263 N.C. App.—No. 4 Pages 597-712

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 5, 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
CHRISTOPHER BROOK

Former Chief Judges

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

Former Judges

WILLIAM E. GRAHAM, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
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
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 A. DAVIS
ROBERT N. HUNTER, JR.

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

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 5 February 2019

Estate of Belk v. Boise Cascade Wood Prods., L.L.C. 597
In re B.B. 604
Jones v. Jones 606
Lamb v. Styles 633
McLaughlin v. Bailey 647
Rivera v. Matthews 652
Smith v. Rodgers 662
State v. Nixon 676
State v. Shelton 681
State v. Sheridan 697

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Banyan GW, LLC v. Wayne Preparatory Acad. Charter Sch., Inc. 709
Brunson v. N.C. Dep't of Justice 709
Foster v. Wells Fargo Bank, N.A. 709
Hunt v. Collinsworth 709
In re C.S. 709
In re G.G.K. 709
In re I.C. 709
In re J.P.N. 709
In re N.A.C. 709
In re N.L.C. 709
In re S.M. 709
Int'l Prop. Devs., LLC v. K Constr. & Roofing, LLC 709
Lloyd v. Bailey 710
Morgan v. Defeo 710
Sanghrajka v. Family Fare, LLC 710
State v. Brothers 710
State v. Brown 710
State v. Clark 710
State v. Clawson 710
State v. Davis 710
State v. Dotson 710
State v. Forte 710
State v. Fowler 710
State v. Johnson 710
State v. Kingsberry 710
State v. Lamberth 710
State v. Latham 711
State v. Lloyd 711
State v. McKoy 711
State v. Morgan 711
State v. Narron 711
State v. Otto 711
State v. Sanders 711
State v. Spencer 711
State v. Swafford 711
State v. Thompson 711
State v. Tyson 711
State v. White 711
Summit De Corp. v. Kweider Bros. Inc. 711
Teague & Glover, P.A. v. Kane & Silverman, P.C. 712
Turnmire v. Eldreth 712
Walz v. Walz 712
Young v. Bailey 712

HEADNOTE INDEX

APPEAL AND ERROR

Abandonment of issues—equitable distribution—unpaid distributive award—tort claims—On appeal from an action to enforce an equitable distribution order granting a distributive award to plaintiff, the superior court had jurisdiction to dismiss plaintiff's claims for breach of fiduciary duty and conversion for failure to state a claim upon which relief can be granted. Plaintiff failed to advance any argument about the elements of those torts, thereby abandoning any issue on the merits. **Smith v. Rodgers, 662.**

CHILD CUSTODY AND SUPPORT

Grandparents—deceased parents—abatement of action—A child custody claim by a grandparent did not abate where the father was found dead in the family home, in which illegal drugs and paraphernalia were discovered; the mother was arrested and the child stayed with the paternal grandparents; the paternal grandparents filed a complaint for child custody against the mother and were awarded temporary custody; the mother died; and plaintiff, the maternal grandfather, filed this action for custody. Although plaintiff argued that the custody action abated upon the mother's death, the single sentence on which plaintiff relied, in *McIntyre v. McIntyre*, 341 N.C. 629 (1995), constituted dicta and did not resolve the legal issue raised by the particular facts of the case. Considering constitutional and statutory law, the *McIntyre* rule did not apply because it was not a dispute for the care, custody, and control of the child between two parents and there was no surviving parent vested with constitutional rights. **Rivera v. Matthews, 652.**

Pending claim—new complaint—no subject matter jurisdiction—The trial court did not have subject matter jurisdiction to consider the maternal grandfather's independent complaint for child custody against the paternal grandparents where both parents were deceased, the paternal grandparents had been awarded temporary custody, and that action had not abated. The proper procedure for plaintiff was to file a motion to intervene and a motion for custody in the pending custody action. **Rivera v. Matthews, 652.**

CIVIL PROCEDURE

Entry of default—motion to set aside—good cause—diligence in pursuit of matter—In a breach of contract action, the trial court did not abuse its discretion by denying defendant's motion to set aside entry of default where defendant did not show good cause pursuant to Civil Procedure Rule 55(d). Defendant took no action during the two months following a Court of Appeals decision in the matter (regarding the denial of defendant's motion to dismiss for lack of subject matter jurisdiction), and he admitted that he did not fully comply with the terms of the separation agreement and the property settlement. **Jones v. Jones, 606.**

CONSTITUTIONAL LAW

Speedy trial—length of delay—Barker factors—The trial court's ruling on a motion for speedy trial was remanded where the twenty-eight month delay between arrest and trial was enough to trigger further analysis. The appeal was insufficiently developed for analysis and determination where the trial court did not consider all of the factors under *Barker v. Wingo*, 407 U.S. 514 (1972). **State v. Sheridan, 697.**

Speedy trial—pro se motion—representation by counsel—Defendant's pro se motion for a speedy trial, made while defendant was represented by counsel, was properly before the Court of Appeals where the trial court ruled on the motion. **State v. Sheridan, 697.**

COURTS

Law of the case—decision of Supreme Court—motion for relief from judgment—consideration by trial court—The trial court erred by considering the substance of plaintiff's Rule 60(b)(6) motion for relief from judgment, which argued that he was entitled to relief because a U.S. Supreme Court opinion, decided after the N.C. Supreme Court's opinion in his case, was "now controlling." The trial court

lacked discretion to consider the substance of the motion because the N.C. Supreme Court's decision was the law of the case. But the trial court's denial of plaintiff's motion was affirmed since it was the correct result—even if correct for the wrong reason. **McLaughlin v. Bailey, 647.**

CRIMINAL LAW

Felony death by vehicle—prosecutor's closing argument—propriety—In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, the trial court was not required to intervene in the prosecutor's closing argument, where the entirety of the closing argument correctly stated the law regarding impairment and the trial court's instruction on impairment was not challenged by defendant. Moreover, the State's appeal to the jury to be the voice and conscience of the community when considering the verdict was not so grossly improper that intervention was required. **State v. Shelton, 681.**

DAMAGES AND REMEDIES

Surveyor's negligence—costs of prior litigation—no statutory authorization —Plaintiffs did not sufficiently allege damages against a surveyor where their alleged damages consisted of costs associated with prior litigation to quiet title against the landowner who hired the surveyor, an action in which the surveyor was not a party. Costs are entirely creatures of legislation; plaintiffs did not cite any statute authorizing them to recover court costs and attorney fees in this action. **Lamb v. Styles, 633**.

DIVORCE

Equitable distribution—distributive award—death of spouse—not claim against estate—In an action to enforce an equitable distribution order granting a distributive award to plaintiff, plaintiff's declaratory judgment claim was not time-barred by the provisions of Chapter 28A, since the distributive award was not part of the decedent's estate (of plaintiff's former spouse), and plaintiff was therefore not required to adhere to Chapter 28A's filing and notice requirements. The equitable distribution order vested in plaintiff a property right and did not constitute a claim against decedent's estate. **Smith v. Rodgers, 662.**

ENGINEERS AND SURVEYORS

Negligence—liability to adjoining landowner—sufficiency of allegations—Plaintiffs' allegations of a breach of a duty to exercise ordinary care were not sufficient to survive a motion to dismiss in a negligence action against a surveyor by an adjoining landowner. The liability of a surveyor to an adjoining landowner had not then been addressed by the Court of Appeals, but plaintiff argued several reasons for the Court of Appeals to adopt a rule holding surveyors accountable for such damages. Plaintiffs also alleged a breach of the common law duty to exercise ordinary care. **Lamb v. Styles, 633.**

Surveyors—liability—general negligence principles—Plaintiffs, adjoining landowners, did not identify a duty of care owed by an allegedly negligent surveyor to a non-reliant third party. Cases involving whether a professional owes a third party a duty of care are often analyzed based on negligent misrepresentation. Applying

that standard, plaintiffs did not sufficiently allege that they were within the class of people intended to rely on the survey or to whom the survey would be supplied. Even though plaintiffs argued that negligent misrepresentation did not apply, plaintiffs still needed to show that defendants' conduct induced them to act in reliance. **Lamb v. Styles, 633.**

Surveyors—negligence—causation—Plaintiffs, adjoining landowners who brought a negligence action against a surveyor, did not sufficiently allege that defendants' survey was the proximate cause of their damages where plaintiffs alleged that defendant wrongfully created a cloud on the title of plaintiffs' property. There were doubts about whether the plat was apparently valid; if any party relied on defendants' plats, then the liability would be with the encroaching party rather than with defendants. **Lamb v. Styles, 633.**

Surveyors—standard of care—no statutory standard—The legislature intended its rules on surveying to protect property interests in North Carolina. Neither N.C.G.S. § 89C-2, stating that surveying is subject to regulation, nor provisions in the administrative code regulating the profession created a specific standard of care for surveyors. **Lamb v. Styles, 633.**

Surveyors—statute of limitations—ten years—no expansion of duty of care—The fact that the statute of limitations for surveyors is ten years rather than the three years of other professional negligence claims does not create or expand surveyors' duty of care. Statutes of limitations are purely procedural bars to bringing claims and affect only the remedy and not the right to recover. **Lamb v. Styles, 633.**

EVIDENCE

Felony death by vehicle—officer testimony—prejudice analysis—In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, defendant failed to show that he was prejudiced by the exclusion of testimony of an investigating officer that he did not charge defendant with driving while impaired immediately after the collision. Even if the trial court erred by sustaining the State's objection, it was apparent that defendant was not charged separately with that offense, a fact acknowledged by the prosecutor during closing argument. **State v. Shelton, 681.**

INDICTMENT AND INFORMATION

Information—express waiver of indictment—guilty plea—motion for appropriate relief—Defendant was entitled to relief from two criminal convictions where he was charged by a bill of information that did not include or attach an express waiver of indictment pursuant to N.C.G.S. § 15A-642(c). The lack of a formal waiver deprived the trial court of jurisdiction to accept defendant's guilty plea and enter judgment on the convictions. **State v. Nixon, 676.**

JURISDICTION

Equitable distribution—claim for unpaid distributive award—deceased spouse—correct court—In an action to enforce an equitable distribution (ED) order granting a distributive award to plaintiff, plaintiff's declaratory judgment claim filed as part of decedent's estate matter should have been dismissed by the superior court. The distributive award to plaintiff did not belong to decedent (her former spouse) and did not become part of his estate when he died. Exclusive jurisdiction

over ED belonged to the district court, which is where plaintiff must enforce her claim. **Smith v. Rodgers, 662.**

JUVENILES

Appeal of commitment—mootness—juvenile turning 18 years old during appeal —The Court of Appeals dismissed as moot an appeal of a juvenile commitment order where the juvenile reached the age of 18 years during the pendency of the appeal. **In re B.B., 604.**

MOTOR VEHICLES

Felony death by vehicle—impairment—sufficiency of evidence—In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, the State presented sufficient evidence from which the jury could reasonably infer that (1) defendant was appreciably impaired due to ingesting two controlled substances that were present in a blood sample taken after the incident and (2) that the impairment was a proximate cause of the victim's death. Both controlled substances have as possible side effects drowsiness or dizziness; defendant failed to see the victim standing at the side of the road; he admitted he did not know he had struck a human being in the collision; and despite his brakes malfunctioning, he continued to drive all the way to his home. **State v. Shelton, 681.**

SATELLITE-BASED MONITORING

Lifetime monitoring—order—no evidence—An order that defendant would be subject to satellite-based monitoring for the remainder of his life was remanded for proper analysis and determination under N.C.G.S. § 14-208.40A where no evidence was presented in support of the order. **State v. Sheridan, 697.**

SEXUAL OFFENSES

Sexual offense in parental role—mistrial denied—statement of expert— The trial court did not abuse its discretion in a prosecution for sexual offense in a parental role by denying a mistrial where an expert witness stated that the child was neglected because her mother allowed her to stay with defendant, who had a criminal history. The trial court immediately sustained defendant's objection and instructed the jury not to consider the remark. Furthermore, the disclosure of defendant's history of criminality was vague and did not suggest that defendant had been convicted of anything. **State v. Sheridan, 697.**

Sexual offense in parental role—sufficiency of evidence—parent-child relationship—There was sufficient evidence of a parent-child relationship in a prosecution for sexual offense in a parental role where defendant paid for a fourteen-year-old's care and support at a time when she was legally unable to work and maintain herself, made numerous representations to others of his parental and supervisory role over the child, indicated to police that he was her godfather, represented to a friend that he was trying to help her and get her enrolled in school, and told his other girlfriends that the victim was his daughter. There was no indication that he was a friend of the family, and he initiated a relationship of trust by approaching the victim with reference to his daughter, who was the same age, and he was always present when the two girls were hanging out at his house. **State v. Sheridan, 697.**

SPECIFIC PERFORMANCE

Breach of contract—separation agreement—refinance of debt—parties' intent—In a breach of contract action, the trial court did not abuse its discretion by ordering specific performance to achieve the original intent of the parties' separation agreement and property settlement (the Agreement). Since plaintiff-ex-wife satisfied the mortgage on the former marital residence and the outstanding balance on an equity line of credit through a refinance in order to lower her monthly payments, and since both of those debts were defendant-ex-husband's responsibility under the Agreement, the trial court achieved the parties' original intent by ordering defendant to pay plaintiff a monthly sum until the date the mortgage had originally been scheduled to be paid off and to pay a lump sum for the equity line balance (representing the payoff amount as of the date of separation). **Jones v. Jones, 606.**

Sufficiency of evidence—alimony—income, savings, and expenses—There was sufficient evidence to support the trial court's finding and conclusion that defendant had the ability to comply with an order for specific performance of a separation agreement and property settlement, where there were numerous findings regarding defendant's income, savings, and monthly expenses. **Jones v. Jones, 606.**

WORKERS' COMPENSATION

Lent employees—right to control day-to-day work—exclusivity of Industrial Commission's jurisdiction—A mechanic who was lent to a plywood manufacturing company by a staffing company was a special employee of the plywood company for purposes of workers' compensation law. Pursuant to the contract between the two companies, the plywood company had the right to control the mechanic's day-to-day work, establishing the mechanic's status as its special employee. The Industrial Commission had exclusive jurisdiction over claims arising from the mechanic's death in a workplace accident at the plywood plant. **Estate of Belk v. Boise Cascade Wood Prods., L.L.C., 597.**

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

THE ESTATE OF WILLIAM BELK, BY AND THROUGH
TAQUITTA BELK, ADMINISTRATRIX, PLAINTIFF
v.
BOISE CASCADE WOOD PRODUCTS, L.L.C., A MEMBER OF
BOISE CASCADE COMPANY, JOHN DOE 1 AND JOHN DOE 2, DEFENDANTS

No. COA18-542

Filed 5 February 2019

Workers' Compensation—lent employees—right to control day-to-day work—exclusivity of Industrial Commission's jurisdiction

A mechanic who was lent to a plywood manufacturing company by a staffing company was a special employee of the plywood company for purposes of workers' compensation law. Pursuant to the contract between the two companies, the plywood company had the right to control the mechanic's day-to-day work, establishing the mechanic's status as its special employee. The Industrial Commission had exclusive jurisdiction over claims arising from the mechanic's death in a workplace accident at the plywood plant.

Judge BRYANT concurring in result only.

Appeal by Defendant Boise Cascade Company from order entered 11 December 2017 by Judge David Thomas Lambeth, Jr., in Lee County Superior Court. Heard in the Court of Appeals 13 November 2018.

Muller Law Firm, PLLC, by Tara Davidson Muller, and The Hunt Law Firm, by Anita B. Hunt and Ralph A. Hunt, Jr., for Plaintiff-Appellee.

Husch Blackwell, LLP, by William E. Corum, and Teague, Campbell, Dennis & Gorham, LLP, by Jennifer B. Milak, for Defendant-Appellant Boise Cascade Wood Products, L.L.C.

DILLON, Judge.

Defendant Boise Cascade Company ("Boise Cascade")[1] appeals from the trial court's order denying its motion for summary judgment.

1. Pursuant to motion allowed 6 August 2018, Boise Cascade Company has been substituted for Boise Cascade Wood Products, L.L.C., as the defendant in this case. We conform the caption in this opinion to the previous documents in this line.

Boise Cascade contends that exclusive jurisdiction over this case belongs to the Industrial Commission, because Boise Cascade was a "special employer" of the deceased. After careful review, we reverse.

I. Background

Boise Cascade is a limited liability company which owns and operates a plywood manufacturing plant in Moncure. Boise Cascade entered into an Agreement for Temporary Services with a staffing company, Aerotek, Inc. ("Aerotek"), to provide temporary personnel for the plant. Pursuant to their Agreement for Temporary Services, Aerotek recruited William Belk as a candidate for a mechanic position in Boise Cascade's maintenance department.

In August 2014, Mr. Belk began working at the Boise Cascade plant. On 26 September 2015, after working at the Boise Cascade plant for more than a year, Mr. Belk was killed in a workplace accident when a machine he was repairing collapsed.

Mr. Belk's estate ("Plaintiff") brought a workers' compensation claim against Aerotek before the Industrial Commission and received an award of death benefits.

In April 2016, Plaintiff instituted this civil action against Boise Cascade seeking damages for Mr. Belk's death. Boise Cascade then filed to dismiss, which was denied. Boise Cascade subsequently moved for summary judgment, which, after a hearing on the matter, was also denied.

Boise Cascade appeals.

II. Appellate Jurisdiction

This appeal is interlocutory. Typically, "[t]he denial of a motion for summary judgment is an interlocutory order and is not appealable." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Nonetheless, "the denial of a motion concerning the exclusivity provision of the Workers' Compensation Act affects a substantial right and thus is immediately appealable." *Fagundes v. Ammons Dev. Grp., Inc.*, ___ N.C. App. ___, ___, 796 S.E.2d 529, 532 (2017). Therefore, we conclude that the appeal is timely.

Plaintiff, though, argues that Boise Cascade has not properly appealed from the correct judgment. N.C. R. App. P. 3(d) ("The notice of appeal required to be filed . . . shall designate the judgment or order from which appeal is taken[.]"). Boise Cascade's notice of appeal cites to the order denying summary judgment as the order being appealed. Plaintiff, though, argues that this order was void. Specifically, Plaintiff

contends that the trial court's denial of Boise Cascade's prior motion to dismiss was, essentially, an order denying summary judgment because the trial court considered matters outside the complaint. Therefore, Plaintiff contends, the subsequent order denying summary judgment was void and any appeal should have been taken from the first order. We disagree with Plaintiff.

The record shows that Boise Cascade did initially file a Rule 12(b)(6) motion to dismiss and that the trial court entered an order denying that motion. Plaintiff notes that in defense to the Rule 12(b)(6) motion it submitted approximately twenty-seven (27) pages of documents to the trial court, thus transforming the Rule 12(b)(6) motion into a motion for summary judgment.

It is true that "[a] Rule 12(b)(6) motion to dismiss for failure to state a claim is . . . converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979). However, "the trial court [is] not required to convert a motion to dismiss into one for summary judgment simply because additional documents [are] submitted." *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 252, 552 S.E.2d 186, 189 (2001). Where it is clear from the record, namely from the order itself, that the additional materials were not considered by the trial court, the 12(b)(6) motion is not converted into a Rule 56 motion. *Id.*

Here, the order denying Boise Cascade's Rule 12(b)(6) motion does not mention that the trial court considered anything beyond the pleadings. The order merely states that the court's decision was made after "having reviewed the pleadings and having heard and considered the arguments of Counsel[.]" At best, the trial court's language converted the Rule 12(b)(6) motion, which properly focuses only on the complaint, into a Rule 12(c) motion, which focuses on all of the pleadings. We, therefore, deny Plaintiff's motion to dismiss Boise Cascade's appeal.

III. Analysis

This appeal is from the denial of Boise Cascade's motion for summary judgment. We review an appeal from summary judgment *de novo*, to determine whether, in the light most favorable to the nonmoving party, there is any genuine issue of material fact and whether 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). "If there is any question as to the weight of evidence, summary judgment should be denied." *Marcus Bros.*

Textiles, Inc., v. Price Waterhouse, LLP, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999).

On appeal, Boise Cascade argues that the evidence showed, as a matter of law, that Boise Cascade was a "special employer" of Mr. Belk, and that, therefore, jurisdiction over Plaintiff's action belongs exclusively to the Industrial Commission. We agree.

The Workers' Compensation Act creates an exclusive remedy for employees injured in work-related incidents. N.C. Gen. Stat. Ann. § 97-10.1 (2013) ("[T]he rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death."). Where the Workers' Compensation Act applies, the employee is barred from pursuing a common law negligence action against his employer(s), *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985), and the trial courts are divested of jurisdiction. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 579, 350 S.E.2d 83, 85 (1986).

Our Supreme Court has recognized that an employee may be in both the employment of his primary, general employer, and also be "lent" as a special, temporary employee to a secondary, special employer. *Leggette v. J. D. McCotter, Inc.*, 265 N.C. 617, 625, 144 S.E.2d 849, 855 (1965); *Leonard v. Tatum & Dalton Transfer Co.*, 218 N.C. 667, 671, 12 S.E.2d 729, 731 (1940); *Baker v. State*, 200 N.C. 232, 235, 156 S.E. 917, 918 (1931). But the lent employee is not automatically an employee of both the general and the special employer for the purpose of workers' compensation. *Id.*

Our Supreme Court has held that "[t]he crucial test in determining whether a servant furnished by one person to another becomes the employe [sic] of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it* [] irrespective of whether [the latter] actually *exercises* that control or not." *Weaver v. Bennett*, 259 N.C. 16, 28, 129 S.E.2d 610, 618 (1963). Our Supreme Court has applied this test to determine whether a plaintiff-worker was a special employee of a defendant-company, and therefore subject to the jurisdiction of the Industrial Commission in seeking compensation/damages when he was injured on the job. *Moody v. Kersey*, 270 N.C. 614, 621, 155 S.E.2d 215, 220-21 (1967); *see also Rouse v. Pitt County Memorial Hosp.*, 343 N.C. 186, 197-98, 470 S.E.2d 44, 51 (1996) (applying the

Weaver "right to control" test to determine whether a borrowed worker was a special employer).

Whether a lent worker became a special employee of the entity to whom he was lent is a question of fact. And, in a civil action, where the evidence is sufficient to create a genuine issue of fact on this issue, our Supreme Court has instructed that the determination is to be decided by the jury. *See Weaver*, 259 N.C. at 30, 129 S.E. 2d at 620 (reversing dismissal where evidence in the light most favorable to the plaintiff created a genuine issue of fact regarding whether there was an employment relationship between the lent worker and the special employer).[2]

Therefore, the question before us is whether there was a genuine issue of material fact before the trial court regarding whether Mr. Belk was a special, lent employee of Boise Cascade. For the reasons stated below, we conclude that the evidence established, as a matter of law, that Mr. Belk was, indeed, a special employee of Boise Cascade: The evidence conclusively establishes that control over the manner in which Mr. Belk performed his job passed to Boise Cascade. Accordingly, Boise Cascade was entitled to summary judgment.

In reaching our conclusion, we note the following uncontested facts:

The Agreement for Temporary Services between Aerotek (Mr. Belk's general employer) and Boise Cascade attributes the right to control Mr. Belk to Boise Cascade. Specifically, in that Agreement, Boise Cascade clearly undertook the right to control the day-to-day work activities of Mr. Belk, leaving administrative/clerical functions (payroll, etc.) to Aerotek, providing as follows:

> 1. . . . *[Aerotek] will be the general employer*, responsible for all administrative responsibilities and legal compliance, except as otherwise provided in this Agreement. *Boise Cascade will be the special employer, responsible for day-to-day supervision and control* of [Aerotek's] Employees who are assigned by [Aerotek] to render services to Boise Cascade, pursuant to this

2. We do not disturb a jury's determination in a civil trial regarding the nature of the relationship between a lent worker and the company for whom he is working, where the determination is supported by evidence. However, in the context of a worker's compensation claim brought before the Industrial Commission, the reviewing court gives no deference to the Commission's findings on this jurisdictional issue, but reviews them *de novo*. *See, e.g.*, *Whicker v. Compass Group USA, Inc.*, 246 N.C. App. 791, 795-96, 784 S.E.2d 564, 568 (2016) (reviewing "jurisdictional facts" *de novo*).

> Agreement . . . . *Boise Cascade will also be considered an employer for purposes of state workers' compensation law*, although [Aerotek] will retain liability for workers' compensation benefits.
>
> . . .
>
> 4. . . . .[Aerotek] shall have the right and responsibility to . . . [comply with] state and local taxes and charges incident to the provision of and payment of compensation for Temporary Services . . . .
>
> 5. Boise Cascade will be responsible for that portion of the day-to-day supervision and control of Employees as necessary to conduct Boise Cascade's business and shall determine the general procedures to be followed by the Employees regarding the performance of their duties.
>
> 6. . . . *[Aerotek] shall inform the Employees that both [Aerotek] and Boise Cascade are considered their employer for workers' compensation benefits.*

(Emphasis added).

Our Supreme Court has stated that "most persuasive" to the determination of special employment is whether the contract between the employers gives the right to control the work of the employee to the special employer. *Harris v. Miller*, 335 N.C. 379, 395, 438 S.E.2d 731, 740 (1994) ("When a contract, written or oral, between two employers expressly provides that one or the other shall have right of control, solution of the [lent employee] question is relatively simple[.]" (citation omitted)). In its 1996 *Rouse* opinion, our Supreme Court repeated a statement it made in its 1994 *Harris* opinion, that "[w]here the [employers] have made an explicit agreement regarding the right of control, this agreement will be dispositive." *Rouse*, 343 N.C. at 200, 470 S.E.2d at 52. But we do not take this statement to mean that a statement contained in the contract between the employers is *conclusive* on the issue of whether the lent worker is an employee of the special employer, notwithstanding the use of the word "dispositive." Rather, such an agreement is merely strong evidence of the nature of the relationship between the lent worker and the special employer. Indeed, in *Rouse*, our Supreme Court recognized that the contract between the employers gave the right to control the lent workers to the special employer, but that this and other evidence was sufficient only to raise a genuine issue of material

fact as to whether there was indeed a right to control sufficient to create a special employment relationship. *Id.* at 201-02, 470 S.E.2d at 53.

In addition to the contract between Aerotek and Boise Cascade, there is other uncontradicted evidence demonstrating that Mr. Belk was a special employee of Boise Cascade. For instance, Mr. Belk was hired by Boise Cascade to serve as a mechanic in its maintenance department. Mr. Belk was fatally injured while repairing a hydraulic valve on one *of Boise Cascade's machines*[3] when part of the machine collapsed. It is uncontested, and therefore there is no genuine issue of fact, that Mr. Belk was performing the work of Boise Cascade, the special employer, when the incident occurred.

The evidence is uncontradicted that Boise Cascade had the right to control Mr. Belk with respect to the work he performed as a maintenance mechanic. Boise Cascade paid Mr. Belk an hourly wage. And Mr. Belk worked at Boise Cascade's plant for over a year before he was injured.

Plaintiff relies on various points in depositions that were before the trial court that suggest Boise Cascade did not provide training, direction, or supervision over Mr. Belk regarding his job duties. Regardless, Boise Cascade had the right and ability to control Mr. Belk's work pursuant to contract.

Plaintiff claims that its proceedings in the Industrial Commission against Aerotek alone preclude the possibility that Boise Cascade controlled Mr. Belk because the resulting Opinion and Award stated that "there [was] no question as to . . . nonjoinder of parties." However, the Industrial Commission made no rulings in its Opinion and Award as to whether Aerotek controlled Mr. Belk. Rather, the parties in that proceeding mutually stipulated both that there was no issue of nonjoinder and that Mr. Belk was an employee of Aerotek. In any event, this stipulation is not binding on Boise Cascade, who was not a party to that proceeding.

IV. Conclusion

We conclude that there were no genuine questions of fact with respect to whether Mr. Belk was a special, lent employee of Boise

---

3. Our Supreme Court has held that a presumption exists that a lent worker remains the sole employee of the general employer when the worker works with expensive equipment owned by the general employer. *Weaver*, 259 N.C. at 28-29, 129 S.E.2d at 619. But, here, there is no indication that Aerotek owned any equipment which was used by Mr. Belk. Rather, Mr. Belk was working with equipment owned by Boise Cascade.

Cascade. Even considering the evidence in the light most favorable to Plaintiff, we hold that the evidence conclusively showed that Mr. Belk was a special employee of Boise Cascade. Necessarily, exclusive jurisdiction over Plaintiff's claims rests in the Industrial Commission, not the trial court below. Therefore, we reverse the trial court's order denying Boise Cascade's motion for summary judgment.

REVERSED.

Judge ZACHARY concurs.

Judge BRYANT concurs in result only.

IN THE MATTER OF B.B.

No. COA18-428

Filed 5 February 2019

Juveniles—appeal of commitment—mootness—juvenile turning 18 years old during appeal

The Court of Appeals dismissed as moot an appeal of a juvenile commitment order where the juvenile reached the age of 18 years during the pendency of the appeal.

Appeal by Juvenile from Amended Disposition and Commitment Order entered 14 December 2017 by Judge Robert A. Mullinax, Jr. in Caldwell County District Court. Heard in the Court of Appeals 16 January 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for the State.

