its discretion in excluding defendant's first two statements at trial.

Id. at __, 803 S.E.2d at 844 (internal quotation marks omitted).

As in *Thompson* and *Broyhill*, there is no nexus between the 14 September 2016 interview of defendant and the 15 September 2016 post-arrest interrogation of defendant that would require evidence of the post-arrest interrogation to explain or add context to the 14 September 2016 interview. Thus, the trial court did not err in determining the 14 September 2016 interview and the 15 September 2016 post-arrest interrogation were discrete. That determination, however, is of no consequence in this case.

By its terms, Rule 106 only applies to the introduction of a "writing or recorded statement" by defendant "which ought in fairness to be considered contemporaneously" with a writing or recorded statement introduced by the State. N.C. Gen. Stat. § 8C-1, Rule 106. The commentary to Rule 106 explains that, "[f]or practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations." *See* Advisory Committee Notes to Rule 106. The commentary also notes that "[t]he rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case." *Id.*

In both *Thompson* and *Broyhill*, the defendants sought to introduce transcripts of interviews under Rule 106 at the same time that the State

introduced transcripts and recordings of phone calls, *see Thompson*, 332 N.C. at 219, 420 S.E.2d at 403, and another interview, *see Broyhill*, __ N.C. App. at __, 803 S.E.2d at 838. In contrast to those cases, the defense does not argue that it attempted to introduce a transcript or recording of the post-arrest interrogation at the time the State introduced recordings of the 14 September 2016 interview. The defense explained and put on offers of proof showing that it simply wanted to question the State's witnesses about the post-arrest interrogation of defendant during cross-examination.

Rule 106 neither provides for the admission or exclusion of such testimony during the defense's cross-examination of the State's witnesses in this case.

It is Rule 611 of the North Carolina Rules of Evidence that addresses the scope of cross-examination. The pertinent portion of Rule 611 provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2017). Our appellate courts have referred to this rule as " 'the "wide-open" rule of cross-examination, so called because the scope of inquiry is not confined to those matters testified to on direct examination.' " *State v. Singletary*, 247 N.C. App. 368, 374, 786 S.E.2d 712, 717 (2016) (quoting *State v. Penley*, 277 N.C. 704, 708, 178 S.E.2d 490, 492 (1971)). "But, the defendant's right to cross-examination is not absolute." *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854, *disc. review denied*, 333 N.C. 793, 431 S.E.2d 28 (1993). "[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990); *see also* N.C. Gen. Stat. § 8C-1, Rule 611. "Absent a showing of an abuse of discretion or that prejudicial error has resulted, the trial court's ruling will not be disturbed on review." *State v. Maynard*, 311 N.C. 1, 10, 316 S.E.2d 197, 202-203, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984), *dismissal of habeas corpus aff'd*, 943 F.2d 407 (1991), *cert. denied*, 502 U.S. 1110, 117 L. Ed. 2d 450 (1992).

Although defendant does not specifically cite Rule 611, defendant does make the argument that testimony regarding his post-arrest interrogation that the defense sought to elicit from the State's witnesses during cross-examination was relevant. We agree. "Relevant evidence" is broadly defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). In this case, there is no question

that the defendant's post-arrest interrogation, during which defendant admitted to the abduction of the juvenile and took law enforcement to the location where he left the juvenile chained to a tree, was relevant. The issue this Court must decide is whether the trial court's exclusion of the relevant evidence was an abuse of discretion.

As shown above in the summary of the defense's attempts to cross-examine the State's witnesses regarding the 15 September 2016 post-arrest interrogation and the State's counter arguments to exclude the testimony, the State argued the cross-examination was improper for a number of reasons, including that the post-arrest interrogation was separate from the interview of defendant on 14 September 2016 for purposes of Rule 106, the testimony the defense sought to elicit included self-serving declarations by defendant, the State had not elicited any evidence about the post-arrest interrogation, and the testimony was hearsay. In denying defendant the opportunity to elicit testimony concerning the post-arrest interrogation from the State's witnesses, the trial court accepted the reasons argued by the State. The court explained at different times that "the [15 September 2016] interview was a separate interview from the [14 September 2016] interview; and, therefore, I will not allow the defense to ask this witness any questions . . . about the [15 September 2016] interview[,]" and "[m]y understanding based upon everything that I heard about that last interview on [15 September 2016], that there's not been any testimony about that last interview by [the witness]; therefore, you will not question [the witness] about anything that has to do with that interview."

When the trial court's reasons for disallowing the defense from cross-examining the State's witnesses regarding the 15 September 2016 post-arrest interrogation is considered in light of the law on Rule 106 and Rule 611, it is clear that the trial court abused its discretion in disallowing the evidence. As determined above, Rule 106 is inapplicable in this case and Rule 611 does not limit cross-examination to those matters raised during direct examination.

Generally, "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001); *see also* N.C. Gen. Stat. § 15A-1443(a) (2017). Defendant, however, argues the error in this case amounted to a violation of his constitutional rights and, therefore, the State must prove the error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2017) ("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.").

We hold the trial court's error in this case was harmless under either prejudice standard given the overwhelming evidence of defendant's guilt, *see State v. Harris*, 136 N.C. App. 611, 617, 525 S.E.2d 208, 212 (" 'Overwhelming evidence of guilt will render even a constitutional error harmless.' ") (quoting *State v. Welch*, 316 N.C. 578, 583, 342 S.E.2d 789, 792 (1986)), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000), and the fact that the evidence the defense sought to admit on cross-examination was ultimately admitted into evidence, albeit through defendant's own testimony, *see State v. Durham*, 74 N.C. App. 159, 164, 327 S.E.2d 920, 924 (1985) ("The rule in North Carolina is that where a trial court erroneously refuses to allow cross-examination of a witness, and then the evidence sought to be admitted by cross-examination is admitted later by another witness, the error is harmless."). Because the jury had the opportunity to consider the overwhelming evidence against defendant, including testimony by those who either witnessed the abduction or saw defendant with the juvenile, testimony by the victim about the abduction and the assault, testimony by law enforcement about the investigation and the rescue of the juvenile from being left chained by the neck to a tree overnight, testimony from medical personnel who examined the juvenile, and testimony by defendant about his post-arrest interrogation on 15 September 2016, and because the jury unanimously found defendant guilty of attempted first degree murder, we hold the defendant was not prejudiced by the trial court's erroneous rulings limiting cross-examination.

2. MAR

[2] On appeal, defendant also argues that the trial court erred in denying his motion for appropriate relief. We disagree.

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). " 'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are

fully reviewable on appeal.' " *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

In the MAR filed on 29 September 2017, defendant argued the State erred by failing to allege aggravating factors in the indictments and by failing to narrowly define the aggravating factors. In bringing the MAR, defendant sought to have the sentences for the aggravated offenses vacated and to be resentenced to non-aggravated sentences. The trial court denied defendant's MAR by order on 13 November 2017.

Defendant does not challenge the trial court's findings, but instead argues the trial court erred in its application of the relevant law. First, defendant argues that the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), should apply in this instance and asks this Court to hold for the first time that, "in order to be convicted of an aggravated crime, the indictment must include the element of the aggravated crime." In *Apprendi*, the Supreme Court held that a New Jersey "hate crime" law that allowed a trial judge to impose an extended term of imprisonment "based upon the judge's finding, by a preponderance of the evidence, that the defendant's 'purpose' . . . was 'to intimidate' [the] victim on the basis of a particular characteristic the victim possessed" violated the Due Process Clause of the Fourteenth Amendment. 530 U.S. at 491, 147 L. E. 2d at 456. The Supreme Court explained that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" and "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id*. at 490, 147 L. Ed. 2d at 455 (internal quotation marks and citations omitted).

Relying on *Apprendi*, defendant argues the aggravation of an offense is "a new, separate, and greater crime" and, therefore, aggravating factors must be alleged in an indictment.

However, our Supreme Court held in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000), that "the Fourteenth Amendment does not require the listing in an indictment of all the elements or facts which might increase the maximum punishment for a crime." 351 N.C. at 508, 528 S.E.2d at 343. Defendant acknowledges *Wallace*, but seeks to have the issue reconsidered in light of *Apprendi*. We decline to do so as *Apprendi* and *Wallace* are not at odds.

In North Carolina, N.C. Gen. Stat. § 15A-1340.16 governs aggravated and mitigated sentences and places the burden on the State to prove to a jury beyond a reasonable doubt that an aggravating factor exists if the defendant does not admit to the aggravating factor. *See* N.C. Gen. Stat. § 15A-1340.16(a) and (b) (2017). The statute also contains a list of statutory aggravating factors, *see* N.C. Gen. Stat. § 15A-1340.16(d), and specifically provides that "[a]ggravating factors set forth in subsection (d) . . . need not be included in an indictment or other charging instrument[,]" N.C. Gen. Stat. § 15A-1340.16(a4). Instead, the statute requires that

> [t]he State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section . . . at least 30 days before trial or the entry of a guilty or no contest plea. . . . The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6).

It appears the State complied with the requirements of N.C. Gen. Stat. § 15A-1340.16 in this case. In accordance with N.C. Gen. Stat. § 15A-1340.16(a6), the State filed a written notice of aggravating factors on 22 June 2017, months before trial. That notice informed defendant that the State sought to prove two statutory aggravating factors, that "[t]he offense was especially heinous, atrocious, or cruel[,]" *see* N.C. Gen. Stat. § 15A-1340.16(d)(7), and that "[t]he victim was very young[,]" *see* N.C. Gen. Stat. § 15A-1340.16(d)(11). Pursuant to the procedure for a bifurcated trial set forth in N.C. Gen. Stat. § 15A-1340.16(a1), after the jury convicted defendant of the underlying offenses, the court allowed the State to proceed on the aggravating factors. Upon consideration of the evidence and arguments, the jury found that each offense was especially heinous, atrocious, or cruel and that the victim was very young.

We hold the State complied with N.C. Gen. Stat. § 15A-1340.16 in all respects and that the procedure prescribed by the statute satisfies the mandate in *Apprendi*, that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455.

In addition to defendant's argument that the aggravating factors should have been alleged in the indictments, defendant argues the trial court erred in denying his MAR because the North Carolina jury instruction issued by the trial court for "heinous, atrocious, or cruel" is unconstitutionally vague. Our Supreme Court, however, has previously

rejected that argument and held the jury instruction for heinous, atrocious, or cruel provides constitutionally sufficient guidance to the jury. *See State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 140-41 (1993). We are bound by our Supreme Court's decision.

III. Conclusion

For the reasons discussed, we hold defendant received a trial free from prejudicial error. However, remand is necessary to correct the clerical error in the judgment entered on defendant's conviction for AWDWISI.

NO PREJUDICIAL ERROR; REMAND.

Judge CALABRIA concurs.

Judge MURPHY concurs in result only.

STATE OF NORTH CAROLINA, Plaintiff
v.
RODNEY LEE ENOCH, Defendant

No. COA17-1248

Filed 18 September 2018

1. **Jury—rehabilitation—noncapital murder trial—trial court's discretion**

During jury selection for a noncapital first-degree murder trial, the trial court properly exercised its discretion when it denied defendant's request to rehabilitate certain jurors in order to keep them on the jury, where the trial court stated that rehabilitation was "potentially allow[ed]" but "generally not done" in noncapital cases.

2. **Evidence—other crimes, wrongs, or acts—prior abusive relationships—similar patterns of assaults—time gap**

In a first-degree murder trial, the testimony of two women regarding their prior abusive relationships with defendant was admissible pursuant to Rule of Evidence 404(b) to show motive, intent, modus operandi, and identity. The murder victim had been in an abusive relationship with defendant and was found stabbed to death in an isolated area, and the two witnesses testified to similar

patterns of assaults by defendant. A nine-year gap between the assaults and the murder did not render the testimony inadmissible.

3. Appeal and Error—preservation of issues—waiver—objection to limiting instruction on evidence—failure to object to evidence itself

Defendant waived an argument that the trial court erred in his first-degree murder trial by admitting evidence of defendant's prior assaults against the murder victim to show identity, where defendant objected only to the court's limiting instruction to the jury and not to the evidence, its limited admissibility, or its use in proving identity.

4. Evidence—hearsay—exceptions—then-existing mental, emotional, or physical condition—letter concerning assaults by defendant

In a first-degree murder trial, the trial court did not abuse its discretion by admitting a document hand-written by the victim listing things she wanted to tell defendant regarding defendant's assaults upon her, including an assault with frozen meat four months earlier. The trial court reasonably concluded that the document was relevant to show the victim's state of mind around the time of the murder and was not unfairly prejudicial.

5. Evidence—relevance—danger of unfair prejudice—skeletal remains

The trial court in a first-degree murder trial did not abuse its discretion by admitting the skeletal remains of the victim. The remains were relevant and more probative than prejudicial where the skull proved the victim's identity and illustrated the testimony of the hunter who found the remains, the rib bones showed the nature and number of the victim's fatal wounds, and the femur showed the biological item used to establish the victim's identity through DNA testing. Further, defendant failed to show that any prejudice resulted from the alleged error.

Appeal by Defendant from a judgment entered 16 September 2016 by Judge James E. Hardin Jr. in Alamance County Superior Court. Heard in the Court of Appeals 8 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

HUNTER, JR., ROBERT N., Judge.

Rodney Lee Enoch ("Defendant") appeals from a 16 September 2016 judgment after a jury convicted him of one count of first degree murder. Following the jury verdict,[1] the trial court sentenced Defendant to life imprisonment, without parole. Defendant asserts the trial court erred by: (1) not allowing him to rehabilitate jurors; (2) admitting evidence of two prior abusive relationships; (3) instructing the jury it could use prior assaults on the victim to show identity; (4) admitting an irrelevant and prejudicial document; (5) allowing the victim's skeleton to be displayed to the jury by denying his mistrial motion; and (6) denying him a fair trial due to cumulative error. We find no prejudicial error.

I. Factual and Procedural Background

On 14 October 2013, an Alamance County Grand Jury indicted Rodney Lee Enoch ("Defendant") on one count of first degree murder.

A. Jury Selection

On 15 August 2016, the trial court called Defendant's case for trial, and jury selection began. The State questioned a prospective juror, Terrance Copling. Copling stated he was familiar with Defendant's family, though he did not know Defendant himself. Copling stated he thought he could be impartial and fair to both sides in the case. When the State later pressed Copling, however, he admitted "having the connection to [Defendant's] dad or knowing his dad in the past . . . will probably cause issues . . . ." The State made a motion to dismiss Copling as a juror for cause. Defendant asked the trial court for leave to rehabilitate Copling, in order to keep him on the jury. The court denied Defendant's request, and stated "[t]his is not a capital case." The trial court asked Copling, "Is it your position that due to your knowledge of the defendant's family that you could not fairly evaluate the evidence presented to you and be impartial to the State and the defendant?" Copling answered in the affirmative. Answering a clarifying question, Copling clearly agreed his feelings were "so strong" he could not be impartial. The trial court allowed the State's challenge for cause and excused Copling over Defendant's objection.

---

1. The record on appeal indicates the Alamance County Clerk of Superior Court could not locate the actual verdict sheet from trial.

Outside the presence of the prospective jury, the trial court told Defendant he was "not entitled to ask questions to rehabilitate in any fashion[]" because "this [wa]s not a capital case." Defendant objected and argued, "I don't think whether it's capital or non-capital makes any difference." Defendant also noted he wished to rehabilitate other jurors, but did not "because [he] understood the [c]ourt's ruling to be that because it's not a capital case [he] wouldn't be able to . . . ." The court reiterated it had already ruled on the issue, but noted Defendant preserved the issue for the record.

After a brief recess, the trial court stated in pertinent part:

> Just so there's no ambiguity at all on what the [c]ourt ruled upon with respect to the defendant's last objection regarding the juror Terrance Copling, we were having a conversation but I want to make sure the record is clear as to what the Court's rationale was for its ruling.
>
> It has long been my understanding that in capital cases the defendant is entitled to rehabilitate jurors on the question of death qualification only and that's the only provision that I'm aware of that requires and does give the defendant such an opportunity.
>
> As to questioning of jurors when the other party has the juror, it's long been my belief that the system was designed to at least potentially allow for that but it's generally not done. In my discretion I chose not to do it because, again, this is not a capital case. The rehabilitation question [is] only allowed – only required in capital cases.
>
> . . . [T]he Court has exercised its discretion and will allow the parties to ask questions when they have the jurors and the other party will not be allowed ask questions during that aspect of the process.

B. Trial Court's General Findings of Fact

The evidence presented at trial led the court to find the following by a preponderance of the evidence: Debra Dianne Sellars ("Sellars") was last seen on 20 April 2012. Sellars' children reported her missing on 24 April 2012. Defendant was Sellars' on-again, off-again boyfriend. On 16 December 2011, Defendant assaulted Sellars. Defendant pleaded guilty to the assault. On 3 October 2012, a hunter discovered human skeletal remains in a wooded area on the property of 4280 Union Ridge Road, Burlington, North Carolina. DNA analysis confirmed the remains

belonged to Sellars. Sellars' assailant stabbed her to death and deposited her body at 4280 Union Ridge Road. Defendant objected to the trial court's findings of fact.

C. Testimony at Trial

The State called Chelsea Sellars ("Chelsea"), Sellars' daughter. Chelsea first met Defendant in 2011 when he dated her mother. For a period of time in late 2011, Defendant lived with Sellars, Chelsea, and Sellars' son Deandre Terrell ("Andre"). During that period, Chelsea noticed her mother's "face look[ed] a little different on occasion" due to heavier makeup application. From the time Defendant moved out, sometime in late 2011, to 20 April 2012, Chelsea did not notice her mother interacting with any other men. On 20 April 2012, a Friday, Chelsea got dressed for school, told her mother goodbye, and went to the bus stop at 7:30 a.m. When Chelsea got home from school on Friday around 3:15 p.m., her mother was not home. Over the weekend, Chelsea stayed in her room and played video games. She knew her mother was not home, "but it wasn't unusual for her to be gone over the weekend." On Monday, Chelsea became concerned when her mother still did not come home. On Tuesday, Chelsea went to school and informed her teacher "that [her] mother hadn't returned home over the weekend nor that Monday." The teacher sent Chelsea to the counselor who then contacted the police.[2]

The State called Andre. While Defendant and Sellars were dating, Andre recalled seeing his mother with a black eye and bruises on her face and neck. Andre later asked his mother if she was still seeing Defendant, and Sellars said "no." Andre suspected his mother still accepted phone calls from Defendant. On 20 April 2012, Andre stayed home from work with his mother. Around 4:00 p.m., Sellars received a phone call. Andre heard Sellars talking to "a male voice" from the other room, and he heard his mother say "that [she] will meet [them] at the hotel." Andre did not recognize the voice as Defendant's. Andre then told his mother he had to be at work the next morning. Sellars said she would be back in the morning so Andre could use the van to get to work. Sellars left around 5:00 p.m. Andre did not see or speak to his mother again. Andre called his mother later the same night to remind her he needed the car for work in the morning. Sellars did not pick up the phone, and she was not

---

2. Burlington Police Department Officer Dana Mitchell spoke with Chelsea on Tuesday, 24 April 2012. Mitchell immediately called his supervisor because "it didn't seem like a normal missing person kind of case to [him]." Mitchell also entered Sellars' name into the NCIC database as a "missing person."

home the next morning at 6:00 a.m. when Andre got up for work. Andre continued to call his mother throughout weekend. On Saturday, Sellars' phone rang, and then went to voicemail. On Sunday and Monday, Sellars' phone went straight to voicemail without ringing.

The State called Justin Curtis ("Curtis"), an employee of a car dealership in Greensboro, North Carolina. In 2012, Curtis lived in Burlington, North Carolina, at his parents' house, located next to 4280 Union Ridge Road. In October 2012, Curtis went deer hunting on the land next door. While surveying the land for signs of deer, Curtis saw something with a "bright, cream color" in the woods. Curtis didn't initially realize he discovered human remains. Curtis "pick[ed] up the skull" and took it back to his parents' house, leaving the other remains behind. Curtis then called the Sheriff's Department. When a police officer arrived, with gloves on he picked up the skull and took it to his vehicle. A second officer then arrived with a K-9 unit, and Curtis took the officers to the location of the other human remains. Curtis identified the remains he saw on a photograph displayed for the court.

In *voir dire*, the State indicated it intended to "put some of the remains into evidence." The State explained its "plan was to enter the skull, the ribs, and the femur." The remains were in a box and not individually labeled. The State argued it was "only entering what [it] felt [was] necessary for this trial." Defendant objected to the relevancy and evidentiary value of the skeletal remains, aside from "the four ribs." Specifically, Defendant argued Curtis would not be able to identify the skull as the one he found in the woods. Defendant also argued the State gained nothing from showing the skull, because no expert witness drew any conclusions from it. As to the State introducing the femur as a source of DNA, Defendant argued the actual femur added nothing to previously provided photographs.

The State countered "every single remain" had relevance to the case. Specifically, the State argued the skull was relevant "because that goes with [Sellars] and that also helps identify her and identify her race." Without Curtis' identification of the skull, other witnesses would not be able to identify any of the remains. The trial court determined "403 and 401 [balancing] at this point are premature in my view because [the State's] not going to be moving it into evidence [at this time]." Defendant replied, "Then I have a question about how this witness can [identify the skull] and I would ask that at least the State do it in voir dire outside the presence of the jury." At the trial court's allowance, the State then broke the seal on the box during *voir dire*. Curtis identified Sellars' skull "by the two front teeth" as the skull he found

in the woods. The State then moved to enter the skull into evidence. Defendant again objected to the relevancy of the skull. Defendant also argued the skeletal remains, on the whole, were not necessary to establish the victim's identity because "things were done with that evidence that identified her."

After a brief recess, *voir dire* continued, and Defendant motioned for the Court to release the remains to Sellars' family. Defendant then waived all issues on chain of custody as to the remains. The State argued the court could not release the remains until after trial, because the State needed the evidence to prove its case. The State offered the following reasons to support the relevancy of the skeletal remains:

> [T]he jury can look at the side by side comparisons of her photograph to the skull. I'm required to prove that someone died.
>
> Dr. Ann Ross did examine all of the remains used. To determine how she died she had to go through each of the remains. As I mentioned in my opening and as she will testify that she had to go through each of the remains to see if there were any injuries on that.
>
> And in addition, the family, you know, wants me to prove my case. They know that they will get her remains, whatever is left, you know, when the case is over, so they're not requesting those remains at this time. And just as I previously mentioned, you know, all of them would be relevant. They were all found there at the scene at that time.

The trial court found admission of Sellars' skeletal remains into evidence would not be duplicative of photographs on the record. The trial court then held the skull's evidentiary value was "not substantially outweighed by the danger of unfair prejudice[,]" and thus "admissible pursuant to Rules 401, 403 and 402."[3] After *voir dire*, the State pulled the skull out of the box, and Curtis identified the skull for the jury. Defendant renewed his relevancy objection. The trial court overruled Defendant's objection, and received the skull into evidence.

The State called Dr. Ann Ross, director of the Forensic Sciences Institute at North Carolina State University. The trial court tendered Dr. Ross as an expert in the field of forensic anthropology. Dr. Ross

---

3. The trial court noted Defendant objected to the skull on the basis of 401 and 403, not on the basis of chain of custody via 402 because Curtis actually recognized the skull.

conducted trauma analysis on each individual bone of the completely skeletonized remains. Dr. Ross noted only very small bones were missing from the "almost" complete skeleton of the decedent. Dr. Ross then assembled all twelve of Sellars' left rib bones on a table in front of the jury. Dr. Ross explained the process of "lay[ing] all the remains in [an] anatomical position" so she could "go through everything . . . to see if there [are] fractures or any type of evidence on there . . . ." Out of the set of the left twelve rib bones, Dr. Ross noted four were "completely fractured in half." The fractures were not due to animal activity and indicated four penetrating slits made by a sharp instrument. Dr. Ross concluded the pattern of the cuts on the rib bones was consistent with Sellars being stabbed multiple times with a knife. Dr. Ross then assembled the right rib bones on the table next to the left ribs. She noted animal activity damaged the right rib bones. The trial court then invited the jurors to "without comment . . . step down and see" the bones assembled on the table in front of them. Four out of fifteen jurors stepped down and examined the rib bones. After the trial court noted it "[saw] no further indication that the jurors wish[ed] to see this array of ribs[,]" the court then directed Dr. Ross to put the rib bones back into their packaging.

Outside the presence of the jury, Defendant argued "a distinct odor" filled the courtroom each time the State opened the box of remains. The trial court and Dr. Ross did not notice the odor. Defendant continued to object to the display of Sellars' bones in the courtroom.

In *voir dire*, Dr. Ross admitted this was her first time displaying the actual bones of a deceased victim in front of a jury. Typically, Dr. Ross used anonymous skeletons of deceased persons, who voluntarily donated their bodies to science, to instruct the jury. Defendant renewed his motion to return the remains to the family, then moved for a mistrial. The court denied both motions.

With the jury back in the courtroom, the State moved the left and right rib bones into evidence. Defendant renewed his objections. The trial court overruled Defendant's objections, and the court received the ribs into evidence.

The State then brought in a separate hanging anatomical skeleton for Dr. Ross to demonstrate the pattern of injury from another angle. Dr. Ross normally used this hanging skeleton to explain her findings to a jury. Dr. Ross showed the placement of Sellars' earlier described injuries to the jury, as marked by red stickers on the hanging skeleton.

The State called Dr. Clay Nichols, a medical examiner. Dr. Nichols performed Sellars' autopsy and concluded Sellars died by four stab

wounds that struck her left lung and heart. Dr. Nichols declared the death was a homicide.

The State called Dr. George Maha, Associate Vice President and Laboratory Director of the DNA Identification Testing Division of Laboratory Corporation of America in Burlington, North Carolina. The trial court tendered Dr. Maha as an expert witness. At his lab in Burlington, Dr. Maha cut off a piece of the deceased's femur for DNA testing. Dr. Maha's DNA test of the femur revealed a 99.9999% probability the bones belonged to Sellars. The State moved to enter the femur into evidence. The trial court admitted and received the femur into evidence over Defendant's renewed objection.

The State called Brian Phillips ("Officer Phillips"), an officer with the Burlington Police Department. On 16 December 2011, Phillips met Sellars when she came to the police department. Sellars told Phillips "she had just been assaulted by her boyfriend at the time." Sellars identified Defendant as her assailant. She described the incident to Phillips as a "verbal altercation" which resulted in her "getting punched in the face two to three times and then struck on top of her head with a frozen pack of hamburger meat." Based on Sellars' visible injuries, Phillips went to the magistrate and obtained a warrant on Defendant for the assault.[4] Phillips advised Sellars she could obtain a protective order against Defendant. Phillips noted Sellars seemed "hesitant, reluctant" throughout their conversation. Phillips last saw Sellars at the court date for the assault charge against Defendant. Defendant did not object to this testimony regarding Defendant's previous assault charges.

Outside the presence of the jury, the trial court told Defendant it "would be willing to give a limited instruction if it were requested" on testimony regarding Defendant's previous assaults. The trial court suggested a pattern limiting instruction; Defendant then objected to the court's suggestion. Specifically, Defendant objected to the limiting instruction for purposes of identity and intent. Over Defendant's objection, the trial court instructed the jury as follows:

> [E]vidence has been received tending to show that on or about December the 16th of 2011, [and] on other non-specified occasions prior to this date, that the defendant, had engaged in assaultive actions against Debra Dianne Sellars. This evidence was received solely for the purposes of showing the identity of the person who committed the

4. Phillips also obtained a warrant for larceny of Sellars' cellphone.

> crime charged in this case, if it was committed; that the defendant had the intent, which is a necessary element of the crime charged in this case; and that the defendant acted with malice, which is a necessary element charged in this case.
>
> If you believe this evidence you may consider it but only for the limited purposes for which it has been received. You may not consider it for any other purpose[.]

The State called Kali Marsh ("Marsh"), former employee of Family Abuse Services ("FAS"). FAS is a nonprofit agency that helps domestic violence victims. On 2 April 2012, Sellars went to FAS seeking to file a protective order against Defendant. Sellars reported to Marsh that on 1 April 2012, Defendant had continuously harassed her over the phone. Sellars also described to Marsh a previous incident the year before. Sellars said in December 2011, Defendant "had physically assaulted her by hitting her, choking her and placing a pillow over her face." Sellars and Marsh had a short conversation, and Marsh did not have a chance to go over safety planning with Sellars. Marsh did not see Sellars again.

The State called Natalie Snowden ("Snowden"), an investigative analyst with the Criminal Investigation Division of the Burlington Police Department. Snowden determined Defendant's cell phone records indicated he called Sellars around sixty-six times between 18 April 2012 and 20 April 2012. On 20 April 2012, Defendant called Sellars at 8:35 p.m. After 20 April 2012, Defendant did not call Sellars.

The State then called Shelia Daye ("Daye"), Sellar's little sister. On 24 April 2012, Daye learned her sister was missing and tried to help the police find her. While looking through Sellars' belongings, Daye found a handwritten letter. The letter was on loose-leaf paper and was "folded in a book where [Sellars] didn't want nobody to find it." The State showed Daye the letter Sellars wrote. Daye recognized Sellars' handwriting as her sister's.

Outside the presence of the jury, Defendant argued the letter was not relevant and lacked a proper foundation. The State argued the letter was relevant because it spoke to Sellars' state of mind before she went missing. The State suggested the jury could infer the date of the letter from its references to Defendant's assault of Sellars in December 2011. The trial court found the letter relevant due to its "significant internal references" to Defendant's "assaultive behavior" towards Sellars. The court also found the probative value of the letter significantly outweighed the

danger of unfair prejudice. The court admitted Sellars' handwritten letter into evidence, and the State published copies of the letter to the jury.

In *voir dire*, the State called Cornelia Crisp ("Crisp"), Defendant's ex-girlfriend with whom he had a son in 1993. Crisp met Defendant in 1989, and shortly thereafter they began dating. After the first year of dating, Defendant "started getting controlling[,]" and would "smack" Crisp around. Crisp and Defendant lived together for about seven years. Crisp recalled several times when Defendant hit her in the face while she drove him in her car.

One particular evening, Defendant and Crisp left a club arguing.[5] Defendant took Crisp "out in the country and dragged [her] out of the car and took [her] out in a field on Union Ridge Road." Defendant proceeded to "jump" on Crisp in the snow and beat her in the head with his fists. Defendant told Crisp "he would kill [her][,]" and "that he could get rid of [her]" so no one would find her. The next day, Crisp went to the doctor after feeling sick and feverish. Crisp then found out from the doctor she was three months pregnant. Crisp noted Defendant took her to "that area" near Union Ridge Road about three times over the course of their relationship, and upon reaching that location, he would drag her out of the car and beat her.

Crisp tried to leave Defendant several times. Defendant would call her job and "pop up" at her friend's house to find her. On several occasions while dating Defendant, Crisp would wake up in the hospital with a black eye and bruises. Crisp did not report the incidents to anyone. Defendant left Crisp when he met Tamara Lewis.

At the close of Crisp's testimony, the trial court asked the State its alleged purposes for Crisp's testimony. The State said, "Some of the purposes include [Defendant's] modus operandi, malice, lack of accident, his motive, his opportunity. . . . His plan, intent, which is the same as malice. Common plan or scheme." Defendant argued the State's alleged purposes were "nothing more than a laundry list." Defendant claimed Crisp's testimony had "nothing to do with Dianne Sellars[,]" given the assaults on Crisp occurred about twenty years prior and did not involve a weapon. The State conceded some of Crisp's testimony could stay out, but "the other similarities . . . [were] just too numerous[.]" The trial court delayed ruling on the admission of Crisp's testimony until after it heard Tamara Lewis' testimony for context.

---

5. Crisp did not recall the exact date of this incident but estimated it happened before her son's birth around 1993.

The State then called Tamara Lewis ("Lewis"), Defendant's ex-wife and mother of two of his children. During *voir dire*, Lewis described her marriage to Defendant as "pretty good[,]" until "[t]he abuse" started after her son was born in September 1996. After Lewis told Defendant she wanted a divorce, Defendant "put [her] in a head lock and beat [her] several times in the head" with his fists. Lewis described Defendant as controlling and abusive; when she tried to move away from him he would always follow. Defendant often left bruises and knots on Lewis. One time, after Defendant struck Lewis with a belt, Lewis called the police. He had also choked her. A court sentenced Defendant to domestic violence counseling for the incident.

Lewis moved to a different town to get away from Defendant. In 1999 on Christmas Eve, a roommate brought Lewis and her children back into town to see their father for Christmas. At Defendant's mother's house, Defendant told Lewis he wanted her and the children to stay with him at a hotel for the night. Lewis told Defendant she would not stay with him. Defendant did not let Lewis leave and became "aggravated." Lewis then woke up Defendant's mother and told her Defendant would not let her leave. Defendant then took the phone off the hook and asked Lewis to go "in the back with him." Lewis refused. Defendant grabbed Lewis, threw her down on the floor, and stabbed her repeatedly with an ice pick, which injured her eye, neck, ear, and shoulder—all in front of Lewis's two-year-old son, who tried to pull Defendant off of Lewis. When Defendant went into the kitchen to get a "bigger knife," Defendant's mother helped Lewis go out the back door. Lewis ran to her car where her roommate was in the driver's seat with the car running. Defendant ran out of the front door "with another knife" and chased Lewis to the car. Lewis jumped in the car, and her roommate locked the doors. As Lewis and her roommate started to leave, Defendant "just took the knife that he had and started stabbing the window with it . . . ." Lewis described the first "knife" Defendant used to stab her with as "an ice pick," and described the second "knife" Defendant used as "a bigger carving knife." Lewis sustained "a couple of nicks on [her] ear and on [her] . . . right shoulder." Defendant pleaded guilty to one count of assault inflicting serious injury, and one count of second degree kidnapping for the incident.

At the close of Lewis's testimony, the trial court asked Defendant if he wished to be heard on his objection. Defendant stated, "Nothing that Ms. Lewis talked about is comparable in any way to the crime charged except the -- potentially the incident involving the stabbing and Christmas in 1999." Defendant further argued the December 1999

incident was possibly generically similar, but not sufficiently similar for admission under Rule 404(b). The State countered that Defendant had a discernable pattern of assault against women he dated, and thus Lewis's testimony showed Defendant's potential motive for attacking Sellars. The trial court found both Lewis and Crisp's testimonies regarding Defendant's "assaultive behavior" more probative than prejudicial, and admissible for 404(b) purposes. Lewis and Crisp then testified in front of the jury, pursuant to the trial court's orders and limiting instructions.

The State rested. Defendant neither testified nor offered evidence; the trial court charged the jury not to let that influence its decision. Defendant moved to dismiss for insufficient evidence, and in the alternative moved for the case to proceed on second degree murder. The trial court denied the motion on each. The jury found Defendant guilty of first degree murder. The trial court sentenced Defendant to life without parole.

II. Standards of Review

A. Trial Court's Discretion Regarding Jury Rehabilitation

This Court "must defer to the trial court's judgment as to whether the prospective juror could impartially follow the law." *State v. Bowman*, 349 N.C. 459, 471, 509 S.E.2d 428, 436 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). Accordingly, we review the trial court's decision to not allow Defendant to rehabilitate certain jurors for abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion."). An abuse of discretion occurs when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Rule 404(b) Rulings

"When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions." *See* N.C. Gen. Stat. § 8C-1, R. Evid. 404(b) (2017). We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012). Any potential evidentiary error on appeal is deemed "harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C.

App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

C. Rule 403 Rulings

This Court reviews a trial court's admission of evidence under Rule 403 of the North Carolina Rules of Evidence for abuse of discretion if appellant properly preserved the issue for appeal. *State v. Miles*, 223 N.C. App. 160, 164, 733 S.E.2d 572, 575 (2012) (citing *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995)); *see* N.C. Gen. Stat. § 8C-1, R. Evid. 403 (2017). Generally, an issue is properly preserved if the party: (1) makes a timely objection at trial; (2) gives specific grounds for the objection; and (3) obtains a ruling denying the request. N.C. R. App. 10(a)(1) (2017). Specifically, a timely objection requires appellant to object when the evidence is actually introduced at trial. *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) (citations omitted). Additionally, appellant must object in the jury's presence. *Id.* at 816, 783 S.E.2d at 737-38 ("An objection 'only during a hearing out of the jury's presence prior to the actual introduction of the testimony' is insufficient.") (quoting *State v. Thibodeaux*, 352 N.C. 570, 581-82, 532 S.E.2d 797, 806 (2000)).

An abuse of discretion occurs when the trial court's ruling is "manifestly unsupported by reason." *State v. Graham*, 200 N.C. App. 204, 207, 683 S.E.2d 437, 440 (2009) (citation omitted). On appeal, appellant "must demonstrate a reasonable possibility that, but for the admission of this evidence, the jury would have reached a different result." *Id.* at 207-08, 683 S.E.2d at 440 (citation omitted); *see also Ferguson*, 145 N.C. App. at 307, 549 S.E.2d at 893.

III. Analysis

Defendant contends the trial court committed the following errors: (1) not allowing Defendant to rehabilitate jurors; (2) admitting evidence of two prior abusive relationships; (3) instructing the jury it could use prior assaults on the victim to show identity; (4) admitting an irrelevant and prejudicial document; (5) allowing the victim's skeleton to be displayed to the jury by denying his mistrial motion; and (6) denying him a fair trial due to cumulative error. Pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure, we do not consider Defendant's cumulative error argument. *State v. Bellamy*, 172 N.C. App. 649, 662, 617 S.E.2d 81, 91 (2005) (holding this Court is not required to consider evidence for cumulative error when appellant sparsely, and sometimes unrelatedly, objects as a continuing objection at trial). We consider Defendant's other five arguments in turn.

A. Trial Court's Discretion Regarding Jury Rehabilitation

[1] Defendant assigns error to the trial court for not allowing the defense the opportunity to rehabilitate jurors. Defendant contends this action was improper in that it amounted to a "blanket ruling" as to the court's inability to act. We decline to find such violations.

Our Supreme Court has held "[a] defendant has no right to attempt to rehabilitate jurors, and the trial court is not required to allow a defendant to rehabilitate jurors for cause." *State v. East*, 345 N.C. 535, 547, 481 S.E.2d 652, 660 (1997) (citing *State v. Burr*, 341 N.C. 263, 281-82, 461 S.E.2d 602, 611 (1995)), *cert. denied*, 517 U.S. 1123 (1996)). "The trial court retains discretion as to the extent and manner of questioning, and its decisions will not be overturned absent an abuse of discretion." *Id.* at 547, 481 S.E.2d at 660 (citing *State v. Wilson*, 313 N.C. 516, 526, 330 S.E.2d 450, 459 (1985)).

This Court has determined in noncapital cases that a trial court has discretion when considering whether to allow rehabilitation during *voir dire*. *See State v. Jones*, 151 N.C. App. 317, 323, 566 S.E.2d 112, 116 (2002) (*appeal dismissed* by *State v. Jones*, 356 N.C. 687, 578 S.E.2d 320, 2003 N.C. LEXIS 284 (2003) (*cert. denied* by *Jones v. North Carolina*, 2003 U.S. LEXIS 5726 (U.S., Oct. 6, 2003) (finding a challenge to a potential juror for cause was supported by her answers in the record, and defendant failed to show further questioning would produce different responses); *accord State v. Crummy*, 107 N.C. App. 305, 323, 420 S.E.2d 448, 458 (1992).

Here, looking to the totality of the *voir dire*, there is no evidence that the trial court ruled out the possibility of rehabilitation. At first the trial court told Defendant he was "not entitled to ask questions to rehabilitate in any fashion[]" because "this [wa]s not a capital case," but later the trial court allowed for the possibility of rehabilitation. To the trial court's questions of prospective juror Copling about his ability to be fair and impartial, based on Copling's knowledge of Defendant's family, Copling expressed an inability to follow the law. Defendant also wanted to rehabilitate prospective juror Clapp, believing the State's questions had confused her and she could follow the law. The trial court overruled the objection "based upon what the Court chose to do in its discretion and excused her for cause."

Rather than disallowing rehabilitation of any jurors, the court clarified its understanding of the law, explaining rehabilitation was "potentially allow[ed]" but "generally not done" in noncapital cases. That the court disallowed defense counsel's requests for rehabilitation does not,

in the absence of other evidence, amount to a de facto "blanket" ruling against all rehabilitation efforts. *See East*, 345 N.C. at 547, 481 S.E.2d at 660-61 (trial court's correct application of law led to preclusion of all rehabilitation efforts). The trial court properly exercised its discretion in disallowing Defendant's request to rehabilitate jurors; this assignment of error is therefore overruled.

B. Admission of Testimonial Evidence

[2] Defendant next assigns error to the admission of the testimonies of Cornelia Crisp and Tamara Lewis regarding prior abusive relationships.

Evidence Rule 404(b) provides "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith [but] may . . . be admissible for other purposes[.]" N.C. Gen. Stat. § 8C-1, R. Evid. 404(b) (2017). Our Supreme Court has held Rule 404(b)

> states a clear general rule of inclusion of relevant evidence of other crimes, wrongs, or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Evidence considered for admission under Rule 404(b) should be "carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citing N.C. Gen. Stat. § 8C-1, Rule 404(a)). Thus, "the rule of inclusion . . . is constrained by the requirements of similarity and temporal proximity." *Id.* at 154, 567 S.E.2d at 123.

"When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *sentence vacated on other grounds*, 494 U.S. 1023 (1990)). In order to be sufficient for admission of prior-crimes evidence under Rule 404(b), "similarities between the two incidents need not be 'unique and bizarre,' " but the similarities must tend to support " 'a reasonable inference that the same person committed both the earlier and later acts.' " *State v. Sneeden*, 108 N.C. App. 506, 509-10, 424 S.E.2d 449, 451 (1993) (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)).

Temporal proximity "must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered." *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998), *cert. denied*, 525 U.S. 1180 (1999). "[T]he passage of time between the commission of the two acts slowly erodes the commonality between them[.]" *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988). Further, "where the perpetrator's identity [i]s in question," there must be "significant similarities and little passage of time between incidents." *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 420 (1986).

When evaluating temporal proximity, the passage of time during which acts occurred should be considered as a whole rather than as individual incidents. In *State v. Frazier*, for example, defendant objected to the trial court's admission of testimony, where there was a period of prior sexual abuse against multiple victims spanning twenty-six years, and ending seven years before the crime of sexual abuse at issue in the trial. 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996). The Supreme Court explained the "testimony in question tended to prove that defendant's prior acts of sexual abuse occurred continuously over a period of approximately twenty-six years and in a strikingly similar pattern." *Id.* at 616, 475 S.E.2d at 300; *see also State v. Shamsid-Deen*, 324 N.C. 437, 447, 379 S.E.2d 842, 848 (1989) (holding no error for trial court to admit testimony of prior sexual misconduct occurring during a twenty-year period); *State v. Penland*, 343 N.C. 634, 644, 472 S.E.2d 734, 735 (1996), (*cert. denied*, 519 U.S. 1098 (1997) (holding ten-year span between crimes charged and prior bad acts did not render the evidence so remote in time as to negate the existence of a common plan or scheme).

Before admitting the respective testimonies, the trial court conducted a *voir dire* hearing pertaining to Defendant's assaults on the two women. Crisp's *voir dire* hearing testimony and trial testimony were similar, yet during *voir dire* she was less clear about certain sequential and road location specifics. During *voir dire*, Crisp told the court about several incidents of abuse. Crisp testified that during all three incidents, Defendant was "[a]ngry, . . . [v]ery upset." Lewis' *voir dire* hearing testimony and trial testimony were substantially similar.

The trial court ruled certain assaults on Crisp were admissible, and certain assaults on Lewis were admissible. The trial court entered two separate detailed orders concluding Crisp and Lewis' testimonies were admissible under Rule 404(b) for the purpose of showing identity, malice, intent, motive, and *modus operandi*, and the evidence should not be excluded under Rule 403. The trial court also overruled Defendant's objections. Through a limiting instruction on Crisp and Lewis' testimony,

the court excluded evidence of "generalized conflict[s]" between Defendant and the women.

Here, substantial evidence of similarity among the prior bad acts and the crime charged exists. The trial court's factual findings show similarities in Defendant's actions as to all three women. The assaults on Crisp and Lewis were similar to the one perpetrated on Sellars in 2011. Defendant's assaults on Crisp were similar to those resulting in Sellars' murder. In both instances, the domestic relationship was violent.

The trial court's findings of fact identified comparative location similarities between the prior crimes evidence of Defendant's activities with Crisp and Lewis. Defendant drove Crisp in her car and hit her in the head with his fist. He dragged Crisp out of her car and across a field through high grass, then assaulted her, hitting her in the head and kicking her. In another incident, Defendant likewise dragged Crisp out of the car and beat her. Although Crisp had some difficulty identifying which specific acts occurred at which specific locations, Defendant assaulted her in isolated locations in Alamance County. The area was also isolated where Defendant drove around with Lewis when he was angry. Although no evidence showed Defendant took Sellars, while alive, to isolated locations on multiple occasions, Sellars' remains were found on one of the roads in an isolated area where Defendant drove, dragged, and assaulted Crisp. Evidence showed Sellars' body had been dragged through brush before being left there.

Defendant's argument that Lewis' stabbing with an ice pick was merely "a very generic similarity," insufficient for admission per Rule 404(b), fails. Though Defendant claims "there were no features common to the ice pick/knife incident," an inference is reasonable that the same person committed both the earlier and later acts. Defendant stabbed Lewis when he became angry; he admitted to police he knew where to "poke" Lewis without killing her.

Although the exact nature of Sellars' killing was unknown, the evidence surrounding Sellars' death is admissible to prove Defendant's identity. On the last night Sellars was seen with Defendant, he had rented a hotel room. After Sellars decided she would not go with him, she was stabbed to death with a knife. By Defendant's own admission about Lewis, he would know exactly where to stab Sellars to kill her.

Defendant also asserts a lack of evidence showing the motive and cause of Sellars' murder was anger and control. In all three of Defendant's relationships pertinent to this case, however, assaults and harmful behaviors were triggered by anger, control, and conflict. It is

reasonable to infer such issues motivated and caused Defendant to murder Sellars.

Evidentiary similarities indicate both Lewis and Crisp's testimony is relevant to show intent and motive, and indicate the same person, Defendant, committed the prior assaults on Crisp and Lewis, and Sellars' murder. On this basis, the evidence was properly admitted.

Defendant contends there were "no 'striking similarities' between the prior acts" and Sellars' death, and such "remoteness of the prior acts weighs heavily in favor of exclusion." Supporting his argument, Defendant relies on *State v. Jones*, 322 N.C. 585, 591, 369 S.E.2d 822, 825 (1988) (holding a seven-year gap between assaultive sexual abuse incidents made the prior crimes inadmissible as proof of common scheme or plan, despite considerable similarities between the prior crimes and the charged crimes) and *State v. Shane*, 304 N.C. 643, 656 285 S.E.2d 813, 821 (1982) (holding even though there was a "striking similarity" between prior and current sexual offense acts, the seven months between the prior act and the crimes charged "substantially negated the plausibility of the existence of an ongoing and continuous plan to engage persistently in such . . . activities").

In *State v. Hipps*, defendant argued the prior crime, a second-degree murder that occurred in 1978, was too remote in time to be relevant to any aspect of the murder for which he was being tried. 348 N.C. 377, 403, 501 S.E.2d 625, 641 (1998), *cert. denied*, 525 U.S. 1180 (1999). Defendant maintained the error was prejudicial since the jury likely used the evidence for improper purposes. *Id.*, 348 N.C. at 403, 501 S.E.2d at 641; *see* N.C. Gen. Stat. § 8C-1, Rule 404(b). Since the time lapse between the prior crime and the crime charged was seventeen years, defendant argued it was too remote to be admissible under Rule 404(b). The Supreme Court explained, "[r]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered . . . [f]or some 404(b) purposes, remoteness in time is critical to the relevance of the evidence for those purposes; but for other purposes, remoteness may not be as important." *Id.*, 348 N.C. at 403, 501 S.E.2d at 641; *see* N.C. Gen. Stat. § 8C-1, Rule 404(b). The Court further explained "time may be significant" when introducing prior-crime evidence to show "both crimes arose out of a common scheme or plan," but "remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident." *Id.*, 348 N.C. at 403, 501 S.E.2d at 641. The *Hipps* Court concluded the "time lapse between the crimes goes to the weight of evidence, not to its admissibility." *Id.*, 348 N.C. at 403, 501 S.E.2d at 641.

Here, the evidence of prior crimes was admitted to show motive, intent, modus operandi, and identity. The testimony tended to show Defendant's assaults on Crisp occurred from 1990-1993, and those on Lewis from 1996-1999. Sellars' death in 2012 leaves an apparent stretch of approximately thirteen years. Both the State and Defendant agreed to subtract the four years Defendant spent in prison from calculating the passage of time between assaults, resulting in an apparent nine-year gap. The assaults on multiple victims over time, with relatively short gaps in between, show a pattern of behavior. In *voir dire*, Crisp testified as to her belief that she was able to leave Defendant because he met Lewis—his next victim. We conclude, considering the similarities and pattern of assaults, the time lapse between Defendant's assaults on Crisp and Lewis and Sellars' murder was temporal enough to justify admissibility.

Defendant also argues Crisp and Lewis' testimonies provided only a "slight" value when compared to the "substantial prejudice engendered by the testimony," in violation of Evidence Rule 403. Assuming without deciding this issue is preserved, the argument lacks merit. Demonstrating the weighing of evidence under the Rule 403 balancing test, the trial court conducted a *voir dire* hearing, heard arguments from the parties, limited the admission of Lewis and Crisp's testimony, entered a detailed order, and gave limiting instructions. Given the similarity of the assaults, our view that the lapse in time was not so great as to limit the admissibility of evidence, and the overwhelming evidence against Defendant, we find no error in the admission of Crisp and Lewis' testimony and no abuse of discretion.

C. Admission of Prior Assaults to Show Identity

[3] Defendant next assigns error to the trial court's instructing the jury it could use evidence of prior assaults on Sellars to show identity. According to Defendant, the evidence was irrelevant and inadmissible under Rule 404(b) for that purpose and only showed his violent propensity.

Multiple trial witnesses testified regarding Defendant's abuse of Sellars, prior to her murder, including the December 2011 assault she reported to Officer Phillips. At trial, Defendant did not object to the testimony, but stated outside the presence of the jury that the evidence was admissible only to show malice. Following Officer Phillips' testimony, and after being prompted by the trial court, Defendant requested a limiting instruction. The State requested the trial court include in the instruction intent, motive, malice, and identity, among others, so that evidence of Defendant's assaults on Sellars could be considered. The

trial court ruled the evidence was relevant to show identity, intent, and malice, and it passed the Rule 403 balancing test. Defendant objected to identity and intent. The trial court then entered an order overruling Defendant's objection.

Defendant argues there is a dissimilarity of assault evidence from the charged crime that would make jurors make an impermissible inference that because Defendant assaulted Sellars, he is a violent person and must have killed her.

Defendant objected to the limiting instruction, but not to the evidence, its limited admissibility, or its use in proving identity. His argument on appeal is thus waived. *See* N.C. R. App. P. 10(a)(1). Even if preserved, Defendant's argument is meritless, and any error was not prejudicial. Sufficient similarities exist here to infer Defendant was the perpetrator of both the prior crimes and the charged offense. *See* N.C. Gen. Stat. 8C-1, R. Evid. 404(b); *see also Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91. Defendant's prior assaults and the murder for which he was on trial involved the same victim, Sellars. They arose in the context of the exact same relationship, one in which Defendant used violence to control Sellars' behavior. Defendant harassed Sellars, calling her several times a day during the week before the murder. During the afternoon of her disappearance, Andre heard Sellars talking to a man over the telephone about meeting at a hotel. Defendant admitted Sellars ultimately decided against that meeting. Similarities were sufficient to infer Defendant perpetrated both the prior assaults on Sellars and her murder. The trial court properly admitted evidence of Defendant's prior assaultive behavior toward Sellars for the purpose of showing identity.

On appeal, Defendant did not argue that the other purposes for which the trial court instructed the jury it could consider his prior assaults on Sellars—intent, motive, and malice—were improper. Given the overwhelming evidence against Defendant, there is no prejudice. *See* N.C. Gen. Stat. § 15A-1443(a).

D. Admission of Handwritten Document

[4] Defendant argues the trial court erred by admitting an "irrelevant and overly prejudicial document" written by Sellars. Defendant asserts the document references past events that are inadmissible under Rule 803(3). N.C. Gen. Stat. § 8C-1, R. Evid. 803(3) (2017).

> Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

> or less probable than it would be without the evidence." Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*. Defendant bears the burden of showing that the evidence was erroneously admitted and that he was prejudiced by the error.

State v. Kirby, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citations omitted). "Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand." *Stager*, 329 N.C. at 314, 406 S.E.2d at 897 (citation omitted).

Under Rule 403, "relevant [] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, R. Evid. 403. Rule 803(3) provides "[a] statement of the declarant's then existing state of mind" is admissible as an exception to the hearsay rule, but not "a statement of memory or belief to prove the fact remembered or believed[.]" N.C. Gen. Stat. § 8C-1, R. Evid. 803(3).

The handwritten document at issue contained a list of things Sellars was going to tell Defendant. Defendant objected to the admission of the document, outside the presence of the jury, based on lack of foundation and relevance. Defendant claims it is irrelevant as to Sellars' state of mind on or about the time of Sellars' death, because there was an approximate four month period of time between the reference to Defendant hitting Sellars with frozen meat on 16 December 2011 and Sellars' disappearance on or about 20 April 2012. Supporting the argument that the document references past events, Defendant relies on *State v. Hardy* for the proposition that certain statements in Sellars' letter are "merely a recitation of facts which describe various events," as opposed to "statement[s] of [the victim's] then existing state of mind[.]" *See State v. Hardy*, 339 N.C. 207, 228, 451 S.E.2d 600, 612 (1994). According to Defendant, the State's presentation of the letter was meant solely to be prejudicial. A trial court's ruling will be reversed on appeal, however, "only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Kirby*, 206 N.C. App. at 457, 697 S.E.2d at 503 (citation omitted).

Assuming without deciding Defendant's argument is preserved, we find his argument without merit. The statements in the letter far exceed a mere recitation of events. The document references a time frame as to

Defendant hitting Sellars on the head with frozen meat, which occurred on 16 December 2011. Moreover, the document reflected Sellars was "choked," had her "air cut[] off," "begged for [her] life, and was without "heat in the middle of winter," statements from which a trial court could reasonably determine the documents showed her state of mind. Defendant presents no evidence this is not a reasonable conclusion nor that the trial court abused its discretion in any way. Defendant's assignment of error is, therefore, without merit, and the trial court did not err.

E. Admission of Skeletal Remains

[5] Defendant also assigns error to the trial court's admission of Sellars' skeletal remains. First, Defendant claims the trial court erred in admitting the evidence under Rule 403, because Sellars' skeletal remains were more prejudicial than probative. Second, Defendant claims the trial court violated his due process rights by allowing repetitive display of the bones to the jury. Lastly, Defendant claims the trial court erred by denying his mistrial motion. We consider only the first claim, because it is the easiest burden for Defendant to meet. If Defendant cannot prove the trial court abused its discretion in admitting the evidence generally under 403 balancing, then he logically cannot meet the plain error standard of a due process claim. Additionally, the mistrial motion is moot if the court properly admitted the evidence under Rule 403 as more probative than prejudicial.

Rule 403 of the North Carolina Rules of Evidence states relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, R. Evid. 403. " 'Unfair prejudice' means an undue tendency to suggest a decision on an improper basis, usually an emotional one." *State v. Hennis*, 323 N.C. 279, 283, 372 S.E.2d 523, 526 (1988) (quoting *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986)). When reviewing a trial court's Rule 403 evidentiary ruling, we generally give great deference to the "sound discretion" of the trial court. *State v. Graham*, 200 N.C. App. 204, 207, 683 S.E.2d 437, 440 (2009) (quoting *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990)) (quotation marks omitted). Thus, evidence that illustrates witness testimony is generally found to be competent so long as its relevant. *See State v. Lloyd*, 354 N.C. 76, 100, 552 S.E.2d 596, 615 (2001) (holding admission of victim's bloody clothing was not unduly prejudicial because it was relevant).

Sellars' skull, left ribs, right ribs, and right femur were offered and admitted into evidence at different points during the State's case in chief. Defendant properly objected to each individual bone at the appropriate time, and thus we review for an abuse of discretion.[6]

Defendant argues the State submitted Sellars' skeletal remains into evidence "to excite the sympathies or to inflame the passions of the jury." North Carolina case law suggests if the only effect of evidence is to excite prejudice or sympathy, then the trial court abused its discretion when it admitted such evidence. *See e.g.*, *State v. Simpson*, 299 N.C. 335, 346, 261 S.E.2d 818, 825 (1980) (holding trial court erred in admitting during a murder trial evidence that defendant sodomized a dog). In order to determine whether the admission of Sellars' skeleton only excited prejudice and sympathy, we consider the State's purported rationale for each contested set of bones. If there is an established relevant reason for each, we generally defer to the trial court's discretion on relevancy. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

First, we consider the trial court's admission of Sellars' skull. The trial court's admission of a homicide victim's skull is an issue of first impression for this Court.[7] Generally, evidence used to identify a victim is relevant and admissible at trial. *State v. Eason*, 328 N.C. 409, 421, 402 S.E.2d 809, 814-15 (1991) (holding no error to admit victim's little finger into evidence when used to identify charred victim). In *State v. Williams*, this Court held physical evidence of "a segment of skin from the victim's right leg bearing a tattoo design of a Cobra" was not overly prejudicial and properly established the identity of the victim. 17 N.C. App. 39, 43, 193 S.E.2d 452, 454 (1972), *cert. denied*, 282 N.C. 675, 194 S.E.2d 155 (1973). The Court concluded defendant's argument "that the segment of skin should have been photographed and the photograph

---

6. Though Defendant's original objection was to admission of the various remains on the whole in *voir dire*, Defendant renewed his objection when the trial court admitted each piece into evidence in front of the jury. Defendant also received a ruling from the trial court for each item.

7. In a case where defendant was tried for being an accessory to crimes of disturbing graves, this Court found no error where the trial judge allowed skulls to be admitted, over defense counsel's objection, to show the object offered was the same as the object involved in the incident giving rise to the trial. *State v. Lewis*, 58 N.C. App. 348, 351-52, 293 S.E.2d 638, 641 (1982). A review of caselaw in other jurisdictions reveals skulls have been deemed properly admitted to show identity and injuries, *see e.g.*, *State v. Cazes*, 875 S.W. 2d 253, 263 (1994) (*reh'g denied* April 4, 1994); type and location of injury and to corroborate expert testimony, *see e.g.*, *Larmon v. State*, 81 Fla. 553, 555, 88 So. 471, 471 (1921); and condition of the skull, *see e.g.*, *Texas & P. Ry. Co. v. Williams*, 200 S.W. 1149, 1151 (1918).

used as evidence so as to minimize adverse effect on the jury[]" was without merit. *Id.* at 43, 193 S.E.2d at 455.

In the instant case, the State claimed the skull proved the victim's identity and race. The State further argued it needed Curtis, the hunter who found the skull, to identify it so other witnesses could later identify other pertinent bones. Curtis positively identified the skull as the one he found, based on its two front teeth. Defendant waived all chain of custody arguments, so we assume the skull established a chain of custody to bring in the other pertinent remains to prove the State's case. As in *Williams*, where a segment of skin from the victim's right leg was not overly prejudicial, *see* 17 N.C. App. at 43, 193 at 454, here the admitted skull was relevant to the State's case and illustrated Curtis' testimony. Though we may have found other means of establishing Sellars' identity sufficient, the admission of the skull was more probative than prejudicial and properly admitted under Rule 403. *See* N.C. Gen. Stat. § 8C-1, R. Evid. 403.

Next, we consider the admission of the rib bones. Evidence showing the nature and number of a victim's wounds is sufficiently probative under our case law. *State v. Hager*, 320 N.C. 77, 82-83, 357 S.E.2d 615, 618 (1987) (stating "the nature and number of the victim's wounds is also a circumstance from which premeditation and deliberation can be inferred") (citation omitted); *see also State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653 (1987) (concluding nature and number of victims' multiple gunshot wounds showed premeditation). Here, the State used the rib bones to illustrate Sellars' injuries, which the medical examiner later concluded caused her death. Accordingly, the rib bones were more probative than prejudicial and properly admitted under Rule 403. N.C. Gen. Stat. § 8C-1, R. Evid. 403.

Lastly, we consider the admission of the femur. Biological items used in DNA testing are generally admissible in North Carolina under North Carolina General Statute section 8C-1, Rule 702(a). *State v. Williams*, 355 N.C. 501, 553-54, 565 S.E.2d 609, 640 (2002). Our Supreme Court has held DNA evidence is highly probative under Rule 403. *State v. Daughtry*, 340 N.C. 488, 512, 459 S.E.2d 747, 759 (1995). Here, the State used the femur to establish the identity of the deceased through DNA testing. Accordingly, the femur was highly probative and properly admitted under Rule 403. N.C. Gen. Stat. § 8C-1, R. Evid. 403.

In light of the bones' relevancy, we conclude the trial court did not abuse its discretion in admitting Sellars' skeletal remains into evidence and publishing them to the jury. *See Quedens v. State*, 280 Ga. 355, 629

S.E.2d 197 (2006) (The Supreme Court of Georgia concluded admitting skeletal remains of the victim into evidence, and publishing the skeleton to the jury, was not overly prejudicial in a murder trial.). We ultimately defer to the trial court's discretion because Defendant failed to show prejudice. *See State v. Graham*, 200 N.C. App. 204, 207-08, 683 S.E.2d 437, 440 (2009) (citing *State v. Hennis*, 323 N.C. 279, 287, 372 S.E.2d 523, 528 (1988)). Defendant did not prove that had the skeletal remains not been admitted, a reasonable possibility existed the jury would have reached a different result. *Id.* at 207-08, 683 S.E.2d at 440. Because we find no prejudicial error in the trial court's admission of Sellars' remains, Defendant's remaining claims on this topic are moot.

IV. Conclusion

For the reasons stated herein, we hold Defendant has not shown prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
ERNEST RAYSEAN GRAY, Defendant

No. COA17-1162

Filed 18 September 2018

Homicide—identity of perpetrator—relevant circumstances—motive and opportunity—sufficiency of evidence

The State presented sufficient physical evidence and testimony regarding defendant's motive and opportunity from which the jury could reasonably infer he was the person who fatally shot the victim, or that he was present when the victim was shot, to overcome defendant's motion to dismiss his charges for first-degree murder and discharging a weapon into an occupied dwelling.

Appeal by defendant from judgments entered 16 March 2017 by Judge Douglas B. Sasser in Bladen County Superior Court. Heard in the Court of Appeals 7 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenneth A. Sack, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

BERGER, Judge.

On March 16, 2017, a Bladen County jury convicted Ernest Raysean Gray ("Defendant") of first-degree murder and discharging a weapon into an occupied dwelling, and he was sentenced to life in prison without parole. Defendant asserts that the trial court erred when it denied his motion to dismiss both charges because the State had not introduced sufficient evidence to establish that he was the perpetrator of the crimes. We disagree.

Factual and Procedural Background

In October 2014, Malcolm Jerome Melvin ("Melvin") was living in a mobile home park in Elizabethtown, North Carolina, with his girlfriend, Danielle Purdie ("Purdie"). On October 28, 2014, around 1:15 a.m., Melvin saw a Facebook message from Defendant on Purdie's phone. Melvin responded to the message, both identifying himself and questioning why Defendant was messaging his girlfriend. Defendant responded with another message that said, "Wassup doh [expletive] y u inbox back doh . . . I'm sayn wess up [expletive] wat up want beef now I'm down wit dat."

After discussing the messages with Melvin, Purdie went back to sleep, but awoke to a knock at the door at about 2:30 a.m. Melvin retrieved his pistol from a closet and went to the front door. Purdie remained in the bedroom. From the bedroom, Purdie could hear voices, but she could not identify the individuals at the door. A person at the door said, "Wass up doh? Wass up? You want beef?" Purdie then heard a gunshot, saw Melvin fall to the floor, and heard more gunshots. Purdie ran to Melvin, but he was not breathing and had no pulse.

Angela Locklear ("Locklear") and Stephen Johnson ("Johnson"), Defendant's uncle, lived in a mobile home that was located about 220 feet from Melvin's residence. On October 28, 2014, between 1:00 a.m. and 2:00 a.m., Locklear heard gunshots. Shortly thereafter, Defendant knocked on their door and asked to speak with his uncle. Locklear testified that Defendant "looked like somebody was after him or something . . . he act[ed] like he was scared." Defendant told Johnson he did

not know anything about the gunshots. Defendant then fell asleep in their home.

Around 6:00 a.m. the following morning, Twasjay Brown ("Brown") knocked on Locklear and Johnson's door, looking for Defendant. Johnson asked Brown whether he or Defendant had anything to do with the events that occurred during the night. Brown denied any involvement. Defendant and Brown then left the residence.

When deputies with the Bladen County Sheriff's Department began investigating Melvin's death on October 28, 2014, they found a wallet, with a driver's license and social security card belonging to Defendant, on the ground between Melvin's residence and Johnson's residence. A cell phone belonging to Brown was also found in the front yard of Melvin's residence, next to .45 caliber shell casings. Both .45 caliber and 9mm shell casings were recovered from the front yard of Melvin's residence. There were several bullet holes on the exterior of the residence near the front door, as well as several bullet holes inside of the entrance, where investigators recovered a .45 caliber bullet. Melvin's pistol was located inside his residence and had not been fired. Melvin's cause of death was determined to be a gunshot wound to the head. The weapon used to kill Melvin was never recovered.

Defendant was indicted for first-degree murder and discharging a weapon into an occupied dwelling. At trial, Defendant moved to dismiss both charges at the close of the State's presentation of evidence, and the motion was renewed at the close of all the evidence. Both of Defendant's motions were denied. Defendant was found guilty of first-degree murder and discharging a weapon into an occupied dwelling, and sentenced to life imprisonment without parole. Defendant gave timely notice of appeal.

Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 378-79, 526 S.E.2d at 455 (*purgandum*[1]).

Analysis

In North Carolina, a death that is the result of a "felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." N.C. Gen. Stat. § 14-17(a) (2017).

> The elements of felony murder are (1) that a defendant, or someone with whom the defendant was acting in concert, committed or attempted to commit a predicate felony under N.C. Gen. Stat. § 14-17(a) (2013); (2) that a killing occurred in the perpetration or attempted perpetration of that felony; and (3) that the killing was caused by the defendant or a co-felon.

State v. Maldonado, 241 N.C. App. 370, 376, 772 S.E.2d 479, 483-84 (*purgandum*), *appeal dismissed*, *disc. review denied*, ___ N.C. ___, 776 S.E.2d 196 (2015). Shooting into an occupied dwelling is a qualifying

---

1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

predicate felony for felony murder pursuant to Section 14-17(a). *State v. Wall*, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982).

When evidence of whether the defendant was the perpetrator of the crime is circumstantial, "courts often [look to] proof of motive, opportunity, capability, and identity to determine whether a reasonable inference of the defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator." *State v. Hayden*, 212 N.C. App. 482, 485, 711 S.E.2d 492, 494 (2011) (citation and quotation marks omitted). "The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

As this Court explained before in *State v. Lowry*:

> The real problem lies in applying the test to the individual facts of a case, particularly where the proof is circumstantial. One method courts use to assist analysis is to classify evidence of guilt into several rather broad categories. Although the language is by no means consistent, courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime. . . .
>
> While the cases do not generally indicate what weight is to be given evidence of these various factors, a few rough rules do appear. It is clear, for instance, that evidence of either motive or opportunity alone is insufficient to carry a case to the jury. On the other hand, when the question is whether evidence of both motive and opportunity will be sufficient to survive a motion to dismiss, the answer is much less clear. The answer appears to rest more upon the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable 'bright line' test.

State v. Lowry, 198 N.C. App. 457, 466, 679 S.E.2d 865, 870-71 (2009) (*purgandum*).

Here, the State introduced evidence tending to establish both motive and opportunity. First, motive tended to be sufficiently established with testimony concerning the hostility that existed between Defendant and

Melvin over Defendant's communication with Purdie. Although Purdie did not see the individuals and was unable to identify their voices, the evidence tended to show that similar, distinctive language had been used both in the message sent by Defendant and by the person speaking with Melvin at the time he was shot. Both communications were about a perceived "beef" between Defendant and Melvin over Defendant's interactions with Purdie. The Facebook message, which could be affirmatively attributed to Defendant, along with the fact that a speaker using similar language came to Purdie's home to confront Melvin with a weapon, evidenced some hostility between Defendant and Melvin of the kind that would precipitate an intentional killing. This is sufficient for a reasonable juror to conclude Defendant had motive to kill Melvin.

Second, Defendant's opportunity to commit the crimes tended to be sufficiently established by both physical evidence at the crime scene and testimony of those who interacted with Defendant near the scene shortly after Melvin's death. Defendant's wallet containing his identification and social security cards was found near Melvin's residence. Shortly after gunshots were heard, Defendant knocked on the door of Locklear's residence, which was located near Melvin's residence. Brown's cell phone was also recovered near the crime scene, and Brown attempted to locate Defendant shortly after the gunshots had been heard. Because the evidence placed Defendant at or near the scene of the crime around the time of the victim's murder, a reasonable juror could find that Defendant had the opportunity to commit the felony that resulted in Melvin's death.

Finally, it is undisputed that, regardless of who fired a weapon into Purdie's residence, an occupied dwelling, it resulted in Melvin's death. The shots Locklear heard in the mobile home park that night came from outside Melvin's residence. Although there were two weapons fired, based on the shell casings found at the scene, "[i]t is not necessary to support a conviction of felony-murder that defendant actually inflicted the fatal shot." *State v. Peplinski*, 290 N.C. 236, 240, 225 S.E.2d 568, 571 (1976). When "several persons aid and abet each other" and one "fatally wounds the victim, all being present, each is guilty of murder in the first degree." *Id.* at 240-41, 225 S.E. 2d at 571. The State's evidence tended to show that Brown had come to Locklear's residence to meet with Defendant shortly after Melvin's death. Moreover, Defendant's wallet containing his identification and social security cards, along with Brown's iPhone, were found at the crime scene. The evidence tended to show that either Defendant or Brown likely fired the fatal shot. Regardless of who actually fired the fatal shot, however, Defendant could still be found guilty of felony murder.

As our Supreme Court held,

> [i]f the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, *then it is for the jury to decide* whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (emphasis added). Based upon the evidence introduced by the State, there was sufficient evidence from which a reasonable inference of Defendant's guilt could be drawn. The trial court did not err in denying Defendant's motion to dismiss, and the jury's verdict will not be disturbed by this Court.

Conclusion

The trial court did not err in denying Defendant's motion to dismiss because the State introduced substantial evidence of each essential element of both discharging a weapon into an occupied dwelling and felony murder. Defendant received a fair trial, free from error.

NO ERROR.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
DAMIEN AARON WHITE, Defendant

No. COA17-1355

Filed 18 September 2018

1. Rape—first-degree—sufficiency of evidence

The State presented sufficient evidence to withstand defendant's motion to dismiss the charge of first-degree rape where multiple eyewitnesses identified defendant as the man straddling the victim in an alley and there was debris and a small black hair inside the victim's vaginal canal.

2. Satellite-Based Monitoring—constitutionality of search—hearing required

The trial court erred by ordering defendant to enroll in satellite-based monitoring (SBM) upon his release from imprisonment without first conducting a hearing to determine the constitutionality of subjecting defendant to SBM, requiring the order to be vacated and the case to be remanded for a hearing on the matter.

Appeal by defendant from judgment and order entered 6 June 2017 by Judge Imelda J. Pate in New Hanover County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the state-appellee.

Mark Montgomery for defendant-appellant.

ZACHARY, Judge.

Defendant Damien Aaron White appeals (1) from the trial court's order denying his Motion to Dismiss his charge of first-degree rape, and (2) from the trial court's order enrolling him in satellite-based monitoring. Because we conclude that the State presented sufficient evidence to withstand Defendant's Motion to Dismiss his first-degree rape charge, we affirm the trial court's denial of the Motion to Dismiss. Because the trial court did not conduct a hearing to determine whether it would be constitutional to subject Defendant to satellite-based monitoring upon

his release, we vacate the trial court's order enrolling Defendant in satellite-based monitoring, and remand for a hearing on this matter.

Background

Defendant was indicted for first-degree rape and was tried before a jury beginning on 30 May 2017. The victim could not remember the incident, and thus was unable to testify that she had been raped or that Defendant was the one who had raped her. Rather, the evidence at Defendant's trial tended to show the following:

The victim was out with several of her friends one night in downtown Wilmington. The victim and Defendant had never met each other prior to this time. At approximately 1:30 a.m., the victim and her friend Eddie were talking when a man—whom Eddie was "six out of ten" sure was Defendant—approached the victim. The victim and the man walked away together. Ten minutes later, the victim's friend Katherine ran into the victim. The victim eventually walked away from Katherine, at which point a man—whom Katherine was "95 percent confident" was Defendant—asked Katherine if the victim was okay.

Later in the evening, Jean and John, strangers to the victim, were walking downtown when they heard a woman screaming for help. Jean and John ran toward the screams and came upon a man in an alley "straddling" the victim, "in like a missionary position." John threw the man off of the victim, and recalled that he could "clearly see [the man] pulling his pants up" and that the man had an erection. The man said, "It's not what it looks like," and another individual yelled out, "He raped her, call the police." The man then took off running. John and another male ran after the man while Jean stayed with the victim, who had been left on the ground with her pants and underwear pulled down to her ankles.

Officer Benjamin Galluppi was on duty near the scene when he saw Defendant being chased by two males. Officer Galluppi was able to detain Defendant, whose pants were undone. Jean and John participated in a show-up identification of Defendant shortly thereafter. Jean was "a hundred percent sure," and John had no "doubt in [his] mind," that Defendant was the man that they had just seen straddling the victim in the alley.

The victim was taken to the emergency room where she was examined by Wendy Bledsoe, an emergency room nurse and expert in sexual assault examination. In addition to having sustained a concussion and various injuries to her head, neck, and forearm, Nurse Bledsoe testified that she found "debris and a small black hair inside the vagina on one

of the [victim's] vaginal walls" that was "most consistent with a pubic hair." The victim did not have pubic hair. The victim's sexual assault kit was tested, but no sperm or semen was found. A DNA sample was taken from the victim's underwear and revealed one profile matching the victim's DNA and another "minor profile." However, the profile not belonging to the victim "was inconclusive due to insufficient quality and quantity of DNA present" on the underwear.

Defendant also testified at trial as follows: Defendant went downtown that evening to go out with friends but could not get into any bars because he did not have his identification. Accordingly, he spent most of the evening talking to his friends outside in the street and walking around trying to find a bar into which he could gain admission without identification.

At one point Defendant walked to a parking garage in order to urinate. Afterward, Defendant recalls seeing the victim:

> [T]here was a young woman [the victim] who was walking down the street. You could definitely tell she had been drinking and everything. She was stumbling as she was walking. She could walk but she was stumbling and everything, and she had walked up and interlocked her arm with mine, and I smiled at her and she smiled at me and we kept walking down the street.
>
> And I'm walking back . . . and I think we got maybe like maybe a block and a half . . . and she had seen two other male gentlemen that I assumed she knew and she separated from me and went to them and interlocked between them two and I looked at them. I asked did they have her, was everything fine, they said yeah, they had her and they went off across the street in the opposite direction and I went further down. I said okay and kept going. That was it. I continued walking.

Defendant came across the victim once again later in the evening:

> . . . I was walking up the street and then there is an alleyway that was to my right and on the side of the street that I was walking on, there was hardly anybody or anything on it, so I wanted to get to the other side where it was more populated and where I could see more people and try to find some area because at that point I didn't know where I was at.

> And so as soon as I turned down the alleyway, right at the very beginning of the alleyway, there was a dumpster and right there was a young woman out like exposed, laying on her side. . . . [A]nd so I knelt down in front of her to ask her if she was all right or if she needed anything or any kind of help and as soon as I got her attention, she turns and looks at me and at that point I could tell that this is the same young woman who I had seen earlier.
>
> She starts to scream, "Get away from me nigger, get away from me, nigger," over and over again. So I'm like moderate reaction, just like, whoa, and I stand up and . . . as soon as I stand up, it's almost immediately I see fists and people are trying to attack me and I didn't know what was going on in that situation.
>
> The first thought is, I mean, I'm in unfamiliar territory, I don't know what's going on and I'm being attacked. And so my initial thought was to leave, get away from the situation, so that's what I did, I ran.

Defendant testified that Officer Galluppi possibly saw that his pants were unzipped because he had just gone to the bathroom, and that "I do have a habit of maybe leaving a fly undone, so it is quite possible that I didn't zip my pants back up afterwards." Defendant testified that he never pulled his pants off or down that evening, but that he does like to wear his pants "loose," and that if he "ever ha[s] to bend over or to pick something up, sit down for too long or kneel down for anything, once I stand up I have to readjust my pants."

Finally, Defendant testified that he did not rape the victim, did not attempt to rape the victim, did not pull her pants down, and did not "ever touch her in any manner other than attempt to assist her."

Defendant's trial counsel moved to dismiss the first-degree rape charge for insufficient evidence. The trial court denied Defendant's Motion to Dismiss and the jury subsequently convicted Defendant of first-degree rape. The trial court sentenced Defendant to 240 to 300 months' imprisonment and ordered that he enroll in satellite-based monitoring for the remainder of his natural life upon his release from prison. The trial court ordered Defendant to enroll in satellite-based monitoring without first having conducted an inquiry into whether doing so would constitute a permissible Fourth Amendment search.

Defendant appealed from his conviction in open court and filed written notice of appeal from the trial court's order enrolling him in satellite-based monitoring. On appeal, Defendant argues (1) that the trial court erred in denying Defendant's motion to dismiss his first-degree rape charge for insufficiency of the evidence, and (2) that the trial court erred in ordering lifetime satellite-based monitoring without first conducting a hearing on its constitutionality.

Motion to Dismiss

[1] The standard of review on a motion to dismiss is well established:

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State. Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight, which is a matter for the jury. Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (citations and emphasis omitted).

"The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984) (citation omitted). Where the State's evidence of the defendant's guilt is circumstantial, "the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually

guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965) (citation omitted).

In order to survive a motion to dismiss a charge of first-degree rape, the State must present sufficient evidence that the defendant "engage[ed] in vaginal intercourse with another person by force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.21(a) (2017). "The slightest penetration of the female sex organ by the male sex organ is sufficient to constitute vaginal intercourse within the meaning of the statute." *State v. McNicholas*, 322 N.C. 548, 556, 369 S.E.2d 569, 574 (1988) (citing *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985)).

In the instant case, Defendant argues that the trial court erred when it denied his Motion to Dismiss because the State failed to present sufficient evidence (1) that the perpetrator engaged in vaginal intercourse with—*i.e.*, "penetrated"—the victim, and (2) if so, that Defendant was the perpetrator. We disagree.

The evidence to which the State points in support of the trial court's denial of Defendant's Motion to Dismiss tended to show that the victim was heard screaming "Help, help me." The scream was "absolutely not" a joke: "It was a distress, it was—it was scary. It was you knew something was seriously wrong." When Jean and John ran toward the sound of the victim's screams, they "saw a man straddling" the victim "in like a missionary position," at which point John "ran up to him and I threw him off of her and he stands up." John testified that when he pushed the man off of the victim, "I'm watching his hands and I can clearly see him pulling his pants up[.]" The man looked "like a deer caught in headlights . . . like in shock, like standing there[,]" and "had an erection." The victim's "underwear and her pants were all the way to the ankle." Jean testified that someone yelled, "Call the police, he raped her," at which point the man "took right off. As soon as that was said, he was gone." Jean testified that the victim was crying and "kept thanking me," and that, "I'm a mom, I just—I knew she went through something, I just held her."

In addition, Nurse Bledsoe found "debris and a small black hair inside the vagina on one of the [victim's] vaginal walls" that was "most consistent with a pubic hair." The victim did not have pubic hair. The following exchange took place between Nurse Bledsoe and the State regarding the debris and hair found inside the victim:

> Q. In your training and experience, Ms. Bledsoe, if a female sits on a beach without bathing suit bottoms, for example, would the sand go up inside her vaginal canal?

> . . .
>
> A. No.
>
> Q. In your training and experience, if a female goes swimming and, say, is not wearing bathing suit bottoms, if there is debris in the water, would that go up inside that female?
>
> . . .
>
> A. No.
>
> Q. And if a female sits on a paved alley that has dirt and debris all over it, just by sitting there would that dirt and debris be pulled up by the vaginal canal?
>
> . . .
>
> A. No.
>
> Q. And why is that?
>
> . . .
>
> A. The typical state of the vaginal walls, as I mentioned earlier, are collapsed in their normal state, they're collapsed and they only open up if something is introduced inside of them.

The victim's friend Eddie identified Defendant as the man that he saw with the victim roughly thirty minutes before the assault took place to a sixty-percent degree of certainty. Ten minutes after Defendant was identified as being with the victim, the victim's friend Katherine testified that a man came up to her and asked if the victim was okay. Katherine identified Defendant as the person she spoke to that night with "95 percent confiden[ce]." Officer Galluppi observed Defendant running away from the scene of the assault and being chased by John and the other male. Officer Galluppi apprehended Defendant. At show-up identifications of Defendant shortly thereafter, Jean was "a hundred percent sure" that Defendant was the man who she saw straddling the victim, and John had no "doubt in [his] mind" that Defendant was the man whom he had thrown off of the victim.

"Considered in the light most favorable to the State, a reasonable juror could have inferred from this evidence" (1) that the victim was vaginally penetrated against her will, and (2) that Defendant was the perpetrator of that assault. *Hunt*, 365 N.C. at 440, 722 S.E.2d at 490 (citation omitted). Defendant's arguments pertaining to the discrepancies and

inconsistencies in the evidence go to the evidence's weight rather than its sufficiency and were thus matters to be resolved not by the trial judge, but by the jury. *Hunt*, 365 N.C. at 436, 722 S.E.2d at 488. Accordingly, the trial court properly denied Defendant's Motion to Dismiss the first-degree rape charge.

Satellite-Based Monitoring

[2] Our General Assembly has enacted "a sex offender monitoring program that uses a continuous satellite-based monitoring system . . . designed to monitor" the location of individuals convicted of certain sex offenses after they are released from prison. N.C. Gen. Stat. § 14-208.40(a) (2017).

> The United States Supreme Court has held that [this] program constitutes a search for purposes of the Fourth Amendment. *Grady v. North Carolin*a, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462, 135 S. Ct. 1368 (2015) [("*Grady I*")]. As such, North Carolina courts must first "examine whether the State's monitoring program is reasonable—when properly viewed as a search"—before subjecting a defendant to its enrollment. *Id.* at ___, 191 L. Ed. 2d at 463. This reasonableness inquiry requires the court to analyze the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, 191 L. Ed. 2d at 462.

State v. Greene, ___ N.C. App. ___, ___, 806 S.E.2d 343, 344 (2017). The State bears the burden of proving that enrollment in satellite-based monitoring is a permissible Fourth Amendment search of each particular defendant targeted. *State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016); *State v. Morris*, ___ N.C. App. ___, ___, 783 S.E.2d 528, 530 (2016). This Court recently addressed the framework governing the constitutionality of satellite-based monitoring orders in *State v. Gordon*, No. COA17-1077, ___ N.C. App. ___, ___ S.E.2d ___ (filed Sept. 4, 2018), *State v. Griffin*, No. COA17-386, ___ N.C. App. ___, ___ S.E.2d ___ (filed Aug. 7, 2018), and on remand from *Grady I* in *State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018) ("*Grady II*").

In the instant case, after judgment was entered, the trial court ordered Defendant to enroll in satellite-based monitoring for the remainder of his natural life. The trial court did so despite not having held a hearing or having made a determination on the constitutionality of that search. The trial court simply concluded that, "in regard to

satellite-based monitoring, that upon release from imprisonment, the defendant shall enroll in satellite-based monitoring for the rest of his natural life." The State had not yet offered any evidence in support of the constitutionality of the satellite-based monitoring of Defendant after Defendant's eventual release from prison. Defendant cited *Grady I* and objected to the constitutionality of the satellite-based monitoring program, which the trial court stated was "so noted and those objections are denied." Defendant filed proper written notice of appeal.

It is clear that the trial court erred when it ordered Defendant to enroll in satellite-based monitoring upon his release from prison without first holding a hearing in order to determine whether doing so would be in compliance with the Fourth Amendment. *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *Morris*, ___ N.C. App. at ___, 783 S.E.2d at 529-530. In light of this deficiency on the part of the trial court, the State concedes that this Court should vacate the satellite-based monitoring order and "remand this issue to the trial court to provide the parties an opportunity to offer evidence and arguments regarding [satellite-based monitoring] and for the trial court to make findings as" to its constitutionality. Defendant, however, cites *Greene*, *supra*, and argues that the appropriate remedy is for this Court to reverse the satellite-based monitoring order without remanding for a hearing. Defendant's application of *Greene* is misplaced.

In *Greene*, there was a hearing in the trial court. *Greene*, ___ N.C. App. at ___, 806 S.E.2d at 344. The State put forth scant evidence in support of the constitutionality of satellite-based monitoring and both parties presented arguments on the matter. *Id.* The defendant filed a motion to dismiss the State's application for satellite-based monitoring, but the trial court concluded that the State's evidence had established that satellite-based monitoring constituted a reasonable Fourth Amendment search of the defendant. *Id.* The defendant appealed, arguing that "the State's evidence was insufficient to establish" the trial court's finding "that the enrollment constituted a reasonable Fourth Amendment search[.]" *Id.* The State conceded that *the evidence it presented at the hearing* was insufficient. *Id.* We thus concluded that the matter "ended there[,]" and that the State was therefore not "permitted to 'try again' " by presenting additional evidence at a second hearing. *Id.* at ___, 806 S.E.2d at 345. The defendant's motion to dismiss should have been granted. *Id.*

In the instant case, there was no hearing. The trial court did not afford the State an opportunity to present evidence in order to establish the constitutionality of enrolling Defendant in satellite-based monitoring. Because no evidentiary hearing was held on the matter whatsoever,

we are unable to review the propriety of enrolling Defendant in lifetime satellite-based monitoring. *Cf. Gordon*, No. COA17-1077, ___ N.C. App. ___, ___ S.E.2d ___ (filed Sept. 4, 2018). Accordingly, we must remand the matter to the trial court in order to conduct a hearing, at which time the State will be required to establish the constitutionality of subjecting Defendant to continuous location monitoring for the remainder of his natural life upon Defendant's eventual release from prison. After allowing the State an opportunity to satisfy this arduous burden and after hearing arguments from both sides, the trial court must make its Fourth Amendment determination after having explicitly analyzed the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations[,]" in light of this Court's recent opinions in *Gordon*, *Griffin*, and *Grady II*, *supra*. *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at 462. The remand hearing will be the State's sole opportunity to present evidence that ordering Defendant to enroll in satellite-based monitoring for the remainder of his natural life after Defendant has been released from prison will constitute a permissible search under the Fourth Amendment. *Greene*, ___ N.C. App. at ___, 806 S.E.2d at 345.

Conclusion

The trial court's order denying Defendant's Motion to Dismiss is affirmed. The trial court's order enrolling Defendant in satellite-based monitoring is vacated and remanded for the purpose of conducting an evidentiary hearing consistent with this Opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges ELMORE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
MONTREZ BENJAMIN WILLIAMS, Defendant

No. COA16-178

Filed 18 September 2018

Constitutional Law—first-degree murder—juvenile offender—life without parole

In a case of first impression, the Court of Appeals determined that the Eighth Amendment required a trial court to consider, as a threshold matter, whether a juvenile offender convicted of first-degree murder qualified as an irreparably corrupt individual before imposing a sentence of life imprisonment without the possibility of parole. Where a trial court found that a juvenile offender's likelihood of rehabilitation was unknown or speculative, the imposition of life without parole was constitutionally invalid as applied to that individual.

Appeal by Defendant from Judgment entered 11 September 2015 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2016. Supplemental briefing ordered on 21 May 2018.

Attorney General Joshua H. Stein, by Special Attorney General Lars F. Nance and Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant-Appellant.

INMAN, Judge.

More than a decade ago, the United States Supreme Court outlawed capital punishment for even the worst offenders under the age of eighteen. Six years ago, the United States Supreme Court held that the Eighth Amendment to the United States Constitution also prohibits mandatory life sentences without parole for juvenile offenders. Which leads to the next question: When does the Eighth Amendment allow for the sentencing of a juvenile offender to prison for life without the possibility of parole? Despite extensive critiques, courts in all jurisdictions are still discerning the appropriate criteria and methodology for

imposing the harshest of sentences on young people whose entire lives lie before them and whose potential for change is generally unknowable.

This appeal presents the conflict arising when a trial court expressly finds that a juvenile offender's likelihood of rehabilitation is uncertain and sentences him to life in prison without parole. We hold that the United States Supreme Court's mandate that life without parole is reserved for those juvenile defendants who exhibit such irretrievable depravity that rehabilitation is impossible compels us to vacate the sentence in this case and remand for Defendant to be re-sentenced to life with the possibility of parole.

I. Facts and Procedural History

In 2008, Defendant was indicted on two counts of first-degree murder in the shooting deaths of Terry Rashad Long and Joshua Vinsel Davis. At the time of the shooting, Defendant was seventeen years old. In 2011, following a trial in Mecklenburg County Superior Court, a jury convicted Defendant on both charges based on a theory of malice, premeditation, and deliberation. Defendant was sentenced to two consecutive terms of life in prison without the possibility of parole. This Court upheld Defendant's conviction and sentence on appeal, *State v. Williams*, 220 N.C. App. 130, 724 S.E.2d 654 (2012), and the North Carolina Supreme Court dismissed his petitions for review. *State v. Williams*, 366 N.C. 240, 731 S.E.2d 167 (2012).

In June 2012, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), holding that mandatory sentences of life without parole for juvenile offenders violate the Eighth Amendment's prohibition against cruel and unusual punishments. Weeks later, in July 2012, the North Carolina General Assembly enacted an amendment to the sentencing statute, N.C. Gen. Stat. § 15A-1340.19B, removing the mandatory life sentence without parole for juvenile murderers and replacing it with a permissive sentencing scheme. 2012 N.C. Sess. Law 2012-148, § 1. The amended statute delineates mitigating factors to be considered in sentencing: (1) the offender's age at the time of offense; (2) immaturity; (3) ability to appreciate the risks and consequences of the conduct; (4) intellectual capacity; (5) prior record; (6) mental health; (7) familial or peer pressure exerted upon him; (8) likelihood that he would benefit from rehabilitation in confinement; and (9) other mitigating factors and circumstances. N.C. Gen. Stat. § 15A-1340.19B (2017).

Following the *Miller* decision, Defendant filed a motion for appropriate relief seeking a new sentencing hearing. Defendant's motion was

granted. At the resentencing hearing, Defendant presented evidence related to several mitigating factors. After consideration of the evidence and arguments by counsel, the trial court entered a lengthy order containing 52 findings of fact and 16 conclusions of law; among them, the following conclusion: "There is no certain prognosis of Defendant[']s possibility of rehabilitation. The speculation of Defendant's ability to be rehabilitated can only be given minimal weight as a mitigating factor." The trial court sentenced Defendant to serve two consecutive sentences of life without parole, and Defendant appealed.

II. Analysis

In his original brief to this Court, Defendant argued that his sentence should be vacated because: (1) the trial court's finding that Defendant's potential for rehabilitation was speculative removes him from the permissible class of juveniles whom the United States Supreme Court has held are eligible for life without parole; (2) the trial court failed to give the required weight to the mitigating factors of youth, immaturity, diminished appreciation of risk, and negative peer and family pressure; (3) the trial court relied on unsupported findings regarding escalation of prior offenses and that the offense of which Defendant was convicted was a "Planned Ambush;" and (4) that N.C. Gen. Stat. § 15A-1340.19B is unconstitutional on its face. Because we are bound by the North Carolina Supreme Court's recent decision in *State v. James*, __ N.C. __, 813 S.E.2d 195 (2018), which upheld the constitutionality of N.C. Gen. Stat. § 15A-1340.19B, we reject Defendant's fourth argument and will not address it further. Because we agree with Defendant's first argument that the trial court's finding rendered him ineligible for sentences of life without parole, we need not address his remaining arguments.

A. Standard of Review

This Court reviews constitutional issues *de novo*. *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000). "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. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

B. Discussion

After prohibiting mandatory sentences of life without parole for juvenile offenders in *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), the United States Supreme Court held in *Montgomery v. Louisiana* that "a lifetime in prison is a disproportionate sentence

for all but the rarest of children, those whose crimes reflect irreparable corruption" and "who exhibit such irretrievable depravity that *rehabilitation is impossible*." __ U.S. __, __, __, 193 L. Ed. 2d 599, 611, 619 (2016) (internal quotation marks and citations omitted) (emphasis added).

In this case we face a question of first impression: whether the Supreme Court's holdings require trial courts to determine, as a threshold matter, whether a juvenile defendant is eligible for such punishment independent of other relevant factors, or whether it merely identifies additional factors that the trial court must consider as it weighs the totality of circumstances in making its sentencing decision. The answer lies in further study of *Miller* and its progeny.

In *Miller*, the United States Supreme Court held that mandatory sentences of life in prison without parole for juveniles—anyone under the age of eighteen—violate the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishments. 567 U.S. at 465, 183 L. Ed. 2d at 415. The Court reasoned that "juveniles have diminished culpability and greater prospects for reform . . . [thereby making them] less deserving of the most severe punishments." *Id.* at 471, 183 L. Ed. 2d at 418 (internal quotation marks and citation omitted). The Court provided no specific criteria for sentencing a juvenile to life in prison without parole but predicted that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 479, 183 L. Ed. 2d at 424.

Following *Miller*, courts disputed whether its holding proscribed a procedural rule of constitutional law, which would apply only to prospective cases, or a substantive rule that applied retroactively. In *Montgomery*, the Supreme Court held that *Miller* "announced a substantive rule of constitutional law." __ U.S. at __, 193 L. Ed. 2d at 620. However, the Court cautioned that States would be required to develop procedural criteria to protect juveniles' substantive rights: "[t]hat *Miller* does not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Id.* at __, 193 L. Ed. 2d at 621. The Court's justification for not imposing a formal factfinding requirement is derived from the notion that, "[w]hen a new substantive rule of constitutional law is established, [the United States Supreme Court] is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.* at __, 193 L. Ed.

2d at 621 (citation omitted). Despite this reservation, the *Montgomery* decision noted that "*Miller* did bar life without parole . . . for all but the rarest juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at __, 193 L. Ed. 2d at 620.

As Justice Sotomayor highlighted in a concurring opinion in *Tatum v. Arizona*, __ U.S. __, __, 196 L. Ed. 2d 284, 285 (2016) (Sotomayor, J., concurring), "the question *Miller* and *Montgomery* require a sentencer to ask [is]: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.' " (citation omitted).

We interpret the United States Supreme Court's decisions to prohibit imposing a sentence of life without the possibility of parole on any juvenile whom a trial court has found is constitutionally ineligible for that sentence, independent of its consideration of the totality of circumstances that might otherwise favor the harshest sentence. A closer look at North Carolina precedent supports this conclusion.

In *State v. James*, the North Carolina Supreme Court upheld the constitutionality of the newly amended N.C. Gen. Stat. § 15A-1340.19B. *James*, __ N.C. at __, 813 S.E.2d at 207. The Court relied on principles of statutory construction that direct our courts, when faced between two interpretations of a statute, to construe the statute as constitutional. *See id.* at __, 813 S.E.2d at 203 ("Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." (internal quotation marks and citations omitted)). *James* considered whether N.C. Gen. Stat. § 15A-1340.19B creates a presumption of life without parole for juvenile offenders convicted of first-degree murder on a basis other than the felony murder rule,[1] *id.* at __, 813 S.E.2d at 200, the argument being that if such a presumption is present, N.C. Gen. Stat. § 15A-1340.19B conflicts with *Miller*. *Id.* at __, 813 S.E.2d at 207.

The North Carolina Supreme Court in *James* skeptically viewed the State's argument that a statute including a presumption of life imprisonment without parole for juvenile offenders would pass constitutional muster:

> In view of the fact "that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those

1. Section 15A-1340.19B mandates that juveniles found guilty of first-degree murder on the sole basis of the felony murder rule are to be sentenced to life in prison with the possibility of parole. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2015).

> whose crimes reflect 'irreparable corruption,' " a statutory sentencing scheme embodying a presumption in favor of a sentence of life imprisonment without the possibility of parole for a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule would be, at an absolute minimum, in considerable tension with the General Assembly's expressed intent to adopt a set of statutory provisions that complied with *Miller* and with the expressed intent of the United States Supreme Court that, as a constitutional matter, the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile be a rare event.

Id. at __, 813 S.E.2d at 206-07 (quoting *Montgomery*, __ U.S. at __, 193 L. Ed. 2d at 611). This analysis is consistent with that adopted by other state courts. *See*, *e.g.*, *People v. Gutierrez*, 58 Cal.4th 1354, 1328, 1387, 171 Cal.Rptr.3d 421, 324 P.3d 245, 264, 267 (2014) (holding that interpreting a sentencing statute as establishing "a presumption in favor of life without parole [for juvenile homicide offenders] raises serious constitutional concerns under the reasoning of *Miller* and the body of precedent upon which *Miller* relied").

The *James* court instead held that N.C. Gen. Stat. § 15A-1340.19B provides trial courts with an even choice between two equal alternative sentencing options—life with parole or life without parole. *James*, __ N.C. at __, 813 S.E.2d at 204. In so holding, *James* rejected the notion that a sentencing statute must presume a sentence of life with the possibility of parole for juvenile offenders. *See id.* at __, 813 S.E.2d at 207 ("[T]rial judges sentencing juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule should refrain from presuming the appropriateness of a sentence of life imprisonment without the possibility of parole and select between the available sentencing alternatives based solely upon a consideration of 'the circumstances of the offense,' 'the particular circumstances of the defendant,' and 'any mitigating factors,' as they currently do." (internal citations omitted)). Because it held that N.C. Gen. Stat. § 15A-1340.19B does not create a presumption in favor of life without parole, the North Carolina Supreme Court did not reach the issue of whether such a presumption would be constitutional under *Miller* and its progeny.

James also contemplated whether *Miller* requires a trial court to make an explicit finding that the juvenile is " 'irreparably corrupt' or 'permanently incorrigible' before the juvenile can be sentenced to life imprisonment without the possibility of parole." *James*, __ N.C. at __,

813 S.E.2d at 208. To this end, the North Carolina Supreme Court, interpreting N.C. Gen. Stat. § 15A-1340.19B *in pari materia* with the other parts of the Juvenile Code,[2] explained:

> [A] trial judge required to sentence a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule must consider "all the circumstances of the offense," "the particular circumstances of the defendant," and the mitigating circumstances enumerated in subsection 15A-1340.19B(c), [N.C. Gen. Stat.] § 15A-1340.19C, and comply with *Miller*'s directive that sentences of life imprisonment without the possibility of parole for juveniles convicted of first-degree murder should be the exception, rather than the rule, with the "harshest prison sentence" to be reserved for "the rare juvenile offender whose crime reflects irreparable corruption," rather than "unfortunate yet transient immaturity." *Miller*, 567 U.S. at 479-80, 183 L. Ed. 2d at 424. In our view, the statutory provisions at issue in this case, when considered in their entirety and construed in light of the constitutional requirements set out in *Miller* and its progeny as set out in more detail above, provide sufficient guidance to allow a sentencing judge to make a proper, non-arbitrary determination of the sentence that should be imposed upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule to satisfy due process requirements.

Id. at __, 813 S.E.2d at 208. *James* further held that the newly amended sentencing statute was sufficient without additional procedural requirements, such as the consideration of aggravating factors:

> As a result of the fact that the statutory provisions at issue in th[e] case require consideration of the factors enunciated in *Miller* and its progeny and the fact that *Miller* and its progeny indicate that life without parole sentences for juveniles should be exceedingly rare and reserved for specifically described individuals, we see no basis for concluding that the absence of any requirement that the sentencing authority find the existence of aggravating

2. Other Juvenile Code provisions the Supreme Court cited included N.C. Gen. Stat. §§ 15A-1340.19A through 15A-1340.19D, which set forth the scheme designed for sentencing juveniles convicted of first-degree murder. *James*, __ N.C. at __, 813 S.E.2d at 198.

> circumstances or make any other narrowing findings prior to determining whether to impose a sentence of life without parole upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule renders the sentencing process enunciated in [N.C. Gen. Stat.] §§ 15A-1340.19A to 15A-1340.19D unconstitutionally arbitrary or vague.

Id. at __, 813 S.E.2d at 209.

Following *Miller*, *James*, and their progeny, we hold that whether a defendant qualifies as an individual within the class of offenders who are irreparably corrupt is a threshold determination that is necessary before a life sentence without parole may be imposed by the trial court. This holding is not inconsistent with the North Carolina Supreme Court's rejection of a specific factfinding requirement. Rather, we hold that, when a trial court does make a finding about a juvenile offender's possibility of rehabilitation that is inconsistent with the limited class of offenders defined by the United States Supreme Court, a sentence of life in prison without the possibility of parole is unconstitutional as applied to that offender.

In *State v. Sims*, this Court upheld the imposition of a life sentence without parole for a juvenile offender who was not found to have any characteristic inconsistent with constitutional restrictions. __ N.C. App. __, __, __ S.E.2d __, __ (COA17-45) (2018 WL 3732800). The defendant in *Sims* challenged, among other things, the trial court's finding regarding his likelihood of benefiting from rehabilitation in confinement. *Id.* at __, __ S.E.2d at __. This Court concluded, "[w]hile *Miller* states that life without parole would be an uncommon punishment for juvenile offenders, *the trial court has apparently determined that [the] defendant is one of those 'rare juvenile offenders' for whom it is appropriate*." *Id.* at __, __ S.E.2d at __ (emphasis added) (quoting *Miller*, 567 U.S. at 479, 183 L. Ed. 2d at 424). We explained that "[t]he trial court's unchallenged evidentiary findings combined with its ultimate findings regarding the *Miller* factors demonstrate that the trial court's determination was the result of a reasoned decision." *Id.* at __, __ S.E.2d at __. In essence, the trial court in *Sims* impliedly found that the defendant fell within the class of irreparably corrupt offenders, and did not find any characteristic in the defendant inconsistent with that class of offenders.

Turning to the case at hand, we conclude that the trial court erred by imposing a sentence of life in prison without the possibility of parole

after making a finding contrary to the defined class of irreparably corrupt offenders described in our precedent. Unlike in *Sims*, the trial court here made an explicit finding that "there is no certain prognosis" for Defendant's potential for rehabilitation. This finding directly conflicts with the limitation of life in prison without parole to juvenile offenders who are "irreparably corrupt" and "permanently incorrigible." As Judge Stroud, concurring in *Sims*, explained: " 'Permanent' means forever. 'Irreparable' means beyond improvement. In other words, the trial court should be satisfied that in 25 years, in 35 years, in 55 years—when the defendant may be in his seventies or eighties—he will likely still remain incorrigible or corrupt, just as he was as a teenager, so that even then parole is not appropriate." *Sims*, __ N.C. App. at __, __ S.E.2d at __ (Stroud, J., concurring). Because the trial court made an explicit finding contrary to a determination that Defendant is one of those rarest of juvenile offenders for whom rehabilitation is impossible and a worthless endeavor, we hold the trial court erred by imposing a life sentence without the possibility of parole.

III. Conclusion

For the foregoing reasons, we vacate the trial court's judgment and remand for Defendant to be resentenced to two consecutive terms of life imprisonment with the possibility of parole.

VACATED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

THE TOWN OF CARRBORO, NORTH CAROLINA; THE TOWN
OF CHAPEL HILL, NORTH CAROLINA; ORANGE COUNTY, NORTH CAROLINA;
AND WILLIAM INMAN, PLAINTIFFS
V.
ANDREW SLACK AND BETHANY SLACK, DEFENDANTS

No. COA17-864

Filed 18 September 2018

1. Easements—prior transaction—third parties—intent to create express easement appurtenant—valid only between owners

In an action to establish access to a gravel road separating adjacent properties, a prior transaction by a landowner granting an easement to non-landowner third parties merely created an easement in gross as to those third parties, and not an easement appurtenant running with the land. To create an easement appurtenant, the easement must be granted by the owner of the servient estate and accepted by the owner of the dominant (benefiting) estate.

2. Easements—express easement by reservation—necessary language in deed

In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show that an express easement by reservation was created where none of the deeds in the defendants' chain of title contained any reservation or exception. Although all the deeds in defendant landowners' chain of title referenced a "private road" on the eastern edge of their property, none had language indicating an intent to withhold a portion of the conveyance so as to create an easement by reservation.

3. Easements—implied easement by dedication—public use—sufficiency of evidence

In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show possession of an implied easement by dedication by which deeds referencing a "private road" could be construed to create an easement for public use where the recorded instruments themselves did not indicate an intent to create such an easement, no public authority expressly or implicitly accepted a dedication, and the actions of the landowners were not consistent with an intent to create one.

4. Easements—implied easement by plat—conveyance necessary

In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show an implied easement

by plat because defendants never conveyed any property to them, undermining the argument that defendants should be estopped from denying the existence of an easement plaintiffs relied on when purchasing their property.

5. Easements—implied easement by estoppel—equity arguments—inducement and reliance required

In an action to establish access to a gravel road separating adjacent properties, government plaintiffs failed to show they possessed an implied easement by estoppel because they could not show they were innocently and ignorantly induced by defendants to believe they possessed an easement before making plans for development of their land. Further, government plaintiffs' own actions in approving defendants' request to build a bioretention basin in the path of the purported easement undermined its argument for equitable consideration.

6. Easements—by prescription—rebuttable presumption of permissive use—regular use and upkeep

In an action to establish access to a gravel road separating adjacent properties, a private citizen neighbor established a prescriptive easement claim by rebutting the presumption that his use of a private road across defendants' property was permissive by showing that he maintained a private right of way across the eastern edge of defendants' property through regular use to access his own property and regular physical maintenance of the road. However, the trial court erred by entering a permanent injunction enjoining defendants from taking any measures that would prevent trespassers from using the road.

Appeal by defendants from order entered 17 May 2017 by Judge A. Graham Shirley in Orange County Superior Court. Heard in the Court of Appeals 7 February 2018.

The Brough Law Firm, PLLC, by G. Nicholas Herman; Ralph D. Karpinos, Town Attorney for Town of Chapel Hill; and John Roberts, Orange County Attorney, for plaintiffs-appellees local governments.

Wyrick Robbins Yates & Ponton LLP, by Paul J. Puryear, Jr. and Tobias S. Hampson, for plaintiff-appellee William Inman.

Hendrick Bryant Nerhood Sanders & Otis, by Matthew H. Bryant and Benjamin C. McManus, for defendants-appellants.

DIETZ, Judge.

Andrew and Bethany Slack own a home on several acres of land in Orange County. There is a gravel road along the eastern edge of their property. That private drive has existed in one form or another since at least the 1940s. This appeal concerns who, if anyone, has an easement to use that gravel road to access other properties north of the Slacks' property.

At the summary judgment hearing below, Plaintiffs asserted a slew of alternative legal theories touching on nearly every form of express and implied easement known to the law. We address each theory in turn below but ultimately conclude that the government plaintiffs—Carrboro, Chapel Hill, and Orange County—do not possess any easement rights over the Slacks' property. We therefore reverse and remand that portion of the trial court's summary judgment order for entry of judgment in favor of the Slacks. We affirm the trial court's entry of summary judgment in favor of Plaintiff William Inman on his prescriptive easement claim, but vacate and remand the trial court's permanent injunction for further proceedings in light of the reasoning set forth in this opinion.

Facts and Procedural History

This dispute involves four adjacent tracts of land which, for purposes of illustration, can be envisioned as four quadrants on a map. In the northwest quadrant (the upper left) is a roughly 100-acre tract owned by the Town of Carrboro, the Town of Chapel Hill, and Orange County. Proceeding clockwise from there, the northeast quadrant is William Inman's property, including his home. To the southeast lies the property of the Episcopal Church of the Advocate. To the southwest is the property of Andrew and Bethany Slack, including their home.

On the border between the Slack property and the Church property is a gravel road. The road extends from the southern border of the properties all the way to the Inman and government properties to the north.

This gravel road is the heart of the litigation. The road has existed at least since the 1940s and all of the deeds in the Slacks' chain of title reference this "private road" to describe the eastern border of the Slacks' property.

On 9 August 1965, the Slacks' predecessors-in-interest, the Cardens, executed a deed granting a "perpetual easement" that "is appurtenant to and runs with the land" to Grady & Dryer Development Company and James Watson. The easement granted a thirty-foot right of way on the eastern edge of the Slacks' property (along the border with the Church

property) to permit ingress and egress to the “Byrd Farm,” which is now the properties owned by Inman and the government. The deed required Grady & Dryer Development Company and Watson to “pave a roadway along said right of way,” to “landscape said right of way,” and to “cause same to be passable for ingress and egress at all times during construction.”

At the time the parties executed this instrument, Grady & Dryer Development Company and James Watson apparently had plans to buy the Byrd Farm and to develop it. But that did not happen. These developers did not own the Byrd Farm property when the Cardens executed the deed and they never acquired title at any future point.

Roughly a month later, on 3 September 1965, the predecessor-in-interest to the Church property (the property to the east of the Slacks) granted an easement appurtenant to the owners of the Byrd Farm. Unlike the easement involving the Slacks’ property, which was between the Slacks’ predecessors-in-interest and third parties, this easement was between the owner of the Church property and the owner of the Byrd Farm to the north (now the Inman and government properties). The easement described a sixty-foot right of way in areas south of the Slacks’ property that then narrowed to a thirty-foot easement along the western border of the Church property adjacent to the Slacks’ property. If this easement were combined with the one concerning the Slacks’ property, together they would create a continuous, sixty-foot right of way leading to the Byrd Farm property to the north.

In 2015, the Slacks began re-grading the gravel road on the eastern border of their property and, in doing so, shifted that gravel road slightly westward, entirely onto their property. The Slacks also began constructing a fence separating their property from the Church property. At that point, the government plaintiffs and Inman objected, arguing that they possessed an easement over the Slacks’ property—one that was contiguous with the express easement appurtenant on the Church property—and that this easement prohibited the Slacks from moving the gravel road or constructing a fence on their property line.

This lawsuit followed, and the trial court ultimately entered summary judgment in favor of the Plaintiffs, concluding that they possessed an easement along the eastern border of the Slacks’ property. The trial court permanently enjoined the Slacks from moving or impeding the gravel road, or placing any fence along the eastern border of the Slacks’ property. The Slacks timely appealed.

Analysis

We review the trial court's grant of summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). Summary judgment is proper where there is no genuine issue as to any material fact and a party is therefore entitled to judgment as a matter of law. *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 228, 768 S.E.2d 582, 597 (2015). Plaintiffs asserted a number of legal theories to support their motion for summary judgment and the trial court's order does not identify the particular theory or theories on which it relied. We therefore address each of Plaintiffs' theories in turn below.

I. Express Easement Appurtenant

[1] Plaintiffs first argue that they hold an express easement appurtenant over a thirty-foot right of way along the eastern border of the Slacks' property.

An easement appurtenant "runs with the land," and is a "right to use the land of another, i.e., the servient estate, granted to one who also holds title to the land benefitted by the easement, i.e., the dominant estate." *Brown v. Weaver-Rogers Assocs., Inc.*, 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998). The easement "is owned in connection with other real estate and as an incident to such ownership." *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963). This distinguishes an easement appurtenant from an easement in gross, which is a personal license to the grantee and does not run with the land itself. *Brown*, 131 N.C. App. at 123, 505 S.E.2d at 324.

In 1965, the Slacks' predecessors-in-title, the Cardens, granted to Grady & Dryer Development Company and James Watson a thirty-foot easement along the edge of the Cardens' property. This easement allowed the grantees to access the Byrd Farm (the property now owned by Plaintiffs) from a nearby road bordering the Cardens' property. The easement granted "a perpetual right and easement, for ingress and egress . . . it being agreed that the right and easement hereby granted is *appurtenant to and runs with the land*." (Emphasis added.)

This language unquestionably indicates an *intent* to grant an easement appurtenant that runs with the Carden property (the servient estate) for the benefit of the Byrd Farm (the dominant estate). But there is a problem. The grantees, Grady & Dryer Development Company and James Watson, did not own the Byrd farm (the dominant estate) at the time the Cardens granted this purported easement appurtenant. Indeed,

these grantees *never* owned the Byrd Farm—the record suggests that they planned to buy the property at some point, but the sale never took place.

Plaintiffs contend that "it makes no difference that Grady & Dryer Development Company and James A. Watson never acquired any interest in the [Byrd Farm] because the easement granted by Carden was not 'in gross' and purely personal to those grantees." Thus, Plaintiffs reason, because the easement expressly states that it is not a personal license and that it runs with the land, it necessarily must be an easement appurtenant.

We reject this argument. An easement appurtenant must be "granted to one who also holds title to the land benefitted by the easement, i.e., the dominant estate." *Brown*, 131 N.C. App. at 123, 505 S.E.2d at 324. "The easement attaches to the dominant estate and passes with the transfer of the dominant estate as 'an appurtenance thereof.' " *Id.*

A landowner cannot create an easement appurtenant in a transaction with a complete stranger to the dominant estate. *See Woodring v. Swieter*, 180 N.C. App. 362, 368, 637 S.E.2d 269, 275–76 (2006). Although easements appurtenant generally are favorable to the owner of the dominant estate, they are "owned in connection with [the dominant estate] and as an incident to such ownership." *Shingleton*, 260 N.C. at 454, 133 S.E.2d at 185. In other words, they create property rights in the dominant estate. These rights cannot be unilaterally imposed on an unwilling landowner; the owner of the dominant estate must accept the creation of this property right. Thus, to create an easement appurtenant, the transaction that creates these rights and obligations must be between the owner of the servient estate and the owner of the dominant estate. *Brown*, 131 N.C. App. at 123, 505 S.E.2d at 324.

Here, the transaction was between the owner of the servient estate and third parties that did not own the dominant estate. As a result, despite language indicating an intent to create an easement appurtenant, this transaction created only an easement in gross granting personal rights to those third parties.

II. Express Easement by Reservation

[2] Plaintiffs next argue that that they possess an express easement by reservation because "every deed in the Slacks' chain of title creates an easement by reservation over the 'private road' running to the 'Byrd land' from which [Plaintiffs'] properties originate."

An easement by reservation or exception arises when the "grantor reserves something arising out of the thing granted" or "withdraws

from the effect of the grant some part of the thing itself." *Central Bank & Trust Co. v. Wyatt*, 189 N.C. 107, 109, 126 S.E. 93, 94 (1925). Plaintiffs focus their argument on the lack of any description in these deeds of the dominant estate and how this Court can look to extrinsic evidence to identify the intended dominant estate that benefits from this private road. But this overlooks a more fundamental problem with this argument: none of the deeds in the Slacks' chain of title contain any reservation or exception.

To be sure, each deed references a "private road" on the eastern border of the Slack property. But the deeds do so in describing the boundaries of the property conveyed, which is identified as a tract of real estate in Orange County, North Carolina:

> [B]ounded by J.O. Franklin, the old Byrd Farm, now McGhee, and a private road, and being more particularly described as follows:
>
> BEGINNING in the center of said private road near the stable, running thence with said road North 250 feet to a bend in the road; thence North 35 degrees East 100 feet to another bend in the road; thence North 48 degrees East 369 feet to the old Byrd line, now McGhee . . .

Although an easement by reservation or exception need not use the words "reserve" or "except" to be effective, it must at least indicate some intent to withhold a portion of the conveyance. *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953). These deeds do not do so. The only language concerning this private road is descriptive, explaining the eastern boundary of the property conveyed. Accordingly, the language on which Plaintiffs rely is insufficient to create an express easement by reservation or exception.

III. Implied Easement by Dedication

[3] Plaintiffs next contend that they possess an implied easement by dedication.[1] "Dedication is a form of transfer whereby an individual grants to the public rights of use in his or her lands." *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 631, 684 S.E.2d 709, 718 (2009). Dedication may be express or implied. *Id.*

1. The government plaintiffs appear to abandon this argument on appeal, but the trial court considered it, and the Slacks address it, so we will do so as well in our *de novo* review of the trial court's order. *Builders Mut. Ins. Co.*, 361 N.C. at 88, 637 S.E.2d at 530.

"[A]n implied dedication of property for public use requires (1) an offer of dedication, and (2) an acceptance of this offer by a proper public authority." *Id.* at 639, 684 S.E.2d at 723. "When proving implied dedication, where no actual intent to dedicate is shown, the manifestation of implied intent to dedicate must clearly appear by acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use." *Id.* at 640, 684 S.E.2d at 723. "Dedication is an exceptional and peculiar mode of passing title to an interest in land" and, thus, "courts will not lightly declare a dedication to public use." *Id.* at 631, 684 S.E.2d at 718.

Plaintiffs argue that there is an implied easement by dedication based on references to a "private road" or other right of way in "the Slacks' chain of title and those pertinent to other properties contiguous to" the Slacks' property. But nothing in these recorded instruments indicates that the private parties involved intended to dedicate an easement for public use. Likewise, there is no indication that any public authority expressly or implicitly accepted a dedication. Thus, Plaintiffs have not shown that these recorded instruments are "inconsistent and irreconcilable with any construction except dedication of the property to public use." *Id.* at 640, 684 S.E.2d at 723. Likewise, although the Slacks later dedicated a five-foot stormwater easement to the public in the path of this purported thirty-foot easement, nothing in that express dedication reflects an implied dedication of a thirty-foot easement for ingress and egress. Indeed, because that stormwater easement accompanied creation of a bioretention basin along the path of this thirty-foot easement, it arguably is inconsistent with dedication of a broader thirty-foot easement at that same location. We therefore reject Plaintiffs' argument concerning an implied easement by dedication.

IV. Implied Easement by Plat

[4] Plaintiffs next contend that there is an implied easement by plat. "[W]here land is sold in reference to a plat or map, but the dedication of the land has not been formally accepted by the appropriate authority, purchasers of land who buy property relying on the plat still acquire an easement in those right-of-ways." *Price v. Walker*, 95 N.C. App. 712, 715, 383 S.E.2d 686, 688 (1989). This is so because a "grantor who grants land described with reference to a plat showing a street is equitably estopped" from denying the existence of an easement over that street "to a purchaser." *Webster's Real Estate Law in North Carolina* § 15.15. Importantly, this type of easement arises only "when the purchaser whose transaction relies on the plat is conveyed the land." *Price*, 95 N.C. App. at 715, 383 S.E.2d at 688.

Applying this precedent here, Plaintiffs' argument fails. The Slacks and their predecessors-in-interest never granted anything to Plaintiffs. Creation of an implied easement by plat is grounded in principles of estoppel; the easement is created because a grantee purchases property in reliance on a right of way or other easement reflected in the plat at the time of the conveyance. *Id.*; *Webster's Real Estate Law in North Carolina* § 15.15. Because the Slacks never conveyed any property to Plaintiffs, the easement by plat theory is inapplicable. Accordingly, we reject this argument as well.

V. Implied Easement by Estoppel

[5] Plaintiffs next claim that they possess an implied easement through the equitable doctrine of estoppel. They argue that the Slacks are estopped from denying the existence of an easement on the eastern border of their property "because the Slacks' conduct in this case renders that assertion contrary to equity." Specifically, they contend that the Slacks acknowledged the easement in permit applications during the construction of the Slacks' home through notations indicating a right of way existed on the eastern portion of the property (although these permitting applications did not identify who, if anyone, was entitled to use that right of way). They also argue that the Slacks or their predecessors-in-title "remained silent at times they should have spoken," including when Inman repeatedly used the gravel road to access his own home, and when the government plaintiffs publicly discussed plans to build "affordable housing, open space, and possibly a school site" on their property and, in those public discussions, indicated that they would use the right of way across the Slacks' property to access these new developments.

Our Supreme Court has held that an easement may arise where one party induces another "innocently and ignorantly" to "expend money or labor in reliance on the existence of such an easement." *Delk v. Hill*, 89 N.C. App. 83, 87, 365 S.E.2d 218, 221 (1988). Inman's arguments on this issue are better characterized as claims for a prescriptive easement (on which, as explained below, he prevails) and we address them there. We reject the government plaintiffs' arguments because they have not presented any evidence that they innocently and ignorantly were induced to expend money or labor in reliance on an easement.

To be sure, the government plaintiffs have plans to develop their property. But even if the preliminary work on those future plans could be considered "money or labor" spent on the project, they have not shown—indeed, they do not even argue—that they did so *in reliance* on an easement across the Slacks' property. The only arguable reference to reliance

in the government plaintiffs' brief is in relation to a public hearing in 2007. The government plaintiffs assert that access to their property from the south "was considered, during those 2007 discussions, critical for access to the tract and its future uses, notwithstanding that those uses are still indeterminate." But the government possesses the power of eminent domain. Thus, indicating that a roadway across a property owner's land will be necessary to a future public project does not in any way suggest that the government is relying on possession of an existing easement.

In any event, as with all estoppel arguments, the government plaintiffs' implied easement by estoppel argument is grounded in "principles of equity" that are "designed to aid the law in the administration of justice when without its intervention injustice would result." *Thompson v. Soles*, 299 N.C. 484, 486, 263 S.E.2d 599, 602 (1980). But the equities do not weigh in the government plaintiffs' favor nearly as strongly as they contend. For example, the government plaintiffs approved the Slacks' request to build a bioretention basin in the path of the purported easement that is inconsistent with the government's claim that it believed it possessed a right of way across that same stretch of land. And over time the government has been equivocal (at best) in its own assessment of whether it possesses an easement across the Slacks' property, at one point even suggesting in writing that "we have determined that the access easement is a 30-foot-wide [*sic*] and outside of the Slack's eastern property line." Simply put, even if the government plaintiffs could show that they were "innocently and ignorantly" induced into believing they possessed an easement on the Slacks' property (and they have not), they have not shown that the equities weigh sufficiently in their favor to compel creation of an implied easement where one does not exist in law. Accordingly, we reject the government plaintiffs' implied easement by estoppel arguments.

The government plaintiffs also cite cases (not in the implied easement context) involving the doctrine of quasi-estoppel, which provides that when "one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." *Redev. Comm'n of City of Greenville v. Hannaford*, 29 N.C. App. 1, 4, 222 S.E.2d 752, 754 (1976). But the government has not identified any transaction or instrument that the Slacks chose to accept that indicated the government plaintiffs possessed an easement across their land. The only remotely relevant evidence concerns the permit applications described above, which marked a right of way where the gravel road exists across their property. But as we noted in discussing those permit

applications above, they do not indicate that the *government plaintiffs* had a right to use that right-of-way. Accordingly, quasi-estoppel is inapplicable here.

Because we reject all of the legal theories on which the government plaintiffs assert easement rights in the Slacks' property, we reverse the trial court's entry of summary judgment in favor of the government plaintiffs and remand for entry of summary judgment in favor of the Slacks on those claims.

VI. Easement by Prescription

[6] We thus turn to the final theory in this case—easement by prescription—which only Inman asserts on appeal. To prevail on a prescriptive easement claim, the claimant must establish: "(1) that the use is adverse, hostile, or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period." *Myers v. Clodfelter*, __ N.C. App. __, __, 786 S.E.2d 777, 779–80 (2016).

There is a rebuttable presumption that use of a private road across another landowner's property is permissive, but our courts have long held that this presumption can be rebutted where the claimant shows that she maintained the private roadway, for example by grading or gravelling it, or repeatedly clearing the path to permit travel. *Id.* at __,786 S.E.2d at 781. These acts indicate a claim of right to use the roadway and thus "manifest and give notice that the use is being made under a claim of right." *Id.* at __, 786 S.E.2d at 780.

Here, there is uncontested evidence in the record that Inman maintained a private right of way across the eastern portion of the Slacks' property by using a gravel road located there to access his property and by maintaining the gravel road through landscaping, mowing, and laying gravel. The record indicates that Inman's use and maintenance of this gravel road was under claim of right, open and notorious, and continuous and uninterrupted for a period of at least twenty years. Accordingly, the trial court properly entered summary judgment in favor of Inman on his prescriptive easement claim.

But it does not follow from this conclusion that the remainder of the trial court's order with respect to Inman is appropriate. Inman is entitled to use and maintain a right-of-way across the Slacks' property to access his own property. But the trial court's order goes further and permanently

enjoins the Slacks from "erecting or placing any fencing or impediment within the thirty (30) most eastern feet of their property" or from "erecting or placing any fencing or impediment on their property that in any way obstructs [Inman's] use of the gravel road in its existing location."

The record indicates that the Slacks, too, use and maintain this gravel road on their property. And they wish to prevent trespassers—those other than Inman—from using that road. The Slacks are entitled to erect a gate or other improvements along that gravel road so long as it does not prevent Inman from "the reasonable use and enjoyment of the easement." *Hundley v. Michael*, 105 N.C. App. 432, 435, 413 S.E.2d 296, 298 (1992). On appeal, the parties did not address the extent to which a gate or similar improvements to the Slacks' property would impact Inman's use and enjoyment of the easement, and we are unable to answer that question from the record before us.

Similarly, although property owners cannot unilaterally move the location of an express easement whose boundaries are recorded, *see A. Perin Dev. Co., LLC v. Ty-Par Realty, Inc.*, 193 N.C. App. 450, 452–53, 667 S.E.2d 324, 326 (2008), the parties did not address on appeal which portion of the gravel road Inman used and maintained, and thus in which he acquired a prescriptive easement. We therefore cannot adjudicate whether the Slacks, by shifting the gravel road slightly westward and building a fence along their property line, interfered with the reasonable use and enjoyment of the easement that Inman acquired through prescription.

We therefore vacate the trial court's entry of a permanent injunction in favor of Inman and remand this matter to the trial court for further proceedings.

Conclusion

We reverse the trial court's entry of summary judgment on the claims asserted by the Town of Carrboro, Town of Chapel Hill, and Orange County, and remand for entry of judgment in favor of Andrew and Bethany Slack on those claims. We affirm the entry of summary judgment in favor of William Inman on his prescriptive easement claim but vacate the trial court's corresponding injunctive relief. We remand the matter for the trial court to determine what, if any, injunctive relief is appropriate in light of this opinion.

REVERSED IN PART; AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judges ELMORE and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 18 September 2018)

APPERSON v. INTRACOASTAL REALTY CORP. No. 18-147	Pender (17CVS440)	Affirmed
BLUMENSCHEIN v. BLUMENSCHEIN No. 17-1299	Buncombe (15CVD2778)	Affirmed in Part, Dismissed in Part
CABARRUS CTY. BD. OF EDUC. v. BD. OF TRS., TEACHERS' & STATE EMPS.' RET. SYS. No. 17-1019	Wake (17CVS1986)	Affirmed
IN RE DE LUCA No. 17-1339	N.C. Utilities Commission (SP-100) (SUB32)	Affirmed
IN RE FORECLOSURE OF SDS INVS., LLC No. 18-133	Catawba (17SP156)	Affirmed
IN RE V.P.M.A. No. 17-1386	Wake (15JA57)	Affirmed
JOHNSTON CTY. BD. OF EDUC. v. BD. OF TRS. TEACHERS' & STATE EMPS.' RET. SYS. No. 17-1024	Wake (17CVS1624)	Affirmed
JOHNSTON CTY. BD. OF EDUC. v. DEP'T OF STATE TREASURER, RET. SYS. DIV. No. 17-1021	Wake (17CVS1524)	Affirmed
LETENDRE v. CURRITUCK CTY. No. 18-163	Currituck (17CVS146)	Reversed and Remanded
MALONE v. HUTCHISON-MALONE No. 18-220	Durham (06CVD2127)	Dismissed
MITMAN v. SHIPLEY No. 18-173	Wake (17CVD600783)	Reversed
SMITH v. N.C. BD. OF FUNERAL SERV. No. 17-996	Wake (16CVS15396)	Affirmed

Case	County	Disposition
STATE v. BARNES No. 18-134	Bertie (15CRS177)	No Error
STATE v. BROWN No. 18-52	Columbus (15CRS52691) (16CRS224)	Dismissed
STATE v. BRYANT No. 17-1201	Wake (15CRS202885) (15CRS203058) (15CRS203076) (15CRS203078) (15CRS203619) (15CRS204135)	Dismissed
STATE v. CATALDO No. 17-1296	Rockingham (11CRS50300-01) (11CRS50518)	Reversed and Remanded
STATE v. ERIKSEN No. 18-119	Wake (14CRS225053)	Affirmed
STATE v. FOWLER No. 17-723	Rutherford (13CRS50255-56) (13CRS50292) (13CRS50379-84)	Affirmed
STATE v. GAINEY No. 17-1422	Forsyth (15CRS52678)	No Error
STATE v. HILL No. 18-15	Martin (15CRS50890-91)	Affirmed
STATE v. HOLLIFIELD No. 18-63	Henderson (15CRS54766)	NO ERROR IN PART; VACATED IN PART AND REMANDED
STATE v. INMAN No. 17-1408	Mecklenburg (15CRS243371) (15CRS243373)	Affirmed
STATE v. JILANI No. 18-123	Wake (14CRS6232)	No Error
STATE v. KELLY No. 18-194	Pasquotank (12CRS51951)	No Error
STATE v. LUNSFORD No. 17-1187	Wake (05CRS81735)	Reversed
STATE v. MAZUR No. 17-736	Wake (12CRS211095) (12CRS211096)	No Error

STATE v. McGILL No. 18-33	New Hanover (16CRS000002) (16CRS1904)	Reversed
STATE v. McKOY No. 17-1025	Guilford (09CRS99645)	No Error
STATE v. MILLER No. 17-1130	Guilford (15CRS74012)	No Error
STATE v. OGLES No. 18-210	Guilford (16CRS23193) (16CRS23194) (16CRS73464)	NO PREJUDICIAL ERROR.
STATE v. RINEHART No. 18-92	Burke (16CRS1231) (17CRS1296)	Remanded for resentencing
STATE v. SMITH No. 17-1401	Wake (14CRS228383)	Reversed
STATE v. SPIVEY No. 17-1312	Wake (16CRS207870)	Dismissed
STATE v. THABET No. 17-1417	Wake (16CRS201984)	Affirmed
STATE v. TRAUB No. 18-31	Cherokee (14CRS50824)	No Error
STATE v. VICKERS No. 18-35	Wake (14CRS211534)	DISMISSED AS MOOT
STATE v. WHITE No. 18-136	Onslow (16CRS54917-19)	No Error
STATE v. WHITEHEAD No. 17-1320	Pitt (12CRS52757-59) (12CRS52764)	No Prejudicial Error
UNION CTY. BD. OF EDUC. v. BD. OF TRS., TEACHERS' & STATE EMPS.' RET. SYS. No. 17-1023	Wake (17CVS1359)	Affirmed
UNION CTY. BD. OF EDUC. v. DEP'T OF STATE TREASURER, RET. SYS. DIV. No. 17-1022	Wake (17CVS1459)	Affirmed

WILKES CTY. BD. OF EDUC. v. BD. OF TRS., TEACHERS' & STATE EMPS.' RET. SYS. No. 17-1018	Wake (17CVS1649)	Affirmed
WILKES CTY. BD. OF EDUC. v. DEP'T OF STATE TREASURER, RET. SYS. DIV. No. 17-1020	Wake (17CVS1580)	Affirmed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS