266 N.C. App.—No. 4 Pages 404-619

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 22, 2020

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COURT OF APPEALS

CASES REPORTED

FILED 6 AUGUST 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

material misrepresentation in violation of the Rules of Professional Conduct. The ADA's qualification in his response that it was his personal belief made the statement truthful. **In re Entzminger, 480.**

Misconduct—findings—"unavailing" apology to court—sufficiency of evidence—In a disciplinary hearing against an assistant district attorney (ADA) whose written explanation for why a criminal case was being dismissed included language directed against the trial judge, the superior court's finding that the ADA's apology was "unavailing" and its conclusion that the ADA refused to acknowledge the wrongful nature of his conduct were supported by competent evidence. **In re Entzminger, 480.**

Misconduct—material misrepresentations to court—sufficiency of evidence—In a disciplinary hearing against an assistant district attorney (ADA), competent evidence supported the superior court's conclusion that the ADA's statements to the court—regarding when he learned of the unavailability of a key witness—constituted a material misrepresentation in violation of the Rules of Professional Conduct 3.3 and 8.4 where the statements had the potential to mislead the court by suggesting no one in the district attorney's office had been informed of the witness unavailability until the day of trial, contrary to the facts. **In re Entzminger, 480.**

BAIL AND PRETRIAL RELEASE

Bond forfeiture—relief—pre-final judgment—deportation—The trial court erred by granting relief from a forfeited bail bond based on N.C.G.S. § 15A-301 where the defendant had been deported, because N.C.G.S. § 15A-544.5 is the exclusive avenue for relief from a pre-final judgment forfeiture. **State of N.C. v. Ortiz, 512.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Neglect—Uniform Child Custody Jurisdiction and Enforcement Act—transfer to another state—lack of evidence—In a case involving a neglected child, the Court of Appeals reversed the trial court's order transferring the case to Tennessee and remanded for a new hearing to determine whether jurisdiction should be terminated pursuant to N.C.G.S. § 7B-201. Although the trial court found North Carolina to be an "inconvenient forum" pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, its findings of fact and conclusions of law were unsupported by any evidence. The trial court did not hold a full hearing, taking only some arguments (including from the child's mother before she was appointed counsel) but no sworn testimony, and considering only unverified documents. **In re C.M.B., 448.**

Neglected juvenile—Chapter 7B juvenile proceedings—Chapter 50 custody proceedings—distinction—requirement of transfer or termination of jurisdiction—Issues that arose in a juvenile neglect matter—initiated by a county department of social services (DSS) but that later included a filing by the child's guardian in Tennessee to modify the mother's visitation—were controlled by Chapter 7B (juvenile proceedings), not Chapter 50 (custody proceedings). Although DSS had not been directly involved in the case for many years since it was relieved of reunification efforts and the trial court's order treated the case as a Chapter 50 proceeding, the action was never transferred as a Chapter 50 private custody matter pursuant to N.C.G.S. § 7B-911, and the trial court never terminated its jurisdiction under section 7B-201. **In re C.M.B., 448.**

regarding the population to be served (criteria 3), financial and operational projections (criteria 5), the cost, design, and means (criteria 12), and the contribution in meeting the needs of the elderly and underserved groups (criteria 13(c)). There was substantial evidence of the applicant's compliance with each of the review criteria. **Raleigh Radiology LLC v. N.C. Dep't of Health & Human Servs., 504.**

Certificate of need—spoliation of evidence—irrelevant documentation—An administrative law judge (ALJ) did not err by denying a certificate of need (CON) applicant's motion in limine to apply adverse inference based on another applicant's alleged spoliation of certain evidence where the other applicant's third-party consultant who drafted its CON application discarded all useless and irrelevant documentation, consistent with the practice of most consultants in the field. Further, the documents would not have been the subject of review because the ALJ's review was limited to the CON agency's findings and conclusions. **Raleigh Radiology LLC v. N.C. Dep't of Health & Human Servs., 504.**

INDICTMENT AND INFORMATION

Indictment—habitual larceny—essential elements—representation in prior larcenies not essential element—Defendant's indictment for habitual larceny was not facially invalid for failing to allege that defendant was represented by counsel or waived counsel in the predicate prior larcenies, because representation by counsel was not an essential element of habitual larceny. Language in N.C.G.S. § 14-72(b)(6) that prior larceny convictions could not be counted unless defendant was represented by or waived counsel established an exception for which a defendant bears the burden of production. **State v. Edgerton, 521.**

Special indictment—section 15A-928(c)—habitual larceny—prior convictions an element of offense—failure to arraign—prejudice—In a prosecution for habitual larceny, which includes as an essential element that a defendant has four prior convictions for larceny, the trial court's failure to arraign defendant on a special indictment as required by N.C.G.S. § 15A-928(c) was not prejudicial where defendant was given adequate notice that his prior convictions would be used against him as well as an opportunity to admit or deny those convictions. **State v. Edgerton, 521.**

LARCENY

Habitual—sufficiency of evidence—essential elements—stipulation to prior convictions—Sufficient evidence was presented to uphold a conviction of habitual larceny where defendant stipulated to prior larceny convictions through counsel and his argument on appeal that representation in those prior convictions was an essential element was rejected. **State v. Edgerton, 521.**

MENTAL ILLNESS

Competency to stand trial—sua sponte competency hearing—history of mental illness—The trial court violated defendant's due process rights by failing to conduct a sua sponte competency hearing immediately before or during defendant's criminal trial where defendant had a long history of mental illness (including schizophrenia, bipolar disorder, and mild neurocognitive disorder), numerous prior forensic evaluations had reached differing results regarding his competency, there was a five-month gap between his competency hearing and his trial, several physicians and trial judges had expressed concerns about the potential for defendant's condition

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 BANK OF HAMPTON ROADS, PLAINTIFF
v.
LUCIEN S. WILKINS, HOWARD F. MARKS, JR., STEPHEN D. SAIEED, AND BRUNSWICK PROFESSIONAL PROPERTIES, INC, DEFENDANTS

No. COA18-1239

Filed 6 August 2019

Civil Procedure—Rule 60(a)—order amending judgment—correction of misnomer in plaintiff's name

In an action regarding a defaulted loan, the trial court properly entered an order, pursuant to Rule 60(a), to correct a misnomer in plaintiff's name (from "O'Mahoney Holdings, LTD" to "O'Mahoney Holdings, LLC") in a charging order entered by another judge. This correction neither affected any of defendant's substantial rights (because plaintiff's identity was certain and known to all parties) nor altered the original charging order's effect. The doctrine of laches did not require reversal because Rule 60(a) provides no time limit for correcting clerical errors on judgments, and the doctrine of judicial estoppel—which defendant failed to raise in the trial court despite asserting it on appeal—did not apply where the misnomer was based on inadvertence or mistake.

Appeal by Defendant Stephen D. Saieed from Order entered 7 May 2018 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 8 May 2019.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Christopher K. Behm, for plaintiff-appellee.

Stubbs & Perdue, P.A., by Matthew W. Buckmiller, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Stephen D. Saieed (Defendant) appeals from an Order to Amend Charging Order (Order) filed on 7 May 2018, amending 4 April 2017 Charging Orders (Charging Order) to reflect that O'Mahoney Holdings, LLC—and not O'Mahoney Holdings, LTD—is the assignee and holder of the Charging Order against corporate entities in which Defendant has an interest. The Record tends to show the following:

On 5 August 2010, the Bank of Hampton Roads (Bank) filed a complaint against Defendant and others, seeking to collect on a defaulted loan by Brunswick Professional Properties, LLC, on which loan Defendant was a guarantor (10-CVS-3647 Action). On 20 April 2011, the trial court entered its Order Granting Summary Judgment Against all Defendants (Judgment).[1] Pursuant to a Purchase Agreement, Bank then assigned the Judgment to "O'Mahoney Holdings, LTD" on 14 March 2016 (Assignment of Judgment). Thereafter, on 4 April 2017, O'Mahoney Holdings, LTD sought and obtained the Charging Order against eight limited-liability companies in which Defendant allegedly had an interest.

After the Charging Order was obtained in favor of O'Mahoney Holdings, LTD, a separate lawsuit was filed by O'Mahoney Holdings, LLC against Defendant and various limited-liability companies allegedly associated with Defendant (17-CVS-4280 Action). Sometime after the filing of the 17-CVS-4280 Action, Defendant filed a motion to dismiss apparently alleging, *inter alia*, that O'Mahoney Holdings, LLC was not the holder of the Judgment and therefore not the real party in interest.[2] This motion appears to have been based on the fact that the Assignment of Judgment and Charging Order instead named "O'Mahoney Holdings, LTD."

In response, O'Mahoney Holdings, LLC filed its Motion to Correct Order *Nunc Pro Tunc* Based on Misnomer of O'Mahoney Holdings, LLC (Motion to Correct) on 28 February 2018. In its Motion to Correct, counsel for O'Mahoney Holdings, LLC explained that the designation of LTD instead of LLC was a "clerical error" created by the LLC's principal and sole managing member, Matthew F. Collins (Collins), who—since the creation of O'Mahoney Holdings, LLC—believed the corporate descriptor was LTD not LLC. This mistake was repeated by counsel for O'Mahoney Holdings, LLC on all contracts and court documents up until 2018. In its Motion to Correct, O'Mahoney Holdings, LLC sought to amend, pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure, the Assignment of Judgment, the Charging Order, and all other related court proceedings to correct this misnomer.

On 20 March 2018, the trial court entered an order in the 10-CVS-3647 Action, the 17-CVS-4280 Action, and a separate, related action, finding O'Mahoney Holdings, LLC was not the holder of the Judgment and thus

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1. This Judgment was also against Defendants Lucien S. Wilkins and Howard F. Marks, Jr.; however, these two Defendants are not parties to this appeal.

2. The motion to dismiss the 17-CVS-4280 Action is not included in this Record. However, the trial court's order on this motion was also entered in the 10-CVS-3647 Action and is included in the Record.

was not the real party in interest. The trial court noted the Assignment of Judgment was a private contract and that the Charging Order therefore was not subject to revision under Rule 60(a) until the Assignment of Judgment was corrected. The trial court then allowed O'Mahoney Holdings, LLC six months to correct the issues regarding the Assignment of Judgment.

On 23 March 2018, O'Mahoney Holdings, LLC filed an Amendment to the Assignment of Judgment (Amended Assignment of Judgment), which "correct[ed] a scrivener's error contained in the [Purchase] Agreement and [Assignment of Judgment] whereby O'Mahoney Holdings, LLC was inadvertently referred to as O'Mahoney Holdings, Ltd." On 6 April 2018, O'Mahoney Holdings, LLC filed in this 10-CVS-3647 Action its Renewed Motion to Correct Order *Nunc Pro Tunc* Based on Misnomer of O'Mahoney Holdings, LLC (Renewed Motion to Correct) seeking again to correct this misnomer in the Assignment of Judgment, Charging Order, and all related proceedings under Rule 60(a). The same day, O'Mahoney Holdings, LLC filed its Motion for Ratification on Standing seeking to ratify the standing of O'Mahoney Holdings, LLC as the real party in interest in the various actions.

On 7 May 2018, the trial court entered its Order amending the Charging Order under Rule 60(a) "to reflect that O'Mahoney Holdings, LLC is the assignee and holder of the judgment against [Defendant]." The trial court also noted the "Charging Order as amended shall be effective as of the date originally entered." The same day, the trial court entered its Order Addressing Real Party in Interest (Real Party in Interest Order) finding "O'Mahoney Holdings, LLC is the real party in interest as Plaintiff and that their status as the real party in interest will relate back to the filing of the commencement of this action." On 6 June 2018, Defendant filed his Notice of Appeal from the Order amending the Charging Order. Defendant, however, did not appeal the Real Party in Interest Order.

Issue

The determinative issue on appeal is whether the trial court erred by entering its Order amending the Charging Order to correct a misnomer under Rule 60(a).

Analysis

I. Standard of Review

"Rule 60 motions are addressed to the sound discretion of the trial court and will not be disturbed absent a finding of abuse of discretion." *Lumsden v. Lawing*, 117 N.C. App. 514, 518, 451 S.E.2d 659, 661-62

(1995) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

II. Rule 60(a)

Defendant contends the trial court erred by entering its Order amending the Charging Orders to correct the misnomer under Rule 60(a) for several reasons. First, Defendant claims Rule 60(a) does not allow for correction of a misnomer in a plaintiff's name. Second, even assuming Rule 60(a) permits this change, Defendant argues it cannot apply retroactively or "*nunc pro tunc*." Third, Defendant asserts the Order is invalid because the superior court judge who entered this Order did not enter the original Charging Order. Lastly, Defendant argues that the doctrines of laches and judicial estoppel prevented the trial court from entering the Order. For the following reasons, we disagree.

Rule 60(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders.

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2017). Our Court has noted, "The court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions." *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985) (citations omitted).

Our review of decisions from our appellate courts reveals no circumstances where Rule 60(a) has been used to correct a misnomer of a party's name. However, "Rule 60(a) simply codifies the body of law in existence in this State at the time the new rules of civil procedure were adopted." *H & B Co. v. Hammond*, 17 N.C. App. 534, 538, 195 S.E.2d 58, 61 (1973) (citation omitted). Therefore, we look to our pre-enactment case law for guidance.

In *Shaver v. Shaver*, our Supreme Court described a court's power to correct clerical errors as follows:

> [T]he court has inherent power to amend judgments by correcting clerical errors or supplying defects so as to

> make the record speak the truth. The correction of such errors is not limited to the term of court, but may be done at any time upon motion, or the court may on its own motion make the correction when such defect appears. But this power to correct clerical errors and supply defects or omissions must be distinguished from the power of the court to modify or vacate an existing judgment. And the power to correct clerical errors after the lapse of the term must be exercised with great caution and may not be extended to the correction of judicial errors, so as to make the judgment different from what was actually rendered.

248 N.C. 113, 118, 102 S.E.2d 791, 795 (1958) (citations omitted). On the question of the effect of clerical errors in the names and designation of parties, our case law is clear. "Names are to designate persons, and where the identity is certain a variance in the name is immaterial. Errors or defects in the pleadings or proceedings not affecting substantial rights are to be disregarded *at every stage of the action*." *Patterson v. Walton*, 119 N.C. 500, 501, 26 S.E. 43, 43 (1896) (citations and quotation marks omitted). We also find the case of *Gordon v. Pintsch Gas Co*. instructive. 178 N.C. 435, 100 S.E. 878 (1919).

In *Pintsch Gas Co.*, our Supreme Court affirmed the order of the lower court allowing an amendment, after judgment was entered, correcting and changing the name of the defendant from "Pintsch Gas Company" to "Pintsch Compressing Company," where the true defendant had notice it was the intended defendant and suffered no prejudice as a result of the name change. *Id.* at 438-39, 100 S.E. at 879-80. The *Pintsch Gas Co.* Court went on to explain: "A misnomer does not vitiate provided the identity of the *corporation* or person . . . intended by the parties is apparent, whether it is in a deed, *or in a judgment*, or in a criminal proceeding[.]" *Id.* at 439, 100 S.E. at 880 (emphasis added) (citations and quotation marks omitted); *see also McLean v. Matheny*, 240 N.C. 785, 787, 84 S.E.2d 190, 191 (1954) ("Ordinarily, under the comprehensive power to amend process and pleadings where the proper party is before the court, although under a wrong name, an amendment will be allowed to cure a misnomer." (citations omitted)); *Thorpe v. Wilson*, 58 N.C. App. 292, 297, 293 S.E.2d 675, 679 (1982) ("If . . . the effect of amendment is merely to correct the name of a person already in court, there is no prejudice.").

Because our case law prior to the enactment of the North Carolina Rules of Civil Procedure makes clear that a trial court can correct a misnomer in a judgment, we conclude Rule 60(a) may be an appropriate

vehicle for amending a judgment to correct a misnamed party. *See H & B Co.*, 17 N.C. App. at 538, 195 S.E.2d at 61 (citation omitted). We acknowledge our previous case law dealt with a misnamed *defendant* not a *plaintiff*. However, we see no basis to apply any different rule. Our conclusion is supported by two decisions from our sister states interpreting their corresponding rule in the same manner. *See Reisbeck, LLC v. Levis*, 2014 COA 167, ¶¶ 8-15, 342 P.3d 603, 604-06 (2014) (upholding amendment of judgment to correct a misnomer in the plaintiff's name from "Reisbeck, LLC" to "Reisbeck Subdivision, LLC," where the record indicated it was an honest mistake, the corrected judgment represented the parties' expectations, no additional or different liability would have been imposed on any existing defendant, and no party previously a stranger to the action would have been added); *Labor v. Sun Hill Indus. Inc.*, 48 Mass. App. Ct. 369, 369-73, 720 N.E.2d 841, 842-44 (1999) (allowing the individual plaintiffs to amend the judgment from "Jan-Art Packaging, Inc.," which was a nonexistent corporation, to "Janet Labor and Arthur Thomas, d/b/a Jan-Art Packaging Co.").

Here, the trial court did not err by allowing O'Mahoney Holdings, LLC's Renewed Motion to Correct. As discussed, Rule 60(a) allows for the correction of a misnomer in a judgment so long as it does not "affect the substantive rights of the parties[.]" *Hinson*, 78 N.C. App. at 615, 337 S.E.2d at 664 (citations omitted); *see also Patterson*, 119 N.C. at 501, 26 S.E. at 43 (holding a variance in a party's name does not affect a substantive right "where the identity is certain" (citation omitted)). Because O'Mahoney Holdings, LLC's identity is certain, correction of this misnomer does not affect a substantial right of Defendant. Indeed, Defendant does not argue O'Mahoney Holdings, LLC and O'Mahoney Holdings, LTD are distinct, existing entities or that there was any confusion by Defendant regarding the actual identity of the judgment creditor. Moreover, nothing in the record indicates this misnomer was anything but an honest mistake by Collins—the managing member of the LLC, no additional liability is imposed on Defendant by correcting this mistake, and no party previously a stranger to the action was added; therefore, the trial court did not err in allowing O'Mahoney Holdings, LLC's Rule 60(a) Renewed Motion to Correct. *See Reisbeck, LLC*, 2014 COA 167, ¶¶ 8-15, 342 P.3d at 604-06.

Defendant next argues that, even assuming Rule 60(a) allows this change, it cannot apply retroactively or "*nunc pro tunc*." In O'Mahoney Holdings, LLC's Renewed Motion to Correct, O'Mahoney Holdings, LLC asked the trial court "for entry of an order *nunc pro tunc* to correct" the misnomer. In its Order, the trial court does not use the phrase "*nunc pro*

tunc." The Order did, however, state: "The Charging Order as amended shall be effective as of the date originally entered."

We note, "*Nunc pro tunc* orders are allowed only when a judgment has been actually rendered, or decree signed, *but not entered on the record*, in consequence of accident or mistake or the neglect of the clerk[.]" *Long v. Long*, 102 N.C. App. 18, 21-22, 401 S.E.2d 401, 403 (1991) (emphasis added) (citation and quotation marks omitted). Here, the Charging Order was "entered on the record"; therefore, the Order was not and could not have been entered *nunc pro tunc*. *See id.* (citation and quotation marks omitted). Rather, the Order was entered pursuant to Rule 60(a) following the Amended Assignment of Judgment in order to "make the record speak the truth." *See Shaver*, 248 N.C. at 118, 102 S.E.2d at 795. Such an order does not "apply retroactively;" rather, the change simply corrects a clerical error and does not alter the effect of the original Charging Order. *See Gordon v. Gordon*, 119 N.C. App. 316, 318, 458 S.E.2d 505, 506 (1995) (explaining that correction of a clerical mistake under Rule 60(a) does not "alter[] the effect of the original order" (citation omitted)).

Defendant further contends the Order is invalid because the superior court judge who entered this Order did not enter the original Charging Order. *See, e.g.*, *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (explaining the general rule that "ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action" (citation omitted)). However, as the Official Comment to Rule 60(a) makes clear, "[t]he motion to correct a clerical error need not be made to the same judge who tried the cause." N.C. Gen. Stat. § 1A-1, Rule 60(a) cmt. Therefore, the trial court could and did properly enter the Order.

Lastly, Defendant argues the doctrines of laches and judicial estoppel require reversal of the Order. With regard to the doctrine of laches, our Court has held: "Rule 60(a) provides no time limit for the correction of clerical errors. In fact, the rule states that such errors may be corrected 'at any time.' " *Gordon*, 119 N.C. App. at 319, 458 S.E.2d at 507. Therefore, the doctrine of laches is inapplicable. As for the doctrine of judicial estoppel, Defendant failed to raise judicial estoppel before the trial court; therefore, we need not address this argument. *See Bailey & Assocs. Inc. v. Wilmington Bd. of Adjust.*, 202 N.C. App. 177, 195, 689 S.E.2d 576, 589 (2010) ("[Appellant's] failure to raise the issue of [judicial] estoppel before the [trial court] effectively . . . precludes this Court from considering [appellant's] estoppel claim."). Nevertheless, even assuming this argument is preserved, we find the doctrine inapplicable

because O'Mahoney Holdings, LLC's "inconsistent position," that its corporate descriptor was LLC instead of LTD, "was based on inadvertence or mistake." *See Whiteacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 30, 591 S.E.2d 870, 889 (2004) (citation and quotation marks omitted) ("Thus, it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." (citation and quotation marks omitted)).

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order amending the Charging Order to correct the misnomer under Rule 60(a).

AFFIRMED.

Judges STROUD and YOUNG concur.

ROY EUGENE COUICK, PETITIONER
v.
TORRE JESSUP, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES, STATE OF NORTH CAROLINA, RESPONDENT

No. COA18-1200

Filed 6 August 2019

Motor Vehicles—license revocation—willful refusal of chemical analysis—affidavit—sufficiency of evidence

The Department of Motor Vehicles had no jurisdiction to revoke a driver's license for willful refusal to take a chemical analysis test where the law enforcement officer designated on his affidavit refusal of one type of test—blood—but petitioner refused another type of test—breath. The affidavit failed to show the essential element that the driver refused the type of chemical analysis requested and was therefore not a "properly executed affidavit" pursuant to N.C.G.S. § 20-16.2.

Appeal by respondent from order entered 25 May 2018 by Judge Jeffery K. Carpenter in Superior Court, Union County. Heard in the Court of Appeals 24 April 2019.

James J. Harrington for petitioner-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for respondent-appellant.

STROUD, Judge.

Respondent Commissioner of the Division of Motor Vehicles appeals an order vacating a decision of the Division of Motor Vehicles, rescinding its previously imposed revocation and reinstating petitioner's driving privilege. Because the affidavit and amended affidavit both showed the arresting officer designated a blood test but petitioner refused a breath test, neither was a properly executed affidavit showing petitioner willfully refused blood alcohol testing under North Carolina General Statute § 20-16.2. The trial court correctly concluded DMV did not have jurisdiction to revoke petitioner's license upon receipt of the affidavits, so we affirm.

I. Background

On 7 July 2017, petitioner was charged with driving while impaired and allegedly refused to submit to a chemical analysis. Deputy Justin Griffin of the Union County Sheriff's Office, the law enforcement officer, filed an "Affidavit and Revocation Report of Law Enforcement Officer" form (DHHS 3907) ("Affidavit"). The Affidavit noted Deputy Griffin requested petitioner submit to a blood analysis and had specifically *marked out* the word "breath" for the type of chemical analysis designated. Attached and incorporated into the affidavit was the "Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S. §20-16.2(a)" form (DHHS 4081) ("Rights Form"), which noted "Breath" as the type of analysis refused by petitioner.

On 14 November 2017, Deputy Griffin amended both the Affidavit and Rights Form. The amended Affidavit now noted that Deputy Griffin was both the law enforcement officer and chemical analyst but again he *marked out* the word "breath" and *circled* blood as the type of analysis designated. The amended Rights Form still reflected "Breath" as the type of analysis refused.

Petitioner was notified that his driving privilege would be suspended in December of 2017 for his refusal to submit to a chemical test. Petitioner requested a hearing on the matter, and in February of 2018 the Division of Motor Vehicles ("DMV") decided "petitioner's refusal to submit to a chemical analysis is sustained." Petitioner's driving privilege was suspended effective 18 February 2018.

On 2 March 2018, petitioner filed a petition for a hearing in the trial court regarding his suspended driving privilege. The trial court found "the Division seeks to revoke the Petitioner's driving privilege for willfully refusing a chemical analysis (specifically a breath analysis) that the Petitioner was not requested to submit to" because the Affidavits indicate "Petitioner was requested to submit to a blood analysis and only a blood analysis[.]" Relying on *Lee v. Gore*, 365 N.C. 227, 717 S.E.2d 356 (2011), the trial court determined the DMV did not have the authority to revoke defendant's privilege because "the affidavits signed on July 7, 2017 and on November 9, 2017 are not 'properly executed affidavits' to give rise to a revocation of the Petitioner's driving privilege for failing to submit to a chemical analysis of his breath." The trial court vacated the prior decision of the DMV, revoked the DMV's previously imposed revocation, and reinstated petitioner's driving privilege. Respondent appeals.

II. Properly Executed Affidavit

Respondent contends that its "receipt of a properly executed affidavit under N.C. Gen. Stat. § 20-16.2(d) provided the requisite jurisdiction for respondent to revoke petitioner's license under N.C. Gen. Stat. § 20-16.2." (Original in all caps.)

> [O]n appeal from a DMV hearing, the superior court sits as an appellate court, and no longer sits as the trier of fact. Accordingly, our review of the decision of the superior court is to be conducted as in other cases where the superior court sits as an appellate court. Under this standard we conduct the following inquiry: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. . . . . We hold that these cases provide the appropriate standard of review for this Court under the amended provisions of N.C. Gen. Stat. § 20–16.2.

Johnson v. Robertson, 227 N.C. App. 281, 286–87, 742 S.E.2d 603, 607 (2013) (citations and quotation marks omitted). Furthermore, "[q]uestions of statutory interpretation of a provision of the Motor Vehicle Laws of North Carolina are questions of law and are reviewed *de novo* by this Court." *Id.* at 283, 742 S.E.2d at 605 (citation and quotation marks omitted).

Respondent contends that it had authority to revoke petitioner's license upon receipt of the Affidavit because the Affidavit "contained all requisite jurisdictional elements – boxes 1, 4, 7 and 14." As *Lee* emphasizes, respondent must receive "a properly executed affidavit meeting

all of the requirements set forth in N.C. Gen. Stat. § 20-16.2(c1) before the DMV is authorized to revoked a person's driving privileges." 365 N.C. at 233, 717 S.E.2d at 360-61 (quotation marks omitted). Specifically, Respondent argues the affidavit must allege that:

> (1) The person was charged with an implied-consent offense or had an alcohol concentration restriction on the driver's license[, Box 4 of the Affidavit];
>
> (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the driver's license[, Box 1 of the Affidavit];
>
> . . . .
>
> (5) The results of any tests given or that the person *willfully refused to submit to a chemical analysis*[, Box 14 of the Affidavit].

N.C. Gen. Stat. § 20-16.2(c1) (2017) (emphasis added). In other words, respondent contends box 9 of the form is "immaterial" to its jurisdiction to revoke but acknowledges that box 14 is essential. The problem here is that box 14 conflicts with box 9 on this Affidavit and the Affidavit on its face did not establish jurisdiction. *See generally Lee*, 365 N.C. at 233, 717 S.E.2d at 360-61. Respondent relies upon *Lee* for its argument that the Affidavit was sufficient to confer jurisdiction for revocation, but Respondent overlooks the factual differences between *Lee* and this case as well as the additional statutory requirement relevant to this case. *See generally* N.C. Gen. Stat. § 16.2; *Lee*, 365 N.C. 227, 717 S.E.2d 356.

In *Lee*, the Supreme Court considered a case where a police officer stopped a driver for speeding and the officer believed the driver was driving while impaired. *Id.* at 228, 717 S.E.2d at 357. The officer took the driver to an intake center to "undergo chemical analysis by way of an Intoxilyzer test." *Id.* The officer told the driver "several times that his failure to take the Intoxilyzer test would be regarded as a refusal to take the test" and would "result in revocation of petitioner's North Carolina driving privileges." *Id.* The driver still refused to take the test, and the officer noted "on form DHHS 3908" that the driver had " 'refused' the test at 12:47 a.m. on 23 August 2007." *Id.*

> Later that day the officer appeared before a magistrate and executed an affidavit regarding petitioner's refusal to submit to chemical analysis. Form DHHS 3907, entitled

> "Affidavit and Revocation Report," was created by the Administrative Office of the Courts for this purpose. The form includes fourteen sections, each preceded by an empty box. The person swearing to the accuracy of the affidavit checks the boxes relevant to the circumstances and then signs the affidavit in the presence of an official authorized to administer oaths and execute affidavits.
>
> Section fourteen of form DHHS 3907 states: "The driver willfully refused to submit to a chemical analysis as indicated on the attached form DHHS 3908. DHHS 4003." The officer did not check the box for section fourteen. The officer then mailed both the DHHS 3907 and DHHS 3908 forms to the DMV. Neither form indicated a willful refusal to submit to chemical analysis.
>
> Nevertheless, upon receiving the forms, the DMV suspended petitioner's North Carolina driving privileges for one year, effective 30 September 2007, for refusing to submit to chemical analysis.

Id. at 228, 717 S.E.2d at 357-58.

The driver requested a hearing to contest the license revocation, and at the November 2007 hearing

> it came to light that the copy of form DHHS 3907 on file with the DMV had an '*x*' in the section fourteen box. All the other boxes marked on the form DHHS 3907 contained check marks, not *x*s. Petitioner's copy of form DHHS 3907 did not contain an *x* in the box preceding section fourteen.

Id. at 228-29, 717 S.E.2d at 358. The hearing officer upheld the license revocation, and the driver appealed to Superior Court, which affirmed. *Id.* at 229, 717 S.E.2d at 358. The driver then appealed to the Court of Appeals, which reversed the Superior Court because "DMV never received the statutorily required affidavit indicating that petitioner had willfully refused to submit to a chemical analysis of his blood alcohol level." *Id.* Based upon a dissent which considered the error in the DHHS 3907 Affidavit as "an inconsequential violation of administrative procedure, rather than a violation of petitioner's right to due process[,]" DMV appealed. *Id.*

Our Supreme Court agreed with the majority opinion that DMV had no jurisdiction to revoke the license because the Affidavit did not show the driver had willfully refused the Intoxilyzer test. *Id.* at 365 N.C. at

229-34, 717 S.E.2d at 358-61. The Court then explained that its "disposition of this case turns on the limited authority of the DMV." *Id.* at 230, 717 S.E.2d at 359.

> The DMV is a division of the North Carolina Department of Transportation ("DOT"), which has been described by this Court as an inanimate, artificial creature of statute whose form, shape and authority are defined by the Act by which it was created and which is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism. Chapter 20 of our statutes creates the DMV, sets out its powers and duties, and delineates the DMV's authority to discharge these duties. As such, the DMV possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority.
>
> N.C.G.S. § 20–16.2, the statutory grant of authority at issue here, enables the DMV to act when a driver is charged with an implied-consent offense, such as driving while impaired, and the driver refuses to submit to chemical analysis. Under subsection (a) of the statute, drivers on our highways consent to a chemical analysis test if charged with an implied-consent offense. Before the test is administered, however, a chemical analyst who is authorized to administer a breath test must give the person charged both oral and written notice of his rights as enumerated in that subsection, including his right to refuse to be tested.
>
> Subsections (c) and (c1) then address the refusal to submit to chemical analysis, providing as follows:
>
> > (c) Request to Submit to Chemical Analysis.—*A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.*

> (c1) Procedure for Reporting Results and Refusal to Division.—Whenever a person refuses to submit to a chemical analysis the law enforcement officer and the chemical analyst shall without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating that:
>
> (5) The results of any tests given or that the person willfully refused to submit to a chemical analysis.
>
> The officer shall immediately mail the affidavit(s) to the Division. If the officer is also the chemical analyst who has notified the person of the rights under subsection (a), the officer may perform alone the duties of this subsection.

N.C.G.S. § 20–16.2(c), (c1) (2006).[1]

Next, subsection (d) addresses the consequences stemming from a driver's refusal to submit to chemical analysis and provides for administrative review:

> (d) Consequences of Refusal; Right to Hearing before Division; Issues.—Upon receipt of a properly executed affidavit required by subsection (c1), the Division shall expeditiously notify the person charged that the person's license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division.

Id. § 20–16.2(d) (2006).

Last, subsection (e) authorizes superior court review.

> (e) Right to Hearing in Superior Court.—If the revocation for a willful refusal is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing on the record. The superior court review shall be limited

1. North Carolina General Statute § 20-16.2 has been amended since 2006, but none of the amendments effect the substance of this case. *See* N.C. Gen. Stat. § 20-16.2 (2017) (History).

> to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.

Id. § 20–16.2(e) (2006).

Our appellate courts have had a number of opportunities to consider N.C.G.S. § 20–16.2. These decisions confirm that a person's refusal to submit to chemical analysis must be willful to suspend that person's driving privileges.

Here the Court of Appeals concluded that the DMV did not receive a properly executed affidavit required by subsection (c1) indicating petitioner's willful refusal to submit to chemical analysis. Consequently, the Court of Appeals held that the DMV lacked authority to revoke petitioner's driving privileges under N.C.G.S. § 20–16.2(d). The Court of Appeals further held that, absent this authority, there was also no authority in N.C.G.S. § 20–16.2 for a review hearing or superior court review.

Echoing the dissent, however, the DMV contends that the Court of Appeals erred in reaching these conclusions. The DMV argues that it has the authority to revoke petitioner's driving privileges because petitioner was charged upon reasonable grounds with the implied-consent offense of driving while impaired, was notified of his rights under N.C.G.S. § 20–16.2(a) and willfully refused to submit to chemical analysis, and thus was subject to the consequences outlined in N.C.G.S. § 20–16.2(d). We disagree that the DMV had the authority to revoke petitioner's license under these circumstances, absent an affidavit indicating that petitioner willfully refused to submit to chemical analysis.

N.C.G.S. § 20–16.2(c1) is clear and unambiguous. When a person refuses to submit to chemical analysis the law enforcement officer and the chemical analyst shall without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating the results of any tests given or that the person willfully refused to submit to a chemical analysis. In the instant case the officer swore out the DHHS 3907 affidavit

and attached to that affidavit the DHHS 3908 chemical analysis result form indicating the test was "refused." Yet, neither document indicated that petitioner's refusal to participate in chemical analysis was willful. As such, the requirements of section 20–16.2(c1) have not been met.

Additionally, the requirements of N.C.G.S. § 20–16.2(d) have not been satisfied. The plain language of subsection (d) requires that the DMV receive "a properly executed affidavit" meeting all the requirements set forth in N.C.G.S. § 20–16.2(c1) before the DMV is authorized to revoke a person's driving privileges under N.C.G.S. § 20–16.2. *Here neither the DHHS 3907 affidavit submitted to the DMV, nor the attached DHHS 3908 form indicating a refusal, states that the refusal was willful. Consequently, the DMV lacked authorization to revoke petitioner's license.*

. . . .

[W]hile we are cognizant of the strong public policy favoring the removal of unsafe drivers from our roads, *the DMV's burden here was light. The DMV could have cured the deficiency in the affidavit by simply inquiring of the officer whether the affidavit contained an omission. If so, the DMV could have requested that the officer swear out a new, properly executed affidavit. Instead, the DMV took the position that the error described here was cured through a hearing the DMV lacked the authority to conduct.* To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason. The DMV's interpretation would also permit suspension of driving privileges for willful refusal without an evidentiary predicate. The suspended driver would then have to request a hearing to contest the State's actions. Yet, if the driver failed to request a hearing, his driving privileges likely would be suspended even though the DMV never received evidence of willful refusal. This result is not contemplated in N.C.G.S. § 20–16.2. Simply put, the DMV lacks the authority to suspend driving privileges, or revoke a driver's license, without some indication that a basis for suspension or revocation as required by N.C.G.S. § 20–16.2(c1) has occurred.

> *Finally, to hold otherwise essentially adopts a "no harm, no foul" analysis. Absent prejudice, so the argument goes, a statutory violation such as we have here may be overlooked. As we explain above, however, this case involves the DMV's authority to act. This is not a case that turns upon prejudice to the petitioner.*

Id. at 229-234, 717 S.E.2d at 358-61 (emphasis added) (citations, quotation marks, ellipses, brackets, and footnotes omitted). The Supreme Court affirmed the Court of Appeals opinion and held "that the DMV lacked the authority to revoke the driving privileges of petitioner[.]" *Id.* at 227, 717 S.E.2d at 357. Based on *Lee*, respondent contends, "Information contained in Box #9 of the Affidavit regarding the type of chemical test requested is immaterial to a determination of whether the Petitioner's license should be revoked pursuant to N.C. Gen. Stat. § 20-16.2."

Respondent initially contends that marking "blood" instead of "breath" was merely a clerical error. To be clear, this is not simply a matter of checking boxes where a box was missed and later filled in, as in *Lee*, *id.* at 228, 717 S.E.2d at 358, or a misplaced mark could be misunderstood as a strikeout when it was intended as a checkmark to indicate just the opposite of what a strikeout would accomplish. Box 9 leaves blanks for the date and time to be filled in by hand and then the preprinted text on the form states, "I requested the driver to submit to chemical analysis of his/her breath/ or blood/ or urine." On both Affidavits "breath" and "urine" are both marked out and the word "blood" is circled. This is not merely a clerical error indicating a "minor mistake" but rather a purposeful choice to mark out "breath" and "urine[,]" and to designate "blood[.]" *See State v. Allen*, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) ("A clerical error is defined as, an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record[.]" (citation, quotation marks, and brackets omitted)). Further, the same "error" as to the type of test designated occurs on both the original and amended Affidavits. And without the correct designation of the test requested in box 9, box 14 cannot support the claim of a willful refusal.

Respondent also argues that the correct type of test, breath, was noted on the attached DHHS Form 4081, "Rights of Person Requested to Submit to Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance under N.C.G.S. 20-16.2(a)[.]" But Form 4081 was actually part of the Affidavit. Box 14 of the Affidavit states: "The driver willfully refused to submit to a chemical analysis *as*

indicated on the attached: [] DHHS 4082 [] DHHS 4081."[2] Both the originally filed and amended DHHS 4081 forms were the same. At the top of the attached form, three options are printed:

"[ ] Breath [ ] Blood [ ] Subsequent Test[.]"

"Breath" is checked as the test refused on both the original and amended forms. Thus, on its face, the Affidavit showed that Deputy Griffin requested a blood test and petitioner refused a breath test.

But as noted, respondent also contends that the error was immaterial and does not affect whether the Affidavit was properly executed to invoke the DMV's authority. We turn to the applicable version of North Carolina General Statute § 20-16.2 which addresses the requirements for request for a chemical analysis. *See generally* N.C. Gen. Stat. § 20-16.2. One requirement is that the officer or analyst "designate the type of test or tests to be given":

> (c) **Request to Submit to Chemical Analysis.** -- A law enforcement officer or chemical analyst *shall designate the type of test or tests to be given* and may request the person charged to submit *to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section*, but the refusal does not preclude testing under other applicable procedures of law.

N.C. Gen. Stat. § 20-16.2 (emphasis added). Box 9 of the Affidavit form is the portion of the Affidavit where the officer designates the "type of test or tests to be given[.]" *Id.* The statute requires the officer or analyst to "designate the type of test or tests to be given" and the person charged must submit "to the type of chemical analysis *designated*." *Id.* (emphasis added). If the person refuses "to submit to that chemical analysis" the officer could then designate another type of testing, but the type of test designated and the type of test refused must be the same for the driver's refusal to be willful. *See id.* Thus, the *type* of chemical analysis requested and refused is an essential element showing that the driver willfully refused testing and is a necessary part of a properly executed affidavit. *Id.*

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2. On both the original and amended affidavit both boxes are checked, but only one form, DHHS 4081 was attached.

Respondent's reading of *Lee* as holding only four specific sections of the Affidavit are relevant to invoke for jurisdiction is not entirely incorrect but focuses only on the facts in the *Lee* case. *See generally Lee*, 365 N.C. 227, 717 S.E.2d 356. In *Lee*, the officer requested and the driver refused a breath test, but the box regarding willful refusal was not checked at all. *See id*. at 228, 717 S.E.2d at 357-58. Here, the issue is whether petitioner willfully refused to take the type of test designated by Deputy Griffin, and based upon both the original Affidavit and the amended Affidavit, the officer "designated" one type of test – blood -- and petitioner refused another type of test -- breath. Under North Carolina General Statute § 20-16.2, this is not a willful refusal of a chemical analysis. *See* N.C. Gen. Stat. § 20-16.2.

In *Lee*, the Supreme Court noted the "particularly disturbing" fact that the affidavit as originally completed did not have the block for box 14 checked, but the version of the affidavit presented at the hearing had an *x* mark in that block. *Lee*, 365 N.C. at 229-233, 717 S.E.2d at 358-61. The Court noted that DMV could have corrected the problem but this correction would have to be done *before* revocation of the license, not at the hearing, because DMV would have no jurisidiction either to revoke the license or to hold a hearing without a properly executed affidavit:

> The DMV could have cured the deficiency in the affidavit by simply inquiring of the officer whether the affidavit contained an omission. *If so, the DMV could have requested that the officer swear out a new, properly executed affidavit. Instead, the DMV took the position that the error described here was cured through a hearing the DMV lacked the authority to conduct*. To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason. The DMV's interpretation would also permit suspension of driving privileges for willful refusal without an evidentiary predicate.

Id. at 234, 717 S.E.2d at 361 (emphasis added) (citations omitted).

Here, on 14 November 2017, Deputy Griffin prepared the amended Affidavit form, including the amended attached DHHS 4081 form, but the amended forms still included the exact same information in Section 9 as the original forms. We assume the only reason for the Amended Affidavit was to show that Deputy Griffin was the law enforcement officer and the chemical analyst. Since the Affidavit still states

that Deputy Griffin designated one type of test and petitioner refused another type of test, the refusal was not willful under North Carolina General Statute § 20-16.2. *See generally* N.C. Gen. Stat. § 20-16.2.

Respondent also argues that any deficiency in the Affidavit was corrected by Deputy Griffin's testimony at the hearing because Deputy Griffin testified that he requested that respondent submit to a breath test and he refused. Deputy Griffin also testified that respondent asked for a blood test but he did not offer a blood test because "I have to go with my discretion" and "most of the time when I do a blood draw it's for . . . substances, illegal drugs and/or alcohol." But as our Supreme Court stressed in *Lee*, the error in the Affidavit cannot be "cured through a hearing the DMV lacked the authority to conduct. To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason." *Lee*, 365 N.C. at 234, 717 S.E.2d at 361. The respondent's argument ignores DMV's "limited authority" to suspend a driver's license. *Id.* at 230, 717 S.E.2d at 359. As the Supreme Court noted, "Absent prejudice, so the argument goes, a statutory violation such as we have here may be overlooked. As we explain above, however, this case involves the DMV's authority to act. This is not a case that turns upon prejudice to the petitioner." *Id.* at 234, 717 S.E.2d at 361.

III. Conclusion

Because the Affidavit submitted to DMV did not show that petitioner had willfully refused chemical analysis under North Carolina General Statute § 20-16.2, it was not a "properly executed affidavit" which conferred jurisdiction upon DMV to revoke petitioner's license. We therefore affirm the trial court's order.

AFFIRMED.

Judges BRYANT and COLLINS concur.

CROSMUN v. TRS. OF FAYETTEVILLE TECH. CMTY. COLL.

[266 N.C. App. 424 (2019)]

DR. SANDRA T. CROSMUN, DR. MICHAEL HESS, LESLIE KEENAN, DR. JOHN R. PARKER, III, JAMIE E. STEVENS AND CHERYL J. THOMAS, PLAINTIFFS
v.
THE TRUSTEES OF FAYETTEVILLE TECHNICAL COMMUNITY COLLEGE, DR. LARRY J. KEEN, DR. DAVID L. BRAND AND CARL MITCHELL, DEFENDANTS

No. COA18-1054

Filed 6 August 2019

1. Appeal and Error—discovery order—interlocutory—substantial right—privilege asserted

An interlocutory order compelling discovery (which required an extensive forensic examination of a college's computer databases in a retaliatory dismissal action) was immediately appealable where defendants asserted non-frivolous and particularized objections to specific requests for information based on privilege and immunity grounds.

2. Discovery—electronically stored information (ESI)—forensic examination—privileges and immunity—protective protocol

In a whistleblower retaliatory dismissal action, the trial court abused its discretion in ordering defendant college to comply with a discovery order that allowed plaintiff's agent, not an independent or neutral party, to conduct a three-week forensic examination of electronically stored information (ESI) copied from defendant's computer servers without providing adequate protection against violations of defendant's attorney-client privilege and work-product immunity. Since a party cannot be compelled to disclose privileged information absent a prior waiver or applicable exception, the trial court was directed on remand to ensure that any discovery protocol adopted gave defendant an opportunity to review responsive documents and assert privileges prior to production.

Appeal by Defendants from an order entered 15 June 2018 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 9 May 2019.

Tin, Fulton, Walker & Owen, PLLC, by S. Luke Largess, and Rabon Law Firm, PLLC, by Charles H. Rabon, Jr., Gregory D. Whitaker, and David G. Guidry, for Plaintiffs-Appellees.

Yates, McLamb & Weyher, LLP, by Sean T. Partrick and David M. Fothergill, for Defendants-Appellants.

INMAN, Judge.

Seeking justice often involves enduring tedium. Many attorneys and judges unsurprisingly consider the discovery stage of civil litigation among the most prosaic and pedestrian aspects of practice.[1] A single page among millions of records, however—even one dismissed as irrelevant by the withholding party—may be considered a "smoking gun" to the party seeking its disclosure.

Our discovery rules "facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial," *Am. Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888 (1979), and are designed to encourage the "expeditious handling of factual information before trial so that critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that evidence at trial may flow smoothly and objections and other interruptions be minimized." *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976). These vital purposes are no less present when electronic discovery ("eDiscovery") is concerned; in many instances, their importance is heightened.[2]

Electronically stored information, or ESI, "has become so pervasive that the volume of ESI involved in most cases dwarfs the volume of any paper records. This makes ESI the driving force behind the scope of preservation and discovery requirements in many cases[.]" *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 56 (2018) (hereinafter the "Sedona Principles");[3] *see*

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1. Appellate courts are generally inoculated from directly engaging in discovery by virtue of their distance from pre-trial proceedings. *Cf. Barnette v. Woody*, 242 N.C. 424, 430, 88 S.E.2d 223, 227 (1955) ("[I]t would require a tedious and time-consuming voyage of discovery for us to ascertain upon what the appellant is relying to show error, and our Rules and decisions do not require us to make any such voyage.").

2. Also no less present in eDiscovery is the monotony of document review. *See, e.g.*, *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 Fed. App'x 37, 45 (2d Cir. 2015) (interpreting North Carolina law and holding that a California attorney, unlicensed in North Carolina, was not engaged in the practice of law in this State when he served as a contract attorney sorting electronic documents into categories devised by trial counsel, as he "exercised no legal judgment whatsoever" and "provided services that a machine could have provided").

3. The Sedona Principles, first published in 2004, seek to "serve as best practice recommendations and principles for addressing ESI issues in disputes—whether in federal or state court, and whether during or before the commencement of litigation."

also Analog Devices, Inc. v. Michalski, 2006 NCBC 14, 2006 WL 3287382, at *5 (N.C. Super. Ct. Nov. 1, 2006) ("It is an inescapable fact that ninety-nine percent of all information being generated today is created and stored electronically. That fact may be shocking to judges who still find themselves buried in paper, but even our court systems are moving, albeit reluctantly, into the age of technology." (citation omitted)).[4]

Despite the general disdain of courts for discovery disputes, in the words of Dorothea Dix, "[a]ttention to any subject will in a short time render it attractive, be it ever so disagreeable and tedious at first." Dorothea L. Dix, *Conversations on Common Things; Or, Guide to Knowledge. With Questions. For the Use of Schools and Families*. 270 (4th ed. 1832). This appeal presents this Court with our first opportunity to address the contours of eDiscovery within the context of North Carolina common and statutory law regarding the attorney-client privilege and work-product doctrine.

Defendants appeal from an order compelling discovery that allows Plaintiffs' discovery expert access to Fayetteville Technical Community College's ("FTCC") entire computer system prior to any opportunity for Defendants to review and withhold documents that contain privileged information or are otherwise immune from discovery. Defendants argue

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Sedona Principles at 29. They were drafted and published by The Sedona Conference, "a 501(c)(3) research and educational institute that exists to allow leading jurists, lawyers, experts, academics, and others at the cutting edge of issues in the areas of antitrust law, complex litigation, and intellectual property rights, to come together in conferences and mini-think tanks . . . to engage in true dialogue—not debate—in an effort to move the law forward in a reasoned and just way." *Id.* at 8. The Sedona Principles and other publications of The Sedona Conference have been relied upon by federal and state courts nationwide, including North Carolina's trial courts. *See, e.g.*, *Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249 (4th Cir. 2013) (relying on a glossary of eDiscovery terms published by The Sedona Conference); *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012) (citing various publications of The Sedona Conference concerning eDiscovery); *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008) (relying in part on the Sedona Principles in setting aside a trial court's orders compelling forensic imaging of the defendants' computer hard drives where the orders "fail[ed] to account properly for the significant privacy and confidentiality concerns present"); *In re Queen's University at Kingston*, 820 F.3d 1287 (Fed. Cir. 2016) (citing a publication of The Sedona Conference on ESI retention); *In re State Farm Lloyds*, 520 S.W.3d 595, 60 Tex. Sup. Ct. J. 1114 (2017) (utilizing the Sedona Principles to resolve an eDiscovery issue governed by Texas law); *Tumlin v. Tuggle Duggins, P.A.*, 2018 NCBC 49, 2018 WL 2327022, at *10 (N.C. Super. Ct. May 22, 2018) (relying on the Sedona Principles to determine whether sanctions for spoliation in eDiscovery were proper).

4. Our Supreme Court, recognizing the continuous stream of cases involving ESI in the North Carolina Business Court, has promulgated a series of Business Court rules expressly requiring counsel to discuss ESI with their clients and conduct a conference with the opposing party to fashion an ESI production protocol. N.C. R. Bus. Ct. 10.2-.8 (2019).

that the order compelling discovery constitutes an impermissible involuntary waiver of those privileges.[5] Plaintiffs argue that the trial court's order, in conjunction with a stipulated protective order consented to by the parties, adequately protects Defendants' privileges such that no waiver will occur. After careful review, we hold that the trial court abused its discretion by compelling production through a protocol that provides Plaintiffs' agent with direct access to potentially privileged information and precludes reasonable efforts by Defendants to avoid waiving any privilege. We therefore vacate the order and remand for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs, who are former employees of FTCC, filed suit against Defendants on 7 December 2016, alleging retaliatory dismissals from FTCC in violation of the North Carolina Whistleblower Protection Act. *See* N.C. Gen. Stat. § 126-84 (2017). One week later, Plaintiffs' counsel mailed a letter to each Defendant concerning the complaint and informing them of their obligation to preserve ESI in light of the litigation. As the action advanced to discovery, Plaintiffs served two sets of interrogatories and requests for production of documents on Defendants in April and October of 2017. Defendants responded to both sets of discovery requests but objected to certain requests based on attorney-client, attorney work-product, and state and federal statutory privileges.

In January 2018, Plaintiffs served Defendants with a third set of interrogatories and requests for production; Plaintiffs also mailed Defendants' counsel a letter asserting their discovery responses were incomplete and expressing concern that Defendants had destroyed responsive ESI. In February 2018, Defendants' counsel responded by letter denying any spoliation, rejecting Plaintiffs' claim that certain responses were incomplete, and agreeing to produce newly discovered additional responsive documents. Dissatisfied with Defendants' response, Plaintiffs' counsel sent additional letters reiterating their discovery demands. Plaintiffs followed their letters with a motion to compel requesting the trial court "[o]rder that the parties identify a computer forensics entity or individual who, at Defendants' cost, will search the computer servers

5. We recognize that the work-product doctrine is "not a privilege, but a 'qualified immunity.' " *Evans v. United Serv. Auto. Ass'n*, 142 N.C. App. 18, 28, 541 S.E.2d 782, 788 (2001) (quoting *Willis v. Power Co.*, 291 N.C 19, 35, 229 S.E.2d 191, 201 (1976)). Because the issues raised in this appeal require no analysis differentiating attorney-client privilege and work-product immunity, to avoid confusion and for ease of reading, we use the word "privilege" broadly to encompass both traditional privileges, such as attorney-client privilege, and the qualified work-product immunity.

at FTCC to determine if Defendants have deleted emails and files pertaining to these discovery requests."

Plaintiffs' motion came on for hearing on 26 February 2018 before Superior Court Judge Douglas B. Sasser. At that hearing, Judge Sasser issued an oral ruling requiring a forensic computer examination of FTCC's servers and tasked the parties with submitting a proposed order.

Judge Sasser's oral ruling did little to quell the parties' disagreement, and instead shifted their focus from what should be produced to what should appear in the proposed order. Defendants objected to Plaintiffs' first proposed order on the ground that general language permitting Plaintiffs to search FTCC's "computer files" for "deleted material" was over-broad, as it required a search of all of FTCC's systems for any and all documents without limitation. Plaintiffs refused to revise the proposed order and reiterated their belief that a search of FTCC's entire system was both necessary and allowed by Judge Sasser's ruling. Defendants then drafted their own proposed order. Plaintiffs then revised their proposed order slightly and suggested Defendants draft a consent protective order to address concerns relating to the production of student information. Defendants objected that Plaintiffs' revised order did not adequately protect privileged information or appropriately limit the scope of discoverable materials. But Defendants agreed to draft a protective order for consideration by the trial court and Plaintiffs.

While the above discussions were ongoing, and roughly two weeks after the hearing before Judge Sasser, Defendants provided Plaintiffs with a supplemental document production. Defendants also informed Plaintiffs that they had yet to complete a draft protective order, as the model protective orders they were working from "only covered inadvertent disclosure of confidential material[,]" and "[i]t has been much more difficult to address privilege issues under a forensic search situation." Plaintiffs replied that they would draft a proposed protective order prohibiting the disclosure of information protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Counsel for Defendants rejected that offer, expressing concern about how to prevent disclosure of materials within the attorney-client privilege or work-product immunity. As discussions surrounding the protective order continued, Plaintiffs submitted the parties' competing proposed orders on the motion to compel to Judge Sasser.

Judge Sasser entered Plaintiffs' proposed order on the motion to compel on 16 April 2018 (the "Forensic Examination Order"). In it, Judge Sasser provided for "a forensic examination of [FTCC's] computer

files" by a "forensic examiner." The order also provided that "the parties shall work with the examiner to agree on key words and other search parameters to use in conducting this forensic review, which will cover the period from . . . July 2014 to the present[,]" and that "Plaintiff's shall bear the initial costs of the forensic review." However, the Forensic Examination Order did not address how a forensic examiner would be selected, whether the examiner would be an independent third party, or how the forensic examination itself would be conducted, and it left resolution of any confidentiality concerns to a future protective order to be submitted by the parties at a later date.

Plaintiffs retained Clark Walton ("Mr. Walton"), an expert in computer forensics and a licensed North Carolina attorney, to draft a proposed forensic examination protocol to effectuate the Forensic Examination Order. As part of that process, Defendants permitted Mr. Walton to question members of FTCC's Information Technology department about the nature of the college's computer systems. Plaintiffs then submitted a proposed forensic examination protocol to Defendants for their consideration on 21 May 2018.[6] The proposed protocol, in pertinent part, provided for the following:

> (1) Mr. Walton would physically access, either at his offices or at FTCC, all FTCC devices on which responsive material might be found or from which responsive material may have been deleted;
>
> (2) From those devices, Mr. Walton would create searchable mirror images[7] and keep those images in his custody (the "Search Images");
>
> (3) Mr. Walton would run search terms "and other search parameters" desired by Plaintiffs through the Search Images to identify responsive data (the "Keyword Search Hits");
>
> (4) Mr. Walton would then remove non-user and other non-responsive system files from the Keyword Search Hits consistent with standard computer forensics practice;

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6. The protocol provided to and adopted by the trial court was not drafted solely by Mr. Walton; rather, it appears from the hearing transcript that Mr. Walton provided certain model protocols for use by Plaintiffs' counsel, who then crafted the protocol with input from Mr. Walton.

7. In eDiscovery parlance, a "mirror image" is "[a] bit by bit copy of any storage media. Often used to copy the configuration of one computer to anther [sic] computer or when creating a preservation copy." *The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 Sedona Conf. J. 340 (2014) (citation omitted).

(5) Using six search terms identified by Plaintiffs in their proposed protocol, Mr. Walton would then screen out any potentially privileged documents from the Keyword Search Hits (the "Privilege Search Hits");

(6) Mr. Walton would immediately deliver those documents not flagged in the Privilege Search Hits to Plaintiffs for their review, while Defendants would review the Privilege Search Hits and create a privilege log for all items in the Privilege Search Hits that they believed to be privileged;

(7) Finally, Defendants would provide Plaintiffs with the privilege log and any documents from the Privilege Search Hits that Defendants determined were not actually subject to a privilege.

Plaintiffs also submitted a proposed stipulated protective order to Defendants on 24 May 2018.

By 4 June 2018, Defendants had not responded to the protocol or followed up with Plaintiffs about the joint protective order. Plaintiffs filed a combined motion to compel and motion for sanctions requesting that the trial court: (1) adopt the proposed protocol; (2) enter the proposed protective order; (3) shift the costs of discovery to Defendants; and (4) as a sanction for Defendants' alleged violation of prior court orders, award Plaintiffs their attorneys' fees incurred in obtaining the discovery.

On the same day Plaintiffs filed the combined motion, Defendants faxed a letter objecting to the protocol, noting that their "main concern still lies with the improper protection of files that could be potentially privileged. . . . It is FTCC's position that none of the documents . . . may be viewed by anyone who is not part of the FTCC privilege [group] prior to the files being reviewed and approved by FTCC." Defendants also attached a red-lined version of the protocol identifying various provisions that they believed endangered their privileges.

The parties appeared before the trial court for a hearing on Plaintiffs' combined motion on 11 June 2018. They presented a stipulated protective order (the "Protective Order") for entry by the trial court. The Protective Order covers personnel and any other information "generally treated as confidential[,]" and, if designated confidential upon production or within 21 days of discussion in deposition testimony, precludes dissemination of that information to outside parties except as necessary to the litigation. It also addresses, in limited respects, the production of privileged information as follows:

15. Review of the Confidential Information by those so authorized by this Order shall not waive the confidentiality of the documents or objections to production. Nothing contained in this Order and no action taken pursuant to it shall waive or prejudice the right of any party to contest the alleged relevancy, admissibility, or discoverability of the Confidential Information sought or provided in discovery.

16. Nothing in the foregoing provisions of this Order shall be deemed to waive any privilege, or to preclude any party from seeking and obtaining, on an appropriate showing, such additional protection with respect to Confidential Information as that party may consider appropriate.

. . . .

17. In order to facilitate discovery, the inadvertent disclosure of documents or other information subject to confidentiality, a privilege, or other immunity from production shall be handled as follows:

a. From time to time during the course of discovery, one or more of the parties may inadvertently disclose documents or other information subject to confidentiality, a privilege, or other immunity from production. Any such disclosure shall not be deemed a waiver of the confidential, privileged, or immune nature of that document or information, or of any related subject matter.

b. To that end, if a producing party, through inadvertence, error or oversight, produces any document(s) or information that it believes is immune from discovery pursuant to any attorney-client privilege, attorney work product immunity or any other privilege or immunity, such production shall not be deemed a waiver, and the producing party may give written notice to the receiving party that the document(s) or information so produced is deemed privileged and that the return of the document(s) or information is requested. Upon receipt of such written notice, the receiving party shall immediately undertake to gather the original and all such copies to the producing party, and shall promptly destroy any newly created derivative document such as a summary of or comment on the inadvertently produced information.

Four days after the hearing and entry of the Protective Order, the trial court entered its order on Plaintiffs' combined motion (the "Protocol Order"). That order adopted the protocol proposed by Plaintiffs without alteration, and provided for Mr. Walton, as "Plaintiffs' expert[,]" to conduct a three-week-long forensic examination of the Search Images at his offices. The trial court denied Plaintiffs' motion for sanctions.

Defendants filed their notice of appeal from the Protocol Order and a motion to stay on 21 June 2018. On 3 July 2018, the trial court entered a consent order on Defendants' motion to stay, requiring the immediate imaging of certain discrete computer systems but otherwise staying operation of the Protocol Order.[8]

II. ANALYSIS

A. Appellate Jurisdiction

[1] Interlocutory orders, or those orders entered in the course of litigation that do not resolve the case and leave open additional issues for resolution by the trial court, are ordinarily not subject to immediate appeal. *Sessions v. Sloane*, 248 N.C. App. 370, 380, 789 S.E.2d 844, 853 (2016). Such orders are appealable, however, "when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014) (citations and quotations omitted). That said, "[a]n order compelling discovery is interlocutory in nature and is usually not immediately appealable because such orders generally do not affect a substantial right." *Sessions*, 248 N.C. App. at 380, 789 S.E.2d at 853 (citing *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999)).

An interlocutory order compelling discovery affects a substantial right when "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial[.]" *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. This rule applies to attorney work-product immunity and common law attorney-client

8. On appeal, Plaintiffs argue that the specific systems listed in the order granting the stay are the only systems subject to forensic examination under the Protocol Order. This does not appear to be the case, however, as neither the Forensic Examination Order nor the Protocol Order contains any such limit, and the stay does not modify the prior orders. The record reflects that Plaintiffs rejected Defendants' request to include such a limit in their proposed order submitted to Judge Sasser, which was later entered as the Forensic Examination Order. Applying their plain language, we interpret both the Forensic Examination and Protocol Orders as requiring a complete imaging of all of Defendants' systems.

privilege. *See, e.g.*, *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 446, 717 S.E.2d 1, 4 (2011) (holding an interlocutory order requiring production over the producing party's objections on attorney-client privilege and work-product immunity grounds affected a substantial right subject to immediate appeal).

Blanket assertions that production is not required due to a privilege or immunity are insufficient to demonstrate the existence of a substantial right. *Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 853. But specific objection to a discrete enumerated request for production or a document-by-document identification of alleged privileged information may suffice. *See*, *e.g.*, *K2 Asia Ventures*, 215 N.C. App. at 446-48, 717 S.E.2d at 4-5 (holding that some appealing defendants demonstrated a substantial right by asserting work-product immunity and attorney-client privilege as to a specific request for production of documents in their discovery responses while other appealing defendants failed to show a substantial right by simply prefacing their discovery responses with a general objection on those grounds not particularized to any specific request).

Plaintiffs argue that Defendants have failed to demonstrate that enforcement of the Protocol Order will affect a substantial right because Defendants have yet to identify specific privileged documents that would be captured and produced under the protocol. A document-by-document assertion of privilege, however, is not strictly required. Although "objections made and established on a document-by-document basis are *sufficient* to assert a privilege[,]" *Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 853 (citation and quotation marks omitted) (emphasis added), they are not the exclusive means of demonstrating the loss of a substantial right and the appealable nature of a discovery order. *K2 Asia Ventures*, 215 N.C. App. at 446, 717 S.E.2d at 4; *see also Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, 247 N.C. App. 641, 788 S.E.2d 170 (2016) (holding that a discovery order affected a substantial right and was immediately appealable under the circumstances even though the appellants failed to assert particularized claims of attorney-client privilege in their initial discovery responses), *aff'd as modified on separate grounds*, 370 N.C. 235, 805 S.E.2d 664 (2017). We base our determination on whether Defendants have legitimately asserted the loss of a privilege or immunity absent immediate appeal. *See*, *e.g.*, *Evans v. United States Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (holding an interlocutory discovery order was immediately appealable after determining the appellants' assertion of privilege was neither frivolous nor insubstantial and that the privilege would be lost absent immediate review).

Defendants made their specific objections on privilege and immunity grounds early and often. In their responses to Plaintiffs' requests for production of documents, Defendants particularized these objections to specific requests. When Plaintiffs first identified deficiencies in Defendants' document production, Defendants responded that they would be "re-running all . . . discovery key word searches" but would require "some time to review [any newly discovered documents] for potential privilege issues before some documents will be produced." Although we do not have a transcript of the hearing before Judge Sasser, Defendants communicated to Plaintiffs during the proposed order drafting process that any forensic examination protocol and protective order would need to protect privileged information, as they did not "think [Judge Sasser] ordered disclosure of attorney/client or work product material."

After Plaintiffs filed their combined motion to compel and motion for sanctions, Defendants filed a response objecting to the protocol because it "would require wholesale production of **all** of FTCC's attorney/client privileged information to the Plaintiffs' forensic agent." (emphasis in original). Defendants likewise lodged that objection in a letter to Plaintiffs requesting certain changes to the protocol as proposed. Defendants also raised their privilege concerns directly with the trial court at the hearing on Plaintiffs' combined motion to compel and for sanctions. Plaintiffs have never disputed that the forensic search and creation of the Search Images would capture potentially privileged information; to the contrary, they have simply argued that the protocol protects those privileged documents from production. Defendants' particularized, continuous, and timely objections do not appear frivolous from this record, especially when Plaintiffs do not deny the possibility that the forensic search will capture privileged information.

It also appears that Defendants' privileges will be lost absent immediate appeal. The Protocol Order requires the indiscriminate production of Defendants' entire computer system via the Search Images to Plaintiffs' expert, a process which, as explained *infra*, immediately violates Defendants' privilege interests. As a result, Defendants' meritorious and substantial objections will be lost absent immediate review, and the Protocol Order constitutes an interlocutory order affecting a substantial right subject to immediate appeal. *See Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581; *K2 Asia Ventures*, 215 N.C. App. at 446, 717 S.E.2d at 4; *Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 853.

B. Standard of Review

Discovery orders compelling production and applying the attorney-client privilege and work-product immunity are subject to an abuse of discretion analysis. *Sessions*, 248 N.C. App. at 381, 789 S.E.2d at 853-54. "Under an abuse of discretion standard, this Court may only disturb a trial court's ruling if it was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 381, 789 S.E.2d at 854 (citation and internal quotation marks omitted). "When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006) (citations omitted).

C. eDiscovery Orders and the Protection of Privilege

We write on a relatively blank slate regarding privileges in the forensic imaging and eDiscovery context. As our Business Court has observed, "North Carolina case law addressing problems inherent in electronic discovery, including waiver arising from inadvertent disclosure of privileged information, is not yet well developed." *Blythe v. Bell*, 2012 NCBC 42, 2012 WL 3061862, at *8 (N.C. Super. Ct. July 26, 2012).

North Carolina authority regarding eDiscovery is bare bones, generally providing that "discovery of [ESI] stands on equal footing with discovery of paper documents." N.C. R. Civ. P. 34, Comment to the 2011 Amendment (2017); *see also* N.C. R. Civ. P. 26(b) (defining ESI and including it within the scope of discovery subject to the same privileges as paper documents).

No statute, procedural rule, or decision by this Court or the North Carolina Supreme Court has delineated the parameters of eDiscovery protocols with respect to the protection of documents and information privileged or otherwise immune from discovery.

Just as a producing party is responsible for collecting, reviewing, and producing responsive paper documents, it is generally understood that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." Principle 6, Sedona Principles at 118. It behooves a responsive party's attorneys, then, to engage with opposing counsel and jointly develop a mutually agreeable means of conducting eDiscovery when it is clear that litigation will involve ESI. *See, e.g.*, Comment 3.b., Sedona Principles at 76-78 (noting that cooperation and agreement on eDiscovery may reduce costs and

expedite discovery for both parties while avoiding "expensive motion practice, which may lead to undesirable court orders"); N.C. R. Civ. P. 26(f) (providing a mechanism for discovery conferences to address production of ESI); N.C. R. Bus. Ct. 10.2-.3 (requiring a discovery conference that includes discussion of eDiscovery and detailing issues that should be addressed via an ESI production protocol).

Absent controlling authority directly on point, we consider decisions by courts in other jurisdictions as well as the universally persuasive authority, common sense.

Forensic imaging of a recalcitrant responding party's computers is one method of resolving a dispute over ESI. *See*, *e.g.*, *Feeassco*, *LLC v. Steel Network*, *Inc.*, ___ N.C. App. ___, ___, 826 S.E.2d 202, 209 (2019) (holding a trial court did not abuse its discretion in ordering an onsite audit of the producing party's electronic sales and accounting systems for potentially responsive ESI by an independent auditor when the producing party conceded it had failed to comply with discovery requests). However, as has been recognized by various state and federal courts, "[a] Court must be mindful of the potential intrusiveness of ordering forensic imaging." *Wynmoor Community Council*, *Inc. v. QBE Ins. Co.*, 280 F.R.D. 681, 687 (S.D. Fla. 2012) (citing *Bennett v. Martin*, 186 Ohio App.3d 412, 425, 928 N.E.2d 763 (10th District 2009)); *see also In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (vacating the district court's order to provide the requesting party unlimited, direct access to the responding party's databases without any protocol for the search, including no search terms, and finding that direct access is not permissible without a factual finding of non-compliance with discovery rules); *Exec. Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 569 (8th Cir. 2008) (holding that the district court did not abuse its discretion in declining to order a forensic analysis of a computer because the responding party had provided all relevant documents in hard copy and forensic discovery could disclose privileged documents).[9]

Forensic examinations of ESI may be warranted when there exists some factual basis to conclude that the responding party has not met its duties in the production of discoverable information. *Feeassco*, ___ N.C. App. at ___, 826 S.E.2d at 209; *see also* N.C. R. Civ. P. 34, Comment to the 2011 Amendment ("If a party that receives produced information

9. The Sedona Principles likewise caution that "[i]nspection of an opposing party's computer system under Rule 34 [of the Federal Rules of Civil Procedure] and state equivalents is the exception and not the rule for discovery of ESI." Comment 6.d., Sedona Principles at 128.

claims that it needs . . . access to the full database or system that generated the information, the question of . . . direct access will turn on whether the requesting party can show that there is some specific reason, beyond general suspicion, to doubt the information and that the burden of providing direct access is reasonable in light of the importance of the information and the circumstances of the case."); *Wymmoor Community Council*, 280 F.R.D at 687 (allowing forensic imaging to recover potentially responsive deleted documents when the producing party was "either unwilling or unable to conduct a search of their computer systems for documents responsive to . . . discovery requests").

Even when a forensic examination is proper and necessary, any protocol ordered must take into account privileges from production that have not been waived or otherwise lost. Broadly speaking, courts ordering forensic examinations should be mindful of:

> a) revealing trade secrets;
>
> b) revealing other highly confidential or private information, such as personnel evaluations and payroll information, properly private to individual employees;
>
> c) revealing confidential attorney-client or work-product communications;
>
> d) unreasonably disrupting the ongoing business;
>
> e) endangering the stability of operating systems, software applications, and electronic files if certain procedures or software are used inappropriately; and
>
> f) placing a responding party's computing systems at risk of a data security breach.

Comment 6.d., Sedona Principles at 128-29.[10] As the Sixth Circuit has observed, "even if acceptable as a means to preserve electronic evidence, compelled forensic imaging is not appropriate in all cases, and courts must consider the significant interests implicated by forensic imaging before ordering such procedures." *John B.*, 531 F.3d at 460 (citation omitted).

To resolve these concerns, it is recommended that a trial court's chosen forensic examination protocol: "(1) be documented in an agreed-upon (and/or court-ordered) protocol; (2) recognize the rights

10. These interests are certainly present in this case, as FTCC maintains significant amounts of personal data concerning its students that are subject to FERPA requirements.

of non-parties, such as employees, patients, and other entities; and (3) be narrowly restricted to protect confidential and personally identifiable information and system integrity as well as to avoid giving . . . access to information unrelated to the litigation." Comment 6.d., Sedona Principles at 129. In every decision cited favorably by Plaintiffs for ordering a forensic examination or other eDiscovery protocol, the trial court also took pains to address at least some of the above concerns. *See Bank of Mongolia v. M & P Global Fin. Servs., Inc.*, 258 F.R.D. 514, 520-21 (S.D. Fla. 2009) (adopting a protocol that contained provisions designed to protect the producing parties' privileges, including an express holding that production to a court-appointed third-party expert would not constitute waiver and allowing the producing parties to conduct a prior privilege review of all documents to be produced); *Wynmoor Community Council*, 280 F.R.D. at 687-88 (adopting the *Bank of Mongolia* protocol while acknowledging the "potential intrusiveness of . . . compelling a forensic examination"); *Adair v. EQT Prod. Co.*, Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982, *4 (W.D. Va. June 29, 2012) (ordering an eDiscovery protocol that did not include an opportunity for prior privilege review of produced documents solely because other protective and clawback orders entered in the case "protect any inadvertently produced privileged documents from waiver and any nonrelevant documents from use or disclosure outside this litigation").[11]

A court-ordered eDiscovery protocol, no matter how protective of a party's confidences, may result in the production of privileged information. *See, e.g.*, *Adair* 2012 WL 2526982 at *4 ("To be sure, there is the potential for privileged or nonrelevant documents to slip through the racks and be turned over to the other side."). Federal district courts may turn to Rule 502(d) of the Federal Rules of Evidence to resolve the issue, which expressly permits "[a] federal court [to] order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding." Fed. R. Evid. 502(d) (2019). North Carolina's Rules of Evidence and Rules of Civil Procedure

11. *Adair* did not allow the requesting party direct access to the responding party's systems through a forensic examination, and instead established a protocol by which the responding party would conduct a review of its own ESI. If the district court in *Adair* had ordered a forensic review by the requesting party without offering the producing party an opportunity to review any eventual production for privilege, it would have been outside the norm, as "courts that have allowed [forensic access] generally have required that . . . no information obtained through the inspection be produced until the responding party has had a fair opportunity to review that information." Comment 6.d., Sedona Principles at 129.

contain no direct analog, however; thus, litigants in our courts may wish to agree to protective orders to address additional privilege concerns when a forensic examination has been ordered. *See* N.C. R. P. C. 1.6(c) (2017) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."). A court ordering a forensic examination should encourage parties to enter into a protective order before requiring a forensic examination "to guard against any release of proprietary, confidential, or personally identifiable ESI accessible to the adversary or its expert [in the course of the forensic examination]." Comment 10.e., Sedona Principles at 152.

D. North Carolina Law on Privileges from Production

Although the advent of eDiscovery has undeniably altered how discovery is conducted by parties and overseen by courts, it has not thus far influenced North Carolina law regarding privileges.[12] Fundamentally, the attorney-client privilege and work-product immunity doctrine attach to ESI in the same manner and to the same extent they apply to paper documents or verbal communications. *See*, *e.g.*, N.C. R. Civ. P. 26(b)(5) (providing a mechanism for asserting privilege or work-product immunity as to "information otherwise discoverable[,]" which includes ESI under the Rule).

Determining whether the common law attorney-client privilege attaches to discoverable information—including ESI—depends on the following five criteria:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

In re Miller, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003). "[T]he [attorney-client] privilege belongs solely to the client." *Id.* at 338-39, 584 S.E.2d at

12. We acknowledge that this may change if and when cases concerning the involuntary disclosure of privileged ESI make their way to our appellate courts. *See*, *e.g.*, *Blythe*, 2012 WL 3061862, at *8-14 (discussing in detail inadvertent waiver of privilege in the eDiscovery context). Because no inadvertent disclosure has yet occurred in this case, this particular question of inadvertent waiver under North Carolina common law is not squarely before this Court, and we do not resolve it here.

788. Critically, it is the client's alone to waive, for "*[i]t is not the privilege of the court or any third party.*" *Id.* at 338, 584 S.E.2d at 788 (citations and quotation marks omitted) (emphasis in original). Compulsory, involuntary disclosure may be ordered only "[w]hen certain extraordinary circumstances are present" and some applicable exception, such as the crime-fraud exception, apply. *Id.* at 335, 584 S.E.2d at 786.

Work-product immunity, which "protects materials prepared in anticipation of litigation from discovery," *Sessions*, 248 N.C. App. at 383, 789 S.E.2d at 855, is also subject to a particularized test that asks:

> Whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.

Cook v. Wake Cnty. Hosp. Sys., Inc., 125 N.C. App. 618, 624, 482 S.E.2d 546, 551 (1997) (emphasis omitted). This immunity, too, is waivable. *See, e.g.*, *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977) (holding work-product immunity is waived when a party seeks to introduce its counsel's work-product into evidence). Information covered by the doctrine may nonetheless be discovered if the requesting party demonstrates a "substantial need of the materials" and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." N.C. R. Civ. P. 26(b)(3).

Both the work-product immunity and attorney-client privilege are subject to statutory modification. *See, e.g.*, N.C. Gen. Stat. §§ 132-1.1 and 132-1.9 (2017) (altering the application and availability of attorney-client privilege and work-product immunity in the public records context). But neither statute nor caselaw has provided any parameters for eDiscovery protocols in these respects.

E. The Protocol Order

[2] This appeal does not, at its core, turn on the appropriateness of the Forensic Examination Order. Defendants have not appealed that order, nor do they present any argument that a forensic examination was inappropriate. As is the case with many discovery disputes, we have little doubt that information pertinent to Defendants' conduct in discovery did not make its way into the printed record before us; Judge Sasser, as a

judge of the trial division tasked with overseeing the discovery, was well positioned to review the conduct of the parties before him—whether dilatory or otherwise—and determine in his discretion that the purposes of discovery were best served by entry of the Forensic Examination Order. Similarly, Judge Tally was in the best position to determine that, although sanctions were not appropriate, a court ordered protocol that weighed Plaintiffs' discovery needs more heavily than Defendants' was warranted. Although we ultimately vacate the Protocol Order for the reasons stated *infra*, this opinion should not be read on remand as questioning the necessity of either the Forensic Examination Order or entry of a protocol order favorable to Plaintiffs' interests. *See*, *e.g.*, *Capital Resources*, *LLC v. Chelda*, *Inc.*, 223 N.C. App. 227, 234, 735 S.E.2d 203, 209 (2012) ("It is well-established that, because the primary duty of a trial judge is to control the course of the trial so as to prevent injustice to any party, the judge has broad discretion to control discovery." (citations and quotation marks omitted)).

We identify error in two interrelated provisions of the Protocol Order. First, it allows Plaintiffs' expert, rather than an independent third party, the authority to directly access and image the entirety of Defendants' computer systems absent regard for Defendants' privilege. Second, it orders the delivery of responsive documents to Plaintiffs without allowing Defendants an opportunity to review them for privilege. In both instances, the protocol compels an involuntary waiver, *i.e.*, a violation of Defendants' privileges. Because North Carolina law is clear, albeit only in the analog discovery context until now, that a court cannot compel a party to waive or violate its own attorney-client privilege absent some prior acts constituting waiver or an applicable exception, *In re Miller*, 357 N.C. at 333-35, 584 S.E.2d at 786-87, those two provisions of the Protocol Order were entered under a misapprehension of the law constituting an abuse of discretion. Because production of information subject to the work-product immunity can only be compelled upon a showing of substantial need and undue hardship, N.C. R. Civ. P. 26(b)(3), requiring the production of any work-product documents to Mr. Walton and Plaintiffs without any such showing is similarly improper.

The Protocol Order, as recounted *supra*, describes Mr. Walton as "Plaintiffs' expert[.]" Plaintiffs have acknowledged that Mr. Walton is their agent and not Defendants', and conceded at oral argument that appointment of a special master would be "more neutral" than the present arrangement. Further, although Plaintiffs were unsure whether an attorney-client relationship exists between themselves and Mr. Walton, retaining an attorney as an eDiscovery expert provides the opportunity

for creation of an attorney-client relationship. *See*, *e.g.*, Jay E. Grenig et al., *Electronic Discovery & Records & Information Management Guide: Rules*, *Checklists*, *and Forms* § 8:3 (2018-2019 ed.) ("Perhaps one of the key and often overlooked benefits of e-discovery counsel is the protection of the attorney-client and work-product privileges, as well as the e-discovery counsel's ability to offer legal advice. Vendors who sell e-discovery products often offer consulting services with the products, but are prohibited from offering legal advice. While the advice of consultants may not be protected, legal advice from e-discovery counsel will have the protection of privilege.").[13]

The Protocol Order tasks Mr. Walton with creating the Search Images, which contain *all* of FTCC's data, by mirror imaging FTCC's systems. The order provides for him to take those Search Images to his own office and conduct a forensic examination of those images pursuant to the protocol over the course of three weeks. A comparable protocol for a paper production would allow Plaintiffs' expert to photocopy all of Defendants' documents (including those in their in-house counsel's file cabinets), take those copies off-site, and then review those files for responsive documents, both privileged and non-privileged, without Defendants having had an opportunity to conduct their own review of those copies first. Such a process would violate Defendants' attorney-client privilege as a disclosure to the opposing party. *See*, *e.g.*, *Industrotech Constructors*, *Inc. v. Duke University*, 67 N.C. App. 741, 743, 314 S.E.2d 272, 274 (1984) ("It is well established in this state that even absolutely privileged matter may be inquired into where the privilege has been waived by disclosure"). The digital equivalent does so as well.[14]

Plaintiffs contend that the Protocol Order's provision for a privilege screen prior to any production from Mr. Walton to Plaintiffs adequately protects Defendants' privilege. We disagree.

The Protocol Order requires Mr. Walton to use search terms to scan the Search Images for any potentially responsive files—the Keyword Search Hits—and then tasks him with searching the Keyword Search

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13. eDiscovery Attorneys are subject to fiduciary and ethical professional standards provided by our common law and the North Carolina Rules of Professional Conduct, including those that require the eDiscovery attorney to place his clients' interests over his own and those of the opposing party.

14. Nothing in this opinion should be read to call into question the competency or integrity of Mr. Walton. Our holding would not change no matter who the Plaintiffs had selected to serve as their expert, as the error present in the Protocol Order is a legal one, independent of the individuals tasked with carrying the order out.

Hits with different search terms to identify and segregate potentially privileged files—the Privilege Search Hits. The Protocol Order allows Defendants to review the Privilege Search Hits for privileged documents to withhold under a privilege log, while Mr. Walton would turn over any Keyword Search Hits not identified as Privilege Search Hits directly to Plaintiffs. Plaintiffs argue that because Mr. Walton is prohibited from sharing the Privilege Search Hits with Plaintiffs and Defendants will have an opportunity to review the Privilege Search Hits prior to production, Defendants' privilege will not be violated.

We are unconvinced. While the use of search terms assists in preventing disclosure of privileged materials, it is far from a panacea. "[A]ll keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches for privilege review." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 256-57 (D. Md. May 29, 2008). Selecting the appropriate keywords and search parameters requires special care, as "there are well-known limitations and risks associated with [keyword searches], and proper selection and implementation obviously involves technical, if not scientific knowledge." *Id.* at 260 (citations omitted). To determine whether or not selected search terms are adequate to screen for privilege, parties should "test and re-test samples to verify that the search terms used . . . ha[ve] a reasonably acceptable degree of probability of identifying privileged or protected information[,]" Comment 10.g., Sedona Principles at 157, and should "perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive." *Victor Stanley, Inc.*, 250 F.R.D. at 257.

With one exception, the decisions cited by Plaintiffs in support of the Protocol Order allowed for the producing party to engage in this kind of quality control before any responsive documents identified in the forensic examinations were produced. *See Bank of Mongolia*, 258 F.R.D. at 521 (allowing the producing party to review the responsive documents identified by keyword search for privilege prior to production to the requesting party); *Wynmoor Community Council*, 280 F.R.D at 688 (providing for the same).

The singular case identified by Plaintiffs in which no prior review was allowed, *Adair*, is immediately distinguishable because it did not involve a compulsory forensic examination by the requesting party or its agent. *Adair* instead involved an order compelling the responding

party to produce certain documents through a protocol imposed on it by the trial court. *Adair*, 2012 WL 2526982 at *2-3. Also, the parties in *Adair* had entered into both a clawback order and a protective order to avoid waiver. The clawback order provided that "[t]he producing party is specifically authorized to produce Protected Documents without a prior privilege review, and the producing party shall not be deemed to have waived any privilege or production in not undertaking such a review." *Id.* at *1. The protective order prohibited use of the documents in any other action and designated all documents produced under the court's order as confidential. *Id.* at *4, n.6. In ordering a production without prior privilege review, the district court wrote that "this approach would not be appropriate without the existence of the Protective Order and Clawback Order." *Id.* at *4.

Although the parties in this case did enter into the Protective Order, unlike the protective order in *Adair*, it does not apply to all documents produced pursuant to the Protocol Order. Instead, it contemplates the parties having an opportunity to designate a document as "confidential" at the time of production—an opportunity that is denied to Defendants under the automatic production of the Keyword Search Hits by Mr. Walton to Plaintiffs pursuant to the Protocol Order. And, although the Protective Order allows for a clawback of privileged documents, it does not contain the language, relied on by the court in *Adair*, providing that production of documents without prior privilege review *would not constitute a waiver*. Instead, the clawback here applies only to privileged documents produced "through inadvertence, error or oversight," and it is not immediately clear whether production of any privileged information not captured in the Privilege Search Hits and delivered to Plaintiffs as part of the Keyword Search Hits would fall within that language.[15] Assuming *arguendo* that such a production would be inadvertent and

15. The parties disagree on this question, though neither cites any caselaw as to whether a court compelled disclosure constitutes an inadvertent disclosure, either for purposes of the Protective Order or similar clawback language found in N.C. R. Civ. P. 26(b)(5)b. Various federal courts had, prior to enactment of Rule 502 of the Federal Rules of Evidence, held that a court compelled disclosure is an inadvertent production subject to clawback by interpreting and applying Rule 501 of the Federal Rules of Evidence and a proposed rule of evidence that Congress ultimately declined to adopt. *See, e.g.*, *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 246 (D. Md. 2005) (holding that the federal common law rule of privilege applicable through Rule 501 permitted consideration of the proposed, but never enacted, federal rule concerning court compelled production and concluding such a production would not waive privilege). With the advent of Rule 502, federal courts need not grapple directly with the question any longer, and can simply state in their orders that any disclosure pursuant thereto does not constitute a waiver. Fed. R. Evid. 502(d). North Carolina, however, expressly declined to adopt either Rule 501 as

subject to the clawback provision's language, the Protocol Order nevertheless compels Defendants to violate their privilege as to any documents given to Mr. Walton and Plaintiffs that are not contained within the Privilege Search Hits, leaving Defendants with, at best, an imperfect clawback remedy to rectify the compulsory violation. *See, e.g.*, *Blythe*, 2012 WL 3061862, at *10 ("Protections to guard against privilege cannot be deferred by first addressing the risk of waiver only after a production has been made."); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group*, 116 F.R.D. 46, 52 (M.D. N.C. 1987) ("[W]hen disclosure is complete, a court order cannot restore confidentiality and, at best, can only attempt to restrain further erosion."). Under the circumstances presented here, the Protective Order is inadequate to protect Defendants' privilege, and it does not avoid the compulsory violation of that privilege under the Protocol Order. *Cf. In re Dow Corning Co.*, 261 F.3d 280, 284 (2d Cir. 2001) ("[C]ompelled disclosure of privileged attorney-client communications, absent waiver or an applicable exception, is contrary to well established precedent. . . . [W]e have found no authority . . . that holds that imposition of a protective order . . . permits a court to order disclosure of privileged attorney-client communications. The absence of authority no doubt stems from the common sense observation that such a protective order is an inadequate surrogate for the privilege.").

In short, the Protocol Order provides Plaintiffs' agent direct access to privileged information, which disclosure immediately violates Defendants' privileges. It furthers that violation by directing that agent, having attempted to screen some privileged documents out through the use of search terms, to produce potentially responsive documents without providing Defendants an opportunity to examine them for privilege. If, following that continued violation, Plaintiffs—their agent notwithstanding—receive privileged documents, Defendants must attempt to clawback that information, reducing their privilege to a post-disclosure attempt at unringing the eDiscovery bell. Such compelled disclosure of privileged information is contrary to our law concerning both attorney-client privilege and work-product immunity. *Cf. In re Miller*, 357 N.C. at 333-35, 584 S.E.2d at 786-87; N.C. R. Civ. P. 26(b)(3). As a result, we hold the trial court misapprehended the law concerning attorney-client

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adopted by Congress or the proposed rules Congress rejected, *see* Official Commentary, N.C. R. Evid. 501 (2017), and our legislature has not yet enacted an equivalent to Federal Rule 502(d). Thus, federal caselaw is of questionable assistance. In any event, the question has not been squarely presented here, as no inadvertent disclosure has yet occurred and it is unclear whether the issue will arise between the parties. We therefore decline to reach that question on the merits.

privilege and the work-product immunity (however understandably given its undeveloped state within the eDiscovery arena), vacate the Protocol Order, and remand for further proceedings.

F. Disposition on Remand

Because we recognize the complexity of privilege in the eDiscovery context, and given the extensive investment of time and resources by the parties and the trial court to date, we identify several nonexclusive ways in which the trial court could resolve the discovery dispute in light of this decision.

First, the trial court may wish to employ a special master or court-appointed independent expert—such as Mr. Walton, provided his agency relationship to Plaintiffs is severed—to perform the forensic examination as an officer of the court[16] consistent with the cases cited by Plaintiffs on appeal. *Bank of Mongolia*, 258 F.R.D. at 521; *Wynmoor Community Council*, 280 F.R.D at 688. Such an appointment appears to be the commonly accepted approach in other jurisdictions and is consistent with the recommendations of the leading treatises on eDiscovery. *See*, *e.g.*, Comment 10.e., Sedona Principles at 152-53 (noting that forensic examination orders "usually should provide that either a special master or a neutral forensic examiner undertake the inspection"). And, by restricting the expert's relationship to that of an independent agent of the trial court, Defendants can safely disclose any and all privileged information to him without endangering confidentiality. *Cf. In re Miller*, 357 N.C. at 337, 584 S.E.2d at 787 (noting that privileged information disclosed to the trial court for *in camera* review "retains its confidential nature").

Second, the trial court may wish to provide Defendants with some opportunity, however expedited given the position of the case, to review the Keyword Search Hits prior to production to Plaintiffs. Such an approach is, again, consistent with both the cases dealing with forensic examinations cited by Plaintiffs on appeal and pertinent commentaries on eDiscovery. *Bank of Mongolia*, 258 F.R.D. at 521; *Wynmoor Community Council*, 280 F.R.D at 688. *See*, *e.g.*, Comment 6.d., Sedona Principles at 129 ("[C]ourts that have allowed access [for forensic examinations] generally have required . . . that no information obtained through the inspection be produced until the responding

16. Mr. Walton, as a licensed attorney, is already an officer of the court. That status, however, does not inherently deprive him of his agency relationship with Plaintiffs or resolve the privilege issue. Plaintiffs' attorneys, too, are officers of the court, but disclosure of Defendants' privileged information to them may nonetheless serve as a waiver of attorney-client privilege and work-product immunity.

party has had a fair opportunity to review that information."). In addition, the trial court may wish to order that any documents produced under the protocol adopted are confidential within the meaning of the Protective Order and that any disclosure of privileged information under the protocol is subject to clawback without waiver of any privilege or work-product immunity.[17]

Provisions such as those outlined here have been recognized by courts in other jurisdictions as sufficient to prevent any compulsory violation of Defendants' privilege. *See, e.g.*, *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) (holding that because the forensic examination would be performed by an independent third party and the producing party would have the opportunity to review for privilege prior to any production, their "privacy and attorney-client communications will be sufficiently protected"); *Genworth Financial Wealth Mgmt., Inc. v. McMullan*, 267 F.R.D. 443, 449 (D. Conn. 2010) (ordering a forensic examination by a neutral, court-appointed expert and allowing the producing party an opportunity to review for privilege prior to production). We cite these cases as examples rather than offering them as the as the exclusive means of resolving the parties' dispute. The trial court is in the best position to fashion any other or additional provisions not inconsistent with this opinion. All that is required on remand is that the protocol adopted not deprive the Defendants of an opportunity to review responsive documents and assert any applicable privilege, whether that be through the use of the inexhaustive suggestions enumerated above or some other scheme of the trial court's own

17. It may be that this modification alone could, in certain circumstances, be sufficient to protect the producing party's privilege. We do not resolve the question here, but note that North Carolina's legislature has not seen fit to adopt analogs to Rules 501 and 502 of the Federal Rules of Evidence that have assisted in addressing the court compelled disclosure of privileged information in the federal courts. Furthermore, we observe that such agreements appear to be generally disfavored as the exclusive means of protecting privilege in most contexts. *See* Comment 10.e., Sedona Principles at 153-56 (reviewing the drawbacks of clawback or "quick peek" agreements and concluding "[i]t is inadvisable for a fully-informed party to enter a 'quick peek' agreement unless either the risks of disclosure of privileged and work-product protected information, as well as commercial and personally sensitive information, are non-existent or minimal, or the discovery deadline cannot otherwise be met . . . and alternative methods to protect against disclosure are not available"). Such agreements, then, are best considered as an additional protective measure rather than the primary prophylactic. *Compare* N.C. R. Bus. Ct. 10.3(c)(3) (requiring counsel to discuss as part of an ESI protocol methods for designating documents as confidential) *and* N.C. R. Bus. Ct. 10.5(b) (encouraging parties to agree on implementation of privilege logs to protect privileged information), *with* N.C. R. Bus. Ct. 10.6 ("The Court encourages the parties to agree on an order that provides for the non-waiver of the attorney-client privilege or work-product protection in the event that privileged or work-product material is inadvertently produced.").

devise.[18] *Cf. Playboy Enterprises*, 60 F. Supp. 2d at 1053-54 (noting that discovery of ESI through a forensic examination is permissible but that "[t]he only restriction in this discovery is that the producing party be protected against undue burden and expense and/or invasion of privileged matter").

III. CONCLUSION

For the foregoing reasons, we vacate the Protocol Order for an abuse of discretion and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges STROUD and ZACHARY concur.

IN THE MATTER OF C.M.B., JUVENILE

No. COA18-1002

Filed 6 August 2019

1. Child Abuse, Dependency, and Neglect—neglected juvenile—Chapter 7B juvenile proceedings—Chapter 50 custody proceedings—distinction—requirement of transfer or termination of jurisdiction

Issues that arose in a juvenile neglect matter—initiated by a county department of social services (DSS) but that later included a filing by the child's guardian in Tennessee to modify the mother's visitation—were controlled by Chapter 7B (juvenile proceedings), not Chapter 50 (custody proceedings). Although DSS had not been directly involved in the case for many years since it was relieved of reunification efforts and the trial court's order treated the case as a Chapter 50 proceeding, the action was never transferred as a Chapter 50 private custody matter pursuant to

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18. Of course, the trial court may also, in its discretion, wish to address other aspects of the protocol not discussed herein, such as the shifting of costs, the manner in which search terms are selected, additional protections for information covered by FERPA, the timeline of production, or the limitation of the search to certain computers, servers, or hard drives. We stress, however, that the trial court need not reinvent the wheel, and the only issue that must be addressed on remand is the avoidance of compulsory waiver and the violation of Defendants' privilege as described herein.

N.C.G.S. § 7B-911, and the trial court never terminated its jurisdiction under section 7B-201.

2. Child Abuse, Dependency, and Neglect—neglect—Uniform Child Custody Jurisdiction and Enforcement Act—transfer to another state—lack of evidence

In a case involving a neglected child, the Court of Appeals reversed the trial court's order transferring the case to Tennessee and remanded for a new hearing to determine whether jurisdiction should be terminated pursuant to N.C.G.S. § 7B-201. Although the trial court found North Carolina to be an "inconvenient forum" pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, its findings of fact and conclusions of law were unsupported by any evidence. The trial court did not hold a full hearing, taking only some arguments (including from the child's mother before she was appointed counsel) but no sworn testimony, and considering only unverified documents.

Appeal by respondent from order entered 18 June 2018 by Judge William F. Southern, III, in District Court, Surry County. Heard in the Court of Appeals 13 March 2019.

J. Clark Fischer, for appellee William Brickel (Custodian).

Assistant Appellant Defender Annick Lenoir-Peek for respondent-mother.

STROUD, Judge.

Respondent-mother appeals an order staying proceedings and transferring jurisdiction of this juvenile proceeding under Chapter 7B to Tennessee. Because the trial court failed to hold an evidentiary hearing before entering the order on appeal, we reverse and remand for a new hearing and entry of an order consistent with this opinion.

I. Background

On 27 July 2009, the Surry County Department of Social Services ("DSS") filed a petition alleging Jane[1] was a neglected juvenile, and on 18 September 2009 the trial court adjudicated her as neglected. In a review hearing order, on 17 December 2009, the trial court noted Jane

1. A pseudonym is used to protect the identity of the minor involved.

was "in the care of a maternal great aunt [, Ms. Brickel], the placement has gone well[,]" and Mother was now residing in Virginia. Jane continued to do well with her aunt, as noted in the 22 April 2010 permanency planning order. On 8 July 2010, the trial court entered another permanency planning order which found Mother was not present at the hearing and it was not known where she was "residing."

About six months later, on 19 January 2011, the trial court found that Jane had been residing with the Brickels since September of 2009, placement had "gone well and the BRICKELS have expressed a willingness and desire to continue to provide care and placement for the child." Mother had not been in contact with DSS, and DSS was relieved of reunification efforts. The permanent plan for Jane was "custody and guardianship with a relative[.]" The trial court ordered the Brickels receive "legal and physical care, custody, and control of" Jane, appointed the Brickels as joint guardians of Jane, "released and discharged" Mother's attorney, and waived future review hearings.

On 6 August 2014, Mother and the Brickels entered into a Consent Order. Neither DSS nor a guardian *ad litem* participated in entry of the Consent Order. Mother and the Brickels agreed Jane would remain in the custody of the Brickels, and Mother would have visitation. The order noted that "[t]he current action is a review hearing" initiated by Mother's "Motion for Review" filed on 11 February 2014. The consent order noted that in late 2013 or early 2014, the Brickels had moved to Tennessee. The order included these findings of fact:

> 13. The parties also stipulate that this consent order resolves all issues that are currently pending between the parties and, upon entry of this consent order, that there are no other outstanding issues concerning the child's placement and welfare in this action.
>
> 14. DSS has been released from reunification efforts in this action. (See Permanency Planning Order, Paragraph No. 8, dated January 19, 2011).
>
> 15. DSS has also been relieved of any further responsibility in this matter. (See Permanency Planning Order, Paragraph No. 18, dated January 19, 201[1]).
>
> 16. The guardian ad litem has been discharged in this action. (See Permanency Planning Order, Paragraph No. 18, dated January 19, 2011).

17. Because DSS and the GAL have been released/discharged, these agency's attorneys' consent to this consent order is unnecessary.

The order decreed that "the child shall continue to remain in the custody of" the Brickels. It then set forth a detailed visitation schedule for Mother on weekends, holidays, and during the summer school recess; it also made provisions for the transfer of physical custody "at a location that is exactly one-half (1/2) of the distance between Harrimon, Tennessee and Dobson, North Carolina." In addition, the order decreed:

4. DSS is continued to be relieved of reunification and of any responsibility in this action.

5. The GAL is continued to be discharged in this action.

6. This consent order is a final order and it disposes of all outstanding issues in this action.

7. Attorney Marion Boone is hereby released and discharged and attorney Jody P. Mitchell is hereby released and discharged.

A few years later, in November of 2017, the Brickels filed a motion in Tennessee to register the North Carolina custody order under "T.C.A. 36-6-229" and in the same motion requested modification of the North Carolina order by suspending Mother's visitation. "T.C.A. 36-6-229" provides, "A child-custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the appropriate court in this state[.]" Tenn. Code Ann. § 36-6-229 (2017). T.C.A. § 36-6-229 allows for registration of child custody orders from another state and is part of Tennessee's Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). *See id.* Registration of the North Carolina custody order in Tennessee allowed for enforcement of the order in Tennessee, but not modification; registration of the order alone does not confer jurisdiction under the UCCJEA. *See* Tenn. Code Ann. § 36-6-230(b) (2017) ("A court of this state shall recognize and enforce, but may not modify, except in accordance with this part, a registered child-custody determination of a court of another state.") Yet the Brickels' motion also requested modification of the North Carolina order, based upon these allegations:

d. Upon information and belief, the home of . . . [Mother] is not suitable for visits with the minor child.

> e. That the minor child is schedule[d] to visit with . . . [Mother] at the beginning of Winter Break and Petitioner seeks that this visit be suspended pending a full hearing on this matter.

Mother then filed a *pro se* motion in Tennessee to dismiss the Brickels' motions. Mother also filed three pro se motions in North Carolina between December of 2017 and January of 2018: (1) a motion for review requesting an "emergency" revocation of the Brickels as guardians and that she be appointed as Jane's guardian; (2) a motion and order to show cause claiming the Brickels had violated the custody agreement, and (3) a motion requesting North Carolina to invoke jurisdiction as it was the "more appropriate forum[.]" (Original in all caps.)

The Tennessee court heard the Brickels' motions to register and modify the custody order on 13 December 2017. Mother was present and testified at the hearing in Tennessee. By order entered 12 January 2018, the Tennessee court entered an "ORDER OF TRANSFER TO COURT HAVING JURISDICTION UNDER TCA § 36-6-216 and 229" ("Order of Transfer").[2] The Tennessee "Order of Transfer" found that the minor child and Brickels had lived in Tennessee since 2014 and Mother resided in Virginia. Based upon the findings that neither the child not nor any parties had resided in North Carolina since 2014, the Tennessee court ordered "that this Court is the proper forum to have jurisdiction regarding the minor child, . . . and jurisdiction is hereby transferred." A handwritten notation at the bottom of the order states, "Court directs Ms. Hogg to forward a copy of this order to the Court in Surry County, N.C."

By order entered on 18 January 2018, the Tennessee court granted the Brickel's motion to modify visitation, modifying Mother's visitation to allow her only limited supervised visitation in Tennessee. The order notes it is based upon several statutes, including Tenn. Code Ann. § 36-6-216, "Initial custody determination; jurisdiction[;]" -218, "Child-custody determination in another state; modification[;]" and -219, which provides for "[t]emporary emergency jurisdiction" to enter an order if "necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." T.C.A. §§ 36-6-216, -218, -219. But from the findings of fact in the

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2. Tenn. Code Ann. § 36-6-216 addresses jurisdiction for an "[i]nitial custody determination" and Tenn. Code Ann. § 36-6-229 addresses registration of an out of state custody order; neither statute addresses modification jurisdiction under the UCCJEA. T.C.A. §§ 36-6-216; -229 (2017). There is no indication in the order or our record about whether the Tennessee court did or did not communicate with the North Carolina court prior to entry of the order.

order, it does not appear Tennessee was exercising emergency jurisdiction, as there are no findings of an emergency. Instead, the Tennessee court found only "[t]hat based upon the evidence and testimony presented, there has been a substantial change of circumstances sufficient to temporarily modify the terms of the prior Consent Order."

On 29 January 2018, the Brickels filed an unverified motion in North Carolina to "stay" Mother's pending motions or to transfer jurisdiction to Tennessee because North Carolina was an "inconvenient forum" under North Carolina General Statute § 50A-207. The Tennessee orders were attached as exhibits to this motion. The trial court in North Carolina began holding a hearing on the pending motions by the Brickels and Mother on 1 February 2018. The Brickels were represented by counsel, and Mother appeared *pro se*. The trial court heard arguments from the Brickels' counsel and from Mother. The trial court then inquired if Mother would like court-appointed counsel, and she requested court-appointed counsel. The trial court then announced that "[i]n reviewing [the Tennessee] order, I believe he has made his order very clear about transferring jurisdiction to himself, but I believe I need to discuss that with him before I make any further order in this Surry County matter." The trial court then set the next court date, for completion of the hearing, for 1 March 2018.

On 1 March 2018, Mother's newly-appointed counsel and the Brickels' counsel appeared, and the trial court noted that he had not yet been able to discuss the case with the judge in Tennessee and continued the case to 5 April 2018. On 2 March 2018, the trial court entered an order continuing the completion of the hearing to 5 April 2018 "for communication between Surry County and Tennessee to take place." (Original in all caps.) But the trial court never resumed the hearing which started on 1 February 2018. Instead, on 15 March 2018, a District Court Judicial Assistant for the Surry County District Court sent an email to the Brickels' counsel[3] stating that "Judge Southern has spoken with Judge Humphries in TN and agreed jurisdiction is in Tennessee. Judge Southern request[s] that you prepare an order and notify all parties there will be no need to appear on 4/5/18." On 18 June 2018, the North Carolina trial court entered an order allowing the Brickels' motion to "stay" and "transfer" jurisdiction based on North Carolina being an inconvenient forum. Mother appeals.

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3. The email was also copied to an individual Mother's brief identifies as the juvenile clerk. Neither Mother nor her counsel was included on the email.

II. Appellate Jurisdiction

Mother contends the trial court erred in determining North Carolina was an inconvenient forum under North Carolina General Statute 50A-207 and transferring the action to Tennessee. We first note that Mother argues that we have jurisdiction to consider this appeal because it is a final order, and we agree. As far as North Carolina is concerned, the order on appeal is final, since it does not leave the case open "for further action by the trial court in order to settle and determine the entire controversy[,]" *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950), but transfers the matter to Tennessee. We therefore have jurisdiction to consider Mother's appeal.

III. Distinction between Juvenile Proceedings under Chapter 7B and Custody Proceedings under Chapter 50

[1] Although the parties' arguments rely almost exclusively on the UCCJEA, the issues here are actually controlled by Chapter 7B. Before addressing the substantive issues, we stress that this case arises in a juvenile neglect proceeding initiated under Chapter 7B, but somewhere along the way, Mother, the Brickels, and the trial courts in North Carolina and Tennessee essentially began treating the case as if it were a Chapter 50 custody proceeding. Although DSS initiated this case in 2009 because of an investigation of neglect and there was an adjudication of neglect, DSS has not been directly involved in the case since 2011. DSS did not participate in this appeal nor did a guardian *ad litem* participate on behalf of Jane, so we do not have the benefit of briefs from DSS or guardian *ad litem*. The only "parties" appearing or participating before the trial and this Court are Mother and the Brickels. But this case was never transferred as a Chapter 50 private custody matter under North Carolina General Statute § 7B-911. *See* N.C. Gen. Stat. § 7B-911(a) (2017) ("Upon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7."). Although the UCCJEA is applicable to abuse, neglect and dependency proceedings under Chapter 7B actions, the trial court's jurisdiction over this case is based upon Chapter 7B, and the trial court has not terminated its jurisdiction.

The last order entered by the North Carolina juvenile court with the involvement of DSS and the GAL was a Permanency Planning Order entered under "NCGS 907(b)" on 19 January 2011. The 2011 order ordered that "legal and physical care, custody, and control of [the

minor child] is hereby granted to . . . [the Brickels] and, further, the same are hereby appointed as joint guardians of the child[.]" The trial court ordered that "the SURRY COUNTY DEPARTMENT OF SOCIAL SERVICESSURRY COUNTY DEPARTMENT OF SOCIAL SERVICES is relieved of further responsibility in this matter. The guardian ad litem is hereby discharged." Counsel for both Mother and Father were also released. The trial court also waived future review hearings in accordance with "N.C.G.S. 7B-906(b)[.]"[4] But the trial court did not terminate its jurisdiction. *See In re S.T.P.*, 202 N.C. App. 468, 473, 689 S.E.2d 223, 227 (2010) ("[W]e hold that the district court did not terminate its jurisdiction by its use of the words 'Case closed.' ") Nor did the 2011 order return Mother to her pre-petition status by returning Jane to her custody. Thus, the juvenile court's jurisdiction continues "until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B–201(a) (2017). Thereafter, the trial court entered its 2014 consent order between Mother and the Brickels and again did not terminate jurisdiction.[5] Under North Carolina General Statute § 7B-201, once the trial court had jurisdiction over Jane, it retains jurisdiction until she attains the age of 18 or the trial court terminates its jurisdiction. N.C. Gen. Stat. § 7B-201(a) (2017) ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first."). Only North Carolina can terminate its own juvenile court jurisdiction; a court in Tennessee cannot. *See id.*

The North Carolina juvenile court has never terminated its jurisdiction in this matter and even the order on appeal does not clearly terminate jurisdiction under North Carolina General Statute § 7B-201. Instead, based solely upon the UCCJEA and not Chapter 7B, the order on appeal concluded both North Carolina and Tennessee had subject matter

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4. This version of the statute was repealed in 2013. *See* N.C. Gen. Stat. § 7B-907 (2017).

5. In fact, in its 2014 consent order the trial court noted DSS "*continued* to be relieved of reunification" and "[t]he GAL is *continued* to be discharged[,]" (emphasis added), because the trial court had already relieved DSS, the GAL, and counsel in its 2011 order. By exercising jurisdiction in 2014 -- after relieving DSS, the GAL, and counsel in 2011 -- the trial court demonstrated it retained jurisdiction. For a thorough analysis on when a juvenile court terminates its jurisdiction *see Rodriguez v. Rodriguez*, 211 N.C. App. 267, 710 S.E.2d 235 (2011). The 2014 consent order, like its 2011 predecessor, also has no affirmative language terminating jurisdiction nor does either party contend it did -- Mother contends North Carolina has always been the appropriate jurisdiction and the Brickels filed a motion to transfer jurisdiction to Tennessee.

jurisdiction and both "stayed" and "transferred" the North Carolina action. The order includes these relevant conclusions of law:

> a. The Court has subject matter jurisdiction over this action. The Court takes judicial notice of the UCCJEA and determines that the State of Tennessee also has appropriate subject matter jurisdiction over this action.
>
> . . . .
>
> c. The Court concludes as a matter of law that the State of North Carolina is no longer a convenient forum for this matter.
>
> d. The Court concludes as a matter of law that it exercises its discretion and relinquishes jurisdiction over this matter to the State of Tennessee for any further proceedings herein.
>
> e. The Court further concludes as a matter of law that it is exercising its discretion to stay these proceedings, and/or to transfer jurisdiction of these proceedings to Tennessee, due to the pendency of the matters pending in Roane County Tennessee.

The order then decreed as follows:

> 1. This matter is stayed for any further proceedings in Surry County North Carolina.
>
> 2. This matter is hereby transferred to the Roane County court for any further proceedings and/or dispositions.
>
> 3. The Surry County Clerk of Superior Court shall forthwith prepare the Court file in this matter for transfer to the Roane County Tennessee Clerk of Circuit Court.

North Carolina General Statute § 50A-207 directs the trial court to "stay" proceedings if it "determines that it is an inconvenient forum and that a court of another state is a more appropriate forum" but this stay is conditioned upon the requirement "that a child-custody proceeding be promptly commenced in another designated state[.]" N.C. Gen. Stat. § 50A-207(c) (2017). A "stay" of proceedings is not a termination of the trial court's jurisdiction, but under a stay, a court refrains from acting temporarily and *explicitly* retains jurisdiction to lift the stay and resume the case if necessary. *See generally In re M.M.*, 230 N.C. App. 225, 229,

750 S.E.2d 50, 53 (2013) ("If a trial court considering a child custody matter determines that the current jurisdiction is an inconvenient forum and that another jurisdiction would be a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state. It is well established that the word shall is generally imperative or mandatory. The trial court here simply purported to transfer jurisdiction, effectively dismissing the case in North Carolina. It did not stay the present case and condition the stay on the commencement of a child custody proceeding in Michigan. The record before us does not indicate that there is or ever has been a custody proceeding of any sort regarding Margo in Michigan. Failure to condition an order transferring jurisdiction on the filing of a child custody proceeding in the new jurisdiction leaves the child and the proceedings in legal limbo, something that the Uniform Child–Custody Jurisdiction Act is intended to prevent. It also ignores the mandatory procedure contained in N.C. Gen. Stat. § 50A–207(c)." (citations and quotation marks omitted)). Of course, since the Tennessee custody proceeding had already been filed, a stay may not be needed.

Chapter 7B does not provide an option for "transfer" but instead provides for the trial court to either terminate the juvenile court jurisdiction and return the parents to their pre-petition status or to transfer the matter to a private custody case under Chapter 50:

> When the court's jurisdiction terminates, whether automatically or by court order, the court thereafter shall not modify or enforce any order previously entered in the case, including any juvenile court order relating to the custody, placement, or guardianship of the juvenile. The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed, unless applicable law or a valid court order in another civil action provides otherwise. Termination of the court's jurisdiction in an abuse, neglect, or dependency proceeding, however, shall not affect any of the following:
>
> (1) A civil custody order entered pursuant to G.S. 7B-911.[6]
>
> (2) An order terminating parental rights.

6. North Carolina General Statute § 7B-911 addresses Chapter 50. *See* N.C. Gen. Stat. § 7B-911 (2017).

> (3) A pending action to terminate parental rights, unless the court orders otherwise.
>
> (4) Any proceeding in which the juvenile is alleged to be or has been adjudicated undisciplined or delinquent.
>
> (5) The court's jurisdiction in relation to any new abuse, neglect, or dependency petition that is filed.

N.C. Gen. Stat. § 7B-201(b) (2017). Thus, if the trial court were to determine Tennessee is a more appropriate forum under North Carolina General Statute § 50A-207 and the Tennessee proceeding will address the child custody issues, it may terminate the juvenile court's jurisdiction under North Carolina General Statute § 7B-201 to allow the matter to be addressed in that court. *See* N.C. Gen. Stat. § 7B-201.

IV. Inconvenient Forum

[2] This brings us to the present issue raised by Mother who contends the trial court erred in "transferring" the case to Tennessee based upon its determination that North Carolina is an inconvenient forum under the UCCJEA. *See generally* N.C. Gen. Stat. § 50A-207.

> (a) A court of this State which has jurisdiction under this Article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.
>
> (b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) The length of time the child has resided outside this State;

(3) The distance between the court in this State and the court in the state that would assume jurisdiction;

(4) The relative financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this State may decline to exercise its jurisdiction under this Article if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

N.C. Gen. Stat. 50A-207.

Mother's brief contends that only North Carolina's court had the authority to decide "who has jurisdiction in this matter" and that North Carolina "was bound to take evidence and follow the" UCCJEA. Mother argues that the trial court failed to follow the proper procedure under the UCCJEA, and the order must be reversed.

We first note that Tennessee's orders are not before us, and we do not purport to determine based upon the record before us whether Tennessee complied with the UCCJEA or made any other error under Tennessee law. But Tennessee's order "transferring" jurisdiction of this North Carolina juvenile matter to the Tennessee court has no effect on North Carolina's jurisdiction under Chapter 7B or on our analysis. Our

only question is whether there is reversible error in the North Carolina trial court's order.

A. Communication between Courts

Mother's first argument is that the trial court did not follow a proper procedure under North Carolina General Statute § 50A-110 for its communications with the Tennessee court. Where the parties do not participate in the communication, the statute requires a record to be made of the communication and the parties notified of the record:

> (b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. . . . .
>
> . . . .
>
> (d) Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.
>
> (e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

N.C. Gen. Stat. § 50A-110 (2017). Mother argues that "[t]he only record of the communication between the two courts is a one line email sent by the judge's judicial assistant to the Brickels' trial counsel, but not [Mother's] trial counsel, and copied to the juvenile clerk."

Mother is correct that the email indicates only that it was send only to the Brickels' counsel, which would be inappropriate, as it should have been sent simultaneously to counsel for both parties. But we also note that the trial court informed Mother on 1 February and her counsel on 1 March that it would be communicating with the Tennessee judge; that was the reason for the continuances. Neither Mother nor her counsel requested to participate in the communication. Further, the email was apparently included in the court file as it is a part of our record on appeal, and there is no indication Mother was not "informed promptly" of the communication or that she was not "granted access" to the court file. *Id*. The email is also a "record" as defined by North Carolina General Statute § 50A-110 as it is "information that is inscribed on a tangible

medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *Id.*

Under North Carolina General Statute § 50A-110, Mother was also entitled to have an "opportunity to present facts and legal arguments before a decision on jurisdiction is made" if the parties did not participate in the communication between the courts. *Id.* Although the statute does not specify if this "opportunity" must be before or after the communication, we need not make this determination here. Mother presented some "facts and legal argument" to the trial court on 1 February 2018, before her counsel was appointed, but she did not testify or present evidence. *Id.* On 1 February 2018, the trial court heard only arguments and no sworn testimony. The only documents filed with the trial court were unverified motions. At that point, the trial court had heard no evidence regarding the facts of the case, only arguments. The trial court continued the case and set another date for the parties to return – presumably for an evidentiary hearing on the four pending motions -- after its communication with Tennessee. The trial court appointed counsel for Mother, but the full hearing scheduled for 5 April 2018 was canceled by the trial court. No evidentiary hearing was ever held.

B. Findings of Fact

Mother argues that the court had insufficient evidence upon which it could base its findings of fact or a decision on whether North Carolina was an inconvenient forum. We agree.

Even if we assume the trial court correctly conducted and documented its communications with the Tennessee court, we must reverse the order because there was no evidence to support the trial court's findings of fact. The order on appeal includes findings of fact regarding the factors listed in North Carolina General Statute § 50A-207 for purposes of determining that North Carolina is an inconvenient forum and related conclusions of law. We need not address each finding of fact specifically since none is supported by the evidence. Although some factors could possibly be addressed based upon the trial court's record without evidence from the parties, such as the familiarity of the court with the case, most require some evidence regarding the parties and child. Since there was no evidence, the findings of fact cannot be supported. *See Crews v. Paysour*, ___ N.C. App. ___, ___ 821 S.E.2d 469, 472 (2018) ("[A]lthough counsel discussed the issue with the trial court, the parties did not stipulate to amounts paid since the prior order or agree on how any overpayment by Father should be addressed. And arguments of counsel are not evidence: It is axiomatic that the arguments

of counsel are not evidence." (citations, quotation marks, and brackets omitted)). In addition, the motions before the trial court were unverified, and neither party presented any affidavits or other documentary evidence. We also note that when Mother presented her argument to the trial court on 1 February 2018, she had no attorney, but she was entitled to court-appointed counsel. The trial court recognized this problem and appointed counsel for Mother, but since the trial court canceled the completion of the hearing, Mother's counsel never had the opportunity to provide meaningful representation. With no evidence to support the findings of fact, the trial court's conclusions of law based upon the findings of fact must fail also.

V. Conclusion

We therefore reverse and remand for the trial court to hold a new hearing on the parties' motions and to determine whether to terminate jurisdiction under North Carolina General Statute § 7B-201. The trial court should again communicate with the Tennessee court, as directed by North Carolina General Statute § 50A-110 and should allow the parties the opportunity either "to participate in the communication" or "to present facts and legal arguments before a decision on jurisdiction is made." N.C. Gen. Stat. § 50A-110. If the trial court again determines that North Carolina is an inconvenient forum under North Carolina General Statute § 50A-207, depending upon the status of the Tennessee case, the trial court could stay the proceedings under North Carolina General Statute § 50A-207 or may terminate its jurisdiction under North Carolina General Statute § 7B-201. Although nothing in this opinion should be interpreted as expressing an opinion on whether North Carolina is an inconvenient forum under North Carolina General Statute § 50A-207, we note that the trial court also has the option of terminating the juvenile court's jurisdiction and transferring the case to a private Chapter 50 matter in North Carolina under North Carolina General Statute § 7B-911. But unless the trial court determines that the case should remain under the jurisdiction of the juvenile court of Surry County, the trial court's order should clearly terminate the juvenile court's jurisdiction. The trial court's order must be based upon sworn testimony or other evidence, and Mother is entitled to court-appointed counsel at all proceedings as long as the matter remains in juvenile court.

REVERSED AND REMANDED.

Judges INMAN and ZACHARY concur.

IN RE C.N.

[266 N.C. App. 463 (2019)]

IN THE MATTER OF C.N., A.N.

No. COA18-1031

Filed 6 August 2019

1. Termination of Parental Rights—grounds for termination—neglect—sufficiency of evidence—probability of repetition of neglect

The trial court erred by concluding that grounds of neglect existed to terminate a mother's parental rights where the children were removed from the mother's care after one child spilled a chemical cleaning product onto herself. The mother had made some progress on her case plan, and the evidence was insufficient to support a conclusion that the neglect was ongoing and that there was a probability of repetition of neglect.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of evidence

The trial court erred by concluding that grounds of willful failure to make reasonable progress existed to terminate a mother's parental rights where the children were removed from the mother's care after one child spilled a chemical cleaning product onto herself. While the trial court found that the mother had not been consistent in her treatment or fully compliant with her case plan, such findings did not support a conclusion of willful failure to make reasonable progress—especially where the evidence of willfulness was lacking and the mother presented evidence of numerous activities and accomplishments in compliance with her case plan.

Appeal by respondent-mother from order entered 3 July 2018 by Judge J.H. Corpening II in New Hanover County District Court. Heard in the Court of Appeals 27 June 2019.

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

Mary McCullers Reece for respondent-appellant mother.

Womble Bond Dickenson (US) LLP, by Jessica Gorczynski, for guardian ad litem.

TYSON, Judge.

Respondent-mother appeals from an order terminating her parental rights to her minor daughters, C.N. ("Carrie") and A.N. ("Anne"). *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles). The order also terminates the parental rights of the legal father of A.N. and putative father of C.N. and the unknown father of C.N. No father is a party to this appeal. We reverse the trial court's order as it relates to Respondent-mother.

I. Background

On or about 28 June 2016, EMS and law enforcement responded to a 911 call regarding a child who had suffered chemical burns. Carrie was treated for corneal abrasions and chemical burns on her tongue in the New Hanover Regional Medical Center Emergency Department and was kept overnight for observation.

Respondent-mother reported Carrie had pulled up on a table and spilled an open bottle of Mr. Clean liquid detergent onto herself. EMS and law enforcement who responded to the 911 call reported that conditions inside the home were dirty and in poor shape. Needles were found inside the home. Respondent-mother admitted to using marijuana within the previous week and had reported past incidents of domestic violence. Concerns were also expressed about Respondent-mother's mental health.

Prior to the this incident, the New Hanover County Department of Social Services ("DSS") had received a report in May 2016 that Anne was found wandering alone behind a Roses retail store off of Carolina Beach Road. DSS obtained nonsecure custody of eleven-month-old Carrie and two-year-old Anne and filed a juvenile petition alleging they were neglected juveniles. Nonsecure custody with DSS was continued and the juveniles were placed with Respondent-mother's sister.

Respondent-mother stipulated at the adjudication hearing to the allegations in the juvenile petition that Carrie and Anne were neglected, as they did not receive proper care, supervision or discipline and lived in an environment injurious to their welfare.

The trial court adjudicated Carrie and Anne to be neglected juveniles based upon Respondent-mother's stipulation. The trial court determined their best interests were served for legal custody and placement authority to remain with DSS and to continue their placement in the Respondent-mother's sister's home.

The trial court also adopted the recommendations of DSS and the guardian *ad litem* ("GAL") for Respondent-mother's case plan and ordered

Respondent-mother to: (1) obtain and maintain stable income; (2) obtain and maintain stable housing; (3) complete a mental health assessment; (4) comply with all recommendations; (5) sign releases for DSS and GAL; (6) submit to random drug screens; (7) successfully complete substance abuse treatment; and (8) successfully complete parenting classes. Respondent-mother was scheduled for weekly supervised visitation.

A permanency planning hearing was held on 3 May 2017, after which the trial court entered its order on 23 June 2017. DSS asserted Respondent-mother was "not actively participating in her treatment plan," had not obtained stable housing, and had not shown up for the majority of the requested drug screens. Respondent-mother responded that she had completed her comprehensive clinical assessment ("CCA") and parenting classes, but had difficulties with a cell phone. The trial court changed the primary permanent plan for Carrie and Anne from reunification to legal guardianship with Respondent-mother's sister with a concurrent plan of reunification.

Another permanency planning hearing was held on 26 September 2017, after which the trial court entered an order on 13 November 2017, followed by an amended permanency planning order on 16 January 2018. The trial court found that the juveniles were "currently placed in foster care after their kinship placement with [their] maternal aunt [was] disrupted[,]" and that "Respondent-[m]other is not actively participating in her treatment plan[,]" "has not consistently engaged in services[,]" and "does not show up for the majority of the requested drug screens." The order reflects Respondent-mother had submitted proof of employment, secured housing, and asserted that transportation was an issue and requested bus passes.

The trial court ordered DSS to provide bus passes to Respondent-mother and ordered a home study on Respondent-mother's home. The court changed the primary permanent plan for Carrie and Anne to adoption with a concurrent plan for reunification.

On 8 February 2018, DSS filed a petition to terminate Respondent-mother's and the putative fathers' parental rights to Carrie and Anne. DSS alleged the following grounds for termination of Respondent-mother's parental rights: neglect and willful failure to make reasonable progress. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2) (Supp. 2018). The petition was heard on 23 and 26 April 2018.

The trial court found grounds of neglect and willful failure to make reasonable progress existed to terminate Respondent-mother's parental

rights. The trial court concluded Carrie and Anne's best interests required termination of Respondent-mother's parental rights in an order entered 3 July 2018. *See* N.C. Gen. Stat. § 7B-1110(a) (2017). The fathers are not parties to this appeal. The trial court's order is final concerning termination of the fathers' parental rights. Respondent-mother timely appealed. DSS filed no response or brief to Respondent-mother's appeal.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of the district court entered 3 July 2018 pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2017).

III. Issues

Respondent-mother argues the trial court erred by finding and concluding the grounds of neglect and willful failure to make reasonable progress existed to terminate her parental rights.

IV. Standard of Review

"This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015). "We review conclusions of law *de novo*." *In re B.S.O.*, 234 N.C. App. 706, 708, 760 S.E.2d 59, 62 (2014).

V. Analysis

A. Neglect

[1] A neglected juvenile is one whose parent does not "provide proper care, supervision, or discipline . . . or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101 (15) (Supp. 2018).

A parent has neglected a juvenile if the court finds the juvenile to be neglected within the meaning of N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1). "A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted).

Respondent-mother argues the trial court erred by finding and concluding that the ground of neglect under N.C. Gen. Stat. § 7B-1111(a)(1) existed to terminate her parental rights to Carrie and Anne. Where,

as here, the juvenile has been removed from the parent's custody, "[t]he trial court must also consider *any evidence of changed conditions* in light of the evidence of prior neglect *and the probability of a repetition of neglect*." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (citation omitted) (emphasis supplied). *See also In re M.J.S.M.*, __N.C. App. __, __, 810 S.E.2d 370, 373 (2018) ("where there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents." (citation omitted)).

With respect to Respondent-mother, the trial court made the following findings of fact:

> 3. . . . Both children have been in the legal custody of [DSS] since June 28, 2016, were residing in a kinship placement with a maternal aunt and have currently been residing with licensed foster parents since being placed in an out of home placement.
>
> . . . .
>
> 10. That [Carrie] and [Anne] were adjudicated neglected Juveniles within the meaning of G.S. 7B-101(15) at a hearing held on August 24, 2016 where Respondent-Parents stipulated to the allegations in the petition. Respondent-Mother was ordered to comply with her Case Plan; obtain and maintain stable income and housing; submit to a substance abuse assessment and to comply with all recommendations; complete a mental health assessment and comply with all recommendations; successfully complete parenting classes; and participate in random drug screens. . . .
>
> 11. That from June 2016 through February 2018 Respondent-Mother demonstrated a pattern of instability in housing and income. She has lived with several different boyfriends within New Hanover and Bladen County and earns income by cleaning houses and selling things on eBay. For the past year, Respondent-Mother has primarily resided with a boyfriend in Carolina Beach. She is financially dependent on her boyfriend for transportation, income and housing. Respondent-Mother has been inconsistent with her communication with [DSS], has

not provided a current, working telephone number, has not provided an email address, does not return phone calls, has missed appointments and was not engaged when she did attend. [DSS] has provided her with bus passes and offered individual transportation. Respondent-Mother completed her substance abuse assessment but not the recommended treatment consisting of intensive out-patient, community support, 12 step program, individual therapy, skill set, SAIOP, after care and relapse prevention. Respondent-Mother started to participate in her treatment plan then elected to detox at home in August 2016. She disengaged with services, moved from her service area, and then sporadically re-engaged with services in early 2018. She accessed mental health treatment in August 2017 and out-patient therapy was recommended to help her cope with her depressive order, ADHD, alcohol and Opioid use. Respondent-Mother self-reports that she "has so much going on", that she has depression and runs from or ignores her problems, copes with it by sleeping for days and not eating. She stopped attending classes at Coastal Horizons because she "thought they were a joke" and would have enrolled in substance abuse treatment if she thought it was important. Respondent-Mother completed her parenting classes and participated in 13 out of 38 drug screen requests with mixed negative and positive results for benzodiazepines and amphetamines. During a home visit, Respondent-Mother was unable to account for her missing medication and thought she may have taken extra. Respondent-Mother had multiple phone issues during the underlying matter. Her boyfriend pays for her phone and has taken it from her when she texted someone else. Respondent-Mother and her boyfriend have broken up a few times over the past year when she texts other people. To date, Respondent-Mother has not been consistent with any treatment, is not compliant with her case plan and re-engaged in some services at lunch time on the first day of this hearing.

. . . .

15. . . . . Respondent-Mother was late to visits in November 2017 and December 2017 and did not notify anyone when she did not attend visits in August 2017, September

> 2017, January 2018, and March 2018. When visits with Respondent-Mother occurred, she would bring snacks and gifts for the children and interact appropriately with the children.

Based upon these findings, the trial court concluded that Respondent-mother had "neglected the children, that the neglect is ongoing, and that there is a probability of repetition of neglect."

"Our courts cannot presume a parent to be unfit or to have acted inconsistently with his constitutional rights as a parent without clear, cogent, and convincing evidence to demonstrate why the parent cannot care for his child." *In re S.J.T.H.*, __ N.C. App. __, __, 811 S.E.2d 723, 725 (2018) (citations omitted). DSS must overcome this presumption of parental fitness and meet and carry its burden of proof by clear, cogent and convincing evidence to show grounds exist to terminate parental rights. *Id.*

A parent's failure to make reasonable progress in completing a case plan may indicate a likelihood of future neglect. *In re D.M.W.*, 173 N.C. App. 679, 688-89, 619 S.E.2d 910, 917 (2005), *rev'd per curiam per the dissent*, 360 N.C. 583, 635 S.E.2d 50 (2006). Failure to make progress must be viewed by the actions and attempts of parents within their abilities and means, considering their resources or lack thereof and the priority for their securing their basic necessities of life. *See* N.C. Gen. Stat. § 7B-1111(a)(2) ("No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.").

Here, the juveniles were removed from Respondent-mother's care after the youngest child spilled Mr. Clean onto herself and Respondent-mother called for medical assistance. No evidence shows and the trial court made no findings indicating such actions were likely to be repeated. As progress on her case plan, to become a better parent, and to reduce or remove the likelihood of future neglect, Respondent-mother had completed parenting class, completed a CCA, had re-engaged in treatment, was employed, had recently submitted to drug testing and had obtained stable housing and transportation. The social worker testified Respondent-mother's recent drug test results were inconclusive and DSS was awaiting new results at the time of the hearing.

The evidence presented and the trial court's findings are insufficient to support the conclusion that "neglect is ongoing, and there is a probability of repetition of neglect." We reverse the conclusion that Respondent-mother's neglect is ongoing and the probability exists of her

future neglect of her daughters. *See In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

B. Failure to Make Reasonable Progress

[2] Respondent-mother argues the trial court erred in concluding grounds for termination of her parental rights existed "[b]ecause [she had] made reasonable efforts and progress in addressing the conditions that led to her children's removal."

The trial court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2).

"Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). "A finding of willfulness does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996) (citation omitted).

The undisputed evidence shows Respondent-mother completed a CCA in January 2017. The CCA recommended substance abuse treatment and individual therapy sessions to address her mental health. Respondent-mother sought mental health services beginning in August 2017. Evidence was presented that from then until February 2018, Respondent-mother presented to and attended nine sessions for therapy and five appointments for medication management. She missed 10 scheduled sessions during the same time frame. Following a break from therapy after one session in February 2018, Respondent-mother attended one additional therapy session at the end of March 2018. The trial court found Respondent-mother had ceased attending sessions because "she 'thought they were a joke' and [she] would have enrolled in substance abuse treatment if she thought it was important."

While evidence tending to show missed therapy sessions may support the trial court's finding that her attendance at treatment was inconsistent, a parent's inconsistent attendance at therapy sessions does not alone show a lack of reasonable progress, particularly when a parent is working or seeking to comply with other provisions of her plan to meet her and her children's needs. "While extremely limited progress is not reasonable progress, certainly perfection is not required to reach the

reasonable standard." *In re S.D.*, 243 N.C. App. 65, 73, 776 S.E.2d 862, 867 (2015) (citations and quotations omitted).

Respondent-mother argues the trial court's findings are misleading and do not reflect evidence of her progress and situation at the time of the hearing. Respondent-mother points to undisputed evidence of her activities and accomplishments to show reasonable progress in her case plan: (1) she re-enrolled in substance abuse treatment; (2) she continued therapy; (3) she was taking medications to address her mental health issues; (4) she had fully completed a parenting class; (5) she had improved her housing; (6) she was employed; (7) she had improved transportation; and (8) she had maintained better contact with DSS.

Respondent-mother also specifically challenges the portion of finding of fact number eleven, which states she "has not provided an email address." Testimony at the termination hearing tended to show DSS did not have a valid telephone number for Respondent-mother, and had recently resorted to email to communicate with Respondent-mother when they were unable to reach her by telephone. Evidence shows Respondent-mother had, in fact, provided an email address to DSS to remain in contact with her social worker as directed by her case plan.

When the evidence and the trial court's findings are viewed against the parental presumption favorable to Respondent-mother, DSS has failed to meet its burden to prove she had failed to make reasonable progress to support the conclusion to terminate her parental rights on this ground.

Respondent-mother's efforts and the facts before us sharply contrast to those where this Court has held that "[e]xtremely limited progress is not reasonable progress." *See In re Nolen*, 117 N.C. App. at 700, 453 S.E.2d at 224-25; *see also In re Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681 (1989) (upholding termination of parental rights where, "although respondent has made some progress in the areas of job and parenting skills, such progress has been extremely limited").

DSS recognized Respondent-mother had engaged with service providers and that her substance abuse recommendations were intertwined with her mental health treatment. While Respondent-mother had completed her substance abuse assessment, the social worker opined Respondent-mother's progress was minimal and she was not participating "with any real consistency that you could make some change."

Other areas of progress in Respondent-mother's case plan, such as stable housing and transportation were partly attributable to Respondent-mother's relationship with a new boyfriend, upon whom

she was financially dependent. Respondent-mother's case plan does not and cannot require that she alone be responsible for providing her housing and transportation. Evidence in the record also shows Respondent-mother was employed at the time of the hearing. Respondent-mother also engaged in appropriate visits with her daughters.

N.C. Gen Stat. § 7B-904 provides that a court may order a parent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent." N.C. Gen. Stat. § 7B-904(d1)(3) (2017). In the case of *In re W.V.*, 204 N.C. App. 290, 297, 693 S.E.2d 383, 388-89 (2010), this Court vacated the trial court's order requiring the respondent to obtain housing or employment where those requirements were unrelated to the causes of the conditions in the home which contributed to the juvenile's adjudication or the court's decision to remove the juvenile from the home. *Id.* Nothing in the record suggests or supports the finding that the Respondent-mother's dependence on her present boyfriend for housing, transportation, and for providing her a cell phone bears any relation to the causes of the conditions of the removal of Carrie and Anne from their mother's home. *See id.*

The trial court found Respondent-mother had not been consistent in her treatment, was not fully compliant with her case plan, and had only recently re-engaged in some services. These findings do not support the trial court's conclusion that Respondent-mother had not made reasonable progress in her case plan to address the reasons that led to the removal of her children, or that her failure to make reasonable progress was willful to support termination of her parental rights to both of her daughters. *See In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005) (trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.) and *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001) ("Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." (citation omitted)).

VI. Conclusion

The public policy of North Carolina, as is statutorily expressed by the General Assembly, mandates every court-ordered plan to include a

concurrent goal of reunification of children with their parent(s). N.C. Gen. Stat. § 7B-906.2 (2017). This policy necessarily requires that DSS's relationships and dealings with the parent(s) must continue as cooperative, rather than adversarial, until termination of the parent's rights by the court and through exhaustion of appeals. *Id*. The trial court's adjudication of the evidence and findings of fact fail to support the conclusions that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1) or (a)(2) to terminate Respondent-mother's parental rights. We reverse the trial court's termination of Respondent-mother's parental rights to Carrie and Anne. *It is so ordered.*

REVERSED.

Judges DILLON and BERGER concur.

IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT RECORDING SOUGHT BY CITY OF GREENSBORO

No. COA18-992

Filed 6 August 2019

Constitutional Law—First Amendment—police body camera recordings—release to city council members—gag order

A court order allowing city council members to view certain recordings from police body cameras but limiting the council members' ability to discuss the recordings in a public setting did not violate the council members' First Amendment rights. By statute (N.C.G.S. § 132-1.4A), the trial court had discretion to order the restrictions on the release of the recordings, and the council members had no First Amendment right to view the recordings—they only viewed them by the grace of the legislature through a judicial order.

Judge BERGER concurring in separate opinion.

Appeal by Plaintiff from order entered 23 February 2018 by Judge Susan Bray in Guilford County Superior Court. Heard in the Court of Appeals 8 May 2019.

Fox Rothschild LLP, by Patrick M. Kane and Kip David Nelson, and City of Greensboro Attorney's Office, by Rosetta Davidson Davis, for Petitioner-Appellant City of Greensboro.

Rossabi Reardon Klein Spivey PLLC, by Gavin J. Reardon and Amiel J. Rossabi, for Other-Appellee Involved Greensboro Police Officers.

Julius L. Chambers Center for Civil Rights, by Mark Dorosin and Elizabeth Haddix, ACLU of North Carolina Legal Foundation, by Christopher A. Brook, and Tin, Fulton, Walker & Owen, PLLC, by S. Luke Largess and Cheyenne N. Chambers, for Amici Curiae.

DILLON, Judge.

Petitioner City of Greensboro (the "City") appeals from the trial court's order denying its Motion to Modify Restrictions placed on Greensboro city council members, which allowed them to view certain recordings from body cameras ("body-cams") worn by Greensboro Police Department officers, *but* which limited their ability to discuss the recordings in a public setting. The City contends that the trial court's restrictions interfere with the city council members' fundamental responsibilities to their constituents and violate council members' First Amendment rights. After careful consideration, we affirm.

I. Background

This case arises from a 10 September 2016 incident in downtown Greensboro, resulting in the arrest of several individuals by Greensboro police officers (the "Officers"). The parties to this action are the City and the Officers.

Video footage of the incident was recorded by the Officers' body-cams. The City petitioned the footage be made available to members of its City council to view.

In January 2018, the trial court entered orders (the "Release Orders") allowing members of the City's governing council and certain other City officials to view the body-cam footage, but subject to a limited gag order, as follows: those City officials choosing to view the footage would not be allowed to discuss the footage except amongst themselves in the performance of their official duties. This Release Order further provided that any violation of the gag order would subject the offender to a fine

of up to five hundred dollars ($500.00) and imprisonment of up to thirty (30) days. The Release Order, though, allowed the City Attorney to seek modification of the gag order in the future.

The following month, in February 2018, the City moved to lift the gag order, to allow its officials to discuss the body-cam footage with their constituents and others. After a hearing on the matter, the trial court entered orders denying the City's motions for modification (the "Modification Denial Order").

The City appealed.[1]

II. Analysis

On appeal, the City argues that the trial court committed error by refusing to remove the gag order. We disagree.

In conducting our review, we will first assess the initial validity of the restriction in the Release Orders under the First Amendment.

Our General Assembly has provided that police body-cam footage is neither a public nor a personnel record, N.C. Gen. Stat. § 132-1.4A(b) (2016), and that only those depicted in the video and their personal representatives have an absolute right to view the footage, N.C. Gen. Stat. § 132-1.4A(c) (2016). The General Assembly also provided that anyone else wanting to view police body-cam footage may not do so unless that individual obtains a court order. N.C. Gen. Stat. § 132-1.4A(g) (2016). And "[i]n determining whether to order the release of all or a portion of the recording, in addition to any other standards [it] deems relevant," the court must consider the applicability of eight standards in making its decision, as follows:

> (1) Release is necessary to advance a compelling public interest.
>
> (2) The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law.

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1. The Officers contend that the Modification Denial Order and the initial Release Orders are interlocutory because they left open the possibility of future modification once City officials actually viewed the body-cam footage. However, alongside its appeal, the City has filed a petition for writ of *certiorari*. To the extent that the City has no right to appeal the orders before us, we grant the City's petition for writ of *certiorari* to aid our jurisdiction. *See* N.C. R. App. P. 21(a)(1).

> (3) The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding.
>
> . . .
>
> (5) Release may harm the reputation or jeopardize the safety of a person.
>
> (6) Release would create a serious threat to the fair, impartial, and orderly administration of justice.
>
> (7) Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.
>
> (8) There is good cause shown to release all portions of a recording.

Id. If a court is inclined to grant a request to release the footage, the court "may place any conditions or restrictions on the release of the recording that the court, *in its discretion*, deems appropriate." *Id.* (emphasis added).

Here, the trial court, in its discretion, deemed it appropriate to place a "condition or restriction" on the release of the body-cam footage to the City officials; namely, that the City officials could only discuss the footage amongst themselves in their official capacities. To support the imposition of this gag order, the trial court determined that statutory standards #1, 2, 3, 5, 6, 7 and 8 were all applicable. Specifically, standards #2, 5, 6 and 7 all support the imposition of the gag order. And in its Modification Denial Order, the trial court, in its discretion, denied the City's motion to lift the gag order.

In its principal brief to our Court, though, the City made no argument that the trial court abused its discretion in the manner it considered or weighed the statutory standards. And it is the City's burden on appeal to show how the trial court abused its discretion.[2] Rather, the City argues

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2. The City does note in its factual summation that the criminal cases of the two individuals depicted in the video were no longer pending. And this statement does suggest that standard #7, that a court must consider whether denying a request for the release of body-cam footage would be "necessary to protect either an active or inactive internal or criminal investigation[,]" was no longer applicable. N.C. Gen. Stat. § 132-1.4A(g)(7) (2016). But the City makes no argument that the other statutory standards supporting the gag order were no longer present. For instance, the City makes no argument that standard #5, that a public disclosure of the information "may harm the reputation or jeopardize the safety of [the officers,]" was no longer applicable.

that the gag order impermissibly violates the First Amendment rights of its council members and, otherwise, impairs their ability to engage in open government.[3] For the following reasons, we disagree.

The gag order does not violate the City's First Amendment[4] rights because the gag order only restricts the council's speech about matters that the council, otherwise, had no right to discover except by the grace of the legislature through a judicial order. Indeed, our General Assembly chose not to make body-cam footage a public record. *See* N.C. Gen. Stat. § 132-1.4A(b). In so holding, we are guided by the United States Supreme Court's opinion in *Seattle Times Co. v. Rhinehart*, in which that Court held that a protective order preventing public disclosure of information learned through discovery in a civil case did not violate the First Amendment. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-37 (1984). In that case, a newspaper was involved in litigation and sought discovery of financial documents from the other party. The trial court allowed the discovery, deeming it relevant to the litigation, but otherwise granted the other party a protective order preventing the newspaper from publishing the information to the public. The newspaper challenged the

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3. Briefly, for clarity, we elaborate that the City does not challenge the constitutionality of Section 132-1.4A itself. The City makes no arguments regarding the constitutional validity of keeping body-cam footage private, requiring court orders for release of the footage, or allowing the imposition of restrictions for viewing the footage based upon the trial court's discretion. Rather, the City challenges the constitutionality of the particular restriction placed on its access to the footage in this case: an order limiting the city council members' speech under threat of punishment.

4. The Officers contend that whether the restriction is unconstitutional under the First Amendment is not preserved for appeal because the issue was not argued during the trial court's hearing on the motions for modification. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."). Indeed, our Courts have a policy of not undertaking constitutional questions "except on a ground definitely drawn into focus by [the movant's] pleadings." *Hudson v. Atl. Coast Line R. Co.*, 242 N.C. 650, 667, 89 S.E.2d 441, 453 (1955).

However, this Court has stated that specific language invoking the constitution is not required where a constitutional issue is "apparent from the context." *State v. Spence*, 237 N.C. App. 367, 371, 764 S.E.2d 670, 674-75 (2014) (holding criminal defendant properly preserved constitutional issue by making a request that "directly implicate[d]" a constitutional right). In its motion to modify restrictions, the City repeatedly references the city council members' inability to properly engage in discussion and political discourse with their constituents. The City argued the same during the trial court's hearing on the matter. And the United States Supreme Court has acknowledged that an elected representative's speech to their constituency is guarded by the First Amendment. *See Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). The issue of the First Amendment's affirmative grant of freedom of speech was "definitely drawn into focus" by the City's arguments, which "directly implicate" a government official's need to speak openly with his or her constituency.

protective order, contending that it had a First Amendment right to publish the information learned during discovery.

The *Seattle Times* Court disagreed, holding that the protective order did not violate the newspaper's First Amendment rights. Essentially, the Court held that where a person only learns of information through judicial compulsion, the court compelling disclosure can place restrictions on the further dissemination of that information, but otherwise cannot generally place restrictions on the dissemination of information learned by other means:

> As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the [Civil Procedure] Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant [otherwise] has no First Amendment right of access to [the] information.
>
> . . .
>
> [I]t is significant to note that an order prohibiting dissemination of . . . information [that was only learned about through discovery during civil litigation] is not the kind of classic prior restraint that requires exacting First Amendment scrutiny. As in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's process.

Id. at 32-34 (internal citation omitted).

The present case is similar to *Seattle Times*. Specifically, here, the City has no First Amendment right to the body-cam footage, but has been given the right to access the information through a court order. The gag order only prevents the City from disseminating information that it has only learned through the court order. The gag order does not otherwise restrain the City officials from discussing the subject police encounter generally, only from discussing the body-cam footage specifically. Therefore, we conclude that the gag order does not impermissibly infringe on the City's First Amendment rights.

In the same way, we conclude that the gag order does not impermissibly impair the City council's ability to perform its official duties. Indeed, the City council members have no right to the information in the first place. The trial court could have denied the request to view the body-cam footage altogether. The City council members are still free to discuss any information about the police encounter learned from other sources with their constituents. Accordingly, we conclude that the trial court did not exceed its authority in imposing the gag order as a condition of access to the body-cam footage.

III. Conclusion

We conclude that, though the restriction does limit the City council members' speech, the trial court did not abuse its discretion in initially placing and later refusing to modify a restriction on release of body-cam footage, as the City officials otherwise had no right to the information. Much like a protective order under Rule 26(c), the discretionary restrictions allowed by Section 132-1.4A seek to protect the interests of those depicted in the information being released. In this case, protecting the reputation and safety of those individuals, as well as safeguarding the administration of justice, presents a substantial government interest for which the trial court's restrictions are no greater than necessary. The City has failed to meet its burden of showing that the trial court abused its discretion in determining that this protection is still not warranted. Therefore, we affirm.

AFFIRMED.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority's analysis. However, appellant's constitutional argument was not raised in the trial court. Because appellant presents its First Amendment argument for the first time on appeal, this matter should be dismissed. *See Powell v. N.C. Dep't of Transp.*, 209 N.C. App. 284, 296, 704 S.E.2d 547, 555 (2011) ("A constitutional issue not raised at trial will generally not be considered for the first time on appeal.").

IN RE ENTZMINGER

[266 N.C. App. 480 (2019)]

IN THE MATTER OF PHILLIP ENTZMINGER,
ASSISTANT DISTRICT ATTORNEY PROSECUTORIAL DISTRICT 3A

No. COA18-1224

Filed 6 August 2019

1. Attorneys—misconduct—material misrepresentations to court—sufficiency of evidence

In a disciplinary hearing against an assistant district attorney (ADA), competent evidence supported the superior court's conclusion that the ADA's statements to the court—regarding when he learned of the unavailability of a key witness—constituted a material misrepresentation in violation of the Rules of Professional Conduct 3.3 and 8.4 where the statements had the potential to mislead the court by suggesting no one in the district attorney's office had been informed of the witness unavailability until the day of trial, contrary to the facts.

2. Attorneys—misconduct—allegation of material misrepresentation of fact—qualified by stating personal belief

In a disciplinary hearing against an assistant district attorney (ADA), the evidence did not support the superior court's conclusion that the ADA's response to a question in court—that a case was not prioritized higher because "There were felonies on the docket is my understanding"—constituted a material misrepresentation in violation of the Rules of Professional Conduct. The ADA's qualification in his response that it was his personal belief made the statement truthful.

3. Attorneys—misconduct—findings—"unavailing" apology to court—sufficiency of evidence

In a disciplinary hearing against an assistant district attorney (ADA) whose written explanation for why a criminal case was being dismissed included language directed against the trial judge, the superior court's finding that the ADA's apology was "unavailing" and its conclusion that the ADA refused to acknowledge the wrongful nature of his conduct were supported by competent evidence.

Appeal by respondent from order entered 31 May 2018 by Judge Marvin K. Blount in Pitt County Superior Court. Heard in the Court of Appeals 22 May 2019.

IN RE ENTZMINGER

[266 N.C. App. 480 (2019)]

The North Carolina State Bar, by Deputy Counsel David R. Johnson and Counsel Katherine Jean, for appellee.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for respondent-appellant.

TYSON, Judge.

Phillip Entzminger ("Respondent") appeals from an order of discipline, which suspended his license to practice law for two years, with possibility of a stay of the balance of the suspension after six months. We affirm the order appealed from in part, reverse in part, and remand for further hearing on the appropriate discipline to be imposed.

I. Background

Respondent was employed as an assistant district attorney ("ADA") in Pitt County when he entered a dismissal of a driving while impaired ("DWI") charge. Haleigh Aguilar was arrested for DWI and driving after underage consumption of alcohol in December 2014. Aguilar's case was one in a series of cases in which the Pitt County District Attorney's Office "employed a novel and unusual procedure to obtain grand jury presentments and indictments in pending impaired driving cases." *State v. Baker*, ___ N.C. App. ___, ___, 822 S.E.2d 902, 903 (2018). Prior to Aguilar's initial trial and disposition in district court, the district attorney obtained a presentment and indictment from a grand jury in March 2017 and removed the case to superior court. Aguilar's case was set for trial during the 11 September 2017 superior court criminal session.

Aguilar married a United States Marine Corps service member, who was then stationed in Hawaii. Aguilar moved to Hawaii while her charges were pending. Aguilar's attorney, Leslie Robinson, Esq. contacted Hailey Bunce, the ADA assigned to Aguilar's case, on 8 August 2017 to request the trial be given priority to be heard due to his client having to return to North Carolina from Hawaii. Robinson also requested to be provided advance notice of a possibility of a continuance, and indicated he would oppose a motion to continue if the State did not call Aguilar's case for trial during the scheduled week of 11 September 2017.

Bunce indicated to Robinson that Aguilar's case was assigned to Respondent. In her reply email, Bunce stated the district attorney's office was unable to guarantee priority and advised Robinson to contact Respondent directly with any additional questions. Respondent was

copied on Bunce's emailed response. Robinson then sent his same calendar and notice requests directly to Respondent.

On 25 August 2017, Respondent replied to Robinson and indicated the trial of Aguilar's case had been assigned to ADA Brandon Atwood. Respondent also indicated to Robinson he could make no promises concerning the priority of Aguilar's case and noted pending felonies would probably have priority for disposition over this case. Robinson then sent the same priority requests previously sent to Bunce and Respondent to ADA Atwood.

Aguilar flew back from Hawaii to North Carolina for trial and was present for calendar call on Monday, 11 September 2017. Two other DWI cases were called prior to Aguilar's case. Her case was called for trial on Wednesday, 13 September 2017.

Officer Sinclair, Aguilar's breathalyzer test administrator, was an essential State witness. On 5 September 2017, she had informed a DWI Victim Witness Assistant within the district attorney's office of her unavailability as a witness for court due to training during the week of 11 September 2017. No ADA was informed of this scheduling issue. Officer Sinclair received an email from the district attorney's office on 11 September 2017, requesting her attendance in court. Officer Sinclair replied and again informed them of her conflict and being unavailable at training out of town. No subpoena was issued for Officer Sinclair to be present in court.

Atwood became aware of Officer Sinclair's impending absence sometime on 11 September 2017. Someone in the district attorney's office sent Respondent to "take over" the Aguilar case on Wednesday, 13 September 2017. Atwood informed Respondent of Officer Sinclair's unavailability. Neither Atwood nor Respondent informed Robinson of the officer's unavailability, nor did Respondent disclose his intention to move to continue the case.

After lunch on 13 September 2017, Respondent appeared before Resident Superior Court Judge, Jeffery Foster, and moved for a continuance in the Aguilar matter. Robinson objected and presented the history and circumstances of the case and his notices of scheduling with the district attorney's office.

The following colloquy occurred with Respondent, Atwood, and Judge Foster:

> THE COURT: Well, why didn't you call this case first?

> [Respondent]: There were felonies on the docket is my understanding.
>
> THE COURT: No, there weren't. They were all pled out last week.
>
> [Respondent]: I think when the calendar was made, your Honor, I think you could make –
>
> THE COURT: But we knew Monday that, that wasn't the case is what I'm saying, so why didn't we go ahead and do this?
>
> . . .
>
> THE COURT: When did y'all know that this officer was going to be unavailable?
>
> [Respondent]: I found out today, your Honor, at approximately 12:15. I was –
>
> THE COURT: When did the officer know?
>
> MR. ATWOOD: I was made aware that the chemical – that the officer in the case was in Huntersville, I was made aware Monday.

After determining no subpoena was present in the court file or had been issued for Officer Sinclair, the trial court denied the State's motion to continue. The State dismissed the DWI charge against Aguilar and accepted her plea on the driving after consuming while underage charge.

The next day, Respondent completed a document entitled "Prosecutor's Dismissal and Explanation" which included Respondent's version of the reason for the State's dismissal of the DWI:

> This 2014 case was set in superior court. The analyst was unavailable due to training with the Huntersville Police Department (North Carolina). The State made a motion to continue which was denied. Oddly enough, the judge indicated the DWI case should have been set further up in calendar because defendant was from Hawaii. All defendants simply need to move out of state after being charged with a crime if that is the case.
>
> . . . .

> [The State] could have proved all the elements but a superior court judge denied the motion to continue for lack of an analyst to show the .12.

Judge Foster saw and reviewed the dismissal document and spoke with Officer Sinclair concerning her absence for training and learned the true history, including her prior notice of her unavailability and absence as a witness on trial day. After consulting with other judges, Judge Foster "made the decision to begin this action." Judge Foster felt Respondent's comments on the dismissal document "called the Court into disrepute," and were "disrespectful," "inappropriate," and "unnecessary."

Judge Foster entered an order for Respondent to show cause why he should not be held in contempt or disciplined. The order alleged Respondent: (1) showed "a disregard for the dignity of the Court"; (2) "demonstrated undignified and discourteous conduct"; (3) "[m]isled the Court by making statements he knew or should have known to be false"; and, (4) "[a]cted to create a false record."

The Office of Counsel of the State Bar was appointed to prosecute the matter. Respondent filed a motion to recuse Judge Foster, which was granted by the trial court.

A hearing was held in two phases: the first phase was to determine whether Respondent had violated the Rules of Professional Conduct or was guilty of criminal contempt, and, if so, the second phase was to determine the appropriate discipline. The trial court found Respondent was not guilty of criminal contempt, but found he had violated Rules 3.3(a)(1), 4.4(a), 8.2(a), 8.4(c), and 8.4(d) of the Rules of Professional Conduct.

After hearing additional evidence concerning sanctions, the trial court suspended Respondent's license to practice law for two years. Respondent was provided the opportunity to request a stay of the suspension after six months had elapsed and after compliance with various requirements.

Respondent entered notice of appeal. The trial court denied his motion to stay the order of discipline. This Court granted Respondent's motion for writ of *supersedeas* and stayed enforcement of the order of discipline until the disposition of this appeal.

II. Jurisdiction

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

III. Issues

Respondent argues the trial court erred by finding and concluding: (1) Respondent had made false statements of material fact regarding when he had learned of Officer Sinclair's unavailability, which misled the trial court; (2) Respondent's statement that "there were felonies on the docket is my understanding" created a material misrepresentation that Respondent knew or should have known was false; and, (3) Respondent had refused to acknowledge the wrongful nature of his conduct and his apology to the Court was "unavailing."

IV. Standard of Review

Respondent asserts this Court's standard of review on an order of discipline is the whole record test. He cites *N.C. State Bar v. Livingston*, __N.C. App. __, __, 809 S.E.2d 183, 188 (2017), for support. The order in *Livingston* was entered by the State Bar Disciplinary Hearing Commission. *Id.*

The North Carolina State Bar (the "State Bar") asserts the appropriate standard of review is whether competent evidence supports the findings of fact, since this is a matter brought by a court in the exercise of its inherent disciplinary power over officers of the court and members of the bar. *In re Key*, 182 N.C. App. 714, 717, 643 S.E.2d 452, 455 (2007); *State v. Key*, 182 N.C. App. 624, 626, 643 S.E.2d 444, 447 (2007).

Respondent argues the proceedings before us are more like a disciplinary hearing, as compared with the proceedings in the *Key* cases, which were prosecuted by the local district attorney and the State Bar. We find this argument unconvincing.

As in the *Key* cases, this matter was initiated by a judge of the superior court pursuant to the court's inherent authority to discipline attorneys and under N.C. Gen. Stat. § 5A-15(a). The appointment of counsel of the State Bar to prosecute this matter, given Respondent's employment by the district attorney, rests within the authority of the court, and does not remove the proceeding from its authority. N.C. Gen. Stat. § 5A-15(g) (2017) ("The judge presiding over the hearing may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar to represent the court in hearings for criminal contempt.").

Our review of the trial court's findings of fact "is limited to whether there is competent evidence in the record to support the findings." *In re Key*, 182 N.C. App. at 717, 643 S.E.2d at 455. "It is irrelevant that the evidence would also support contrary findings of fact." *Id.* at 717-18, 643 S.E.2d at 455.

"Where the trial judge sits as the trier of the facts, his findings of fact are conclusive on appeal when supported by competent evidence . . . . The appellate court cannot substitute itself for the trial judge in this task." *Gen. Specialities Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979) (internal citations and quotations omitted).

The trial court's conclusions of law, which must be supported by its findings of fact, are reviewed *de novo*. *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 664, 554 S.E.2d 356, 361-62 (2001). Any sanctions imposed are reviewed on appeal for abuse of discretion. *Id.* at 664-65, 554 S.E.2d at 362.

V. Analysis

The inherent power of Justices and Judges of the General Courts of Justice to discipline members of the Bar as officers of the court predates and remains more comprehensive than the statutory powers initially and subsequently provided by the General Assembly to the State Bar. *Swenson v. Thibaut*, 39 N.C. App. 77, 109, 250 S.E.2d 279, 299 (1978). It is axiomatic that judges must rely upon the honesty and veracity of all witnesses and participants, and particularly the full disclosure and candor by members of the Bar, to be able to administer and render fair and impartial justice. *See id.*

The trial court found and concluded Respondent's conduct during the Aguilar hearing, and its dismissal and aftermath, constituted grounds for discipline. Respondent challenges two of those conclusions of law. Respondent also challenges one finding of fact and conclusion concerning his apology.

A. False Statement Concerning Officer Availability

[1] The superior court concluded:

> That [Respondent], by claiming to the Court to have learned of Officer Sinclair's unavailability only minutes before a hearing on the State's motion to continue and thereby misleading the Court by making a material misrepresentation of facts upon which the Court acted, violated Rule 8.4(c) and Rule 3.3(a)(1) of the Rules of Professional Conduct[.]

Respondent asserts this conclusion "is not supported by the findings of fact and is greatly at odds with the evidence presented at the hearing." Based upon this Court's standard of review, we disagree. *See In re Key*, 182 N.C. App. at 717, 643 S.E.2d at 455.

North Carolina's Rules of Professional Conduct provide: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer." N.C. R. Prof. Cond. Rule 8.4(c). Additionally, "[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." N.C. R. Prof. Cond. Rule 3.3(a)(1).

Here, competent evidence supports the superior court's disciplinary order. Respondent made two statements to Judge Foster regarding Officer Sinclair's availability that implicated rules 8.4 and 3.3. First, when Judge Foster questioned why Officer Sinclair was not present to testify, Respondent replied, "I could not tell you. Ms. Stroud in our office told me today that she was in Huntersville. And I want to say actually [she] has a job in Huntersville in training with the police department." Second, in response to Judge Foster's question to Respondent of when "did *y'all* know that [Officer Sinclair] was going to be unavailable," Respondent stated, "*I* found out today, your Honor, at approximately 12:15." (Emphasis supplied).

Respondent's statements could be found to be a misrepresentation of facts that could have misled the court to believe the District Attorney's office had learned of Officer Sinclair's absence only that day. This potential to mislead the court may have prompted Atwood to interject and clarify Respondent's statements, by saying, "I was made aware Monday. [Officer Sinclair] contacted our office and said she is in training with the police department." During Respondent's hearing, Atwood was asked and clarified why he felt the need to interject:

> [COUNSEL]: And how did you take that question in terms of who he [Judge Foster] was asking?
>
> [ATWOOD]: Mr. Entzminger and I were both standing at the counsel table. Mr. Entzminger was – made the motion to continue, but since I was standing with him, Mr. Entzminger gave his answer and I felt it proper to clarify with my answer.
>
> [COUNSEL]: And why did you feel like after Mr. Entzminger said, well, I just found out at 12:15 that you needed to also answer?
>
> [ATWOOD]: To just be truthful with the Court at that point that I had – I had found out at some point Monday after

> 10:18. I didn't want – I didn't want Judge Foster to think that we had just found out on Wednesday at whatever time it was. I wanted him to know that it was at some point Monday after 10:18, or whenever it was.

Atwood made similar statements on cross-examination:

> [COUNSEL]: Mr. Atwood, you said you didn't want Judge Foster to think that you didn't know that Officer Sinclair was unavailable?
>
> [ATWOOD]: I just didn't want – I wanted to clarify Mr. Entzminger's answer, that it wasn't at – whatever his response was. I wanted to clarify with my knowledge.
>
> [COUNSEL]: You felt it needed clarification?
>
> [ATWOOD]: Correct. I just wanted Judge Foster to hear my answer.

Judge Foster's question was directed at both Respondent and Atwood as representatives of both the district attorney's office and the State, and was inquiring when they or their office and the State had collectively learned of Officer Sinclair's unavailability. Respondent's answers were found to potentially have misled the court, a violation of the rules of professional conduct:

> an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer *or in a statement in open court*, may properly be made *only* when the lawyer knows the assertion is true or *believes it to be true on the basis of a reasonably diligent inquiry*. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

N.C. R. Prof. Cond. Rule 3.3, cmt. 3 (emphasis supplied).

Respondent's statement that *he* had just found out about Officer Sinclair's unavailability that afternoon could have been stated in Respondent's ignorance of the truth. However, this statement belied the truth that the district attorney's office was made aware of the officer's absence over a week before the case was to be called, no subpoena had been issued, and it had simply failed to act upon the information received until Respondent moved for a continuance and made representations to the court.

Respondent's statements prompted the presiding judge to question whether Officer Sinclair was ignoring a subpoena, to check the court file, and to decide whether or not the court should issue a show cause order to appear. Ultimately, Respondent stated he could not make the representation Officer Sinclair had, in fact, been subpoenaed. After the court reviewed the court file for the presence of a subpoena and found none, it denied the State's motion to continue.

The trial court found Respondent's answers did not disclaim knowledge, failed to disclose the true facts known by the State, led the court to question the duty and motivations of other actors and officers not present in court, and tended to shift the blame elsewhere for the State's essential witness not being present.

The superior court found these statements violated Rules 8.4(c) and 3.3(a)(1) of the Rules of Professional Conduct. Competent evidence in the record supports these findings of fact. "It is irrelevant that the evidence would also support contrary findings of fact." *In re Key*, 182 N.C. App. at 717-18, 643 S.E.2d at 455. Respondent's argument is overruled.

B. Statement Concerning the Docket

[2] When Judge Foster asked why the State did not call the Aguilar case for trial first, Respondent replied, "There were felonies on the docket *is my understanding*." (Emphasis supplied). Judge Foster responded: "No, there weren't. They were all pled out last week." At the hearing, the trial court concluded it was a material misrepresentation that Respondent knew or should have known to be false, and this statement constituted another violation of Rule 8.4(a) of the Rules of Professional Conduct.

The trial court's finding and conclusion that this statement was a material misrepresentation of fact to the court is not supported by competent evidence. Respondent relied upon the trial docket and calendar and represented facts he believed to be true, with the qualification of "in my understanding."

Atwood, as Respondent's co-counsel, immediately supplemented the response:

> THE COURT: Well, why didn't you call this case first?
>
> [RESPONDENT]: There were felonies on the docket is my understanding.
>
> THE COURT: No, there weren't. They were all pled out last week.

> [RESPONDENT]: I think when the calendar was made, your Honor, I think you could make –
>
> THE COURT: But we knew Monday that, that wasn't the case is what I'm saying, so why didn't we go ahead and do this?
>
> [ATWOOD]: Your Honor, due to the number of motions that were in this particular case, we decided to place two cases in front of it that did not have the amount of motions to try to go ahead and knock out a couple of cases.

Respondent's first response of "There were felonies on the docket is my understanding" was a truthful statement. At the disciplinary hearing, the trial court made factual findings that: (1) there were felonies originally calendared on the docket; (2) Respondent had no involvement in the Aguilar case "from 25 August 2017 until approximately 12:15 pm on 13 September 2017"; (3) Respondent "was not assigned to represent the State during the 11 September 2018 trial session and did not appear in court before Judge Foster during that session until he was summoned to by someone in the DA's office to appear in Superior Court"; and (4) Respondent "had not participated in any trial preparation regarding the case."

A conclusion that Respondent engaged in conduct involving misrepresentation that reflected adversely on his fitness as a lawyer does not logically follow from the factual findings that Respondent had no involvement with the case between the time that the felonies on the docket were pled out and the moment before the hearing in question. Respondent, when specifically asked, recited a fact that was true at the last point of his knowledge, and also qualified it as such.

No evidence supports a finding or conclusion that Respondent engaged in misrepresentations concerning the docket and the reasons for the order in which the Aguilar case was called for trial, in violation of N.C. R. Prof. Cond. Rule 8.4(c). This conclusion is reversed.

C. Respondent's Apology

[3] Respondent asserts his apology to the court was "direct and unequivocal" and challenges Finding of Fact 5: "[Respondent's] apology to Judge Foster was unavailing," and the inclusion and consideration of "[Respondent's] refusal to acknowledge [the] wrongful nature of conduct" in the conclusions regarding discipline.

Respondent argues the trial court improperly considered his defense raised during the adjudication phase against him during the dispositional

phase, in violation of *N.C. State Bar v. Rogers*, 164 N.C. App. 648, 657, 596 S.E.2d 337, 343 (2004). The findings of fact related to Respondent's conduct leading to and during the adjudication phase include:

> 1. Entzminger sent an electronic communication to Judge Foster on 3 November 2017 stating, in part, that his language in the Aguilar dismissal was directed at Robinson [defense counsel], not Judge Foster.
>
> 2. Entzminger's electronic communication to Judge Foster further states that there was no disrespect for Judge Foster's ruling in the filed dismissal.
>
> 3. Leading up to and through the hearing in this matter, Entzminger continued to claim, in the face of clear evidence to the contrary, that the language in the "Prosecutor's Dismissal and Explanation" was not directed at Judge Foster.
>
> 4. Entzminger did not apologize to Judge Foster at any point from the time he filed the "Prosecutor's Dismissal and Explanation" to the time of the hearing in this matter. Entzminger took the stand on the second day of the hearing, after the Court found that Entzminger had engaged in professional misconduct, and apologized to Judge Foster.

Respondent is correct in arguing that an attorney may defend against charges of professional misconduct without his defense being used against him in the dispositional phase. *See id.* His assertion of his lack of an apology to Judge Foster prior to or during the adjudication hearing being held against him in determining the appropriate discipline is not supported by the findings.

The trial court explicitly found that after being found to have engaged in unprofessional conduct. Respondent did, in fact, apologize to Judge Foster:

> Judge Foster, I apologize for my actions. The language that was put in the dismissal was inappropriate, should not have been there. It was – could have been seen as directed towards you, which it was not. I shall always yield gracefully to any ruling that you have. You should know the only reason that I have not been to you – the only reason why I have not been by your office, sat down in your office, the only reason I have not talked to you in the hallway has been under the advice of both counsel as well as those

> that I have asked since this began. I realize that when I sent you text messages, when I left you a phone message in order to set up a meeting, instead I should have just gone to your office. By the time I received counsel from others they said it was probably not a good idea. I wanted nothing more than to look at you and say I apologize for anything that I put in the dismissal. And I'm not just saying that just because here we are now. I'm really not. I was prepared to do this last Tuesday, I was prepared to do this last February, I was prepared to do this back at the end of September, before October the 2nd. I have always been prepared to do this. Yesterday if you would have been in court, in the afternoon you had to go somewhere, I would have said the same thing, that I deeply apologize to you. But more to the point I apologize to Mr. Walthall. I apologize to Mr. – the other Bar representative, I forget his name. And I apologize to Judge Blount. It is my actions that have brought us here today and I apologize for wasting the Court's time with something like this.

Despite Respondent's explanations and assertions, the trial court found his apology lacking. Respondent admitted under cross-examination during the dispositional phase of his trial that at least part of the language from his order of dismissal could have been construed as being directed at Judge Foster's ruling on denying Respondent's motion to continue. Respondent's dismissal specifically states: "Oddly enough, *the judge* indicated the DWI case should have been set further up in the calendar because defendant was from Hawaii." (Emphasis supplied).

The trial court included this finding of fact regarding discipline, which Respondent does not challenge and is binding upon appeal:

> 14. Contrary to the overwhelming weight of the evidence presented at the hearing, Entzminger's continued attempts to maintain that the dismissal language was not directed at Judge Foster and that he meant no disrespect to Judge Foster by his conduct demonstrates Entzminger's refusal to acknowledge the wrongfulness of his conduct."

"[U]nchallenged findings of facts are binding on appeal." *N.C. State Bar v. Key*, 189 N.C. App. 80, 87, 658 S.E.2d 493, 498 (2008) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

Competent evidence exists to support the challenged finding of fact, which, along with uncontested findings, supports the challenged

conclusion of law. This Court does not find facts or "substitute itself for the trial judge." *Gen. Specialties Co.*, 41 N.C. App. at 275, 254 S.E.2d at 660. Respondent's argument is overruled.

VI. Conclusion

Competent evidence in the record supports the challenged findings of fact that Respondent had made false statements of material fact regarding when he had learned of Officer Sinclair's unavailability, which misled the trial court, and that Respondent had refused to acknowledge the wrongful nature of his conduct and his apology to the Court was "unavailing." *In re Key*, 182 N.C. App. at 717, 643 S.E.2d at 455. Those challenged conclusions of law are supported by the trial court's findings of fact and are affirmed.

The trial court's conclusion of law that Respondent's statement that "there were felonies on the docket is my understanding" created a material misrepresentation that Respondent knew or should have known was false is a conclusion of law unsupported by competent evidence and is unsupported by the findings of fact. This conclusion is reversed.

Respondent failed to challenge or argue the trial court's conclusion, or the findings of fact supporting it, that Respondent's filing of the dismissal violated Rules 8.4(d), 8.2(a), and 4.4(a) of the Rules of Professional Conduct and "constitute[d] grounds for discipline." *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

The trial court's order for discipline is affirmed in part, reversed in part, and remanded for a new hearing on the disciplinary sanctions to be imposed. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges BRYANT and ZACHARY concur.

IN RE NICOR, LLC

[266 N.C. App. 494 (2019)]

IN THE MATTER OF NORTH CAROLINA (FUTURE ADVANCE) DEED OF TRUST BY NICOR, LLC TO JERONE C. HERRING AND SUBSEQUENTLY D. TALMADGE SCARBOROUGH III, SUBSTITUTE TRUSTEE

RECORDED AT BOOK 1770, PAGE 152 OF THE MOORE COUNTY REGISTRY

SUBSTITUTION OF TRUSTEE RECORDED AT BOOK 4862, PAGE 263, IN THE MOORE COUNTY REGISTRY

IN THE MATTER OF NORTH CAROLINA DEED OF TRUST AND SECURITY AGREEMENT BY NICOR, LLC TO BB&T COLLATERAL SERVICE CORPORATION AND SUBSEQUENTLY D. TALMADGE SCARBOROUGH III, SUBSTITUTE TRUSTEE

RECORDED AT BOOK 2988, PAGE 461 OF THE MOORE COUNTY REGISTRY

SUBSTITUTION OF TRUSTEE RECORDED AT BOOK 4862, PAGE 265, IN THE MOORE COUNTY REGISTRY

IN THE MATTER OF NORTH CAROLINA DEED OF TRUST AND SECURITY AGREEMENT BY FOREST HAVEN, LLC TO BB&T COLLATERAL SERVICE CORPORATION AND SUBSEQUENTLY D. TALMADGE SCARBOROUGH III, SUBSTITUTE TRUSTEE

RECORDED AT BOOK 2793, PAGE 393 OF THE MOORE COUNTY REGISTRY

SUBSTITUTION OF TRUSTEE RECORDED AT BOOK 4862, PAGE 269, IN THE MOORE COUNTY REGISTRY

IN THE MATTER OF NORTH CAROLINA DEED OF TRUST AND SECURITY AGREEMENT BY NICOR, LLC TO BB&T COLLATERAL SERVICE CORPORATION AND SUBSEQUENTLY D. TALMADGE SCARBOROUGH III, SUBSTITUTE TRUSTEE

RECORDED AT BOOK 3216, PAGE 62 OF THE MOORE COUNTY REGISTRY
SUBSTITUTION OF TRUSTEE RECORDED AT BOOK 4862, PAGE 267, IN THE MOORE COUNTY REGISTRY

No. COA18-1071

Filed 6 August 2019

Mortgages and Deeds of Trust—foreclosure—power-of-sale—possible deficiency judgment—argument outside scope of proceeding

In a foreclosure proceeding, obligors' argument that anti-deficiency statutes (N.C.G.S. §§ 45-21.36 and 45-21.38) should have precluded the trial court from entering orders of sale permitting foreclosure amounted to an equitable argument that was outside the scope of a power-of-sale foreclosure proceeding. The trial court properly allowed foreclosure to proceed where the elements of N.C.G.S. § 45-21.16 were satisfied, although the trial court lacked authority to conclude that a judgment previously obtained by the holder of several promissory notes did not prevent foreclosure. However, obligors could raise their argument regarding a deficiency judgment in a hearing to enjoin the sale held pursuant to section 45-21.34.

IN RE NICOR, LLC

[266 N.C. App. 494 (2019)]

Appeal by respondents from orders entered 26 April 2018 by Judge Tanya T. Wallace in Moore County Superior Court. Heard in the Court of Appeals 27 March 2019.

Nelson Mullins Riley & Scarborough LLP, by Leslie Lane Mize and D. Martin Warf, for petitioner-appellee.

Clayton Myrick McClanahan & Coulter, by Noel B. McDevitt, Jr., and West & Smith, LLP, by Stanley W. West, for respondents-appellants.

ZACHARY, Judge.

Respondents-Appellants Nicor, LLC and Forest Haven, LLC (hereinafter "Nicor," "Forest Haven," and collectively "Obligors") appeal from orders of sale in three proceedings permitting foreclosure of certain real property "described in the [d]eeds of [t]rust in accordance with the terms and provisions of the power of sale contained therein." Prior to commencing foreclosure proceedings, RREF II WBC Acquisitions, LLC ("RREF"), then the holder of the notes, filed Obligors' confession of judgment entitling RREF to judgment for the entire outstanding amount owed on the promissory notes securing the deeds of trust. The trial court entered judgment in RREF's favor and stayed the foreclosure proceedings. Obligors argued before the trial court, and now argue before this Court, that the entry of judgment in RREF's favor for the aggregate debt secured by the deeds of trust on the property precluded the holder of the notes from subsequently foreclosing on the properties. Due to the limited scope of power-of-sale foreclosure proceedings, we conclude that this argument was not properly before the trial court. Accordingly, we affirm the trial court's orders of sale permitting foreclosure.

I. Background

Over a period of nearly twelve years, Nicor executed five promissory notes with principal amounts totaling $1,351,200.00 and secured repayment by executing three deeds of trust, originally for the benefit of BB&T Collateral Service Corporation ("BB&T"). Thereafter, BB&T assigned the Nicor promissory notes and deeds of trust to RREF.

On 4 May 2015, Forest Haven executed a promissory note in the original principal amount of $933,500.00, and secured repayment of the note by executing a deed of trust in favor of BB&T. BB&T assigned the Forest Haven promissory note and deed of trust to RREF.

Obligors defaulted; however, in October 2015, Obligors and RREF entered into a forbearance agreement, which provided Obligors

additional time to satisfy their debts. The agreement acknowledged the current amount of the debt owed and the existence of defaults under the promissory notes. RREF agreed not to exercise its rights under the loan documents until the earlier of 31 August 2016, or Obligors' failure to comply with the terms of the forbearance agreement (including any event of default). In addition, Obligors agreed to entry of judgment in RREF's favor if Obligors failed to satisfy the terms of the forbearance agreement, and they accordingly executed a confession of judgment. Obligors further permitted RREF, "[u]pon termination of the Forbearance Period," to initiate foreclosure proceedings upon the Nicor and Forest Haven deeds of trust that "have not [been] paid off under the terms of this Agreement."

One year later, in October 2016, the parties executed a "Modification of Forbearance Agreement" extending the forbearance period to 31 August 2017. The second forbearance agreement included confession of judgment and foreclosure provisions that were identical to those contained in the first forbearance agreement.

Obligors subsequently failed to comply with the terms of the modified forbearance agreement, and RREF filed the confession of judgment on 8 August 2017 in Moore County Superior Court. That day, the clerk of court entered judgment against Obligors in the amount of $1,834,071.42, plus interest at the annual rate of 12% to be calculated from the filing of the confession of judgment.

On 12 October 2017, RREF initiated three power-of-sale foreclosure proceedings before the Moore County Clerk of Superior Court. After initiating the foreclosure proceedings, RREF assigned the Nicor and Forest Haven promissory notes and deeds of trust to CL45 MW Loan 1, LLC ("CL45"), the current holder of the notes. The assistant clerk of superior court consolidated the matters for hearing, and concluded that the requirements of N.C. Gen. Stat. § 45-21.16 were satisfied. On 1 February 2018, the assistant clerk of court entered an order of sale in each proceeding allowing CL45 to proceed with the power-of-sale foreclosures on the real estate described in the deeds of trust.

Obligors appealed, and the matters were consolidated for a *de novo* hearing in Moore County Superior Court on 12 March 2018, the Honorable Tanya T. Wallace presiding. On 26 April 2018, Judge Wallace concluded that the requirements of N.C. Gen. Stat. § 45-21.16 were satisfied and entered orders of sale permitting foreclosure. Obligors timely filed notices of appeal.

II. Discussion

Obligors argue on appeal that the trial court erred in permitting the foreclosures to proceed after the holder of the notes had already obtained a judgment against Obligors for the entire amount of the debt secured by the deeds of trust. For the reasons explained below, we affirm the trial court's orders of sale permitting foreclosure.

A. Standard of Review

When reviewing a trial court's decision sitting without a jury, "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Id.*

B. Power-of-Sale Foreclosure

There are two types of foreclosure proceedings in North Carolina: (1) foreclosure by judicial action, and (2) foreclosure under power of sale. *Banks v. Hunter*, 251 N.C. App. 528, 534, 796 S.E.2d 361, 367 (2017). "[F]oreclosure by power of sale under a deed of trust is a non-judicial proceeding." *In re Foreclosure of Lucks*, 369 N.C. 222, 222, 794 S.E.2d 501, 503 (2016). Chapter 45 of our General Statutes, concerning power-of-sale foreclosures, provides "certain minimal judicial procedures, including requiring notice and a hearing designed to protect the debtor's interest." *Id.* at 223, 794 S.E.2d at 503. In order to foreclose under a power-of-sale provision in a deed of trust, the clerk must find:

> (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A[.]

N.C. Gen. Stat. § 45-21.16(d) (2017). If the clerk finds the existence of these six elements, "the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article." *Id.*

The statute permits a *de novo* appeal of the clerk's findings "to the judge of the district or superior court having jurisdiction" within ten days after entry of the clerk's order. *Id.* § 45-21.16(d1). On appeal, the trial court is limited to deciding the same issues as the clerk—the existence of the elements provided in N.C. Gen. Stat. § 45-21.16(d). *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993). "The superior court has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in N.C. Gen. Stat. § 45-21.16." *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013) (quotation marks omitted).

C. Anti-Deficiency Statutes

Obligors first argue that the entry of judgment against them for the full amount of the debt precludes CL45 from subsequently proceeding with foreclosure, because doing so would in effect repeal N.C. Gen. Stat. § 45-21.36. Section 45-21.36 grants debtors a fair-market-value offset defense to certain deficiency judgments entered after foreclosure. A party may utilize this defense

> [w]hen any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part.

N.C. Gen. Stat. § 45-21.36.

Under this provision, where the foreclosing creditor is the high bidder for the property for an amount less than the debt owed to the foreclosing creditor in a power-of-sale foreclosure, and the foreclosing creditor subsequently sues to recover the deficiency, the deficiency may

be eliminated or reduced in two circumstances. First, the court may eliminate the deficiency if the debtor can show "that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale." *Id.*; *see also United Cmty. Bank v. Wolfe*, 242 N.C. App. 245, 246, 775 S.E.2d 677, 679 (2015), *rev'd on other grounds*, 369 N.C. 555, 799 S.E.2d 269 (2017). Alternatively, the court can reduce the deficiency upon the debtor's showing "that the amount bid [by the foreclosing creditor] was substantially less than its true value." N.C. Gen. Stat. § 45-21.36; *see also Wolfe*, 242 N.C. App. at 246, 775 S.E.2d at 679.

This statute's purpose is "to protect a debtor from a creditor unilaterally determining the amount to be applied to a debt resulting from the trustee's sale of collateral." *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 368 N.C. 301, 307, 776 S.E.2d 838, 842 (2015). The deficiency offset "protects a debtor by calculating the debt based upon the fair market value of the collateral instead of the amount bid by the creditor at the trustee's sale." *Id.* at 307, 776 S.E.2d at 843. This protection "is an equitable method of calculating the indebtedness, and as such is not subject to waiver." *Id.* "[W]aiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guarantee agreement would violate public policy." *Id.* at 308, 776 S.E.2d at 843.

Obligors assert that this Court should interpret section 45-21.36 as preventing the evasion of its deficiency protections, just as our Supreme Court interpreted section 45-21.38 in *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979). Section 45-21.38 provides that

> [i]n all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase

> money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

N.C. Gen. Stat. § 45-21.38.

Pursuant to this statute, "if the debt secured by the mortgage or deed of trust is for the balance of the purchase price owed to the [creditor] for the land involved, no deficiency judgment can be recovered against the mortgagor." 1 Patrick K. Hetrick and James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 13.46[1] (Matthew Bender, 6th ed.). However, the deed of trust must explicitly state that the indebtedness is for the balance of the purchase price for the real estate. *Id.*

Our Supreme Court interpreted this purchase-money mortgage antideficiency statute as limiting a foreclosing creditor, who was also the original seller of the land, to the remedy of foreclosing on the land. *Ross Realty*, 296 N.C. at 370, 250 S.E.2d at 273 ("[W]e think the manifest intention of the Legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.").

In construing section 45-21.38, the *Ross* Court stated that "the 1933 General Assembly intended to protect vendees from oppression by vendors and mortgagors from oppression by mortgagees." *Id.* at 371, 250 S.E.2d at 274. Indeed, our Supreme Court determined that it was "compelled to construe [section 45-21.38] more broadly and . . . conclude that the Legislature intended to take away from creditors the option of suing upon the note in a purchase-money mortgage transaction. This construction of the statute not only prevents its evasion, but also gives effect to the Legislature's intent." *Id.* at 373, 250 S.E.2d at 275.

The mortgages in this case do not fall within section 45-21.38's protections because they are not purchase-money mortgages, but Obligors nevertheless ask our Court "to construe [section] 45-21.36 with the same breadth" as our Supreme Court construed section 45-21.38 in *Ross*. The construction that Obligors seek would prevent a lender from suing and obtaining a judgment *in personam* on a promissory note, and then subsequently pursuing a second action *in rem* by filing a foreclosure action. Obligors maintain that if CL45 proceeds with the foreclosure under these circumstances, then it "can purchase the properties for a fraction of their fair market value at the foreclosure sale with negligible effect on the substantial [j]udgment that it possesses. Then, [CL45] can freely

continue to execute and enforce the [j]udgment against [the] property that was never secured by the foreclosed deeds of trust." In sum, Obligors contend that it would be inequitable—and in their view, prohibited by statute—to permit CL45 to foreclose on the property when it has already taken a substantial money judgment against Obligors for the full amount of the debt.

While Obligors ask this Court to read into section 45-21.36 an anti-deficiency protection when a foreclosing mortgagee has already taken a judgment against the mortgagor, this appeal is before us after the trial court found in each case that CL45 had established the elements required for authorization of a power-of-sale foreclosure. CL45 responds that Obligors' equitable argument exceeds the scope of review under N.C. Gen. Stat. § 45-21.16(d); however, Obligors contend that after taking a judgment for the entire amount of the debt, CL45, as the holder of the notes, lost the "right to foreclose on the underlying [d]eeds of [t]rust *as a matter of law*."

D. "Right to Foreclose Under the Instrument"

As discussed above, one of the elements that the clerk of court or trial court must find to authorize a power-of-sale foreclosure is that the party seeking foreclosure had the "right to foreclose under the instrument." N.C. Gen. Stat. § 45-21.16(d). The trial court must "consider strictly whether 'the instrument' at issue conveys a right to foreclose." *Young*, 227 N.C. App. at 506, 744 S.E.2d at 480. The right to foreclose will not exist simply because the proper wording is used in the deed of trust; rather, "[i]n order for a trustee under a Deed of Trust to have any right to foreclose on a parcel of land, the Deed of Trust must encompass the subject property as security for the debt owed by the mortgagor." *In re Foreclosure of Michael Weinman Assoc.*, 333 N.C. 221, 228, 424 S.E.2d 385, 389 (1993). In that the clerk or trial court has no equitable jurisdiction in a power-of-sale foreclosure, "[t]he existence of any equitable defenses is inapposite to consideration" of the right to foreclosure. *Young*, 227 N.C. App. at 506, 744 S.E.2d at 480. Thus, only legal defenses may be considered.

Our courts have found that legal defenses to the right to foreclose under the instrument were properly raised where: (1) the property listed in the notice of hearing was not encumbered by the lien in the deed of trust, *Goforth*, 334 N.C. at 376-77, 432 S.E.2d at 859-60; (2) the property was released from the deed of trust and did not secure the note, or the borrower was entitled to a release under the deed of trust and the lender refused to deliver or record the release; the deed of trust did not contain

a valid power-of-sale provision; and the property subject to foreclosure was owned free and clear of the deed of trust being foreclosed upon, *Weinman*, 333 N.C. at 229-30, 424 S.E.2d at 389-90; (3) the property was not secured by the deed of trust because the lender attached a fraudulent legal description to the deed of trust after the borrower signed it, *In re Hudson*, 182 N.C. App. 499, 503, 642 S.E.2d 485, 488 (2007); and (4) the deed of trust was not properly executed by the parties, *Espinosa v. Martin*, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999), *disc. review denied*, 351 N.C. 353, 543 S.E.2d 126 (2000).[1]

As these cases illustrate, a party may assert an appropriate legal defense to the right to foreclose where (1) the loan documents provide the lender or holder of the note with the right to foreclose, and (2) a defect exists in the documents or the proceedings resulting therefrom. The existence of a deficiency judgment against the debtor is not a legal defense that may be raised prior to the issuance of the order of sale.

While the trial court must decline to address any argument beyond the existence of the six elements listed in N.C. Gen. Stat. § 45-21.16(d), this Court has repeatedly held that such arguments may be raised in a hearing to enjoin a foreclosure sale pursuant to N.C. Gen. Stat. § 45-21.34. *Young*, 227 N.C. App. at 505-06, 744 S.E.2d at 480. To enjoin a mortgage sale on equitable grounds,

> [a]ny owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient.

N.C. Gen. Stat. § 45-21.34.

In the instant case, the only element disputed by Obligors is CL45's right to foreclose under the instrument. Obligors do not contend that any of the loan documents prohibit CL45 from proceeding with foreclosure. The forbearance agreements explicitly provide for CL45's right

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1. For further explanation and more examples, *see* Meredith Smith, *Foreclosure by Power of Sale Equitable vs. Legal Defenses G.S. Chapter 45-21.16*, UNC School of Government, 6-7 (March 2015), [https://perma.cc/A6YS-3N3P].

to foreclose. Moreover, Obligors do not contest the existence of any of the other elements in N.C. Gen. Stat. § 45.21.16(d). However, although the trial court determined that "the filing of the Confession of Judgment does not preclude foreclosure," the trial court did not have the authority to make this conclusion. Accordingly, the trial court's order of sale permitting foreclosure of the properties at issue must be affirmed, sans the conclusion that the previously filed judgment does not preclude foreclosure.

In a subsequent hearing to enjoin the power-of-sale foreclosure pursuant to N.C. Gen. Stat. § 45-21.34, Obligors may assert that entering judgment against a debtor precludes a creditor from subsequently seeking to foreclose. If Obligors are unsuccessful in enjoining the foreclosure on equitable grounds pursuant to N.C. Gen. Stat. § 45-21.34, they may appeal that order to this Court and make their arguments again. *See Goad v. Chase Home Fin. LLC*, 208 N.C. App. 259, 704 S.E.2d 1 (2010) (reviewing the denial of an order to enjoin a foreclosure pursuant to N.C. Gen. Stat. § 45-21.34).

III. Conclusion

We affirm the trial court's orders of sale permitting foreclosure. Obligors' equitable argument exceeds the scope of a trial court's review in a power-of-sale foreclosure proceeding; however, Obligors may present their argument in a hearing to enjoin the mortgage sale pursuant to N.C. Gen. Stat. § 45-21.34 if circumstances warrant.

AFFIRMED.

Judges STROUD and INMAN concur.

RALEIGH RADIOLOGY LLC D/B/A RALEIGH RADIOLOGY CARY, PETITIONER
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED, RESPONDENT, AND DUKE UNIVERSITY HEALTH SYSTEM, RESPONDENT-INTERVENOR

No. COA18-785-2

Filed 6 August 2019

1. Hospitals and Other Medical Facilities—certificate of need—application—statutory criteria—compliance

An administrative law judge properly concluded that a certificate of need application for an MRI machine complied with the statutory criteria (N.C.G.S. § 131E-183(a)) regarding the population to be served (criteria 3), financial and operational projections (criteria 5), the cost, design, and means (criteria 12), and the contribution in meeting the needs of the elderly and underserved groups (criteria 13(c)). There was substantial evidence of the applicant's compliance with each of the review criteria.

2. Hospitals and Other Medical Facilities—certificate of need—appeal—comparative analysis of applications—de novo review

An administrative law judge erred on appeal by conducting its own comparative analysis of two certificate of need (CON) applications for an MRI machine where the CON agency did not abuse its discretion in its own analysis. The administrative law judge erroneously exceeded its authority by conducting a de novo review and considering two additional factors not utilized by the agency.

3. Hospitals and Other Medical Facilities—certificate of need—spoliation of evidence—irrelevant documentation

An administrative law judge (ALJ) did not err by denying a certificate of need (CON) applicant's motion in limine to apply adverse inference based on another applicant's alleged spoliation of certain evidence where the other applicant's third-party consultant who drafted its CON application discarded all useless and irrelevant documentation, consistent with the practice of most consultants in the field. Further, the documents would not have been the subject of review because the ALJ's review was limited to the CON agency's findings and conclusions.

Appeal by Respondents and cross-appeal by Petitioner from an amended final decision entered 16 March 2018 by Judge J. Randolph

Ward in the Office of Administrative Hearings. Heard originally in the Court of Appeals 13 March 2019. This matter was reconsidered in the Court pursuant to an order allowing Petitioner's Petition for Rehearing. This opinion supersedes the opinion *Raleigh Radiology v. NC DHHS*, No. 18-785, ___ N.C. App. ___, 827 S.E.2d 337 (2019), previously filed on 7 May 2019.

Brooks, Pierce, McLendon Humphrey & Leonard, L.L.P., by James C. Adams, II, for Petitioner Raleigh Radiology LLC.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need.

Poyner Spruill LLP, by Kenneth L. Burgess, William R. Shenton, and Matthew A. Fisher, for Respondent-Intervenor Duke University Health System.

DILLON, Judge.

Petitioner Raleigh Radiology LLC ("Raleigh") and Respondents N.C. Department of Health and Human Services, Division of Health Care Regulation, Health Care Planning and Certificate of Need (the "Agency"), and Duke University Health System ("Duke") all appeal a final decision of the Office of Administrative Hearings ("OAH") regarding the award of a Certificate of Need ("CON") for an MRI machine in Wake County.

I. Background

In early 2016, the Agency determined a need for a fixed MRI machine in Wake County and began fielding competitive requests. In April 2016, Duke and Raleigh each filed an application for a CON with the Agency.

Section 131E-183 of our General Statutes sets forth the procedure the Agency should use when reviewing applications for a CON. N.C. Gen. Stat. § 131E-183 (2016). The Agency uses a two stage process: First, the Agency reviews each application independently to make sure that it complies with certain statutory criteria. *See Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 460 (1995) (citing N.C. Gen. Stat. § 131E-183(a)). Typically, if only one application is found to have complied with the statutory criteria, that applicant is awarded the CON. But if more than one application complies, the Agency moves to a second step, whereby the Agency conducts a comparative

analysis of the compliant applications. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 461.

In the present case, the Agency approved Duke for the CON, denying Raleigh's application, on two alternate grounds. First, the Agency determined that Duke's application alone was compliant. Alternatively, the Agency conducted a comparative analysis, assuming *both* applications were compliant, and determined that Duke's application was superior.

In October 2016, Raleigh filed a Petition for Contested Case Hearing. After a hearing on the matter, the administrative law judge (the "ALJ") issued a Final Decision, determining that both applications were compliant *but that*, based on its own comparative analysis, Raleigh's application was superior. Accordingly, the ALJ reversed the decision of the Agency and awarded the CON to Raleigh.

Duke and the Agency timely appealed. Raleigh also timely cross-appealed.

II. Standard of Review

We review a final decision from an ALJ for whether "substantial rights of the petitioners may have been prejudiced[.]" N.C. Gen. Stat. § 150B-51(b) (2018). We use a *de novo* standard if the petitioner appeals the final decision on grounds that it violates the constitution, exceeds statutory authority, was made upon unlawful procedure, or was affected by another error of law. N.C. Gen. Stat. § 150B-51(b)(1)-(4), (c) (2018). And we use the whole record test if the petitioner alleges that the final decision is unsupported by the evidence or is "[a]rbitrary, capricious, or an abuse of discretion." N.C. Gen. Stat. § 150B-51(b)(5)(6), (c) (2018).

III. Analysis

On appeal, Duke and the Agency argue that the ALJ erred in reversing the Agency's decision. Though successful in its appeal before the ALJ, Raleigh cross-appeals certain aspects of the ALJ's decision and with the process in general. We address the issues raised in the appeal and cross-appeal below.

A. ALJ's Finding that Duke's Application Conformed

[1] We first address Raleigh's cross-appeal challenge to the ALJ's finding that Duke's application complied with the Agency criteria. That is, though the ALJ awarded Raleigh the CON based on a determination that Raleigh's compliant application was superior to Duke's compliant application, Raleigh contends that the ALJ should have determined that Duke's application was not compliant to begin with. Specifically, Raleigh

contends that Duke did *not* conform with Criteria 3, 5, 12, and 13(c) found in Section 131E-183(a). For the following reasons, we disagree.

We review this argument under the whole record test, N.C. Gen. Stat. § 150B-51(b)(5)(6), (c), and properly "take[] into account the administrative agency's expertise" in evaluating applications for a CON. *Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461.

A review of the whole record reveals that the evidence presented by Duke in its CON application, the Agency hearings, and the Office of Administrative Hearings amounts to substantial evidence of Duke's compliance with the review criteria.

In conformity with Criteria 3, Duke "identif[ied] the population to be served by the proposed project, and . . . demonstrate[d] the need that this population has for the services proposed, and the extent to which all residents of the area . . . are likely to have access to the services proposed." N.C. Gen. Stat. § 131E-183(a)(3). More specifically, in its application, Duke illustrated the current levels of accessibility to MRI scanners in Wake County and identified the location of its proposed MRI, the Holly Springs/Southwest Wake County area, as one in need of increased access to scanners, particularly due to its rapidly growing population. Duke also laid out the current travel burdens faced by Wake County residents in the Duke Health System who require access to an MRI scanner and how the addition of a new MRI scanner in its proposed location could have a favorable impact on those geographic burdens. Duke coupled those factors with the historically consistent utilization rate for MRIs in Wake County to demonstrate the need in the area for the MRI scanner.

In conformity with Criteria 5, Duke provided financial and operational projections that demonstrated "the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal[.]" N.C. Gen. Stat. § 131E-183(a)(5). For example, Duke set forth the anticipated source of financing for the project, with all the funding projected to be drawn from its accumulated reserves. Duke also provided five-year projections for its financial position and income statements, as well as three-year projections for the revenues to be produced by the new MRI scanner. The Chief Financial Officer of Duke also certified the existence and availability of funding for the project and referenced Duke's most recent audited financial statement to demonstrate the availability of such funds.

Duke also conformed with Criteria 12 by delineating that the construction "cost, design, and means" were reasonable by comparing its proposed

project with potential alternatives. N.C. Gen. Stat. § 131E-183(a)(12). Essentially, Duke compared its proposal to potential alternatives, including maintaining the status quo, developing the proposed MRI scanner in a different location, developing a mobile MRI service in Holly Springs, and pursuing the current project.

Lastly, Duke conformed with Criteria 13(c) by "demonstrat[ing] the contribution of the proposed service in meeting the health-related needs of the elderly and of members of medically underserved groups . . . [and] show[ing] [t]hat the elderly and the medically underserved groups identified in this subdivision will be served by [its] proposed services and the extent to which each of these groups is expected to utilize the proposed services[.]" N.C. Gen. Stat. § 131E-183(a)(13)(c). Duke demonstrated that it expects almost one-third (1/3) of its patients to be Medicare or Medicaid recipients and that it has the support of community programs, which help in providing healthcare access to low-income, uninsured residents of Wake County. In addition, Duke provided statistics regarding its interactions with female and elderly patients, along with its policy of non-discrimination against handicapped persons. Using this data, Duke asserted that these kinds of patients will receive the same access to the new MRI scanner at the Holly Springs location.

In accordance with our previous holdings in CON cases, this Court "cannot substitute our own judgment for that of the Agency if substantial evidence exists." *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005). Indeed, Duke met this threshold by putting forth the aforementioned evidence; and the Agency is entitled to deference, as Duke put forth substantial evidence of its conformity with these criteria. Thus, we affirm the ALJ's finding of fact number 24 that Duke's application was compliant.

B. Comparative Analysis Review

[2] Duke and the Agency argue that the ALJ erred in conducting its own comparative analysis review of the two CON applications. That is, they argue that the ALJ should have given deference to the Agency's determination that Duke's application was superior. We review this question of law *de novo*. *Cumberland Cty. Hosp. Sys. v. N.C. Dep't of Health & Human Servs.*, 242 N.C. App. 524, 527, 776 S.E.2d 329, 332 (2015).

Our Court has held that where the Agency compares two or more applications which otherwise comply with the statutory criteria, "[t]here is no statute or rule which requires the Agency to utilize *certain* comparative factors." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health*

& Human Servs., 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006) (emphasis added). But, rather, the Agency has discretion to determine factors by which it will compare competing applications. *Id.*

However, the ALJ on appeal of an Agency decision does not have this same discretion to conduct a comparative analysis. That is, where an unsuccessful applicant appeals an Agency decision in a CON case, the ALJ does *not* engage in a *de novo* review of the Agency decision, but simply reviews for correctness of the Agency decision, pursuant to N.C. Gen. Stat. § 150B-23(a). *E. Carolina Internal Med., P.A. v. N.C. Dep't of Health & Human Servs.*, 211 N.C. App. 397, 405, 710 S.E.2d 245, 252 (2011). Indeed, "there is a presumption that 'an administrative agency has properly performed its official duties.' " *Id.* at 411, 710 S.E.2d at 255 (quoting *In re Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980)).

In the present case, the Agency reviewed Duke's application and Raleigh's application for the CON independently. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 460 (citing N.C. Gen. Stat. § 131E-183(a)). This review revealed that Duke's application conformed with all criteria and that Raleigh failed to conform with respect to certain criteria. At that point, assuming that Raleigh's application indeed failed to conform to certain criteria, it would have been appropriate for the Agency to proceed with issuing the CON to Duke. Nevertheless, the Agency, as stated in its seventy-four (74) pages of findings, additionally "conducted a comparative analysis of [Duke's and Raleigh's applications] to decide which [one] should be approved," assuming that Raleigh's application did satisfy all of the criteria. *See id.* at 385, 455 S.E.2d at 461.

The Agency, in its discretion, used seven comparative factors in reviewing the CON applications: (1) geographic distribution, (2) demonstration of need, (3) access by underserved groups, (4) ownership of fixed MRI scanners in Wake County, (5) projected average gross revenue per procedure, (6) projected average net revenue per procedure, and (7) projected average operating expense per procedure. This comparative analysis led the Agency to approve and award the CON to Duke.

However, on appeal to the OAH, the ALJ deviated from the above factors by considering two additional factors: (1) the types of scanners proposed by each applicant, and (2) the timeline of each proposed project. Admittedly, there was evidence that Raleigh's proposed MRI machine was superior to the machine which Duke would use. It is this deviation and the reliance on additional comparative factors by the ALJ which we must conclude was error.

Indeed, adding two additional comparative factors is not affording deference to the Agency, but rather constitutes an impermissible *de novo* review of this part of the Agency's decision. Such a substitute of judgment by the ALJ is not allowed. *E. Carolina Internal Med.*, 211 N.C. App. at 405, 710 S.E.2d at 252.

Evidence was provided that the factors utilized by the Agency have been used in two previous MRI CON decisions and that the additional factors used by the ALJ have not been a part of the Agency's policies and procedures for many years. We note that information pertaining to Raleigh's allegedly superior MRI machine was not included in Raleigh's application, though it was otherwise presented at the Agency public hearing, but without an expert testifying as to the machine's medical efficacy. Even so, the Agency has the discretion to pick which factors it evaluates in conducting its own comparative analysis. *Craven Reg'l Med. Auth.*, 176 N.C. App. at 58, 625 S.E.2d at 845. Further, regarding the timeline factor used by the ALJ, there was testimony that the Agency puts little, if any, weight to this factor as the factor disadvantages new providers. The ALJ did not determine that the Agency acted arbitrarily and capriciously, but rather simply substituted his own judgment in weighing the factors. We cannot say, though, that the Agency abused its discretion to rely on the factors that it did. Therefore, we conclude that the ALJ exceeded its authority conducting a *de novo* comparative analysis of the competing applications.

Separately, Raleigh argues that the Agency erred by concluding that its application was not conforming. But even assuming that the Agency incorrectly made a determination that Raleigh's application did not conform to certain statutory criteria, such error was harmless: the Agency proceeded with a comparative analysis of both applications as if Raleigh's application did comply and, in its discretion, determined that Duke's application was superior.

Therefore, we reverse the Final Decision and reinstate the decision of the Agency.[1]

C. Motion in Limine – Spoliation of Evidence

[3] In its cross-appeal, Raleigh argues that the ALJ erred in denying its motion in limine to apply adverse inference based on Duke's alleged spoliation of certain evidence. We disagree.

1. We note that additional arguments were made on appeal. For instance, Duke and the Agency contend that Raleigh did not establish substantial prejudice and that the Final Decision was incomplete and untimely by thirty-seven (37) minutes. However, in light of the ALJ's comparative analysis error and our subsequent reversal of the Final Decision, we need not address these arguments.

"[W]hen the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case." *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 187-88, 527 S.E.2d 712, 718, *disc. rev. denied*, 352 N.C. 357, 544 S.E.2d 563 (2000). This inference is a permissible adverse inference. *Id.* "To qualify for [an] adverse inference, the party requesting it must ordinarily show that the spoliator was on notice of the claim or potential claim at the time of the destruction." *McLain*, 137 N.C. App. at 187, 527 S.E.2d at 718 (internal citations omitted). However, "[i]f there is a fair, frank and satisfactory explanation" for the absence of the documents, an adverse inference will not be applied. *Yarborough v. Hughes*, 139 N.C. 199, 211, 51 S.E. 904, 908 (1905).

In the present case, Duke contracted with a third-party consultant, ("Keystone"), to perform and draft its CON application. Keystone's practice is to discard all useless documentation and application references so as to keep only relevant, accurate applications and data. This practice is consistent with most consultants in this field, it is not disputed, and amounts to "a fair, frank and satisfactory explanation[.]" *Id.*

Moreover, as Duke and the Agency correctly point out, these documents would not be the subject of review or an appeal. Rather, the ALJ's review of the Agency's decision is limited to its seventy-four pages of findings and conclusions. We conclude that the ALJ did not err in not applying an adverse inference based on the absence of certain documents.

IV. Conclusion

The ALJ erred in not deferring to the comparative analysis performed by the Agency and conducting its own comparative analysis. However, the ALJ did not err in finding and concluding that Duke conformed with the applicable review criteria nor in not applying an adverse inference against Duke regarding certain information. Thus, we reverse the Final Decision and reinstate and affirm the decision of the Agency awarding the CON to Duke.[2]

REVERSED.

Judges BRYANT and ARROWOOD concur.

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2. We acknowledge Raleigh's motion for leave to file a supplemental brief regarding the ALJ's authority to remand a contested case to the Agency. We deny this motion as our resolution has rendered such an issue moot.

STATE OF NORTH CAROLINA
v.
ELMER ROMERO ORTIZ, Defendant, and ANTHONY BROADWAY, Bail Agent, and 1ST ATLANTIC SURETY COMPANY, Surety

No. COA18-1311

Filed 6 August 2019

1. Appeal and Error—notice of appeal—timeliness—final judgment

A board of education timely filed its notice of appeal from the trial court's order providing relief from a forfeited bail bond where the trial court's oral ruling—at which time the clerk stamped "forfeiture stricken" on the forfeiture notice, the trial court signed and dated the stamp, and the clerk wrote "entered" and the date next to the stamp—was not a final order. The stamped notice was not served on the parties (as required by Civil Procedure Rule 58), and the trial court's and parties' actions indicated that nobody thought the oral ruling was a final order. The board of education timely filed a notice of appeal from the final judgment, which was entered approximately two months later.

2. Bail and Pretrial Release—bond forfeiture—relief—pre-final judgment—deportation

The trial court erred by granting relief from a forfeited bail bond based on N.C.G.S. § 15A-301 where the defendant had been deported, because N.C.G.S. § 15A-544.5 is the exclusive avenue for relief from a pre-final judgment forfeiture.

Appeal by the State from Order entered 18 September 2018 by Judge Larry D. Brown, Jr. in Alamance County District Court. Heard in the Court of Appeals 21 May 2019.

Todd Allen Smith and Champion & Giles, P.A., by Robert Clyde Giles, II, for Alamance Burlington Board of Education, Appellant.

No brief for Elmer Romero Ortiz, Defendant.

David K. Holley for Anthony Broadway, Bail Agent, Appellee.

Brian Elston Law, by Brian D. Elston, for 1st Atlantic Surety Company, Surety, Appellee.

INMAN, Judge.

The Alamance Burlington Board of Education ("the Board") appeals from the trial court's order providing relief from a forfeited bond before a final judgment. The Board argues that the trial court erred in granting relief based on N.C. Gen. Stat. § 15A-301 because a different statute, N.C. Gen. Stat. § 15A-544.5, is the exclusive means for relief. After thorough review of the record and applicable law, we vacate the trial court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record tends to show the following[1]:

On 29 June 2017, Defendant Elmer Romero Ortiz ("Defendant") was arrested in Alamance County on felony charges of committing a statutory sex offense on a child younger than fifteen years of age and taking indecent liberties with a minor. Defendant was released on a $50,000 bond on 30 June 2017 to secure his appearance at further proceedings. The bond was underwritten by Anthony Broadway as bail agent for 1st Atlantic Surety Company (collectively, "Sureties").

Defendant failed to appear for his 14 February 2018 court date. The court forfeited Defendant's bond and issued an order for his arrest. The forfeiture order was entered on 19 February 2018, the parties were notified of the forfeiture on 22 February 2018, and the final judgment of forfeiture was scheduled to be entered on 22 July 2018.

On 26 April 2018, Sureties filed a motion to recall the order for arrest and strike the forfeited bond, pursuant to N.C. Gen. Stat. §§ 15A-301 and 15A-544.5. Sureties alleged that Defendant was deported at the time of his missed 14 February 2018 court appearance.

During the initial hearing on the motion on 3 May 2019, the Board argued that because the forfeiture had not yet become a final judgment, Section 15A-544.5 was the sole avenue of relief and that Sureties could not establish any of that statute's enumerated factors to set aside the bond forfeiture. Sureties conceded that none of the factors existed, but argued that Section 15A-301 provided alternative authority for the trial court to strike the forfeiture. The trial court took the matter under advisement and continued the hearing.

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1. Because there is no transcript of the trial court proceedings, the parties prepared a narrative summarizing what transpired at the hearings, pursuant to Rule 9(c)(1) of our Rules of Appellate Procedure.

At the second hearing on 9 May 2018, at the request of the trial court, Defendant's counsel and an assistant district attorney for Alamance County were present, along with Sureties and the Board. Defense counsel informed the trial court that Defendant was in federal immigration custody on 14 February 2018 and that his current whereabouts were unknown.[2] The assistant district attorney asserted her belief that since being deported, Defendant "had already returned to the United States without proper permission and had been apprehended by law enforcement officials in Texas." The trial court again took the matter under advisement.

During the third hearing on 20 July 2018—two days before the original final judgment date—the trial court told the parties that it would not strike Defendant's arrest order but would grant Sureties relief from the forfeited bond. The trial court entered a written order on 18 September 2018 citing Section 15A-301 for its authority to grant relief and found "that extraordinary circumstances exist[ed] for good cause" to strike the bond forfeiture.

The Board appealed on 20 September 2018.

II. ANALYSIS

A. Notice of Appeal

[1] Sureties argue that the Board's appeal should be dismissed because it untimely filed notice of appeal more than two months following entry of final judgment on 20 July 2018. We disagree.

Rule 3 of our Rules of Appellate Procedure generally provides that in civil actions a party has 30 days to file and serve notice of appeal from the date of the trial court's final judgment or from the date of service if not served within three days upon judgment. N.C. R. App. P. 3(c) (2019); *Brown v. Swarn*, __ N.C. App. __, __, 810 S.E.2d 237, 238 (2018). In describing what makes a judgment final, Rule 58 of our Rules of Civil Procedure states:

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2. Throughout the proceedings, Defendant's location was never verified, nor did the trial court ever determine whether he was permanently deported or detained somewhere in the United States. Prior to his February 2018 court date, in a letter dated 20 November 2017, the United States immigration authorities notified the Alamance County Clerk of Court that it "[would] be enforcing an order of removal from the United States against" Defendant. The assistant district attorney also filed a dismissal with leave on 14 February 2018 reasoning that Defendant was deported. And in the trial court's order granting relief from the forfeited bond, it found that Defendant was in federal custody prior to his court date.

> [A] judgment is entered when it is *reduced to writing, signed by the judge, and filed with the clerk of court* pursuant to Rule 5. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered.

N.C. Gen. Stat. § 1A-1, Rule 58 (2017) (emphasis added). Thus, "the rendering of an oral ruling does not constitute the entry of a final judgment or order." *Kingston v. Lyon Constr., Inc.*, 207 N.C. App. 703, 709 n.3, 701 S.E.2d 348, 353 n.3 (2010) (citing *Kirby Bldg. Sys., Inc. v. McNiel*, 327 N.C. 234, 393 S.E.2d 827 (1990)); *see also Carter v. Hill*, 186 N.C. App. 464, 465-66, 650 S.E.2d 843, 844 (2007) (holding that no judgment was entered to support the civil contempt order because it was made orally by the trial court and not reduced to writing, pursuant to Rule 58).

After the trial court's oral ruling at the 20 July 2018 hearing, the clerk stamped "forfeiture stricken" on the bond forfeiture notice, and the trial court signed and dated that stamp. The clerk also wrote "entered" and the date next to the stamp. No copy of the signed and stamped forfeiture notice was served on either of the parties. Sureties assert that (1) the stamped forfeiture notice constituted a valid written final judgment and (2) because final judgment was rendered, the Board had actual notice of the entry of judgment and its content, notwithstanding the lack of service.[3]

It is clear from the 18 September 2018 order that the trial court did not construe the signed and stamped forfeiture notice to be a final judgment. Not only was the stamped notice not served on the parties, as required by Rule 58 of the Rules of Civil Procedure, the parties' and trial court's actions contravene Sureties' argument. At the conclusion of the 20 July 2018 hearing, the trial court told Sureties, consistent with Rule 58, *to draft a proposed final order*, deliver it to the Board for review, and then submit it to the trial court. After Sureties submitted a proposed order, the trial court notified the parties that it would write its own final order. These communications are inconsistent with the stamped and signed forfeiture notice serving as a final judgment. *See Russ v. Woodard*, 232 N.C. 36, 41, 59 S.E.2d 351, 355 (1950) (holding that a final judgment

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3. Sureties made the same argument in the district court arguing that the Board had actual notice of the court's decision on 20 July 2018. The trial court, in an order entered on 21 December 2018, denied Sureties' motion. Sureties do not contest any of the findings in that order.

is made "without any reservation for other and *future directions* of the court, so that it is not necessary to bring the case again before the court" (quotations and citations omitted) (emphasis added)).

Further, the Board's conduct reflects that it did not have notice that final judgment had been rendered before the trial court's written order in September 2018. *See Durling v. King*, 146 N.C. App. 483, 494, 554 S.E.2d 1, 7 (2001) (citations omitted) ("[T]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered."). After the trial court indicated that it would write the final order, the Board continually inquired up until 18 September 2018 as to when the order would be finalized because it "wished to enter a timely notice of appeal."

We therefore conclude that the trial court's judgment granting relief from the forfeited bond was not entered on 20 July 2018, but rather on 18 September 2018. Because the Board timely filed notice of appeal two days later, we need not address Sureties' secondary argument concerning the Board's actual notice, and proceed in reviewing the merits of the issue on appeal.

B. Authority to Grant Relief Pre-Final Judgment

[2] The Board argues that Section 15A-544.5 is the sole provision in Chapter 15A for a court to provide relief before the date of a forfeited bond's final judgment and that the trial court erred in granting relief from the bond forfeiture. In response, Sureties argue that Section 15A-301 granted the trial court authority to relieve them of their bond obligation. For the reasons set out below, we conclude that the trial court exceeded its statutory authority provided by Chapter 15A and vacate the trial court's order.

Section 15A-554.1 *et seq.* of our General Statutes govern bail bond forfeiture and establish the contours of the trial court's authority to relieve an obligor from its bond liability. When a bond has been issued to secure the pre-trial release of a criminal defendant who then proceeds to "fail[] on any occasion to appear before the court as required," the trial court is obligated to "enter a forfeiture for the amount of that bond . . . against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2017). A forfeiture order becomes a final judgment 150 days after notice is given to the interested parties. *Id.* § 15A-544.6. Once final, the judgment is docketed "as a civil judgment . . . against each surety named in the judgment." *Id.* § 15A-544.7(a).

In certain statutorily prescribed circumstances, the trial court can grant relief to a surety from the forfeited bond pre- and post-final judgment. For bonds that have not become final judgments, the trial court can only "set aside" a forfeiture if one of seven enumerated reasons have been established, such as due to the defendant's death or additional incarceration. *See id.* § 15A-544.5(b) ("Reasons for Set Aside."). For final judgments, the trial court can grant "relief" if (1) "[t]he person seeking relief was not given notice" or (2) "[o]ther extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief." *Id.* § 15A-544.8(b).

Here, the trial court concluded that, although Section 15A-544.5 did not apply,[4] as no factor existed to set aside the forfeited bond, Section 15A-301 provided a basis to grant relief. Section 15A-301 generally allows for the trial court to recall "[a]ny criminal process other than a warrant or criminal summons . . . for good cause." *Id.* § 15A-301(g)(2). The trial court construed Section 15A-544.5 to apply only to "motions to set aside [sic] a forfeiture," and concluded that a "motion[] to strike a bond forfeiture (recall of process)" pursuant to Section 15A-301 is distinct and provided an alternative basis to grant Sureties relief. Because Sureties motioned to "strike"—instead of set aside—the forfeited bond, the trial court concluded Section 15A-301 applied in lieu of Section 15A-544.5.

The Board contends that a bond forfeiture is not a criminal process as written in Chapter 15A, Article 17 of our General Statutes, but rather a civil matter separate from any criminal statute's purview. Indeed, although bond proceedings are ancillary to an underlying criminal proceeding, they are civil in nature and are not controlled by the North Carolina Rules of Criminal Procedure, *State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 221, 606 S.E.2d 907, 909 (2005), and forfeited bonds are docketed as civil judgments once final. N.C. Gen. Stat. § 15A-544.7(a). Further, Article 17 of our General Statutes establishes four types of criminal processes: citations, criminal summons, warrants for arrests, and orders for arrests. N.C. Gen. Stat. §§ 301 *et seq.* (2017). Bond forfeiture proceedings—and bonds generally—are not listed as a criminal process or referenced in any of Article 17's provisions. It follows then that a trial court's authority to

4. Section 15A-544.8 was not implicated because the parties disputed the bond forfeiture before it was scheduled to become final on 22 July 2018. *See id.* § 15A-544.6 (stating that a forfeiture does not become final if (1) an order to set aside the forfeiture was entered on or before the final judgment date or (2) a motion to set aside the forfeiture is pending on the date of final judgment).

recall a criminal process under Section 15A-301 does not extend to bond forfeitures.[5]

Even assuming, without deciding, that a bond forfeiture proceeding is a criminal process, Section 15A-544.5 provides that "[t]here shall be no relief from a [pre-final] forfeiture except as provided in this section" and that "a forfeiture shall be set aside for any one of the [seven] reasons, *and none other*." *Id.* §§ 15A-544.5(a)-(b) (emphasis added). Section 15A-544.5 clearly and unambiguously instructs that it is "[t]he *exclusive avenue for relief* from forfeiture on an appearance bond (where the forfeiture has not yet become a final judgment)." *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012); *see also State v. Knight*, __ N.C. App. __, __, 805 S.E.2d 751, 755 (2017) ("[B]y its plain language, [Section] 15A-544.5 provides the 'exclusive' relief for setting aside a bond forfeiture that has not yet become a final judgment."); *State v. Robertson*, 166 N.C. App. 669, 670-71, 603 S.E.2d 400, 401 (2004) (same); *State v. Cobb*, __ N.C. App. __, __, 803 S.E.2d 176, 178 (2017) (same).

It is for this reason that the trial court could not rely on Section 15A-301 to relieve Sureties from the forfeited bond. Accordingly, because relief from a pre-final judgment forfeiture "is exclusive and limited to the reasons provided in [Section] 15A-544.5," *State v. Rodrigo*, 190 N.C. App. 661, 664, 660 S.E.2d 615, 617 (2008), the trial court's authority to grant relief is limited to one of the seven enumerated reasons set out in subdivision (b). And because Defendant's "deportation is not listed as one of the [seven] exclusive grounds" to set aside a bond forfeiture, *id.* at 665, 660 S.E.2d at 618, the trial court was without authority to grant Sureties relief from the forfeited bond. *See also State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005) (holding that the trial court "lacked

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5. The trial court's error in this regard is understandable. It is well established that the purpose of bail "is to secure the appearance of the principal in court as required." *State v. Hollars*, 176 N.C. App. 571, 574, 626 S.E.2d 850, 853 (2006) (quotations and citation omitted). But, "Criminal Process" is defined as "[a] process (such as an arrest warrant) that issues to compel a person to answer for a crime." Black's Law Dictionary (11th ed. 2019); *see also State v. Jones*, __ N.C. App. __, __ 805 S.E.2d 701, 710 (2017) (Zachary, J., dissenting) (citing Black's Law Dictionary's definition and Article 17's Official Commentary on what constitutes a criminal process). If bond procedures are meant to incentivize a defendant's appearance in court, it is arguable that bond proceedings can be categorized as a criminal process. We need not answer this question because, as is discussed below, Section 15A-544.5 narrows the trial court's authority with respect to bonds before they become final judgments. *See Whittington v. N.C. Dep't of Human Res.*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990) ("[W]hen one statute speaks directly and in detail to a particular situation, that direct, detailed statute will be construed as controlling other general statutes regarding that particular situation, absent clear legislative intent to the contrary.").

the authority to grant surety's motion" because it "was not premised on any ground set forth" in Section 15A-544.5).

Sureties first argue that the trial court did not err in granting them relief because N.C. Gen. Stat. § 15A-544.5(b)(1) allows the trial court to set aside the forfeiture when the "failure to appear has been set aside . . . and any order for arrest issued for that failure to appear has been recalled." Sureties assert that, in conjunction with the relief from the forfeiture, the trial court also struck Defendant's failure to appear and recalled the order for arrest because it "did not grant in part or deny in part [Sureties'] motion."

We are unpersuaded. First, the written narrative crafted by the Board—which was not objected to by Sureties—states that the trial court refused to strike the order for arrest. Second, the order itself is silent as to a decision on the failure to appear or the order for arrest, merely stating that "[t]he issue before this Court is to determine whether the Surety and Bail Agent should receive relief from the Bond Forfeiture in this case." Lastly, the trial court's order expressly concludes that "[no] factors exist as enumerated under [Section] 15A-544.5 to strike the forfeiture in this case" and that it was relying on Section 15A-301 in granting relief.[6] Sureties' understanding of the court's order is thus misplaced.[7]

Sureties next argue that the trial court did not err because the Board failed to file a written objection to the motion to set aside the bond forfeiture as required by statute. Upon a motion to set aside a forfeiture, "[e]ither the district attorney or the county board of education may object to the motion by filing a written objection." N.C. Gen. Stat. § 15A-544.5(d)(3) (2017). If, after 20 days upon service of the motion, "neither the district attorney nor the attorney for the board of education has filed a written objection to the motion . . . the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either." *Id.* § 15A-544.5(d)(4). Despite there being multiple hearings on the matter, there is no evidence in the record showing that the Board filed a written objection within 20 days of Sureties' motion. However, Sureties did not raise this issue before the trial court and instead fully participated over the course of three hearings. *See Richland Run Homeowners*

6. Because the trial court admitted that Section 15A-544.5 was inapplicable, we reject Sureties' other arguments pertaining to the trial court's authority under that statute.

7. We also reject Sureties' additional argument that the Board lacks standing to appeal the order because it is premised on the trial court granting relief through N.C. Gen. Stat. § 15A-544.5(c).

Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 347, 473 S.E.2d 649, 651 (1996) ("[B]y attending and participating in the hearing without objection or without requesting a continuance, plaintiff waived any right to object to the summary judgment hearing on the ground of lack of notice."), *rev'd on other grounds*, 346 N.C. 170, 484 S.E.2d 527 (1997). Because Sureties did not preserve this issue for appeal by arguing that Section 15A-544.5(d)(4) applied, it cannot serve as an alternative basis to affirm the trial court's order.

III. CONCLUSION

In sum, we hold that the Board timely filed its notice of appeal on 20 September 2018 upon the trial court's final 18 September 2018 order. We also hold that the trial court erred in granting Sureties relief from the forfeited bond. Section 15A-544.5 is the exclusive section for relieving a party from a forfeited bond pre-final judgment and the trial court in this instance was without statutory power under Section 15A-301 to supplement that authority. In determining that no basis existed within Section 15A-544.5 to set aside the forfeited bond, the trial court's order is vacated.

VACATED.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE v. EDGERTON

[266 N.C. App. 521 (2019)]

STATE OF NORTH CAROLINA
v.
LAMONT EDGERTON, DEFENDANT

No. COA18-1091

Filed 6 August 2019

1. Indictment and Information—indictment—habitual larceny—essential elements—representation in prior larcenies not essential element

Defendant's indictment for habitual larceny was not facially invalid for failing to allege that defendant was represented by counsel or waived counsel in the predicate prior larcenies, because representation by counsel was not an essential element of habitual larceny. Language in N.C.G.S. § 14-72(b)(6) that prior larceny convictions could not be counted unless defendant was represented by or waived counsel established an exception for which a defendant bears the burden of production.

2. Stipulations—habitual larceny—stipulation to prior convictions—authority of counsel

In a prosecution for habitual larceny, the record contained no evidence that defense counsel lacked authority to stipulate to defendant's prior larceny convictions, since attorneys are presumed to have authority to act on behalf of their clients, and because defendant's statement in court did not amount to a denial of the existence of his prior convictions but an objection to their use where they predated the enactment of the habitual larceny statute.

3. Indictment and Information—special indictment—section 15A-928(c)—habitual larceny—prior convictions an element of offense—failure to arraign—prejudice

In a prosecution for habitual larceny, which includes as an essential element that a defendant has four prior convictions for larceny, the trial court's failure to arraign defendant on a special indictment as required by N.C.G.S. § 15A-928(c) was not prejudicial where defendant was given adequate notice that his prior convictions would be used against him as well as an opportunity to admit or deny those convictions.

4. Larceny—habitual—sufficiency of evidence—essential elements—stipulation to prior convictions

Sufficient evidence was presented to uphold a conviction of habitual larceny where defendant stipulated to prior larceny convictions through counsel and his argument on appeal that representation in those prior convictions was an essential element was rejected.

5. Evidence—best evidence rule—habitual felon status—proof of prior convictions—ACIS printout

In a prosecution for habitual felon status, introduction of a printout from the Automated Criminal/Infraction System (ACIS) to prove prior convictions did not violate the best evidence rule because the printout was a certified copy of the original record, and an assistant clerk of court testified to its accuracy at trial.

Appeal by Defendant from judgment dated 26 April 2018 by Judge Mark E. Powell in Rutherford County Superior Court. Heard in the Court of Appeals 25 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Erika N. Jones, for the State.

W. Michael Spivey for Defendant-Appellant.

INMAN, Judge.

Felony habitual larceny, which elevates the crime of misdemeanor larceny if the defendant has been convicted of four or more prior larcenies, does not include as an essential element the requirement that the defendant was represented by counsel or waived counsel in obtaining those prior larceny convictions.

Lamont Edgerton ("Defendant") appeals following a jury verdict finding him guilty of habitual larceny and attaining the status of an habitual felon. Defendant argues that (1) the indictment was facially invalid and insufficient to charge him with habitual larceny; (2) he was not properly arraigned for the charge of habitual larceny; (3) his attorney was not authorized to stipulate to his prior larceny convictions; (4) the State did not provide sufficient evidence to prove the charge of habitual larceny; and (5) the use of an Automated Criminal/Infraction System printout to prove a prior felony conviction violated the best evidence rule. After

careful review of the record and applicable law, we hold that Defendant has failed to demonstrate error.

I. Factual and Procedural History

The record and evidence introduced at trial reveal the following:

On 14 September 2016, employees at Ingles Markets, Incorporated ("Ingles") witnessed Defendant "sticking . . . meats inside of a bag he brought in the store for himself." Defendant then left the store without paying for the items. One employee followed Defendant outside and planned to identify the license plate of Defendant's vehicle, but Defendant made eye contact with him and the employee returned inside the store.

Defendant reentered the store and confronted the employees at the Ingles deli counter. Defendant became "pretty rowdy," asked the employees if there was a problem, and said if there was he would "be back and take care of that problem." Both employees felt threatened by Defendant's behavior and told Defendant to take the meat. Once Defendant had left the store, they notified their management and called the police.

Sergeant Andy Greenway ("Sgt. Greenway") of the Lake Lure Police Department was dispatched to Ingles to investigate the call. He viewed surveillance footage of the incident and recognized Defendant. Sgt. Greenway and another officer found Defendant in front of his house with his father and sister and noticed two empty Ingles bags in the driveway. He then arrested Defendant, who asked, "Can I not just have my dad go back and pay for the pork chops?" Sgt. Greenway told Defendant that it was too late for that. Defendant told Sgt. Greenway that he took the pork chops because he had no money and wanted something nice to eat on his birthday.

Defendant was indicted for habitual larceny and as an habitual felon. The habitual larceny charge came on for jury trial during the 23 April 2018 session of Rutherford County Superior Court. At the close of the State's evidence, after conferring with Defendant, Defendant's counsel informed the court "for the record, we would stipulate to the sufficient prior larcenies to arrive at the level of habitual larceny." On 25 April 2018 the jury returned a verdict finding Defendant guilty of larceny.

After the jury returned its verdict, Defendant became agitated, made comments to the jury, and was removed from the courtroom when he got "more and more out of control." The court found that Defendant

"was a physical threat to everyone in the courtroom" and ruled that he had waived his right to be present.

The habitual felon phase of the trial proceeded in Defendant's absence.[1] Defendant's counsel declined to stipulate to Defendant's felony record. Karla Tower, an assistant clerk of the Rutherford County Superior Court, testified about Defendant's prior felony convictions and the jury found Defendant guilty of being an habitual felon.

The next day, the court reconvened for sentencing with Defendant present. The court found Defendant to have a level VI prior felony record level, and sentenced Defendant to 103 to 136 months' imprisonment. Defendant appeals.

II. Analysis

A. Indictment

[1] Defendant argues the indictment charging him with habitual larceny was facially invalid because it did not allege all the essential elements of the offense. We disagree.

Our General Statues provide that larceny of property valued $1,000 or less is a misdemeanor, and larceny of property valued more than $1,000 is a felony. N.C. Gen. Stat. § 14-72(a) (2017). But our statutes also provide that a charge of larceny ordinarily classified as a misdemeanor can be elevated to a felony charge when the defendant has committed four or more prior larcenies. The larceny must have been:

> [c]ommitted after the defendant has been convicted in this State or in another jurisdiction for any offense of larceny under this section, or any offense deemed or punishable as larceny under this section, or of any substantially similar offense in any other jurisdiction, regardless of whether the prior convictions were misdemeanors, felonies, or a combination thereof, at least four times. *A conviction shall not be included in the four prior convictions required under this subdivision unless the defendant was represented by counsel or waived counsel at first appearance or otherwise prior to trial or plea.*

N.C. Gen. Stat. § 14-72(b)(6) (2017) (emphasis added). Defendant argues that the felony indictment in this case is invalid because it did

1. Defendant does not argue on appeal that the trial court erred in proceeding in his absence.

not specifically allege that he was represented by counsel or had waived counsel in the proceedings underlying each of his prior larceny convictions. For the reasons explained below, we hold that the counsel requirement is not an essential element of the crime of habitual larceny and that the indictment was therefore valid.

A constitutionally sufficient indictment "must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Brice*, 370 NC 244, 249, 806 S.E.2d 32, 36 (2017) (citations omitted). An indictment that fails to allege an essential element of the offense is facially invalid, thereby depriving the trial court of jurisdiction. *Id*. We review a challenge to the facial validity of an indictment *de novo*, *State v. Williams*, 368 N.C. 620, 622, 781 S.E.2d 268, 270 (2016), considering the matter anew and freely substituting our own judgment for that of the trial court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

The indictment in this case alleges that Defendant did "steal, take, and carry away 2 packs of pork products, the personal property of Ingles Markets, Inc." and, in a separate count, alleges that Defendant previously had been convicted of four larceny offenses. The indictment lists the date of conviction, court, and file number for each larceny offense. The indictment does not allege that Defendant obtained those convictions while he was represented by counsel or had waived counsel.

We consider whether Section 14-72(b)(6)'s counsel requirement is an essential element of the offense, and is therefore required to be alleged in an indictment for habitual larceny, or whether the requirement provides for an exception to criminal liability that is not an essential element of the offense. Each provision in a statute defining criminal behavior is not necessarily an essential element. Such provisions may instead constitute, for example, affirmative defenses or evidentiary issues to be proven at trial. *See*, *e.g.*, *State v. Sturdivant*, 304 N.C. 293, 309-10, 283 S.E.2d 719, 730-31 (1981) (holding that consent is an absolute defense to kidnapping, rather than an essential element); *State v. Leaks*, 240 N.C. App. 573, 578, 771 S.E.2d 795, 799 (2015) (holding the manner used by a sex offender to notify the sheriff of a change in address is an evidentiary issue to be proven at trial, rather than an essential element of the crime). In some instances, we have held that exceptions to criminal statutes are "hybrid" factors, which the State is not required to allege in an indictment and for which it bears no initial burden of proof but must rebut evidence that a defendant's conduct falls within the exception. *See State v. Trimble*, 44 N.C. App. 659, 666, 262 S.E.2d 299, 303-04 (1980).

Allegations beyond the essential elements of a crime need not be included in an indictment. *State v. Rankin*, ___ NC ___, ___, 821 S.E.2d 787, 792 (2018).

The language of Section 14-72(b)(6) provides for an exception to the crime of habitual larceny, removing from consideration prior convictions obtained when a defendant was not represented by counsel and had not waived counsel. "Whether an exception to a statutorily defined crime is an essential element of that crime or an affirmative defense to it depends on whether the statement of the offense is complete and definite without inclusion of the language at issue." *Id.* When the statute's statement of the offense is complete and a subsequent clause provides an exception to criminal liability, the exception need not be negated by the language of the indictment. *State v. Mather*, 221 N.C. App. 593, 598, 728 S.E.2d 430, 434 (2012) (citing *State v. Connor*, 142 N.C. 700, 701, 55 S.E. 787, 788 (1906)). There are no "magic words" that indicate an exception to a statutory offense is a defense: "[t]he determinative factor is the nature of the language in question." *State v. Brown*, 56 N.C. App. 228, 230, 287 S.E.2d 421, 423 (1982). The question is whether the language is part of the definition of the crime or if it withdraws a class from an already complete definition of the crime. *Id.*

This Court has employed this analysis with respect to several criminal statutes, but we have not always focused on the same factors in making this determination. Prior decisions have identified as relevant the manner in which the statute and exception are drafted, *Brown*, 56 N.C. App. at 228, 287 S.E.2d at 421, prior decisions that enumerate the elements of the crime, *Brice*, 370 N.C. at 244, 806 S.E.2d at 32, and the essential fairness of assigning an exception as a defense or as an element, *Trimble*, 44 N.C. App. at 659, 262 S.E.2d at 299.

In *Brown*, we examined Section 14-74 of our General Statutes, which defines the crime of larceny by an employee. 56 N.C. App. at 230, 287 S.E.2d at 423. This statute criminalizes the act of an employee who takes certain possessions of his employer with the intent to steal or defraud "[p]rovided, that nothing in this section shall extend to apprentices or servants within the age of 16 years." N.C. Gen. Stat. § 14-74 (2017). We held that the exception withdrew a class of defendants—those under sixteen years of age—from the crime of larceny by an employee, and that the language of the statute preceding the clause completely defined the offense. *Brown*, 56 N.C. App. at 230-31, 287 S.E.2d at 423. Therefore, an indictment for the crime was not required to allege the defendant's age. *Id.* This Court further reasoned that a defendant's age "is a fact particularly within [the] defendant's knowledge," such that placing the

burden on the defendant to raise that exception is not an unfair allocation of proof. *Id.*

Similarly, Section 14-72(b)(6) provides a complete statement of the crime of habitual larceny without incorporating the exception at issue. We reach this conclusion by determining the type of criminal conduct the legislature intended to prohibit. *See Rankin*, ___ N.C. at ___, 821 S.E.2d at 792. In so defining a crime, we look to decisions by our Supreme Court enumerating its elements. *See*, *e.g.*, *Leaks*, 240 N.C. App. at 577, 771 S.E.2d at 799.

In *Leaks*, we addressed whether an indictment charging a sex offender with failure to notify the sheriff of a change of address must allege failure to provide notice in writing. *Id.* at 577-78, 771 S.E.2d at 798-99. We held that the writing requirement is an evidentiary issue, rather than an essential element, based on a Supreme Court decision enumerating the elements of that crime as part of its review of the sufficiency of the evidence presented against a defendant. *Id.* (citing *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449, (2009)).

With respect to Section 14-72(b)(6), we take guidance from our Supreme Court's recent decision in *Brice*, which enumerated the elements of habitual larceny:

> [A] criminal defendant is guilty of the felony of habitual misdemeanor larceny in the event that he or she "took the property of another" and "carried it away" "without the owner's consent" and "with the intent to deprive the owner of his property permanently" after having been previously convicted of an eligible count of larceny on four prior occasions.

370 N.C. at 248-49, 806 S.E.2d at 35-36 (internal citations omitted).[2] Our Supreme Court omitted the counsel requirement in its list of the essential elements of the offense. *Id.* We view this as an accurate description of the behavior our legislature intended to criminalize: larceny by a defendant who has been previously convicted of larceny at least four times. The counsel exception is therefore not an essential element of habitual larceny.

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2. An "eligible count" refers to convictions of larceny as defined in the statute: "any offense of larceny under this section, or any offense deemed or punishable as larceny under this section, or of any substantially similar offense in any other jurisdiction." N.C. Gen. Stat. § 14-72(b)(6).

We follow the guiding principal that the elements of an offense cannot be so defined as to place an unfair burden of proof upon the defendant. *See Brown*, 56 N.C. App. at 231, 287 S.E.2d at 423. It is "substantively reasonable to ask what would be a 'fair' allocation of the burden of proof, in light of due process and practical considerations, and then assign as 'elements' and 'defenses' accordingly." *Trimble*, 44 N.C. App. at 666, 262 S.E.2d at 303.

It is not unfair to require the defendant to bear the initial burden of producing evidence regarding representation by counsel with respect to one or more prior larceny convictions. Eligible prior larcenies for the purposes of Section 14-72(b)(6) include those committed at any time prior to the larceny being elevated to habitual status, in *any* jurisdiction. Even when a prior larceny was committed within the same jurisdiction as the habitual larceny case, as the assistant superior court clerk testified, court records are purged after a period of time. Defendants are likely the best source of information as to whether or not they were represented in proceedings resulting in a particular prior conviction.

Our Supreme Court's analysis of an analogous provision in our Fair Sentencing Act is instructive. In *State v. Thompson*, the Court examined the use of prior convictions as aggravating factors during sentencing. 309 N.C. 421, 307 S.E.2d 156 (1983). Although the burden of proving the prior convictions rests on the State, the Court held that "the initial burden of raising the issue of . . . lack of assistance of counsel on a prior conviction is on the defendant." *Id.* at 427, 307 S.E.2d at 161. The Court allocated to the defendant the burden to object to, or move to suppress, the admission of evidence of a prior conviction based on lack of representation because "cases in which a defendant was convicted while indigent and unrepresented should be the exception rather than the rule. A defendant generally will know, without research, whether this occurred." *Id.* at 426, 307 S.E.2d at 160 (quoting *State v. Green*, 62 N.C. App. 1, 6 n.1, 301 S.E.2d 920, 923 n.1 (1983)). As it is not unfair to require a defendant to raise the issue of lack of counsel when prior convictions are being used for sentencing purposes, it is likewise not unfair to place that initial burden on the defendant in the case of habitual larceny.

The legislature has also spoken on this question. Our Criminal Procedure Act provides that a defendant moving to suppress the use of a prior conviction "has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel." N.C. Gen. Stat. § 15A-980(c) (2017). This statute demonstrates a decision by our legislature that requiring a defendant to raise the representation issue is not an unfair allocation of the burden of proof.

Because Defendant's appeal challenges only the validity of the indictment, and Defendant presented no evidence regarding whether he was represented by or waived counsel in his prior larceny cases, our analysis concludes with determining that the counsel requirement is not an essential element of habitual larceny. We do not address whether the defendant bears any burden on this issue beyond that of production.[3]

Based on the structure of Section 14-72(b)(6), our Supreme Court's definition of its elements in *Brice*, and the availability to defendants of information regarding whether they had or waived counsel when they obtained prior convictions, we hold that representation by or waiver of counsel in connection with prior larceny convictions is not an essential element of felony habitual larceny as defined by N.C. Gen. Stat. § 14-72(b)(6). The indictment in this case was not required to allege facts regarding representation by or waiver of counsel and was sufficient to charge Defendant with the crime of felony larceny and grant the trial court subject matter jurisdiction.

B. Authority to Stipulate

[2] Defendant additionally argues that his attorney was without authority to stipulate to the prior convictions used to elevate his charge to habitual larceny. Defendant analogizes this stipulation to counsel's entry of a guilty plea or admission of a defendant's guilt to a jury, decisions which "must be made exclusively by the defendant." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985). "[A] decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences." *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 274 (1969)).

We have expressly rejected this analogy in prior decisions. In *State v. Jernigan*, the defendant, charged with habitual impaired driving,

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3. While some defenses place the burdens of both production and proof upon the defendant, some only require an initial showing that shifts the burden of proof to the State. In *Trimble*, for example, we examined Section 14-401 of our General Statutes, which criminalizes putting poisonous foodstuffs in certain public places and provides that it "shall not apply" to poisons used for protecting crops and for rat extermination. 44 N.C. App. at 664, 262 S.E.2d at 302. We held that the exception was neither an element of the crime nor an affirmative defense, but a hybrid factor for which "the State has no initial burden of producing evidence to show that defendant's actions do not fall within the exception; however, once the defendant, in a non-frivolous manner, puts forth evidence to show that his conduct is within the exception" the burden shifts to the State. *Id.* at 666, 262 S.E.2d at 303-04. Similarly, in *Thompson*, our Supreme Court held that a *prima facie* showing by a defendant that prior convictions being used as aggravating factors were obtained in violation of the right to counsel shifts the burden to the State to show that they were not. 309 N.C. at 428, 307 S.E.2d at 161.

argued that the same procedural protections that apply to guilty pleas applied when his counsel stipulated to his previous convictions. 118 N.C. App. 240, 243-45, 455 S.E.2d 163, 165-66 (1995). We held in that case that a defendant's attorney may stipulate to an element of a charged crime, including previous convictions, and there is no requirement that the record show the defendant personally stipulated to the element or knowingly and voluntarily consented to the stipulation. *Id.* (citing *State v. Morrison*, 85 N.C. App. 511, 514-15, 355 S.E.2d 182, 185 (1987)). An attorney is presumed to have the authority to act on behalf of his client during trial, including while stipulating to elements of a crime, and "the burden is upon the client to prove the lack of authority to the satisfaction of the court." *Id.* at 245, 455 S.E.2d at 167 (citing *State v. Watson*, 303 N.C. 533, 538, 279 S.E.2d 580, 583 (1981)).

Defendant cites our Supreme Court's decision in *State v. Mason* for the proposition that "an attorney has no right, in the absence of express authority, to waive or surrender by agreement or otherwise the substantial rights of his client." 268 N.C. 423, 426, 150 S.E.2d 753, 755 (1966) (citation omitted). However, that same decision makes clear that its holding is based on the fact that the waiver made by defendant's counsel was not a "stipulation of guilt to an essential element of the crime charged." *Id.* at 425, 150 S.E.2d at 755.

In this case, the record does not show that Defendant's attorney acted without authority. The trial transcript does not support Defendant's assertion on appeal that he "immediately, clearly, and vigorously rejected any stipulation." Once the State's evidence had concluded and the jury was allowed to leave, Defendant's attorney informed the trial court "for the record, we would stipulate to the sufficient prior larcenies to arrive at the level of habitual larceny." Defendant then interjected, "It ain't nothing but a misdemeanor larceny charge." He explained, "It's not no felony larceny. Habitual larceny came out December 1, 2012. I did my time on all them other charges."

Defendant's statements immediately following his counsel's stipulation do not reflect a denial of the existence of those convictions or of his attorney's authority to stipulate to them. Instead, they reflect his legal disagreement with the use of convictions obtained prior to the enactment of our habitual larceny statute as prior convictions for the statute's purposes. Defendant has not satisfied the burden of showing his trial counsel did not have authority to stipulate to his prior larceny convictions.

C. Habitual Larceny Arraignment

[3] Defendant also argues that the trial court's failure to arraign him as mandated by Section 15A-928(c) of our General Statutes constitutes prejudicial error. We disagree.

When a defendant's prior convictions are used to raise an offense from a lower grade to a higher grade, thereby becoming an element of the offense, the State must obtain a special indictment alleging the previous convictions. N.C. Gen. Stat. § 15A-928(b) (2017). After the trial commences, and before the close of the State's case, the trial judge must arraign the defendant upon the special indictment and advise him that he may admit the alleged convictions, deny them, or remain silent. N.C. Gen. Stat. § 15A-928(c) (2017).

Defendant did not object at trial to the court's failure to arraign him. Although this would generally preclude Defendant from raising this issue on appeal, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (citations and quotations omitted). A statutory mandate automatically preserves an issue for appellate review when it (1) requires a specific act by the trial judge or (2) requires specific proceedings the trial judge has authority to direct. *In re E.D.*, ___ N.C. ___, ___, 827 S.E.2d 450, 457 (2019) (citations omitted). Because the arraignment proceeding in question is mandated by Section 15A-928(c) of our General Statutes, the trial court's error is preserved for appeal if it prejudiced Defendant.

The State does not contest that the trial court failed to formally arraign Defendant upon the charge of habitual larceny. A trial court's failure to arraign defendant under Section 15A-928(c) is not *per se* reversible error but is analyzed for prejudice. "If there is no doubt that defendant was fully aware of the charges against him and was in no way prejudiced by the omission of the arraignment required by Section 15A-928(c), the trial court's failure to arraign defendant is not reversible error." *Jernigan*, 118 N.C. App. at 244, 455 S.E.2d at 166. The question before us, both in determining if this issue was preserved for appeal and if the error is reversible, is whether Defendant was prejudiced by the failure of the trial court to arraign him.

In *Jernigan*, the trial court failed to arraign a defendant who was charged with habitual impaired driving. 118 N.C. App. at 243, 455 S.E.2d at 165. Because the defendant's attorney informed the court that he had

discussed the case with the defendant and the defendant was willing to stipulate to the charges, and the defendant made no argument on appeal that he was not aware of the charges against him or did not understand his rights or the effect of the stipulation, we held that he was not prejudiced by the lack of arraignment. *Id.* at 245, 455 S.E.2d at 167.

In this case, as in *Jernigan*, Defendant stipulated through counsel to the prior convictions. Unlike in *Jernigan*, Defendant argues on appeal that he did not understand the charges of the special indictment and was confused about the impact of the stipulation. The record does not support this argument.

The two purposes of the statute, informing Defendant of the prior convictions that would be used against him and allowing him an opportunity to admit or deny those convictions, were fulfilled in this case. As in *Jernigan*, the prior convictions being used to elevate Defendant's charge were identified with specificity in a valid indictment, providing him with notice. 118 N.C. App. at 243, 455 S.E.2d at 166. When the trial court addressed the question of whether Defendant wished to stipulate to the prior convictions, Defendant was allowed the opportunity to admit or deny the convictions. Defendant's attorney requested a moment to speak with his client, they conferred and then, through counsel, Defendant stipulated to the prior larcenies. While Defendant protested at that time, as discussed *supra*, his disagreement concerned the eligibility of convictions he had obtained prior to the enactment of the habitual larceny statute. Defendant did not before the trial court and does not on appeal deny the convictions. Accordingly, we find that the purposes of Section 15A-928(c) were satisfied and Defendant was not prejudiced by the trial court's failure to arraign him on his prior convictions.

D. Sufficiency of Evidence

[4] Defendant additionally argues that the trial court erred in denying his motion to dismiss because the State failed to present sufficient evidence that Defendant was represented by or had waived counsel for his previous larceny convictions.

We review a trial court's denial of a motion to dismiss *de novo*, considering the matter anew and freely substituting our own judgment for that of the trial court. *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015). In reviewing a motion to dismiss based on insufficiency of the evidence, our inquiry 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." *Id.* at 470-71, 770 S.E.2d at 136.

In this case, the only essential element that Defendant contends the State failed to prove was that Defendant was represented by or had waived counsel in his prior larceny convictions. However, as discussed *supra*, because we hold that the counsel requirement is not an essential element under Section 14-72(b)(6), the State was not required to provide evidence of Defendant's representation. Furthermore, Defendant's counsel stipulated to Defendant's convictions for "sufficient prior larcenies to arrive at the level of habitual larceny." We therefore hold that the trial court did not err in denying Defendant's motion to dismiss.

E. Best Evidence Rule

[5] Finally, Defendant challenges the use of an Automated Criminal/Infraction System ("ACIS") printout to prove one of Defendant's prior convictions during the habitual felon phase of Defendant's trial. Defendant argues that the use of the printout violates the best evidence rule, which excludes secondary evidence used to prove the contents of a recording when the original recording is available. *See* N.C. Gen. Stat. § 8C-1, Rules 1002-1004 (2017).

When a defendant is charged with attaining the status of habitual felon, the trial proceeds in two phases. N.C. Gen. Stat. § 14-7.5 (2017). First the defendant is tried for the underlying felony and then, if the defendant is found guilty, the indictment charging the defendant as an habitual felon is revealed to the jury and the trial proceeds to the second phase. *Id*. The State must then prove that the defendant "has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States." N.C. Gen. Stat. § 14-7.1 (2017). The prior convictions "may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." N.C. Gen. Stat. § 14-7.4(a) (2017).

Defendant argues that Section 14-7.4 requires that a copy of judgment record be used to prove prior convictions, and that an ACIS printout is therefore secondary evidence that must comply with the foundational requirements of the best evidence rule—meaning the State must establish that a copy of the judgment record could not be "obtained by the exercise of reasonable diligence." N.C. Gen. Stat. § 8C-1, Rule 1005 (2017). We disagree.

This Court has previously held that a certified copy of an ACIS printout is sufficient evidentiary proof of prior convictions under our habitual felon statute. *State v. Waycaster*, ___ N.C. App. ___, ___, 818 S.E.2d 189, 195 (2018). We concluded in *Waycaster* that Section 14-7.4 is permissive and allows, rather than requires, that the proof tendered be a certified

copy of the court record of the prior conviction. *Id.* Accordingly, an ACIS printout, certified by the Clerk of McDowell County Superior Court as containing information accurately reflecting the judgment, was sufficient proof of the defendant's prior conviction. *Id.* Because the evidence tendered was not proof of the contents of another document, the best evidence rule did not bar the admission of the printout. *Id.*

In this case, the State similarly provided an ACIS printout evidencing Defendant's prior conviction. An assistant clerk testified as to its accuracy, and the printout was a certified copy. Following *Waycaster*, this is competent evidence of Defendant's prior conviction, and was properly admitted by the trial court.

NO ERROR.

Judges ARROWOOD and BROOK concur.

STATE OF NORTH CAROLINA
v.
JACK HOWARD HOLLARS

No. COA18-932

Filed 6 August 2019

Mental Illness—competency to stand trial—sua sponte competency hearing—history of mental illness

The trial court violated defendant's due process rights by failing to conduct a sua sponte competency hearing immediately before or during defendant's criminal trial where defendant had a long history of mental illness (including schizophrenia, bipolar disorder, and mild neurocognitive disorder), numerous prior forensic evaluations had reached differing results regarding his competency, there was a five-month gap between his competency hearing and his trial, several physicians and trial judges had expressed concerns about the potential for defendant's condition to deteriorate during trial, and defense counsel raised concerns about defendant's competency on the third day of trial.

Judge BERGER dissenting.

Appeal by Defendant from Judgments entered 12 January 2018 by Judge William H. Coward in Watauga County Superior Court. Heard in the Court of Appeals 28 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Josephine N. Tetteh, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jack Howard Hollars (Defendant) appeals from his convictions for three counts of Indecent Liberties with a Child and three counts of Second-Degree Sexual Offense. The Record and evidence presented at trial tend to show the following:

Defendant was arrested in connection with this case on 10 February 2012. On 3 September 2013, Defendant was indicted by a Watauga County Grand Jury for one count of Statutory Sexual Offense of a Person Who Is Under 13 Years of Age, three counts of Statutory Sexual Offense of a Person Who Is 13–15 Years of Age, and four counts of Indecent Liberties with a Child. Subsequently, on 4 May 2015, superseding indictments were entered on these offenses, charging Defendant with three counts of Indecent Liberties with a Child and three counts of Second-Degree Sexual Offense. These indictments stemmed from incidents that occurred between 1977 and 1981.

Although Defendant initially waived his right to court-appointed counsel, on 23 April 2012, the trial court in its discretion decided to provide Defendant with court-appointed counsel because Defendant "was not responsive to [the] Court's questions" during his initial appearance. On 4 May 2012, Defendant's counsel filed a motion to have Defendant evaluated because of Defendant's behavior on 1 May 2012. On that date, Defendant's counsel met with Defendant at the Watauga County Jail for approximately one hour. During this visit, "Defendant's thought process [was] scattered and random[,] and he [was] unable to focus." Defendant claimed to have no memory of the events leading to his current charges because "God closed the door and I cannot see." Further, Defendant stated that he would not take any medication because "chemicals in the water at Parris Island in 1968 when he was in the Marine Corps 'messed up [his] brain.' "

On 7 May 2012, Defendant underwent a forensic evaluation by Daymark Recovery Services, which rendered a report on Defendant's capacity to proceed to trial two days later (Daymark Report). The Daymark Report noted some of the same concerns that Defendant's counsel had expressed previously about Defendant's behavior, such as "religious concerns and ideas to an extent that suggested a dysfunctional preoccupation"; Defendant's unwillingness to discuss the nature of the charges that he was facing; and Defendant's aversion to taking his medications. The Daymark Report concluded by stating:

> It is the opinion of the Certified Forensic Evaluator that [Defendant] is not competent to stand trial, and is impaired in providing the expected ability to assist in his defense. [Defendant] showed limited ability to cooperate in even basic discussion of his case with the undersigned despite a history of cooperative interaction over many years. [Defendant] appears psychotic and delusional, and in need of medication and treatment to relieve his condition. It seems likely, given [Defendant's] history, that a reestablishment of his psychotropic medication regimen would reestablish his capacity to proceed to trial. However, it also appears unlikely that he will allow this voluntarily in his current state of mind.

The Daymark Report also recommended further assessment and inpatient treatment of Defendant.

Based on the Daymark Report, the trial court entered an order committing Defendant to Central Regional Hospital for an examination on his capacity to proceed. On 25 July 2012, Dr. David Bartholomew (Dr. Bartholomew) of Central Regional Hospital evaluated Defendant and found him incapable to proceed in a written report dated 9 August 2012 (First Dr. Bartholomew Report). Dr. Bartholomew based his Report on, *inter alia*, Defendant's prior medical records, the Daymark Report, and a 75-minute in-person evaluation of Defendant. The First Dr. Bartholomew Report contained many of the same concerns as the Daymark Report and concluded that:

> [Defendant] has a history of significant mental health problems including psychosis and depression. He is currently not receiving any treatment for his conditions. He is quite impaired at the present time as a result of symptoms of his mental illness. He is unable to describe a reasonable understanding of the nature and objects of the

> proceedings against him. He is not rational about his place in regards to the proceedings. He is unable to assist his attorney in a reasonable manner. [Defendant] is not capable to proceed.

This Report also noted Defendant "may gain capacity if he receives mental health treatment."

Based on the First Dr. Bartholomew Report, the trial court entered an order on 18 September 2012, finding Defendant incapable to proceed and involuntarily committing Defendant to Broughton Hospital. Defendant would remain at Broughton Hospital until, and throughout, his trial in January of 2018. During this time period, Defendant would undergo several other forensic evaluations with differing results.

On 14 May 2013, Dr. Bartholomew entered another report, based on a forensic evaluation from the previous month, finding Defendant competent to stand trial (Second Dr. Bartholomew Report). This Second Dr. Bartholomew Report found that Defendant's "mental health condition has improved with medication" but recommended continued psychiatric treatment of Defendant.

On 31 March 2015, Dr. Bartholomew conducted a third forensic evaluation of Defendant and entered a written report on 14 April 2015 (Third Dr. Bartholomew Report). Although this Report concluded Defendant was capable to proceed, Dr. Bartholomew noted that Defendant "has a longstanding mental illness which has been labeled as schizophrenia, schizoaffective disorder, or bipolar disorder by various clinicians." The Report further recommended that:

> Given his dementia, [Defendant] may not function well at the jail and may likely decompensate again if housed overnight in the jail. If [Defendant's] future court visits will take more than one day, I would recommend that, if possible, he stay at Broughton Hospital each night and be transported to court each morning or day. It is also possible his condition may deteriorate with the stress of a trial so vigilance is suggested if his case proceeds in a trial.

On 5 May 2015, the trial court held a competency hearing where Dr. Bartholomew testified that in his opinion Defendant was competent. However, the trial court had reservations regarding Defendant's capacity and ordered Defendant to undergo an additional psychiatric evaluation before determining Defendant's capacity to stand trial. On 23 July

2015, the trial court appointed Dr. James E. Bellard (Dr. Bellard) to conduct this evaluation.

On 9 October 2015, Dr. Bellard held a forensic interview with Defendant; thereafter, Dr. Bellard found Defendant incompetent to proceed and reduced his findings to a written report on 4 November 2015 (Dr. Bellard Report). The Dr. Bellard Report found Defendant suffered from hallucinations and diagnosed him with schizophrenia and mild neurocognitive disorder. In the Report, Dr. Bellard expressed that "[he] simply cannot see [Defendant] as competent to stand trial" and that if Defendant proceeded to trial, he "would have difficulty refraining from irrational or unmanageable behavior during a trial."

On 7 March 2016, the trial court entered an Order on Defendant's Incapacity to Proceed (Incapacity Order) finding Defendant "lacks capacity to proceed." In the Incapacity Order, the trial court found that "Defendant suffers from Schizophrenia and experiences auditory hallucinations . . . on a regular basis." The trial court also found Defendant had a mild neurocognitive disorder that "impacts his daily life and competency[.]" Lastly, the trial court noted—"Defendant's difficulty maintaining mental stability upon transfer to the jail suggests that he would have difficulty tolerating stress at a trial or while awaiting trial, and he would have difficulty refraining from irrational or unmanageable behavior during a trial."

On 8 December 2016, Dr. Bartholomew conducted another forensic evaluation of Defendant and found he was capable to proceed, based on Defendant's progress with his treatment and continued medication. On 15 August 2017, Dr. Bartholomew and Dr. Reem Utterback (Dr. Utterback) examined Defendant and found him competent in a report dated 24 August 2017 (Final Dr. Bartholomew Report). This Report concluded that "it is reasonable to assume [Defendant] will maintain this [level of] functioning in the foreseeable future and during a trial."

Thereafter, the trial court held a competency hearing on 5 September 2017, finding Defendant competent to stand trial. On 2 January 2018, Defendant filed a Motion to Dismiss citing the delay in prosecuting his case. Defendant contended there was "no physical evidence whatsoever that any crime ever occurred[.]" Defendant further noted his "Capacity to Proceed has been in question since his initial arrest in 2012" and various treatment attempts and psychological issues "account for almost all the delay between Defendant's initial arrest in 2012 and the present." Defendant conceded the delay was "not the fault of the State" but contended the passage of time, in terms of both witness recollection

and Defendant's progressing psychological issues, "has worked to substantially prejudice Defendant." That same day, Defendant also filed a Motion to Quash Indictments and a second Motion to Dismiss, citing double jeopardy and other constitutional concerns. On 5 January 2018, Defendant filed a Supplement to his Motion to Dismiss alleging additional details regarding his mental health.

On 8 January 2018, the matter proceeded to trial, and the trial court did not hold another competency hearing before commencing this trial. After the State's first witness had finished her testimony on 10 January 2018, Defendant's counsel brought to the trial court's attention his concerns regarding Defendant's competency. Specifically, Defendant's counsel stated:

> Your Honor, . . . I just had a brief conversation with [Defendant] during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that. . . . I've been asking him how he's doing and if he knows what's going on. And up until just now he's been able to tell me what's been going on. He just told me just a few minutes ago that he didn't know what was going on. . . . I asked him if he understood what was going on. He said, no, he didn't know what [the witness] was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. . . . I feel we need to make sure. And I'm not asking for an evaluation[.] I would just ask for the Court to query him quickly to make sure . . . I'm seeing something that is not there.

The trial court suggested Defendant's lack of understanding was likely attributable to earlier discussions of Rules 403 and 404(b) of the North Carolina Rules of Evidence, not Defendant's mental state. Thereafter, the trial court stated it would address this issue the following morning. The next morning, the ensuing exchange between the trial court and Defendant's counsel occurred:

> THE COURT: Do you have any more information or arguments you want to make as to [Defendant's] capacity this morning?
>
> [DEFENSE COUNSEL]: No, Your Honor. When [Defendant] came in this morning he greeted me like he has other mornings. I interacted with him briefly and

> he interacted like he has been interacting every morning. And I've not had any questions about his capacity this morning. I just had some yesterday evening because he kind of looked at me and the look in his face was like he had no idea who I was.
>
> THE COURT: Yeah, well, any time you get to -- like I said, any time you get to talking about 404(b) and 403 everybody in the courtroom is going to look like that but.
>
> [DEFENSE COUNSEL]: I don't have any concerns this morning.
>
> THE COURT: Okay.

Neither the trial court nor Defendant's counsel raised the issue of Defendant's competency again at trial. On 12 January 2018, the jury returned verdicts finding Defendant guilty on all charges. The trial court entered separate Judgments on each of the charges against Defendant, sentencing Defendant to ten years on each charge of Indecent Liberties with a Child and 40 years on each charge of Second-Degree Sexual Offense to run consecutively in the custody of the North Carolina Department of Adult Correction. Additionally, the trial court entered Judicial Findings and Order for Sex Offenders on each charge. Defendant appeals.

Issue

The dispositive issue in this case is whether the trial court violated Defendant's due-process rights by failing to conduct a competency hearing immediately prior to or during Defendant's trial.

Analysis

I. Standard of Review

"[T]he conviction of an accused person while he is legally incompetent violates due process[.]" *State v. Taylor*, 298 N.C. 405, 410, 259 S.E.2d 502, 505 (1979) (citations omitted). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

II. Lack of Competency Hearing

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*,

420 U.S. 162, 171, 43 L. Ed. 2d 103, 112-13 (1975). Our North Carolina Supreme Court has held

> under the Due Process Clause of the United States Constitution, a criminal defendant may not be tried unless he is competent. As a result, a trial court has a constitutional duty to institute, *sua sponte*, [a] competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent. In enforcing this constitutional right, the standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.

State v. Badgett, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (alteration in original) (citations and quotation marks omitted). In addition, "a trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654-55 (2005) (citation omitted). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and *any prior medical opinion on competence to stand trial* are all relevant to a bona fide doubt inquiry." *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000) (alteration in original) (emphasis added) (citation and quotation marks omitted).

Defendant contends the trial court erred by failing to conduct *sua sponte* a competency hearing either immediately before or during the trial because substantial evidence existed before the trial court that indicated Defendant may have been incompetent. We agree with Defendant and believe *McRae* controls our analysis.

In *McRae*, the defendant suffered from schizophrenia and psychosis and had undergone at least six psychiatric evaluations over a seventeen-month period leading up to his first trial, which evaluations had differing results regarding the defendant's competency. *Id.* at 390-91, 533 S.E.2d at 559-60. Immediately following a competency hearing finding him competent, the defendant went to trial; however, this trial resulted in a mistrial. *Id.* at 391, 533 S.E.2d at 560. Thereafter, Defendant underwent an additional evaluation finding him competent, and five days later, the defendant's second trial began. *Id.* Noting "concern[s] about the temporal nature of [the] defendant's competency[,]" this Court held that the trial court erred in failing to conduct a competency hearing immediately prior to the second trial. *Id.* (citation omitted); *see also Meeks*

v. Smith, 512 F. Supp. 335, 338-39 (W.D.N.C. 1981) (finding a bona fide doubt existed as to the defendant's competency where defendant was diagnosed as schizophrenic and underwent seven psychiatric evaluations yielding different conclusions as to defendant's competency).

Here, the trial court was presented with substantial evidence raising a bona fide doubt as to Defendant's competency to stand trial in January of 2018. First, on 8 January 2018, the trial court had access to Defendant's seven prior forensic evaluations. These evaluations found Defendant was psychotic at times, suffered from hallucinations, and had been diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder, and mild neurocognitive disorder. Several of these evaluations also noted a temporal aspect to Defendant's mental ability to stand trial. For instance, the Third Dr. Bartholomew Report noted, "It is also possible his condition may deteriorate with the stress of a trial so vigilance is suggested if his case proceeds in a trial." Dr. Bellard expressed similar concerns in his report as well. Our Court has recognized that "[e]vidence of . . . any prior medical opinion on competence to stand trial [is] relevant to a bona fide doubt inquiry." *McRae*, 139 N.C. App. at 390, 533 S.E.2d at 559 (citation and quotation marks omitted).

In addition, Defendant's last forensic evaluation was conducted on 15 August 2017 and reduced to writing on 24 August 2017—the Final Dr. Bartholomew Report. Based on this Report, the trial court conducted a competency hearing and determined Defendant to be competent to stand trial on 5 September 2017. However, Defendant's trial did not begin until 8 January 2018, a full five months after Defendant's competency hearing and almost six months after Defendant's last forensic evaluation. Given the temporal nature of Defendant's mental illness, the appropriate time to conduct a competency hearing was immediately prior to trial. *See id.* at 391, 533 S.E.2d at 560; *Meeks*, 512 F. Supp. at 338-39; *see also State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975) (stating a defendant's competency must be assessed "at the time of trial" (citations omitted)).

In a similar vein, we find it significant that Defendant's prior medical records disclosed numerous concerns about the potential for Defendant's mental stability to drastically deteriorate over a brief period of time and with the stress of trial. Dr. Bartholomew correctly indicated that "vigilance is suggested if [Defendant's] case proceeds in a trial[,]" as "a defendant's competency to stand trial is not necessarily static, but can change over even brief periods of time." *State v. Whitted*, 209 N.C. App. 522, 528-29, 705 S.E.2d 787, 792 (2011) (citation omitted). Because these forensic evaluations suggested a "temporal nature of [Defendant's]

competency[,]" the trial court should have conducted a competency hearing. *See McRae*, 139 N.C. App. at 391, 533 S.E.2d at 560 (citation omitted). Therefore, we conclude the trial court committed prejudicial error in failing to hold a competency hearing.

Further, we find additional support for this conclusion based on the events at trial. For instance, Defendant's counsel questioned Defendant's capacity on the third day of trial. Specifically, defense counsel stated, "I just had a brief conversation with [Defendant] during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that." Defense counsel's concerns stemmed from Defendant's responses that he "didn't know what was going on" and "didn't know what [the witness] was talking about." These concerns were raised before the trial court, although a competency hearing was not held at this time.[1] However, our Court has observed that a defendant's demeanor is also relevant to a bona fide-doubt inquiry. *See id.* at 390, 533 S.E.2d at 559 (citation and quotation marks omitted). Moreover, Defendant never had an extended colloquy with the trial court or testified in a manner that demonstrated he was competent to stand trial. *Cf. Staten*, 172 N.C. App. at 679-84, 616 S.E.2d at 655-58 (holding that there was not substantial evidence of defendant's incompetence where defendant engaged in a lengthy voluntariness colloquy with the trial court; defendant's responses were "lucid and responsive"; and his testimony was mostly rational).

In light of Defendant's extensive history of mental illness, including schizophrenia, schizoaffective disorder, bipolar disorder, and mild neurocognitive disorder, his seven prior forensic evaluations with divergent findings on his competency, the five-month gap between his competency hearing and his trial, the concerns expressed by physicians and other trial judges about the potential for Defendant to deteriorate during trial and warning of the need for vigilance, the concerns his counsel raised to the trial court regarding his conduct and demeanor on the third day of trial, and the fact that the trial court never had an extended colloquy with Defendant, we conclude substantial evidence existed before the trial court that raised a bona fide doubt as to Defendant's competency to stand trial. Therefore, the trial court erred in failing to institute *sua sponte* a competency hearing for Defendant.

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1. Although by the next morning Defendant's counsel indicated that he no longer had any concerns and the trial court proceeded with the trial, in our view, under the totality of the circumstances—including Defendant's extensive medical history and the gap between Defendant's last competency hearing and trial—there was substantial evidence giving rise to a bona fide doubt regarding Defendant's competency, notwithstanding defense counsel's failure to further pursue a competency hearing during trial.

III. Remedy

Because we have found that the trial court erred by failing to hold a competency hearing immediately prior to or during Defendant's trial, we follow the procedure employed in *McRae* and remand to the trial court for a determination of whether a meaningful retrospective hearing can be conducted on the issue of Defendant's competency at the time of his trial. *See McRae*, 139 N.C. App. at 392, 533 S.E.2d at 560-61 ("The trial court is in the best position to determine whether it can make such a retrospective determination of [a] defendant's competency."). On remand,

> if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required. If the trial court determines that a meaningful hearing is no longer possible, defendant's conviction must be reversed and a new trial may be granted when he is competent to stand trial.

Id. at 392, 533 S.E.2d at 561. In reaching its decision, the trial court must determine if a retrospective determination is still possible as it relates to (1) Defendant's competency immediately prior to trial, (2a) Defendant's competency during trial, and (2b) specifically Defendant's competency during the proceedings on the afternoon of 10 January 2018 when Defendant's trial counsel raised concerns over Defendant's mental state. If the trial court decides a retrospective determination is possible, the trial court must make detailed findings of fact and conclusions of law in a written order. Because it is possible on remand that the trial court concludes Defendant was not competent and orders a new trial, which would moot Defendant's arguments in his Conditional Motion for Appropriate Relief, we dismiss Defendant's Conditional Motion for Appropriate Relief without prejudice.

Conclusion

For the foregoing reasons, we remand this case to the trial court for a hearing to determine Defendant's competency at the time of trial. Further, we dismiss Defendant's Conditional Motion for Appropriate Relief without prejudice.

REMANDED.

Judge MURPHY concurs.

Judge BERGER dissents in a separate opinion.

BERGER, Judge, dissenting in separate opinion.

There was no *bona fide* doubt as to Defendant's competence to stand trial, and there was not substantial evidence before the trial court that Defendant was incompetent. Thus, the trial court did not err when it began Defendant's trial, and proceeded with the trial, without undertaking another competency hearing, and I respectfully dissent.

A defendant lacks capacity to proceed when "he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." *State v. King*, 353 N.C. 457, 465-66, 546 S.E.2d 575, 584 (2001) (citation omitted), *cert. denied*, 534 U.S. 1147 (2002). "[A] conviction cannot stand where the defendant lacks capacity to defend himself." *Id.* at 467, 546 S.E.2d at 585 (citation omitted).

"[A] trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency . . . ." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654 (2005). "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a *bona fide* doubt inquiry." *Id.* at 678, 616 S.E.2d at 655. "[A] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Id.* at 681, 616 S.E.2d at 656.

"There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.* at 679, 616 S.E.2d at 655 (citations omitted). There must be "evidence before the trial court that defendant was not capable of assisting in his own defense," *State v. Blancher*, 170 N.C. App. 171, 174, 611 S.E.2d 445, 447 (2005), or otherwise lacked capacity to proceed.

There is no evidence in the record of irrational behavior or change in demeanor by Defendant at trial. The majority rests its reasoning almost entirely on Defendant's prior competency evaluations. While relevant, this factor alone is not controlling.

Defendant underwent multiple competency evaluations prior to trial. The dates of those evaluations, doctors, and results are set forth below:

May 7, 2012	Dr. Murray Hawkinson	Not Competent[1]
July 25, 2012	Dr. David Bartholomew	Not Competent
April 30, 2013	Dr. David Bartholomew	Competent
March 31, 2015	Dr. David Bartholomew	Competent
October 9, 2015	Dr. James Bellard	Not Competent
December 8, 2016	Dr. David Bartholomew	Competent
August 15, 2017	Dr. David Bartholomew Dr. Reem Utterback	Competent
September 5, 2017	Dr. James Bellard	Competent[2]

The reports from evaluations in which Defendant was found not competent each note that either Defendant was not taking medications to address his mental health issues, or that his medication dosage had been reduced prior to the evaluation. There is no such notation for evaluations in which Defendant was deemed competent to proceed.

In addition, Dr. Bartholomew stated in his report from the December 18, 2016 evaluation that "[g]iven the stability of [Defendant's] mental status and functioning for the last year or more at Broughton Hospital, I believe it is reasonable that [Defendant] will maintain this functioning in the foreseeable future and during a trial." A similar notation was made in the report from the August 15, 2017 evaluation by Drs. Bartholomew and Utterback. This is consistent with prior reports that Defendant's condition had improved and that his medication had helped with his symptoms.

Defendant's trial began in January, 2018. At a minimum, the trial court had information that was only four months old that Defendant was competent and would remain competent. This information was based on more than a year's worth of documentation while Defendant was housed in Broughton Hospital. This alone distinguishes this case from *State v. McRae*, 139 N.C. App. 387, 533 S.E.2d 557 (2000), and the majority's conclusion that there were concerns about the temporal nature of Defendant's competency is not reflected in the reports.

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1. Dr. Hawkinson conducted a forensic screening at the Watauga County Jail.

2. Defendant's counsel advised the trial court that Dr. Bellard spoke with Defendant that morning and found him to be competent, and defense counsel conceded to a finding of competence in open court.

In addition, a report from a June 28, 2017 evaluation by Dr. Bellard exists, but was not filed with the Watauga County Clerk of Court and not provided to the trial court. In that report, Dr. Bellard indicates that "[t]he degree to which [Defendant experiences hallucinations] is directly correlated with" Defendant's medication.

Thus, there is nothing in the record that would have required the trial court to conduct another pre-trial hearing. The Bartholomew-Utterback report clearly stated that Defendant was competent and that he would maintain capacity to proceed for the foreseeable future. Defense counsel did not alert the trial court to any concerns at any time between August 15, 2017 and January 8, 2018. To the contrary, defense counsel informed that Court that Dr. Bellard had determined that Defendant was competent to proceed in September 2017 and conceded to a finding that Defendant was competent.

In addition, prior to trial, defense counsel informed the trial court that

> [Defendant]'s been diagnosed with bipolar disorder at various times. He has been - - there are a number of times where they talk through – in the – where the evaluators in these evaluations talk about how he may well be actively psychotic at the point in time in which they were talking to him. I don't have any reason to believe he is that way as he is here today.

Here, "defendant's actions and courtroom behavior [at that time] did not indicate that [he] was incompetent. He participated in the proceedings, his demeanor was appropriate, and his trial counsel represented that he was competent." *State v. Johnson*, 190 N.C. App. 818, 820, 661 S.E.2d 287, 289 (2008). In addition, "where, as here, the defendant has been . . . examined relative to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing." *Id.* at 821, 661 S.E.2d at 289 (citation omitted).

Thus, the trial court did not err in not conducting another pretrial competency hearing because there was no evidence before the trial court that Defendant was incompetent at the time his trial began in January 2018.

Defendant also contends, and the majority agrees, that the trial court erred by failing to intervene *sua sponte* following an exchange between defense counsel and the trial court. I disagree.

There is nothing in the record that indicates Defendant was acting irrationally, or otherwise incompetent on January 8 or 9, 2018, or that his attorney or the trial court had any such concerns. On January 10, 2018, court convened for trial of Defendant's case at 9:32 a.m. Jury selection continued until 11:05 a.m. The court released prospective jurors for a recess at 11:12 a.m., and after the jury left the courtroom, neither defense

counsel nor the prosecutor raised any concerns about Defendant. Court reconvened at 11:32 a.m. and jury selection continued until 12:27 p.m. Jurors were released for lunch at 12:35 p.m. After the jury left the courtroom, there was again no concern raised about Defendant.

After lunch, court resumed at 2:02 p.m. Jury selection was finalized and the jury impaneled at 3:07 p.m. At 3:16 p.m. the jury left the courtroom for the afternoon recess. Again, no issues were raised regarding Defendant when the jury left the courtroom. Court resumed at 3:32 p.m. The trial court provided instructions to the jurors, and opening statements were given by the prosecutor and defense counsel until 3:43 p.m. The State thereafter called the victim to testify as its first witness.

While the victim was testifying, defense counsel made an objection and asked to be heard outside the presence of the jury. The jury was thereafter escorted from the courtroom at 4:27 p.m. The trial court and counsel then engaged in a discussion of 404(b) evidence, and the jury returned at 4:34 p.m. The trial court then gave a limiting instruction to the jury, and the victim continued her testimony. Testimony continued, and the trial court gave an instruction prior to the jury being released for the evening at 5:00 p.m.

The trial court then mentioned 404(b) evidence again and a recess was taken at 5:03 p.m. They went back on the record at 5:03 p.m., at which time, defense counsel stated the following:

> I just had a brief conversation with Mr. Hollars during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that.
>
> . . .
>
> I asked him -- I've been asking him how he's doing and if he knows what's going on *and up until just now* he's been able to tell me what's been going on. *He just told me just a few minutes ago* that he didn't know what was going on.

(Emphasis added).

The trial court replied to defense counsel:

> THE COURT: Well, when we start throwing around 404(b) and 403, you'd have to have graduated from law school to have any inkling of what we're talking about. So I'm not sure what it is you -- I want you to be more specific.
>
> [Defense counsel]: He said -- I asked him -- he said – I asked him if he understood what was going on. He said,

no, he didn't know what she was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. I just – I feel we need to make sure. *And I'm not asking for an evaluation* I would just ask for the Court to query him quickly to make sure that I'm just not -- make sure I'm seeing something that is not there.

THE COURT: Well, I tell you what, it's been a long day, and I'd rather inquire of Mr. Hollars in the morning and give everyone a chance to rest. Give you a chance to talk to him and try to explain to him what's going on, especially with all of these rule numbers. I don't know if anybody could explain that to a non-lawyer and have them understand it.

We could take a poll around here of non-lawyers and see if they understood it. I doubt many of them would. But, you know, essentially what is going on is that the victim in this case has been telling everybody what he did, and that's about a simple concept as you can imagine. Now, if he surely does not understand that for some reason, not that he remembers it or not, or whether he can think of some defense or something, that is not the case.

[Defense counsel]: I understand.

THE COURT: But if the information coming from this woman about what he did, if he can understand that is what is happening, then I would say that the capacity situation hasn't changed any. We've got one, two -- I counted them before, three, four, five, six, capacity evaluations. The latest one was August 15, 2017, and this latest one found him capable of proceeding. We'll talk about it in the morning.

[Defense counsel]: Yes, sir.

THE COURT: Okay, thank you.

There was not substantial evidence before the court at this time, indicating that Defendant was incapable of proceeding, sufficient to require another competency hearing. There is nothing in the record that addresses Defendant's demeanor or behavior during trial on January 10, 2018 that would indicate or suggest Defendant was not competent. At

the end of the day, defense counsel informed the trial court that he and Defendant "had a brief conversation" and Defendant told defense counsel that he did not know what was going on and that Defendant "didn't know what [the victim] was talking about."

As the trial court pointed out, the discussion concerning 404(b) evidence may have been too complicated for Defendant to understand. The trial court also informed defense counsel that Defendant's capacity may be an issue if he did not understand the victim's testimony, not merely that Defendant was denying knowledge of the content of her testimony, or the ability to think of a defense to her testimony. The "brief conversation" by Defendant and defense counsel did not produce "*substantial evidence before the court* indicating that the accused may be mentally incompetent." *Staten*, 172 N.C. App. at 681, 616 S.E.2d at 656. Rather, at this point in the trial, there was the very real probability that Defendant did not understand the intricacies of 404(b) testimony, and that he had in fact heard and understood the victim's testimony. Perhaps at this point he fully comprehended the nature of his situation in relation to the proceedings. While there may be speculation concerning Defendant's competence, there is no *bona fide* doubt as to Defendant's competence.

On January 11, the trial court asked if there was a need "for any further inquiry as to Mr. Hollars' capacity." Defense counsel indicated there was not. Presumably defense counsel had more than a "brief conversation" with Defendant after the conclusion of court on January 10 to better understand Defendant's comments in court at the end of the 404(b) discussion. As this Court has noted, trial courts give "significant weight to defense counsel's representation that a client is competent, since counsel is usually in the best position to determine if his client is able to understand the proceedings and assist in his defense." *Blancher*, 170 N.C. App. at 174, 611 S.E.2d at 447 (citation omitted). Again, there was no substantial evidence before the court that Defendant may be incompetent at this point in the trial.

Even though not required because of the lack of substantial evidence, one could argue that the trial court's inquiry of defense counsel on the morning of January 11 satisfied the requirements of conducting a hearing on competence. *See* N.C. Gen. Stat. § 15A-1002 (b)(1); *See also State v. Gates*, 65 N.C. App. 277, 282, 309 S.E.2d 498, 501 (1983) (When a hearing is required concerning Defendant's capacity to proceed, "no particular procedure is mandated. The method of inquiry is still largely within the discretion of the [court].") The majority implies that the trial court was required to conduct a colloquy with Defendant at this point. While the trial court may do so, it is not required to do so.

Thus, because there was no *bona fid*e doubt as to Defendant's competence to stand trial, there was not substantial evidence before the trial court that Defendant was incompetent. I would find the trial court did not err when it began Defendant's trial, and proceeded with the trial, without undertaking another competency hearing. In addition, I would dismiss Defendant's motion for appropriate relief without prejudice to his right to file an MAR in the trial court.

STATE OF NORTH CAROLINA
v.
DMITRY KONAKH

No. COA18-1249

Filed 6 August 2019

Criminal Law—guilty plea—motion to withdraw—denied—no manifest injustice

After defendant pleaded guilty to three drug-related felonies, the trial court properly denied his motion to withdraw the plea and motion for appropriate relief because defendant failed to show that granting the motions was necessary to prevent manifest injustice. The trial court's unchallenged findings of fact established that defendant did not assert his innocence during the plea hearing or the hearing on the motion to withdraw his plea, he had ample time to discuss plea options with his attorney, his claims of pleading guilty while "dazed and confused" lacked credibility, and the trial court entered the plea after thoroughly questioning defendant about his decision to plead guilty and the consequences of doing so.

Appeal by Defendant from judgment entered 10 April 2018 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Candace A. Hoffman, for the State.

Office of the Appellate Defender, by Emily Holmes Davis, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from an order denying his Motion to Withdraw Plea and Motion for Appropriate Relief. Defendant argues that the trial court erred by denying the motions because circumstances demonstrate that the withdrawal of Defendant's guilty plea would prevent manifest injustice. We affirm.

I. Factual Background and Procedural History

On 10 April 2018, Defendant pled guilty to felony possession with intent to manufacture, sell, or deliver marijuana; felony possession of marijuana; and felony maintaining a vehicle for controlled substance. During the plea hearing, Defendant admitted to transporting and delivering approximately three pounds of marijuana to Asheville; answered affirmatively when asked by the court if he understood the felony charges to which he was pleading guilty; and answered affirmatively when asked by the court if he was, in fact, guilty of all three felony charges. The court consolidated Defendant's three convictions for judgment, sentenced Defendant to a term of 6 to 17 months' imprisonment, suspended the sentence, and placed Defendant on supervised probation for 24 months. The court also assessed $972.50 in costs, ordered Defendant to complete 72 hours of community service within the first 150 days, and required Defendant to report for an initial substance abuse assessment.

On 12 April 2018, Defendant filed a Motion to Withdraw Plea and Motion for Appropriate Relief ("Motion"), alleging that he "felt dazed and confused at the time of the plea due to lack of sleep and due to medications he was taking;" "did not understand he was pleading guilty to three felonies and . . . did not understand what three felonies being consolidated into one judgment meant;" "did not feel he had appropriate time to consider the plea agreement and felt pressured to make a decision regarding his plea;" and believed his decision to plead guilty would "have negative employment ramifications . . . that he was not aware of at the time he entered his plea."

On 16 April 2018, the Motion was heard in superior court. At the hearing, when the State asked Defendant if he had three pounds of marijuana in his car on the date of the offense, Defendant replied, "Yea, I guess." Defendant testified that "nobody threatened or coerced" him into taking a plea, and that he was not promised anything for taking the plea. When asked if he understood what crimes he was charged with and whether he had discussed possible defenses with his attorney, Defendant replied "yes" and "yes, sir." Moreover, when Defendant was asked whether, at the time of the plea hearing, he understood that he was pleading guilty to three felony charges, Defendant replied "yes." Despite these statements

and admissions, however, when asked by the State whether he was asserting his legal innocence, Defendant replied, "I am now."

At the conclusion of the hearing, the court announced extensive findings of fact in support of its conclusion that the Motion was without merit, and denied the Motion. On 24 April 2018, the court entered a written order reflecting its ruling from the bench. The court made the following written findings of fact:

> . . . .
>
> 2. Based on the testimony of the Defendant, as well as the observations and understandings of the Court regarding his trial, the Defendant was not only aware of the factual circumstances against him, he was also aware of the pleas that he had been offered to him by the State and that the Defendant basically simply took a position of not doing anything until the trial date.
>
> 3. On the morning of April 10, 2018, the Court heard the Defendant's Motion to Suppress. That Motion to Suppress was denied prior to the Court's lunch recess at 12:30 pm and that the State was ready to proceed with the Defendant's trial. Following the denial of the Defendant's Motion to Suppress but prior to the lunch recess, the Defendant was given an opportunity to consider whether to accept a plea offer or go to trial. The Court recessed from 12:30 until 2:00 to give the Defendant an opportunity to consider what was available to him and also to consider whether he wanted to proceed at trial. Furthermore, the Court paused for a period of time up to 15 to 30 minutes, from 2:00 to 2:30, to allow the Defendant to further talk with his attorney and consider whether or not he wanted to plead in this matter.
>
> 4. On April 10, 2018 the Defendant appeared before the Court and answered the questions as given to him both orally and written and pursuant to the transcript of the plea.
>
> 5. The Defendant at that time answered those questions clearly, appropriately, and at that time did not exhibit any indications that he was dizzy and he stood through the whole transcript -- during the whole time that the plea was offered to him.

6. The Court did not observe any condition of him that would indicate that he was in any way dizzy, nauseous, sick, or confused. The Defendant answered the Court's questions clearly and appropriately throughout the transcript, even pausing at one time to talk to his attorney about one of the questions.

7. Throughout the entire duration of the plea, the Defendant did not indicate through counsel or directly with the Court that he was dizzy in any respects. At the conclusion of the plea the Defendant asked to speak directly with the Court. During the time the Defendant spoke on his behalf directly to the Court, the Defendant spoke both logically and clearly setting out positions that he was taking in regard to the matter before the Court including admitted responsibility for the charges that he had plead guilty to.

8. The Defendant sought to withdraw his plea after this Court had sentenced him.

9. The Court finds the contentions set forth in the Defendant's Motion for Appropriate Relief filed by the Defendant on April 12, 2018 including that the Defendant was dizzy, nauseous, sick, confused, and did not understand the questions are not credible. It appears to the Court that the Defendant is merely changing his mind after entering into the plea freely and voluntarily and understandingly.

10. The Court also finds that while the Defendant was on cross-examination by the State regarding these matter[s], he indicated that he did not remember various questions asked of him by the Court during the plea. The Court finds his testimony to be untrue and that the Defendant simply does not want to remember those answers, not that he doesn't remember them.

11. The Court finds that the Defendant's appearance, behavior, and ability to communicate with the Court on April 10, 2018, when the plea was entered, were identical to that on April 16, 2018, when the Court heard the Defendant's Motion for Appropriate Relief.

12. The Court renews all the plea adjudication findings that were previously discussed on April 10, 2018.

13. The Defendant entered into and accepted the plea arrangement on April 10, 2018 freely, voluntarily, and understandingly.

14. The Defendant's plea was not entered into in haste, under coercion or at a time when the Defendant was confused.

15. The Court further finds the following in regards to the factors set forth in *State v. Meyer*, 330 N.C. 738, 742-43, 412 S.E.2d 339, 342 (1992); The Defendant did not assert his legal innocence on April 10, 2018 during the plea or in his filed Motion for Appropriate Relief; The State's case and the evidence against the Defendant was insurmountable. At a previous hearing evidence was presented that State and law enforcement had placed a GPS tracker within the boxes where the marijuana was located, and they were tracking both the Defendant as well as the vehicle he was driving at the time. Law enforcement knew and had verified that marijuana was contained in the boxes before the Defendant took possession, and law enforcement conducted surveillance on the Defendant the entire time the marijuana was in his possession. Furthermore, the marijuana was found by the officer at the time that the Defendant was pulled over. In addition, the Defendant admitted to possessing and transporting marijuana to officers; throughout the entire time the Defendant's charges have been pending, he has been represented by counsel. The Defendant has been represented by his own Counsel which was retained in December and that counsel is certainly competent and has represented him as such throughout the entire process including filing and arguing various motions before the Court.

Upon its findings, the court concluded:

. . . .

2. Where a guilty plea is sought to be withdrawn by the defendant after sentencing, it should be granted only to avoid manifest injustice; *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990).

3. Based on the above Findings of Fact the Court finds as a matter of law that no manifest injustice exist[s].

> 4. The Court concludes as a matter of law that the Motion is without merit and that it is not supported by any facts in any respects, thus there is no manifest injustice by denying the Defendant's motion.

Based upon the findings of fact and conclusions of law, the trial court denied the Motion. From the trial court's order denying the Motion, Defendant appeals.

II. Discussion

Defendant argues that the trial court erred by denying his Motion because the circumstances demonstrate that withdrawal of his plea would prevent manifest injustice. We disagree.

A. Standard of Review

When a defendant seeks to withdraw a guilty plea, and the "defendant's motion to withdraw his plea was made post-sentence, it is properly treated as a motion for appropriate relief." *State v. Monroe*, 822 S.E.2d 872, 875 (N.C. Ct. App. 2017) (citation omitted). When reviewing "a trial court's findings on a motion for appropriate relief . . ., [the] findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citations omitted). Unchallenged findings of fact are "presumed to be supported by competent evidence and are binding on appeal." *State v. Evans*, 251 N.C. App. 610, 613, 795 S.E.2d 444, 448 (2017) (brackets and citations omitted). "[T]he trial court's conclusions of law are fully reviewable on appeal." *State v. Johnson*, 126 N.C. App. 271, 273, 485 S.E.2d 315, 316 (1997).

B. Analysis

"When a defendant seeks to withdraw a guilty plea after sentencing, his motion should be granted only where necessary to avoid manifest injustice." *State v. Suites*, 109 N.C. App. 373, 375, 427 S.E.2d 318, 320 (1993) (citations omitted). "Some of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of the time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times." *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990) (citations omitted). "Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration." *Id.* "A plea is voluntary and knowing if it is made by someone fully aware of the direct consequences of the plea." *Wilkins*, 131 N.C. App at 224,

506 S.E.2d at 277 (citations omitted). Moreover, "[i]n cases where there is evidence that a defendant signs a plea transcript and the trial court makes a careful inquiry of the defendant regarding the plea, this has been held to be sufficient to demonstrate that the plea was entered into freely, understandingly, and voluntarily." *Id.* (citations omitted).

Defendant challenges just two of the trial court's 15 findings of fact. Specifically, Defendant challenges finding 13, that he "entered into . . . the plea . . . freely, voluntarily, and understandingly," and finding 14, that his "plea was not entered into in haste, under coercion or at a time when the Defendant was confused." Defendant does not challenge the court's remaining 13 findings, which are thus binding on appeal. *Evans*, 251 N.C. App. at 613, 795 S.E.2d at 448.

Defendant argues that his plea should be withdrawn because he (1) is innocent, (2) pled guilty in haste, and (3) pled guilty in confusion and "based on the erroneous belief that all three convictions would be consolidated into a single conviction."

Defendant's claim of innocence is belied by the record, which indicates that Defendant admitted at the hearing on his Motion that he possessed three pounds of marijuana on the date of the offense. Moreover, the trial court found that Defendant did not assert his legal innocence at the plea hearing or in his filed Motion for Appropriate Relief, and Defendant did not challenge this finding, which is thus binding on appeal. *Id.* Accordingly, Defendant's claim that his innocence requires the withdrawal of his plea is meritless.

Defendant next claims that he pled guilty in haste, and that he had "less than 10 minutes" to think about the plea. However, the court found that Defendant had approximately two hours to consider his options. Defendant did not challenge this finding, which is therefore binding on appeal, *id.*, rendering Defendant's claim that he pled guilty in haste also unavailing.

Lastly, Defendant claims that he pled guilty in confusion and based on a misunderstanding of the law, specifically claiming that he erroneously believed "that all three convictions would be consolidated into one conviction." However, the transcript from the plea hearing reveals that the trial court made a careful inquiry of Defendant regarding his decision to plead, the accuracy of which Defendant confirmed by executing a Transcript of Plea form. These two things demonstrate that the plea was entered into knowingly, voluntarily, and with an understanding of the direct consequences of the plea. *State v. Russell*, 153 N.C. App. 508, 511, 570 S.E.2d 245, 248 (2002); *Wilkins*, 131 N.C. App at 224, 506 S.E.2d

at 277. Moreover, the trial court found Defendant's contentions that he was "confused and did not understand the questions" during the plea hearing "not credible[,]" and Defendant did not challenge this finding, which is thus binding on appeal. *Evans*, 251 N.C. App. at 613, 795 S.E.2d at 448. Defendant's claim that he pled guilty in confusion and based on a misunderstanding of the law is therefore also meritless.

III. Conclusion

Since Defendant was represented by competent counsel, had ample time to consider and discuss the plea with his attorney, and was thoroughly questioned by the trial court about his decision to plead and the effects of his decision to plead guilty to three criminal charges, we conclude that Defendant is unable to establish manifest injustice and unable to show that the trial court erred by denying his Motion. As Defendant entered into the plea knowingly, voluntarily, and with an understanding of the direct consequences, *Wilkins*, 131 N.C. App at 224, 506 S.E.2d at 277, we determine that the trial court properly denied Defendant's Motion.

AFFIRMED.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
SAMANTHA MEIAZA MATTHEWS, Defendant

No. COA18-1257

Filed 6 August 2019

1. Appeal and Error—pro se appellant—defective notice of appeal—clear intent to appeal—importance of addressing issue of first impression

In an appeal from an order revoking probation, defendant's petition for a writ of certiorari was allowed under Appellate Rule 21 where—although defendant, acting pro se, filed multiple notices of appeal that did not comply with Appellate Rule 4—defendant's intent to appeal was clear, this intent was frustrated through use of form notices of appeal that the clerk's office provided her, the State was neither confused nor prejudiced by the mistake, and the appeal presented an important issue of first impression regarding a district court's subject matter jurisdiction to revoke probation.

2. Probation and Parole—probation revocation hearing—in district court—subject matter jurisdiction—consent

The district court properly exercised subject matter jurisdiction over defendant's probation revocation hearing pursuant to N.C.G.S. § 7A-271(e), under which the superior court generally has exclusive jurisdiction over probation revocation hearings unless the State and the defendant consent to jurisdiction in the district court. Based on the statute's plain meaning, the word "consent" includes implied consent to jurisdiction, which defendant gave by actively participating at every stage of her revocation hearing, affirmatively requesting alternative relief from the trial court, and declining an opportunity to present further argument after the trial court's oral ruling.

Appeal by Defendant from judgment entered 4 May 2018 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 21 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas J. Felling, for the State.

Office of the Appellate Defender, by Wyatt Orsbon and Glenn Gerding, for Defendant-Appellant.

INMAN, Judge.

Defendant Samantha Meiaza Matthews ("Defendant") appeals, by petition for writ of certiorari, the district court's revocation of her probation imposed under a conditional discharge. Defendant argues that the district court lacked subject matter jurisdiction to conduct the probation revocation hearing, contending that she did not expressly consent to the district court's exercise of jurisdiction. After thorough review of the record and applicable law, we allow Defendant's petition but hold Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

On 3 February 2017, Defendant was charged by magistrate's order with one count each of felony possession with the intent to manufacture, sell, or deliver ("PWIMSD") Percocet (Schedule II), Hydrocodone (Schedule II), and Diazepam (Schedule IV). On 5 May 2017, Defendant was charged by a bill of information with felony possession of a Schedule IV substance, a class I felony. Defendant and the State entered into a plea agreement that same day. Per the plea agreement, the State

agreed to dismiss the three PWIMSD charges and Defendant agreed to plead guilty to felony possession of a Schedule IV substance and receive supervised probation on a conditional discharge.

The district court accepted the plea agreement and entered a conditional discharge placing Defendant on 12 months of supervised probation. The court also ordered Defendant to pay court costs of $450 and a supervised probation fee, complete 225 hours of community service, and undergo a substance abuse evaluation.

On 4 March 2018, Defendant's probation terms were modified to allow her additional time to complete her community service hours. Defendant's probation officer later filed a violation report on 23 April 2018, asserting that Defendant had only completed 26.1 of her 225 court-ordered community service hours and had not yet paid in full her court costs and supervised probation fee.

On 4 May 2018, the district court held a hearing on the violation report. Defendant's counsel did not object to the district court's jurisdiction during the hearing and fully participated in the proceeding. After Defendant admitted the willfulness of her three violations, Defendant's probation officer testified that Defendant had completed 75 hours of community service at the time of the hearing. The court, in reliance on Defendant's admissions and the officer's testimony, found that Defendant willfully violated her probation and conditional discharge. While the trial court was reciting this finding, Defendant asked the court through counsel if she could speak; Defendant then addressed the court directly and asked for an additional 30 days to complete her community service requirement. The trial court denied Defendant's request.

The trial court entered judgment for felony possession of a Schedule IV substance following the above exchange. As punishment, the court ordered a suspended sentence of 4 to 14 months imprisonment and placed Defendant on supervised probation for 12 months. After sentencing and at the conclusion of the hearing, Defendant directly asked the trial court if a felony would appear on her record. The trial court answered the question "yes"—to which Defendant replied, "Okay"—and then the trial court asked counsel if there was anything further Defendant wished to present to the court; Defendant's counsel responded, "No, Your Honor[.]"

It does not appear from the hearing transcript that Defendant gave oral notice of appeal at the hearing; however, the trial judge checked a box on the "Disposition/Modification of Conditional Discharge" form that Defendant was appealing the order to superior court. The trial judge

also checked and appears to have initialed a box on the judgment itself, stating "[t]he defendant gives notice of appeal from the judgment of the trial court to the Appellate Division[.]" Both the Disposition/Modification of Conditional Discharge and the judgment were entered on 4 May 2018, the day of the hearing revoking Defendant's probation.[1]

Defendant, *pro se*, filed form notices of appeal designating her appeal to the superior court on 11 May 2018 and 17 May 2018; the first notice identified the original judgment entered on her guilty plea as the order appealed, while the second identified the order revoking her probation. Despite these forms designating Defendant's appeal to the superior court, a form judgment in the record signed by the trial court judge indicates that Defendant "[a]ppealed to [the] NC Court of Appeals" on 17 May 2018.[2]

On 18 May 2018, the trial court again called Defendant's case for hearing, and the judge made the following statement on the record:

> [Defendant] came in yesterday and gave notice of appeal. Madam Clerk contacted her this morning to try to get her back in here so we could get this on the record that she did give notice of appeal from that revocation of that conditional discharge.
>
> I just wanted to make sure we had this on the record. I think (*inaudible*) that she did give notice of appeal (*inaudible*).
>
> . . . .
>
> Also, that Madam Clerk did contact and left a message for her that we would try to do this on the record this morning. She has not called Madam Clerk back (*inaudible*) contact with her (*inaudible*) that she did give notice of appeal on May 7th.

The trial judge then completed and filed an appellate entries form, noting Defendant's appeal to this Court.

Defendant's appellate counsel filed a petition for writ of certiorari with this Court on 13 February 2019. In the petition's appendix, Defendant

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1. It is unclear, however, if the portion of the order designating an appeal to the Appellate Division was checked and initialed at the time the order was entered, or if the trial court amended and initialed the order at a later date.

2. This form judgment appears to be a local form created and utilized internally by Wake County's district courts, rather than a standardized form promulgated by the North Carolina Administrative Office of the Courts.

included an email between her appellate counsel and the assistant district attorney assigned to her case in which the district attorney acknowledged Defendant "appeared in court to provide notice of appeal" on 18 May 2018. The State filed a motion to dismiss Defendant's appeal on 12 March 2019, arguing that the actions of Defendant and the trial court recounted above failed to comply with the jurisdictional requirements of Rule 4 of the North Carolina Rules of Appellate Procedure.

II. ANALYSIS

A. Appellate Jurisdiction

[1] In its motion to dismiss, the State argues that Defendant's various notices and related attempts to appeal failed to comply with Rule 4(a)-(b) of the North Carolina Rules of Appellate Procedure. Rule 4(a) requires an appealing party to either give oral notice of appeal at trial or file and serve a written notice of appeal within fourteen days of judgment; Rule 4(b) sets forth the requirements for a written notice of appeal, which include a mandate that the notice "designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 4(a)-(b) (2019).

Defendant concedes that her various attempts to appeal fail to comply with the above requirements, but she notes that the State has not shown surprise, confusion, or prejudice and requests that we allow her petition for writ of certiorari. Pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, we may exercise our broad discretion to allow review "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21 (2019); *see also State v. Ledbetter*, ___ N.C. ___, ___, 814 S.E.2d 39, 43 (2018) (holding that this Court possesses "the jurisdiction and the discretionary authority . . . [a]bsent specific statutory language limiting the Court of Appeals' jurisdiction . . . to issue the prerogative writs, including certiorari").

In our discretion, we allow Defendant's petition and deny the State's motion to dismiss, as: (1) Defendant, acting *pro se*, made clear her intent to appeal the revocation of probation within ten days of the order's entry; (2) her intent was frustrated only through use of form notices of appeal that appear to have been provided to her by the Wake County clerk's office; (3) the State appears to have understood Defendant's intent to appeal when she filed the defective notices, which the trial court later made clear on the record; and (4) Defendant's appeal presents an issue of first impression concerning a fundamental aspect of the trial court's authority, namely, the district court's subject matter jurisdiction to revoke her probation. *See, e.g.*, *State v. Hill*, 227 N.C. App. 371,

374, 741 S.E.2d 911, 914 (2013) (allowing certiorari for failure to take timely action where the defendant filed, *pro se*, a form notice of appeal on the day after judgment that was provided to him by the jail, was not served on the State, incorrectly designated his appeal as one from district court to superior court, and did not correctly identify all orders appealed from); *State v. Keller*, 198 N.C. App. 639, 642, 680 S.E.2d 212, 214 (2009) (allowing certiorari "[d]ue to the fundamental nature of the errors asserted by defendant" (citation omitted)).

B. Standard of Review

We review challenges to a trial court's subject matter jurisdiction *de novo*. *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012). We apply that same standard to questions of statutory interpretation. *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009). Under this standard, we "consider[] the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

C. District Court Jurisdiction Per N.C. Gen. Stat. § 7A-271(e)

[2] Under the statutory framework setting forth the jurisdiction of our district and superior courts over criminal matters, the superior court generally exercises exclusive jurisdiction over probation revocation hearings even when the underlying felony conviction and probationary sentence were imposed through a guilty plea in district court. N.C. Gen. Stat. § 7A-271(e) (2017). There exists, however, an exception to this general rule; namely, that "the district court shall have jurisdiction to hear these matters with the *consent* of the State and the defendant." *Id.* (emphasis added). By allowing parties to consent to the district court's jurisdiction, then, the legislature modified the common law rule that subject matter jurisdiction "cannot be conferred upon a court by consent, waiver or estoppel." *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967). The statute provides no definition for the word "consent," and neither this Court nor our Supreme Court has had occasion to construe it.

D. Consent to Jurisdiction

Defendant contends that she did not "consent" to the district court's jurisdiction within the meaning of the word as used in Section 7A-271(e), as she never made her "express consent" apparent on the record. The State argues that Defendant's active participation in the hearing without objection constituted implied consent sufficient to confer jurisdiction

on the trial court. Because implied consent is, by definition, consent, and the legislature declined to limit the exception to express consent, we hold that Defendant consented to the district court's jurisdiction and its judgment was free from error.

This Court has, in multiple contexts, recognized implied consent as a form of consent. *See*, *e.g.*, *Montgomery v. Montgomery*, 110 N.C. App. 234, 238, 429 S.E.2d 438, 441 (1993) ("[T]here are many ways in which a defendant may give express or implied consent to the jurisdiction of the court over his person." (citation omitted).[3] For example, we held in *State v. McLeod*, 197 N.C. App. 707, 682 S.E.2d 396 (2009), that a person's words and actions gave police implied consent to search his home when he walked officers through his house and told them where to find an illegally-possessed firearm, even though he never expressly invited them inside to search his home. 197 N.C. App. at 713, 682 S.E.2d at 399. Evidence found during that search was therefore admissible at trial, as the applicable statute provided that "a law-enforcement officer may conduct a search and make seizures, without a search warrant or other authorization, *if consent to the search is given*." N.C. Gen. Stat. § 15A-221(a) (2007) (emphasis added); *McLeod*, 197 N.C. App. at 710-11, 682 S.E.2d at 398. Thus, *McLeod* stands for the proposition that the legislature's use of the word "consent" encompasses both express and implied consent.

Our General Assembly has also recognized implied consent as a form of consent in the civil context. Rule 15(b) of the North Carolina Rules of Civil Procedure provides that "[w]hen issues not raised by the pleadings are tried by the express *or implied* consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15(b) (2017) (emphasis added). In interpreting that rule, we have held that, in a non-jury trial, implied consent existed where evidence pertaining to an issue outside the pleadings was introduced and no objection to the evidence was lodged. *Gay v. Gay*, 62 N.C. App. 288, 291, 302 S.E.2d 495, 497 (1983).

As Defendant recognizes, the use of the word "consent" in Section 7A-271(e) is unambiguous, and we must give it "its plain meaning."

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3. Defendant incorrectly asserts that *Montgomery* confuses the concepts of consent and waiver without distinguishing them. A close reading of that decision shows that the Court was not indifferent to, but was instead mindful of, the distinction. *See* 110 N.C. App. at 238, 429 S.E.2d at 440-41 (discussing "the consent by which a defendant waives personal jurisdiction" as a "consent to personal jurisdiction and a waiver of the requirements usually necessary to invoke that jurisdiction").

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Implied consent falls within that plain meaning, and Defendant offers no definition to the contrary. *Cf. McLeod*, 197 N.C. App. at 713, 682 S.E.2d at 399; *see also Consent*, *Black's Law Dictionary* (11th ed. 2019) (including the definition of "implied consent" as a subentry to the definition of "consent"). We see no reason to hold that implied consent is not sufficient to confer subject matter jurisdiction under Section 7A-271(e); as a result, we hold that the State and a defendant may impliedly consent to jurisdiction under the statute.

We also hold that Defendant's conduct in this case constitutes implied consent sufficient to confer jurisdiction. The transcript opens with Defendant waiving a formal reading of the violation report and admitting to the willfulness of her violations through counsel. Following direct examination of the probation officer by the State, Defendant's counsel then cross-examined her about Defendant's community service and good behavior while on probation. The trial court then questioned Defendant's counsel directly about those same issues, and he responded without hesitation. Defendant even interjected into that line of questioning, offering an answer to one of the court's inquiries. Finally, as the trial court was reciting its ruling, Defendant asked if she could address the trial court directly, whereupon she proceeded to state that she had difficulty completing the necessary community service and needed an extension.

Defendant or her counsel participated at every stage in the hearing without protest, and they even declined to object when presented with a final opportunity by the trial court. In other words, the State submitted the case for resolution to the district court, and Defendant willingly participated in its adjudication. Defendant even went so far as to affirmatively request *additional* relief from the trial court in the form of an extension of her probation. Such conduct certainly demonstrates "[c]onsent inferred from one's conduct rather than from one's direct expression" to the trial court's jurisdiction to hear the revocation of her probation. *Consent*, *Black's Law Dictionary*; *cf. McLeod*, 197 N.C. App. at 713, 682 S.E.2d at 399; Gay, 62 N.C. App. at 291, 302 S.E.2d at 497.

We are unpersuaded by Defendant's argument that consent must be established at the beginning of the probation violation proceedings. Defendant cites two cases for this proposition: *Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010), and *In re T.K.*, ___ N.C. App. ___, 800 S.E.2d 463, *disc. rev. denied*, 370 N.C. 216, 804 S.E.2d 527, 528 (2017). In *Boseman*, our Supreme Court held that a trial court lacks jurisdiction if it is not invoked by a proper pleading. 364 N.C. at 547, 704 S.E.2d at 501. In *T.K.*, we wrote that "[b]efore a court can address any

matter on the merits, it must have jurisdiction," ___ N.C. App. at ___, 800 S.E.2d at 465, and held that because a juvenile petition lacked certain statutorily required signatures, it failed to invoke the jurisdiction of the trial court. *Id.* at ___, 800 S.E.2d at 467. Here, the State appropriately invoked the district court's jurisdiction by filing a violation report that complied with the statute governing such reports. *See* N.C. Gen. Stat. § 15A-1345(e) (2017) (imposing various notice requirements on probation violation reports); *State v. Moore*, 370 N.C. 338, 345, 807 S.E.2d 550, 555 (2017) (holding a probation violation report that satisfies N.C. Gen. Stat. § 15A-1345(e)'s notice requirements confers jurisdiction on the trial court to revoke probation). Thus, the probation violation report was a sufficient pleading to invoke the district court's jurisdiction. Then, as explained *supra*, the trial court entered its judgment on the merits only after Defendant had participated fully in the hearing, affirmatively requested alternative relief from the trial court, and declined an opportunity to present further argument after the trial court's oral ruling, *i.e.*, after she had impliedly consented to its jurisdiction.

We are similarly unpersuaded by Defendant's argument that her conduct was somehow exclusively a form of estoppel or waiver, neither of which are mentioned in Section 7A-271(e) and are thus insufficient to confer subject matter jurisdiction under the otherwise-unmodified common law. Although Defendant repeats that consent, waiver, and estoppel "are 'not synonymous' " throughout her briefs by quoting our Supreme Court's decision in *Lenoir Mem'l Hosp., Inc. v. Stancil*, 263 N.C. 630, 633, 139 S.E.2d 901, 903 (1965), she fails to identify—outside of conclusory statements—how her conduct constitutes waiver or estoppel rather than consent. *Lenoir* is itself completely silent on consent, as the word is entirely absent from the opinion, and the full passage quoted by Defendant is far from an unqualified statement of general applicability: "Though often used interchangeably *with reference to insurance contracts*, the terms *waiver* and *estoppel* are not synonymous." *Id.* (first emphasis added).[4] Absent persuasive or binding authority, we reject Defendant's argument that she assented to jurisdiction through waiver or estoppel rather than consent.

III. CONCLUSION

For the foregoing reasons, we hold that Defendant consented to the trial court's subject matter jurisdiction within the meaning of

4. Indeed, the only case discussing the meaning of the word "consent" that Defendant cites is a decision from the Court of Appeals for the Tenth Circuit that attempts to interpret language found in a city ordinance in Denver, Colorado, and that state's statutes. *United States v. Abeyta*, 877 F.3d 935 (10th Cir. 2017).

Section 7A-271(e), and the trial court possessed jurisdiction to revoke her probation.

NO ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER DAVID PATTERSON, DEFENDANT

No. COA18-1052

Filed 6 August 2019

Sexual Offenders—failure to return address verification form—N.C.G.S. § 14-208.9A—definition of "business day"

In a prosecution for failure by a registered sex offender to timely return an address verification form, the Court of Appeals construed the term "business day" in section 14-208.9A to mean any calendar day other than Saturday, Sunday, or a legal holiday listed in N.C.G.S. § 103-4. Defendant was entitled to dismissal of the charge where he responded within three business days, excluding Columbus Day, a legal holiday.

Judge DILLON dissenting.

Appeal by Defendant from judgment entered 28 March 2018 by Judge Lori I. Hamilton in Rowan County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Gail E. Carelli, for the State-Appellee.

Sharon L. Smith for Defendant-Appellant.

COLLINS, Judge.

This case requires us to determine the definition of "business day" for purposes of Chapter 27A of our General Statutes. Defendant Christopher David Patterson appeals from judgment entered upon a jury

verdict of guilty of failing to register as a sex offender by failing to timely return an address verification form. Defendant argues there was insufficient evidence of his willful failure to return the address verification form within three business days after receipt because Columbus Day could not be counted as a business day. We hold that the term "business day," as used in Chapter 27A, means any calendar day except Saturday, Sunday, or legal holidays declared in N.C. Gen. Stat. § 103-4. Because Columbus day is a legal holiday pursuant to N.C. Gen. Stat. § 103-4, there was insufficient evidence that Defendant willfully failed to return the address verification form within three business days after receipt. The trial court erred by denying Defendant's motion to dismiss and we thus vacate Defendant's conviction.

I. Background

On or about 8 March 2012, Defendant was convicted of a sex offense in violation of N.C. Gen. Stat. § 14-27.7(b), which requires registration under N.C. Gen. Stat. § 14-208.7. On or about 12 March 2012, Defendant registered as a sex offender with the Rowan County Sheriff's Department.

Every year on the anniversary of a person's initial registration date, and again six months after that date, the Department of Public Safety mails an address verification form to the last reported address of the person. Once the person receives the form, he has three business days to take the form to the sheriff's office to be signed.

Rowan County Sheriff's Deputy John Lombard, a twenty-three-year employee of the department and an acquaintance of Defendant's since kindergarten, was in charge of the sex offender registry in Rowan County in 2012. Lombard testified that when the address verification form was returned to the sheriff's department as undeliverable,[1] "I would normally call [Defendant], and he would come in and sign the [form]." In May 2014, Lombard moved to another position within the sheriff's department and Deputy Karen Brindle was put in charge of the sex offender registry.

Around October 2014, an address verification form was mailed to Defendant, but was returned to the Rowan County Sheriff's Department as undeliverable. On Thursday, 9 October 2014, Brindle instructed Lieutenant Larry St. Clair to deliver the address verification form to Defendant at his place of employment. On that day, St. Clair found Defendant at his place of employment, and told Defendant that "he needed to contact Ms.

1. Lombard and Defendant testified that there was an issue with Defendant's address, and that the address verification forms, mailed out of Raleigh, would return to the Rowan County Sheriff's Department as "undeliverable."

Brindle to set up an appointment to come up and verify the information she was needing." St. Claire had Defendant sign a card acknowledging that he needed to set up an appointment and left the address verification form with Defendant. The telephone call log entered into evidence by the State showed that Defendant called Brindle on Thursday, 9 October 2014; Monday, 13 October 2014; Tuesday, 14 October 2014, at which time he left Brindle a voicemail; and twice on Wednesday, 15 October 2014. Brindle testified that she did not return any of Defendant's calls or respond to his voicemail.

After the unsuccessful attempts to set up an appointment with Brindle as instructed, Defendant appeared in person at the sheriff's department on 15 October 2014 and asked to meet with Brindle. Defendant testified that he understood the form had to be returned within three business days, and thought Columbus Day was not a business day. He testified, "I thought by showing up on Wednesday I -- I was complying with my requirement." He further explained that he thought "Friday would have been the first [business day]. Obviously, the weekend didn't count. I knew that Monday was a federal holiday, so it was my assumption that -- that that Monday didn't count as a business day. That was my assumption, so I knew in my mind, I had until Wednesday to get with the sheriff's department." Defendant testified, "I took Wednesday off on purpose in case I had to meet with her at that point."

Upon his arrival at the sheriff's office, Defendant was told to wait in the lobby. Unbeknownst to Defendant, at some point on 15 October 2014, the Rowan County District Court found probable cause that Defendant "unlawfully, willfully, and feloniously" failed to return an address verification form as required by N.C. Gen. Stat. § 14-208.9A and issued a warrant for Defendant's arrest. After waiting in the lobby, an officer approached Defendant, handcuffed him, and arrested him for failing to register as a sex offender by failing to return the address verification form.

On 16 October 2014, Defendant was brought to court for his first appearance. After paying his bond, Defendant saw Brindle in the lobby of the sheriff's department. Defendant approached and handed her the signed address verification form. Brindle testified that Defendant twice apologized to her "for making a mistake."

On 8 December 2014, a Rowan County grand jury indicted Defendant for failure to register as a sex offender by failing to return an address verification form as required under N.C. Gen. Stat. § 14-208.9A. Defendant was tried by a jury on 27 and 28 March 2018 in superior court. At the

close of the State's evidence and again at the close of all the evidence, Defendant moved to dismiss for insufficient evidence; the court denied the motions. The jury found Defendant guilty of failing to register as a sex offender. The court sentenced Defendant to a term of 19-32 months' imprisonment, suspended the sentence, and placed Defendant on supervised probation for 36 months. Additionally, the court required Defendant to complete 24 hours of community service during the first 180 days of probation. The court also imposed a fine of $250, and assessed costs and fees in the amount of $3,215.50. Defendant gave proper notice of appeal in open court.

II. Discussion

On appeal, Defendant argues there was insufficient evidence of his failure to register as a sex offender under N.C. Gen. Stat. § 14-208.9A because there was insufficient evidence that he (1) failed to return the address verification form within three business days after receipt or (2) acted willfully if he had, in fact, failed to return the form within three business days after receipt.

A. Standard of Review

"This Court reviews a trial court's denial of a motion to dismiss *de novo*[.]" *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015) (citation omitted). Moreover, "[i]ssues of statutory construction are questions of law which we review *de novo* on appeal[.]" *State v. Hayes*, 248 N.C. App. 414, 415, 788 S.E.2d 651, 652 (2016). Upon *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

Upon a defendant's motion to dismiss, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Worley*, 198 N.C. App 329, 333, 679 S.E.2d 857, 861 (2009) (quotation marks and citations omitted). "[T]he trial court must consider the record evidence in the light most favorable to the State . . . ." *Id.* (citation omitted). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). 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." *Id.* (citation omitted).

B. Analysis

A person required to register as a sex offender pursuant to Article 27A, and who "willfully" fails to return an address verification form required under N.C. Gen. Stat. § 14-208.9A, is guilty of a Class F Felony. N.C. Gen. Stat. § 14-208.11 (a)(3) (2018). N.C. Gen. Stat. § 14-208.9A provides:

> (1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Department of Public Safety shall mail a nonforwardable verification form to the last reported address of the person.
>
> (2) The person shall return the verification form in person to the sheriff within three business days after the receipt of the form.
>
> (3) The verification form shall be signed by the person . . . .
>
> . . . .
>
> (4) If the person fails to return the verification form in person to the sheriff within three business days after receipt of the form, the person is subject to the penalties provided in [N.C. Gen. Stat.] § 14-208.11. . . .

N.C. Gen. Stat. § 14-208.9A(a).

1. Business Days

Defendant moved to dismiss the charge at the end of the State's case-in-chief, arguing there was insufficient evidence that Defendant willfully failed to return the form within three business days as Columbus Day was not a "business day." Whether Columbus Day is a "business day" for purposes of N.C. Gen. Stat. § 14-208.9A appears to be an issue of first impression for this Court.

"In North Carolina, the cardinal principle of statutory interpretation is to ensure that the legislative intent is accomplished." *State v. Huckelba*, 240 N.C. App. 544, 559, 771 S.E.2d 809, 821 (2015) (internal quotation marks and citation omitted), *rev'd per curiam on other grounds*, 368 N.C. 569, 780 S.E.2d 750 (2015). "Generally, the intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act[,] and what the act seeks to accomplish." *Id.* (internal quotation marks, brackets, and citation omitted). Moreover, "criminal statutes are to be strictly construed against the State." *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489 (1987) (internal quotation marks and citation omitted).

Article 27A does not define "business day." Our General Statutes define and use the term "business day" in various ways, including: (1) any day other than Saturday, Sunday, or a legal holiday;[2] (2) any day other than Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions;[3] (3) any calendar day except Sunday and legal holidays;[4] (4) any calendar day except Sunday and some designated legal holidays;[5] and (5) "a weekday other than one on which there is both a State employee holiday and neither house is in session."[6] In a dissenting opinion from our Supreme Court, Justice Beasley (now Chief Justice Beasley) noted in dicta, "[t]hough not defined in this context by the legislature, we assume that a business day occurs Monday through Friday during 'bankers' hours.' " *State v. Williams*, 368 N.C. 620, 630 n.3, 781 S.E.2d 268, 275 n.3 (2016) (Beasley, J., dissenting) (addressing the necessity of including the phrase "within three business days" in an indictment for failure to timely notify the sheriff of a change of address pursuant to N.C. Gen. Stat. § 14-208.9). According to state and federal law, "Columbus Day, the second Monday in October" is declared to be a

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2. *See*, *e.g.*, N.C. Gen. Stat. § 66-209 (governing invention development services and defining business day as "any day other than a Saturday, Sunday, or legal holiday"); N.C. Gen. Stat. § 58-87-1 (governing the Volunteer Fire Department Fund and stating, "The Commissioner must award the grants on May 15, or on the first business day after May 15 if May 15 falls on a weekend or a holiday . . . ."); N.C. Gen. Stat. § 105-395.1 (governing payment of taxes; "When the last day for doing an act required or permitted by this Subchapter falls on a [Saturday or Sunday, or a holiday], the act is considered to be done within the prescribed time limit if it is done on the next business day."); N.C. Gen. Stat. § 1A-1, Rule 6 (computing time for civil filings; "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.").

3. *See*, *e.g.*, N.C. Gen. Stat. § 1A-1, Rule 6 (computing time for civil filings; "The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.").

4. *See*, *e.g.*, N.C. Gen. Stat. § 143-143.21A (governing purchase agreements and buyer cancellations and defining business day as "any day except Sunday and legal holidays"); N.C. Gen. Stat. § 66-232 (entitled the Membership Camping Act and defining business day as "any day except Sunday or a legal holiday.").

5. *See*, *e.g.*, N.C. Gen. Stat. § 14-401.13 (governing the failure to give right to cancel in off-premises sale, lease, or rental of consumer goods or services and defining business day as "[a]ny calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and Good Friday.").

6. *See* N.C. Gen. Stat. § 120-33 (governing the duties of the enrolling clerk in the Legislative Services Commission and defining business day).

state and federal legal public holiday. N.C. Gen. Stat. § 103-4 (11) (2018); 5 U.S.C. § 6103(a) (2018).

As illustrated by the fact that "business day" is defined and used in various different ways in our General Statutes, the plain language of N.C. Gen. Stat. § 14-208.9A(a) is ambiguous—it does not make clear what a "business day" is. We therefore look to the legislative history of the statute and "the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Huckelba*, 240 N.C. App. at 559-60, 771 S.E.2d at 821 (internal quotation marks and citation omitted).

In 1995, North Carolina enacted Article 27A, "requiring individuals convicted of certain sex-related offenses to register their addresses and other information with law enforcement agencies." *State v. White*, 162 N.C. App. 183, 185, 590 S.E.2d 448, 450 (2004). "The stated purpose of the law is to curtail recidivism because 'sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and . . . protection of the public from sex offenders is of paramount governmental interest.' " *Id.* (quoting N.C. Gen. Stat. § 14-208.5). Registered offenders were required to "sign and return the [form] verifying his or her current address" within "ten days of receipt." *Id.* at 186, 590 S.E.2d at 451 (citing N.C. Gen. Stat. § 14-208.9A(4) (2003)).

"In 2006 Congress enacted the Sex Offender Registration and Notification Act (SORNA) to provide a comprehensive system for nationwide sex offender registration." *Williams*, 368 N.C. at 629, 781 S.E.2d at 274 (citing *United States v. Price*, 777 F.3d 700, 703 (4th Cir.), *cert. denied*, 135 S. Ct. 2911, 192 L. Ed. 2d 941 (2015)) (footnote omitted).

> "Congress through SORNA has not commandeered . . . nor compelled the state[s] to comply with its requirements. Congress has simply placed conditions on the receipt of federal funds. A state is free to keep its existing sex-offender registry system in place (and risk losing funding) or adhere to SORNA's requirements (and maintain funding)."

Williams, 368 N.C. at 629, 781 S.E.2d at 274-275 (quoting *United States v. White*, 782 F.3d 1118, 1128 (10th Cir. 2015)) (quotations omitted).

N.C. Session Law 2008-117, effective 1 December 2008 and applicable to offenses committed on or after that date, substituted "three business days" for "10 days" in N.C. Gen. Stat. § 14-208.9A(a)(2) and (a)(4).[7]

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7. The same or similar substitution was made in sections 14-208.7, 14-208.9, 14-208.27, and 14-208.28.

The session law also substituted "three business days" for "72 hours" in N.C. Gen. Stat. § 14-208.9A(c). It is evident from these changes that a "business day" is not synonymous with a "day" or a 24-hour period—the word "business" imports meaning. *See N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("[The court] give[s] every word of the statute effect, presuming that the legislature carefully chose each word used.").

The purpose of the session law was "to amend the sex offender registration requirements to be more stringent," 2007 Filed Edition of H933, https://www.ncleg.gov/Sessions/2007/Bills/House/PDF/H933v6.pdf (last visited June 12, 2019), to comply with SORNA requirements by "shorten[ing] the 'grace period' during which an offender must report an address change" or verify an address. *Williams*, 368 N.C. at 630, 781 S.E.2d at 275. Shortening the grace period for reporting is achieved under even the most expansive statutory definition of business day which effectively allows six days for reporting (Saturday + Sunday + Holiday + three weekdays) as opposed to ten (or eleven if the last day of the ten-day period falls on a Sunday).

Moreover, Justice Beasley has opined that

> [t]he legislature's deliberate change from "day" to "business day" alleviates confusion for offenders and law enforcement. For example, if a defendant's address changes on Thursday, without this business day requirement, it would be unclear whether that defendant is required to report his change of address to the sheriff by the following Sunday or by the following Tuesday.

Id. While this change alleviates confusion regarding whether a defendant is required to report on Sunday,[8] as every statutory definition of business day excludes Sunday, it did not alleviate confusion in this case regarding whether Defendant was required to report on Columbus Day, a legal holiday which is excluded from some but not all statutory definitions of business day.

The issue of whether Columbus Day was a business day was discussed extensively in the context of Defendant's motions to dismiss, the jury charge, and the arguments allowed to be made in closing. The parties acknowledged that the General Assembly left the term "business day" undefined and offered various definitions of the term. The trial

8. The Supreme Court's calculation requires an inference that a defendant is not required to report on a Saturday either.

court remarked, "I can't believe that we don't have any cases in North Carolina that have looked at how many -- what counts as a business day for the purposes of determining the limitations in the sex-offender registry statutes."

As neither the plain language nor the legislative intent of the statute clearly assigns meaning to the term "business day," we analyze N.C. Gen. Stat. § 14-208.9A under a third and final principle of statutory construction, the rule of lenity. "In construing ambiguous criminal statutes," the rule of lenity "requires us to strictly construe the statute." *State v. Howell*, 370 N.C. 647, 659, 811 S.E.2d 570, 577-78 (2018) (internal quotation marks and citations omitted). However,

> [t]he canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

State v. Raines, 319 N.C. 258, 263, 354 S.E.2d 486, 490 (1987) (quoting *United States v. Brown*, 333 U.S. 18, 25-26 (1948)). We hold that the term "business day," as used in Chapter 27A, means any calendar day except Saturday, Sunday, or legal holidays declared in N.C. Gen. Stat. § 103-4. This construction effectuates the purpose of Session Law 2008-117 to shorten the grace period for reporting, and alleviates confusion for offenders and law enforcement, thus giving the term its "fair meaning in accord with the manifest intent of the lawmakers." *Raines*, 319 N.C. at 263, 354 S.E.2d at 490 (quotation marks and citation omitted).

In denying Defendant's motion to dismiss, the trial court explained:

> I do think it's an issue of fact for the jury to determine whether or not there's been testimony that it was not, in fact, a holiday, there's been testimony that it was. . . . I think ultimately, the jury is going have to decide whether they consider that that was a business day. I don't think that's -- I can't take a judicial notice of the fact that Columbus Day is a holiday. It's not a state holiday. We don't have -- we don't shutdown -- as far as I know, shut down state offices on Columbus Day.

The trial court erroneously concluded that the statutory construction of N.C. Gen. Stat. § 14-208.9A and the meaning of "business day" is a question of fact for the jury; it is a question of law for the court. *State*

v. Marino, No. COA18-1135, 2019 N.C. App. LEXIS 472, at *5 (Ct. App. May 21, 2019) ("Issues of statutory construction are questions of law which we review de novo on appeal.") (internal quotation marks, brackets, and citation omitted). Moreover, the trial court erroneously concluded that it could not take judicial notice of the fact that Columbus Day is a legal holiday as "[i]t is generally held that the courts are bound to take judicial notice of what days are legal holidays." *State v. Brunson*, 285 N.C. 295, 302, 204 S.E.2d 661, 665 (1974) (internal quotation marks and citations omitted).

Citing *Southpark Mall Ltd. P'ship v. CLT Food Mgmt. Inc.*, 142 N.C. App. 675, 679, 544 S.E.2d 14, 17 (2001) for the proposition the "the term 'business day' in a commercial lease is any day the property was open for business[,]" the dissent thus concludes, "because the Rowan County Sheriff's Office was open for regular business to the public on Columbus Day, . . . Columbus Day counted as a 'business day' for purposes of Section 14-208.9A[.]" However here, unlike the imposition of civil liability in *Southpark Mall*, the State seeks to impose criminal liability, under a statute that does not clearly define the term "business day." N.C. Gen. Stat. § 14-208.9A. Under the rules of statutory construction, the rule of lenity "requires us to strictly construe the statute." *Hinton*, 361 N.C. at 211, 639 S.E.2d at 440. Moreover, *Southpark Mall* is inapposite as it involved the meaning of the term "five (5) days" in a commercial lease agreement. This Court rejected Defendants' argument that the phrase "days" should be construed as "business days," and concluded that "five (5) days" unambiguously meant five calendar days. Furthermore, the dissent's determination of which " 'public holidays' in Section 103-4 . . . are clearly 'business days' " is a determination for the legislature, not this Court.

As we hold that a "business day" is any calendar day except Saturday, Sunday, or legal holidays declared in N.C. Gen. Stat. § 103-4, and Columbus Day is a legal holiday declared in N.C. Gen. Stat. § 103-4, the trial court erred in denying Defendant's motion to dismiss for insufficient evidence where Defendant received the address verification form on Thursday, 9 October 2014 and appeared in person at the sheriff's department to sign the form on Wednesday, 15 October 2014, a period of three business days – excluding Saturday the 11th, Sunday the 12th, and Monday, Columbus Day, the 13th – after he received the form.

C. Willful Failure to Return Form

In light of our holding, we need not reach Defendant's argument that the trial court erred by denying his motion to dismiss where there was

insufficient evidence that he willfully failed to return the address verification form within three business days after receipt.

III. Conclusion

As there was insufficient evidence that Defendant willfully failed to return the verification form within three business days after he received it, the trial court erred in denying Defendant's motions to dismiss. Accordingly, we vacate Defendant's conviction.

VACATED.

Judge INMAN concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

As explained below, because I conclude that Columbus Day is a "business day" under Section 14-208.7 *and* because the jury found that Defendant's one-day tardiness was willful, I dissent.

Section 14-208.7 requires one with a reportable conviction to register his address initially within three business days by reporting "in person at the appropriate sheriff's office[.]" N.C. Gen. Stat. § 14-208.7 (2014). Section 14-208.9A requires that person to verify his address every six months by returning a verification form "in person to the sheriff within three business days after the receipt of the form." N.C. Gen. Stat. § 14-208.9A (2014). And Section 14-208.11 makes it a crime for a person to "willfully" fail to return his verification notice as required in Section 14-208.9A. N.C. Gen. Stat. § 14-208.11(a)(3) (2014).

Here, the evidence showed that Defendant received his verification form on Thursday, 9 October 2014 but did not return the form to the Rowan County Sheriff's Office until Wednesday, 15 October 2014, *four* business days later.

I. Analysis

A. Columbus Day is a "Business Day"

The majority concludes that Defendant's return of his form was timely because Monday, 13 October 2014 should not count as one of the business days since it was Columbus Day. The majority concludes that it was error for the jury to be allowed to determine that Columbus Day is a business day. I agree with the majority that the meaning of "business

days" as used in our General Statutes is a question of law. But conclude, as a matter of law, that Columbus Day is a business day, in the context of Section 14.208.9A, for the reasons stated below. Therefore, since I believe that the jury resolved the issue correctly anyway, any error in allowing the jury to pass on this issue was harmless in this case.

I conclude that the term "business days," as used in these Sections, includes any weekday that the "sheriff's office" is open for regular business and may receive a verification form as required in Section 14-208.9A. *See Southpark Mall Ltd. P'ship v. CLT Food Mgmt. Inc.*, 142 N.C. App. 675, 679, 544 S.E.2d 14, 17 (2001) (stating that the term "business day" in a commercial lease is any day the property was open for business). And because the Rowan County Sheriff's Office was open for regular business to the public on Columbus Day, I conclude that Columbus Day counted as a "business day" for purposes of Section 14-208.9A, which requires one with a reportable conviction to verify his address by returning a completed verification form "to the sheriff[.]" N.C. Gen. Stat. § 14-208.9A.

The majority reasons that Columbus Day is not a "business day," citing Section 103-4 of our General Statutes, which designates certain days as "public holidays" in our State. *See* N.C. Gen. Stat. § 103-4(a)(11) (2014). I do not believe that there is any ambiguity that the General Assembly did not intend for "business days," as used in Section 14-208.9A, to exclude the days it has designated as "public holidays" in Section 103-4(a). Admittedly, *some* of the public holidays listed in Section 103-4 are days which would also be considered *non*-business days for the Rowan County Sheriff's Office, such as New Year's Day, Martin Luther King, Jr.'s Birthday, and Christmas Day. *See* N.C. Gen. Stat. § 103-4(a)(1), (1a), and (15).[1]

But there are a number of days listed as "public holidays" in Section 103-4 which are clearly "business days" (where they fall on a weekday), which no one would reasonably expect the Sheriff's Office to be closed for regular business to the public, such as Robert E. Lee's Birthday (January 19), Greek Independence Day (March 25), Anniversary of the signing of the Halifax Resolves (April 12), Confederate Memorial Day (May 10), Anniversary of the Mecklenburg Declaration of Independence (May 20), and Election Day (Tuesday after first Monday in November in even-numbered years). *See* N.C. Gen. Stat. § 103-4(a)(2), (3a), (4), (5), (6), and (13).[2]

1. These days are listed on Rowan County's government website as *observed* public holidays in which Rowan County offices are closed.

2. These days are not included in the list of Rowan County's observed holidays on its website.

Therefore, since the Rowan County Sheriff's Office was open to the public for the transaction of regular business on Columbus Day, I conclude that Columbus Day was a business day under Section 14-208.9A.

B. There Was Sufficient Evidence that Defendant Acted Willfully.

I conclude that there was sufficient evidence from which the jury could find that Defendant's tardiness was willful. That is, the jury was free to find that Defendant did not act willfully if they had believed his story that he thought Columbus Day was not a business day. I note, though, that Defendant did testify that he attempted to call the Sheriff's Office on Columbus Day, testimony from which the jury could infer that Defendant understood Columbus Day to be a business day. The jury made its call, and we should not disturb its determination.

II. Conclusion

The General Assembly in its role has enacted a law to make it a crime for one with a reportable conviction to fail willfully to turn in his verification form in person at the Sheriff's Office in his county within three business days.

The District Attorney's office in its role decided to prosecute Defendant for delivering his verification form one day late. *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991) ("The clear mandate of [N.C. Const. art. IV, § 18] is that the responsibility and authority to prosecute all criminal actions . . . is vested solely in the several District Attorneys of the State.").

The jury in its role resolved conflicts in the evidence and reached a guilty verdict.

Perhaps, if I was the prosecutor, I would have chosen not to prosecute Defendant for returning his verification form one day late. Perhaps, if I was on the jury, I would have believed Defendant's story regarding his belief about Columbus Day and his honest attempts to return his form earlier than he did and, therefore, not found his tardiness to have been willful. But my role as an appellate judge is not to make such decisions, but rather simply to apply the law. The prosecutor and the jury have made their decisions and have done so within the perimeters of the law, as enacted by our General Assembly. Accordingly, my vote is to conclude that Defendant had a fair trial, free from reversible error.

STATE OF NORTH CAROLINA
v.
MORQUEL DESHAWN REDMOND

No. COA18-801

Filed 6 August 2019

Robbery—with a dangerous weapon—jury instruction—lesser-included offense—common law robbery

At a trial for robbery with a dangerous weapon, where defendant stole cash from a tobacco store after threatening an employee with a box cutter, the trial court did not commit prejudicial error by declining to instruct the jury on the lesser-included offense of common law robbery, even though the judge did not determine that the box cutter was a dangerous or deadly weapon as a matter of law but instead submitted the issue to the jury. The State's evidence was clear and positive as to the "dangerous weapon" element of the charged offense, and there was no conflicting evidence relating to that or any other element.

Appeal by defendant from judgment entered 11 December 2017 by Judge Charles H. Henry in Superior Court, Lenoir County. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

STROUD, Judge.

Morquel Redmond appeals his conviction of robbery with a dangerous weapon. Defendant argues that the trial court erred by failing to instruct the jury on the lesser included offense of common law robbery. Because the trial court could have found the box cutter to be a dangerous weapon as a matter of law, despite submitting this issue to the jury, Defendant was not entitled to a jury instruction on the lesser included offense of common law robbery. Defendant's trial was free of prejudicial error.

I. Background

The State's evidence tended to show that on 20 March 2015, Defendant robbed a Tobacco Road Outlet in Kinston. Linda Walston

was working in the store at the time of the robbery. Defendant and Ms. Walston struggled until Defendant brandished a box cutter and threatened her. Defendant then dragged Ms. Walston to the back room of the store and tied her up with a cord. Defendant took cash out of the register and fled, leaving Ms. Walston tied up.

Law enforcement officers identified Defendant from video surveillance images from the store, with the help of Defendant's mother. Defendant was taken into custody, and officers searched his vehicle and found two box cutters. Defendant was indicted for robbery with a dangerous weapon and first degree kidnapping. At trial, after a *Harbison* inquiry, Defendant admitted that he committed the offenses of common law robbery and second-degree kidnapping. Ms. Walston testified about the events of 20 March 2015, and the State introduced video surveillance from the store during the robbery. Defendant did not present any evidence. During the charge conference, Defendant's counsel requested an instruction on common law robbery which was denied by the trial court. Defendant was found guilty of robbery with a dangerous weapon and first-degree kidnapping and sentenced within the presumptive range. Defendant timely appealed and only challenges his robbery with a dangerous weapon conviction.

II. Standard of Review

Defendant argues that "the trial court erred when it refused to issue a lesser include[d] offense instruction for common law robbery." The State contends that "Defendant is not entitled to an instruction on the lesser included offense because the evidence does not show that a rational jury would find him guilty of common law robbery given the extensive testimony [presented at Defendant's trial]."

> We review *de novo* the trial court's decision regarding its jury instructions. The trial court must "instruct the jury on all substantial features of a case raised by the evidence." "Failure to instruct upon all substantive or material features of the crime charged is error." On the other hand, "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial."
>
> "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." If, however, "the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence

> showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense."

State v. Clevinger, ___ N.C. App. ___, ___, 791 S.E.2d 248, 255 (2016) (citations omitted).

Because Defendant requested a jury instruction on common law robbery, we review the instructions *de novo*.

III. Lesser Included Offense

A defendant is "entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000). Only one element distinguishes common law robbery and robbery with a dangerous weapon, and that element is the use of a dangerous weapon:

> Robbery with a dangerous weapon consists of the following elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. Common law robbery is a lesser-included offense of robbery with a dangerous weapon. The difference between the two offenses is that robbery with a dangerous weapon is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened.
>
> A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm. Relevant here, the evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death. The dangerous or deadly character of a weapon with which the accused was armed in committing a robbery may be established by circumstantial evidence.

Clevinger, ___ N.C. App. at ___, 791 S.E.2d at 255 (citations, quotation marks, and brackets omitted).

Defendant raises three arguments in his brief: "(1) the State never presented the box cutter, (2) Walston did not suffer any injuries from

the box cutter, and (3) the trial court did not find the box cutter to be a deadly weapon as a matter of law[.]" The State's failure to present the box cutter as evidence, and the absence of injuries are facts the jury could consider in its determination of whether the box cutter was used as a "dangerous weapon," but neither are required for a weapon to be a "dangerous weapon" under the law. *See id*. The weight to give to the evidence is for the jury to determine. *See State v. Collins*, 30 N.C. 407, 412-13 (1848) ("Whether the instrument used was such as is described by the witnesses, where it is not produced, or, if, produced, whether it was the one used, are questions of fact[.]").

Next, physical injuries are not required for a dangerous weapon to be considered dangerous. *See State v. Young*, 317 N.C. 396, 417, 346 S.E.2d 626, 638 (1986) ("In order to be characterized as a 'dangerous or deadly weapon,' an instrumentality need not have actually inflicted serious injury. A dangerous or deadly weapon is 'any article, instrument or substance which is likely to produce death or great bodily injury.' ").

The main issue here is whether the trial court was required to give the lesser included offense instruction on common law robbery where the judge did not instruct the jury that the box cutter was a deadly weapon as a matter of law but instead submitted this factual issue to the jury. Almost anything can be a dangerous weapon, depending upon the manner of use in a particular case:

> But where it may or may not be likely to produce such results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. 'Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used,' the question is for the jury. 'If its character as being deadly or not, depended upon the facts and circumstances, it became a question for the jury with proper instructions from the court.'

State v. Perry, 226 N.C. 530, 535, 39 S.E.2d 460, 464 (1946) (citations omitted).

Defendant is correct that the trial court did not find the box cutter to be a deadly weapon as a matter of law, but this does not end the inquiry. Our Court has held that if the trial court could have determined the weapon to be a deadly weapon as a matter of law based upon the evidence, but instead submitted that issue to the jury, its failure to give

an instruction on the lesser-included offense is not prejudicial error. *Clevinger*, ___ N.C. App. at ___, 791 S.E.2d at 256. This Court has rejected

> the proposition that where the trial court submits to the jury the question of whether a dangerous weapon was used to commit a robbery, it must also submit an instruction for common law robbery. That may be the rule when there is evidence of common law robbery, but as our Supreme Court has held repeatedly, an instruction for the lesser-included offense is not required when there is no evidence to support it:
>
> > The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.

Id. at ___, 791 S.E.2d at 255-56 (quoting *State v. Hicks*, 241 N.C. 156, 159-60, 84 S.E.2d 545, 547 (1954)).

We therefore turn to the evidence presented at trial to determine if there was any "*conflicting evidence* relating to the elements of the crime charged." *Id.* at ___, 791 S.E.2d at 256. At trial, Ms. Walston's testimony about the incident included a description of the box cutter:

> Q. At around the ten o'clock hour did an individual wearing a red hoodie come into your store?
>
> A. Yes.
>
> Q. Can you tell us what happened when he came into the store?
>
> A. He asked -- he was looking his uncle something for his birthday. He was asking about some cigars behind the counter and I was price checking them and giving him some prices and he said he needed to leave and go get some money. He'd be back in a little bit and he left.

He came back. When he came back, he asked me about the premium cigars that was in the little humidor in the back, he said are they expensive. I said there's some pretty expensive ones in there. He said, well, just grab me two of the most expensive ones you've got. I'll just get him those.

So, I walked into the room and grabbed two cigars. As I come out the door, I handed him the two cigars and started around the end of the counter to go back to the cash register. When I did, he throwed me up against the chewing tobacco and started fighting me and, of course, I started fighting back.

We proceeded to fight. I fell on the floor. He started choking me. He ripped the buttons off my shirt. Then he somehow managed to get the box cutter. I don't know if he had it because after it was all done and everything I had cuts on the ends of my boots, which I didn't see it until he actually put it in my face and said that he was going to kill me if I didn't cooperate.

Q. What did he put it in your face?

A. Right to my face.

Q. What was the item that he put –

A. A box cutter.

Q. And can you describe the box cutter?

A. A box cutter. That's all I know. I know what a box cutter looks like. I mean, it was a box cutter.

Q. And when you say a box cutter, does it have a particular part on a box cutter that has a razorblade?

A. It has an angled blade that sticks out the end of it, yes.

Q. Was that part facing you?

A. Yes.

Q. About how close was it to you?

A. Close enough that I cooperated.

Q. Where was it pointed?

A. In my face.

On cross-examination, Defendant's counsel asked Ms. Walston about the box cutter:

> Q. Okay. And you testified to the jury that you saw a box cutter, is that right?
>
> A. Yes.
>
> Q. Now, what I know to be a box cutter is a razorblade which is enclosed inside of a metal cover --
>
> A. Yeah.
>
> Q. -- is that correct?
>
> A. Correct.
>
> Q. And essentially what you do with a box cutter is you put the razorblade out and you pull --
>
> A. And you open a box.
>
> Q. -- pull it down and it opens a box?
>
> . . . .
>
> Q. And specifically the box cutter, do you remember if it was silver, black? Do you remember any color about it?
>
> A. I believe it was silver. I do. I know the razor part was silver.
>
> Q. Okay.
>
> A. That was in my face.

Although the weapon used here was a box cutter instead of a chef's knife, the facts here as to the use of the weapon are quite similar to *Clevenger*, where

> during the robbery, the man identified as defendant grabbed McDade's fifteen-year-old daughter, pulled her head back, and held the knife against her neck as he threatened to slit her throat. The State's evidence was clear and positive as to the dangerous weapon element, and there was no evidence from which a rational juror could find that the knife, based on its nature and the manner in which it was used, was anything other than a dangerous weapon.

Id. at ___, 791 S.E.2d at 256 (2016). The court in *Clevinger* held that since there was no conflicting evidence about the knife or its use, the trial court did not err by failing to give an instruction on common law robbery:

> Nor was there any evidence that a knife was not used during the robbery, that the knife used was different than the one from the knife set, or that the knife was used in a non-threatening manner. If the jury believed the State's evidence—that defendant robbed the SBC with the missing chef's knife—then it was required to find him guilty of robbery with a dangerous weapon. But if the jury was not convinced that defendant was the robber, then it was required to acquit him altogether. On the facts of this case, therefore, defendant was not entitled to a lesser-included instruction for common law robbery: he was either guilty of robbing the SBC by the threatened use of the chef's knife, or he was not guilty at all.

Id. at ___, 791 S.E.2d at 256 (citations omitted).

Here, the State's evidence was positive that the defendant held the box cutter, with the blade extended, in Ms. Walston's face and threatened to kill her if she did not cooperate. *See id.* ("Nor was there any evidence that a knife was not used during the robbery, that the knife used was different than the one from the knife set, or that the knife was used in a non-threatening manner."). A box cutter is one type of weapon which has been treated as deadly as a matter of law. *See State v. Wiggins*, 78 N.C. App. 405, 407, 337 S.E.2d 198, 199 (1985) ("The cutter has an exposed, sharply pointed razor blade clearly capable of producing death or great bodily harm. The victim testified that defendant held the cutter a couple of inches from her side as he instructed her to open the cash register. From that position a slight movement of defendant's hand in the direction of the victim's side clearly could have resulted in death or great bodily harm. Accordingly . . . we hold that the court did not err by instructing that the weapon was dangerous *per se*."). Therefore, as in *Clevinger*, Defendant was either guilty of robbing the Tobacco Road Outlet with the threat of using the open box cutter or he was not guilty at all. *See Clevinger*, ___ N.C. App at ___, 791 S.E.2d at 256. ("On the facts of this case, therefore, defendant was not entitled to a lesser-included instruction for common law robbery: he was either guilty of robbing the SBC by the threatened use of the chef's knife, or he was not guilty at all.").

IV. Conclusion

The trial court did not err in failing to instruct the jury on common law robbery.

NO ERROR.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JESSE JAMES TUCKER

No. COA18-1295

Filed 6 August 2019

Satellite-Based Monitoring—lifetime—sentence vacated—failure to present evidence—effective deterrence

A sentence imposing lifetime satellite-based monitoring (SBM) on defendant, a convicted sex-offender, was vacated where the State failed to present evidence—such as empirical or statistical reports—establishing that lifetime SBM effectively protects the public from sex offenders by deterring recidivism.

Judge BERGER dissenting.

Appeal by defendant from order entered 4 April 2018 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 5 June 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant.

DIETZ, Judge.

Defendant Jesse James Tucker appeals the trial court's imposition of lifetime satellite-based monitoring. We vacate the trial court's order

for the reasons discussed in *State v. Griffin*, __ N.C. App. __, 818 S.E.2d 336 (2018).

In *Griffin*, this Court held that the Fourth Amendment prohibits a trial court from imposing lifetime satellite-based monitoring on a convicted sex offender unless the State presents evidence that this type of monitoring "is effective to protect the public from sex offenders." *Id.* at __, 818 S.E.2d at 337. The Court further held that the efficacy of satellite-based monitoring is not self-evident—that is, that the State cannot rely solely on the common-sense assumption "that an offender's awareness his location is being monitored does in fact deter him from committing additional offenses." *Id.* at __, 818 S.E.2d at 341. Likewise, the Court held that the State cannot rely on "decisions from other jurisdictions stating that [satellite-based monitoring] curtails sex offender recidivism." *Id.* Simply put, after *Griffin*, trial courts cannot impose satellite-based monitoring unless the State presents actual evidence—such as "empirical or statistical reports"—establishing that lifetime satellite-based monitoring prevents recidivism. *Id.*

Here, the State did not present the sort of evidence required by *Griffin*—likely because the hearing in this case occurred before this Court decided *Griffin*. Nevertheless, *Griffin* is controlling precedent on direct appeal. Although the Supreme Court stayed the judgment of this Court in *Griffin*, it did not stay our mandate. *See State v. Griffin*, __ N.C. __, 817 S.E.2d 210 (2018). Moreover, *Griffin* largely relies on the reasoning of *State v. Grady*, __ N.C. App. __, __, 817 S.E.2d 18, 27–28 (2018) (*Grady II*), which the Supreme Court has not stayed. Thus, we are bound by the *Griffin* holding in this appeal. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We therefore vacate the imposition of lifetime satellite-based monitoring in this case.

We note that there is disagreement amongst the judges of this Court concerning the holdings of *Griffin* and its companion cases, and that review of several of those cases is pending in our Supreme Court. *See*, *e.g.*, *Griffin*, __ N.C. App. at __, 818 S.E.2d at 342–44 (Bryant, J., dissenting); *Grady*, __ N.C. App. at __, 817 S.E.2d at 28–31 (Bryant, J., dissenting); *State v. Westbrook*, __ N.C. App. __, 817 S.E.2d 794, 2018 WL 4200974, at *4–7 (2018) (Dillon, J. dissenting) (unpublished); *State v. White*, __ N.C. App. __, 817 S.E.2d 795, 2018 WL 4200979, at *9 (2018) (Dillon, J., dissenting) (unpublished); *State v. Gordon*, __ N.C. App. __, __, 820 S.E.2d 339, 349–50 (2018) (Dietz, J., concurring in the judgment). Thus, although we reject the State's arguments as squarely precluded by *Griffin* and *Grady II*, we observe that the State has preserved those arguments for further review in the Supreme Court.

VACATED.

Judge HAMPSON concurs.

Judge BERGER dissents with separate opinion.

BERGER, Judge, dissenting in separate opinion.

This Court is compelled by *Griffin* to vacate the trial court's order of lifetime satellite-based monitoring in this case. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). "Our panel is following [*Griffin*], as we should. However, I write separately to dissent because I believe [*Griffin*] is wrongfully decided[.]" *Watson v. Joyner-Watson*, ___ N.C. ___, ___, 823 S.E.2d 122, 126, (*Dillon, J., dissenting*) (2018).[1]

Here, Defendant entered an *Alford* plea to two counts of indecent liberties with a child. The State's factual recitation during the plea tended to show that there were two separate victims in this case, one was a seven year old girl and the other a nine year old girl. Defendant exposed his penis to the seven year old victim and instructed her to touch his penis. Defendant also pulled down the seven year old's pants and underwear and performed oral sex on the victim. As for the nine year old victim, the State's factual showing established that Defendant rubbed the girl's vagina. In addition, Defendant admitted that he was a recidivist, having been previously convicted of indecent liberties with a child in 2004.

When the trial court conducted a hearing on imposing lifetime SBM, the State presented a host of statistical information which showed high rates of recidivism among sex offenders. Relevant here, one study

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1. *Griffin* misconstrued *Grady II*. Underlying the analysis in *Grady II* is a totality of the circumstances approach for determining the reasonableness of imposing lifetime SBM, as instructed by the U.S. Supreme Court. One factor that could be considered includes information regarding the efficacy of North Carolina's SBM program. But this is not the only means by which the State could establish reasonableness. *Griffin*, however, effectively eliminated the individualized determinations clearly called for in *Grady II* in favor of a single factor test that solely concerns efficacy showings unique to North Carolina's program.

It could be argued that this Court, upon a proper review, could simply take judicial notice that the SBM program is beneficial in deterring sex offenders from re-offending. Upon such a finding, *Griffin* would forever be satisfied. Such a result, however, would be contrary to the individualized determinations called for by the Fourth Amendment, the U.S. Supreme Court's directive in *Grady I*, and this Court's prior holding in *Grady II*.

showed that sex offenders who victimized children and had more than one prior arrest had a recidivism rate of 44.3 percent. In addition, the State provided a North Carolina recidivism study of 988 sex offenders which showed 26 percent of registered sex offenders were rearrested. Based upon this showing, the trial court found that Defendant was a recidivist and that he committed a sexually violent offense; that the purpose of SBM was to deter future criminal acts by Defendant against children; and that imposing lifetime SBM on Defendant was reasonable.

In 2006, the General Assembly established the "continuous satellite-based monitoring system" to monitor certain sex offenders. Individuals subject to SBM include defendants who were convicted of "reportable convictions" and were (1) classified as sexually violent predators, (2) recidivists, or (3) "convicted of an aggravated offense." N.C. Gen. Stat. § 14-208.40(a)(1) (2017). If a trial court determines, based upon evidence presented by the prosecutor, that a convicted sex offender was "classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.23 or G.S. 14-27.28, the court shall order the offender to enroll in a satellite-based monitoring program for life." N.C. Gen. Stat. § 14-208.40A (2017). By the plain language of Section 14-208.40A, Defendant would be required to enroll in lifetime SBM.

However, the United States Supreme Court has stated that the government "conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady v. North Carolina*, 135 S. Ct. 1368, 1370, 191 L. Ed. 2d 459, 462 (2015). Thus, because North Carolina's SBM "program is plainly designed to obtain information[,]" monitoring through an ankle bracelet pursuant to the program constitutes a search under the Fourth Amendment. *Id.* at 1371, 191 L. Ed. 2d at 461 (2015). The Supreme Court stated in *Grady* that "[t]he Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at 1371, 191 L. Ed. 2d at 462.

Thus, the U.S. Supreme Court's opinion in *Grady v. North Carolina* merely applied the Fourth Amendment's requirement of reasonableness to SBM decisions. This should not have disturbed our SBM jurisprudence to the extent that it has. However, *Griffin* seized upon the opportunity provided by *Grady I* and *Grady II* to reimagine the Fourth Amendment, and this Court has been moving the goal posts for trial judges and prosecutors at every turn.

Reasonableness under the Fourth Amendment is intended to be a totality of the circumstances inquiry that includes consideration of "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* This Court has acknowledged that recidivist sex offenders have an expectation of privacy that is "appreciably diminished as compared to law-abiding citizens." *Grady II* ___ N.C. App. at ___, 817 S.E.2d at 28.

In *Griffin*, a case that did not involve a recidivist sex offender or lifetime SBM, this Court abandoned the reasonableness requirement based upon the totality of the circumstances familiar to Fourth Amendment inquiries, and instead manufactured a singular means by which reasonableness could be established. *Griffin's* new requirement is not only contrary to Fourth Amendment jurisprudence, but as the majority points out, lacking in common sense. Judge Bryant dissented in two recent SBM cases, including *Griffin*. Her reasoning provides the proper framework for analyzing SBM cases pursuant to the United States Supreme Court's direction in *Grady*. *See Grady II*, ___ N.C. App. ___, 817 S.E.2d 18 (*Bryant, J., dissenting*); *Griffin*, ___ N.C. App. ___, 818 S.E.2d 336 (*Bryant, J., dissenting*).

Here, Defendant is not simply susceptible of re-offending; Defendant actually re-offended. Defendant is an admitted recidivist who victimized two more children. Further, the trial court determined that Defendant engaged in a sexually violent offense. Defendant has a diminished expectation of privacy, and use of an ankle monitor is a lesser intrusive means of monitoring Defendant and collecting relevant data. The State has a legitimate governmental interest in protecting children and communities from convicted sex offenders, and the government's interest outweighs Defendant's diminished privacy interests. Because imposition of lifetime SBM is reasonable under the circumstances, and thus reasonable under the Fourth Amendment, *Griffin's* required showing is irrelevant to this individual defendant.

The trial court's order of lifetime SBM for Defendant should be affirmed.

STERLING TITLE CO. v. MARTIN

[266 N.C. App. 593 (2019)]

STERLING TITLE COMPANY, PLAINTIFF
v.
LAURA LOUISE MARTIN AND MAGNOLIA TITLE COMPANY, LLC, DEFENDANTS

No. COA18-1189

Filed 6 August 2019

1. Employer and Employee—covenant not to compete—restrictions—temporal and territorial—reasonableness

Restrictions in a covenant not to compete were unreasonably broad and therefore unenforceable where a title insurance company's former employee (an insurance underwriter) was prohibited from providing similar services for one year following termination to any customer with whom she had contact over the course of her employment, regardless of the customer's location and despite the employee's span of service of nearly ten years, which meant the covenant's reach amounted to an eleven-year restriction.

2. Trade Secrets—misappropriation—customer contact information—readily available

A title insurance company's claim under the North Carolina Trade Secrets Protection Act was properly dismissed where the customer information taken by a former employee, consisting of names and email addresses, was readily accessible and not entitled to trade secret protection.

3. Employer and Employee—covenant not to compete—breach of implied duty of good faith and fair dealing—enforceable contract required

Where a title insurance company's covenant not to compete was overly broad and therefore unenforceable, its claim against a former employee for breach of the implied duty of good faith and fair dealing was properly dismissed, since the claim rested on the existence of an enforceable contract.

4. Unfair Trade Practices—misappropriation of trade secrets—failure to state a claim

Where a title insurance company's claim for misappropriation of trade secrets was properly dismissed for failure to state a claim (since its customers' contact information did not constitute a trade secret subject to protection), plaintiff's claim that the dismissed violation also constituted an unfair and deceptive trade practice likewise had no merit.

5. Appeal and Error—abandonment of issues—conversion claim—remaining breach of contract claims

In an appeal from dismissal of multiple claims against a former employee, a title insurance company abandoned any issues related to its claims for conversion and breach of contract where it failed to raise any challenges to those dismissals.

Appeal by plaintiff from order entered 3 July 2018 by Judge Vince Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 April 2019.

Vann Attorneys, PLLC, by Joseph A. Davies, James R. Vann, and J.D. Hensarling, for plaintiff-appellant.

Forrest Firm, P.C., by John D. Burns, for defendants-appellees.

ZACHARY, Judge.

Plaintiff Sterling Title Company appeals from the trial court's order granting Defendants Laura Louise Martin and Magnolia Title Company, LLC's motion to dismiss Plaintiff's claims for breach of the parties' non-compete agreement, breach of the implied duty of good faith and fair dealing, violation of the North Carolina Trade Secrets Protection Act, unfair and deceptive trade practices, and conversion. We affirm.

Background

Plaintiff is a title insurance company located in Raleigh, North Carolina. Defendant Martin began working for Plaintiff as an underwriter in October 2007. Defendant Martin's duties in that role included "underwriting title, developing and maintaining business relationships with [Plaintiff's] clients, serving in a management role, and developing and selling business and maintaining accounts for [Plaintiff's] clients throughout the State of North Carolina." In 2008, Defendant Martin was licensed to practice law in North Carolina.

As part of her employment contract, Defendant Martin signed a Proprietary Information, Inventions, Non-Competition and Non-Solicitation Agreement ("Non-Compete Agreement" or "Agreement"). The Agreement included the following relevant provisions at issue on appeal:

> 3. No Conflicts or Solicitation.
>
> . . . . I also agree that for the period of my employment by the Company and for one (1) year after the date of

> termination of my employment with the Company I will not, either directly or through others: . . . . (c) solicit or attempt to solicit any customer or partner of the Company with whom I had contact during my employment with the Company to purchase a product or service competitive with a product or service of the Company; . . . or (d) provide products or services competitive with a product or service of the Company to any customer or partner of the Company with whom I had contact during my employment with the Company.

On 10 May 2017, while still employed by Plaintiff, Defendant Martin formed Magnolia Title Company, LLC, which, according to its website, "is an attorney-owned independent title agency providing real estate practitioners with extensive knowledge and exceptional service for 4 national title underwriters." Defendant Martin resigned from her employment with Plaintiff on 31 May 2017.

According to Plaintiff, within one year of resigning from her employment, Defendant Martin, through Defendant Magnolia Title Company,

> 35. . . . is and/or has solicited received, and/or has written business for at least one Sterling Title client in New Hanover County, North Carolina. As part of her job duties, Defendant Martin would travel to New Hanover County purportedly to meet with clients, to maintain accounts, and to develop and further business for Sterling Title. . . .
>
> 36. Plaintiff has learned, upon information and belief, that Defendants Martin and/or Magnolia Title have contacted, marketed to, and/or solicited business from Sterling Title clients in furtherance of their business development and scheme. Upon information and belief, Defendants Martin and Magnolia Title did so in direct violation of the Non-Compete Agreement and in an effort to compete directly with Sterling Title and/or to take clients from Sterling Title.
>
> 37. Upon information and belief, Defendants have contacted and/or visited with several of Sterling Title customers with whom Defendant Martin worked while employed by Sterling Title in an effort to obtain additional accounts and business on behalf of Defendant Magnolia Title.

After Defendant Martin's resignation, Plaintiff hired digital forensics examiner Derek Ellington to examine the company computer that

Defendant Martin used while working for Plaintiff. Ellington's affidavit was filed contemporaneously with Plaintiff's complaint ("Ellington Affidavit"). According to the Ellington Affidavit, on 28 April 2017, "a folder called *Magnolia* was created within the Personal folder of the main Dropbox folder [that Defendant Martin had installed] on the Sterling Title Company Dell computer." The folder was found to contain "a list of 51 names and email addresses" in a spreadsheet entitled "*Happy_Hour_with_Carolina_Bank_Sterling_-guest_list-03-22-13(1).xlsx*," which, according to the Ellington Affidavit, "is consistent with being a contact list for Sterling Title Company."

On 7 November 2017, Plaintiff filed a complaint against Defendant Martin asserting claims for breach of the Non-Compete Agreement and breach of the implied duty of good faith and fair dealing. Plaintiff also asserted claims against both Defendants for violation of the North Carolina Trade Secrets Protection Act, unfair and deceptive trade practices, and conversion. On 10 January 2018, Defendants filed a motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that "the Restrictive Covenants at issue are unenforceable as a matter of law," and that the allegations in the complaint otherwise failed to state a claim upon which relief could be granted. By order entered 3 July 2018, the trial court dismissed Plaintiff's complaint with prejudice, concluding that the Non-Compete Agreement was "unenforceable against the Defendants under North Carolina law," and that the complaint otherwise failed to state a claim for which relief could be granted. Plaintiff timely appealed.

On appeal, Plaintiff argues that the trial court erred in granting Defendants' motion to dismiss because (1) the Non-Compete Agreement is a valid and enforceable contract, and (2) the complaint otherwise states cognizable claims for relief as to each of Plaintiff's asserted causes of actions.

Discussion

I. Standard of Review

"In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quotation marks omitted). Under this standard,

> [d]ismissal is proper . . . when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Id. at 784, 618 S.E.2d at 204 (quotation marks omitted).

II. Covenant Not to Compete

[1] It is well established that "[a] covenant in an employment agreement providing that an employee will not compete with his former employer is not viewed favorably in modern law." *Hartman v. Odell and Assocs., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994) (quotation marks omitted), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). In order to be enforceable, an otherwise procedurally valid covenant not to compete must be both (1) "reasonable as to time and territory," and (2) "designed to protect a legitimate business interest of the employer." *Id.* "The reasonableness of a non-compete agreement is a matter of law for the court to decide." *Farr Assocs. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000). "In evaluating reasonableness as to time and territory restrictions, we must consider each element in tandem . . . . Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable." *Id.* at 280, 530 S.E.2d at 881 (citation omitted).

In the instant case, there is no question but that the Non-Compete Agreement is designed to protect Plaintiff's legitimate business interest, i.e., maintaining customer relationships. *See United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 651, 370 S.E.2d 375, 381 (1988) ("[P]rotection of customer relationships and goodwill against misappropriation by departing employees is well recognized as a legitimate protectable interest of the employer."); *Farr*, 138 N.C. App. at 280, 530 S.E.2d at 881 ("[An employer's] desire to keep its client base intact when its employees depart is a legitimate business interest."). Nevertheless, "[i]f a contract . . . in restraint of competition is too broad to be a reasonable protection to the employer's business it will not be enforced." *Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828, *reh'g denied*, 325 N.C. 231, 381 S.E.2d 792, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 531 (1989).

We therefore must consider the scope of the temporal and territorial restrictions in the Non-Compete Agreement in order to determine

whether the Agreement is enforceable as a matter of law. "If not, then the trial court properly granted" Defendants' motion to dismiss Plaintiff's breach of contract claim. *Farr*, 138 N.C. App. at 279, 530 S.E.2d at 880.

a. Reasonableness as to Territory

This Court has identified the following factors as relevant to the determination of whether the geographic scope of a non-compete agreement is reasonable:

> (1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Hartman, 117 N.C. App. at 312, 450 S.E.2d at 917.

Generally, "[w]here the alleged primary concern is the employee's knowledge of the customers, the territory should only be limited to areas in which the employee made contacts during the period of his employment." *Id.* at 313, 450 S.E.2d at 917 (quotation marks omitted). Indeed, our courts have also recognized "the validity of geographic restrictions that are limited not by area, but by a client-based restriction." *Farr*, 138 N.C. App. at 281, 530 S.E.2d at 882 (citation omitted).

The Non-Compete Agreement in the present case does not prevent Defendant Martin from operating within any particular locale. Instead, it prevents Defendant Martin from soliciting or providing a competitive product or service to any "customer or partner of [Plaintiff] with whom [she] had contact during [her] employment with [Plaintiff]." This client-based restriction is, on its face, very broad. It prohibits Defendant Martin from soliciting or providing competitive services to all of Plaintiff's current or former clients with whom Defendant Martin had any form of "contact" during her employment, regardless of the client's location, the extent of the client's "contact" with Defendant Martin during her employment,[1] or the amount of time that has passed since the client

1. As in *Farr*, the Non-Compete Agreement in this case does not define "customer or partner," and thus the restriction would "extend to clients' offices that never contacted" either Plaintiff or Defendant Martin. *Farr*, 138 N.C. App. at 282, 530 S.E.2d at 882 ("If [the employer] worked for a client in one city, but that client has offices in *other* cities, the non-compete agreement ostensibly prevents [the employee] from working for that client in *any* of its offices, not merely the office with which [the employer] once worked. [This] factor[ ] work[s] to expand the reach of the covenant.").

ceased doing business with Plaintiff. The expansiveness of this restriction suggests that the Non-Compete Agreement is unreasonable. *See id.* at 282, 530 S.E.2d at 882 ("Although [the employer] had a legitimate reason for wanting to prevent departing employees from misappropriating clients, the number of clients embraced by the covenant, as compared to the number of clients serviced by [the employee], is unreasonable.").

b. Reasonableness as to Time

Although we conclude that the client-based restriction in the instant case tends to indicate that the Non-Compete Agreement is unreasonable, we next consider the temporal restriction in order to determine whether "the combined effect of the two" nevertheless renders the Non-Compete Agreement enforceable. *Id.* at 280, 530 S.E.2d at 881 ("A longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa*.").

"[T]ime restrictions of a certain length are presumed unreasonable absent a showing of special circumstances. A five-year time restriction is the outer boundary which our courts have considered reasonable . . . ." *Id.* Even so, "only 'extreme conditions' will support a five-year covenant." *Hartman*, 117 N.C. App. at 315, 450 S.E.2d at 918.

Moreover, the time period identified in a non-compete agreement will not always be controlling as the operative time restriction in each case. "[W]hen a non-compete agreement reaches back to include clients of the employer during some period in the past, the look-back period must be added to the restrictive period to determine the real scope of the time limitation." *Farr*, 138 N.C. App. at 280, 530 S.E.2d at 881.

In the instant case, although the applicable time restriction in the Non-Compete Agreement is stated as "the period of [Defendant Martin's] employment . . . and for one (1) year after the date of termination," the Agreement also restricts Defendant Martin from soliciting or providing competitive services to any of Plaintiff's customers with whom she had contact during her employment, a period of roughly ten years. Thus, "[o]n an operative level," the Agreement is in essence an 11-year restriction. *Professional Liab. Consultants v. Todd*, 122 N.C. App. 212, 219, 468 S.E.2d 578, 582 (Smith, J., dissenting), *rev'd for the reasons stated in the dissent*, 345 N.C. 176, 478 S.E.2d 201 (1996). That is, the Agreement prevents Defendant Martin, for a period of one year, from doing business with Plaintiff's former or current clients with whom Defendant Martin had any contact during the past ten years, even if the customer ceased doing business with Plaintiff nine years and 11 months ago. Such a restriction is "patently unreasonable." *Id.* at 219, 468 S.E.2d at 583.

Accordingly, in light of its overarching temporal and territorial restrictions, we conclude that the Non-Compete Agreement is "unreasonably broad and therefore unenforceable." *Farr*, 138 N.C. App. at 283, 530 S.E.2d at 883. Accordingly, the trial court properly granted Defendants' motion to dismiss Plaintiff's claims for breach of contract.

c. Sufficiency of the Allegations

The trial court's dismissal of Plaintiff's breach of contract claim was also proper in that Plaintiff's complaint fails to allege facts sufficient to establish a breach of the Non-Compete Agreement, even assuming it were enforceable. Plaintiff argues that "Paragraphs 35-37 of the Complaint allege facts sufficient to establish a breach of the contract, particularly at the 12(b)(6) stage." Paragraphs 36 and 37, however, set forth nothing more than Plaintiff's "belief" that Defendant Martin has "contacted and/or visited with *several of [Plaintiff's] customers*," wholly failing to identify any such customer that she is alleged to have solicited in breach of the Agreement. (Emphasis added). *See Feltman v. City of Wilson*, 238 N.C. App. 246, 252, 767 S.E.2d 615, 620 (2014) ("Under notice pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial . . . ."). Moreover, while paragraph 35 of the complaint alleges that Defendant Martin "is and/or has solicited received, and/or has written business for at least one [of Plaintiff's clients] in New Hanover County, North Carolina," the complaint fails to allege that this unnamed New Hanover County client was, in fact, one "with whom [Defendant Martin] had contact during [her] employment." Accordingly, even assuming the Non-Compete Agreement to be enforceable, Plaintiff has not pleaded sufficient facts to establish a breach of the Agreement.

III. Trade Secrets Protection Act Claim

[2] Plaintiff's third cause of action is against both Defendants for violation of the North Carolina Trade Secrets Protection Act.

Chapter 66, Article 24, section 153 of the North Carolina General Statutes provides that an "owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret." N.C. Gen. Stat. § 66-153 (2017). For purposes of the Act, a "trade secret" means

> [b]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable

> through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. § 66-152(3).

Under North Carolina law, "[t]o plead misappropriation of trade secrets, a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 510, 606 S.E.2d 359, 364 (2004) (quotation marks omitted). In determining whether the information identified in a complaint constitutes a "trade secret" for purposes of the Act, relevant factors include:

> (1) the extent to which information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; (4) the value of information to business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003). Information will not merit trade secret protection where the information is "either generally known in the industry . . . or [is] readily ascertainable by reverse engineering." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 470, 579 S.E.2d 449, 454 (2003).

In the instant case, Plaintiff alleges that Defendants misappropriated its trade secrets, to wit: "Plaintiff's customer identity and customer account information." In particular, the Ellington Affidavit attached to Plaintiff's complaint states that Defendant Martin saved to her personal Dropbox folder a document titled "*Happy_Hour_with_Carolina_Bank_Sterling_-guest_list-03-22-12(1).xlsx*," which is purportedly "a list of 51 names and email addresses and is consistent with being a contact list for Sterling Title Company." Plaintiff maintains that "[b]ecause the Complaint clearly identifies a specific document which was misappropriated," i.e., the contact list, Plaintiff "has sufficiently pled misappropriation of trade secrets." Nevertheless, even assuming that Plaintiff's identification of this document is sufficient to allege the

existence of a trade secret, we conclude as a matter of law that such a document does not merit trade secret protection under the Act.

The guest list is identified as containing the "names and email addresses" of Plaintiff's "contact[s]." Although "information regarding customer lists . . . can qualify as a trade secret under [the Act]," *Krawiec v. Manly*, 370 N.C. 602, 610, 811 S.E.2d 542, 548 (2018), such is the case only to the extent that the information is not "generally known or readily ascertainable through independent development or reverse engineering." N.C. Gen. Stat. § 66-152(3)(a); *Krawiec*, 370 N.C. at 610, 811 S.E.2d at 548. Assuming that the 51 "contacts" are, in fact, Plaintiff's customers, Plaintiff fails to allege—and there is nothing in the pleadings to support—"that the lists contained any information that would not be readily accessible" to Defendant Martin but for her employment with Plaintiff.[2] *Krawiec*, 370 N.C. at 611, 811 S.E.2d at 549. Thus, because the complaint fails to identify Plaintiff's "customer identity and customer account information" as consisting of anything other than the e-mail addresses of 51 "contacts," Plaintiff has failed to allege a trade secret deserving of protection under the Act. *See id.* at 610, 811 S.E.2d at 548 ("[I]n light of the requirements of subsection 66-152(3), a customer database [does] not constitute a trade secret when the record show[s] that defendants could have compiled a similar database through public listings such as trade show and seminar attendance lists." (quotation marks omitted)).

Accordingly, the trial court properly dismissed Plaintiff's claim for violation of the North Carolina Trade Secrets Protection Act.

IV. Remaining Claims

[3] Plaintiff's second cause of action is against Defendant Martin for breach of the implied duty of good faith and fair dealing under the Non-Compete Agreement. The trial court's dismissal of this claim was proper in light of our holding that the Non-Compete Agreement is unenforceable. Because Plaintiff cannot establish the existence of an enforceable contract, Plaintiff cannot state a claim that Defendant Martin "somehow breached implied terms" of that contract. *Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 180 (2012).

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2. In fact, as Defendants argued at the hearing on their motion to dismiss, the business at issue in this case "is the provision of title insurance. Your customers are real estate attorneys licensed in the state . . . you're selling title insurance in. It's no secret who the potential customers of these companies are. You can go to the state bar and look up the real estate lawyers in your town."

[4] Plaintiff next challenges the trial court's dismissal of its claim against Defendants for unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. In doing so, however, Plaintiff only argues that, because its complaint properly stated a claim for violation of the Trade Secrets Protection Act, the complaint therefore also sufficiently stated a claim for unfair and deceptive trade practices. *See Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992) ("If the violation of the Trade Secrets Protection Act satisfies [the] three prong test [to maintain a cause of action for unfair trade practices], it would be a violation of N.C. Gen. Stat. § 75-1.1."), *cert. dismissed and disc. review denied*, 333 N.C. 344, 427 S.E.2d 617 (1993). Because we conclude that Plaintiff's complaint fails to state a claim for violation of the Trade Secrets Protection Act, the trial court's order cannot be disturbed on this ground.

[5] Lastly, Plaintiff does not challenge the trial court's dismissal of its conversion claim, nor does it challenge the trial court's dismissal of its breach of contract claim except as it relates to the non-compete and non-solicitation restrictions. Accordingly, Plaintiff has abandoned any such challenges not presented. *See* N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

Conclusion

For the reasons contained herein, we affirm the trial court's order granting Defendants' motion to dismiss.

AFFIRMED.

Judges DIETZ and MURPHY concur.

SUAREZ v. AM. RAMP CO.

[266 N.C. App. 604 (2019)]

GAVIN SUAREZ, MINOR CHILD, BY AND THROUGH GUARDIAN AD LITEM, RICHARD P. NORDAN, ESQ.; ERIC SUAREZ AND JEAN SUAREZ, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF GAVIN SUAREZ, PLAINTIFFS

v.

AMERICAN RAMP COMPANY (ARC); TOWN OF SWANSBORO, DEFENDANTS

v.

ALAINA HESS, THIRD-PARTY DEFENDANT

No. COA19-36

Filed 6 August 2019

1. Appeal and Error—interlocutory appeal—pending claims against one defendant—risk of inconsistent verdicts—substantial right

In a negligence action brought by plaintiff parents and their eighteen-month-old child, where the child suffered severe burns at a town-owned skateboard park upon falling onto a hot metal ramp, the trial court's dismissal of plaintiffs' claims against the town was immediately appealable even though all claims against the ramp manufacturer remained pending. Holding separate trials against each defendant would have carried a risk of inconsistent verdicts on common factual issues (namely causation and damages) and therefore the appeal affected a substantial right.

2. Cities and Towns—injury at town-owned skateboard park—town's liability—section 99E-21—no complete immunity defense

The trial court improperly dismissed a negligence action brought against a town by parents of an eighteen-month-old child who suffered severe burns at a town-owned skateboard park (after he fell onto a hot metal ramp), because N.C.G.S. § 99E-21—which applies to governmental entities operating skateboard parks and limits their liability for injuries resulting from "hazardous recreational activities"—did not provide a complete immunity defense. Further, even if section 99E-21 applied to the case (which it did not, because the child was not engaging in the covered activity when he was injured), plaintiffs expressly alleged the town engaged in acts falling under the two statutory exceptions to limited governmental liability in N.C.G.S. § 99E-25(c).

3. Premises Liability—injury at town-owned skateboard park—duty to warn or take steps to prevent—hazardous condition—sufficiency of pleading

The trial court erred by dismissing negligence claims brought against a town by parents of an eighteen-month-old child who suffered severe burns at a town-owned skateboard park (after he fell onto a hot metal ramp), where plaintiffs adequately alleged that the town knew or should have known that the heat-attracting ramps—which were installed in a hot climate area lacking natural shade—presented a risk of burn injuries, and therefore the town owed a duty to warn or take steps to prevent such injuries. Further, the allegations in the complaint did not establish the hot metal ramp to be an "open and obvious condition" for which no duty to warn existed.

4. Premises Liability—injury at town-owned skateboard park—gross negligence—sufficiency of pleading

The trial court erred by dismissing a claim of gross negligence brought against a town by parents of an eighteen-month-old child who suffered severe burns at a town-owned skateboard park (after he fell onto a hot metal ramp), where plaintiffs adequately alleged that the town acted with conscious or reckless disregard for others' safety when it placed heat-attracting ramps in a hot climate area without natural shade, did not inspect the ramps, failed to take steps to prevent the ramps from overheating, and failed to warn others of the risk of burn injuries.

Appeal by Plaintiffs from Order entered 4 September 2018 by Judge Albert D. Kirby, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 8 May 2019.

Zaytoun Law Firm, PLLC, by Matthew D. Ballew, Robert E. Zaytoun, and John R. Taylor, for plaintiffs-appellants.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Clay Allen Collier, and Ward and Smith, PA, by Michael J. Parrish, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Gavin Suarez (minor Plaintiff), by and through his Guardian *ad Litem*, and his parents, Eric and Jean Suarez, (collectively, Plaintiffs) appeal from the trial court's Order dismissing their

Complaint against the Town of Swansboro (Town).[1] The Record before us tends to show the following:

On 21 June 2017, Plaintiffs filed a Complaint against the Town and ARC.[2] The Complaint alleged, in relevant part, that the Town, a North Carolina municipal corporation, owned the Swansboro Skate Park (Skate Park). In the fall of 2011, the Town sent out an invitation for proposals for the construction of a skateboarding park. The Town specifically requested skateboarding ramps be made of "stainless steel or other corrosion resistant material" and indicated that the ramps would "be installed by the Public Works Department of [the Town], under the direction of a certified playground safety inspector who is a Town Employee."

The Town contracted with ARC to design, manufacture, and sell to the Town skateboarding ramps for the Skate Park. The Complaint further alleged the Town and ARC agreed to the sale and purchase of the ramps containing a "heat-attractive surface" and did so knowing the Skate Park was located in a hot-climate area with a lack of natural shade and in direct sunlight, presenting the risk of potential burn injuries. In December 2011, an employee or agent of ARC inspected the installed ramps. However, this inspection did not include any checks related to hazards of burn injuries or overheating of the ramps. Plaintiffs alleged ARC and the Town willfully and wantonly chose not to inspect the ramps installed at the Skate Park for "burn injury potential." The Skate Park opened in early 2012. While the Town posted signs at the Skate Park, none of these signs warned visitors that the ramps may become hot enough to cause burn injuries. As such the Complaint alleged: "Pursuant to N.C. Gen. Stat. § 99E-25(c)(1) . . . [the Town] . . . failed to guard against or warn of a dangerous condition of which guests and participants at the Skate Park did not have notice and cannot reasonably be expected to have notice."

On 14 August 2014, the minor Plaintiff and his older brother were being supervised by their babysitter, Hess. It was a nice warm summer day, and Hess took the children to the municipal park where the Skate Park was located. When they arrived, the Skate Park was not being used. The minor Plaintiff's older brother wanted to see the Skate Park, and

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1. Defendant American Ramp Company (ARC) and Third-Party Defendant Alaina Hess (Hess) are not parties to the instant appeal.

2. We accept the factual allegations of the Complaint as true for the sole purpose of reviewing the Order dismissing Plaintiff's claims against the Town on the face of the Complaint. As such, this opinion should not be construed as judicially establishing any fact at issue in this case.

Hess allowed the children to explore the Skate Park. The group had only been in the Skate Park for a matter of minutes when the minor Plaintiff (then just shy of 18 months old) followed his older brother up a ramp and fell. The minor Plaintiff immediately began screaming and crying. Hess took the child to a bathroom to clean up and observed the skin on his hands and both of his legs had bubbled up into large blisters. Hess ultimately took the minor Plaintiff to Carteret General Hospital where the minor Plaintiff's mother worked. The minor Plaintiff was subsequently transferred by helicopter to the UNC Hospital Pediatric Burn Department.

The Complaint alleged the Plaintiffs suffered damages as a result of the minor Plaintiff's burn injuries caused by the hot ramp. It further alleged Plaintiffs and Hess did not have and could not have had notice of the hazardous condition at the Skate Park. Plaintiffs asserted claims against both ARC and the Town. Against the Town specifically, Plaintiffs claimed both negligence and gross negligence by the Town, grounded in allegations of failure to warn, failure to inspect and maintain, and failure to take corrective measures or precautions to prevent hot skateboarding ramps.

On 1 September 2017, ARC filed its Answer. In its Answer, ARC raised several defenses, including, *inter alia*, the possibility of intervening negligence of a third party. The third party in question, Hess, was served with summons as a third-party defendant. On 19 July 2018, the Town filed an Amended Answer, which included a Motion to Dismiss asserting "Plaintiffs' Complaint fails to establish jurisdiction over the Town and fails to state a claim against the Town upon which relief may be granted" pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. Town also raised the defenses of the intervening negligence of Hess, the contributory negligence of the minor Plaintiff, and governmental immunity, among others.

The Town's Motion to Dismiss came on for hearing on 13 August 2018 in Onslow County Superior Court. At this hearing, the Town argued (1) it was entitled to immunity from suit under the provisions of N.C. Gen. Stat. § 99E-21 *et seq.*, which provide certain protections for governmental operators of skateboarding parks; and (2) alternatively, Plaintiffs' Complaint failed to plead essential elements of a premise-liability claim against the Town to support either negligence or gross-negligence claims. On 4 September 2018, the trial court entered its Order granting the Town's Motion to Dismiss "pursuant to [Rule] 12(b)(1) and/or (6)[.]" The trial court dismissed all claims against the Town with prejudice. Plaintiffs filed Notice of Appeal on 25 September 2018.

Appellate Jurisdiction

[1] As an initial matter, we must determine whether this appeal is properly before us. As Plaintiffs acknowledge, this appeal is interlocutory because it leaves Plaintiffs' claims against ARC pending. *See*, *e.g.*, *Cunningham v. Brown*, 51 N.C. App. 264, 266, 276 S.E.2d 718, 721 (1981) (holding that "[a]n order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" is interlocutory and generally not appealable). The Town, in turn, has filed a Motion to Dismiss the Appeal on this basis.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citations omitted). "Notwithstanding this cardinal tenet of appellate practice, immediate appeal of interlocutory orders and judgments is available in at least two instances." *Id.* at 161, 522 S.E.2d at 579. First, under N.C.R. Civ. P. 54(b), "immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay." *Id.* at 161-62, 522 S.E.2d at 579 (citations omitted). Here, the trial court did not include a Rule 54(b) certification in its Order.[3]

Second, "immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.' " *Id.* at 162, 522 S.E.2d at 579 (citations omitted). "[A]n interlocutory order affects a substantial right if the order 'deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered.' " *Id.* (alteration in original) (citation omitted) (quoting *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991)). Here, Plaintiffs contend the possibility of inconsistent verdicts on overlapping factual issues against the two Defendants in this case is such a substantial right.

"[T]he right to avoid the possibility of two trials *on the same issues* can be . . . a substantial right." *See Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (alteration in original) (citation and quotation marks omitted). We have explained:

> This general proposition is based on the following rationale: when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the

3. It is unclear why the trial court's Order does not contain a Rule 54(b) certification, except to say the Record before us does not reflect Plaintiffs requested one.

> appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

Davidson v. Knauff Ins. Agency, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989) (alteration in original) (citation omitted) (quoting *Green*, 305 N.C. at 608, 290 S.E.2d at 596).

Here, Plaintiffs identify a number of potentially overlapping factual issues that may result in inconsistent verdicts should they be required to pursue separate trials against the Town and ARC, which they maintain affects a substantial right. We agree with Plaintiffs. At a minimum, separate trials would potentially raise inconsistencies in issues of both causation and damages. This gives rise to a substantial right allowing for an immediate appeal. *See Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982) ("[T]he plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries is indeed a substantial right."). In particular, we note a key issue in any trial against both Defendants will be the intervening or superseding negligence of Hess, and different juries could reach inconsistent verdicts on that question. *Cf. Hoots v. Pryor*, 106 N.C. App. 397, 402, 417 S.E.2d 269, 273 (1992) (holding that a scenario where one trial might find a party contributorily negligent while another might not creates a substantial risk of inconsistent verdicts). Therefore, we conclude Plaintiffs' interlocutory appeal is properly before us as affecting a substantial right. Thus, we deny the Town's Motion to Dismiss the Appeal.

Issues

The dispositive issues in this case are: (I) Whether Plaintiffs' Complaint states claims against the Town sufficient to withstand the special liability provisions of N.C. Gen. Stat. § 99E-21 *et seq.*; (II) Whether Plaintiffs adequately alleged the Town knew or should have known of the hazardous condition caused by the hot metal ramp; and (III) Whether the Plaintiffs adequately alleged claims for gross negligence sufficient to withstand the Town's Motion to Dismiss.

Standard of Review

The trial court's Order states the Town's Motion to Dismiss was based on N.C.R. Civ. P. "12(b)(1) and/or (6)." However, the Order does not identify the particular rule or rules upon which it actually based its dismissal. "While we apply a *de novo* standard when reviewing either a

Rule 12(b)(1) or 12(b)(6) dismissal, identifying the precise civil procedure rule underlying a dismissal is critical because it dictates our scope of review." *Holton v. Holton*, ___ N.C. App. ___, ___, 813 S.E.2d 649, 654 (2018). The primary difference is that "[u]nlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Cunningham v. Selman*, 201 N.C. App. 270, 280, 689 S.E.2d 517, 524 (2009) (citation and quotation marks omitted).

Here, it is apparent the trial court limited its consideration to the face of the Complaint in compliance with Rule 12(b)(6). Moreover, to the extent the trial court perceived the Town's Motion to Dismiss as raising an immunity defense, our Courts generally recognize immunity as a defense that can be raised under Rules 12(b)(1), 12(b)(2), or 12(b)(6).[4] *See generally Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 677 S.E.2d 203 (2009). In any event, as discussed herein, we determine the Town's Motion to Dismiss did not implicate an immunity defense and thus did not implicate subject-matter jurisdiction under Rule 12(b)(1). In addition, the trial court dismissed Plaintiffs' claims "with prejudice," which further indicates it was relying on Rule 12(b)(6) and not Rule 12(b)(1). *See Holton*, ___ N.C. App. at ___, 813 S.E.2d at 655 (dismissal under Rule 12(b)(1) is without prejudice (citation omitted)). It follows then that the trial court's dismissal in this case was premised on Rule 12(b)(6), and we review this matter as such.

"The standard of review of an order granting a [Rule] 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Gilmore v. Gilmore*, 229 N.C. App. 347, 350, 748 S.E.2d 42, 45 (2013) (alteration in original) (citation and quotation marks omitted). "On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.* (citation and quotation marks omitted).

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4. This raises a tangled issue that we need not address here. It remains somewhat of an open question in North Carolina as to under which section of Rule 12 sovereign immunity falls. *See Lake v. State Health Plan for Teachers & State Emps.*, 234 N.C. App. 368, 370-71 n.3, 760 S.E.2d 268, 271 n.3 (2014) (citations omitted). *See Can Am S., LLC v. State of N.C.*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014), for a discussion of why this matters under North Carolina appellate practice for purposes of appealability.

Analysis

I. N.C. Gen. Stat. § 99E-21 *et seq.*

[2] The primary issue argued before both the trial court and this Court is whether Article 3 of Chapter 99E of our General Statutes, entitled "Hazardous Recreation Parks Safety and Liability" (Hazardous Recreational Activities Act), serves as a complete bar to Plaintiffs' Complaint. *See* N.C. Gen. Stat. § 99E-21 *et seq.* (2017). The Town contends the Hazardous Recreational Activities Act serves as a complete immunity defense to Plaintiffs' claims akin to governmental or sovereign immunity. We disagree.

The Hazardous Recreational Activities Act serves to limit the liability of governmental entities operating skateboard parks used for skateboarding, inline skating, or freestyle bicycling.[5] Its stated purpose

> is to encourage governmental owners or lessees of property to make land available to a governmental entity for skateboarding, inline skating, or freestyle bicycling. It is recognized that governmental owners or lessees of property have failed to make property available for such activities because of the exposure to liability from lawsuits and the prohibitive cost of insurance, if insurance can be obtained for such activities. It is also recognized that risks and dangers are inherent in these activities, which risks and dangers should be assumed by those participating in those activities.

N.C. Gen. Stat. § 99E-21 (2017).

This purpose is carried out in two ways. First, the Statutes impose duties upon those engaged in "hazardous recreational activities"—"Any person who participates in or assists in hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself or other persons or property that result from these activities." *Id.* § 99E-24(a) (2017). The same is true for "[a]ny person who observes hazardous recreational activities[.]" *Id.*

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5. Article 3 to Chapter 99E of our General Statutes was enacted in 2003 in legislation titled: An Act to Establish the Duties of Operators of Skateboard Parks, to Establish the Duties of Persons Who Engage in Certain Hazardous Recreational Activities, and to Limit the Liability of Governmental Entities for Damage or Injuries that Arise Out of a Person's Participation in Certain Hazardous Recreational Activities and that Occur in an Area Designated for Certain Hazardous Recreational Activities. 2003 N.C. Sess. Law 334 (N.C. 2003).

Second, the Hazardous Recreational Activities Act limits liability for governmental entities and employees:

> No governmental entity or public employee who has complied with G.S. 99E-23 shall be liable to any person who voluntarily participates in hazardous recreation activities for any damage or injury to property or persons that arises out of a person's participation in the activity and that takes place in an area designated for the activity.

Id. § 99E-25(b) (2017). In turn, N.C. Gen. Stat. § 99E-23 simply requires governmental operators of skateboard parks to require the use of helmets, elbow pads, and kneepads while skateboarding at a skateboard park. *Id.* § 99E-23 (2017).

The protections against liability afforded governmental entities under these statutes are, however, not unlimited. First, Section 99E-25 itself provides two exceptions to its limitation on liability:

> (1) The failure of the governmental entity or public employee to guard against or warn of a dangerous condition of which a participant does not have and cannot reasonably be expected to have had notice.
>
> (2) An act of gross negligence by the governmental entity or public employee that is the proximate cause of the injury.

Id. § 99E-25(c)(1)-(2).

Second, these statutes, by their plain language, only apply to persons engaging in "hazardous recreational activities," which is narrowly defined as only including "[s]kateboarding, inline skating, or freestyle bicycling." *Id.* § 99E-22(2) (2017). Further, "inherent risk" is defined as: "Those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, inline skating, and freestyle bicycling." *Id.* § 99E-22(3).

When construing these statutory provisions together, it is evident the Hazardous Recreational Activities Act is not intended to give a governmental actor blanket immunity from every negligence or premise-liability claim arising in a skateboard park. Rather, it operates to limit liability of governmental entities for the *increased* risk of injuries caused by skateboarding, inline skating, and freestyle bicycling that is inherent in those activities. This distinction is important because immunity serves as more than an affirmative defense because it "not

only prevents courts from entering judgments against our state government, but also protects the government from being haled into court in the first instance." *Ballard v. Shelley*, ___ N.C. App. ___, ___, 811 S.E.2d 603, 605 (2018) (citation omitted). Here, N.C. Gen. Stat. § 99E-21 *et seq*. does not bar all claims by an injured person covered under the Act but rather limits those claims and provides for additional defenses. Indeed, we find this distinction further supported by the statutes themselves. Chapter 99E is entitled "Special Liability Provisions," and each article addresses standards of liability for different types of potentially hazardous activities. The Hazardous Recreational Activities Act itself differentiates its provisions from immunity: "Nothing in this section shall be deemed to be a waiver of sovereign immunity under any circumstances." N.C. Gen. Stat. § 99E-25(d). Governmental or sovereign immunity is thus an additional defense that may apply to a particular claim, including a claim falling under Section 99E-21 *et seq*.[6]

In this case, on the face of the Complaint, the 18-month-old Plaintiff was not engaged in a "hazardous recreational activity," as narrowly defined by the statute, but rather was simply playing with his brother within the Skate Park when he contacted the hot metal on the ramp. Indeed, it is not apparent, and certainly not on the face of this Complaint, that severe burns caused by scorching hot metal is an inherent risk of skateboarding or other hazardous recreational activity, such that the minor Plaintiff assumed the risk of such injuries under N.C. Gen. Stat. § 99E-24.

Moreover, even assuming the minor Plaintiff's conduct falls within the ambit of the Hazardous Recreational Activities Act and the limitation of liability under N.C. Gen. Stat. § 99E-25(b), Plaintiffs, in their Complaint, expressly alleged the Town engaged in acts falling under the two statutory exceptions in Section 99E-25(c). First, the Complaint alleges the Town failed to guard against or warn of a dangerous condition of which Plaintiffs and Hess had no notice and could not reasonably be expected to have had notice. Specifically, the Complaint alleges the Town failed to inspect the ramps, take precautions against the ramps becoming dangerously hot, or warn of the potential danger of the hot metal ramps. The Complaint further specifically alleges Plaintiffs and Hess had no notice of the dangerous condition and could not reasonably be expected to have had notice of the burning hot metal. Additionally,

6. Indeed, in the trial court below, the Town tabled its arguments regarding governmental or sovereign immunity for potential later proceedings. We, obviously, express no opinion on the merits or applicability of such immunity defenses to this case.

the Complaint also alleges the Town engaged in gross negligence by willfully and wantonly choosing not to inspect the ramps, despite knowing the ramps were constructed of metal and left in an unshaded area of the park. Consequently, the Complaint alleges claims not barred by Section 99E-25(b). As such, to the extent the trial court dismissed the Complaint against the Town on the basis of the Hazardous Recreational Activities Act on the face of the Complaint, this was error and we reverse the trial court on this ground.

II. The Town's Actual or Constructive Knowledge of a Dangerous Condition

[3] Plaintiffs also argue the trial court erred in dismissing their negligence claims against the Town. The Town contends the trial court correctly dismissed Plaintiffs' claims, arguing the allegations in the Complaint fail to allege the Town breached any duty owed to the Plaintiffs. Specifically, the Town asserts it had no duty to Plaintiffs to warn or take steps to prevent the burn injuries to the minor Plaintiff because there is no allegation the Town knew or should have known of the dangerous condition. *See generally Steele v. City of Durham*, 245 N.C. App. 318, 325, 782 S.E.2d 331, 336 (2016).

However, the Complaint alleges that the Town and ARC contracted for the design, manufacture, and sale of the "heat-attractive" ramps with both Defendants knowing the planned location of the skate park "and its lack of natural shade, and direct natural sunlight." Further, the Complaint alleges the Defendants "knew or should have known that the heat-attractive ramps placed in a location with full, direct sunlight in a hot climate present a risk of potential burn injuries to skin that touches the ramps" and "chose to recommend, install and approve for public use ramps with heat-attractive surfaces in a location with full, direct sunlight in a hot climate[.]" In their claim directed against the Town, Plaintiffs again expressly alleged the Town "knew, or by a reasonable inspection should have discovered, the hazardous, dangerous, and unsafe condition with the hot skateboarding ramps at the Skate Park[.]" Thus, the Complaint clearly alleges the Town knew or should reasonably have known of the alleged dangerous condition.

Nevertheless, the Town maintains it had no duty to warn of the alleged dangerous condition because it constituted a known and obvious danger of which Hess or the Suarez children had equal or superior knowledge to the Town. *See generally Waddell v. Metropolitan Sewerage Dist. of Buncombe Cnty.*, 207 N.C. App. 129, 134, 699 S.E.2d 469, 472 (2010); *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (1999); *Farrelly v. Hamilton Square*, 119 N.C. App.

541, 546, 459 S.E.2d 23, 27 (1995). However, the Complaint quite plainly and repeatedly alleges Plaintiffs and Hess did not have notice of the condition and, moreover, could not reasonably be expected to have had notice. The Complaint alleges the Town failed to warn of the "hidden perils and unsafe condition of hot skateboarding ramps," that Plaintiffs and Hess had no notice of the dangerous condition and could not reasonably have been expected to discover the condition, and that, indeed, Hess had no opportunity to inspect the ramp prior to the 18-month-old Plaintiff contacting the searing hot metal.

Even accepting the premise implicit in the Town's argument—that it is known and obvious metal becomes hot in the North Carolina summer sun—it does not necessarily follow that the hot metal ramp in this case constituted an open and obvious dangerous condition. At this preliminary stage of the litigation, a number of variables remain, including, *inter alia*, the actual appearance of the ramps (*i.e.*, is it apparent they are, in fact, metal) and the layout of the park itself (*i.e.*, would the condition be hidden from someone entering the park). Further discovery and litigation may ultimately lead to the conclusion that the hot metal ramp constituted an open and obvious condition; however, at this stage of the litigation, the allegations of the Complaint do not establish the hot metal ramp to be an open and obvious condition. As such, we reverse the trial court's Order dismissing Plaintiffs' negligence claims under Rule 12(b)(6).

III. Gross Negligence

[4] In addition to the arguments raised by Plaintiffs, the Town further contends Plaintiffs failed to allege the Town acted with conscious or reckless disregard for the rights and safety of others to support a gross-negligence claim. "Gross negligence has been defined as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92 (2002) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988)). "Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages." *Id.* (citation omitted).

In this case, we have already determined Plaintiffs adequately stated negligence claims against the Town. Moreover, Plaintiffs' Complaint alleges that notwithstanding the Town's knowledge and decision to use heat-attractive ramps and place them in an unshaded, direct sun-lit area, the Town failed to inspect and maintain the Skate Park, warn of the danger of the hot metal ramps, or take steps to prevent the ramps from

overheating. The Complaint further expressly alleges that in so failing, the Town acted "wantonly, recklessly and with conscious and intentional disregard for the rights and safety of others[.]"

Therefore, we conclude Plaintiffs' Complaint adequately states a claim for gross negligence to survive the Town's Motion to Dismiss under Rule 12(b)(6). Thus, at this stage of the litigation, the Town is not entitled to dismissal of Plaintiffs' gross-negligence claims.

Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's Order dismissing Plaintiffs' claims against the Town.

REVERSED.

Judges STROUD and YOUNG concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 AUGUST 2019)

ANDERSON v. TREDWELL No. 19-31	Alleghany (18CVD77)	Reversed
BUTTACAVOLI v. BUTTACAVOLI No. 18-1033	Buncombe (17CVD5594)	Affirmed
CARNEY v. WAKE CTY. SHERIFF'S OFFICE No. 18-1299	Wake (18CVS1102)	Affirmed
EVERBANK COMMERCIAL FIN., INC. v. THE HUNOVAL LAW FIRM, PLLC No. 18-909	Lincoln (17CVS661)	Affirmed in Part and Reversed in Part
FOXX v. FOXX No. 18-728	Catawba (16CVD1496)	Vacated and Remanded
GARLOCK v. ROLAND No. 18-755	Buncombe (17CVD559)	Vacated and Remanded
HUTTON v. THE DAVEY TREE EXPERT CO. No. 18-1148	Guilford (17CVS6104)	DISMISSED IN PART, AFFIRMED IN PART
MANGUM v. BOND No. 19-19	Durham (18CVS1500)	Affirmed
PACHAS v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 17-710-2	Mecklenburg (15CVS19217)	Reversed and Remanded
QUALITY BUILT ADVANTAGE, INC. v. GRAHAM No. 18-1230	Moore (18CVD699)	Affirmed in part; Dismissed in part.
REIS v. CARSWELL No. 18-1039	Lincoln (18CVS270)	Dismissed
STATE v. ALCON No. 19-22	Davidson (13CRS57137)	Reversed and Remanded.
STATE v. BIVENS No. 18-800	Pitt (16CRS58158) (16CRS58168)	Vacated and Remanded
STATE v. BRADLEY No. 18-1297	Craven (15CRS54178-80) (16CRS270) (16CRS329)	No error in part; no prejudicial error in part

STATE v. BREWER No. 18-1246	Mecklenburg (17CRS31422) (17CRS31425)	No Error
STATE v. BYRD No. 18-1028	Forsyth (16CRS4707) (16CRS57967)	No Error
STATE v. COX No. 19-160	Caldwell (18CRS781)	Affirmed
STATE v. DAVIS No. 18-559	Lee (15CRS52601) (15CRS52604) (15CRS52605)	Dismissed in Part; No error in Part.
STATE v. ESQUIVEL-LOPEZ No. 18-1258	Forsyth (04CRS50501)	Affirmed
STATE v. FANCHER No. 18-1115	Clay (15CRS44) (15CRS50154) (16CRS28) (17CRS115)	No Plain Error
STATE v. FELTS No. 18-823	Onslow (16CRS50907)	Vacated in Part; Remanded for Resentencing
STATE v. FLOWERS No. 18-832	Jackson (16CRS51385)	No Error.
STATE v. GRIGGS No. 18-1000	Dare (17CRS268) (17CRS50085)	No error in part; remanded for resentencing.
STATE v. HARRINGTON No. 18-644	Cumberland (16CRS64352)	No Error in Part; Remanded in Part.
STATE v. HOLLIDAY No. 18-1144	New Hanover (16CRS56627)	No error in part; vacated and remanded in part.
STATE v. IBRAHIM No. 18-1081	Guilford (16CRS31493)	No Error
STATE v. McBRIDE No. 18-1282	Hoke (16CRS51260) (16CRS51270) (16CRS51287-88)	Vacated and Remanded

STATE v. McCOY No. 19-85	Guilford (16CRS78855) (16CRS78857) (16CRS87504)	Dismissed
STATE v. MIDDLETON No. 18-131	Mecklenburg (16CRS212004-6)	No Error
STATE v. NEWSUAN No. 18-683	Harnett (17CRS50372-73) (17CRS50415)	No Error
STATE v. POPE No. 18-1151	Sampson (16CRS53051)	No Error
STATE v. PRUDENTE-ANORVE No. 18-827	Forsyth (16CRS59105) (16CRS59400)	No Error in Part; Remanded in Part
STATE v. RAYNOR No. 18-942	Sampson (16CRS52798) (16CRS52808-10) (16CRS53237)	No Error
STATE v. SCRUGGS No. 18-1217	Cleveland (17CRS50072-73)	No Error
STATE v. SIMMONS No. 18-1106	Forsyth (14CRS50227)	NO ERROR IN PART; VACATED IN PART AND REMANDED.
STATE v. STRUDWICK No. 18-794	Mecklenburg (16CRS210771)	Reversed
STATE v. THOMPSON No. 18-1146	Guilford (17CRS78147-48)	Affirmed
STATE v. WASHINGTON No. 18-984	Mecklenburg (16CRS21580) (16CRS21582) (16CRS21585)	No Plain Error
STATE v. YOURSE No. 18-776	Guilford (16CRS70187) (17CRS24154)	No Error
YOUNCE v. YOUNCE No. 18-962	Caldwell (17CVS42)	Affirmed

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