Morgan & Carter, PLLC, by Michelle F. Lynch, for juvenile-appellant.

MURPHY, Judge.

B.B. appeals a *Disposition and Commitment Order* of the Caldwell County District Court. Where a juvenile has already been discharged from the custody of a Youth Development Center by reason of his or her age, "the subject matter . . . has ceased to exist and the issue is moot."

In re Swindell, 326 N.C. 473, 474, 390 S.E.2d 134, 135 (1990). We dismiss B.B.'s appeal as moot.

Our decision does not necessitate an extensive description of the background and procedural history of this matter. B.B. was adjudicated delinquent and received a Level 2 disposition of probation after admitting to assault inflicting serious injury by strangulation. Over a year later, the State filed a *Motion for Review* based on its allegation that B.B. had violated probation terms by engaging in a physical interaction. At the hearing before the District Court, B.B.'s attorney moved for a continuance because he had only met B.B. that afternoon and a potential witness—one of B.B.'s relatives—was unavailable to testify on that date. The trial court denied the motion for continuance and sentenced B.B. to a Level 3 disposition. B.B. was committed to a Youth Development Center for a minimum period of six months and an indefinite period not to exceed "the juvenile's eighteenth birthday" thereafter. On appeal, B.B. alleges the trial court "abused its discretion in denying Juvenile's first motion for a continuance in [the] probation revocation hearing . . . ."

"[A]s a general rule [our appellate courts] will not hear an appeal when the subject matter of the litigation has . . . ceased to exist." *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968) (citations omitted). Our appellate courts apply the mootness doctrine in juvenile justice cases where the juvenile has reached the age of 18 during the pendency of their appeal. *In re Swindell*, 326 N.C. at 474, 390 S.E.2d at 135 (dismissing as moot juvenile's appeal of trial court's order committing him to training school where the juvenile was released during the pendency of his appeal); *In re W.H.*, 166 N.C. App. 643, 648, 603 S.E.2d 356, 360 (2004) (dismissing as moot juvenile's appeal of trial court's order regarding custody pending appeal where the juvenile had already served his disposition and been discharged); *In re Cowles*, 108 N.C. App. 74, 78, 422 S.E.2d 443, 445 (1992) (declining to reach arguments on appeal because juvenile had reached the age of 18 during pendency of appeal). Here, B.B. reached the age of 18 during the pendency of this appeal. While the briefing period closed prior to B.B.'s 18th birthday, the Juvenile did not file a supplemental brief addressing mootness or present us with any collateral consequences that may stem from the disposition order in question. *State v. Stover*, 200 N.C. App. 506, 509-10, 685 S.E.2d 127, 130-31 (2009). We need not reach the merits of this appeal and dismiss it as moot.

DISMISSED.

Judges DILLON and ARROWOOD concur.

JONES v. JONES

[263 N.C. App. 606 (2019)]

JOY MANN JONES, Plaintiff-Appellee
v.
BRUCE RAY JONES, Defendant-Appellant

No. COA18-478

Filed 5 February 2019

1. Civil Procedure—entry of default—motion to set aside—good cause—diligence in pursuit of matter

In a breach of contract action, the trial court did not abuse its discretion by denying defendant's motion to set aside entry of default where defendant did not show good cause pursuant to Civil Procedure Rule 55(d). Defendant took no action during the two months following a Court of Appeals decision in the matter (regarding the denial of defendant's motion to dismiss for lack of subject matter jurisdiction), and he admitted that he did not fully comply with the terms of the separation agreement and the property settlement.

2. Specific Performance—breach of contract—separation agreement—refinance of debt—parties' intent

In a breach of contract action, the trial court did not abuse its discretion by ordering specific performance to achieve the original intent of the parties' separation agreement and property settlement (the Agreement). Since plaintiff-ex-wife satisfied the mortgage on the former marital residence and the outstanding balance on an equity line of credit through a refinance in order to lower her monthly payments, and since both of those debts were defendant-ex-husband's responsibility under the Agreement, the trial court achieved the parties' original intent by ordering defendant to pay plaintiff a monthly sum until the date the mortgage had originally been scheduled to be paid off and to pay a lump sum for the equity line balance (representing the payoff amount as of the date of separation).

3. Specific Performance—sufficiency of evidence—alimony—income, savings, and expenses

There was sufficient evidence to support the trial court's finding and conclusion that defendant had the ability to comply with an order for specific performance of a separation agreement and property settlement, where there were numerous findings regarding defendant's income, savings, and monthly expenses.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from entry of default entered 2 June 2015 by the Lee County Clerk of Court and orders entered 10 August 2016 and 12 October 2017 by Judge Mary H. Wells in Lee County District Court. Heard in the Court of Appeals 29 November 2018.

Elizabeth Myrick Boone for plaintiff-appellee.

Wilson, Reives and Silverman, PLLC, by Jonathan Silverman, for defendant-appellant.

ARROWOOD, Judge.

Bruce Ray Jones ("defendant") appeals from entry of default and orders denying his motion to set aside entry of default, denying his Rule 59 motion, and ordering specific performance. For the following reasons, we affirm.

I. Background

Plaintiff initiated this breach of contract action for damages and specific performance by filing a verified complaint on 5 September 2013 alleging defendant failed to comply with a separation agreement and property settlement entered into by the parties on 19 October 2011 as part of their separation and divorce. Defendant filed a motion for extension of time to file responsive pleadings on 13 September 2013 which was granted the same day by order of the clerk. The order allowed responsive pleadings through 8 November 2013. On 7 November 2013, defendant filed a motion to dismiss for lack of subject matter jurisdiction. In the motion, defendant asserted that he had previously filed an action against plaintiff in Lee County with case number 12 CVD 442 to rescind or vacate the 19 October 2011 separation agreement and property settlement at issue and that plaintiff's claims in the present action were compulsory counterclaims in his prior action. Plaintiff filed a response on 13 January 2014.

Defendant's motion to dismiss came on for hearing in Lee County District Court on 12 February 2014. The trial court denied the motion by order filed 18 March 2014. Defendant filed notice of appeal to this Court from the 18 March 2014 order denying his motion to dismiss on 27 March 2014 alleging the trial court's decision affected a substantial right. The appeal was heard before this Court on 25 September 2014. This Court

agreed the matter affected a substantial right and reviewed the appeal, ultimately affirming the trial court's denial of defendant's motion to dismiss in an unpublished opinion filed 17 March 2015. *See Jones v. Jones*, 240 N.C. App. 88, 772 S.E.2d 13 (2015) (unpub.) COA14-507 (available at 2015 WL 1201332).[1] This Court's opinion was certified to the district court on 6 April 2015 and filed in Lee County on 8 April 2015.

Almost two months later, on 2 June 2015, plaintiff filed a motion for entry of default together with an attached affidavit of plaintiff's counsel. Plaintiff asserted entry of default was proper because defendant failed to file an answer or other pleading before the time for doing so expired. The Lee County Clerk of Court entered default against defendant on the same day plaintiff filed the motion, 2 June 2015. Plaintiff then filed an affidavit and a motion for summary judgment on 15 June 2015.

Almost a month after entry of default, defendant filed a verified motion to dismiss and answer on 30 June 2015. Over a month after entry of default, defendant filed a motion to set aside entry of default on 9 July 2015. Defendant asserted that entry of default should be set aside because "[it] was obtained without notice to [him] and as required by Rule 5" and because "[he] has now filed an answer in this action and has meritorious defenses." Thus, defendant contended "[g]ood cause has been shown to set aside entry of default and it should be set aside pursuant to Rule 55(d) . . . ."

The matter came on for a motions hearing on 6 April 2016. Defendant was represented by new counsel at the hearing because his original counsel was suspended from the practice of law around 5 February 2016. At the hearing, the court first considered defendant's motion to set aside entry of default. Defendant argued the entry of default was not proper because he did not have notice or receive service. Defendant further argued that even if entry of default was proper without notice or service, the court could set aside entry of default using its equitable powers. In opposition, plaintiff argued the entry of default was simply a ministerial task by the clerk when there is no responsive pleading. Plaintiff additionally argued that notice and service were not necessary for entry of default and, therefore, defendant has not established grounds for setting aside entry of default.

---

1. Defendant also filed notice of appeal from the trial court's entry of summary judgment in favor of plaintiff in the separate action he previously filed to rescind or vacate the 19 October 2011 separation agreement and property settlement. That appeal was heard at the same time as defendant's appeal in the present action. This Court filed a separate opinion in that appeal. *See Jones v. Jones*, 240 N.C. App. 88, 772 S.E.2d 13 (2015) (unpub.) COA14-236 (available at 2015 WL 1201320).

After considering the arguments, the trial court indicated it was inclined to deny defendant's motion to set aside entry of default. At that point, defendant's counsel sought to postpone a decision until they could get an affidavit from defendant's original counsel. Defendant's counsel asserted that the affidavit would show whether or not good cause existed. The trial court agreed to allow defendant to file an affidavit of defendant's original counsel. The next day, 7 April 2016, defendant filed an amended motion to set aside entry of default, which sought to incorporate an affidavit of his original counsel with the original motion to set aside entry of default. The affidavit of defendant's original counsel asserted the following grounds to support his assertion that good cause does exist to set aside the entry of default: the passage of time between filing the motion to dismiss and this Court's decision in defendant's appeal; a State Bar grievance which defendant's original counsel was dealing with; other murder cases defendant's original counsel was involved with; defendant's defense through the litigation; alleged meritorious defenses; the failure of plaintiff's counsel to provide notice of the motion for entry of default; and the violation of local customs when plaintiff's counsel moved for entry of default without discussing the matter with defendant's counsel in advance.

Plaintiff's counsel responded by filing an affidavit on 8 April 2016. Plaintiff's counsel averred that she spoke with defendant's original counsel after this Court's decision and "asked him if [defendant] was now going to pay [plaintiff]. His response to me was 'that it was the case with no options.' " Plaintiff's counsel further averred that they felt filing the motion for entry of default was the best option after defendant's original counsel's "comment . . . about this being 'the case with no options' along with his failure to file an answer or to respond with any information regarding [defendant's] willingness or unwillingness to comply with the [a]greement[.]"

After plaintiff submitted a proposed order and defendant filed a request for additional findings of fact, the trial court filed an order denying defendant's motion to set aside entry of default on 10 August 2016. On the same day defendant filed a motion for a new hearing pursuant to Rule 59(a)(8) claiming the trial court erred by imputing his original counsel's neglect to him.

The matter came back on for a hearing on 14 September 2016. At that time, the court considered and denied defendant's Rule 59 motion. The court then proceeded to consider plaintiff's motion for summary judgment and denied the motion. The matter was then scheduled for an evidentiary hearing, which took place on 29 September 2016 and

19 October 2016. After plaintiff submitted a proposed order, defendant filed a request for findings of fact on 9 August 2017.

On 12 October 2017, the trial court filed orders denying defendant's Rule 59 motion, denying plaintiff's summary judgment motion, and ordering specific performance of the separation agreement and property settlement. On 9 November 2017, defendant filed notice of appeal from the trial court's entry of default on 2 June 2015, order denying his motion to set aside entry of default filed on 10 August 2016, and orders filed on 12 October 2017 denying his Rule 59 motion and ordering specific performance.

II. Discussion

On appeal, defendant challenges the trial court's denial of his motion to set aside entry of default and the trial court's order for specific performance.

1. Entry of Default

[1] Defendant first argues the trial court erred in denying his motion to set aside entry of default. "A trial court's decision of whether to set aside an entry of default, will not be disturbed absent an abuse of discretion. A judge is subject to a reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Luke v. Omega Consulting Grp., LLC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009) (citation and quotation marks omitted). Upon review, we find no abuse of discretion and affirm the trial court.

Rule 55(d) governs setting aside entry of default and provides that the trial court may set aside an entry of default "[f]or good cause shown[.]" N.C. Gen. Stat. § 1A-1, Rule 55(d) (2017). "What constitutes good cause depends on the circumstances in a particular case" and "defendant carries the burden of showing good cause to set aside entry of default." *Luke*, 194 N.C. App. at 748, 670 S.E.2d at 607 (quotation marks omitted). When determining if defendant has shown good cause to set aside entry of default, both the trial court and this Court consider the following factors: "(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action." *Id.*

> [I]t is entirely proper for the court to give consideration to the fact that default judgments are not favored in the law. At the same time, however, it is also true that rules which require responsive pleadings within a limited time serve

> important social goals, and a party should not be permitted to flout them with impunity.

Howell v. Haliburton, 22 N.C. App. 40, 42, 205 S.E.2d 617, 619 (1974).

In this case, defendant emphasizes that the standard for setting aside entry of default is lower than that for setting aside a default judgment, *see Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, __ N.C. App. __, __, 805 S.E.2d 743, 747 (2017) (" 'This [good cause] standard is less stringent than the showing of 'mistake, inadvertence, or excusable neglect' necessary to set aside a default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b).' ") (quoting *Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000)), and *Coastal Federal Credit Union v. Falls*, 217 N.C. App. 100, 108, 718 S.E.2d 192, 197 (2011) (comparing the standard for setting aside entry of default with the more stringent standard for setting aside a default judgment), and contends that he met the threshold of showing good cause to set aside entry of default in this case. Defendant compares his case to *Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, __ N.C. App. __, 805 S.E.2d 743 (2017), and *Beard v. Pembaur*, 68 N.C. App. 52, 313 S.E.2d 853, *disc. review denied*, 311 N.C. 750, 321 S.E.2d 126 (1984).

In *Swan Beach*, this Court explained that "[a] trial court abuses its discretion when the party appealing the denial of its motion to set aside the entry of default demonstrates that the trial court did not apply the proper 'good cause' standard in its determination." __ N.C. App. at __, 805 S.E.2d at 747. This Court further explained that a trial court may also abuse its discretion in finding that a defendant had not established good cause to set aside entry of default. *Id.* at __, 805 S.E.2d at 747 (citing *Peebles v. Moore*, 48 N.C. App. 497, 504, 269 S.E.2d 694, 698 (1980), *modified and aff'd by* 302 N.C. 351, 275 S.E.2d 833 (1981)).

In *Swan Beach*, this Court held "the trial court abused its discretion by failing to apply the good cause standard when it denied [the d]efendant's motion to set aside the entry of default." *Id.* at __, 805 S.E.2d at 749. This Court explained that its review of the record revealed "that the trial court identified no reason for its denial of [the d]efendants' motion other than uncertainty as to whether the time for which [the d]efendants had to file an answer had run." *Id.* at __, 805 S.E.2d at 748. This Court then went a step further in its analysis and held "that even if the trial court had applied the proper standard it would have abused its discretion in denying [the d]efendant's motion[.]" *Id.* at __, 805 S.E.2d at 749. In reaching its alternative holding, this Court analyzed the three factors set forth above and agreed with the defendants that they had been

vigorously pursuing the litigation and that they would suffer a grave injustice given the size of the judgment and the nature of the claims. *Id.* at __, 805 S.E.2d at 748-49. In concluding the defendants were vigorously pursuing the litigation, this Court explained that within a week of this Court's decision overturning the trial court's grant of the defendant's prior motion to dismiss, "counsel for [the d]efendants promptly resumed discussions with [the p]laintiffs' counsel regarding discovery scheduling and other tasks related to continuing the litigation" and "[t]wo days before [the p]laintiffs' counsel sought entry of default, counsel had scheduled a meeting to discuss settlement." *Id.* at __, 805 S.E.2d at 749. This Court further noted that the entry of default was a surprise to the defendants, who submitted a proposed answer and filed a motion to set aside entry of default six days after entry of default. *Id.* at __, 805 S.E.2d at 749.

In *Beard*, to which this Court referred in *Swan Beach*, *see* __ N.C. App. at __, 805 S.E.2d at 748, this Court reviewed the trial court's denial of the plaintiff's motion to set aside entry of default on the defendant's counterclaim and held the trial court abused its discretion. *Beard*, 68 N.C. App. at 55-56, 313 S.E.2d at 855-56. This Court explained in *Beard* that the plaintiff cited both Rule 55 and Rule 60 and specifically referred to "excusable neglect" and "meritorious defense" in the motion to set aside the entry of default and it was unclear from the trial court's order whether the trial court applied the proper "good cause" standard. *Id.* at 56, 313 S.E.2d at 855. This Court, however, held that "[e]ven if the trial court used as its standard, 'good cause,' as set forth in Rule 55(d), the trial court abused its discretion" because the record indicated that "discovery was being pursued vigorously by the parties; that [the] plaintiff's counsel thought, albeit erroneously, that service was not perfected on [the] defendant until . . . four days before the entry of default; and that all matters in [the] defendant's [c]ounterclaim related to the . . . subject of all material allegations in the plaintiff's [c]omplaint." *Id.* at 56, 313 S.E.2d at 855-56.

First and foremost, unlike in *Swan Beach* and *Beard*, it is clear the trial court applied the "good cause" standard in this case. The trial court made a finding and issued a conclusion directly stating that "[d]efendant has failed to show good cause for his failure to file a responsive pleading in this matter."

Furthermore, the trial court did not abuse its discretion in its good cause analysis. As this Court noted in both *Swan Beach* and *Beard*, the unique facts in each case must be considered. While we may have arrived at a result different from that of the trial court if we were to review the

matter *de novo*, we simply cannot say that the trial court abused its discretion in this instance.

This Court's analysis in both *Swan Beach* and *Beard* emphasized that the defaulting party was vigorously pursuing the litigation at the time of the entry of default. That does not appear to be the case following the appeal to this Court in the present action. Defendant attempts to broaden the scope of this Court's review on appeal by asserting that "[i]t cannot be said that [he] was anything other than diligent in pursuing issues relating to the subject agreement . . . ." In doing so, defendant conflates this action with the action he previously filed to rescind and vacate the separation agreement and property settlement and contends he vigorously litigated both actions all the way to this Court. Defendant contends his participation in the two actions has included taking part in depositions and court hearings, submitting affidavits, and conducting other discovery. Furthermore, despite defendant's acknowledgment that his answer was untimely by weeks, defendant emphasizes that he has submitted an answer raising defenses along with another motion to dismiss.

Indeed, in the order denying defendant's motion to set aside entry of default, the trial court found that defendant had vigorously litigated this action and asserted meritorious defenses. Yet, contrary to defendant's assertion that he was actively pursuing his case through the time of the entry of default and unlike in *Swan Beach*, in which the parties immediately resumed discussions regarding discovery and litigation following this Court's decision on appeal, nothing in the record in this case indicates defendant took any action related to this particular case following the filing of this Court's decision on 17 March 2015 and the certification of that opinion to the district court on 6 April 2015. Based on the record in this case, the trial court found counsel for the parties continued to communicate between the time this Court's decision was filed on 17 March 2015 and entry of default on 2 June 2015. Those communications, however, were directed toward discovery, trial preparation, and continuances in a separate action by plaintiff against defendant's current wife for alienation of affection; they have nothing to do with the present case. The only evidence of communications between counsel concerning this particular case was the affidavit of plaintiff's counsel, in which counsel explains she communicated with defendant's counsel, who indicated there were no options after this Court's decision on appeal.

Additionally, we note that after this Court upheld the validity of the separation agreement and property settlement in defendant's appeal in his separate action to rescind and vacate the agreement, *see Jones*

v. Jones, 240 N.C. App. 88, 772 S.E.2d 13 (2015) (unpub.) COA14-236 (available at 2015 WL 1201320), the only issues for determination in this action were whether defendant breached the agreement and what plaintiff was entitled to recover as a result of any breach. Defendant has admitted to his unilateral reduction in payments toward obligations under the separation agreement and property settlement. Furthermore, the trial court denied plaintiff's motion for summary judgment and ultimately considered evidence related to the affirmative defenses asserted in the untimely answer submitted by defendant. Defendant had the opportunity at trial to contest plaintiff's evidence of his ability to comply and the amount of damages. Thus, it does not appear that defendant has suffered a grave injustice as a result of the entry of default.

Given that defendant took no action regarding this case between the filing of this Court's decision on his appeal and the entry of default, and because defendant admits to not fully complying with the terms of the separation agreement and property settlement when coupled with the fact that defendant was able to contest plaintiff's evidence at trial, this case is distinguishable from *Swan Beach* and *Beard*. The trial court did not abuse its discretion in this case.

Moreover, the trial court found that "[d]efendant failed to state a reason in his [m]otion for his inattention to the process." Defendant argues this finding is not supported by the evidence. However, the record shows that the only grounds asserted in the motion to set aside filed on 9 July 2015 were that defendant previously appeared in the action, the motion for entry of default and the entry of default do not bear a certificate of service, entry of default was obtained without notice, and defendant had filed an answer after entry of default. The motion did not explain why defendant did not timely answer the complaint.

It was not until defendant's motion came on for hearing and the trial court indicated the motion would be denied that defendant requested, and the trial court allowed defendant's replacement counsel to file an affidavit of defendant's original counsel. The trial court, however, did not allow defendant to file an amended motion to change the basis asserted in the original motion. While the affidavit submitted shows that defendant's original counsel was dealing with several unrelated matters during the relevant time, the affidavit continues to maintain that it was defendant's original counsel's opinion that plaintiff's counsel should have provided notice of their motion for entry of default. Defendant's original counsel also candidly admits in the affidavit that it "slipped [his] mind that [he] needed to file additional responsive pleadings after th[is Court] entered its decision."

Considering both the motion to set aside entry of default filed on 9 July 2015 and the affidavit, we hold the trial court's finding is supported by the record. The trial court did not abuse its discretion in denying defendant's motion to set aside entry of default in this case.

2. Specific Performance

[2] Defendant also argues the trial court erred in various ways in its order for specific performance. We are not convinced.

This Court has explained that, "the equitable remedy of specific performance may be ordered only if no adequate remedy exists at law, and the party who is ordered to specifically perform is capable of doing so." *Lasecki v. Lasecki*, __ N.C. App. __, __, 809 S.E.2d 296, 302 (2017) (citations omitted).

> The sole function of the equitable remedy of specific performance is to compel a party to do that which in good conscience he ought to do without court compulsion. The remedy rests in the sound discretion of the trial court, and is conclusive on appeal absent a showing of a palpable abuse of discretion.

Munchak Corp. v. Caldwell, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980) (citations omitted), *modified on other grounds*, 301 N.C. 689, 273 S.E.2d 281 (1981).

Defendant first takes issue with the portion of the trial court's order for specific performance requiring him to continue paying plaintiff the sum of $3,750.00 per month in alimony until the time that the mortgage on the former marital residence was scheduled to be paid in full. Defendant contends this portion of the order was in error because plaintiff voluntarily satisfied the mortgage on the former marital residence on 27 November 2012, which defendant contends triggered a reduction in his alimony payments. Defendant also takes issue with that portion of the trial court's order for specific performance ordering him to pay $16,080.66 to plaintiff after plaintiff satisfied an outstanding balance on an equity line of credit with BB&T that was defendant's responsibility under the separation agreement and property settlement. Defendant argues these alleged errors were the result of the trial court adopting plaintiff's position that there was a subsequent oral agreement between the parties concerning the refinance of the mortgage on the former marital residence.

We address these issues together and, upon review, hold the trial court did not abuse its discretion in fashioning an equitable remedy in

this instance to achieve the original intent of the parties and ordering specific performance.

In regards to the responsibilities of the parties for the mortgage and the equity line of credit, the separation agreement entered into by the parties includes the following relevant provisions:

> 6. . . . [Defendant] shall assume sole liability for the outstanding second mortgage to BB&T, pay in full within 48 months from the date of this agreement, and hold [plaintiff] harmless therefrom.
>
> 13. . . . The [c]amper currently owned by the parties is hereby transferred, set over, and assigned to [defendant] as his sole and separate property. The [c]amper was purchased through the BB&T Home Equity Line of Credit for which [defendant] assumes sole liability. [Defendant] shall make regular payments on this [l]ine of [c]redit and make no further withdrawals. He shall pay this [l]ine of [c]redit in full within 48 months of this agreement.
>
> 18. . . . [Defendant] agrees to pay to [plaintiff] as [a]limony the sum of $3,750.00 per month on the first day of each month beginning [1 November 2011] and on the first day of each month thereafter . . . . At such time as the former marital residence mortgage is paid in full, [defendant's] alimony obligation shall be reduced by $1,444.00, the amount of the mortgage payment. The payments for alimony to [plaintiff], as provided herein, are fixed payments, and shall not be modified or changed, except by further written agreement of the parties.

In plaintiff's 5 September 2013 complaint, plaintiff asserted the following allegations that defendant breached his obligations under the separation agreement and property settlement:

> 7. That [d]efendant has breached the parties' agreement in that he has failed to pay the monthly alimony of $3,750.00 in full since [7 December 2012].
>
> 8. Despite [p]laintiff's demands, the [d]efendant has continued to unilaterally reduce his alimony payments since [7 December 2012.] Defendant owes [p]laintiff

alimony in the amount of $6,678.13 as arrearages as of [16 August 2013].

9. That there was an outstanding balance of $26,020.97 on the [e]quity [l]ine of [c]redit with BB&T on [the] date of separation. Defendant had purchased a camper for his use on [9 September 2011] with an initial cost of $16,020.97. Defendant made minimal monthly payments on the [e]quity [l]ine of [c]redit until [27 November 2012]. On [25 September 2012], [d]efendant represented to [p]laintiff that he would pay off the portion of the outstanding second mortgage to BB&T which consisted of the funds used to purchase his [c]amper with the initial cost of $16,020.97 on [9 September 2011]. Plaintiff relied to her detriment on [d]efendant's representation and obtained financing to combine the first and second mortgages to decrease the monthly payment on or about [27 November 2012]; however, [d]efendant then refused to pay to [p]laintiff the outstanding balance for the [c]amper unless she agreed to his demand to renegotiate the alimony provisions of the subject [s]eparation [a]greement and [p]roperty [s]ettlement. Defendant was distributed the camper in the parties [s]eparation [a]greement and [p]roperty [s]ettlement; however, [p]laintiff now is solely obligated to BB&T for the total previous equity line balance. Plaintiff has made 9 payments since the refinance of the two mortgages. It is equitable that [d]efendant should reimburse [p]laintiff for the entire $26,020.97 date of separation equity line balance.

Both parties acknowledge that the evidence showed that plaintiff satisfied the mortgage on the former marital residence on 27 November 2012 when she refinanced the mortgage in order to reduce the monthly payment. In connection with the refinance, plaintiff paid the outstanding balance on the equity line of credit with BB&T and refinanced it together with the mortgage on the former marital residence. Up to that point, defendant had made minimum payments on the equity line of credit to keep from defaulting. Defendant, however, argues that no competent evidence was presented regarding conversations between him and plaintiff about the refinance of the debt. Defendant objected when plaintiff testified defendant had requested the refinance and plaintiff admitted that

she did not directly communicate with defendant. At that time, plaintiff indicated the conversation was through counsel.

In any event, without making findings about any subsequent conversation or oral agreement between the parties, the trial court found as follows:

> 12. That the [d]efendant began to unilaterally reduce his alimony payments on [7 December 2012] and has continued to do so. Defendant owed [p]laintiff alimony in the amount of $6,678.13 as arrearages as of [16 August 2013] and $81,678.13 as of October 2016. . . .
>
> 13. That [d]efendant has breached the parties' agreement in that he has failed to pay the monthly alimony of $3,750.00 in full since [7 December 2012].
>
> . . . .
>
> 17. That there was an outstanding balance of $26,020.97 on the [e]quity [l]ine of [c]redit with BB&T on [the] date of separation. Defendant had purchased a camper for his use on [9 September 2011] with an initial cost of $16,020.97 which was paid out of funds from the BB&T [h]ome [e]quity [l]ine of [c]redit. Defendant received the [c]amper pursuant to the [a]greement, and was to make regular payments on this [l]ine of [c]redit, make no further withdrawals, and pay the [l]ine of [c]redit in full within 48 months of the [a]greement. Defendant made minimal monthly payments on the [e]quity [l]ine of [c]redit until [27 November 2012]. Plaintiff refinanced the [m]ortgage and [e]quity [l]ine of [c]redit in order to reduce her monthly payment. Although said refinance extinguished the outstanding equity line, [d]efendant has not paid the balance of [e]quity [l]ine of [c]redit that he promised to pay under the [a]greement.
>
> . . . .
>
> 41. That the [p]laintiff is entitled to judgment against the [d]efendant in the amount of $6,678.13 for past due and unpaid alimony.
>
> 42. That it is equitable for the [p]laintiff to receive a judgment requiring the [d]efendant to pay to [p]

laintiff the amount of $16,080.66 representing the date of separation payoff amount of the [e]quity [l]ine of [c]redit with BB&T within 12 months of the date of this [o]rder.

43. In addition to the specific performance provision of the parties' [s]eparation [a]greement and [p]roperty [s]ettlement, the [p]laintiff's remedies at law are inadequate to enforce the agreement in that performance of the agreement involves future payments and activities which cannot adequately be addressed by way of judgment against the [d]efendant. Defendant should be required to specifically perform his obligation to pay alimony pursuant to this agreement, . . . as well as his payments for the BB&T second mortgage on the former marital residence.

Based on these findings, the trial court concluded that "[p]laintiff is entitled to an order of specific performance of [d]efendant's support obligation as provided in the parties' [a]greement" and ordered, in pertinent part, as follows:

1. That [p]laintiff is granted specific performance of the [d]efendant's obligations as provided in the parties' [s]eparation [a]greement and [p]roperty [s]ettlement dated [19 October 2011].

2. That [d]efendant shall pay to [p]laintiff alimony that was due in the amount of $6,678.13 as arrearage as of [16 August 2013] plus monies for failure to perform since [16 August 2013].

3. That [d]efendant shall pay [p]laintiff the sum of $3,750.00 per month as alimony on the first day of each month and shall continue to pay [p]laintiff alimony as provided in the [s]eparation [a]greement and [p]roperty [s]ettlement paragraph 18. At such time that the date that the former marital residence mortgage was scheduled to be paid in full, prior to [p]laintiff refinancing, [d]efendant's alimony obligation shall be reduced by $1,444.00 per month.

4. That [d]efendant is ordered and required to pay to [plaintiff] the [e]quity [l]ine balance in the amount of $16,080.66 within twelve (12) months from the entry of this [o]rder.

Defendant's argument on appeal is that the trial court improperly reformed the separation agreement and property settlement so that he is required to pay what was contemplated at the time the separation agreement and property settlement was executed, even after plaintiff satisfied the mortgage and equity line of credit that he was obligated to pay. Defendant contends the trial court erred because it must uphold the plain language of the original agreement. We do not agree the trial court erred.

Our Supreme Court has long recognized that "[t]he heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Elec. Co. v. Atlantic Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). That is no different when the contract is a separation agreement.

> "Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution."

Gilmore v. Garner, 157 N.C. App. 664, 666, 580 S.E.2d 15, 17-18 (2003) (quoting *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)).

As stated above, the terms of the separation agreement and property settlement concerning the mortgage and equity line of credit are as follows:

> 6. . . . [Defendant] shall assume sole liability for the outstanding second mortgage to BB&T, pay in full within 48 months from the date of this agreement, and hold [plaintiff] harmless therefrom.
>
> 13. . . . The [c]amper currently owned by the parties is hereby transferred, set over, and assigned to [defendant] as his sole and separate property. The [c]amper was purchased through the BB&T Home Equity Line of Credit for which [defendant] assumes sole liability. [Defendant] shall make regular payments on this [l]ine of [c]redit and make no further withdrawals. He shall pay this [l]ine of [c]redit in full within 48 months of this agreement.

> 18. . . . [Defendant] agrees to pay to [plaintiff] as [a]limony the sum of $3,750.00 per month on the first day of each month beginning [1 November 2011] and on the first day of each month thereafter . . . . At such time as the former marital residence mortgage is paid in full, [defendant's] alimony obligation shall be reduced by $1,444.00, the amount of the mortgage payment. The payments for alimony to [plaintiff], as provided herein, are fixed payments, and shall not be modified or changed, except by further written agreement of the parties.

There is nothing in the record to suggest that the parties contemplated a refinance of the mortgage and equity line of credit would terminate defendant's obligations to pay the debts. It appears that the intent of the parties was that defendant would pay $3,750.00 in alimony per month until the mortgage on the marital property at the time of the separation agreement and property settlement was executed was "paid in full," not merely satisfied in a refinance with the debt rolling over into a new mortgage. To hold otherwise would shift from defendant to plaintiff the original mortgage obligation. In the same way, it appears that the intent of the parties was that defendant would pay the entirety of the outstanding balance on the equity line of credit. Defendant testified that at the time of the agreement, it was his intention to pay $3,750.00 in alimony per month and to pay off the equity line of credit. The subsequent refinance of the mortgage and equity line of credit could not have changed the intention of the parties at the time they entered into the separation agreement and property settlement. The separation agreement and property settlement does not specifically address the situation presented here. However, it is clear from the plain language of the agreement and defendant's own testimony that it was the intent of the parties that defendant was to be responsible for paying the balance of both the equity line directly and the mortgage via paying an additional $1,444.00 per month in alimony until the mortgage was paid in full.

In the order for specific performance, the trial court requires defendant to pay no more and no less towards the mortgage on the former marital residence than the parties intended when they entered into the separation agreement and property settlement. Specifically, defendant is obligated to pay "$3,750.00 per month as alimony" in accordance with the separation agreement and property settlement until "*the date that the former marital residence mortgage was scheduled to be paid in full, prior to [p]laintiff refinancing[; then d]efendant's alimony obligation*

shall be reduced by $1,444.00 per month." (Emphasis added). With the reduced, but extended mortgage payments on the former marital residence following the refinance, plaintiff may receive more in alimony in the short term than is necessary to make the mortgage payments on the former marital residence. However, that is by no means a financial benefit to plaintiff who will be making mortgage payments long after defendant's alimony payments have been reduced by $1,444.00 to exclude any contribution to the mortgage. As indicated above, because the order for specific performance requires defendant to pay $3,750.00 in alimony until the time the former marital residence mortgage was scheduled to be paid in full, defendant's obligation is limited to what was contemplated at the time the separation agreement and property settlement was entered into by the parties. Likewise, the order for specific performance does not require defendant to pay any more towards the equity line of credit than he was obligated to pay under the separation agreement and property settlement. Specifically, the trial court ordered defendant to "pay to [plaintiff] the [e]quity [l]ine balance in the amount of $16,080.66 within twelve (12) months from the entry of [the o]rder]."

Upon review of the record in his case, we hold the trial court did not abuse its discretion in ordering specific performance to achieve the intent of the parties. The order for specific performance is equitable as it achieves the parties' intent, as shown by a full reading of the separation agreement and property settlement and by defendant's own testimony. To hold otherwise would provide a windfall to defendant who would escape his obligation to satisfy the former marital residence mortgage in the form of alimony until the former marital residence mortgage is paid in full.

[3] Lastly, defendant contends the trial court erred in ordering specific performance because he lacked the means and ability to comply with the agreement.

Plaintiff bears the burden of showing the defendant has the ability to comply with an order for specific performance. *See Reeder v. Carter*, 226 N.C. App. 270, 276, 740 S.E.2d 913, 918 (2013). Moreover, the trial court must issue findings concerning the defendant's ability to pay before it orders specific performance. *Edwards v. Edwards*, 102 N.C. App. 706, 709, 403 S.E.2d 530, 531 (1991) (citing *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 23 (1986)). Yet,

> [i]n finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's present ability to

> comply as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the defendant possess[es] some amount of cash, or asset readily converted to cash prior to ordering specific performance.

Condellone v. Condellone, 129 N.C. App. 675, 683, 501 S.E.2d 690, 696 (1998) (quotation marks and citations omitted).

In addition to the payments discussed above for alimony in arrears, alimony yet to be paid, and for compensation for the repayment of the equity line of credit, the trial court ordered defendant to "immediately designate [p]laintiff as beneficiary of [a] life insurance policy on his life with a face value of at least $300,000.00" and to "maintain the 12.743 acres [that comprises the former marital residence]." The trial court specifically found in finding of fact number 37 and concluded in conclusion of law number 3 that "[d]efendant has had and continues to have the means and ability to comply with the terms of the [separation agreement and property settlement]."

Defendant now contends there is insufficient evidence in the record to support the trial court's finding and conclusion that he has the ability to comply. Defendant also takes issue with the trial court allowing plaintiff to testify concerning her cost of living and financial future. Defendant contends plaintiff's testimony was irrelevant, speculative, and merely plaintiff's opinion.

Upon review, we hold there was sufficient evidence to support the trial court's many unchallenged findings regarding defendant's financial situation and ability to comply. Specifically, the trial court made findings that defendant lives with his current wife on three acres of land in a mobile home; his current wife has stopped working at the age of 54; defendant and his current wife have made improvements to the mobile home so that her mother is able to live with them instead of in a nursing home; defendant has voluntarily assumed the support for two additional people since executing the separation agreement and property settlement; defendant's current wife receives a distribution of $1,500.00 per month from her 401-k plan; defendant has monthly expenses totaling $3,000.00 for three people without including alimony; defendant has incurred $15,000.00 in legal fees in actions against plaintiff; beginning in June 2013, defendant increased his vehicle payment from $350.00 per month to $500 per month for four months and then increased his vehicle payment again to $1,000.00 per month for six months until he paid $2,078.15 to pay the loan off in April 2014; defendant's current wife

obtained a new vehicle with a $646.54 per month payment; defendant and his current wife purchased six spaces in trailer park that they rent for $350.00 per month, totaling $2,100.00 per month in income; defendant has continued to contribute to his retirement at Duke Energy in 2016 making contributions of $10,556.18 and receiving employer contributions of $4,524.06; defendant maintains a life insurance policy with his current wife named as the beneficiary; as of 11 September 2016, defendant's gross earnings for the year from Duke Energy were $75,401.32; defendant received federal and state income tax returns for 2012 totaling $13,668.00; defendant and his current wife have received federal and state income tax returns for their joint filings for 2013 through 2015 totaling $46,233.00; defendant has a balance of $163,969.00 in one retirement account, $179,013.00 in another individual retirement account, and $257,656.00 in a 401-k plan; defendant has not withdrawn any money from his retirement accounts or 401-k plan; defendant's BB&T joint savings account contained over $100,000.00 from December 2013 until August 2015 when his new wife withdrew $80,000.00 by online transfer.

We hold these numerous findings support the trial court's ultimate finding and conclusion that "[d]efendant has had and continues to have the means and ability to comply with the terms of the [separation agreement and property settlement]." The record in this case established a valid agreement, a breach of that agreement, and defendant's ability to comply with the order for specific performance. Consequently, any error in allowing plaintiff's testimony regarding her own finances into evidence was harmless. The trial court did not abuse its discretion in ordering specific performance in this case.

III. Conclusion

For the reasons discussed, we affirm both the trial court's denial of defendant's motion to set aside entry of default and the trial court's order for specific performance.

AFFIRMED.

Judge INMAN concurs.

Judge TYSON concurs in part, concurs in result in part, and dissents per separate opinion.

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

I concur with that portion of the majority's opinion which affirms under an abuse of discretion standard of review the trial court's denial of defendant-husband's motion to set aside entry of default pursuant to North Carolina Rule of Civil Procedure 55(d). I also concur in result only to affirm that portion of the trial court's order requiring defendant to specifically pay the balance of the equity line of credit. Defendant agreed to assume that liability under the parties' separation agreement and he received the camper the equity line of credit was used to purchase. The trial court's order for defendant to compensate plaintiff for the equity line puts him in no different a position than he otherwise would have been, and is in accordance with what the parties' agreed to under the plain terms of the separation agreement.

I respectfully dissent from that portion of the majority's opinion which affirms the trial court's order of specific performance requiring defendant to pay arrearages on and prospective alimony in the amount of $3,750.00 per month. This order is based upon the trial court's re-writing the parties' express agreement and erroneous conclusion that the parties intended defendant's alimony obligation would be reduced by $1,444.00 per month "[a]t such time as the date that the former marital residence mortgage *was scheduled to be paid in full*, prior to plaintiff refinancing[.]" (Emphasis supplied).

The trial court's conclusion and the majority opinion's holding are contrary to the express and plain language agreed to by the parties in the separation agreement. This agreement provides a condition precedent for defendant's alimony obligation to be reduced by $1,440.00 per month "[a]t such time as the former marital residence mortgage *is paid in full*[.]" (Emphasis supplied). *See, e.g.*, *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) ("A condition precedent is an event which must occur before a contractual right arises[.]" (citation omitted)). The trial court misconstrued the mortgage pay-off condition precedent to reduce defendant's monthly alimony, ventured outside the four corners of the agreement, and failed to make any findings of fact of whether the mortgage on the former marital residence was "paid in full" upon the refinance.

I. Standard of Review

The Supreme Court of North Carolina has held that separation agreements are privately agreed-upon contracts and are to be interpreted according to principles of contract law. *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973). "The proper interpretation of a contractual provision presents a question of law, which is reviewed *de*

novo by this Court." *Reaves v. Hayes*, 174 N.C. App. 341, 345, 620 S.E.2d 726, 729 (2005) (citation omitted).

Our Supreme Court has also held: "When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law." *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 227, 333 S.E.2d 299, 304 (1985) (citations omitted). "[W]here the terms of a separation agreement are plain and explicit, the court will determine the legal effect and *enforce it as written by the parties*." *Tyndall-Taylor v. Tyndall*, 157 N.C. App. 689, 692, 580 S.E.2d 58, 61 (2003) (emphasis supplied) (citation and internal quotation marks omitted). "[C]ourts follow the general rule that the parties are free to contract according to their own judgment and the reasonableness of their engagements will not be entered into." *Gas House, Inc. v. Southern Bell Telephone Co.*, 289 N.C. 175, 183, 221 S.E.2d 499, 505 (1976), *overruled in part on other grounds by State ex rel. Utilities Comm. v. Southern Bell*, 307 N.C. 541, 299 S.E.2d 763 (1983).

When applying the terms and conditions of a contract, our Supreme Court has held: "It is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract *must be construed to mean what on its face it purports to mean*." *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) (emphasis supplied and citation omitted). The intent of the parties is determined by reviewing the plain written language of the contract. *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999).

"Whether or not the language of a contract is ambiguous or unambiguous is a question for the court to determine." *Piedmont Bank and Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52 (1986).

"Where the parties have put their agreement in writing, it is presumed that the writing embodies their entire agreement." *Dellinger v. Lamb*, 79 N.C. App. 404, 408, 339 S.E.2d 480, 482 (1986). The parol evidence rule provides "that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new or different contract from the one evidenced by the writing, is incompetent." *Phelps v. Spivey*, 126 N.C. App. 693, 697, 486 S.E.2d 226, 229 (1997) (emphasis and citation omitted).

"[A] contract is to be interpreted as written, as if there is no dispute with respect to the terms of the contract and they are plain and

unambiguous, *there is no room for construction*." *Lowe's v. Hunt*, 30 N.C. App. 84, 86, 226 S.E.2d 232, 234 (1976) (emphasis supplied) (quotation marks and citation omitted). "It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument." *Light Co. v. Bowman*, 229 N.C. 682, 693-94, 51 S.E.2d 191, 199 (1949) (citations omitted).

In *Neal v. Marrone*, our Supreme Court stated:

> [W]here the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged into the written agreement.

239 N.C. 73, 77, 79 S.E.2d 239, 242 (1953). Another court applying these well-settled principles of contract law stated: "Absent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, *no matter how unwise it may appear to a third party*." *Rowe v. Great Atlantic & Pac. Tea Co.*, 385 N.E.2d 566, 569 (1978) (emphasis supplied).

"When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court . . . and *the court cannot look beyond the terms of the contract to determine the intentions of the parties*." *Piedmont Bank*, 79 N.C. App. at 240, 339 S.E.2d at 52 (emphasis supplied).

II. Plain Language of Separation Agreement

The relevant provisions of the parties' separation agreement state:

> 18. Alimony and Post-Separation Support. Husband agrees to pay to Wife as Alimony the sum of $3,750.00 per month on the first day of each month beginning November 1, 2011 and on the first day of each month thereafter . . . . *At such time as the former marital residence mortgage is paid in full, Husband's alimony obligation shall be reduced by $1,440.00, the amount of the mortgage payment*. The payments for alimony to Wife, as provided herein, are fixed payments, and shall not be modified or changed, except by further written agreement of the parties. (Emphasis supplied)

> . . .
>
> 26. Entire Agreement. Each party acknowledges that the agreement contains *the entire understanding and that there are no representations, warranties, covenants, nor undertakings other than those expressly set forth in the agreement*. (Emphasis supplied)
>
> . . . .
>
> 32. Whole Contract; Modification or Waiver. This agreement constitutes the whole contract between the parties hereto. A modification or waiver of any provision of this agreement shall be effective only if made in writing and executed upon the same formality as the original agreement. . . .

The emphasized portion of provision 18 ("the mortgage condition") is plain, explicit, and unambiguous. *See Tyndall-Taylor*, 157 N.C. App. at 692, 580 S.E.2d at 61; *Piedmont Bank*, 79 N.C. App. at 240, 339 S.E.2d at 52. On its face, the mortgage condition plainly states the parties' intent and agreement that when the mortgage on the former marital residence is "paid in full," defendant's alimony obligation to plaintiff would be reduced by $1,440.00 per month. The mortgage condition does not indicate the parties contemplated a particular date or time upon which the mortgage was scheduled to be "paid in full." Defendant's alimony would be reduced only "*[a]t such time* as the former marital residence mortgage is paid in full." (Emphasis supplied).

Provisions 26 and 32 indicate the separation agreement constitutes the whole contract and the complete agreement between the parties. "There are situations in which the writing, on its face, will clearly indicate that it reflects a complete contract which . . . may not be contradicted or varied." John N. Hutson, Jr & Scott A. Miskimon, *North Carolina Contract Law*, § 5-2, 423 Lexis Publishing, (1st Ed. 2001).

The mortgage condition is a condition precedent to the reduction of defendant's alimony obligation. *See Goforth*, 334 N.C. at 375, 432 S.E.2d at 859 (" 'Almost any event may be made a condition.' The event may be largely within the control of the obligor or the oblige." (quoting II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.2 (1990)). "Where parties enter a contract containing a condition precedent, they are bound when the condition is satisfied." *Powell v. City of Newton*, 364 N.C. 562, 566, 703 S.E.2d 723, 727 (2010).

The trial court, and the majority's opinion, erroneously ignored the plain language of this condition precedent and interpreted "[a]t such time" as being "the date that the former marital residence mortgage *was scheduled to be paid in full*," a new substituted provision for the parties' express language. (Emphasis supplied).

The majority's opinion states: "It appears that the intent of the parties was that defendant would pay $3,750.00 in alimony per month until the mortgage on the marital property at the time of the separation agreement and property settlement was executed was 'paid in full,' not merely satisfied in a refinance with the debt rolling over into a new mortgage." The majority's opinion does not hold the mortgage condition was ambiguous, but effectively concludes it was proper for the trial court to venture outside the four corners of the separation agreement to consider defendant's testimony and construe the intent of the parties beyond the plain language stated in the mortgage condition. *See Lowe's*, 30 N.C. App. at 86, 226 S.E.2d at 234 ("if there is no dispute with respect to the terms of the contract and they are plain and unambiguous there is no room for construction").

The majority's opinion erroneously: (1) ignores the plain, unambiguous language of the mortgage condition in the separation agreement; (2) infers and injects its notion of the parties' intent; (3) adds a time period and condition that does not exist; (4) wholly ignores provisions 26 and 32 of the agreement; and, (5) reads into the condition a distinction between "paid in full" and "satisfaction" that is unsupported by any authority. The trial court's order makes no findings on what constitutes "paid in full," and the majority's analysis effectively rewrites the parties' agreement to create a whole new contractual provision.

Presuming the mortgage condition is ambiguous, it is undisputed plaintiff's attorney drafted the separation agreement. As such, the ambiguous agreement would be construed against her as the drafting party. *Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 476, 528 S.E.2d 918, 921 (2000) ("[W]hen an ambiguity is present in a written instrument, the court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language." (citation omitted)).

The parties entered into the separation agreement on 19 October 2011. Plaintiff subsequently refinanced the mortgage on the former marital residence on her own initiative with BB&T on 21 November 2012 without defendant's prior knowledge or consent. Generally, "[w]hen you refinance, you pay off your existing mortgage and create a new one."

A Consumer's Guide to Mortgage Refinancings (2008), https://www.federalreserve.gov/pubs/refinancings/ (last visited Jan. 22, 2019). Even though the term of plaintiff's new mortgage has a term seven years longer than the original mortgage, plaintiff received a direct and substantial financial benefit for doing so in the form of lower payments. Taking into account the time value of money, the $340.00 difference between the $1,4440.00 plaintiff will be receiving and the reduced amount plaintiff will be paying on the new mortgage, plaintiff is receiving a substantial benefit the parties did not bargain for.

Included as a documentary exhibit to the record on appeal is a satisfaction of security instrument on the marital residence recorded with the Chatham County Registry at Book 1661, Page 937 on 9 January 2013. The satisfaction references a deed of trust for the parties' former marital residence recorded on 2 November 2010 in the Chatham County Registry at Book 1537, Page 826. The satisfaction states, in relevant part: "This Satisfaction terminates the effectiveness of the security instrument."

No promissory note evidencing the debt and corresponding to the collateral secured by the 2010 deed of trust is included in the record on appeal. Based upon the trial court's erroneous interpretation of the mortgage condition in the separation agreement, it appears the trial court failed to make any findings of fact concerning whether the promissory note evidencing the 2010 mortgage debt on the former marital residence was "paid in full" when plaintiff refinanced the mortgage on 21 November 2012.

Plaintiff testified her new mortgage payment is now $1,100.00 per month compared to $1,440.00 per month for the former mortgage. According to the deeds of trust included as documentary exhibits in the record on appeal, the original mortgage on the former marital residence was scheduled to be paid in full by 1 December 2020. After plaintiff refinanced, the new mortgage is scheduled to be paid in full 1 December 2027.

The trial court's order and the majority's affirmation confers a financial benefit on plaintiff of $340.00 per month by allowing her to receive the conditional $1,440.00 per month former payment, even though she now has a lower monthly mortgage payment. The trial court's specific performance order does not acknowledge the $340.00 per month benefit plaintiff obtained from refinancing unilaterally and without defendant's knowledge or consent. Plaintiff's conduct raises conflicts and her hands are not clean to be awarded the equitable relief of specific performance. *See Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985) ("The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands.").

Whether the original mortgage on the former marital home was "paid in full" when plaintiff refinanced in November 2012 is an issue of fact, which must be resolved to determine whether the mortgage condition of the separation agreement to reduce defendant's alimony obligation was satisfied. The trial court's conclusion and decree ordering defendant to pay arrearages including the additional $1,440.00 per month since the date of plaintiff's refinance and until the date the original mortgage "was scheduled to be paid in full" is error and properly reversed. This matter should be remanded to the trial court for further fact finding of whether plaintiff "paid in full" the note for the original 2010 mortgage when she unilaterally refinanced in November 2012. Plaintiff is not entitled to equitable relief on this issue.

The plain and unambiguous language of the mortgage condition must be applied. *See Tyndall-Taylor*, 157 N.C. App. at 692, 580 S.E.2d at 61. If the trial court finds the note evidencing the mortgage on the former marital residence was "paid in full" when plaintiff unilaterally refinanced, such as by the lender loaning her the money to pay off the original mortgage debt and issuing and recording a new mortgage, then the plain language of the mortgage condition in the separation agreement would apply and be satisfied. Defendant would not be legally obligated to pay the additional $1,440.00 per month in alimony as of 21 November 2012, the date plaintiff accomplished her refinancing.

Only if the trial court finds and concludes the note evidencing the 2010 mortgage on the former marital residence was not "paid in full" upon the refinance would defendant be obligated to pay $3,750.00. Defendant's payment would include the $1,440.00 per month former mortgage payment until such time as the 2010 original note and mortgage is "paid in full." The plain language of the separation agreement compels defendant's alimony obligation be reduced by $1,440.00 per month when the original debt is "paid in full."

III. Conclusion

I concur with the portions of the majority's opinion which affirm the trial court's denial of defendant's motion to set aside default, and I concur with the result to require defendant to re-pay the equity line of credit in exchange for the distribution and receipt of the asset purchased therewith.

I respectfully dissent from that portion of the majority's opinion which affirms the trial court's interpretation that the unambiguous 2010 mortgage condition in the separation agreement means "[a]t such time that the date that the former marital residence was scheduled to be paid

in full, prior to plaintiff refinancing" and specifically ordering arrearages and future payments in accordance therewith. The plain, unambiguous language of the mortgage condition indicates the parties' intent that defendant's alimony obligation would be reduced "at such time" as the 2010 original mortgage is "paid in full," and not at the time the mortgage was originally scheduled to be paid off. It is undisputed plaintiff received a substantial financial benefit from her unilateral refinancing to bar any equitable relief.

Courts "must presume[] the parties intended what the language used clearly expresses, and the contract *must be construed to mean what on its face it purports to mean*." *Hagler*, 319 N.C. at 294, 354 S.E.2d at 234 (emphasis supplied). Neither the trial court, nor the majority of a panel of this Court, is free to substitute new or different provisions for what the parties themselves unambiguously agreed to be bound. The trial court and the majority opinion's holding effectively binds defendant to a new contract.

Plaintiff receives a financial benefit in the form of substantially lower payments from her unilateral refinance of the mortgage on the former marital home. The consequence of her action was to trigger the agreed-upon condition precedent to reduce defendant's alimony by the amount of the former payment when the 2010 note and deed of trust evidencing the collateral and mortgage on the former marital residence was "paid in full."

Were we to agree that the mortgage condition is ambiguous to allow parol or extrinsic evidence of the parties' intent, it is undisputed that plaintiff's attorney drafted the separation agreement. As such, any ambiguity in the agreement's provision must be construed against her as the drafting party. *Novacare*, 137 N.C. App. at 476, 528 S.E.2d at 921 ("[T]he court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language."). Plaintiff is not entitled to equitable relief for consequences she brought about through her own unilateral actions.

The trial court's order and the majority's affirmation is erroneous on this issue. I respectfully dissent.

LAMB v. STYLES

[263 N.C. App. 633 (2019)]

JOHN HENRY LAMB, JR., ALMA LAMB ROBERTS, AND KAY LAMB LUNSFORD, PLAINTIFFS
v.
ALAN B. STYLES AND ALAN B. STYLES LAND SURVEYING, PLLC, DEFENDANTS

No. COA18-350

Filed 5 February 2019

1. Engineers and Surveyors—negligence—liability to adjoining landowner—sufficiency of allegations

Plaintiffs' allegations of a breach of a duty to exercise ordinary care were not sufficient to survive a motion to dismiss in a negligence action against a surveyor by an adjoining landowner. The liability of a surveyor to an adjoining landowner had not then been addressed by the Court of Appeals, but plaintiff argued several reasons for the Court of Appeals to adopt a rule holding surveyors accountable for such damages. Plaintiffs also alleged a breach of the common law duty to exercise ordinary care.

2. Engineers and Surveyors—surveyors—statute of limitations—ten years—no expansion of duty of care

The fact that the statute of limitations for surveyors is ten years rather than the three years of other professional negligence claims does not create or expand surveyors' duty of care. Statutes of limitations are purely procedural bars to bringing claims and affect only the remedy and not the right to recover.

3. Engineers and Surveyors—surveyors—standard of care—no statutory standard

The legislature intended its rules on surveying to protect property interests in North Carolina. Neither N.C.G.S. § 89C-2, stating that surveying is subject to regulation, nor provisions in the administrative code regulating the profession created a specific standard of care for surveyors.

4. Engineers and Surveyors—surveyors—liability—general negligence principles

Plaintiffs, adjoining landowners, did not identify a duty of care owed by an allegedly negligent surveyor to a non-reliant third party. Cases involving whether a professional owes a third party a duty of care are often analyzed based on negligent misrepresentation. Applying that standard, plaintiffs did not sufficiently allege that they

were within the class of people intended to rely on the survey or to whom the survey would be supplied. Even though plaintiffs argued that negligent misrepresentation did not apply, plaintiffs still needed to show that defendants' conduct induced them to act in reliance.

5. Damages and Remedies—surveyor's negligence—costs of prior litigation—no statutory authorization

Plaintiffs did not sufficiently allege damages against a surveyor where their alleged damages consisted of costs associated with prior litigation to quiet title against the landowner who hired the surveyor, an action in which the surveyor was not a party. Costs are entirely creatures of legislation; plaintiffs did not cite any statute authorizing them to recover court costs and attorney fees in this action.

6. Engineers and Surveyors—surveyors—negligence—causation

Plaintiffs, adjoining landowners who brought a negligence action against a surveyor, did not sufficiently allege that defendants' survey was the proximate cause of their damages where plaintiffs alleged that defendant wrongfully created a cloud on the title of plaintiffs' property. There were doubts about whether the plat was apparently valid; if any party relied on defendants' plats, then the liability would be with the encroaching party rather than with defendants.

Appeal by Plaintiffs from order entered 13 November 2017 by Judge R. Gregory Horne in Superior Court, Madison County. Heard in the Court of Appeals 14 November 2018.

Sharpe & Bowman, PLLC, by Brian W. Sharpe, for Plaintiffs-Appellants.

Long, Parker, Warren, Anderson, Payne & McClellan, P.A., by Robert B. Long, Jr. and Ronald K. Payne, for Defendants-Appellees.

McGEE, Chief Judge.

John Henry Lamb, Jr., Alma Lamb Roberts, and Kay Lamb Lunsford ("Plaintiffs" or "the Lambs") filed a negligence action against Alan B. Styles Land Surveying, PLLC and its owner Alan B. Styles (together, "Defendants") on 12 June 2017. Defendants performed a survey of a tract of real property adjoining Plaintiffs' real property in 2007 that incorrectly identified the boundary line between the properties. As a result,

Plaintiffs filed suit against their neighbors with claims for quiet title, declaratory judgment, and trespass. The trial court in that case entered an order declaring that the area of real property in dispute was owned by Plaintiffs. Plaintiffs now seek to recover the cost of the prior litigation from Defendants, claiming that Defendants' negligent performance of the survey necessitated the litigation. The trial court entered an order on 13 November 2017 dismissing Plaintiffs' action for failure to state a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

I. Factual and Procedural History

Plaintiffs were joint owners as tenants in common of 36.32 acres of real property located in Madison County ("Lamb property"). John Henry Lamb, Jr. received his interest in the Lamb property in 2011 from his mother, Kay Lamb Lunsford, who is the sister of Alma Lamb Roberts (collectively, "the Lamb sisters"). The Lamb sisters had received the Lamb property from their parents in a deed dated 9 May 1996 and recorded in Deed Book 228, Page 37 in the Madison County Registry.

The Lamb sisters contracted with Dry Ridge Land Surveying ("Dry Ridge") in 2008 to survey and draft a plat of the Lamb property. During the course of the preparation of the plat, Dry Ridge discovered several other plats associated with adjoining property owners. Those plats were prepared by Defendants in 2007, at the request of William Holt and Harold Holt ("the Holts"). The plats Defendants had prepared for the Holts incorrectly depicted 17.632 acres of the Lamb property as being part of the Holts' property. The erroneous plats made by Defendants for the Holts were prepared based on statements made by the Holts to Defendants. Those plats noted that the line separating Plaintiffs' property from the Holts' property was drawn "per parol evidence from William and Harold Holt."

The Lamb sisters filed an action on or around 28 October 2009 against the Holts for quiet title, declaratory judgment, and trespass. John Henry Lamb, Jr. was later added as a party to the action. During the course of that litigation, the trial court ordered a neutral surveyor to map the true boundary line between the properties. The neutral surveyor filed his survey with the trial court on 30 July 2013, matching the description set forth in Deed Book 228, Page 37, which was the deed that conveyed the property to the Lamb sisters by their parents. The trial court ordered the neutral surveyor to amend the filed survey. The amended map also showed that 17.15 acres of the disputed area was owned by the Lambs. The trial court entered an order granting partial summary judgment in favor of the Lambs, dismissing the Holts'

claims to the disputed 17.15 acres, and declaring the 17.15 acres of property was owned by the Lambs.

The Lambs faced financial difficulties as a result of the cost of litigation and filed a voluntary dismissal without prejudice of the remaining claims against the Holts in December 2013. The Holts voluntarily dismissed their counterclaims that had been asserted against the Lambs on 6 December 2013. The North Carolina Board of Examiners for Engineers and Surveyors ("the Board") issued a Notice of Contemplated Board Action on 13 August 2014 charging Defendant Alan B. Styles with "gross negligence, incompetence, and/or misconduct." The Board received no response from Defendant Alan B. Styles and entered a final decision and order on 16 September 2014, requiring Defendant Alan B. Styles to pay a penalty of $2,000.00 and to earn a passing grade in a professional ethics course within three months. The Board based its action on evidence showing Defendant Alan B. Styles "performed inaccurate or substandard surveys . . . failed to make adequate investigation . . . failed to report results of surveys in a clear and factual manner . . . and failed to identify all reference sources."

John Henry Lamb, Jr. also filed a new complaint against the Holts on 30 November 2015 asserting claims for quiet title and declaratory judgment. The trial court entered a memorandum of judgment and order on 27 June 2016 divesting the Holts of any right, title or ownership of the disputed property. The trial court further ordered that any purported interest arising from the disputed property be vested in fee simple in John Henry Lamb, Jr. and Alma Lamb Roberts, as tenants in common.

Plaintiffs filed a complaint on 12 June 2017 asserting a claim of "Professional Negligence" against Defendants. Defendants filed a motion to dismiss on 16 August 2016 pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief could be granted. Defendants argued that a surveyor did not owe any duty of care to adjoining property owners who had not contracted with the surveyor or who did not rely on the survey in any way. The trial court heard Defendants' motion to dismiss on 9 October 2017 and entered an order on 13 November 2017 granting Defendants' motion to dismiss. Plaintiffs appeal.

II. Analysis

[1] Plaintiffs argue that the trial court erred in granting Defendants' motion to dismiss for failure to state a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). We disagree.

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

Kohn v. Firsthealth Moore Reg'l Hosp., 229 N.C. App. 19, 21, 747 S.E2d 395, 397 (2013) (quoting *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)).

> It is well-settled that a plaintiff's claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.

Grich v. Mantelco, LLC, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citation omitted). This Court reviews a trial court's ruling on a motion for Rule 12(b)(6) *de novo*. *Id.*

"While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). While Plaintiffs' complaint alleged a claim for "Professional Negligence," this Court must determine whether the complaint states the substantive elements of "some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citing *Stanback*, 297 N.C. 181, 254 S.E.2d 611). A claim of professional negligence requires plaintiff establish: "(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs." *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 413, 590 S.E.2d 866, 872 (2004).

A. *Duty of Care*

"It is fundamental that actionable negligence is predicated on the existence of a legal duty owed by the defendant to the plaintiff." *Derwort v. Polk Cty.*, 129 N.C. App. 789, 791, 501 S.E.2d 379, 381 (1998). This Court has not yet addressed whether a surveyor owes a duty of care to adjoining landowners when performing a survey and recording

plats. Plaintiffs argue several reasons why this Court should establish a rule that "holds licensed surveyors accountable for damages that foreseeably result from" their conduct: (1) N.C. Gen. Stat. § 1-47(6) (2017) demonstrated that the General Assembly has sought to subject land surveyors to expanded civil liability, (2) N.C. Gen. Stat. § 89C-2 and 21 N.C.A.C. 56.0701 create specific standards of care by which a land surveyor's actions may be judged, and (3) general negligence principles. Plaintiffs argue further that, even if this Court fails to recognize that surveyors owe a duty of care to adjoining landowners, Plaintiffs sufficiently alleged a breach of the common law duty to exercise ordinary care.

1. N.C. Gen. Stat. § 1-47(6)

[2] "Generally, a surveyor or civil engineer is required to exercise 'that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances, and if he fails in this respect and his negligence causes injury, he will be liable for that injury.' " *Fleming*, 162 N.C. App. at 410, 590 S.E.2d at 870 (quoting *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 668, 255 S.E.2d 580, 585, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979)). Plaintiffs argue that N.C.G.S. § 1-47(6) subjects land surveyors to a heightened standard of care in that N.C.G.S. § 1-47(6) creates a ten-year statute of limitations for actions "[a]gainst any registered land surveyor as defined in [N.C.]G.S. 89C-3(9) or any person acting under his supervision and control . . . for economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting[.]" *See Duke Energy Carolinas, LLC v. Bruton Cable Serv., Inc.*, 233 N.C. App. 468, 474-75, 756 S.E.2d 863, 867-68 (2014). Other professional negligence claims are subject to only a three-year statute of limitations pursuant to N.C. Gen. Stat. § 1-52 (2017).

Plaintiffs contend that the General Assembly's decision to impose a longer statute of limitation on claims against surveyors "demonstrates North Carolina's willingness to subject the profession of land surveying to robust regulation and expanded civil liability in the interest of safeguarding property rights and public welfare." We disagree. "A statute of limitations functions to limit the amount of time that a claimant has to file an action." *KB Aircraft Acquisition, LLC v. Barry*, ___ N.C. App. ___, ___, 790 S.E.2d 559, 566 (2016). "Statutes of limitation are purely procedural bars to the bringing of claims; they 'affect only the remedy and not the right to recover.' " *Id.* (quoting *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 117, 446 S.E.2d 603, 604 (1994)). Therefore, the imposition of a longer statute of limitations for

negligence claims against surveyors does not create or expand their duty of care.

2. Statutory Standard of Care

[3] Plaintiffs next argue that there are both statutory and regulatory standards of care imposed upon surveyors for the protection of those who may be damaged by the surveyor's negligence under N.C. Gen. Stat. § 89C-2 and 21 N.C. Admin. Code 56.1601. Courts "may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation[.]" *Hall v. Toreros, II, Inc.*, 176 N.C. App. 309, 317, 626 S.E.2d 861, 867 (2006) (citing *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584 (1983)).

N.C.G.S. § 89-C provides "[i]n order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest." Plaintiffs argue that "the legislature intended its rules on the practice of surveying to protect property interests in North Carolina." In *In re Suttles Surveying, P.A.*, 227 N.C. App. 70, 76, 742 S.E.2d 574, 578-79 (2013), this Court acknowledged "as N.C. Gen. Stat. § 89C–2 makes clear, the Legislature intended its rules on the practice of surveying to protect property interests in North Carolina."

In *Fleming*, the defendant surveying company, challenged the trial court's finding that the defendant "failed to meet its legal duty and failed to meet the standard of care created by N.C.G.S. § 89C–2 and N.C.G.S. § 89C–3." *Fleming*, 162 N.C. App. at 413, 590 S.E.2d at 872. This Court held that "[t]o the extent that [the trial court] suggests that N.C. Gen. Stat. §§ 89C–2, –3 (2003) create a specific standard of care, . . . the trial court erred in relying on those statutes." *Fleming*, 162 N.C. App. at 413, 590 S.E.2d at 872. Therefore, to the extent Plaintiffs argue that N.C.G.S. § 89-C creates a standard of care, their argument is without merit.

The regulatory provisions governing the conduct of surveyors similarly do not create a standard of care. "[A] safety regulation having the force and effect of a statute creates a specific duty for the protection of others. A member of the class intended to be protected by a statute or regulation who suffers harm proximately caused by its violation has a claim against the violator." *Baldwin v. GTE South, Inc.*, 335 N.C. 544, 546, 439 S.E.2d 108, 109 (1994) (internal citations omitted). However " 'not every statute [or regulation] purporting to have generalized safety implications may be interpreted to automatically result in tort liability for its violation.' " *Toreros*, 176 N.C. App. at 318, 626 S.E.2d at 867

(quoting *Williams v. City of Durham*, 123 N.C. App. 595, 598, 473 S.E.2d 665, 667 (1996)). In order for the regulation to be adopted as a standard of care, the purpose of the regulation must be exclusively or in part:

> (a) to protect a class of persons which includes the one whose interest in invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Hutchens, 63 N.C. App. at 14, 303 S.E.2d at 592.

21 N.C.A.C. 56.0701 specifies the Rules of Professional Conduct for engineers and land surveyors and states:

> (b) A licensee shall conduct the practice in order to protect the public health, safety and welfare. The licensee shall at all times recognize the primary obligation to protect the public in the performance of the professional duties. If the licensee's engineering or land surveying judgment is overruled under circumstances where the safety, health and welfare of the public are endangered, the licensee shall inform the employer, the client, the contractor, other affected parties and any appropriate regulatory agency of the possible consequences of the situation.

In *Suttles Surveying*, this Court noted "[t]he Legislature has expressly endowed the *Board* with the authority to promulgate Rules of Professional Conduct and to discipline licensees that violate those rules." 227 N.C. App. at 77, 742 S.E.2d at 579. The Board has therefore established standards of practice for land surveyors in order to better regulate the practice of land surveying. 21 N.C.A.C. 56.1601. Therefore, the intent of 21 N.C.A.C. 56.0701(b) is not to create a private right of action or standard of care for surveyors, but rather to express the public policy considerations the Board will consider in promulgating and enforcing its rules.

3. Negligence Principles

[4] Plaintiffs' final and primary argument is that general negligence principles necessitate that this Court establish a rule that holds licensed surveyors accountable for damages that foreseeably result to adjoining landowners from their negligent performance. We disagree.

Cases involving whether a professional owes a duty of care to a third party are often analyzed based on negligent misrepresentation. Negligent misrepresentation occurs when a party justifiably relies to the party's detriment on information prepared without reasonable care by one who owed the relying party a duty of care. *Howell v. Fisher*, 49 N.C. App. 488, 272 S.E.2d 19 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981). In *Raritan*, 322 N.C. 200, 367 S.E.2d 609, our Supreme Court adopted the approach of the Restatement (Second) of Torts § 552 (1977) to determine an accountant's liability for negligent misrepresentation ("Restatement approach"). The Restatement approach holds:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Our Supreme Court in *Raritan* praised the Restatement approach because it

> recognizes that liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom

> he knows his client intends will so rely. On the other hand . . . it prevents extension of liability in situations where the accountant "merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon [the audited financial statements], on the part of anyone to whom it may be repeated."

Id. at 214-15, 367 S.E.2d at 617. Therefore, "[i]f he knows at the time he prepares his report that specific persons, or a limited group of persons, will rely on his work, and intends or knows that his client intends such reliance, his duty of care should extend to them." *Id.* at 215, 367 S.E.2d at 618.

We find *Raritan*'s approach beneficial in assessing whether a land surveyor can be held liable for negligent misrepresentation by an adjacent landowner. Similar to an accountant, surveyors have little control over the distribution of their surveys once provided to their client. Surveyors also specifically contract with individual clients to perform their surveys. Therefore, applying the Restatement approach appropriately limits the scope of potential liability for surveyors. *See Ballance v. Rinehart*, 105 N.C. App. 203, 207-08, 412 S.E.2d 106, 109 (1992) (extending *Raritan*'s rationale to real estate appraisers).

Applying this standard to the present case, Plaintiffs have failed to sufficiently allege that they are within either category of persons that the Restatement approach identifies: (1) the class of persons whose benefit and guidance Defendants intended to supply the survey, or that Defendants knew that the Holts intended to supply it to Plaintiff, or (2) Defendants or the Holts intended Plaintiffs to rely on the survey in a transaction. Therefore, Plaintiffs failed to allege a valid claim for negligent misrepresentation.

Plaintiffs argue that the cause of action of negligent misrepresentation "has no application under the facts of the instant case," because "[t]here is no allegation that . . . [P]laintiffs relied on [D]efendants' survey work to their detriment." Instead, Plaintiffs argue "[a] third party who might be affected by negligence of a surveyor can still bring a suit against the surveyor for pecuniary harm." In support, Plaintiffs cite *Davidson*, 41 N.C. App. at 666, 255 S.E.2d at 584, which held "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence."

In *Davidson* this Court examined whether two defendants – an architect and an engineering firm – were liable for damages sustained by

the plaintiff. In the portion quoted by Plaintiffs in the case before us, this Court was addressing the architect's liability and stated:

> An architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects. *Where breach of such contract* results in foreseeable injury, economic or otherwise, *to persons so situated by their economic relations, and community of interests as to impose a duty of due care*, we know of no reason why an architect cannot be held liable for such injury. Liability arises from the negligent breach of a common law duty of care *flowing from the parties' working relationship*. Accordingly, we hold that an architect in the absence of privity of contract may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably resulting from breach of an architect's common law duty of due care in the performance of his contract with the owner.

Id. at 667, 255 S.E.2d at 584 (emphasis added). This Court has subsequently interpreted *Davidson* to require some "working relationship" or "community of interests" between a plaintiff and defendant. *See Pompano Masonry Corp. v. HDR Architecture, Inc.*, 165 N.C. App. 401, 409, 598 S.E.2d 608, 613 (2004). Critically, in addressing the engineering firm with whom the plaintiff had no contractual relationship in *Davidson*, this Court applied the Restatement approach discussed above requiring reliance. 41 N.C. App. at 668-69, 255 S.E.2d at 585.

Plaintiffs argue that this Court should apply a six-factor balancing test outlined in *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 406-407, 263 S.E.2d 313, 318 (1980) in this case. This Court has previously acknowledged that:

> [U]nder certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person, for injuries resulting from his failure to exercise reasonable care in such undertaking.

Condominium Assoc. v. Scholz Co., 47 N.C. App. 518, 522, 268 S.E.2d 12, 15 (1980). However, the extent of such a duty is limited. *United Leasing* enumerated six factors to determine "[w]hether or not a party has placed himself in such a relation with another so that the law will

impose upon him an obligation . . . to act in such a way that the other will not be injured[,]" including:

> (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

United Leasing, 45 N.C. App. at 406-7, 263 S.E.2d at 318 (citing *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E.2d 130 (1979), *disc. rev. denied*, 299 N.C. 332, 265 S.E.2d 397 (1980)).

In addressing the first factor, "our courts have generally focused on whether the attorney's (or other professional's) conduct, based on a contractual agreement with the attorney's client, was intended or likely to cause a third party to act in reliance on the deficient service performed by the attorney for his client." *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 405, 580 S.E.2d 1, 7 (2003). Without an allegation in the complaint that a defendant's action "induced any action on the part of the plaintiff *in reliance* on the [defendant's] conduct[,]" "plaintiff has failed to state a claim upon which relief can be granted[.]" *Id.* (emphasis added). Therefore, Plaintiffs' argument that their "theory of liability does not require reliance" is incorrect. Plaintiffs have failed to identify a duty of care that a surveyor owes to a non-reliant third party.

B. *Damages*

[5] Even assuming *arguendo* Plaintiffs had sufficiently alleged that Defendants owed a duty of care, Plaintiffs failed to sufficiently allege damages attributable to Defendants' actions. Plaintiffs' complaint alleged Defendants' negligent acts caused

> Plaintiffs to suffer and incur the following injuries and damages:
>
> a. Reasonable attorneys' fees for resolving the cloud on Plaintiffs' title, contesting the adverse claims of ownership asserted by the Holts, and correcting the misrepresentation appearing of record in the public land registry;
>
> b. Court costs and other expenses, including, but not limited to, expert witness fees and recording fees,

arising from the First Litigation and the Second Litigation; and

c. Costs for producing corrective surveys and plats of the Plaintiffs' real property.

Plaintiffs' alleged damages were all costs expended in connection with their prior litigation against the Holts for quiet title, declaratory judgment, and trespass.

> At common law neither party recovered costs in a civil action and each party paid his own witnesses. Today in this State, all costs are given in a court of law by virtue of some statute. The simple but definitive statement of the rule is: Costs, in this state, are entirely creatures of legislation, and without this they do not exist.

City of Charlotte v. McNeely, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (citations and quotations omitted). Plaintiffs fail to cite any statute authorizing them to recover their court costs and attorney's fees in the present case.

C. *Causation*

[6] Dismissal of Plaintiffs' claims was also proper because Plaintiffs failed to sufficiently allege that Defendants' survey was the proximate cause of their damages. In *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 781 S.E.2d 1 (2015), our Supreme Court addressed whether real estate appraisers who conducted appraisals on behalf of a bank could be held liable to future purchasers if the appraisals were incorrect. The Court held that the plaintiffs had failed to established that the appraisers owed them a duty of care. *Id.* at 454, 781 S.E.2d at 11. However, the Court further held that, even if the appraisers owed a duty of care to potential purchasers, the plaintiffs had failed to establish that the faulty appraisals were the proximate cause of their damages because the plaintiffs failed to allege that they had relied on the appraisals in deciding to purchase or finance their purchases of the real estate. *Id.* at 455, 781 S.E.2d at 11.

In the case before us, Plaintiffs do not allege that they relied on the erroneous surveys. Plaintiffs also do not allege that the Holts or anyone else acted in reliance on the erroneous surveys in a manner that caused damages. Instead, Plaintiffs claim that Defendants' actions were the proximate cause of their damages because Defendants "wrongfully created a cloud on the title to Plaintiffs' real property," which "necessitated" their litigation expenses. "A cloud upon title is, in itself, a title, or

encumbrance, apparently valid, but in fact invalid. . . . A cloud [on title] may be created by anything that may be a muniment of title or constitute an encumbrance." *York v. Newman*, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285 (1968).

In the case before us, there are doubts about whether the recorded plat was "apparently valid" as Defendants failed to conduct a complete survey and noted the deficiency of their work directly on the plat with the annotation "per parol evidence from William and Harold Holt." Nevertheless, a muniment of title is "[d]ocumentary evidence of title, such as a deed or a judgment regarding the ownership of property." Black's Law Dictionary 1043 (8th ed. 2004). The deficient nature of Defendants' survey would make the recorded plats insufficient evidence of title and would not create a cloud on title. *See Parrish v. Haywood*, 138 N.C. App. 637, 640-41, 532 S.E.2d 202, 205 (2000) (noting that where a plat does not sufficiently describe an encumbrance it is void). Therefore, Plaintiffs failed to allege how Defendants' conduct was the proximate cause of Plaintiffs' damages. If a party were to rely on Defendants' plats to encroach on Plaintiffs' property rights, then liability would be with the encroaching party rather than Defendants.

III. Conclusion

A surveyor does not owe a duty of care to landowners that are not in privity with the surveyor and who do not rely on the survey. Additionally, Plaintiffs failed to sufficiently allege that they were damaged by Defendants' conduct. The only damages alleged were litigation costs of an action in which Defendants were not a party. Plaintiffs failed to cite any statute that would entitle them to recover their litigation costs from Defendants. Finally, where Defendants relied on their client's statements in ascertaining the boundary line between the properties and conspicuously noted such on the plat, Defendants were not the proximate cause of Plaintiffs' alleged damages. Therefore, Plaintiffs failed to sufficiently allege a claim for negligence against Defendants. For these reasons, the trial court did not err in granting Defendants' motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

McLAUGHLIN v. BAILEY

[263 N.C. App. 647 (2019)]

IVAN McLAUGHLIN AND TIMOTHY STANLEY, Plaintiffs
v.
DANIEL BAILEY, in his Official Capacity as Sheriff of Mecklenburg County, and OHIO CASUALTY INSURANCE COMPANY, Defendant

No. COA18-665

Filed 5 February 2019

Courts—law of the case—decision of Supreme Court—motion for relief from judgment—consideration by trial court

The trial court erred by considering the substance of plaintiff's Rule 60(b)(6) motion for relief from judgment, which argued that he was entitled to relief because a U.S. Supreme Court opinion, decided after the N.C. Supreme Court's opinion in his case, was "now controlling." The trial court lacked discretion to consider the substance of the motion because the N.C. Supreme Court's decision was the law of the case. But the trial court's denial of plaintiff's motion was affirmed since it was the correct result—even if correct for the wrong reason.

Appeal by plaintiff Timothy Stanley from order entered 16 February 2018 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 16 January 2019.

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

Womble Bond Dickinson (US) LLP, by Sean F. Perrin, for defendants-appellees.

STROUD, Judge.

The background of this case can be found in this Court's prior opinion of *McLaughlin v. Bailey*, 240 N.C. App. 159, 771 S.E.2d 570 (2015), *aff'd*, 368 N.C. 618, 781 S.E.2d 23 (2016). The prior appeal was filed in this same case and addressed the same claims and issues. *See id.* In 2008, plaintiff was a deputy sheriff working in the Mecklenburg County Sheriff's Department. *Id.* at 160, 771 S.E.2d at 573. Defendant Daniel Bailey was elected as sheriff, and defendant then terminated plaintiff's employment. *See id.* at 160-61, 771 S.E.2d at 573. Plaintiff Timothy Stanley filed this lawsuit alleging he had been terminated for unlawful reasons. *See id.* at 161, 771 S.E.2d at 573. Defendant filed a motion for

summary judgment, and the trial court granted summary judgment for defendants, dismissing plaintiff Stanley's claims. *Id.* at 161-62, 771 S.E.2d 573. Plaintiff Stanley appealed, and this Court affirmed the trial court's judgment. *See id.*, 240 N.C. App. 159, 771 S.E.2d 570. Plaintiffs then petitioned the North Carolina Supreme Court for discretionary review, and the Supreme Court affirmed this Court's opinion in January of 2016. *See McLaughlin v. Bailey*, 368 N.C. 618, 781 S.E.2d 23.

In November of 2017, plaintiff Stanley filed a motion with the trial court under Rule 60(b)(6) for relief from judgment, arguing he was entitled to resurrect his claim based upon the United State Supreme Court's opinion in *Heffernan v. City of Patterson, N.J.*, 136 S. Ct. 1412, 194 L. Ed 2d 508 (2016), which was decided after the North Carolina Supreme Court had affirmed the dismissal of his claim. Plaintiff alleged the *Heffernan* case "is now controlling." On 16 February 2018, the trial court entered an order denying plaintiff's motion. Plaintiff appeals.

Plaintiff Stanley contends that the summary judgment for defendants dismissing his claim should be overturned based on *Heffernan*. Defendants contend *Heffernan* is not applicable to plaintiff Stanley's claims and his motion was untimely filed. But we need not address the trial court's substantive rationale for denial of the Rule 60(b)(6) motion or the timing of the motion because the trial court did not have the discretion to allow the Rule 60(b)(6) motion. *See generally D & W, Inc. v. Charlotte*, 268 N.C. 720, 722-23, 152 S.E.2d 199, 202 (1966) ("In our judicial system the Superior Court is a court subordinate to the Supreme Court. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered.").

This Court normally reviews a trial court's order denying a motion under Rule 60(b)(6) for abuse of discretion:

> General Statute 1A-1, Rule 60(b)(6) is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. Our Supreme Court has indicated that this Court cannot substitute what it considers to be its own better judgment for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it probably amounted to a substantial miscarriage of justice. Further, a judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.

Huggins v. Hallmark Enterprises, Inc., 84 N.C. App. 15, 25, 351 S.E.2d 779, 785 (1987) (citations, quotation marks, and brackets omitted).

But in this instance, the trial court had no discretion to allow plaintiff's motion, *see generally D & W, Inc.*, 268 N.C. at 722-23, 152 S.E.2d at 202, even if it had determined plaintiff's argument that *Heffernan* somehow changed the law in a way which would affect plaintiff's claim, though ultimately that is not what the trial court determined. The exact same legal issue, with no factual distinctions, argued by plaintiff in the Rule 60(b)(6) motion was argued in the first appeal and the North Carolina Supreme Court ruled on it; that ruling is the law of the case:

> The questions raised in the present appeal must be viewed in the light of the rule that a decision of this Court on former appeal constitutes the law of the case in respect to questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal when the same matters are involved.

Collins v. Simms, 257 N.C. 1, 3, 125 S.E.2d 298, 300 (1962). While plaintiff Stanley claims that the United States Supreme Court ruling in *Heffernan* changed the law applicable to his claim, that contention is misplaced because his claim was already over.[1] Again,

> [i]n our judicial system the Superior Court is a court subordinate to the Supreme Court. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals.

D & W, Inc., 268 N.C. at 722-23, 152 S.E.2d at 202.

Since the trial court had no authority to rule upon plaintiff Stanley's Rule 60 motion, we must determine whether the trial court's order is simply erroneous, void, or irregular:

> The contention has some procedural significance, and leads to the inquiry as to whether the judgment is erroneous,

1. Plaintiff has not presented any argument as to whether *Heffernan* would have retroactive effect upon his case, and we have not considered this issue. The trial court's order appears to assume that *Heffernan* could have retroactive effect but determined that *Heffernan* did not change the law applicable to plaintiff's claim.

> irregular or void. The question is not without difficulty. The decisions in this and other jurisdictions establish no strict lines of demarcation, in this category of judgments, for determining whether particular judgments are erroneous, irregular or void. We have held judgments of Superior court which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court in the respective causes, especially where they amounted to insubordination, to be unauthorized and void. But we have held judgments, which indicated the judge misunderstood and misinterpreted the opinion of this Court on former appeal and gave it broader significance or narrower scope than we intended, to be erroneous. Judgments of the lower court have been held to be erroneous in a number of cases where its rulings were inconsistent with prior appellate decisions. The Supreme Court has, in at least two cases, held judgments by the lower court to be irregular where they undertook to modify prior opinions of Supreme Court.
>
> Upon the plainest principle, the courts, whose judgments and decrees are reviewed by an appellate court of errors, must be bound by and observe the judgments, decrees and orders of the latter court, within its jurisdiction. Otherwise the courts of error would be nugatory and a sheer mockery. There would be no judicial subordination, no correction of errors of inferior judicial tribunals, and every court would be a law unto itself. But there is no rule of thumb for classifying non-conforming judgments as to whether they are erroneous, irregular or void. Of course general principles apply. But decisions have undoubtedly taken into consideration the circumstances of the particular case, and the necessity for doing justice.

Collins, 257 N.C. at 7–8, 125 S.E.2d at 303–04 (citations and quotation marks omitted).

Here, the trial court's order conformed to the Supreme Court's prior holding, since the motion was denied, albeit for the wrong reason. But the trial court had no authority to do otherwise and should have simply denied plaintiff's motion based on the law of the case since the issue raised by the Rule 60(b) motion was specifically addressed previously and affirmed by the Supreme Court. *See McLaughlin*, 368 N.C. 618, 781 S.E.2d 23. However, the trial court had jurisdiction to hear plaintiff's Rule 60(b) motion so the order is not void. *See generally Collins*, 257

N.C. at 7–8, 125 S.E.2d at 303–04. In theory a proper Rule 60 motion could raise some issue not addressed by the prior appeal and the trial court might have the discretion to grant the motion, although that did not happen here. Furthermore, both in the trial court and on appeal, defendants responded to the substance of plaintiff Stanley's motion without arguing it was barred by the law of the case from the prior appeal, so "[t]he trial court was doubtless misled in the matter by the way in which it was presented." *Cannon v. Cannon*, 226 N.C. 634, 637, 39 S.E.2d 821, 823 (1946). Thus, taking "into consideration the circumstances of the particular case, and the necessity for doing justice[,]" we will characterize the trial court's order analysis simply as erroneous since the trial court "misunderstood and misinterpreted the opinion[s] of [this Court and the Supreme Court] on former appeal and gave [them] … narrower scope than we intended[.]" *Collins*, 257 N.C. at 8, 125 S.E.2d at 303–04. The trial court's rationale was in error only because it had no authority to consider the issue presented — nor does this Court, so we will not address the substance of the motion. *See generally D & W, Inc.*, 268 N.C. at 722-23, 152 S.E.2d at 202.

We conclude the order is erroneous to the extent that it addresses the substance of plaintiff's motion. *See generally Lea Co. v. N.C. Board of Transportation*, 323 N.C. 697, 374 S.E.2d 866 (1989) (affirming the trial court's denial of a Rule 60(b) motion "to reopen a prior judgment for the purpose of making additional findings and conclusions as to whether plaintiff should be awarded compound interest as an element of just compensation for defendant's taking of an interest in plaintiff's property by inverse condemnation" because "[t]he mandate of this Court in the second appeal of this case affirmed a judgment of the trial court granting plaintiff simple interest on its award at the rate of 11% per annum for the time between defendant's taking of plaintiff's property and entry of the judgment awarding compensation. As the trial court noted, our mandate did not include a remand for consideration of an award of compound interest; rather, it affirmed a judgment awarding simple interest, which was all the plaintiff had sought." The trial court "had no authority to modify or change in any material respect the decree affirmed." (citations and quotation marks omitted)).[2] But because the

2. This case can be contrasted with *McNeil v. Hicks*, where the defendant Allstate Insurance Company "moved for relief from the order of partial summary judgment pursuant to N.C. Gen. Stat. § 1A-1 Rule 60(b)(6) (1990), and for an order dismissing all claims against Allstate without prejudice. . . . in light of the North Carolina Supreme Court's recent holding in *Andersen v. Baccus*" because in that case the motion was filed while the action was still pending before the Courts. *See McNeil v. Hicks*, 119 N.C. App. 579, 459 S.E.2d 47 (1995).

trial court denied plaintiff's motion, which is the correct result, we affirm the order. *See generally Hughey v. Cloninger*, 297 N.C. 86, 95-96, 253 S.E.2d 898, 903-04 (1979) (affirming where a lower court, this Court, "reached the right result but for the wrong reason").

AFFIRMED.

Judges DIETZ and BERGER concur.

JOSE E. RIVERA, Plaintiff
v.
RICKY L. MATTHEWS and wife JO MATTHEWS, and LEE COUNTY DEPARTMENT OF SOCIAL SERVICES, Defendants

No. COA18-359

Filed 5 February 2019

1. Child Custody and Support—grandparents—deceased parents—abatement of action

A child custody claim by a grandparent did not abate where the father was found dead in the family home, in which illegal drugs and paraphernalia were discovered; the mother was arrested and the child stayed with the paternal grandparents; the paternal grandparents filed a complaint for child custody against the mother and were awarded temporary custody; the mother died; and plaintiff, the maternal grandfather, filed this action for custody. Although plaintiff argued that the custody action abated upon the mother's death, the single sentence on which plaintiff relied, in *McIntyre v. McIntyre*, 341 N.C. 629 (1995), constituted dicta and did not resolve the legal issue raised by the particular facts of the case. Considering constitutional and statutory law, the *McIntyre* rule did not apply because it was not a dispute for the care, custody, and control of the child between two parents and there was no surviving parent vested with constitutional rights.

2. Child Custody and Support—pending claim—new complaint—no subject matter jurisdiction

The trial court did not have subject matter jurisdiction to consider the maternal grandfather's independent complaint for child custody against the paternal grandparents where both parents were deceased, the paternal grandparents had been awarded temporary

custody, and that action had not abated. The proper procedure for plaintiff was to file a motion to intervene and a motion for custody in the pending custody action.

Appeal by Plaintiff from an order entered 7 June 2017 by Judge Mary H. Wells in Lee County District Court. Heard in the Court of Appeals 17 October 2018.

THE LAW OFFICE OF ERIKA R. BALES, PLLC, by Erika R. Bales, for Plaintiff-Appellant.

POST, FOUSHEE & PATTON, P.A., by Kristy Gaines Patton, for Defendants-Appellees Ricky L. and Jo Matthews.

Elizabeth Myrick Boone for Defendant-Appellee Lee County Department of Social Services.

INMAN, Judge.

Plaintiff-Appellant Jose E. Rivera ("Plaintiff") appeals from an order dismissing his complaint for custody of his maternal grandchild under Sections 50-13.1 and 50A-101 of the North Carolina General Statutes. In dismissing the complaint, the trial court held that, due to an unabated pre-existing child custody action between the child's paternal grandparents, Defendants-Appellees Ricky L. and Jo Matthews (the "Matthews"), and Plaintiff's now-deceased daughter ("Mother"), it lacked subject matter jurisdiction to proceed. After careful review, we affirm the order of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

N. M. ("Nancy")[1] was born out of wedlock to Mother and R. M. ("Father") in 2007. On 5 June 2015, Mother found Father dead in the family home. Seven-year-old Nancy was at the home at the time the body was discovered. Law enforcement searched the home and discovered copious amounts and varieties of illegal drugs and associated paraphernalia. Mother was then arrested on one drug-related misdemeanor and four drug-related felony charges. The Matthews arrived at the home that same day, and Mother implored them to take care of Nancy. Nancy has stayed in the Matthews' care ever since.

1. We refer to the minor and her parents by pseudonym.

In investigating Father's death, law enforcement and the Lee County Department of Social Services ("DSS," together with the Matthews as "Defendants") interviewed Nancy. She told them that Mother injected and snorted drugs in her presence, she had seen used needles and blood in her bathroom, she frequently had to fix her own meals due to Mother's incapacitation from drug usage, and she often missed school. On at least one occasion, Nancy recounted, she had stepped on a used needle littering the floor of the home.

Following their son's death and Nancy's disclosure, the Matthews filed a complaint and motion for domestic violence protective order against Mother under Section 50B-1 of our General Statutes on 9 June 2015. The trial court awarded temporary custody of Nancy to the Matthews by *ex parte* order later that morning.

On 25 June 2015, Mother was charged with first-degree murder in the death of Father and misdemeanor child abuse of Nancy. The Matthews filed a complaint for child custody against Mother the following day (the "Custody Action"), and the trial court immediately entered an *ex parte* temporary custody order. Mother and the Matthews appeared for a hearing to review the *ex parte* temporary custody order the following week and, on 12 August 2015, the trial court entered a temporary custody order continuing Nancy's placement with the Matthews. In that order, the trial court concluded from the evidence and factual findings that Mother "is not a fit and proper person to exercise the care, custody and control of the minor child and has taken such actions that are inconsistent with her constitutionally protected rights as the minor child's natural parent." It also concluded that the Matthews were fit to care for Nancy and that it would be in her best interest to be placed in their sole and exclusive legal custody. The trial court dissolved the *ex parte* order, decreed that the Matthews have "temporary sole and exclusive legal and physical care, custody and control" over Nancy, and ordered that Mother have no contact with Nancy until further order of the court.

On 28 September 2015, Plaintiff filed a complaint and motion in the Custody Action seeking visitation; that claim was subsequently denied and dismissed by the trial court, and Plaintiff did not appeal that decision. The record on appeal reveals no further action in the Custody Action following the dismissal of Plaintiff's complaint and motion.

Mother died on 3 June 2016. On 16 June 2016, Plaintiff, Nancy's maternal grandfather, filed a complaint against the Matthews in a new, separate action seeking full custody of Nancy pursuant to Sections 50-13.1 and 50A-101 of our General Statutes. Although Plaintiff acknowledged

the existence of the Custody Action, he alleged that it terminated upon Mother's death. The complaint also named DSS as a defendant, asserting that "[s]ince both biological and legal parents of the minor are deceased, [DSS] is a necessary party to this action."

The Matthews filed a motion to dismiss pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure on 19 August 2016 on the grounds that the earlier Custody Action was still pending and the temporary child custody order "has not been set aside and continues to remain in full force and effect." After a hearing on 28 September 2016, the trial court granted the motion to dismiss for lack of subject matter jurisdiction. In its written order filed 7 June 2017, the trial court held that the Custody Action had not abated upon Mother's death, concluding that holding otherwise would be contrary to "reason, statutory meaning and legislative intent[,]" insofar as it would render Nancy a ward of the state despite her current placement with "fit and proper legal custodians."

Plaintiff filed a belated notice of appeal from the order on 10 August 2017 and a petition for writ of certiorari on 28 December 2017. We allowed Plaintiff's petition to review the trial court's order on 10 January 2018.

II. ANALYSIS

A. Standard of Review

This Court reviews questions of subject matter jurisdiction *de novo*, *McKoy v. McKo*y, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010), meaning we consider the issue anew without any consideration of or reliance upon the lower court's determination, *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007). This same standard applies to questions of statutory interpretation. *Swauger v. University of North Carolina At Charlotte*, ___ N.C. App. ___, ___, 817 S.E.2d 434, 435 (2018).

B. Death and Abatement In Custody Actions

[1] Plaintiff argues on appeal, as he did below, that Mother's death resulted in an abatement of the Custody Action. That argument is largely premised on a single sentence found within our Supreme Court's opinion in *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995): "After an initial custody determination, the trial court retains jurisdiction on the issue of custody until the death of one of the parties or the emancipation of the youngest child." 341 N.C. at 633, 461 S.E.2d at 745 (citing *Shoaf v. Shoaf*, 282 N.C. 287, 290, 192 S.E.2d 299, 302 (1972)). While this sentence, standing in isolation and devoid of context, may appear to

resolve the question presented by this appeal, an opinion rendered upon that language alone would do a disservice to the law[2] and, as explained *infra*, untether *McIntyre* and other related cases from their constitutional moorings. Indeed, when those decisions are considered fully and alongside our statutes concerning the survival of actions and the custody and visitation rights of grandparents, Plaintiff's appeal grows ever the more vexatious and the simple answer he proposes increasingly less viable. Resolution of this appeal, therefore, requires a thorough dredging of these subjects, and we begin that analysis with *McIntyre*.

In *McIntyre*, paternal grandparents filed a complaint under Section 50-13.1(a) against their son and his wife for visitation with their minor granddaughters, who lived with their parents in an intact family and were not involved in any ongoing custody action. 341 N.C. at 629, 461 S.E.2d at 746-47. To determine whether such a right of action existed under those circumstances, our Supreme Court conducted a review of the statutes under which grandparents may bring a suit for custody or visitation. *Id.* at 633, 461 S.E.2d at 748-49. The Court noted that Section 50-13.5 provides grandparents with the option of filing a motion for visitation in an ongoing custody action following an initial custody determination. *Id.* at 633, 461 S.E.2d at 748-49. The Court cited its earlier decision in *Shoaf* for the proposition that grandparents' rights to file for visitation persist until emancipation of the child or the death of a party to the custody action. *Id.* at 633, 461 S.E.2d at 748. The decision in *McIntyre*, however, was not itself concerned with the abatement of custody actions, and its general review of statutes concerning the rights of grandparents to seek custody against the constitutional rights of parents was only conducted to determine how they "control[led the Supreme Court's] interpretation of [N.C. Gen. Stat.] § 50-13.1(a)." *Id.* at 634, 461 S.E.2d at 749. *Cf. Sharp v. Sharp*, 124 N.C. App. 357, 360, 477 S.E.2d 258, 260 (1996) (recounting the issue in *McIntyre* and concluding that its "holding was narrowly limited to suits initiated by grandparents for *visitation* and does not apply to suits for *custody*" (emphasis in original)). The sentence in *McIntyre* that Plaintiff relies on constitutes *dicta* that, while helpful as a general statement of the law applicable to grandparents' interventions into custody disputes between parents, does not resolve the legal issue raised by the particular facts of this case.

Delving into *Shoaf* and earlier decisions also sheds light on the mismatch between *McIntyre* and this case. *Shoaf* involved a "single question of law[,]" namely, whether a consent judgment in a custody and

2. As well as to the parties and Nancy.

divorce action required a father to pay child support until age 21 when a subsequent change in the law reduced the age of majority to 18. 282 N.C. at 289, 192 S.E.2d at 302. In holding that the father's obligation ceased at age 18, the Supreme Court observed the following:

> When *parents* of minor children invoke the jurisdiction of the court on matters involving separation, support, custody, etc., the children become wards of the court. The court, thereafter has authority to force the parent to discharge the legal obligation to support a minor child until he reaches legal age. *After separation, followed by action for divorce in which a complaint has been filed or a writ of habeas corpus has issued*, authority to provide for the custody of children vests in the court in which *the divorce proceeding* is pending. " 'Jurisdiction rests in this (trial) court so long as the action is pending and it is pending for this purpose until the death of one of the parties,' or the youngest child born of the marriage *reaches the age of maturity*, (emphasis added) whichever event shall first occur. (Citing many cases)." *Weddington v. Weddington*, 243 N.C. 702, 92 S.E.2d 71.

Shoaf, 282 N.C. at 289-90, 192 S.E.2d at 302 (first and second emphasis added).

Weddington and other cases therein all discuss a trial court's jurisdiction over a child's custody in the context of *a divorce action between the child's parents*. *Weddington*, 243 N.C. at 704, 92 S.E.2d at 73 (" 'So soon as the "state of separation" between husband and wife resolves itself into . . . an action for divorce . . . , the jurisdiction . . . and authority to provide for the custody of the children of the marriage vests in the court in which the divorce proceeding is pending. Jurisdiction rests in this court . . . until the death of one of the parties[.]' " (quoting *Phipps v. Vannoy*, 229 N.C. 629, 632, 50 S.E.2d 906, 907-08 (1948) (additional citations omitted)); *Phipps*, 229 N.C. at 632, 50 S.E.2d at 907-08 (noting the trial court has jurisdiction over the divorce proceeding and subordinate child custody issue until the death of one of the parties). This rule has been applied in that context alone. *See, e.g.*, *Elmore v. Elmore*, 67 N.C. App. 661, 313 S.E.2d 904 (1984) (holding an action for divorce and child custody abated upon the death of the husband under the common law and N.C. Gen. Stat. § 28A-18-1(b)(3)); *see also Latham v. Latham*, 74 N.C. App. 722, 723, 329 S.E.2d 721, 722 (1985) ("[W]e rely upon the long-settled rule that a *divorce action* is pending for purposes of determining custody and support until the death of one of the parties or until the

youngest child born of the marriage reaches maturity, whichever event occurs first." (citing *Weddington*, 243 N.C. at 704, 92 S.E.2d at 73) (additional citations omitted) (emphasis added)).[3]

Constitutional law also cautions against the outcome advocated by Plaintiff. As recognized in *McIntyre*, "the common law rule is that parents have a paramount right . . . to custody, care and nurture of their children, . . . and that that right includes the right to determine with whom their children shall associate." 341 N.C. at 631, 461 S.E.2d at 748 (citations and internal quotation marks omitted). This right generally prevails against any desire by grandparents to engage with their grandchild. *See Eakett v. Eakett*, 157 N.C. App. 550, 553, 579 S.E.2d 486, 489 (2003) (holding grandparents are entitled to custody in an action against a parent only when there is a showing of parental unfitness, as "[t]he requirement to show unfitness if a grandparent initiates a custody dispute is consistent with a parent's constitutionally protected right to the care, custody and control of the child" (citation omitted)); *see also Wellons v. White*, 229 N.C. App. 164, 175, 748 S.E.2d 709, 718 (2013) ("To receive custody under N.C. Gen. Stat. § 50-13.1(a), grandparents must prove parental unfitness." (citing *Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 489)). Thus, a custody dispute between grandparents and a parent involves a conflict between unequal interests, *Eakett* at 554, 579 S.E.2d at 489, while a custody battle between two parents involves a conflict of equal rights, *see, e.g.*, *Rosero v. Blake*, 357 N.C. 193, 208, 581 S.E.2d 41, 50 (2003) ("[T]he father's right to custody of his illegitimate child is legally equal to that of the child's mother"). It follows, then, that disputes between parents are subject to different procedural standards and safeguards than those applicable to actions between parents and non-parents:

> [U]nless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution. Furthermore, the protected right *is irrelevant in a custody proceeding between two natural parents*, whether biological or adoptive, *or between two parties who are not natural parents*. In such instances, the trial court must determine custody using the "best interest of the child" test.

---

3. There is "sound reason and logic" behind the notion that all causes of action "incidental to the marital status" abate upon the death of a party, *Elmore*, 67 N.C. App. at 667, 313 S.E.2d at 908, as "no power can dissolve a marriage which has already been dissolved by act of God." *Bell v. Bell*, 181 U.S. 175, 178, 45 L. Ed. 804, 807 (1901).

Owenby v. Young, 357 N.C. 142, 145, 579 S.E.2d 264, 266-67 (2003) (citations omitted) (emphasis added).

The constitutional right vested in parents—and not grandparents—also comes into play when one parents dies. In *McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002), the minors' parents divorced, with the mother receiving custody and the father visitation. 155 N.C. App. at 588, 573 S.E.2d at 607. The mother died and the children began living with their maternal grandmother. *Id.* The grandmother subsequently filed a custody suit against the father. *Id.* The trial court dismissed the grandmother's complaint and we affirmed, "not[ing] that where one parent is deceased, the surviving parent has a natural and legal right to custody and control of the minor children." *Id.* at 589, 573 S.E.2d at 607-08 (citations omitted). That maxim was no less true when the sole surviving parent was the non-custodial parent of the children, *id.* at 589-90, 573 S.E.2d at 608, and, because the complaint failed to allege actions inconsistent with the father's constitutional rights as a parent, we held that the maternal grandmother had failed to state a claim for custody, *id.* at 591, 578 S.E.2d at 609.[4] Thus, as illustrated by *McDuffie*, even a non-custodial parent ordinarily enjoys a constitutional right to the care, custody, and control of his child that springs upon the death of the custodial parent to the exclusion of and superior to any interest held by a grandparent.

Because a non-custodial parent has the benefit of this constitutional right upon the death of the custodial parent while a grandparent does not, it stands to reason that the death of a party in a divorce and custody suit would result in the action's abatement while the death of the last surviving non-custodial parent would not abate a custody action between that parent and the custodial grandparents. Stated differently, when the death of one party in a custody action does not result in an automatic vestiture of custody in another by operation of a constitutional right, the rationale for abatement as set forth in *McIntyre* and other decisions falters.

Finally, statutory law presents a final hurdle to Plaintiff's desired outcome. Section 28A-18-1 of our general statutes provides that "[u]pon the death of any person, *all demands whatsoever*, and rights to prosecute or defend *any action or special proceeding*, existing in favor of or

4. We note that, just as death results in the extinguishing of a parent's constitutional right to the care, custody, and control of her child, this Court has previously equated an order terminating parental rights to "a civil death penalty." *Stann v. Levine*, 180 N.C. App. 1, 11 n.9, 636 S.E.2d 214, 220 n.9 (2006) (citation and internal quotation marks omitted).

against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of the person's estate." N.C. Gen. Stat. § 28A-18-1(a) (2017) (emphasis added). The exceptions listed in subsection (b) are limited to "rights of action *in favor of* a decedent." N.C. Gen. Stat. § 28A-18-1(b) (2017) (emphasis added). Our Supreme Court has held that, in drafting this statute, "[t]he legislature employ[ed] language of broad signification to describe the causes of action which survive." *McIntyre v. Josey*, 239 N.C. 109, 111, 79 S.E.2d 202, 203 (1953) (construing virtually identical language found in N.C. Gen. Stat. § 28A-18-1(a)'s predecessor statute). The Custody Action at issue here was not a cause of action in favor of Mother but a complaint for custody in favor of the Matthews and, therefore, survived Mother's death under the plain language of the statute.

Having reviewed the above constitutional and statutory law, we hold that the rule espoused in *McIntyre* and related cases does not apply to the Custody Action, as it was not a dispute for the care, custody, and control of Nancy between two parents, and there is no surviving parent vested with constitutional rights. Instead, the Custody Action was brought by the Matthews against Mother and, following Mother's death, did not abate for reasons of constitutional law previously articulated by our appellate courts and did not abate pursuant to the plain language of Section 28A 18 1. Plaintiff offers no other grounds for abatement and, with none appearing following our analysis, we hold the trial court properly concluded that the Custody Action was still pending following Mother's death.

C. Subject Matter Jurisdiction

[2] Having determined the trial court properly concluded the Custody Action did not abate, we now turn to Plaintiff's argument that he could invoke the trial court's jurisdiction to pursue custody of his granddaughter pursuant to Section 50-13.1. While that statute does provide that "[a]ny . . . relative . . . may institute an action or proceeding for the custody of [a] child," N.C. Gen. Stat. § 50-13.1(a), we hold that this broad language, when construed *in pari materia* with more specific provisions concerning grandparent rights to visitation and custody and considered in the context of existing case law, does not support Plaintiff's position.

We acknowledge that "N.C. Gen. Stat. § 50-13.1(a) grants grandparents standing to seek custody at any time." *Wellons*, 229 N.C. App. at 174, 748 S.E.2d at 717. Our case law, however, has generally understood this broad grant to provide grandparents with standing to bring an *initial* custody claim against *parents*, not a new suit against

non-parents who have already obtained custody by order in a prior, ongoing action. *See Sharp*, 124 N.C. App. at 363, 477 S.E.2d at 262 ("[Section] 50 13.1(a) grants grandparents the right to bring an *initial suit* for custody *where there are allegations that the child's parents are unfit*." (emphasis added)), *Wellons*, 229 N.C. App. at 174, 748 S.E.2d at 717 ("To receive custody under N.C. Gen. Stat. § 50-13.1(a), grandparents must show parental unfitness."), *Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 489 ("The requirement to show unfitness if a grandparent initiates a custody dispute is consistent with a parent's constitutionally protected right"), *and Perdue v. Fuqua*, 195 N.C. App. 583, 586, 673 S.E.2d 145, 148 (2009) ("[A] grandparent initiating a proceeding for custody [under Section 50-13.1(a)] must allege unfitness of a parent due to neglect or abandonment."). Furthermore, we have held that "[N.C. Gen. Stat.] § 50-13.1(a) grants grandparents the broad privilege to institute an action for custody or visitation, *as allowed in* [N.C. Gen. Stat.] §§ 50-13.2(b1), 50-13.2A, and 50-13.5(j)." *Eakett*, 157 N.C. App. at 552, 579 S.E.2d at 488 (emphasis added). One of those statutes, Section 50-13.5(j), "permits a grandparent to petition for custody or visitation due to changed circumstances in those actions where custody has previously been determined." *Perdue*, 195 N.C. App. at 585, 673 S.E.2d at 147. Our Supreme Court has held that Section 50-13.5(j) is a "special provision [that] control[s the] interpretation of [Section] 50-13.1(a)," and "[w]e therefore must read [it] . . . in conjunction with [Section] 50-13.1(a) so as to harmonize them and give effect to consistent legislative policy." *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749.

In the instant case, Plaintiff initiated his custody claim naming the Matthews and DSS as defendants while the Matthews' Custody Action was, as established *supra* Part II.B., still pending. Plaintiff did not file suit against an allegedly unfit parent, but against non-parents who were previously awarded custody in the Custody Action. And, given our holding that the Custody Action has not abated, Plaintiff's complaint against the Matthews is more akin to a request to modify the custody order entered in the Custody Action under Section 50-13.5(j) than it is an initial claim for custody under Section 50-13.1(a).[5] Construing Plaintiff's complaint in the context of the relevant statutory provisions and the existence of a custody order in the Custody Action, we hold that "under [Section] 50-13.5(j), the proper procedure for [Plaintiff] was to file . . . a

5. Indeed, Plaintiff conceded at oral argument that: (1) if the Custody Action has not abated, then his action can only proceed as a motion in that cause; and (2) the custody order entered in the Custody Action was valid and would survive even if the Custody Action were held to have abated.

Motion to Intervene and a Motion for Custody [in the Custody Action]." *Perdue*, 195 N.C. App. at 585-86, 673 S.E.2d at 147-48. Plaintiff's standing is therefore limited to filing such a motion in the Custody Action, and we hold the trial court properly concluded it lacked subject matter jurisdiction to hear Plaintiff's independent complaint for custody against the Matthews and DSS.

III. CONCLUSION

For the foregoing reasons, we hold the trial court properly concluded the Custody Action had not abated and affirm its dismissal of Plaintiff's complaint for lack of subject matter jurisdiction.

AFFIRMED.

Chief Judge McGEE and Judge DILLON concur.

MARY WOLF SMITH, Plaintiff
v.
RICHARD T. RODGERS, JR., Personal Representative of the Estate of Gerald Wolf, Jr. and SHERMAN AND RODGERS, PLLC, Defendants

No. COA18-261

Filed 5 February 2019

1. Divorce—equitable distribution—distributive award—death of spouse—not claim against estate

In an action to enforce an equitable distribution order granting a distributive award to plaintiff, plaintiff's declaratory judgment claim was not time-barred by the provisions of Chapter 28A, since the distributive award was not part of the decedent's estate (of plaintiff's former spouse), and plaintiff was therefore not required to adhere to Chapter 28A's filing and notice requirements. The equitable distribution order vested in plaintiff a property right and did not constitute a claim against decedent's estate.

2. Jurisdiction—equitable distribution—claim for unpaid distributive award—deceased spouse—correct court

In an action to enforce an equitable distribution (ED) order granting a distributive award to plaintiff, plaintiff's declaratory judgment claim filed as part of decedent's estate matter should have

been dismissed by the superior court. The distributive award to plaintiff did not belong to decedent (her former spouse) and did not become part of his estate when he died. Exclusive jurisdiction over ED belonged to the district court, which is where plaintiff must enforce her claim.

3. Appeal and Error—abandonment of issues—equitable distribution—unpaid distributive award—tort claims

On appeal from an action to enforce an equitable distribution order granting a distributive award to plaintiff, the superior court had jurisdiction to dismiss plaintiff's claims for breach of fiduciary duty and conversion for failure to state a claim upon which relief can be granted. Plaintiff failed to advance any argument about the elements of those torts, thereby abandoning any issue on the merits.

Appeal by Plaintiff from order entered 21 September 2017 by Judge Ebern T. Watson, III, in New Hanover County Superior Court. Heard in the Court of Appeals 20 September 2018.

Law Office of Susan M. Keelin, PLLC, by Susan M. Keelin for Plaintiff Appellant.

Cranfill Sumner & Hartzog LLP, by Melody Jewell Jolly for Defendant Appellees.

INMAN, Judge.

Enforcement of an equitable distribution award remains within the exclusive jurisdiction of the district court, even after one party subject to the order dies.

Plaintiff Mary Wolf Smith ("Ms. Smith") appeals the superior court's dismissal of her complaint arising from an equitable distribution award ordered ("ED Order") by the district court against her ex-husband, Gerald Wolf, Jr. ("Mr. Wolf"), prior to his death. Ms. Smith sued Richard T. Rodgers, Jr., Esq. ("Rodgers") and Sherman and Rodgers, PLLC, administrators of Mr. Wolf's estate (collectively "Defendants") for declaratory relief, breach of fiduciary duty, and conversion. The superior court agreed with Defendants that Ms. Smith's complaint was time-barred by a statute governing claims against estates.

Ms. Smith argues that her complaint does not assert claims against an estate and is therefore not subject to the statutory time limitation for

bringing such claims.[1] We agree that Ms. Smith's claim for declaratory judgment is directly related to enforcement of the ED Order and is not a claim against the estate and therefore not time barred. But we hold that the superior court lacked jurisdiction to hear it. We are not persuaded that Ms. Smith's tort claims are likewise directly related to the ED Order, so we affirm the trial court with respect to those claims.

I. Factual and Procedural Background

The record,[2] including Ms. Smith's complaint, reflects the following:

A. Facts and Litigation Preceding this Action

Ms. Smith and Mr. Wolf married in 1994 and divorced in 2013. During the marriage, Mr. Wolf was a member in Savings Home, LLC ("Savings Home"), which owned parcels of real estate for sale or rental.[3] In December 2012, in an equitable distribution proceeding in the New Hanover County District Court, the court entered an ED Order providing for Ms. Smith to receive fifty percent of the marital estate. The ED Order identified, valued, and distributed specific marital property and debt according to a detailed schedule, including a line item referred to as Savings Home, which allocated half the value of Mr. Wolf's ownership interest in Savings Home ("LLC interest") to Ms. Smith and the other half of the value to Mr. Wolf. The district court found that the LLC interest had a fair market value of $419,283, and allocated a value of $209,642 to Ms. Smith and a value of $209,641 to Mr. Wolf.

Because it was not possible to divide the value of specific assets equally between the parties, the trial court also included a distributive award requiring Mr. Wolf to pay Ms. Smith $30,620 over a period of 36

---

1. Ms. Smith also argues that Defendants are estopped from arguing that her claims are time-barred and that the trial court erred in considering materials outside the pleadings when ruling on a motion to dismiss pursuant to N.C. Rule of Civil Procedure 12(b)(6). Because we hold that Ms. Smith's claim for declaratory judgment should have been dismissed for lack of subject matter jurisdiction, and because she has asserted no argument to differentiate her other claims, we conclude these issues are not dispositive and we do not address them.

2. The only facts not alleged in Ms. Smith's complaint relate to Mr. Wolf's estate proceeding and are reflected by documentary exhibits submitted to the trial court by Defendants. While those facts provide context for the procedural background of this appeal, they are immaterial to our decision.

3. Though the record and the parties refer to Mr. Wolf as a partner, because Savings Home is a limited liability company, we refer to Mr. Wolf as a member and his interest as an ownership interest or LLC interest.

months to make the total distribution to her equal to half of the value it found in the entire marital estate.

The ED Order required that "each party shall immediately execute any and all documents and make all transfers of property necessary to effectuate the terms and conditions of this Order."

Mr. Wolf died suddenly on 7 March 2013, three months after the ED Order but before he had liquidated his LLC interest in Savings Home or paid to Ms. Smith half the value of the LLC interest, as required by the ED Order. At the time of Mr. Wolf's death, Savings Home owned eight parcels of real estate, all of which were controlled by and in the possession of the surviving member in Savings Home, David Goldrup ("Goldrup").

Rodgers qualified as the personal representative of Mr. Wolf's estate through letters of administration filed in the Clerk of New Hanover County Superior Court's estate division on 4 January 2013 (the "Estate Matter"). Mr. Wolf's only heirs at law are his two daughters.[4]

On 7 August 2013, Ms. Smith, through her then-counsel, filed a notice of claim in the Estate Matter for $30,620, the distributive award provided for in the ED Order.[5] In July 2016, Defendants, on behalf of Mr. Wolf's estate, paid Ms. Smith's claim.

Ms. Smith did not file a notice of claim for any other aspect of the equitable distribution award, including the distribution to her of half the value of Mr. Wolf's LLC interest in Savings Home.

After Rodgers became the personal representative of Mr. Wolf's estate, he and Ms. Smith agreed to coordinate efforts to recover the value of the LLC interest in Savings Home for the benefit of Mr. Wolf's estate and Ms. Smith. In August 2014, Rodgers and Ms. Smith filed suit against Savings Home and Goldrup, the sole surviving member, seeking an accounting of the limited liability company's affairs and imposition of a constructive trust on all of its assets ("the Savings Home Action").

---

4. One is Ms. Smith's daughter as well; the other is Ms. Smith's stepdaughter.

5. Defendants assert in their appellate brief that Ms. Smith filed her notice of claim in response to a notice to creditors that Sherman and Rodgers, PLLC sent on 9 August 2013. There is no evidence in the record of a notice to creditors. In any event, the record shows that Ms. Wolf filed her notice of claim two days before the alleged date of the notice to creditors. Because we hold that the superior court had no jurisdiction to hear Ms. Smith's claim to recover any portion of her award provided in the ED Order, the discrepancy is immaterial to our decision.

In June 2016, the parties in the Savings Home Action agreed to a consent order ("the 2016 consent order") for all real property owned by Savings Home to be sold, and for all sales proceeds to be placed in a trust controlled by Sherman and Rodgers, PLLC, the law firm in which Rodgers is a member. The 2016 consent order also provided for Sherman and Rodgers, PLLC to be responsible for managing all of the real property, to provide an accounting for all revenues and expenses for the real property, and to list each parcel of property for sale after obtaining the written approval of all parties to the Savings Home Action to the list price, commission rate, and sale price for each parcel. The 2016 consent order also provided that the net proceeds of the sale of each parcel would be divided by agreement of the parties to the Savings Home Action "or in accordance with any orders of this Court." Consistent with the 2016 consent order, Goldrup then transferred to Sherman and Rodgers, PLLC management and control of all of the real estate owned by Savings Home.[6]

In December 2016, Ms. Smith, through new counsel, Susan Keelin, sent a letter by e-mail to Mr. Rodgers demanding "excise of her property from [Mr. Wolf's estate] as set forth in the [ED Order]." The letter asserted that Ms. Smith's "right to an equitable distribution of property from the marital estate vested when she and [Mr. Wolf] separated" and that it was not, and never had been, part of Mr. Wolf's estate.[7] That same day, Rodgers, on behalf of Sherman and Rodgers, PLLC, sent an e-mail response to the demand letter, telling Keelin that she "[has] no case" and that she should "[c]ontact [her] malpractice insurer carrier and have them call [him]."

On 14 March 2017, Rodgers filed in the Estate Matter a denial of Ms. Smith's demand for half the value of Mr. Wolf's LLC interest in Savings Home, which Rodgers characterized as a "claim" against Mr. Wolf's estate, for failure to properly present a claim pursuant to N.C. Gen. Stat. § 28A-19-1, a statute governing claims against an estate.

---

6. In November 2016, the defendants in the Savings Home Action filed a motion to dismiss Ms. Smith's claim—later refiled as a summary judgment motion—asserting that Ms. Smith was a mere unpaid judgment creditor of Mr. Wolf's estate with no standing to sue Savings Home or its members. As a judgment creditor, they argued, Ms. Smith should have filed a notice of claim against the estate, but the statute of limitations for doing so had expired. Rodgers—Ms. Smith's co-plaintiff—also joined in the motion, asserting that Ms. Smith "was difficult to work with" and was "obstructing the process," exposing him to potential liability. The motion was later withdrawn.

7. On the date of the letter, the balance of funds in the law firm's trust account derived from Savings Home was $193,009.96.

B. This Action and Related Proceedings

On 22 March 2017, Ms. Smith filed suit in New Hanover County Superior Court, alleging claims against Defendants for breach of fiduciary duty, conversion, and for a declaratory judgment that she is entitled to her half of the distributive value of the LLC interest in Savings Home without having to file a claim against Mr. Wolf's estate. Defendants filed a motion to dismiss the action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that Ms. Smith's claims were time-barred by statutes governing claims against a decedent's estate.

On 31 August 2017, the remaining parties in the Savings Home Action agreed to a second consent order ("the 2017 consent order") which required Sherman and Rodgers, PLLC to pay to the New Hanover County Clerk of the Superior Court, among other things, the funds in the law firm's trust account derived from Savings Home, and provided for the trial court to appoint a commissioner to manage and sell the remaining assets of Savings Home. The 2017 consent order also relieved Sherman and Rodgers, PLLC from "any further duties under the 2016 consent order."

One month later, after a hearing in this action, the trial court granted Defendants' motion to dismiss Ms. Smith's complaint, holding that she had failed to state a claim for which relief could be granted. Ms. Smith appeals.

II. Analysis

A. Declaratory Judgment Claim

[1] The trial court concluded that Ms. Smith's claims are subject to Section 28A-19-1 of our General Statutes and are time-barred by that statute because she did not file her claim within 90 days of the estate administrator's notice to creditors that Mr. Wolf had died and his debts were to be handled by his estate. Ms. Smith argues this ruling is error. For reasons explained below, we agree that Ms. Smith's claim to enforce the ED Order through a declaratory judgment falls outside the scope of Chapter 28A and within the scope of Section 50 of our General Statutes, which governs equitable distribution proceedings. But our holding that this claim is an equitable distribution matter is also fatal to subject matter jurisdiction in the superior court. Accordingly, we vacate the trial court's order of dismissal on the merits of Ms. Smith's declaratory judgment claim and dismiss that claim for lack of subject matter jurisdiction.

1. Equitable Distribution Versus Estate Administration

Equitable distribution is the process by which a court divides property belonging to a married couple based upon a variety of statutory factors. N.C. Gen. Stat. § 50-20(c) (2017). It is presumed that an in-kind distribution of marital property is equitable; however, if the presumption is rebutted by the greater weight of the evidence, or "by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind," the court shall provide for a distributive award to be paid by either party, incrementally or in a lump sum, to achieve equity between the parties. *Id.* §§ 50-20(b)(3), (e). "The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation." *Id.* § 50-20(k).

Chapter 28A establishes the procedure for the administration of a decedent's estate. The personal representative appointed to oversee the decedent's estate is obligated to, among other things, accumulate the assets of the estate, notify potential claimants, and pay valid claims against the estate. Different categories of claims are paid according to a statutory hierarchy, which includes the following:

> (a) After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:
>
> . . . .
>
> Sixth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at the decedent's death. . . .
>
> Eighth class. A claim for equitable distribution.
>
> Ninth class. All other claims.

N.C. Gen. Stat. § 28A-19-6(a) (2017). The eighth class of claims was added to the statute in 2005, after Section 50-20(l) had been amended to provide that equitable distribution claims whether pending or not yet filed at the time of a spouse's death, could be pursued against the decedent's estate. Act of July 12, 2005, ch. 180, sec. 1, 2005 N.C. Sess. Laws 307.

This Court held in *Painter Jamieson v. Painter*, 163 N.C. App. 527, 594 S.E.2d 217 (2004), that an award in an equitable distribution proceeding pending prior to the death of one spouse is not a "claim" with

respect to Chapter 28A-19-6(a), but "represents [the surviving spouse's] portion of the marital property." *Id.* at 529, 594 S.E.2d at 218.

In *Painter*, during the pendency of an equitable distribution action with his former spouse, Dr. Painter died. *Id.* at 528, 594 S.E.2d at 218. The personal representative of Dr. Painter's estate was substituted for Dr. Painter in the equitable distribution proceeding, and the parties eventually agreed to a consent order by the district court awarding Deborah Woodward Painter a distributive payment of $167,413.48. *Id.* at 528, 594 S.E.2d at 218. By May 2002, however, the estate had not paid the award. *Id.* at 528, 594 S.E.2d at 218. Deborah filed a motion for contempt against the personal representative seeking immediate payment of the award. Deborah argued—and the district court agreed—that the award was not governed under North Carolina estate law, but "[was] her own money . . . and [did] not [] belong to the estate." *Id.* at 529, 594 S.E.2d at 219. The district court ordered the personal representative to pay the award within thirty days. *Id.* at 529, 594 S.E.2d at 219.

Reviewing the personal representative's appeal, this Court acknowledged "the obvious conflict between the policy of equitable distribution and the application of Chapter 28A to unpaid distributive awards ordered pursuant to an Equitable Distribution Order," *id.* at 531, 594 S.E.2d at 220, but expressly rejected the argument that, "where one party dies before he pays the distributive award[,] Chapter 28A must be utilized to administer the estate and the distribution award becomes a claim against [the] decedent's estate." *Id.* at 531, 594 S.E.2d at 220. We explained that "the distributive award should not be treated as a claim under Chapter 28A" because that statute "provides that [a] decedent's estate is comprised of [a] decedent's assets, including all [of a] decedent's real and personal property." *Id.* at 531, 594 S.E.2d at 220 (citing N.C. Gen. Stat. § 28A-15-1(a) (2004)) (emphasis omitted). Instead, we held: "Although [a] decedent's assets include those he acquired from the equitable distribution order, *his assets do not include those marital assets awarded to his former spouse.*" *Id.* at 531, 594 S.E.2d at 220 (emphasis added).

Our decision in *Painter* also addressed how its holding affected the administration of a deceased ex-spouse's estate:

> Where payment is due from a decedent to a former spouse to account for the former spouse's portion of the marital estate, that payment must be made first. Only after the marital estate is separated from decedent's estate can

> the administrator determine decedent's assets and proceed to pay the creditors and distribute the assets of the estate pursuant to Chapter 28A.

Id. at 532-33, 594 S.E.2d at 221.

This Court recently followed *Painter* in *Watson v. Joyner-Watson*, which, like this case, arose from a superior court proceeding and held that an equitable distribution award owed to a surviving spouse "is neither part of the deceased spouse's estate nor subject to the traditional procedures governing claims against the estate." __ N.C. App. __, __, __ S.E.2d __, __ (Dec. 18, 2018) (COA18-524).

Considering section 50-20(k)'s provision that equitable distribution rights vest on the date of a couple's separation, as well as the express holdings in *Painter* and *Watson* that marital assets distributed to a surviving spouse are not part of a deceased spouse's estate, we conclude that as a result of the ED Order, half of Mr. Wolf's LLC interest in Savings Home belonged to Ms. Smith at the time of his death, and that asset did not become part of Mr. Wolf's estate.

Defendants argue that statutory amendments applicable to equitable distribution claims against decedents' estates require a different analysis. We disagree.

In 2003, the General Assembly amended Section 50-20 to add the following pertinent language:

> (l)(1) A claim for equitable distribution, whether an action is filed or not, survives the death of a spouse so long as the parties are living separate and apart at the time of death.
>
> > (2) The provisions of Article 19 of Chapter 28A of the General Statutes shall be applicable to a claim for equitable distribution against the estate of the deceased spouse.

N.C. Gen. Stat. § 50-20(l) (2017). Unlike *Painter* and *Watson*, the ED Order in this case post-dates the amendment. So we must consider how Section 50-20(l) affects enforcement of an equitable distribution award entered prior to the death of a party, and specifically whether the distribution award becomes a "claim" against the decedent's estate and thus governed by Chapter 28A.

If a statute's language is clear and unambiguous, no further analysis is necessary "and the courts must give it its plain and definite meaning."

Quality Built Homes Inc. v. Town of Carthage, 369 N.C. 15, 19, 789 S.E.2d 454, 457 (2016).

It is reasonable to construe the plain language of "a claim for equitable distribution against the estate of a deceased spouse" to include a yet-to-be-asserted claim for equitable distribution from marital property held by a spouse at the time of his death, as well as a claim previously filed and pending at the time of death. This language plainly does not include an equitable distribution award already ordered, but not yet satisfied, *before* the decedent's death and necessarily *before* the existence of the estate.

Section 50-20(l), created by the General Assembly in 2001, initially provided: "A *pending action* for equitable distribution shall not abate upon the death of a party." Act of Aug. 10, 2001, ch. 364, sec. 2, 2001 N.C. Sess. Laws 1167 (emphasis added). The statute did not mention Chapter 28A, which governs decedents' estates, and this Court held that it "abrogated the Supreme Court's decision in *Brown v. Brown*, which held an *equitable distribution claim* abated upon the death of a party." *Estate of Nelson ex rel. Brewer v. Nelson*, 179 N.C. App. 166, 170-71, 633 S.E.2d 124, 128 (2006) (emphasis added); *see also Stann v. Levine*, 180 N.C. App. 1, 12, 636 S.E.2d 214, 221 (2006) (agreeing with *Nelson*). In *Brown v. Brown*, the parties were separated and were in pending divorce and equitable distribution proceedings; however, before the trial court entered a final divorce decree and a final equitable distribution judgment, the wife died. 353 N.C. 220, 222, 539 S.E.2d 621, 622 (2000). The Supreme Court in *Brown* held that, because an "equitable distribution . . . is inextricably linked with divorce proceedings," the wife's death prior to a final divorce decree abated her claim for equitable distribution. *Id.* at 227, 539 S.E.2d at 625. *Brown* also explained that its "reasoning [did] not contradict *Tucker v. Miller*, 113 N.C. App. 785, 788, 440 S.E.2d 315, 317 (1994)," which "held that an equitable distribution action survived a party's death" occurring after a final divorce decree but before final resolution of the equitable distribution proceeding. *Id.* at 225 n.1, 539 S.E.2d at 624 n.1.

The 2003 amendment to Section 50-20(l) replaced the reference to "a pending action for equitable distribution" with "a claim for equitable distribution, whether an action is filed or not." Act of June 12, 2003, ch. 168, sec. 1, 2003 N.C. Sess. Laws 230 31. The General Assembly noted that the amendment was intended to "allow a claim for equitable distribution to not only survive the death of one of the spouses but also *to be filed* after" a spouse's death if the spouses were separated at the time of death. North Carolina Bill Summary, 2003 Reg. Sess. S.B. 394

(June 12, 2003) (emphasis added). The General Assembly also noted its intent that all "claim[s] against the estate [are] subject to the same filing and notice requirements" like all other creditors "under Article 19 of Chapter 28A." *Id.*

Based on the plain language of the statute, and consistent with related statutes and our precedents, we hold that absent the death of a spouse *prior to* adjudication of an equitable distribution proceeding, Section 50-20(l)(2) does not require the surviving spouse to comply with Section 28A-19-3's filing and notice requirements to enforce an equitable distribution order. Section 50-20(l) does not affect Ms. Smith's right to collect her distributional share of Mr. Wolf's LLC interest in Savings Home. Because the ED Order severed the marital property into separate and distinct assets with respect to each party, Ms. Smith's demand to excise her distributional property from Mr. Wolf's estate is not a "claim" for the purposes of Section 28A-19-6.

Defendants argue in the alternative that, if we do not conclude Ms. Smith has asserted an equitable distribution claim against Mr. Wolf's estate, she was still obligated to comply with Chapter 28A because the ED Order is a judgment, docketed and a lien on the property of Mr. Wolf at the time of his death, falling under the sixth class in the hierarchy of claims against an estate. N.C. Gen. Stat. § 28A-19-6(a). This argument is precluded by this Court's holdings in *Painter* and *Watson*, which explain that an equitable distribution order vests in the surviving spouse a property right that is not subject to Section 28A-19-6(a). Unlike equitable distribution claims, which were added to the hierarchy of claims against a decedent's estate in 2005, docketed judgments have been listed in the hierarchy of claims for more than a century. Defendants have cited no appellate decisions, and we have found none, characterizing an equitable distribution order as a judgment within the scope of Section 28A-19-6(a).

2. Subject Matter Jurisdiction

[2] Because Ms. Smith's claim of ownership in half of Mr. Wolf's LLC interest is not a "claim" falling within Chapter 28A, but a separate asset outside of Mr. Wolf's estate and within the scope of the ED Order, the superior court should have dismissed Ms. Smith's declaratory judgment claim pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. The district court's ED Order established exclusive original jurisdiction over the parties' equitable distribution process.

This Court's recent decision in *Watson*, which followed *Painter*, explained its consequence for subject matter jurisdiction, holding that "the entire equitable distribution process—including the enforcement

of an unpaid distributive award—is governed by N.C. Gen. Stat. § 50 *et seq*. and is under the authority of the district court pursuant to N.C. Gen. Stat. § 7A-244." __ N.C. App. at __, __ S.E.2d at __.

In *Watson*, the district court entered an equitable distribution order in 1999, which named the wife as sole beneficiary of the husband's survivor benefit plan and provided that, if the husband did not make the wife sole beneficiary before his death, an amount equal to the plan's present value would become an obligation of the husband's estate. *Id.* at __, __ S.E.2d at __. The husband died before naming the wife as beneficiary, and the wife filed a claim against his estate in superior court. The trial court dismissed the wife's claim pursuant to Rule 12(b)(1) because she "failed to file her claims with the appropriate division of the general court of justice." *Id.* at __, __ S.E.2d at __.

Watson followed the holding in *Painter* that property rights arising from an equitable distribution order vest at the time of separation and are not subject to statutes governing estate administration. But because *Watson*, unlike *Painter*, arose from an action in superior court, this Court had to address the delineation between the jurisdiction and powers of the trial court division, governed by Chapter 7A of our General Statutes. *Id.* at __, __ S.E.2d at __ (citing N.C. Gen. Stat. § 7A-240 *et seq*. (2017)). We explained:

> [T]he superior court maintains "[e]xclusive original jurisdiction for the probate of wills and the administration of decedents' estates[.]" N.C. Gen. Stat. § 7A-241 (2017). Under the auspice of the superior court, the personal representative of a decedent's estate "must follow the requirements of Chapter 28A, which include . . . paying claims against the estate," among other responsibilities. *Painter-Jamieson v. Painter*, 163 N.C. App. 527, 530, 594 S.E.2d 217, 219 (2004); *see generally* N.C. Gen. Stat. § 28A (2017).
>
> In contrast, the district court exercises subject matter jurisdiction over "civil actions and proceedings for . . . equitable distribution of property . . . and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof." N.C. Gen. Stat. § 7A-244 (2017). Equitable distribution is a process that occurs upon the dissolution of a marriage whereby the district court divides "property acquired during the marriage" among former spouses "in recognition that marital property and divisible property are species of

> common ownership." *Painter-Jamieson*, 163 N.C. App. at 532, 594 S.E.2d at 220 (quoting N.C. Gen. Stat. § 50-20(k)) . . . . *Thus, the entire equitable distribution process—including the enforcement of an unpaid distributive award—is governed by N.C. Gen. Stat. § 50 et seq. and is under the authority of the district court pursuant to N.C. Gen. Stat. § 7A-244.*

Id. at __, __ S.E.2d at __ (emphasis added). We concluded that, because the "plaintiff's portion of the [marital estate] is excluded from the decedent's estate, the superior court properly dismissed [her] claims for lack of subject matter jurisdiction." *Id.* at __, __ S.E.2d at __. The plaintiff's distributive award was "neither part of the [decedent's] estate *nor subject to the traditional procedures governing claims against the estate*." *Id.* at __, __ S.E.2d at __ (citing *Painter*, 163 N.C. App. at 532-33, 594 S.E.2d at 221) (emphasis added).

Here, instead of filing her action in the district court, where the ED Order originated, Ms. Smith brought an action in New Hanover County Superior Court in an attempt to enforce her right to a distributive share in Mr. Wolf's LLC interest. It follows from Ms. Smith's argument that her distributive share is not within her former husband's estate under Chapter 28A and is separate from Mr. Wolf's estate that she "must attempt to enforce her rights through the underlying equitable distribution action." *Id.* at __, __ S.E.2d at __. As established in *Painter*, and as reiterated in *Watson*, Chapter 28A is not the "mechanism for enforcement," as "the district court maintains authority over the enforcement of" the ED Order. *Id.* at __, __ S.E.2d at __.

B. Breach of Fiduciary Duties and Conversion

[3] Ms. Smith also appeals the trial court's dismissal of her claims for breach of fiduciary duty and conversion. Her complaint alleges that (1) Rodgers breached his fiduciary duty to her by not complying with the ED Order and by improperly exercising his power as representative of Mr. Wolf's estate; (2) Sherman and Rodgers, PLLC breached its fiduciary duty to her by mishandling assets it held in trust for her benefit as a result of the 2016 consent order; and (3) Defendants are liable to her for conversion because they continued to exercise dominion and control over her distributive share in the LLC interest after she demanded they relinquish it to her. The trial court dismissed those claims, along with Ms. Smith's declaratory judgment claim, pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim for which relief can be granted.

The tort claims, unlike the declaratory judgment claim, are not clearly within the holdings of *Painter* and *Watson*. Neither of those cases involved tort claims, and unlike a claim to enforce an equitable distribution award, tort claims do not fall within the exclusive jurisdiction of the district court. *Compare* N.C. Gen. Stat. § 7A-244 (2012) (district court is proper division for all equitable distribution matters), *with* N.C. Gen. Stat. § 7A-243 (2012) (civil claims seeking damages in excess of $10,000 are properly filed in the superior court).[8] Ms. Smith's complaint seeks, in addition to $209,642 related to the ED Order, double damages, punitive damages, and attorneys' fees. Accordingly, based upon a review of the complaint on its face, we hold that the superior court had subject matter jurisdiction to hear those claims and we therefore review *de novo* the trial court's dismissal of those claims on their merits.

But Ms. Smith limits her appeal from the trial court's dismissal of her tort claims to the same argument she asserts regarding her declaratory judgment claim—that these claims are not time-barred by Chapter 28A's limitations on claims against a decedents' estates. She argues that all three claims "rise and fall" on this single legal issue. Ms. Smith offers no argument distinguishing the factual allegations or legal theories supporting her tort claims from those supporting her declaratory judgment claim. She offers no argument regarding the elements of these tort claims.

Ms. Smith has offered no argument in this regard on appeal and abandoned any appeal from the dismissal of these claims on their merits. We affirm the trial court's dismissal of these claims pursuant to Rule 12(b)(6).

III. Conclusion

While Ms. Smith's declaratory judgment claim to enforce her equitable distribution rights is not time-barred by Section 28A-19-3, she must

---

8. We note that N.C. Gen. Stat. §§ 7A-240 and 7A-242, respectively titled "Original civil jurisdiction generally" and "Concurrently held original jurisdiction allocated between trial divisions," provide that, with the exception of proceedings in probate and estate matters, the district court and superior court have concurrent jurisdiction in civil matters. Section 7A-242 explains that "[f]or the efficient administration of justice in respect of civil matters as to which the trial divisions have concurrent original jurisdiction, the respective divisions are constituted proper or improper for the trial and determination of specific actions in accordance with allocations in this Article." Section 7A-244, which this Court in *Watson* held gives exclusive jurisdiction in all equitable distribution proceedings to the district court, provides that the district court "is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for . . . equitable distribution of property." We follow *Watson*'s interpretation of Section 7A-244. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

enforce those rights in the district court, which has exclusive jurisdiction over the enforcement of its equitable distribution order. Accordingly, we vacate the trial court's order dismissing the declaratory judgment claim on its merits and remand to the trial court to dismiss that claim pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Absent any argument on appeal regarding the merits of the claims for breach of fiduciary duty and conversion independent of her equitable distribution rights, we affirm the trial court's dismissal of those claims pursuant to Rule 12(b)(6).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges TYSON and BERGER concur.

STATE OF NORTH CAROLINA
v.
CORNELIUS EDWARD NIXON, III

No. COA18-787

Filed 5 February 2019

Indictment and Information—information—express waiver of indictment—guilty plea—motion for appropriate relief

Defendant was entitled to relief from two criminal convictions where he was charged by a bill of information that did not include or attach an express waiver of indictment pursuant to N.C.G.S. § 15A-642(c). The lack of a formal waiver deprived the trial court of jurisdiction to accept defendant's guilty plea and enter judgment on the convictions.

Appeal by Defendant from an Order entered 4 December 2017 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 14 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

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

HAMPSON, Judge.

I. Factual and Procedural Background

On 7 November 2017, Cornelius Nixon (Defendant) filed a Motion for Appropriate Relief (MAR), seeking relief from criminal convictions. The Record based upon the proceedings on the MAR below tends to show the following relevant facts:

On 26 July 2004, a New Hanover County grand jury indicted Defendant for committing a Crime Against Nature. Subsequently, and at some point on or before 2 March 2006, a Bill of Information issued which charged Defendant with the offenses of Crime Against Nature, Indecent Liberties with a Child, and Contributing to the Delinquency of a Juvenile.[1] The Bill of Information included in the Record before us, although signed by Defendant and his trial counsel, contains no express language waiving indictment and no waiver of indictment is attached to the Bill of Information.

On 2 March 2006, in accordance with a plea arrangement, Defendant pleaded guilty to the charges of Indecent Liberties with a Child and Contributing to the Delinquency of a Minor, and the State agreed to dismiss the charge of Crime Against Nature. The presiding Superior Court Judge entered a consolidated Judgment on two charges, sentencing Defendant to a minimum of 19 months and a maximum of 23 months in the custody of the North Carolina Department of Adult Correction. The Judgment, however, erroneously included the charge of Crime Against Nature rather than the charge of Contributing to the Delinquency of a Minor.

On 7 November 2017, Defendant filed his MAR seeking to have the Judgment against him arrested or vacated and alleging two claims for relief: (1) the trial court lacked subject matter jurisdiction over all the charges because no waiver of indictment was attached to or executed upon the Bill of Information such that Defendant had not validly waived indictment; and (2) the Judgment erroneously included the charge of Crime Against Nature, and should be corrected.

On 4 December 2017, the trial court entered its Order on Defendant's MAR granting Defendant relief in part. The trial court vacated the erroneous Crime Against Nature conviction, but denied Defendant relief on his jurisdictional claim. Specifically, the trial court found Defendant had signed the Bill of Information, although the trial court recognized the document lacked specific language reciting Defendant's waiver of an indictment. The trial court concluded that, "[b]y signing the bill

1. The Bill of Information before us in the Record contains no date.

of information, Defendant accepted it in lieu of an indictment and acknowledged that he had received notice of the charges against him[,]" which "operate[d] as a waiver of Defendant's right to an indictment[.]"

On 27 April 2018, this Court granted Defendant's Petition for Writ of Certiorari for the purpose of reviewing the 4 December 2017 Order. *See* N.C. Gen. Stat. § 15A-1422(c)(3) (2017).

II. Issue

The sole issue is whether the trial court erred in denying Defendant's MAR alleging the trial court lacked subject matter jurisdiction to enter the original Judgment where Defendant was charged by way of a Bill of Information which did not include or attach an express waiver of indictment for the crimes of Indecent Liberties with a Minor and Contributing to the Delinquency of a Minor.

III. Analysis

A. Standard of Review

"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)). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

"A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief." N.C. Gen. Stat. § 15A-1420(c)(6) (2017). "If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5). As a result, a defendant seeking an MAR bears the burden of proof before the trial court. *State v. Hyman*, ___ N.C. ___, ___, 817 S.E.2d 157, 172 (2018).

B. Denial of Defendant's MAR

A trial court "acquires jurisdiction of the offense by valid information, warrant, or indictment." *State v. Willis*, 285 N.C. 195, 201, 204 S.E.2d 33, 37 (1974). "There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes

jurisdiction a trial and conviction are a nullity." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966) (citation and quotation marks omitted). "[A] court has no authority to accept a plea to a charge until it has properly acquired jurisdiction." *State v. Brown*, 21 N.C. App. 87, 88, 202 S.E.2d 798, 798 (1974). "[A] plea of guilty standing alone does not waive a jurisdictional defect." *State v. Stokes*, 274 N.C. 409, 412, 163 S.E.2d 770, 772 (1968).

Under the North Carolina Constitution:

> Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

N.C. Const. Art. I, Sec. 22. In felony cases initiated in Superior Court, the General Assembly has prescribed the pleading must be a bill of indictment, "unless there is a waiver of the bill of indictment as provided in G.S. 15A-642." N.C. Gen. Stat. § 15A-923(a), (c) (2017). N.C. Gen. Stat. § 15A-642 allows for the waiver of an indictment in non-capital cases in Superior Court where a defendant is represented by counsel. N.C. Gen. Stat. § 15A-642(b) (2017). The statute further requires: "Waiver of Indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information." N.C. Gen. Stat. § 15A-642(c).

In this case, it is undisputed Defendant, along with his trial counsel, signed a Bill of Information informing him of the charges against him and the relevant factual details thereof. The form used for the Bill of Information itself contains absolutely no language waiving indictment and no waiver appears to be attached or included in the Record before us. This Court has previously held "the absence of a sufficient accusation or a formal waiver of indictment deprived the trial court of jurisdiction to accept defendant's plea and to enter judgment." *State v. Neville*, 108 N.C. App. 330, 333, 423 S.E.2d 496, 497 (1992).

The State contends we should not deem the specific statutory requirements of section 15A-642 to be jurisdictional. The State further contends Defendant has offered no evidence Defendant did not, in fact, waive indictment even if it is not evidenced in writing and, thus, cannot meet his burden to show grounds for relief on his MAR.[2] However,

2. The State offered no evidence of a waiver in fact to rebut Defendant's claims.

in light of *Neville*, these statutory requirements intended to carry out the constitutional mandate of Article I, Section 22 are jurisdictional and mandatory. *See, e.g.*, *State v. Wolfe*, 158 N.C. App. 539, 540-41, 581 S.E.2d 117, 118 (2003) ("Both our State Constitution and Criminal Procedure Act require indictment or waiver thereof in order for a superior court to have jurisdiction in a criminal case"); *State v. Daniel*, 19 N.C. App. 313, 314, 198 S.E.2d 464, 464 (1973) (under a predecessor statute: "In non-capital felony cases a defendant may waive a bill of indictment only *when represented by counsel* and when both defendant *and his counsel* sign a written waiver of indictment" (emphasis in original)).

The absence, in this case, of a formal waiver signed by both Defendant and his counsel on or attached to the Bill of Information meeting the statutory requirements of N.C. Gen. Stat. § 15A-642(c) deprived the trial court of jurisdiction to accept Defendant's guilty plea and enter the original Judgment.

Moreover, the initial indictment for the charge of Crime Against Nature – a charge which was ultimately dismissed pursuant to the plea arrangement – does not vest the trial court with jurisdiction over the subsequent charges of Indecent Liberties and Contributing to the Delinquency of a Minor. While it is true an indictment for one offense may permit a defendant to be lawfully convicted of lesser included offenses, neither Indecent Liberties nor Contributing to the Delinquency of a Minor is a lesser included offense of Crime Against Nature. *See State v. Copeland*, 11 N.C. App. 516, 520, 181 S.E.2d 722, 724 (1971) (Indecent Liberties is not a lesser included offense of Crime Against Nature); *State v. Cronan*, 100 N.C. App. 641, 646, 397 S.E.2d 762, 765 (1990) ("the act of sexual intercourse is not inherent to the crime of contributing to the delinquency of a minor"). We hold Defendant has met his burden to show the existence of the asserted grounds for relief in his MAR. *See Hyman*, ___ N.C. at ___, 817 S.E.2d at 172.

IV. Conclusion

Accordingly, we reverse the portion of the trial court's 4 December 2017 Order denying Defendant's MAR. We remand this matter to the trial court, with instructions to grant the MAR, and to vacate the 2 March 2006 Judgment against Defendant.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge HUNTER concur.

STATE v. SHELTON

[263 N.C. App. 681 (2019)]

STATE OF NORTH CAROLINA
v.
JOSEPH BRIAN SHELTON

No. COA17-1426

Filed 5 February 2019

1. Motor Vehicles—felony death by vehicle—impairment—sufficiency of evidence

In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, the State presented sufficient evidence from which the jury could reasonably infer that (1) defendant was appreciably impaired due to ingesting two controlled substances that were present in a blood sample taken after the incident and (2) that the impairment was a proximate cause of the victim's death. Both controlled substances have as possible side effects drowsiness or dizziness; defendant failed to see the victim standing at the side of the road; he admitted he did not know he had struck a human being in the collision; and despite his brakes malfunctioning, he continued to drive all the way to his home.

2. Evidence—felony death by vehicle—officer testimony—prejudice analysis

In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, defendant failed to show that he was prejudiced by the exclusion of testimony of an investigating officer that he did not charge defendant with driving while impaired immediately after the collision. Even if the trial court erred by sustaining the State's objection, it was apparent that defendant was not charged separately with that offense, a fact acknowledged by the prosecutor during closing argument.

3. Criminal Law—felony death by vehicle—prosecutor's closing argument—propriety

In a prosecution for multiple crimes arising from a hit-and-run that killed a pedestrian, the trial court was not required to intervene in the prosecutor's closing argument, where the entirety of the closing argument correctly stated the law regarding impairment and the trial court's instruction on impairment was not challenged by defendant. Moreover, the State's appeal to the jury to be the voice and conscience of the community when considering the verdict was not so grossly improper that intervention was required.

Appeal by defendant from judgment entered 9 May 2017 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 16 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

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

DAVIS, Judge.

In this case, we address the quantum of evidence the State must present in order to survive a defendant's motion to dismiss a charge of felony death by vehicle arising out of the presence of narcotics in an unknown quantity in the defendant's blood. Because we are satisfied that the State's evidence was sufficient to raise a jury issue as to whether the defendant was, in fact, appreciably impaired, we conclude that the trial court correctly denied his motion to dismiss.

Factual and Procedural Background

The State's evidence at trial tended to show the following: On 22 July 2015, Joseph Brian Shelton ("Defendant") woke up at 6:30 a.m. and ingested Oxycodone, a drug that had been prescribed by his doctor for pain stemming from injuries he had received in a car accident in 2009. The pharmacist's label on the pill bottle warned that the drug could cause drowsiness or dizziness and thus to "use caution when operating a vehicle, vessel or machine." Despite the fact that his driver's license had been revoked for over a year, Defendant got into his green Dodge pickup truck and drove from his home in Sneads Ferry to his place of employment in Surf City. At 11:00 a.m., Defendant ingested another drug, Tramadol, for which he also possessed a prescription. The Tramadol bottle likewise contained warnings about the drug's potential to cause drowsiness and dizziness.

Defendant left work to drive home at 5:00 p.m. that day. At approximately 5:10, Defendant was driving eastbound on Old Folkstone Road, a two-lane road in Onslow County, behind a silver Ford Range Rover being operated by Robin Jones. At the same time, Rebecca Lovely was driving her vehicle behind Defendant's truck. As these three vehicles traveled along Old Folkstone Road at approximately 45-50 miles per hour, both Jones and Lovely saw 53-year-old Rhonda Anderson standing to the right in a grassy area near a group of "two or three" mailboxes

located about three feet away from the side of the road. Approximately 150 yards away, Lee Hill, who was sitting in a pick-up truck facing Old Folkstone Road, also saw Anderson standing by the mailboxes. Although the road was straight, weather conditions were clear, and it was fully light outside, Defendant did not notice Anderson.

As Jones approached the intersection of Old Folkstone Road and Winery Road, he slowed down to turn left on Winery Road. Defendant attempted to slow down as well, but his brakes failed and "went straight to the floor." Although there was no oncoming traffic in the westbound lane to Defendant's immediate left, he swerved to the right through the grassy area and into a ditch. As he did so, Defendant's truck struck Anderson, causing her body to fly 59 feet through the air before hitting the ground. Defendant's truck also hit the rear of Jones' vehicle, causing the truck's driver's side mirror to become detached. Unaware that his truck had collided with Anderson and despite the failure of his brakes moments earlier, Defendant chose to accelerate out of the ditch and drive to his home where he was forced to use his emergency brakes to bring his truck to a stop in his driveway.

At the scene of the collision, Lovely called 911 and went over to the area where Anderson's body had landed. She observed that Anderson was "laying on her back, with both of her legs up on [the] other side of her body . . . [Anderson's] head was bleeding through her hair . . . . She wasn't breathing . . . . and there were no signs of life." Paramedics arrived and declared Anderson dead on the scene.

Dr. William Kelly, a forensic pathologist who examined Anderson's body, found that the cause of death was "multiple blunt trauma." He testified that Anderson's skull was fractured and that she also had a large open fracture of her right hip. In addition, Anderson's left femur was broken, and she had a five-inch-long bruise along the lower part of her left leg.

The collision was investigated by the North Carolina State Highway Patrol. After a call went out that the hit-and-run driver was operating a green Dodge pickup truck missing its driver's side mirror, Trooper James Kirk responded to the call and patrolled the area surrounding the scene of the accident in an attempt to find a vehicle matching that description. At 6:45 p.m., Trooper Kirk observed Defendant's green Dodge pickup truck parked in his driveway. Trooper Kirk pulled into the driveway, exited his vehicle to look at the truck, and saw that the driver's side mirror was missing. As Trooper Kirk was inspecting the truck, Defendant came outside and stated that he knew that Trooper Kirk was there about "the wreck [Defendant] was in on Old Folkstone Road."

Trooper Kirk took Defendant to his patrol car and advised him of his *Miranda* rights, which Defendant waived. In addition to answering Trooper Kirk's questions, Defendant also wrote out a statement, explaining that "when [the] vehicle in front of me had slammed on [his] brakes very unexpected, I tried to stop but my brake pedal failed and went straight to the floor." Defendant also told Trooper Kirk that he "swerved to the right so [he] wouldn't hit another car head-on, but [he] just did clip the truck." Defendant explained that because he knew his license had been revoked, he "panicked" and fled the scene.

Trooper Kirk was aware that a pedestrian had been involved in the collision but did not yet know the extent of her injuries. For this reason, he did not question Defendant about his truck striking Anderson. Nor did Defendant mention having hit anyone with his truck. Defendant told Trooper Kirk he had not consumed any alcohol that day. At 7:05 p.m., Trooper Kirk gave Defendant a portable breathalyzer test, which confirmed the absence of alcohol in Defendant's body. Trooper Kirk did not ask Defendant if he had ingested any other controlled substances, and Defendant did not volunteer the information that he had taken either Oxycodone or Tramadol.

Troopers Johnathan Acuna and Matt Bryan responded to the scene of the collision at approximately 6:00 p.m. Trooper Acuna was the lead investigator, and Trooper Bryan collected evidence. Trooper Acuna learned from paramedics that Anderson had died on the scene. He interviewed Lovely, Jones, and other witnesses and took their statements. After the scene was cleared, Troopers Acuna and Bryan went to Defendant's home.

At Defendant's residence, Trooper Acuna interviewed Defendant in his patrol car. Defendant did not volunteer much information but was polite and cooperative and answered all of Trooper Acuna's questions. Once again, Defendant was not asked whether he had consumed any controlled substances and did not affirmatively disclose to the officers the fact that he had taken either Oxycodone or Tramadol earlier that day.

During the interview, Trooper Acuna told Defendant that his vehicle had struck Anderson and that she had been killed. Defendant "didn't believe it" and "seemed pretty upset." Trooper Bryan obtained a search warrant for Defendant's truck and arranged to have it towed from his home. While backing Defendant's truck out of the driveway for the tow truck, Trooper Bryan attempted to apply the brakes, but the pedal went all the way to the floor. Trooper Acuna subsequently conducted an inspection of Defendant's truck on 27 July 2015 during which he noted a mechanical brake failure and concluded that the "vehicle has no brakes."

In accordance with the protocol followed by the Highway Patrol in connection with fatal motor vehicle accidents, Trooper Bryan obtained a search warrant to collect a sample of Defendant's blood on the night of the accident. The blood sample was submitted to the crime laboratory of the North Carolina State Bureau of Investigation ("SBI") where chemical analyst Natasha Testa ultimately determined that both Oxycodone and Tramadol were present in Defendant's blood.

On the night of the collision, Trooper Acuna charged Defendant with a number of offenses, including misdemeanor death by vehicle, failure to reduce speed to avoid a collision, failure to report an accident resulting in property damage in excess of $1,000, operating a motor vehicle with improper brakes, and driving with license revoked. Defendant was not charged by Trooper Acuna with driving while impaired.

On 13 October 2015 — which was after the results of Defendant's blood test revealed the presence of Oxycodone and Tramadol in his blood — Defendant was indicted by an Onslow County grand jury on charges of second-degree murder, felony death by vehicle, driving with no liability insurance, felony hit and run by failing to immediately stop at the scene of an accident, felony hit and run by failing to remain at the scene of an accident, misdemeanor death by vehicle, failure to reduce speed to avoid a collision, failure to report an accident resulting in property damage in excess of $1,000, operating a motor vehicle with improper brakes, and driving with license revoked. Prior to Defendant's trial, the charges of failure to report an accident, failure to reduce speed to avoid a collision, driving with no liability insurance, and felonious hit and run by failing to remain at the scene of an accident were dismissed.

A jury trial was held beginning on 1 May 2017 in Onslow County Superior Court before the Honorable Charles H. Henry. The State called fourteen witnesses, including Lovely, Jones, and Hill; the responding troopers; the medical personnel who examined Anderson; and several expert witnesses, including Testa. Testa testified to the following: (1) she had tested the sample of Defendant's blood for the presence of impairing substances; (2) her tests showed that Oxycodone and Tramadol were present in his blood; (3) the tests revealed the presence of these drugs in amounts equal to or greater than 25 nanograms per milliliter — the "detection limits" used by the SBI for the test; (4) the half-lives of Oxycodone and Tramadol are approximately three to six hours and four to seven hours, respectively; (5) she was unable to determine the precise quantities of the drugs present in Defendant's blood; and (6) she was not able to accurately determine from the test results whether Defendant would have been impaired at the time of the 22 July 2015 accident.

Defendant testified on his own behalf and elicited testimony from four additional witnesses, including three character witnesses and an expert in the field of pharmacology, Professor Brian McMillen. Professor McMillen offered his opinions that (1) he would "not expect to see impairment" in a person who had 25 nanograms per milliliter of both substances in his bloodstream; and (2) people who frequently take Oxycodone and Tramadol develop "a great deal of tolerance" to the drugs.

Defendant moved to dismiss all charges at the close of the State's evidence and again at the close of all the evidence. Both of these motions were denied. On 8 May 2017, the jury found Defendant not guilty of second-degree murder but guilty of the lesser-included offense of involuntary manslaughter as well as of the offenses of felony death by motor vehicle, driving with improper brakes, driving with license revoked, misdemeanor death by motor vehicle, and felonious hit and run resulting in serious injury or death.[1]

On 10 May 2017, Defendant was sentenced to a term of 73 to 100 months imprisonment for the charge of felony death by motor vehicle. All of the remaining convictions were consolidated with the felony hit and run resulting in serious injury or death conviction for which Defendant was sentenced to a consecutive term of 17 to 30 months imprisonment. Defendant gave timely notice of appeal to this Court.

Analysis

On appeal, Defendant contends that the trial court erred by: (1) denying his motion to dismiss the charge of felony death by vehicle; (2) refusing to allow testimony from Trooper Acuna that Defendant was never charged with driving while impaired; and (3) failing to intervene *ex mero motu* during the State's closing argument. We address each argument in turn.

I. Motion to Dismiss

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, 247 N.C. App. 391, 394, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

1. Following the jury's verdict, the trial court arrested judgment on Defendant's convictions for involuntary manslaughter and misdemeanor death by vehicle.

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) (citation omitted). Evidence may be substantial whether it is "direct, circumstantial, or both[.]" *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009).

When reviewing a motion to dismiss, courts are concerned solely "with the sufficiency of the evidence to carry the case to the jury and not with its weight." *State v. Smith*, 40 N.C. App. 72, 80, 252 S.E.2d 535, 541 (1978) (citation omitted). The evidence must be viewed in the light most favorable to the State, "giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). Any discrepancies in the evidence "are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citations and quotation marks omitted).

Our General Assembly has defined the crime of felony death by vehicle, in pertinent part, as follows:

> (a1) Felony Death by Vehicle. — A person commits the offense of felony death by vehicle if:
>
> > (1) The person unintentionally causes the death of another person,
> >
> > (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 . . . , and
> >
> > (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of death.

N.C. Gen. Stat. § 20-141.4 (2017).

The offense of driving while impaired is, in turn, defined in N.C. Gen. Stat. § 20-138.1.

> (a) Offense. — A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> > (1) While under the influence of an impairing substance; or

> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
>
> (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1 (2017).

Here, Defendant was convicted of felony death by vehicle based on the theory of impairment set out in N.C. Gen. Stat. § 20-138.1(a)(1). This Court has held that "[t]o support a charge of driving while impaired, the State must prove that the defendant has . . . taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental facilities, or both, to such an extent that there is an appreciable impairment of either or both of these faculties." *State v. Norton*, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011) (internal citation and quotation marks omitted). The fact that a motorist has consumed impairing substances "when considered in connection with faulty driving or other conduct indicating an impairment of physical and mental faculties, is sufficient *prima facie* to show a violation of N.C. Gen. Stat. § 20-138.1." *Id.* at 79, 712 S.E.2d at 390 (internal quotation marks, brackets, and citation omitted).

[1] Defendant argues that the trial court erred by denying his motion to dismiss because there was a lack of substantial evidence that he was actually impaired at the time he struck Anderson as a result of his prior ingestion of Tramadol or Oxycodone.[2] He contends that the State's evidence merely showed negligence regarding his operation of his truck at the time of the collision as opposed to giving rise to a reasonable inference that he was impaired. We disagree.

It is undisputed that Defendant ingested both drugs on the day of the accident and that they were still present in his blood after the crash. Taking these facts together with the evidence at trial regarding Defendant's lack of awareness of the circumstances around him and his

---

2. We note that unlike N.C. Gen. Stat. § 20-138.1(a)(3), which provides that operating a vehicle with *any* amount of a Schedule I drug present in one's blood or urine constitutes driving while impaired, § 20-138.1(a)(1) requires a finding that the defendant was actually driving "*under the influence* of an impairing substance" in order for criminal liability to attach. N.C. Gen. Stat. §§ 20-138.1(a)(1), (3) (emphasis added).

conduct before and after the collision, reasonable jurors could — and did — find that Defendant was appreciably impaired.

First, evidence was presented that the labels on the bottles of Tramadol and Oxycodone warned that they may cause drowsiness or dizziness and that care should be taken when operating a vehicle after their ingestion. Under North Carolina law, Oxycodone and Tramadol are classified as Schedule II and Schedule IV controlled substances, respectively. *See* N.C. Gen. Stat. §§ 90-90(1)(a)(14), 90-92(a)(5) (2017).

Second, Defendant testified that he failed to see Anderson standing on the side of the road before the accident despite the fact that it was daytime, visibility was clear, and the road was straight. Moreover, all three of the eyewitnesses who testified at trial — one of whom was at least 150 yards away — were able to see Anderson before Defendant struck her with his truck.

Third, Defendant admitted that following the accident he was unaware that his vehicle had even collided with a human being despite the fact that the impact of the collision was sufficiently strong to cause Anderson's body to fly 59 feet through the air down the side of Old Folkstone Road. Fourth, although Defendant testified that his brakes had completely stopped functioning when he attempted to slow down immediately prior to the accident, he decided not to remain at the scene and instead elected to drive his truck out of the ditch back onto Old Folkstone Road and all the way to his home despite the fact that the vehicle lacked operable brakes.

None of this evidence conclusively established that Defendant was legally impaired. But that is not the question before us. Rather, the sole issue is whether sufficient evidence was presented that *could* have led a rational jury to conclude that Defendant was, in fact, impaired. We are unable to agree with Defendant that this standard was not met. The evidence discussed above lends itself to a reasonable inference that Defendant's senses were appreciably impaired at the time of the collision.

Moreover, we reject Defendant's attempt to separate the concepts of negligence and impairment in this context as mutually exclusive. While the evidence certainly shows, at a bare minimum, negligent driving by Defendant, it also supports the conclusion that such negligence was caused by Defendant's impairment due to his ingestion of Tramadol and Oxycodone earlier that day.

Although Defendant also argues that the failure of his brakes was a cause of the accident, the fact that his brakes were in poor condition is

not incompatible with the proposition that he was driving while impaired and that his impairment constituted a proximate cause of the death of Anderson. Based on the evidence presented at trial, the jury could reasonably have concluded that a non-impaired driver — upon realizing his brakes were inoperable — would not have chosen to swerve in the direction of a person standing on the side of the road whose presence should have been clearly visible to him.[3]

Defendant further points to the evidence that the troopers who met with him following the accident did not charge him with driving while impaired. However, although this fact could support an inference of a lack of impairment, when reviewing the trial court's denial of a defendant's motion to dismiss we are required to draw every reasonable inference and resolve every conflict in the *State's* favor — not the defendant's.[4] *See Rose*, 339 N.C. at 192, 451 S.E.2d at 223. The other evidence discussed above — taken in the light most favorable to the State — was sufficient to support a finding that Defendant was, in fact, impaired.

In reaching this result, we are guided by our Supreme Court's decision in *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970). In *Atkins*, the plaintiff was driving on a highway at night in the rain and fog when he collided with the defendant's truck — which was stopped in the plaintiff's lane of travel — that the plaintiff failed to see in time to prevent the accident. *Id.* at 180-81, 176 S.E.2d at 790-91. The plaintiff did not "break his speed" before he hit the defendant's truck with his vehicle. *Id.* at 185, 176 S.E.2d at 793. After the accident, the defendant detected an odor of alcohol on the plaintiff's breath. *Id.* The investigating officer smelled alcohol in the plaintiff's vehicle and observed that there was a pint bottle containing a small amount of whiskey on the floorboard under the front seat of the plaintiff's car. *Id.*

The plaintiff brought a civil action in which he alleged negligence on the part of the defendant. *Id.* at 181, 176 S.E.2d at 791. The defendant asserted the defense of contributory negligence, arguing that the plaintiff had caused the accident by operating his vehicle while under the

---

3. Indeed, Jones testified that there was no oncoming traffic in the westbound lane at the time of the accident, meaning that Defendant could have safely swerved to the left in order to avoid striking both Jones' vehicle and Anderson.

4. It is undisputed that Defendant did not inform the law enforcement officers about his ingestion of Oxycodone or Tramadol. We observe that signs of drowsiness — a side effect of both Oxycodone and Tramadol — would have been less readily apparent during an interview under these circumstances than, for example, the odor of alcohol or bloodshot and glassy eyes typically exhibited by one who has recently consumed alcohol.

influence of alcohol. *Id.* At trial, the jury determined that the plaintiff had, in fact, been contributorily negligent due to his impairment resulting from his prior consumption of alcohol. *Id.* at 183, 176 S.E.2d at 792.

Our Supreme Court held that the evidence presented was sufficient to support the jury's verdict, noting that the plaintiff was traveling 30 miles per hour upon a straight road and failed to see the tractor trailer until he was ten feet away despite the presence of blinking lights and reflectors. *Id.* at 185, 176 S.E.2d at 793. In its opinion, the Court further explained its ruling as follows:

> An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking. However, an odor, *standing alone*, is no evidence that he is under the influence of an intoxicant, and the *mere* fact that one has had a drink will not support such a finding. Notwithstanding, the fact that a motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show [impairment].
>
> We hold that the evidence of the "broken pint" and the odor of alcohol on plaintiff's breath and in his automobile, when taken in conjunction with his failure to take any action to avoid a collision with the truck, was sufficient to support a finding that plaintiff's faculties had been appreciably impaired by the consumption of an alcoholic beverage. It is quite true . . . that the only testimony of any odor of alcohol on plaintiff's breath came from defendant . . . . We also note that plaintiff testified he had consumed no alcoholic beverages all day and that he failed to see the truck because the lights of an approaching car, reflected on the wet, blacktop pavement, blinded him. The credibility of the witnesses and conflicts in the evidence, however, are for the jury, not the court.

Id. at 185-86, 176 S.E.2d at 793-94 (internal citations, quotation marks, brackets, and ellipses omitted).

Thus, *Atkins* stands for the proposition that impairment can be shown by a combination of evidence that a defendant has both (1) ingested an impairing substance; and (2) operated his vehicle in a manner showing he was so oblivious to a visible risk of harm as to raise an inference that his senses were appreciably impaired.

While Defendant argues that the upholding of his conviction for felony death by vehicle will have the effect of creating a strict liability standard for persons who lawfully take prescription drugs and then are parties to a motor vehicle collision caused by their negligent driving, this contention is misplaced for several reasons. First, the circumstances of every case are different, and not every accident involving a driver who has ingested prescription drugs will raise an inference that the driver was appreciably impaired. Second, even in cases where a defendant is charged with an offense based on impaired driving under such circumstances, it is ultimately the role of the jury to determine whether the defendant was actually impaired and whether the impairment was a proximate cause of the accident.

Finally, we wish to emphasize that our holding today does not break new legal ground as we are simply applying in the context of prescription drugs the same rules that apply to driving after consuming alcohol.[5] It is not *per se* illegal to operate a motor vehicle after consuming alcohol just as it is not — without more — illegal to do so after ingesting prescription drugs. But both are potentially impairing substances, and criminal liability attaches when a driver operates a vehicle despite being appreciably impaired. As *Atkins* demonstrates, this is not a novel proposition.

Were we to accept Defendant's argument, it is unclear how a jury would ever have the opportunity to determine whether a driver with an indeterminate amount of drugs in his bloodstream was impaired in the absence of opinion testimony from an officer — regardless of the strength of the evidence showing that he was oblivious to an obvious risk of harm to others. Neither law nor logic supports such a result.

It was the role of the jury to determine based on the evidence presented at trial whether (1) Defendant was appreciably impaired due to his ingestion of one or both of the controlled substances he had taken earlier that day; and (2) whether his impairment was a proximate cause of Anderson's death. We therefore conclude that the trial court properly denied Defendant's motion to dismiss.

---

5. While the State did not dispute the fact that Defendant possessed prescriptions for Oxycodone and Tramadol, the potentially impairing effects of these substances are the same whether they are taken with or without a prescription. Although Defendant presented testimony suggesting that frequent users of these drugs often develop a tolerance for these side effects, it was up to the jury to decide the appropriate weight to give that evidence.

II. Exclusion of Trooper Acuna's Testimony

[2] Defendant also contends that the trial court committed reversible error in excluding Trooper Acuna's testimony as to the fact that he did not charge Defendant with the offense of driving while impaired. On cross-examination, the following exchange occurred.

> [DEFENDANT'S COUNSEL]: What did you tell [Defendant] he was under arrest for?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [TROOPER ACUNA]: I believe –
>
> [DEFENDANT'S COUNSEL]: Wait a minute.
>
> [PROSECUTOR]: Don't answer that.
>
> THE COURT: I sustained the objection.
>
> [DEFENDANT'S COUNSEL]: What charges did you charge him with?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENDANT'S COUNSEL]: Did you charge him with driving while impaired?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

"A trial court's evidentiary rulings are subject to appellate review for an abuse of discretion, and will be reversed only upon a finding that the ruling was so arbitrary that it could not be the result of a reasoned decision." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 644-45, 643 S.E.2d 28, 33-34 (citation omitted), *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007). It is well established that "[e]ven if the complaining party can show that the trial court erred in its ruling, ordinarily relief will not be granted absent a showing of prejudice." *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988).

Even assuming — without deciding — that the trial court erred in sustaining the State's objections to questioning by Defendant's counsel regarding whether Defendant had been charged with driving while impaired, Defendant has failed to show that he was prejudiced by any

such error. Despite the trial court's exclusion of this testimony, it would have been apparent to the jury that Defendant was never charged with that offense. Troopers Acuna and Kirk both testified that they did not form an opinion that Defendant was impaired based on their interactions with him on the day of the accident. Moreover, in his closing argument the prosecutor expressly acknowledged that the Defendant was not separately charged with driving while impaired.

Therefore, Defendant cannot establish prejudice from the trial court's exclusion of this testimony. *See State v. Boone*, 302 N.C. 561, 565, 276 S.E.2d 354, 357 (1981) (holding that trial court's exclusion of testimony, while erroneous, was not prejudicial).

III. Closing Argument

[3] Finally, Defendant argues that the trial court reversibly erred in failing to intervene *ex mero motu* during the State's closing argument. Specifically, he contends that the prosecutor's argument was grossly improper in that it (1) incorrectly stated the legal standard for impairment; and (2) improperly appealed to the passion and prejudice of the jury.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). Our Supreme Court has held that "[i]n determining whether the [State's] argument was grossly improper, this Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *State v. Tyler*, 346 N.C. 187, 205, 485 S.E.2d 599, 609 (citation omitted), *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997).

Defendant initially challenges the following portion of the State's closing argument:

> So, the controlled substances that were present in Joseph Shelton's blood at the time of this collision, Oxycodone and Tramadol, and those are impairing substances, the presence of these drugs in his blood hours after the collision.
>
> And the laws of the State of North Carolina allow for you to find persons guilty of impaired driving if they have in their blood controlled substances.

> And the State submits to you that these controlled substances were in his blood and he was impaired by those controlled substances and you must follow the law in this case.

Defendant contends that these statements were legally incorrect because in order to convict Defendant of felony death by vehicle the jury had to find beyond a reasonable doubt not merely that impairing substances were present in Defendant's bloodstream but also that he was appreciably impaired at the time of the accident. However, in his brief, Defendant selectively quotes from this portion of the State's argument and omits other statements in which the prosecutor made clear that Defendant could only be convicted if he was, in fact, legally impaired. The relevant portion of the State's argument — in its entirety — stated as follows:

> The State alleges and has proven to you that the defendant was impaired by a controlled substance at the time of this collision.
>
> *And you will find that the defendant is impaired if you find that he was under the influence of an impairing substance, which is what the Court will tell you the law is.*
>
> So, the controlled substances that were present in Joseph Shelton's blood at the time of this collision, Oxycodone and Tramadol, and those are impairing substances, the presence of these drugs in his blood hours after the collision.
>
> And the laws of the State of North Carolina allow for you to find persons guilty of impaired driving if they have in their blood controlled substances.
>
> And the State submits to you that these controlled substances were in his blood and *he was impaired by those controlled substances and you must follow the law in this case.*

(Emphasis added.)

Therefore, when considered contextually the statements cited by Defendant from the State's closing argument did not require intervention *ex mero motu* by the trial court. Furthermore, following closing arguments, the trial court instructed the jury on the issue of impairment, and Defendant has not challenged this instruction.

In addition, Defendant contends that the State improperly appealed to the jury's passion and prejudice in the following portion of its closing argument.

> The people of the State of North Carolina are entitled to guilty verdicts for what he did to her. Her family is entitled to justice for how he left her.
>
> And you can send a message with your verdicts that this will not be tolerated. Let Joseph Shelton know that this will not be tolerated. That he'll be held accountable. Let Rhonda Anderson's family right there know that justice will be served and let the community, the community, right, let them know that people who drive while impaired will be severely punished.
>
> You must not let Joseph Shelton who drove under the influence with his history on a revoked license that ran over that woman and left her there for dead walk out of this courtroom with nothing more than a misdemeanor.
>
> You are the moral voice and conscience of this community, the community you live in, and you can be the somebody that ought to do something. If you don't act, no one can. If you don't decide, no one can.
>
> And the moment of decision is here. It's here. You go back in that jury room, search your heart, search your mind, decide what you think is right. It's not going to be easy, but you've got to decide.

Our Supreme Court has held that it is permissible for a prosecutor to argue "that for purposes of defendant's trial, they are the voice and conscience of the community." *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). It is also not improper for prosecutors to "tell the jury that its verdict will send a message to the community[.]" *State v. Golphin*, 352 N.C. 364, 471, 533 S.E.2d 168, 237 (2000) (quotation marks and citation omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Based on our careful review of the transcript, we are once again unable to agree with Defendant that the State's argument was so grossly improper that intervention *ex mero motu* was required. Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTHONY SHERIDAN

No. COA18-312

Filed 5 February 2019

1. Sexual Offenses—sexual offense in parental role—sufficiency of evidence—parent-child relationship

There was sufficient evidence of a parent-child relationship in a prosecution for sexual offense in a parental role where defendant paid for a fourteen-year-old's care and support at a time when she was legally unable to work and maintain herself, made numerous representations to others of his parental and supervisory role over the child, indicated to police that he was her godfather, represented to a friend that he was trying to help her and get her enrolled in school, and told his other girlfriends that the victim was his daughter. There was no indication that he was a friend of the family, and he initiated a relationship of trust by approaching the victim with reference to his daughter, who was the same age, and he was always present when the two girls were hanging out at his house.

2. Constitutional Law—speedy trial—pro se motion—representation by counsel

Defendant's pro se motion for a speedy trial, made while defendant was represented by counsel, was properly before the Court of Appeals where the trial court ruled on the motion.

3. Constitutional Law—speedy trial—length of delay—Barker factors

The trial court's ruling on a motion for speedy trial was remanded where the twenty-eight month delay between arrest and

trial was enough to trigger further analysis. The appeal was insufficiently developed for analysis and determination where the trial court did not consider all of the factors under *Barker v. Wingo*, 407 U.S. 514 (1972).

4. Sexual Offenses—sexual offense in parental role—mistrial denied—statement of expert

The trial court did not abuse its discretion in a prosecution for sexual offense in a parental role by denying a mistrial where an expert witness stated that the child was neglected because her mother allowed her to stay with defendant, who had a criminal history. The trial court immediately sustained defendant's objection and instructed the jury not to consider the remark. Furthermore, the disclosure of defendant's history of criminality was vague and did not suggest that defendant had been convicted of anything.

5. Satellite-Based Monitoring—lifetime monitoring—order—no evidence

An order that defendant would be subject to satellite-based monitoring for the remainder of his life was remanded for proper analysis and determination under N.C.G.S. § 14-208.40A where no evidence was presented in support of the order.

Appeal by defendant from judgments entered 24 March 2017 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 17 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

TYSON, Judge.

Michael Anthony Sheridan ("Defendant") appeals from judgments entered upon a jury's verdicts and convictions of four counts of first-degree sexual exploitation of a minor, two counts of statutory rape, and one count of sexual offense in a parental role. We find no error in part and remand for appropriate findings on Defendant's *pro se* speedy trial motion and the trial court's satellite-based monitoring ("SBM") determination.

I. Background

T.S. ("Tonya") met Defendant in March 2013, in the Raleigh neighborhood where they both lived. Tonya was fourteen years old and Defendant was forty-four. Defendant told Tonya about and introduced her to his daughter, who was around the same age. Tonya began "hanging out" with Defendant's daughter, and Defendant was "always" around.

On 14 March 2013, Defendant asked Tonya if she wanted to "hang out" at his house the next day, while she waited for his daughter to get home. The next day, Defendant told Tonya his daughter was home, and she should come over.

Once she entered his house, Defendant told Tonya they were alone. Defendant took Tonya into his bedroom, began kissing her, removed their clothes, and engaged in her first vaginal intercourse. Defendant and Tonya engaged in vaginal intercourse and fellatio "every day" thereafter, and within a week or two Tonya came to believe she was "in love" with Defendant.

Tonya moved with her family to Hertford County in November 2013. Defendant continued engaging in sexual relations with Tonya after the move, when she returned to Raleigh with her mother to visit in the area. In June 2014, Tonya moved back to Raleigh and lived with Defendant. Defendant had told Tonya she could choose where she wanted to live after she turned sixteen years old. Tonya told her mother Defendant had offered her a job in Raleigh, and she was going to live with and work for him.

Defendant and Tonya shared a bed when she moved in with him and immediately resumed their sexual relationship. Their near daily sexual activity occurred before and after Tonya's sixteenth birthday. Between 2013 and 2014, Tonya used Defendant's phone at his request to take four or five nude photographs of herself. Defendant purchased food and clothing for Tonya and gave her a bank card to use for expenses.

On 27 October 2014, Defendant and Tonya argued. At Tonya's request, her grandmother dropped her off at her mother's boyfriend's house in Harnett County. Tonya's mother's boyfriend refused to allow Tonya to stay, and she returned to Defendant's house in a taxicab late that night.

When she arrived, Tonya found Defendant naked in bed with another woman. Tonya requested Defendant to pay for her cab fare, but he refused. An argument ensued and the police were called. The cab

driver retained all of Tonya's luggage and belongings for the unpaid fare. Tonya was arrested and taken to jail for failing to pay the cab fare.

Tonya was released from jail at approximately 3:00 a.m. on 28 October 2014 and walked back to Defendant's home from the jail. The other woman was still at the house. Defendant and Tonya argued, and the other woman was driven home by Defendant's housemate. Tonya and Defendant slept in the same bedroom, but upon waking continued to argue, mainly about access to a phone. Defendant had provided Tonya with a phone when she had moved in, but he had taken it away from her.

Tonya attempted to retrieve the phone while Defendant was in the shower, but Defendant allegedly began to physically assault her. Tonya grabbed a beer bottle and struck him on the head. Defendant escalated the assault, and when Tonya fell to the floor, she saw a knife and grabbed it. Defendant and Tonya grappled with the knife, but she regained control of it and stabbed Defendant. The assaults continued, and Defendant's mother called 911.

Officers arrived and Tonya was transported to the hospital and underwent a sexual assault examination. Tonya told police officers that Defendant had raped her that day and had been sexually active with her prior to that occurrence. Tonya was placed into foster care. Soon after, Tonya learned she was pregnant again and gave birth to a son. She had previously aborted an earlier pregnancy. Subsequent DNA testing confirmed to a confidence interval of 99% that Defendant was the father of the child.

Defendant was indicted for four counts of first-degree sexual exploitation of a minor, two counts of statutory rape, one count of sexual offense in a parental role, one count of indecent liberties with a minor, and of attaining habitual felon status. Defendant had retained counsel, but filed a *pro se* motion for a speedy trial on 14 April 2015, while being incarcerated in the Wake County Jail for approximately six months. Even though Defendant was represented by counsel, the trial court heard and denied the *pro se* motion.

Defendant's case was called for trial on 20 March 2017. The jury's verdict found Defendant guilty of the four counts of sexual exploitation, two counts of statutory rape, and one count of sexual offense in a parental role. The State dismissed the charges of indecent liberties and Defendant having attained habitual felon status. Defendant was sentenced to two consecutive sentences of 317-441 months, one consecutive sentence of 33-100 months, and four consecutive sentences of

96-176 months. He was also ordered to register as a sex offender and enroll in SBM for the remainder of his natural life.

Defendant gave oral notice of appeal in open court, but did not enter written notice of appeal of the civil SBM order. Defendant has subsequently filed a petition for writ of certiorari to seek review of the civil SBM.

II. Jurisdiction

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

III. Issues

Defendant argues the trial court erred by (1) denying his motion to dismiss the charge of sexual offense in a parental role; (2) denying his motion for speedy trial; and, (3) denying his motion for mistrial. Defendant also asserts his counsel failed to provide effective assistance.

IV. Motion to Dismiss

[1] Defendant asserts the trial court erred in denying his motion to dismiss the charge of sexual offense in a parental role. He argues the State presented insufficient evidence a parent-child relationship existed between Defendant and Tonya. We disagree.

A. Standard of Review

"Upon a defendant's motion to dismiss for insufficient evidence, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Sweat*, 366 N.C. 79, 84, 727 S.E.2d 691, 695 (2012) (alteration original) (citation and internal quotation marks omitted). The evidence is to be considered and reviewed in the light most favorable to the State, including all reasonable inferences therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

"The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). A motion to dismiss should only be granted when the evidence presented raises no more than a "suspicion of guilt." *Id.*

Whether the State presented sufficient evidence is a question of law, which this Court reviews *de novo*. *State v. Cox*, 367 N.C. 147, 150-51, 749 S.E.2d 271, 274-75 (2013) (citation omitted).

B. Analysis

Defendant was charged with violating N.C. Gen. Stat. § 14-27.7(a), which prohibits a person "who has assumed the position of a parent in the home of a minor victim [from] engag[ing] in vaginal intercourse or a sexual act with a victim who is a minor residing in the home." N.C. Gen. Stat. § 14-27.7(a) (2015). This statute was recodified as § 14-27.31, but the relevant language is virtually identical. 2015 N.C. Sess. Laws 181, § 13(a).

To survive a motion to dismiss, the State must have presented evidence that Defendant "had (1) assumed the position of a parent in the home, (2) of a minor victim, and (3) engaged in a sexual act with the victim residing in the home." *State v. Oakley*, 167 N.C. App. 318, 322, 605 S.E.2d 215, 218 (2004) (citation omitted). Defendant asserts the factor at issue in this case is whether or not Defendant assumed a "parental role" in his relationship with Tonya.

This Court has identified a "parental role" to include evidence of "emotional trust, disciplinary authority, and supervisory responsibility." *State v. Bailey*, 163 N.C. App. 84, 93, 592 S.E.2d 738, 744 (2004). The most significant of these factors is whether the defendant and the minor "had a relationship based on trust that was analogous to that of a parent and child." *Id.* at 94, 592 S.E.2d at 745. It is not necessary for the defendant to have maintained a romantic relationship with the child's parent or to exercise any legal rights over the child in order to be prosecuted under the statute. *Id.*

Defendant argues Tonya was over sixteen years old and she engaged in a "consensual" relationship with him. However, the statute clearly indicates consent is not a defense. N.C. Gen. Stat. § 14-27.31(c) (2017). Further, this Court has found a parental role existed between a sixteen-year-old victim and a twenty-three-year-old defendant. *Oakley*, 167 N.C. App. at 319, 605 S.E.2d at 216. The sexual relationship began when the victim was sixteen, and he began residing with the defendant when he was seventeen. *Id.* at 319, 605 S.E.2d at 216-17.

Both prior to and during the time the victim was living with him, the defendant had "paid for all of [the victim's] support . . . including food, shelter, gifts and spending money." *Id.* at 323, 605 S.E.2d at 219. The defendant, Oakley, held himself out to be the victim's temporary

custodian to the victim's parole officer. *Id.* Evidence at trial indicated the defendant was a friend of the family. *Id.* at 323, 605 S.E.2d at 218.

Similar to the defendant in *Oakley*, Defendant paid for Tonya's care and support at a time she was legally unable to work and maintain herself. He also made numerous representations to others of his parental and supervisory role over Tonya: he indicated to police he was her "godfather," represented to a friend he was trying to help Tonya out and get her enrolled in school, and told his other girlfriends Tonya was his "daughter." While there was no indication Defendant was a friend of Tonya's family, there is evidence he initiated a relationship of trust by approaching Tonya with references to his daughter, who was the same age, and being "always" present when the two girls were "hanging out" at his house.

Viewed in the light most favorable to the State, sufficient evidence of Defendant's exercise of a parental role over Tonya was presented to survive Defendant's motion to dismiss. *See Powell*, 299 N.C. at 99, 261 S.E.2d at 117. We find no error in the trial court's denial of Defendant's motion to dismiss this charge.

V. Motion for Speedy Trial

Defendant argues the trial court erred in denying his motion for speedy trial without addressing any of the *Barker v. Wingo* factors. We remand for appropriate findings.

A. Standard of Review

The appeal of a denial of a speedy trial motion raises a question of constitutional law, which is subject to *de novo* review. *State v. Johnson*, __ N.C. App. __, __, 795 S.E.2d 126, 131 (2016) (citation omitted).

B. Analysis

[2] The State argues this issue is not properly before this Court. Defendant filed his *pro se* motion for a speedy trial on 14 April 2015. At that time, Defendant was represented by retained counsel. It is well established that a defendant cannot file motions on his own behalf and also be represented by counsel. *State v. Williams*, 363 N.C. 689, 700, 686 S.E.2d 493, 501 (2009). Nothing in the record indicates Defendant's appointed trial counsel adopted his *pro se* motion:

> my client I believe wishes to address the Court prior to going further. He's indicated to me, as I heard, his own motions that he is wanting to make.

The defendant in *Williams* argued the trial court erred by declining to rule on his *pro se* motions, including his *pro se* motion for speedy trial. *Id.* The Supreme Court found this refusal to rule on the defendant's *pro se* motion was not error. *Id.* Unlike in *Williams*, the trial court in the present case ruled on Defendant's *pro se* motion for speedy trial, stating, "the defendant's motion for a speedy trial is hereby denied."

Where a trial court has specifically considered and denied a defendant's constitutional argument, this Court has granted review. *E.g.*, *In re Hall*, 238 N.C. App. 322, 329, 768 S.E.2d 39, 44 (2014) (concerning *ex post facto* violation); *State v. Kirkwood*, 229 N.C. App. 656, 665-66, 747 S.E.2d 730, 736-37 (2013) (trial court's *sua sponte* ruling on double jeopardy issue gave this Court jurisdiction over the issue on appeal). Defendant's argument is properly before this Court. Because this is a question of law, subject to *de novo* review, we consider the matter anew. *Johnson*, __ N.C. App. at __, 795 S.E.2d at 131.

[3] A defendant is guaranteed the right to a speedy trial under the Constitution of the United States and the North Carolina Constitution. U.S. Const. amend. VI; N.C. Const. art. I, § 18. The Supreme Court of the United States set out a four-factor balancing test to determine whether a defendant's right to a speedy trial under the Constitution of the United States was violated. *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972).

Reviewing courts are to consider the "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* North Carolina adopted this four-factor balancing test to analyze purported speedy trial violations under our state's constitution. *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000).

The "length of the delay is not *per se* determinative" of whether a defendant's right to a speedy trial has been violated. *Id.* The Supreme Court of the United States has noted a delay becomes "presumptively prejudicial" as it approaches one year, which is enough to warrant further analysis. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992).

Here, the twenty-eight months' delay between Defendant's arrest and trial is enough to trigger further analysis. While the trial court was not obligated to consider Defendant's *pro se* motion for speedy trial while he was represented by counsel, because it did so, it erred by not considering all the *Barker* factors and making appropriate findings. The record on appeal is insufficiently developed for this analysis and determination to be made by this Court.

"A full evidentiary hearing is required in order for the superior court to hear and make an appropriate assessment of Defendant's arguments. If the superior court ultimately concludes Defendant's right to a speedy trial was violated, the only remedy is dismissing the indictment and vacating those convictions." *State v. Wilkerson*, __ N.C. App. __, __, 810 S.E.2d 389, 396 (2018). We remand to the trial court for a proper *Barker v. Wingo* analysis and appropriate findings.

VI. Motion for Mistrial

[4] Defendant argues the trial court erred by denying his motion for mistrial when an expert witness opined that Tonya was neglected because her mother allowed her to stay with Defendant, "a person who had a history of criminality." We disagree.

A. Standard of Review

A trial court is required to call a mistrial "if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2017). Whether or not there has been "substantial and irreparable prejudice" is a matter that rests within the discretion of the trial court. *State v. Mills*, 39 N.C. App. 47, 50, 249 S.E.2d 446, 448 (1978), *cert. denied*, 296 N.C. 588, 254 S.E.2d 33 (1979). "[A]bsent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal." *Id.*

B. Analysis

Dr. Elizabeth Witman, the director of SAFEchild Advocacy Center, testified about Tonya's medical evaluation and diagnostic interview. When asked whether she had any concerns about Tonya's biological family, Dr. Witman replied:

> I did. We always try to look very carefully at those issues and it was my opinion sometimes I'm not describing all these motivation to why a child's been mission [sic] treated or neglected. It could be to a number of factors. It doesn't necessarily always mean ill intention, but I think because of her mother's homelessness and probably financial struggles and some other issues it was my opinion that she was neglected by being allowed to live with a person who had a history of criminality.

Defense counsel immediately moved to strike, and the trial court sustained the objection and instructed the jury:

> Ladies and gentlemen, with regard to the last remark by this witness you are to disregard that remark and not consider it as part of your consideration towards a deliberation to a verdict in this case.

The trial court denied defense counsel's motion for mistrial.

"When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). Defendant argues some evidence "is so inherently prejudicial that its influence on the jury cannot be cured with an instruction to disregard it" and cites to *State v. Hunt*, 287 N.C. 360, 215 S.E.2d 40 (1975), and *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967), for support.

In *Hunt*, evidence of the defendant's "police record," and that he was on probation "for possession of marijuana and assault" was improperly introduced during cross-examination of a defense witness. 287 N.C. at 372-73, 215 S.E.2d at 48. Shortly thereafter, court adjourned for the day. *Id.* at 373, 215 S.E.2d at 48. Defense counsel moved for a mistrial at the beginning of court the next day. *Id.* The trial court denied that motion, but instructed the jury to disregard the testimony. *Id.*

The Supreme Court found "the instructions then given were not specific as to the content of the challenged questions, and by this time the evidence must have found secure lodgment in the minds of the jurors." *Id.* at 376, 215 S.E.2d at 50. The Court also limited its holding to the specific "circumstances of [that] capital case." *Id.* at 376, 215 S.E.2d at 51.

In *Aycoth*, during cross-examination, a State's witness revealed the defendant had been previously arrested on another charge and had been indicted for murder. 270 N.C. at 272, 154 S.E.2d at 60. Defense counsel immediately objected and moved to strike, and the trial court allowed the motion and instructed the jury to not "consider" the previous statements. *Id.* Defense counsel moved for a mistrial after the State rested, which was denied. *Id.* The Supreme Court found "the incompetent evidence to the effect [the defendant] had been or was under indictment for murder was of such serious nature that its prejudicial effect was not erased by the court's quoted instruction." *Id.* at 273, 154 S.E.2d at 61.

Unlike in *Hunt*, the trial court immediately sustained the objection and instructed the jury "to disregard that remark and not consider it." Further, and unlike in *Aycoth*, the disclosure of Defendant's history of criminality was vague and did not suggest Defendant had previously been convicted of anything. Defendant has failed to show the trial

court abused its discretion in denying Defendant's motion for mistrial. Defendant's arguments are overruled.

VII. Ineffective Assistance of Counsel

[5] Defendant argues he was denied effective assistance of counsel when his attorney stated it would be "pointless" to proceed with a SBM hearing. This statement came after the prosecutor acknowledged the cumulative length of Defendant's sentences might make a SBM determination "a moot point," but was prepared to present evidence nonetheless. Because the trial court failed to comply with statutory mandates, we need not reach the merits of Defendant's argument.

We initially address whether this issue is properly before this Court. Defendant did not file written notice of appeal for the SBM determination, as required by N.C. R. App. P. 3. Defendant filed a petition for writ of certiorari, requesting this Court to consider his arguments on the merits. This Court has previously granted petitions for certiorari when a defendant has given oral notice of appeal, but failed to comply with Rule 3 for an appeal of the SBM determination. *State v. Dye*, __ N.C. App. __, __, 802 S.E.2d 737, 741 (2017); *State v. Green*, 229 N.C. App. 121. 128, 746 S.E.2d 457, 464 (2013).

A writ of certiorari "may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Defendant argues issuing a writ of certiorari is appropriate because the trial court erroneously concluded Defendant's convictions were "aggravated offenses" under N.C. Gen. Stat. § 14-208.6(1a) (2017). Aggravated offenses include those where a defendant (1) engaged in a penetrative sexual act with a victim of any age "through the use of force or the threat of serious violence" or (2) engaged in a penetrative sexual act with a child under twelve. *Id.* We agree, grant Defendant's petition, and issue the writ.

When a defendant is convicted of a reportable offense under the sex offender registration scheme, the district attorney is required to present evidence at the sentencing phase of whether: (1) the defendant has been classified as a sexually violent predator; (2) the defendant is a recidivist; (3) the conviction is an aggravated offense; (4) the sexual act or rape was of a victim under thirteen and the defendant was an adult; or, (5) the offense involved physical, mental, or sexual abuse of a minor. N.C. Gen. Stat. § 14-208.40A(a) (2017).

In this case, no evidence was presented prior to or to support the trial court's determination that Defendant would be subject to SBM for the remainder of his life. We vacate the order requiring Defendant to enroll in SBM for the remainder of his life, and remand for proper analysis and determination under N.C. Gen. Stat. § 14-208.40A. *See State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009).

VIII. Conclusion

The State presented sufficient evidence of Defendant's parental role. The trial court did not err by denying Defendant's motion to dismiss the charge of sexual offense by substitute parent. The trial court did not abuse its discretion in denying Defendant's motion for mistrial.

The trial court erred in failing to conduct a proper analysis of the *Barker v. Wingo* factors prior to denying Defendant's *pro se* motion for speedy trial. We remand this issue to the trial court for an appropriate analysis and findings.

We vacate Defendant's SBM determination and remand for the trial court to conduct a proper determination in accordance with N.C. Gen. Stat. § 14-208.40A. *It is so ordered.*

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges ZACHARY and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 FEBRUARY 2019)

BANYAN GW, LLC v. WAYNE PREPARATORY ACAD. CHARTER SCH., INC. No. 18-378	Wake (16CVS66)	AFFIRMED IN PART; DISMISSED IN PART.
BRUNSON v. N.C. DEP'T OF JUSTICE No. 18-837	N.C. Industrial Commission (TA-25964)	Affirmed
BRUNSON v. N.C. DEP'T OF JUSTICE No. 18-656	N.C. Industrial Commission (TA-25758)	Affirmed
FOSTER v. WELLS FARGO BANK, N.A. No. 18-643	Durham (17CVS3799)	Dismissed in Part; Affirmed in Part
HUNT v. COLLINSWORTH No. 18-301	Iredell (10SP976)	Affirmed
IN RE C.S. No. 18-439	Mecklenburg (14JB661)	Dismissed
IN RE G.G.K. No. 18-640	Wake (16JT116-117)	Affirmed
IN RE I.C. No. 18-869	Henderson (13JA116)	Dismissed
IN RE J.P.N. No. 18-622	Iredell (17JA102)	Affirmed
IN RE N.A.C. No. 18-721	Forsyth (17JT16)	Affirmed
IN RE N.L.C. No. 18-669	Caldwell (15JT117)	Affirmed
IN RE S.M. No. 18-759	Iredell (16JA157)	Affirmed
INT'L PROP. DEVS., LLC v. K CONSTR. & ROOFING, LLC No. 17-509-2	Cabarrus (15CVS500)	Dismissed in part; Affirmed in part.

LLOYD v. BAILEY No. 18-666	Mecklenburg (13CVS14121)	Affirmed
MORGAN v. DEFEO No. 18-322	Iredell (17CVD1652)	Reversed
SANGHRAJKA v. FAMILY FARE, LLC No. 18-164	Durham (17CVS3173)	Affirmed
STATE v. BROTHERS No. 18-177	Pitt (16CRS53109)	No Error; Remanded for Correction of Clerical Error
STATE v. BROWN No. 18-279	Buncombe (14CRS89800)	No Error
STATE v. CLARK No. 18-291	Buncombe (16CRS82164-66)	Vacated
STATE v. CLAWSON No. 18-57	Guilford (14CRS68714) (16CRS24493) (16CRS24497)	Dismissed.
STATE v. DAVIS No. 18-471	Johnston (16CRS53489)	No Error
STATE v. DOTSON No. 18-443	Haywood (16CRS538)	Affirmed
STATE v. FORTE No. 17-669-2	Wilson (15CRS1614-15) (15CRS50196) (15CRS50200) (15CRS50247) (15CRS50473)	No Error in Part, Vacate in Part, and Remand.
STATE v. FOWLER No. 16-947-2	Wake (14CRS214112)	No Reversible Error.
STATE v. JOHNSON No. 18-556	Rowan (16CRS55016-19) (17CRS308)	Vacated and Remanded
STATE v. KINGSBERRY No. 18-226	Vance (14CRS50543)	No Error
STATE v. LAMBERTH No. 18-370	Person (16CRS50368)	No Error

STATE v. LATHAM No. 17-1075	Union (14CRS54529)	No Prejudicial Error.
STATE v. LLOYD No. 18-53	Durham (13CRS4534) (13CRS56221) (13CRS56657) (13CRS56716)	Vacated in part; Remanded for resentencing.
STATE v. McKOY No. 18-564	Harnett (16CRS1041-42) (16CRS1143) (16CRS1149)	Affirmed
STATE v. MORGAN No. 18-575	Pitt (15CRS52140-43) (16CRS1242-43)	No Error
STATE v. NARRON No. 18-193	Johnston (14CRS52516-17)	No Error
STATE v. OTTO No. 18-574	Forsyth (15CRS54382) (15CRS54383)	Dismissed
STATE v. SANDERS No. 18-476	Macon (15CRS50788)	No Error
STATE v. SPENCER No. 18-304	Randolph (15CRS50435)	No Prejudicial Error
STATE v. SWAFFORD No. 18-324	Cleveland (15CRS54626)	Dismissed
STATE v. THOMPSON No. 18-423	Lincoln (15CRS53483)	No error in part; Dismissed in part.
STATE v. TYSON No. 18-459	Pitt (16CRS57893)	Vacated and Remanded in Part; Affirmed in Part
STATE v. WHITE No. 18-401	Duplin (16CRS50741)	Dismissed
SUMMIT DE CORP. v. KWEIDER BROS. INC. No. 18-353	Mecklenburg (16CVS19740)	Dismissed

TEAGUE & GLOVER, P.A. v. KANE & SILVERMAN, P.C. No. 17-727	Pasquotank (15CVS454)	Affirm in part; reverse and remand in part.
TURNMIRE v. ELDRETH No. 17-960	Ashe (16CVD59)	Affirm in part; Remand in part
WALZ v. WALZ No. 18-240	Carteret (16CVD361)	Vacated and Dismissed
YOUNG v. BAILEY No. 18-664	Mecklenburg (13CVS9560)	Affirmed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS