269 N.C. App.—No. 2 Pages 111-386

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 4, 2021

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Director
Jaye E. Bingham-Hinch

Assistant Director
David Alan Lagos

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

ADMINISTRATIVE OFFICE OF THE COURTS

Director
McKinley Wooten

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

COURT OF APPEALS

CASES REPORTED

FILED 7 JANUARY 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

and was a good father to his child from a second marriage, and that the mother prevented him from visiting or communicating with their sons for about a year and a half (even though he called them 225 times in that period), resulting in a severed relationship between him and the eldest son. **Deanes v. Deanes, 151.**

CHILD VISITATION

Right to reasonable visitation—finding of unfitness—severe restrictions— The trial court was not required to find that defendant-mother was an unfit person to have reasonable visitation in its order allowing defendant unsupervised overnight visits with her child every other weekend, unsupervised daytime visits on special days, and supervised visits of up to five nights during school breaks for Thanksgiving and Christmas. The visitation parameters were not the type of severe restrictions that amounted to denial of the right of reasonable visitation. **Paynich v. Vestal, 275.**

Supervised visits—support by factual findings—stress and confusion caused by parent—The trial court's conclusion that it was in the child's best interests to allow defendant-mother supervised (rather than unsupervised) visitation during extended visits was supported by the findings of fact, including that the child's well-being had deteriorated ever since defendant had been allowed unsupervised visitation, that defendant continually persisted in causing unnecessary incidents that confused and stressed the child, and that the child would benefit from overnight visits with defendant if defendant could avoid actions that would cause the child psychological harm. **Paynich v. Vestal, 275.**

CONSTITUTIONAL LAW

North Carolina—right to education—harassment by other students—A mother's complaint failed to state a claim upon which relief could be granted where she alleged that her children were deprived of their constitutional right to an education due to persistent harassment at school by other students, which went unaddressed by school personnel. The trial court erred by denying the county board of education's motion to dismiss the constitutional claim because the harm alleged did not directly relate to the nature, extent, and quality of the educational opportunities made available to plaintiff's children. **Deminski v. State Bd. of Educ., 165.**

CONTEMPT

Civil—willful violation of child custody order—telephone communication—not equal to in-person visitation—In an action to modify child custody, the trial court properly held a mother in civil contempt for willfully violating a custody order by denying the father "reasonable telephone communication" with their two sons (for about a year and a half, she only allowed him to speak to the children five times even though he called them 225 times) and by failing to consult the father on major medical, educational, and religious decisions affecting the children. Although the order limited the father's in-person visitation if he consumed alcohol in front of the children, the mother incorrectly argued that those limits also applied to the father's telephone communication with their sons, because electronic communication is not a form of visitation equal to in-person visits. **Deanes v. Deanes, 151.**

would have fired him anyway had it discovered the misconduct earlier. The ALJ did not violate petitioner's due process rights (including his right to notice of the specific grounds for dismissal) by admitting the after-acquired evidence, which simply limited petitioner's remedy for wrongful dismissal. Further, petitioner's dismissal would have been "mandatory" under N.C.G.S. § 126-30(a) because he disclosed "false and misleading information" in his job application. **Brown v. Fayetteville State Univ., 122.**

ENVIRONMENTAL LAW

Action against landfill operator—failure to secure post-closure permit—summary judgment—no genuine issue of material fact—In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, where plaintiff sought to enforce a prior Court of Appeals decision holding the company liable for securing a Part B post-closure permit as the facility's "operator" under the Resource Conservation and Recovery Act, the trial court properly entered summary judgment in plaintiff's favor because no genuine issue of material fact remained as to defendant's liability to obtain the permit. **State of N.C. ex rel. Regan v. WASCO, LLC, 292.**

ESTATES

Removal of representative—appeal—standard of review—on the record—On appeal from the clerk of superior court's order removing respondent as administratix of her father's estate pursuant to N.C.G.S. § 28A-21-4, the superior court properly applied the "on the record" standard of review that applies to estate proceedings (N.C.G.S. § 1-301.3(d)) rather than conducting a de novo hearing. **In re Est. of Harper, 213.**

Sale of decedent's real property—appeal—standard of review—de novo—On appeal from the clerk of superior court's order allowing the public administrator of an estate to sell the decedent's real property to pay the estate's debts, the superior court erred by failing to conduct a de novo hearing, where the proper standard of review for a special proceeding pursuant to N.C.G.S. § 1-301.2 was de novo. **In re Est. of Harper, 213.**

ESTOPPEL

Estoppel by judgment—law of the case—mootness—action against landfill operator—failure to secure post-closure permit—In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, where plaintiff sought to enforce a prior Court of Appeals decision holding defendant liable for securing a Part B post-closure permit as the facility's "operator" under the Resource Conservation and Recovery Act, the Court of Appeals' holding in the prior action constituted the law of the case, and therefore the doctrine of estoppel by judgment precluded defendant from further challenging his liability for obtaining the permit. At any rate, where recent changes to regulations governing "generators" of hazardous waste had no bearing on defendant's responsibilities as a landfill "operator," the trial court properly denied defendant's motion to dismiss plaintiff's second action as moot. **State of N.C. ex rel. Regan v. WASCO, LLC, 292.**

Judicial estoppel—applicability—insurance action—seizure order and injunction—Where the trial court granted the Commissioner of Insurance's petition for a

witnessed a nurse perform the blood draw were sufficient to support the conclusion that a qualified person (pursuant to N.C.G.S. § 20-139.1(c)) drew defendant's blood—even though the officers could not identify the nurse by name or offer evidence to prove her qualifications. **State v. Hoque, 347.**

Driving while impaired—sufficiency of evidence—signs of intoxication and odor of alcohol—controlled substances in blood—refusal to submit to intoxilyzer test—The State presented sufficient evidence to convict defendant of driving while impaired where a police officer found defendant slumped over and apparently sleeping in his car, which was idling in the middle of the road; officers detected a strong odor of alcohol on defendant's breath and observed other signs of intoxication; and defendant failed field sobriety tests. In addition, the presence of controlled substances in defendant's blood and defendant's refusal to submit to an intoxilyzer test each separately constituted sufficient evidence of impairment. **State v. Hoque, 347.**

NEGLIGENCE

Dump truck roll-away accident—planned community developer—duty to inspect construction site—The developer of a planned community owed no legal duty to regularly inspect or monitor a construction site in the development, on a lot that had been sold to a builder, which was being graded by an independent contractor without the developer's permission. Summary judgment was therefore properly entered for the developer in a negligence action brought by the parents of a five-year-old boy who was struck and killed when an unattended dump truck rolled downhill from the nearby construction site. **Copeland v. Amward Homes of N.C., Inc., 143.**

Dump truck roll-away accident—planned community developer—duty to prevent negligent construction work—The developer of a planned community owed no legal duty to take precautions against the possible negligence of others performing construction work in the development. Summary judgment was therefore properly entered for the developer in a negligence action brought by the parents of a five-year-old boy who was struck and killed when an unattended dump truck—which was overloaded, left with its engine running, and without wheel chocks—rolled downhill from a nearby construction site. **Copeland v. Amward Homes of N.C., Inc., 143.**

Dump truck roll-away accident—planned community developer—duty to sequence construction responsibly—In a negligence action brought after their five-year-old son was struck and killed by an unattended dump truck that rolled downhill from a nearby construction site, plaintiffs presented a genuine issue of material fact regarding whether the developer of the planned community owed a legal duty to ensure that the construction of homes in the hilly and steep development was sequenced in such a way as to minimize the known risk of a roll-away accident causing injury to someone. **Copeland v. Amward Homes of N.C., Inc., 143.**

PARTIES

Necessary party—joint and several liability—action against landfill operator—failure to secure post-closure permit—In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, where plaintiff sought to enforce a prior Court of Appeals decision holding defendant liable for securing a Part B post-closure

permit as the facility's "operator" under the Resource Conservation and Recovery Act, the trial court properly denied defendant's motion to dismiss for failure to join the facility's current owner as a necessary party. Defendant and the facility owner had joint and several liability for submitting the permit application, and therefore plaintiff could sue defendant individually. **State of N.C. ex rel. Regan v. WASCO, LLC, 292.**

POLICE OFFICERS

Body cameras—failure to use—during forced blood draw—due process rights—In a driving while impaired case, police officers' failure to use their body cameras, pursuant to department policy, during defendant's forced blood draw did not deny defendant his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). It could not be said that the State suppressed body camera evidence where none existed in the first place; further, defendant could not show that a body camera recording of the blood draw would have been favorable to him. **State v. Hoque, 347.**

Resisting a public officer—sufficiency of evidence—driving while impaired—blood draw—The State presented sufficient evidence to convict defendant of resisting a public officer where defendant resisted officers while they were attempting to investigate whether defendant had been driving while impaired, while they were arresting him for driving while impaired, and while they were attempting to execute a warrant to draw his blood. **State v. Hoque, 347.**

SEARCH AND SEIZURE

Driving while impaired—blood draw—use of force—reasonableness—Police officers' use of force—pinning defendant to a hospital bed—to assist a nurse in taking a blood sample from defendant pursuant to a search warrant, when defendant refused to comply, was objectively reasonable and did not violate his Fourth Amendment rights. **State v. Hoque, 347.**

SENTENCING

Prior record level—section 15A-1340.14(f) factors—burden of proof—not met—The State failed to meet its burden of proving defendant's prior record level by a preponderance of the evidence by any of the methods listed in N.C.G.S. § 15A-1340.14(f) where defendant did not stipulate to the prior record level and the State did not submit either originals or copies of prior convictions or other records that would satisfy its burden. Further, neither defendant's acknowledgment of her "criminal record" during a colloquy with the court nor her notation of the roman numeral "IV" on her transcript of plea (next to all the felonies to which she pled guilty) were sufficient to constitute a stipulation to or otherwise establish the accuracy of the twelve prior record level points or level IV for sentencing. The matter was remanded for resentencing on the charges subject to the guilty plea. **State v. Braswell, 309.**

STATUTES OF LIMITATION AND REPOSE

Tort Claims Act—three-year statute of limitations—exhaustion of administrative remedies—no tolling—A day care facility's claim under the Tort Claims Act against a state regulatory agency—for negligent failure to conduct an independent

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

Opinions will be filed on the first and third Tuesdays of each month.

AKSHAR DISTRIBUTION COMPANY, D/B/A THE GREENSBORO DISCOUNTS, PLAINTIFF
v.
SMOKY'S MART INC., AND UMESH RAMANI, DEFENDANTS

No. COA19-316

Filed 7 January 2020

1. Appeal and Error—Rule 59 motion—tolling period for taking appeal—motion for sanctions

After the trial court entered an order granting plaintiff's motion for sanctions, defendants timely made a Rule 59 motion within the meaning of Appellate Rule 3—using language tracking the text of Rule 59(a)(1) and (3) and supporting the motion with affidavits containing relevant factual details regarding defendants' inability to procure certain bank records and a calendaring mistake by defendants' attorney—tolling the thirty-day period for taking appeal.

2. Appeal and Error—preservation of issues—argument made for the first time on appeal

Where defendants' Rule 59 motion did not argue that the default judgment against them should be set aside due to the complaint's failure to state a claim for unfair and deceptive trade practices, defendants were precluded from making the argument for the first time on appeal.

3. Judges—leaving the bench—rendering judgments unreviewable by other trial judges—review by appellate court

Where a trial judge entered an order imposing sanctions upon defendants and then retired from the bench, rendering the judgment unreviewable by another trial court judge, the task of reviewing defendants' Rule 59 motion seeking relief from the order fell to the Court of Appeals.

4. Discovery—sanctions—motion for relief—unreasonable delay—absence from hearing

Defendants' Rule 59 motion seeking relief from the trial court's order imposing sanctions (for failing to comply with discovery orders) should have been denied where defendants unreasonably delayed in seeking to acquire the required bank documents and defendants' attorney inexcusably missed the hearing on the motion for sanctions due to a calendaring mistake.

Appeal by Defendants from orders entered 21 March 2018 by Judge Patrice A. Hinnant and 3 December 2018 by Judge R. Stuart Albright, both in Guilford County Superior Court. Heard in the Court of Appeals 1 October 2019.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Matthew B. Tynan, Clint S. Morse, and Kimberly M. Marston, for Plaintiff-Appellee.

Hill Evans Jordan & Beatty, PLLC, by R. Thompson Wright, for Defendants-Appellants.

COLLINS, Judge.

Defendants Smoky's Mart Inc. and Umesh Ramani appeal from the trial court's (1) 21 March 2018 order granting Plaintiff Akshar Distribution Company's motion for sanctions filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 37, in which the trial court entered default judgment for treble damages against Defendants, and (2) 3 December 2018 order denying Defendants' motion for reconsideration or a new hearing regarding Plaintiff's motion for sanctions filed pursuant to N.C. Gen. Stat. § 1A-1, Rules 54 and 59. Defendants contend that the trial court (1) erred by entering default judgment against Defendants for treble damages in the 21 March 2018 order and (2) abused its discretion by denying Defendants' N.C. Gen. Stat. § 1A-1, Rule 59[1] motion in the 3 December 2018 order. We dismiss Defendants' appeal from the 21 March 2018 order, vacate the trial court's 3 December 2018 order, and deny Defendants' Rule 59 motion.

I. Background

Plaintiff Akshar Distribution Company is a wholesale distributor for convenience stores. At the time relevant to Plaintiff's allegations, Defendant Umesh Ramani was a minority shareholder of Plaintiff.

According to the first amended complaint, Ramani also owns Defendant Smoky's Mart Inc. ("Smoky's," or collectively with Ramani, "Defendants"),

1. Because Defendants characterize their motion for reconsideration or a new hearing as a "Rule 59 motion" in their briefs on appeal and Defendants do not make any arguments based upon N.C. Gen. Stat. § 1A-1, Rule 54 ("Rule 54") in their briefs, Defendants have abandoned any argument that the trial court erred by denying their purported Rule 54 motion, and we analyze Defendants' motion under N.C. Gen. Stat. § 1A-1, Rule 59 ("Rule 59") alone. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

which operates a convenience store in Greensboro. Smoky's purchased inventory from Plaintiff at various times between December 2014 and January 2017. Although Plaintiff invoiced Smoky's for the merchandise, Smoky's never paid the invoices, which totaled $30,040.09.

On 28 March 2017, Plaintiff filed a complaint against Smoky's in connection with the unpaid invoices. On 28 April 2017, Plaintiff filed its first amended complaint, adding allegations that Ramani had misappropriated Plaintiff's funds for his and Smoky's use in the collective amount of $125,981.55 between March 2014 and April 2016. Plaintiff's first amended complaint brought the following causes of action: (1) action for the price of goods purchased pursuant to N.C. Gen. Stat. § 25-2-709(1)(a), against Smoky's; (2) breach of contract, against Smoky's; (3) unjust enrichment, against Smoky's; (4) conversion, against Defendants; (5) breach of fiduciary duty, against Ramani; (6) unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1, against Defendants; and (7) action to impose a constructive trust, against Ramani.

Defendants answered the first amended complaint on 6 July 2017. In their answer, Defendants (1) admitted that Smoky's owed Plaintiff for the unpaid invoices, (2) denied that Ramani had misappropriated Plaintiff's funds, and (3) raised a number of affirmative defenses.

On 31 July 2017, the trial court entered an order scheduling discovery, pursuant to the consent of the parties. The parties exchanged discovery over the following months. On 18 December 2017, Plaintiff filed a motion to compel discovery pursuant to N.C. Gen. Stat. § 1A-1, Rule 37 ("Rule 37"), arguing that Defendants had insufficiently responded to Plaintiff's discovery requests. On 16 January 2018, the trial court entered a consent order compelling Defendants to respond to Plaintiff's requests.

Plaintiff filed a motion for sanctions pursuant to Rule 37 on 12 February 2018, alleging that Defendants had continued to fail to comply with the trial court's orders governing discovery. Plaintiff's motion for sanctions came on for hearing on 8 March 2018. Defendants did not attend the hearing.

On 21 March 2018, the trial court entered an order granting Plaintiff's motion for sanctions. In the 21 March 2018 order, the trial court: (1) found that Defendants had unjustifiably failed to comply with its orders governing discovery; (2) concluded that Defendants were in contempt of its orders governing discovery; (3) "conclude[d] that sanctions less severe than striking Defendants' answer and entering partial summary judgment for Plaintiff[] would not be adequate given the seriousness of [Defendants'] misconduct"; (4) struck Defendants' answer; (5) entered

default judgment for Plaintiff on all claims brought in the first amended complaint, notably including Plaintiff's claim for unfair and deceptive trade practices, and therefore trebled its damage awards pursuant to N.C. Gen. Stat. § 75-16 to total $90,147.27 from Defendants jointly and severally (for the unpaid invoices) and $377,944.65 from Ramani (for the allegedly misappropriated funds); and (6) ordered Defendants to pay Plaintiff's expenses in connection with preparing, filing, and arguing the motion for sanctions. Noting that it had also granted Plaintiff's motion to file a second amended complaint the same day adding other defendants and causes of action to the lawsuit, the trial court also certified the default judgment as a final judgment pursuant to Rule 54(b).

On 3 April 2018, Defendants filed a motion for reconsideration or a new hearing pursuant to Rules 54 and 59. In their Rule 59 motion,[2] Defendants moved the trial court to set aside its 21 March 2018 order granting Plaintiff's motion for sanctions because (1) Defendants did not have certain documents the trial court had ordered they produce to Plaintiff until 2 April 2018 and (2) Defendants' counsel missed the 8 March 2018 hearing on Plaintiff's motion for sanctions due to a calendaring mistake. Defendants attached affidavits to the motion providing supporting factual details regarding the bases for their Rule 59 motion. Defendants' motion came on for hearing on 3 December 2018. On that date, the trial court denied Defendants' Rule 59 motion.

Defendants noticed appeal from both the 21 March 2018 and 3 December 2018 orders on 2 January 2019.

II. Appellate Jurisdiction

[1] Plaintiff argues that because Defendants did not notice their appeal from the 21 March 2018 order until 2 January 2019, Defendants failed to timely notice appeal from that order, and we accordingly lack jurisdiction to consider Defendants' arguments regarding that order. Defendants counter that their 3 April 2018 Rule 59 motion was timely filed within 10 days following the entry of the 21 March 2018 order, and that Defendants' period to appeal from that order was accordingly tolled pursuant to North Carolina Rule of Appellate Procedure 3 ("Appellate Rule 3") until after the entry of an order disposing of the motion. Because they appealed from the 21 March 2018 order on 2 January 2019—within 30 days following the 3 December 2018 entry of the order denying their Rule 59 motion—Defendants argue that their notice of appeal from the 21 March 2018 order was timely.

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2. As noted above, we analyze Defendants' 3 April 2018 motion under Rule 59 alone. *See supra* note 1.

Appellate Rule 3 says that "if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion[.]" N.C. R. App. P. 3(c)(3) (2018). But merely invoking Rule 59 within the motion is not sufficient to toll the period for taking appeal from an order under Appellate Rule 3. This Court has said:

> To qualify as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must "state the grounds therefor" and the grounds stated must be among those listed in Rule 59(a). The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of [N.C. Gen. Stat. § 1A-1,] Rule 7(b)(1). The motion, to satisfy the requirements of Rule 7(b)(1), must supply information revealing the basis of the motion.

Smith v. Johnson, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (internal citations omitted). This Court has also said:

> In analyzing the sufficiency of a motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, one should keep in mind that a failure to give the number of the rule under which a motion is made is not necessarily fatal, if the grounds for the motion and the relief sought is consistent with the Rules of Civil Procedure. As long as the face of the motion reveals, and the Clerk and the parties clearly understand, the relief sought and the grounds asserted and as long as an opponent is not prejudiced, a motion complies with the requirements of N.C. Gen. Stat. § 1A-1, Rule 7(b)(1).

Batlle v. Sabates, 198 N.C. App. 407, 413, 681 S.E.2d 788, 793-94 (2009) (internal quotation marks, brackets, and citations omitted). The essence of the inquiry, then, is "to ascertain whether [the movant] stated a valid basis for seeking to obtain relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 59." *Id.* at 414, 681 S.E.2d at 794. The parties disagree over whether Defendants' Rule 59 motion stated a valid basis thereunder.

Generally, Rule 59 is applicable only where there has been a trial. *See Ennis v. Munn*, No. COA12-1349, 2013 N.C. App. LEXIS 977, at *11 (unpublished) (N.C. Ct. App. Sept. 17, 2013) (noting that this Court has reasoned that "Rule 59 applies only to judgments resulting from trials"). There has been no trial in this case. But some decisions from this Court have stated in dicta that Rule 59 may be a viable avenue

to attack non-trial judgments, including default judgments entered as Rule 37 sanctions. *See Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 ("[T]he defendants indicate in the[ir purported Rule 59] motion that they rely on Rule 59(a)(2) & (7) as the bases of their motion. . . . It appears that the motion is merely a request that the trial court reconsider its earlier decision granting the sanction and *although this may properly be treated as a Rule 59(e) motion*, it cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made." (internal citation omitted)); *Batlle*, 198 N.C. App. at 413 n.1, 681 S.E.2d at 793 n.1 (noting that *Smith* "appears to assume that relief under N.C. Gen. Stat. § 1A-1, Rule 59, is, at least in theory, available to individuals who have been sanctioned for discovery violations"). Accordingly, we will assume that Defendants' motion is a technically-proper Rule 59 motion for purposes of our analysis.

As mentioned above, the gravamen of Defendants' Rule 59 motion is that (1) Defendants did not have certain bank records the trial court had ordered they produce to Plaintiff until 2 April 2018 and (2) Defendants' counsel missed the 8 March 2018 hearing on Plaintiff's motion for sanctions due to a calendaring mistake. Defendants supported their Rule 59 motion with affidavits providing relevant supporting factual details. Defendants did not specify the Rule 59(a) subsections upon which their motion is based within the text of the motion, but the *Batlle* Court said that this deficiency is not dispositive of the inquiry so long as the grounds asserted are clear and Plaintiff was not prejudiced thereby. *Id.*

Defendants argued in their motion that the lack of documents and the calendaring mistake comprise "circumstances [which] constitute mistake, inadvertence, surprise and excusable neglect, and constitute an irregularity by which defendants Smoky's and Ramani were prevented from having a fair hearing on the Motion for Sanctions[.]" While it also speaks in terms not found within Rule 59—and instead closely tracks language from N.C. Gen. Stat. § 1A-1, Rule 60 (contemplating relief from final judgment based upon "[m]istake, inadvertence, surprise, or excusable neglect")—Defendants' motion tracks the language of Rule 59(a)(1) (contemplating new trial based upon "[a]ny irregularity by which any party was prevented from having a fair trial") and speaks in terms resonant with Rule 59(a)(3) (contemplating new trial based upon "[a]ccident or surprise which ordinary prudence could not have guarded against"). Because Defendants' motion speaks in language tracking text found within Rule 59(a)(1) and (3), and the grounds asserted in the motion are supported by relevant factual details contained within the affidavits, we conclude that Defendants' motion was sufficiently clear to put Plaintiff

on notice of the bases for the motion, and that Plaintiff accordingly was not prejudiced thereby.

Having determined that Defendant's motion was technically proper and sufficiently revealed the bases for the motion, the question remains whether the motion stated valid Rule 59 bases for relief. A Rule 59 motion does not have to be meritorious in order to fall within Appellate Rule 3's ambit, but rather must only state a "potentially valid basis for an award of relief." *Batlle*, 198 N.C. App. at 418 n.4, 681 S.E.2d at 796 n.4 ("The fact that Plaintiff alleged a valid ground for relief from the . . . order in her . . . motion does not, of course, mean that her argument is substantively valid. At this stage, our inquiry is limited to the issue of whether Plaintiff has adequately stated a potentially valid basis for an award of relief. The extent to which Plaintiff is actually entitled to relief on the basis of this claim or is subject to sanctions for advancing it are entirely different issues . . . ."). For the same reasons we conclude that Defendants sufficiently revealed the bases for their motion, we conclude that Defendants stated potentially-valid bases for an award of relief from the trial court's discovery sanction within the meaning of Rule 59.

In sum, although it could have been more artfully drafted, we conclude that Defendants timely made a Rule 59 motion within the meaning of Appellate Rule 3. Accordingly, Defendants' period to notice appeal from the 21 March 2018 order was tolled by Appellate Rule 3(c)(3) until at least 30 days following the 3 December 2018 entry of the order denying Defendants' Rule 59 motion. Because Defendants noticed their appeal from the 21 March 2018 and 3 December 2018 orders within 30 days of entry of the 3 December 2018 order, Defendants' appeals from both orders were timely under Appellate Rule 3, and we have jurisdiction to consider both appeals.

III. Discussion

Defendants contend that the trial court (1) erred by entering default judgment against Defendants for treble damages in the 21 March 2018 order on Plaintiff's motion for sanctions and (2) abused its discretion by denying Defendants' Rule 59 motion for reconsideration or a new hearing in the 3 December 2018 order. We address the two orders in turn.

a. Plaintiff's Motion for Sanctions

[2] Under Rule 37, a trial court may sanction a party's failure to comply with its order to provide or permit discovery in a number of enumerated ways, including by entering "[a]n order striking out pleadings or parts

thereof, or . . . rendering a judgment by default against the disobedient party[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c) (2018).

Defendants argue that the trial court erred in its 21 March 2018 order by entering default judgment against them because the first amended complaint fails to state a claim for unfair and deceptive trade practices within the meaning of N.C. Gen. Stat. § 75-1.1, and liability under Section 75-1.1 was the statutory predicate for the treble-damage awards the trial court entered pursuant to N.C. Gen. Stat. § 75-16. However, Defendants did not move the trial court to set aside the default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 55(d) or 60(b). This Court has said that the failure to attack a default judgment at the trial court precludes an attack on the default judgment on appeal. *Golmon v. Latham*, 183 N.C. App. 150, 151-52, 643 S.E.2d 625, 626 (2007); *see Collins v. N.C. State Highway & Pub. Works Comm'n*, 237 N.C. 277, 284, 74 S.E.2d 709, 715 (1953) ("To set aside a judgment for irregularity it is necessary to make a motion in the cause before the court which rendered the judgment, with notice to the other party; the objection cannot be made by appeal, or an independent action, or by collateral attack." (quotation marks and citation omitted)). As the *Golmon* Court said: "Defendants should have first filed a motion pursuant to N.C.R. Civ. P. 55(d) or 60(b). They would then have been able to appeal to this Court from any denial of that motion. Because defendants failed to follow this procedure, we are precluded from reviewing the issues they raise." *Golmon*, 183 N.C. App. at 152, 643 S.E.2d at 626.

Defendants did seek to have the 21 March 2018 order—including the default judgment entered therein—set aside in its entirety in their Rule 59 motion. And as discussed above in Section II, there is some authority that a litigant may seek relief from Rule 37 sanctions via Rule 59. *See Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. However, Defendants' Rule 59 motion raised factual circumstances as the bases for the relief sought, and Defendants did not argue in that motion (or elsewhere below) that the default judgment should be set aside because the first amended complaint fails to state a claim under N.C. Gen. Stat. § 75-1.1. Defendants' argument is therefore made for the first time on appeal, which our Appellate Rules expressly prohibit. N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."); *Grier v. Guy*, 224 N.C. App. 256,

260-62, 741 S.E.2d 338, 342-43 (2012) (dismissing argument on appeal that default judgment should be set aside because complaint failed to state a claim because the argument was not made to the trial court).

Because Defendants did not attack the default judgment at the trial court on the basis that the first amended complaint failed to state a claim under N.C. Gen. Stat. § 75-1.1, they are precluded from making that argument on appeal.

b. Defendants' Motion for Reconsideration or a New Hearing

[3] Defendants also argue that the trial court abused its discretion by denying their Rule 59 motion in its 3 December 2018 order.

In this case, the parties acknowledge that Judge Hinnant—who entered the 21 March 2018 order whose reconsideration Defendants sought in their 3 April 2018 Rule 59 motion—retired from the bench before the Rule 59 motion came on for hearing on 3 December 2018. Plaintiff argues, despite the fact that Defendants filed their Rule 59 motion in April 2018, that Judge Hinnant's subsequent retirement rendered Defendants' Rule 59 motion unreviewable, and that Judge Albright—who entered the 3 December 2018 order denying Defendants' Rule 59 motion—properly denied that motion accordingly.

This Court has held that a trial judge who did not preside at trial lacks jurisdiction to rule on a Rule 59 motion for a new trial. *Sisk v. Sisk*, 221 N.C. App. 631, 636-37, 729 S.E.2d 68, 72-73 (2012), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 368 (2013). The same rationale—that "[o]ne superior court judge may not overrule another[,]" *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 169, 459 S.E.2d 626, 627 (1995)—applies here. Judge Albright therefore should have dismissed Defendants' Rule 59 motion, and erred by denying it. *See Quevedo-Woolf v. Overholser*, 820 S.E.2d 817, 840 (N.C. Ct. App. 2018) (vacating order: "Because Judge Randolph lacked subject matter jurisdiction to hear Plaintiff's Rule 59 motion, the Randolph Order is void."), *disc. review denied*, 372 N.C. 359, 828 S.E.2d 164 (2019); *In re J.T.*, 363 N.C. 1, 3, 672 S.E.2d 17, 18 (2009) ("[T]he proceedings of a court without jurisdiction of the subject matter are a nullity. When the record clearly shows that subject matter jurisdiction is lacking, the court will take notice and dismiss the action *ex mero motu* in order to avoid exceeding its authority." (quotation marks, brackets, and citations omitted)).

However, where the trial judge who entered the judgment from which a litigant seeks relief pursuant to Rule 59 leaves the bench, thereby rendering the judgment unreviewable by another trial judge,

our Supreme Court has said that "justice requires that [the] defendant be afforded an opportunity to have considered on appeal any asserted errors of law which he contends entitles him to a new trial." *Hoots v. Calaway*, 282 N.C. 477, 490, 193 S.E.2d 709, 717 (1973). The task of reviewing Defendants' Rule 59 motion therefore falls upon us. *See Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co. of Hartford*, 192 N.C. App. 376, 390, 665 S.E.2d 505, 514 (2008) ("[I]t is not appropriate for a superior court judge who did not try a case to rule upon a motion for a new trial, and in that situation, an appellate court should conduct the review of errors to determine if the party is entitled to a new trial."). Because we are not reviewing any decision of a lower court, we necessarily review Defendants' Rule 59 motion *de novo*. *Sisk*, 221 N.C. App. at 631, 729 S.E.2d at 70.

[4] As a threshold matter, as discussed above in Section III(a), Defendants did not argue in their Rule 59 motion that the first amended complaint failed to state a claim under N.C. Gen. Stat. § 75-1.1, so we do not consider this argument, which Defendants impermissibly raise now for the first time on appeal. Defendants made no other assertions of legal error in their Rule 59 motion, which solely asserted factual circumstances as bases for the relief sought.

It is unclear whether the *Hoots* Court, which said that a party must "be afforded an opportunity to have considered on appeal any asserted errors *of law* which he contends entitles him to a new trial[,]" *Hoots*, 282 N.C. at 490, 193 S.E.2d at 717 (emphasis added), also intended that we review asserted Rule 59(a) grounds premised upon factual circumstances, such as the asserted lack of documents and the calendaring mistake upon which Defendants based their Rule 59 motion. But at least one decision of this Court applying *Hoots* and its progeny appears to have conducted such a review, *see Sisk*, 221 N.C. App. at 635-36, 729 S.E.2d at 71-72 (ruling on Rule 59 motion asserting, *inter alia*, irregularity preventing a fair trial and surprise as grounds for new trial), and our Supreme Court denied review of that decision, 366 N.C. 571, 738 S.E.2d 368. We will therefore review Defendants' fact-based arguments.

A careful review of the record leads us to conclude that Defendants' Rule 59 motion should be denied. The record tends to show the following:

- On 31 July 2017, Defendants consented to an order scheduling discovery in this litigation.
- On 25 August 2017, Plaintiff served Defendants with its discovery requests, including requests for the production of "all bank statements for the periods from January 2015 to December

2016, for any Person on which Ramani has signatory authority, including but not limited to, any of Ramani's personal accounts, and any of Smoky's Mart's accounts[,]" ("Document Request 10") and "[f]or the period January 2013 to present . . . all documents evidencing income received by Ramani" ("Document Request 16").

- On 18 December 2017 and 8 January 2018, Plaintiff moved the trial court to compel Defendants to comply with their discovery requests, specifically noting that Defendants had failed to sufficiently respond to Document Requests 10 and 16.
- On 16 January 2018, Defendants consented to the entry of an order compelling them to supplement their discovery responses, including by producing "all documents in their possession, custody or control responsive to" Document Requests 10 and 16 "[o]n or before January 22, 2018[.]"
- Defendants did not seek to procure the documents whose unavailability they assert as grounds for a new trial—which include bank records that would be responsive to Document Requests 10 and 16—until 5 February 2018.

The result of Defendants' unreasonable delay in seeking to procure and produce the documents requested by Plaintiff and ordered to be produced by the trial court is not an "irregularity by which [Defendants were] prevented from having a fair [hearing]" within the meaning of Rule 59(a)(1), and Defendants cannot claim that their inability to produce the documents is the product of "surprise which ordinary prudence could not have guarded against" within the meaning of Rule 59(a)(3). Rather, Defendants' delay tends to demonstrate inexcusable imprudence in heeding the trial court's orders. We therefore reject Defendants' argument that their inability to produce the bank records entitles them to a new hearing on Plaintiff's motion for sanctions.

Defendants' imprudence also leads us to reject Defendants' argument regarding their counsel's calendaring mistake. Our Supreme Court has upheld the denial of relief sought under N.C. Gen. Stat. § 1A-1, Rule 60 for attorney neglect, saying that "[a]llowing an attorney's negligence to be a basis for providing relief from orders would encourage such negligence and present a temptation for litigants to use the negligence as an excuse to avoid court-imposed rules and deadlines." *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998). Further, even had Defendants' counsel properly calendared and appeared at the hearing on Plaintiff's motion for sanctions, the fact that Defendants had

consistently failed to meet their obligations under the trial court's orders governing discovery would remain, and sanctioning Defendants would have been the proper outcome. *See Robinson v. Seaboard Sys. R.R., Inc.*, 87 N.C. App. 512, 528, 361 S.E.2d 909, 919 (1987) (a party seeking a new trial "must demonstrate that he has been prejudiced"). We therefore reject Defendants' Rule 59 argument regarding their counsel's calendaring mistake.

IV. Conclusion

Because Defendants did not raise below the argument they raise in support of their appeal from the trial court's 21 March 2018 order, we dismiss Defendants' appeal from that order. Because the trial judge who entered the 3 December 2018 order lacked subject-matter jurisdiction to consider Defendants' Rule 59 motion, we vacate that order. Because we do not conclude that Defendants are entitled to a new hearing on Plaintiff's motion for sanctions, we deny Defendants' Rule 59 motion.

DISMISSED IN PART, VACATED IN PART, AND DENIED IN PART.

Chief Judge McGEE and Judge HAMPSON concur.

RAY DION BROWN, PETITIONER
v.
FAYETTEVILLE STATE UNIVERSITY, RESPONDENT

No. COA19-13

Filed 7 January 2020

Employer and Employee—contested case—by career state employee—after-acquired evidence doctrine—applicability—mandatory dismissal

In a contested case brought under N.C.G.S. § 126-34.02 by a career state employee (petitioner), an administrative law judge (ALJ) properly applied the after-acquired evidence doctrine when concluding that, although petitioner's employer fired him without just cause, petitioner was not entitled to reinstatement or front pay because later-acquired evidence showed that petitioner lied about his criminal history in his job application and the employer would have fired him anyway had it discovered the misconduct earlier. The ALJ did not violate petitioner's due process rights (including his

right to notice of the specific grounds for dismissal) by admitting the after-acquired evidence, which simply limited petitioner's remedy for wrongful dismissal. Further, petitioner's dismissal would have been "mandatory" under N.C.G.S. § 126-30(a) because he disclosed "false and misleading information" in his job application.

Appeal by Petitioner from Final Decision entered 10 July 2018 by Administrative Law Judge Stacey Bice Bawtinhimer in the Office of Administrative Hearings. Heard in the Court of Appeals 5 September 2019.

The Angel Law Firm, PLLC, by Kirk J. Angel, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Vanessa N. Totten, for respondent-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Ray Dion Brown (Petitioner) appeals from a Final Decision of the Administrative Law Judge (ALJ) concluding Fayetteville State University (Respondent or FSU) failed to show its decision to terminate Petitioner was for "just cause" but further concluding Petitioner was not entitled to reinstatement and additional damages based on after-acquired evidence of Petitioner's misconduct. The Record before us tends to show the following:

Petitioner began employment with Respondent as a housekeeper on a temporary basis in June 2000. On 21 August 2000, Petitioner submitted an application for full-time employment with Respondent, and on 1 February 2001, Respondent hired Petitioner into a permanent position as a housekeeper, thereby rendering Petitioner a "career State employee" under N.C. Gen. Stat. § 126-1.1(a). Petitioner continued working in this position until Respondent fired him on 26 July 2017.

On 14 July 2017, Petitioner was assigned to clean the FSU library. While in the library, Petitioner took an iPhone charger cube (charger) from Library Technician Man-Yee Chan's (Chan) desk. After realizing the charger was missing, Chan contacted her supervisor to report the missing charger and to request viewing security camera footage. Chan testified she did not recognize Petitioner on the footage and also could not remember whether she had given Petitioner permission to use the charger, even though in the past she had given several other coworkers

permission to use the charger. Petitioner asserted Chan had previously given him permission to use her charger.

On 20 July 2017, Petitioner was placed on Investigatory Leave with Pay for "stealing an item from a staff member's desk." After attending a pre-disciplinary conference, Respondent notified Petitioner on 26 July 2017 in writing that he was dismissed for unacceptable personal conduct for "stealing a staff member's personal item from their . . . desk." Petitioner appealed his discharge through Respondent's Internal Grievance Process, and Respondent issued a Final University Decision upholding Petitioner's dismissal on 19 December 2017. Thereafter, on 23 January 2018, Petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings (OAH), alleging his termination was without just cause. The matter came on for hearing before the ALJ on 18 May 2018.

Sometime prior to this hearing, Respondent submitted a Motion for Summary Judgment.[1] The ALJ found that in this Motion, Respondent alleged for the first time that dismissal of Petitioner's claims was warranted because Petitioner had falsified his employment application in 2000 by "submitt[ing] false and misleading information about his criminal background[.]" Respondent asserted it first learned of Petitioner's alleged false application on 9 August 2017 and that Petitioner would have been terminated immediately for this reason. Although Respondent learned of this falsification on 9 August 2017 during the Internal Grievance Process, Respondent did not disclose this evidence to Petitioner until it filed its Motion for Summary Judgment sometime prior to the hearing before the ALJ.

Petitioner's 2000 job application asked whether Petitioner had "ever been convicted of an offense against the law other than a minor traffic violation[.]" If answered in the affirmative, the application requested the applicant to "explain fully on an additional sheet." Petitioner listed driving without a license as his only prior criminal conviction. During an offer of proof at the hearing before the ALJ, Petitioner acknowledged that prior to submitting his 2000 job application with FSU, he had been convicted of carrying a concealed weapon, possession of drug paraphernalia, resisting an officer, and larceny. Petitioner, however, contended there was an additional page on his application that was not presented at the hearing showing he did disclose these prior convictions. Also during

1. In his brief, Petitioner contends Respondent filed its Motion for Summary Judgment on 21 March 2018. However, Petitioner failed to include this Motion in the Record on Appeal.

this offer of proof by Respondent, FSU's Director of Facilities Operation, who directly oversaw Petitioner, testified that had Respondent known of Petitioner's prior criminal history, Respondent would have terminated Petitioner immediately in accordance with Respondent's Employment Background and Reference Check Policy.

At the hearing on 18 May 2018, the ALJ bifurcated the hearing to address two separate issues: "Whether Respondent . . . had just cause to terminate Petitioner from his position as a Housekeeper with FSU and, if not, what is the appropriate remedy considering the 'after acquired' evidence of Petitioner's misconduct?" Regarding the first issue, the ALJ found "there [was] no credible evidence to suggest Petitioner willfully and intentionally stole the charger cube from Ms. Chan" and therefore concluded "Respondent's termination of Petitioner was without 'just cause.' " Turning to the after-acquired evidence of Petitioner's failure to disclose his prior criminal convictions on his 2000 job application, the ALJ in its Final Decision made the following relevant Conclusions of Law:

> 27. Even though FSU lacked "just cause" to terminate Petitioner on July 26, 2017, FSU provided substantial "after-acquired" evidence demonstrating that Petitioner provided false and misleading information on his August 21, 2000 State Application for Employment. FSU did not discover that Petitioner had submitted false and misleading information on his August 21, 2000 job application until August 9, 2017 after Petitioner was terminated.
>
> 28. "Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit." *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 362, 130 L. Ed. 2d 852, 864 (1995). The North Carolina Court of Appeals explicitly adopted the after-acquired evidence doctrine established by *McKennon*. *See Johnson v. Bd. of Trs. of Durham Tech. Cmty. College*, 157 N.C. App. 38, 48, 577 S.E.2d 670, 675 (2003). If an employer demonstrates that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge, neither reinstatement nor front pay are allowed, and back pay is limited to the time between

the discharge and the time of discovery. *Id.* at 48-49, 577 S.E.2d at 676.

29. "[F]alsification of a State application or in other employment documentation" also constitutes unacceptable personal conduct. 25 N.C.A.C. 01J .0614(8)(h).

30. Furthermore, a State agency may discharge "[a]ny employee who knowingly and willfully discloses false or misleading information, or conceals dishonorable military service; or conceals prior employment history or other requested information, either of which are significantly related to job responsibilities on an application for State employment." N.C.G.S. § 126-30(a).

31. Dismissal is "mandatory" for any employee who "discloses false or misleading information in order to meet position qualifications." N.C.G.S. § 126-30(a).

32. The preponderance of evidence shows that Petitioner falsely claimed on the application that his only conviction prior to August 21, 2000 was for driving without a license.

33. Petitioner admitted at hearing that, prior to August 21, 2000, he had also been convicted of: assault on a female; carrying a concealed weapon; resisting a public officer; possession of drug paraphernalia; and larceny. . . .

34. Pursuant to N.C.G.S. § 126-30(a), if Petitioner were still employed by FSU, his dismissal would have been mandatory.

35. FSU provided substantial "after-acquired evidence" that bars Petitioner's reinstatement, front pay, and significantly limits his back pay to the period between July 26, 2017, his discharge, to August 9, 2017, the date FSU discovered the falsification on his application.

The ALJ's Final Decision then reversed the Final University Decision and ordered that "Petitioner is barred from reinstatement and front pay . . . [and] his back-pay shall be limited to the time between his discharge on July 26, 2017 and the discovery of the 'after acquired' evidence on August 9, 2017." Petitioner timely filed Notice of Appeal from the ALJ's Final Decision. *See* N.C. Gen. Stat. § 126-34.02(a) (2017) (allowing an

aggrieved party to appeal the ALJ's final decision to this Court, as further provided under N.C. Gen. Stat. § 7A-29(a)).[2]

Issue

The sole issue on appeal is whether the ALJ erred by applying the after-acquired-evidence doctrine to Petitioner's contested case under N.C. Gen. Stat. § 126-34.02 and concluding Petitioner was barred from the remedies of reinstatement and additional compensation.

Standard of Review

" 'It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test.' " *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 99, 798 S.E.2d 127, 132 (quoting *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004)), *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142-43 (2017).

"Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 207, 784 S.E.2d 509, 518 (2016) (citation and quotation marks omitted). As such, "[u]nder a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ]." *Id.* (alteration in original) (citation and quotation marks omitted).

On the other hand, "[u]nder the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). "When the trial court applies the whole record test, however, it may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citation and quotation marks omitted).

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2. Although the ALJ concluded "Petitioner may seek reasonable attorney's fees proportionate to his limited prevailing party status[,]" the ALJ did not decide the amount to be awarded to Petitioner; however, the fact the ALJ left open the issue of the amount of attorney's fees "does not alter the final nature of the ALJ's Final Decision for purposes of its appealability under N.C. Gen. Stat. § 7A-29(a)." *Ayers v. Currituck Cty. Dep't of Soc. Servs.*, ___ N.C. App. ___, ___, 833 S.E.2d 649, 654 (2019) (citation omitted).

Analysis

Petitioner contends the trial court erred by applying the after-acquired-evidence doctrine because the application of this doctrine to a career State employee would "contravene the just cause statute and deny due process." Specifically, Petitioner asserts this doctrine is inapplicable to contested cases brought under N.C. Gen. Stat. § 126-34.02 and that applying the doctrine in this case would violate Petitioner's due process rights. In addition, Petitioner argues that even assuming the after-acquired-evidence doctrine applies, the ALJ erred by concluding Petitioner's dismissal was "mandatory." We address each of Petitioner's contentions in turn below.

The United States Supreme Court first articulated the after-acquired-evidence doctrine, or *McKennon* rule, in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 130 L. Ed. 2d 852 (1995). In *McKennon*, the employee, McKennon, alleged she was discharged by her employer in violation of the Age Discrimination in Employment Act (ADEA). *Id.* at 354-55, 130 L. Ed. 2d at 859. While conducting a deposition of McKennon during discovery, McKennon's employer learned McKennon had copied confidential company documents before her discharge, as McKennon suspected she would be fired based on her age and wanted "insurance" and "protection" against her employer. *Id.* at 355, 130 L. Ed. 2d at 859 (quotation marks omitted). A few days after these deposition disclosures, McKennon's employer sent her a letter advising her that the "removal and copying of the records was in violation of her job responsibilities[,]" informing her that she was terminated again, and stating "had it known of McKennon's misconduct it would have discharged her at once for that reason." *Id.* The Sixth Circuit Court of Appeals held this misconduct was grounds for McKennon's termination and affirmed the trial court's granting of summary judgment in favor of the employer. *Id.*

The Supreme Court reversed, concluding the after-acquired evidence of McKennon removing and copying confidential company documents could not serve as a valid justification for upholding the employee's termination because the employer did not know of McKennon's misconduct until *after* she was discharged. *Id.* at 359-60, 130 L. Ed. 2d at 862. Therefore, "[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason." *Id.* at 360, 130 L. Ed. 2d at 862. Although the after-acquired evidence of the employee's misconduct could not bar the employee's ADEA claim, this type of evidence could be used to limit the employee's *relief*. *Id.* at 361-62, 130 L. Ed. 2d at 863. Specifically, the Supreme Court in *McKennon* held: "as a general rule in

cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *Id.* Rather, the *McKennon* Court limited the remedy of a wrongfully discharged employee in such circumstances to backpay for the period between the wrongful termination and discovery of the new information:

> Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered. In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.

Id. at 362, 130 L. Ed. 2d at 864.

In *Johnson v. Board of Trustees of Durham Technical Community College*, this Court adopted the *McKennon* rule to the plaintiff's claim under the North Carolina Persons with Disabilities Protection Act (NCPDPA), N.C. Gen. Stat. § 168A-1, *et seq.* 157 N.C. App. 38, 48, 577 S.E.2d 670, 676 (2003). The *Johnson* Court looked to the common purposes and remedial provisions of the NCPDPA and the ADA, and after noting the purposes and contents of the two statutes were consistent with one another, our Court held the *McKennon* rule applies for determining the proper remedy in NCPDPA cases involving after-acquired evidence of wrongdoing on the part of the employee. *Id.* at 46-48, 577 S.E.2d at 674-76.

Accordingly, the question presented here is whether the *McKennon* rule should also apply to contested cases brought by career State employees. As our Court did in *Johnson*, "we look to the provisions of the statute [governing career State employees] to ensure that *McKennon* is consistent with its purpose and content." *Id.* at 46, 577 S.E.2d at 674.

Pursuant to Section 126-35 of our General Statutes, "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2017). Although

Petitioner focuses on the purpose of the notice requirements under Section 126-35, see *infra*, the overall statutory scheme of the North Carolina Human Resources Act, which includes Section 126-35, is to ensure employees are not arbitrarily or discriminatorily fired by their employer. *See, e.g.*, N.C. Gen. Stat. § 126-34.02(b)(1)-(6) (allowing the ALJ to hear an employee's claim that the employee was wrongfully terminated based on, *inter alia*, discrimination or harassment, retaliation, or a lack of just cause). Although the North Carolina Human Resources Act protects a different class of employees than either the NCPDPA or the ADA, all three acts are designed to guard against adverse employment action by employers. *See id.* § 126-34.02(a)-(b) (allowing "an applicant for State employment, a State employee, or former State employee" to file a contested case alleging their adverse employment action was based on impermissible grounds); *see also* N.C. Gen. Stat. § 168A-5(a)(1) (2017) (barring an employer from making an adverse employment action based on the employee's or applicant's disability); 42 U.S.C.A. § 12112(a) (West 2013) (same under federal law). In addition, the ADA, NCPDPA, and the North Carolina Human Resources Act all "contain similar remedial provisions, including those for injunctive relief and back pay awards." *Johnson*, 157 N.C. App. at 46, 577 S.E.2d at 674 (citing 42 U.S.C. § 2000e-5(g); then citing N.C. Gen. Stat. § 168A-11); *see also* N.C. Gen. Stat. § 126-34.02(a)(1)-(3).

Further, Section 126-35 sets the benchmark for a state employer who desires to terminate a career State employee. This Section "establishes a condition precedent that must be fulfilled by the employer before disciplinary actions are taken." *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 350, 342 S.E.2d 914, 922 (1986) (citation omitted). "The employer must provide the employee with a written statement enumerating specific acts or reasons for the disciplinary action" *before* the action is taken. *Id.* (citation omitted). As in *Johnson*, "[t]his is consistent with *McKennon*, which focuses on the intent of the employer at the time of the alleged discriminatory act." 157 N.C. App. at 46, 577 S.E.2d at 675 (citing *McKennon*, 513 U.S. at 360, 130 L. Ed. 2d at 862). Accordingly, "[w]e find nothing in the purpose or content of the [North Carolina Human Resources Act] that is inconsistent with or contrary to the *McKennon* rule." *Id.* Therefore, both *Johnson* and *McKennon* support the proposition that the *McKennon* rule should be adopted to contested cases brought under N.C. Gen. Stat. § 126-34.02.

This does not end our inquiry, however, as Petitioner claims extending the *McKennon* rule to this context violates a career State employee's due process rights. Specifically, Petitioner alleges by allowing the

after-acquired evidence of Petitioner's misconduct—which Petitioner first learned of in Respondent's Motion for Summary Judgment before the ALJ—to limit Petitioner's remedy, Petitioner was not given the required notice and opportunity to be heard, thereby denying his due process rights.

Petitioner correctly notes a career State employee has a property interest in continued employment, therefore requiring a state employer to comply with certain procedural due process requirements before terminating employment. *See Leiphart*, 80 N.C. App. at 348-49, 342 S.E.2d at 921-22 (citations omitted). The North Carolina Human Resources Act affords these obligatory protections by requiring, *inter alia*, written notice to the employee stating the precise grounds for termination and by providing an employee with the opportunity to be heard on why the adverse employment action is not warranted. *See* N.C. Gen. Stat. §§ 126-35; -34.02. Our Supreme Court has explained these statutory protections "fully comport[] with the constitutional procedural due process requirements mandated by the Fourteenth Amendment" of the United States Constitution. *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 327, 507 S.E.2d 272, 280 (1998).

Adoption of the *McKennon* rule to contested cases brought by career State employees, however, does not conflict with these due process protections. This is so because after-acquired evidence of misconduct does not serve as a justification for the *termination*.[3] Rather, under the *McKennon* rule, this after-acquired evidence simply limits the *remedy* of an employee who was wrongfully discharged. *See Johnson*, 157 N.C. App. at 48, 577 S.E.2d at 675 (explaining that "while 'after-acquired' evidence of employee misconduct could not bar an employer's liability for discriminatory discharge, such evidence may be relevant to determining the *relief* available to the employee" (emphasis added) (citation omitted)). Therefore, the application of the *McKennon* rule is not inconsistent with the statutory notice provisions mandated by a career State employee's due process rights. Further, this result is consistent with N.C. Gen. Stat. § 126-34.02(a)(3), which grants the ALJ "express statutory authority to '[d]irect other suitable action' upon a finding that just cause does not exist for the particular action taken by the agency."

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3. Indeed, if it did serve as a justification for termination, this would flout the purpose of the North Carolina Human Resources Act's statutory notice protections. *See Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 922 (Section 126-35(a) "was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal.").

Harris, 252 N.C. App. at 109, 798 S.E.2d at 138 (alteration in original) (quoting N.C. Gen. Stat. § 126-34.02(a)(3)).

In any event, and on these facts, Petitioner was afforded sufficient notice to comport with due process. Regarding the after-acquired evidence and Petitioner's notice thereof, the ALJ found that Respondent first disclosed this evidence in its "Motion for Summary Judgment to bolster Respondent's 'just cause' argument"; Petitioner filed a Motion in Limine to exclude this evidence as support for Petitioner's termination, which Motion the trial court granted; after the ALJ concluded just cause did not exist to terminate Petitioner, "Respondent was allowed to submit this 'after acquired' evidence as Offers of Proof in the form of documentation and testimony"; and "Petitioner cross-examined the witnesses on this documentation during Respondent's Offer of Proof." Because Petitioner has not challenged these Findings of Fact and because substantial evidence in the Record supports these Findings, they are binding on appeal. *See id.* at 108, 798 S.E.2d at 137 (citation omitted). These Findings show Petitioner knew of Respondent's intent to offer this evidence prior to the hearing before the ALJ and that Petitioner was given the opportunity to cross-examine the State's witnesses on this evidence, thereby comporting with constitutional procedural due process requirements. *See Peace*, 349 N.C. at 322, 507 S.E.2d at 278 ("The fundamental premise of procedural due process protection is notice and the opportunity to be heard." (citation omitted)).

As discussed *supra*, the structure and content of the North Carolina Human Resources Act are consistent with the application of the *McKennon* rule. Further, application of this rule does not conflict with Petitioner's due process rights under the Act. Accordingly, we hold the *McKennon* rule applies in a contested case brought under N.C. Gen. Stat. § 126-34.02 and that the ALJ did not err in applying this doctrine to Petitioner's contested case.

Lastly, Petitioner contends even assuming the application of this doctrine was appropriate, the ALJ erred by concluding Petitioner's dismissal was "mandatory" because "there was not sufficient evidence to show that Petitioner should have been terminated[.]" Under Section 126-30(a) of our General Statutes, "[d]ismissal shall be mandatory where the applicant discloses false or misleading information in order to meet position qualifications." N.C. Gen. Stat. § 126-30(a) (2017).

Here, the ALJ found that Petitioner's 2000 job application listed his only criminal conviction as driving without a license. However, at the hearing before the ALJ, Petitioner admitted he had been previously

convicted of carrying a concealed weapon, possession of drug paraphernalia, resisting an officer, and larceny. When asked whether he listed any of these convictions on his application, Petitioner contended "[t]here was another sheet that should have been with [the application] that had all that stuff on it." Petitioner presented no additional evidence regarding another sheet attached to his application. Based on this testimony, the ALJ found Petitioner failed to "report[] these criminal convictions on his application." The ALJ also found, based on FSU's Director of Facilities Operation's testimony, that Respondent would have terminated Petitioner immediately upon learning of Petitioner's inaccurate application. These Findings are supported by substantial evidence in the Record and thus binding on appeal. *See Harris*, 252 N.C. App. at 108, 798 S.E.2d at 137 (explaining that as the ALJ is "the only tribunal with the ability to hear testimony, observe witnesses, and weigh credibility[,] . . . we defer to the ALJ's findings of fact, even if evidence was presented to support contrary findings" (citation omitted)). In turn, these Findings support the ALJ's conclusion—"Pursuant to N.C.G.S. § 126-30(a), if Petitioner were still employed by FSU, his dismissal would have been mandatory." Therefore, the ALJ did not err in applying the *McKennon* rule, concluding Petitioner's after-acquired evidence of misconduct would have warranted dismissal, and limiting Petitioner's remedy to back pay from the time of his discharge to the discovery of this after-acquired evidence.

Conclusion

Accordingly, for the foregoing reasons, we affirm the ALJ's Final Decision.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

MIKE CAUSEY, COMMISSIONER OF INSURANCE
OF NORTH CAROLINA, PETITIONER
v.
CANNON SURETY, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, RESPONDENT

MARK L. BIBBS, ATTORNEY AT LAW D/B/A BIBBS LAW GROUP, PLAINTIFF
v.
CANNON SURETY, LLC, A NORTH CAROLINA
LIMITED LIABILITY COMPANY, DEFENDANT

No. COA19-27

Filed 7 January 2020

1. Insurance—seizure order and injunction—North Carolina Captive Insurance Act—confession of judgment—void

After granting the Commissioner of Insurance's petition for a seizure order and injunction against a captive insurance company under the North Carolina Captive Insurance Act, the trial court properly struck a confession of judgment filed against the company in favor of the company's attorney, which arose from the company's breach of contract to pay the attorney for his legal services in the case. The company's president violated the seizure order—which enjoined the company's officers from transacting the company's business without the Commissioner's consent—by signing the confession of judgment, and therefore the confession of judgment was void.

2. Estoppel—judicial estoppel—applicability—insurance action—seizure order and injunction

Where the trial court granted the Commissioner of Insurance's petition for a seizure order and injunction against a captive insurance company under the North Carolina Captive Insurance Act, the doctrine of judicial estoppel did not prevent the court from also granting the Commissioner's motion to strike a confession of judgment filed against the company in favor of the company's attorney (for failure to pay for legal services in the case). The company's president did not violate the seizure order by hiring legal counsel, but he did violate the order by signing the confession of judgment. Therefore, where the Commissioner did not object to the company's legal representation in the case, the Commissioner did not change positions by later asserting that the company violated the seizure order by signing the confession of judgment.

Appeal by Plaintiff from orders entered 18 April 2018 by Judge A. Graham Shirley, II, in Wake County Superior Court. Heard in the Court of Appeals 22 August 2019.

Bibbs Law Group of North Carolina, by Mark L. Bibbs, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel S. Johnson, Special Deputy Attorney General M. Denise Stanford, and Assistant Attorney General Heather H. Freeman, for Petitioner-Movant-Appellee and Respondent-Defendant-Appellee in Rehabilitation.

COLLINS, Judge.

Attorney Mark L. Bibbs ("Bibbs") appeals from orders granting motions filed by Commissioner of Insurance Mike Causey ("Commissioner") to strike a confession of judgment against Cannon Surety, LLC ("Cannon") in favor of Bibbs for $227,850.50 plus 8% interest, arising from Cannon's breach of contract to pay for Bibbs' legal services. The confession of judgment violated an existing seizure order entered under the North Carolina Captive Insurance Act, and it was void. Accordingly, we affirm the trial court's orders.

I. Statutory Background: North Carolina Captive Insurance Act

A captive insurance company is "an insurance company that is owned by another organization and whose exclusive purpose is to insure risks of the parent organization and affiliated companies." N.C. Gen. Stat. § 58-3-165 (2018). Captive insurance companies must be licensed, must meet certain capital and surplus requirements, and must file annual reports to the Commissioner. N.C. Gen. Stat. §§ 58-10-345, -370, -405(b), -415 (2018). A captive insurance company failing to meet these requirements may be subject to seizure, rehabilitation, and liquidation by the Commissioner of Insurance. N.C. Gen. Stat. §§ 58-10-475, 58-30-1 to -310 (2018).

To initiate seizure, the Commissioner must file a petition in Wake County Superior Court requesting a formal delinquency proceeding, after which the trial court may issue an ex parte seizure order directing the Commissioner to

> take possession and control of all or a part of the property, books, accounts, documents, and other records of an insurer, . . . and that, until further order of the Court,

> enjoins the insurer and its officers, managers, agents, and employees from disposing of its property and from transacting its business except with the written consent of the Commissioner.

N.C. Gen. Stat. § 58-30-65(b) (2018).

To initiate rehabilitation, the Commissioner must petition the court on one or more specified grounds. N.C. Gen. Stat. § 58-30-75 (2018). If granted, a rehabilitation order appoints the Commissioner as the rehabilitator and directs the Commissioner to "take possession of the assets of the insurer and to administer them under the general supervision of the Court." N.C. Gen. Stat. § 58-30-80 (2018). As the rehabilitator, the Commissioner has "all the powers of the directors, officers, and managers, whose authority shall be suspended" and has broad powers to "take such action as he considers necessary or appropriate to reform and revitalize the insurer." N.C. Gen. Stat. § 58-30-85(c) (2018).

II. Factual and Procedural History

Cannon was a licensed special purpose captive insurance company. Accordingly, Cannon was governed by the requirements set forth in the North Carolina Captive Insurance Act, N.C. Gen. Stat. §§ 58-10-335 to -655, and regulated by the Department of Insurance, which included oversight and enforcement by the Commissioner. Cannon's license permitted it to transact insurance for judicial appearance bonds written by or on behalf of the members of its parent company, Premier Judicial Consultants, LLC.

On 27 September 2017, the Commissioner filed a verified petition in Wake County Superior Court requesting a seizure order, an order of rehabilitation, an order appointing a receiver, and injunctive relief against Cannon. This filing commenced case number 17 CVS 11692 (the "Insurance Action"). On that day, the trial court entered a 60-day seizure order and an injunction as follows:

> SEIZURE ORDER
>
> 1. Pursuant to the provisions of N.C. Gen. Stat. § 58-30-65, Mike Causey, in his capacity as Commissioner of Insurance of the State of North Carolina, is HEREBY ORDERED to take possession and control of all the property, books, accounts, documents, and other records of [Cannon], and of the premises occupied by it for transaction of its business.

2. The Commissioner is hereby authorized, empowered and directed to take into his possession and control all property, stocks, bonds, securities, bank accounts, savings accounts, monies, accounts receivable, books, papers, records, data bases, printouts and computations, . . . and all other assets of any and all kinds and nature whatsoever belonging to [Cannon], wherever located, and to conduct [Cannon's] business and administer [Cannon's] assets and affairs.

INJUNCTION AGAINST
INTERFERENCE WITH COMMISSIONER

3. Until further Order of this Court, [Cannon], its trustees, officers, directors, agents, employees, third party administrators, and all other persons with notice of this Order are hereby ENJOINED and RESTRAINED from the disposition, waste or impairment of any of [Cannon's] property, assets, or records, and said persons are enjoined from transacting [Cannon's] business except with the written consent of the Commissioner. All such persons are hereby ORDERED to surrender to the Commissioner any and all property or records of [Cannon] in their custody or control, wherever situated.

4. Until further order of this Court, [Cannon], its officers, managers, agents, employees, and third party administrators are hereby ENJOINED and RESTRAINED from interfering in any manner with the Commissioner in the exercise of his duties.

5. All persons, firms and corporations with notice of the Court's Order are hereby enjoined from obtaining preferential payments or transfers against [Cannon] or its assets.

6. This Seizure Order shall be effective, unless otherwise extended, for sixty (60) days from the date of this Seizure Order, which is the period the undersigned considers necessary for the Commissioner to ascertain the condition of the insurer.

As counsel for Cannon, Bibbs filed a motion requesting review, relief, and dissolution of the seizure order, followed by an emergency motion asking the trial court to stay enforcement of and set aside the seizure

order. The Commissioner filed a motion for partial summary judgment, seeking to be appointed rehabilitator of Cannon. The trial court extended the seizure order until the latter of a ruling on the Commissioner's partial summary judgment motion or 28 December 2017. The Commissioner served Bibbs, as counsel for Cannon, with the extension of the seizure order on 17 November 2017.

On 15 December 2017, Bibbs moved to withdraw as counsel of record for Cannon, on the ground that Cannon had failed to pay Bibbs for legal representation in the Insurance Action. The trial court granted the motion that day.

On 18 December 2017, Bibbs filed a confession of judgment as a plaintiff in Wake County Superior Court, commencing case number 17 CVS 15505 (the "Attorney Action"). The confession of judgment was signed by Dallas R. McClain ("McClain"), President of Cannon, and averred that (1) Cannon breached a contract with Bibbs for legal services by defaulting on payments due; (2) the confession of judgment resulted from settlement negotiations to resolve the balance owed; (3) McClain authorized the entry of judgment against Cannon in favor of Bibbs for $227,850.50 plus 8% interest; (4) Cannon, "through its President and legally authorized officer, Dallas R. McClain, expressly agree[d] to waive any right to a hearing or appeal arising from entry of" the confession of judgment; and (5) the confession of judgment, executed "by its President and legally authorized officer, Dallas R. McClain," should be binding on all future successors in interest of Cannon.

In the Insurance Action, the trial court entered orders in January 2018 granting the Commissioner's motion for partial summary judgment, placing Cannon in rehabilitation, appointing the Commissioner as rehabilitator and receiver of Cannon, and issuing an injunction against Cannon to prevent interference with rehabilitation.

On 6 February 2018, the Commissioner filed motions in the Insurance Action and the Attorney Action to strike the "purported" confession of judgment filed by Bibbs, contending that McClain's act of signing the confession of judgment violated the seizure order and injunction, rendering the confession of judgment void.[1]

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1. Specifically, the Commissioner alleged in his motions that (a) McClain transacted business on behalf of Cannon while lacking authority to do so under the seizure order and interfered with the Commissioner's exercise of his duties under the seizure order; (b) with knowledge of the terms of the seizure order, Bibbs obtained the purported confession of judgment against Cannon in Bibbs' pecuniary favor, and in so doing sought to obtain preferential payments against Cannon as prohibited by the seizure order; (c) the

On 15 March 2018, Bibbs filed motions to intervene and for payment of attorney fees in the Insurance Action. The trial court heard arguments regarding the motions filed by both parties on 21 March 2018. The trial court had show cause orders served on McClain and Bibbs "for interference with this Court's Seizure Order and Extension of the Seizure Order." On 18 April 2018, the trial court entered orders granting the Commissioner's motions to strike the confession of judgment and denying Bibbs' motions to intervene and for payment of attorney fees in the Insurance Action.

From the 18 April 2018 orders, Bibbs timely filed notice of appeal.[2]

III. Discussion

Bibbs asserts that the trial court improperly struck the confession of judgment and urges this Court to apply the doctrine of judicial estoppel to reverse the trial court's order.

A. Confession of Judgment

[1] Whether a confession of judgment is void is a question of law, which we review de novo. *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). Under de novo review, we consider the matter anew and freely substitute our own judgment for that of the lower tribunal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

"A judgment by confession may be entered without action at any time in accordance with the procedure prescribed by [N.C. Gen. Stat. § 1A-1, Rule 68.1]. Such judgment may be for money due or for money that may become due." N.C. Gen. Stat. § 1A-1, Rule 68.1(a) (2018). "A prospective defendant desiring to confess judgment shall file with the clerk of the superior court . . . a statement in writing signed and verified or sworn to by such defendant authorizing the entry of judgment for the amount stated." N.C. Gen. Stat. § 1A-1, Rule 68.1(b) (2018). "If the statutory requirements [governing a confession of judgment] are not complied with, the judgment is irregular and void, because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings." *Cline v. Cline*, 209 N.C. 531, 535, 183 S.E. 904, 906 (1936) (internal quotation marks and citations omitted); *see*

Commissioner's rights under the seizure order were impaired by the purported confession of judgment and Bibbs' interference; and (d) accordingly, McClain's and Bibbs' actions rendered the purported confession of judgment void.

2. Bibbs makes no argument on appeal regarding the trial court's orders denying his motions to intervene and for payment of attorney fees in the Insurance Action.

Nimocks v. Cape Fear Shingle Co., 110 N.C. 20, 23-24, 14 S.E. 622, 623 (1892) (affirming a trial court's order setting aside a confession of judgment as void because it did not appear in the record that the directors of defendant corporation had authorized the treasurer or agent to confess the judgment). "A void judgment is not a judgment and may always be treated as a nullity. It lacks some essential element; it has no force whatever; it may be quashed *ex mero motu*." *Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 708, 128 S.E. 20, 23 (1925).

In this case, McClain transacted Cannon's business when McClain executed the confession of judgment on behalf of Cannon in favor of Bibbs. Bibbs conceded as much at the hearing on 21 March 2018:

> THE COURT: Executing a Confession of Judgment is – you know, people do that in transacting the business of their company. Is that correct?
>
> MR. BIBBS: That is correct.
>
> THE COURT: Okay. So when Mr. McClain executed that Confession of Judgment, he was transacting the business of Cannon Surety.
>
> MR. BIBBS: That is correct.

As the seizure order stripped McClain of the authority to transact Cannon's business, and McClain did not obtain the Commissioner's written consent to do so, the confession of judgment was executed in violation of the seizure order. Moreover, because Bibbs had notice of the seizure order and was attempting to obtain immediate payment, the confession of judgment was executed in violation the seizure order's provision enjoining persons with notice of the court's order from obtaining preferential payments or transfers against Cannon or its assets. Additionally, because McClain lacked the legal authority to sign the confession of judgment or otherwise transact any business on behalf of Cannon while the seizure order and injunction were in effect, the confession of judgment was void for "want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings." *See Cline*, 209 N.C. at 535, 183 S.E. at 906. Because the confession of judgment was executed in violation of the seizure order and injunction and was void for want of jurisdiction, the trial court did not err by striking the orders.[3]

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3. While the trial court declared the confession of judgment null and void as a matter of law in its order granting the motion to strike, the trial court *also* stated at the hearing that it could treat the Commissioner's motion to strike as a motion for appropriate relief

B. Judicial Estoppel

[2] Bibbs argues that the trial court abused its discretion by refusing to apply the doctrine of judicial estoppel to this case. Bibbs' estoppel argument proceeds as follows: (1) the Commissioner participated in the October 2017 hearing in the Insurance Action after the seizure order had been entered and without objecting to Bibbs' representation of Cannon or arguing that McClain lacked authority to hire Bibbs to represent Cannon in the Insurance Action; (2) the Commissioner, as the "purported rehabilitator," did not take it upon himself to hire counsel to represent Cannon in the Insurance Action; (3) by failing to object to Bibbs' representation of Cannon, the Commissioner waived the ability to hire counsel on behalf of Cannon and to contest representation by Bibbs later; and (4) when the Commissioner later moved to strike the confession of judgment signed by McClain, the Commissioner effectively changed positions.

"[J]udicial estoppel is to be applied in the sound discretion of our trial courts." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 33, 591 S.E.2d 870, 891 (2004). Our review of a trial court's application of the doctrine is limited to determining whether the trial court abused its discretion. *Id.* at 38, 591 S.E.2d at 894.

Judicial estoppel is an equitable, gap-filling doctrine that "provid[es] courts with a means to protect the integrity of judicial proceedings" from "individuals who would play fast and loose with the judicial system." *Id.* at 26, 591 S.E.2d at 887 (internal quotation marks and citation omitted) (noting that this doctrine protects courts, not litigants). The doctrine prohibits parties from deliberately changing positions on factual assertions. *Id.* at 22-33, 591 S.E.2d at 883-91. While circumstances allowing for judicial estoppel "are probably not reducible to any general formulation of principle[,]" *id.* at 28, 591 S.E.2d at 888, the United States Supreme Court set forth three factors to guide its application, which our courts have articulated as follows:

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and, accordingly, invoke its authority under Rule 60(b)(6) to strike the judgment "for any reason justifying relief from the operation of the judgment." A motion for relief from a judgment or order made pursuant to Rule 60(b) is "addressed to the sound discretion of the trial court and the court's ruling will not be disturbed without a showing that the court abused its discretion." *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983). A trial court abuses its discretion if its ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [if] . . . [t]he judgment is void[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2018). Because we conclude the confession of judgment was void as a matter of law, as discussed in Part A, even were we to review the trial court's order as a grant of relief under 60(b) for abuse of discretion, we would likewise affirm the trial court's decision.

> (1) whether a party has taken a subsequent position that is clearly inconsistent with its earlier position,
>
> (2) whether the party successfully persuaded a court to accept the earlier, inconsistent position raising a threat to judicial integrity by inconsistent court determinations or the appearance that the first or the second court was misled, and
>
> (3) whether the inconsistent position gives the asserting party an unfair advantage or imposes on the opposing party unfair detriment if not estopped.

Harvey v. McLaughlin, 172 N.C. App. 582, 584, 616 S.E.2d 660, 662-63 (2005) (citing *Whitacre*, 358 N.C. at 28-29, 591 S.E.2d at 888-89 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001))). Our Supreme Court noted in *Whitacre* that only the first factor is essential. *Whitacre*, 358 N.C. at 29 n.7, 591 S.E.2d at 888 n.7.

The doctrine of judicial estoppel is not applicable in this case because the Commissioner did not take a subsequent position on a factual assertion that was clearly inconsistent with his earlier position. *See id.* at 33, 591 S.E.2d at 891. By participating in the October 2017 hearing, in which Bibbs represented Cannon, the Commissioner did not manifest consent to McClain transacting the company's business in any manner, including by signing a confession of judgment. When McClain appeared at the hearing with legal counsel, he was not transacting business on behalf of Cannon, which would have violated the terms of the seizure order.

The Commissioner's implicit acknowledgment of Bibbs as counsel for Cannon in the Insurance Action was not inconsistent with the Commissioner's later assertion that McClain violated the seizure order by signing the confession of judgment filed in the Attorney Action. As the doctrine of judicial estoppel was not applicable in this case, the trial court did not abuse its discretion by declining to apply it.

IV. Conclusion

The confession of judgment violated the seizure order and was void. The trial court did not abuse its discretion by failing to apply the doctrine of judicial estoppel. The trial court's orders striking the confession of judgment are affirmed.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

COPELAND v. AMWARD HOMES OF N.C., INC.

[269 N.C. App. 143 (2020)]

WILLIAM EVERETT COPELAND IV AND CATHERINE ASHLEY F. COPELAND, CO-ADMINISTRATORS OF THE ESTATE OF WILLIAM EVERETT COPELAND, PLAINTIFFS
v.
AMWARD HOMES OF N.C., INC., CRESCENT COMMUNITIES, LLC; AND CRESCENT HILLSBOROUGH, LLC, DEFENDANTS

No. COA18-1021

Filed 7 January 2020

1. Negligence—dump truck roll-away accident—planned community developer—duty to inspect construction site

The developer of a planned community owed no legal duty to regularly inspect or monitor a construction site in the development, on a lot that had been sold to a builder, which was being graded by an independent contractor without the developer's permission. Summary judgment was therefore properly entered for the developer in a negligence action brought by the parents of a five-year-old boy who was struck and killed when an unattended dump truck rolled downhill from the nearby construction site.

2. Negligence—dump truck roll-away accident—planned community developer—duty to prevent negligent construction work

The developer of a planned community owed no legal duty to take precautions against the possible negligence of others performing construction work in the development. Summary judgment was therefore properly entered for the developer in a negligence action brought by the parents of a five-year-old boy who was struck and killed when an unattended dump truck—which was overloaded, left with its engine running, and without wheel chocks—rolled downhill from a nearby construction site.

3. Negligence—dump truck roll-away accident—planned community developer—duty to sequence construction responsibly

In a negligence action brought after their five-year-old son was struck and killed by an unattended dump truck that rolled downhill from a nearby construction site, plaintiffs presented a genuine issue of material fact regarding whether the developer of the planned community owed a legal duty to ensure that the construction of homes in the hilly and steep development was sequenced in such a way as to minimize the known risk of a roll-away accident causing injury to someone.

Appeal by plaintiffs from order entered 7 May 2018 by Judge W. Osmond Smith III in Orange County Superior Court. Heard in the Court of Appeals 12 February 2019.

Edwards Kirby, LLP, by David F. Kirby and William B. Bystrynski, and Holt Sherlin LLP, by C. Mark Holt and David L. Sherlin, for plaintiffs-appellants.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart and F. Marshall Wall, for defendants-appellees.

DIETZ, Judge.

Five-year-old Everett Copeland died after an overloaded dump truck rolled away and struck him as he played near his home. The dump truck was left unattended, with its engine running and without wheel chocks, at a home construction site up a hill from the Copeland's home.

This case screams of negligence—by the dump truck driver, by the company that operated the dump truck, perhaps even by the general contractor responsible for supervising the operation. This appeal involves none of those parties.

This case concerns negligence claims against the real estate developer who designed the planned community where the accident occurred. The Copelands argue that the developer—although it sold the lots to independent builders to handle construction—retained a duty to develop a safety plan, sequence the project to minimize harm from construction accidents, and conduct inspections of builders' progress.

Most of the Copelands' theories of legal duty are barred by settled tort principles established by our Supreme Court. A real estate developer, like anyone else, may hire a contractor to perform a service such as building a home, and has no duty to supervise that contractor's work. *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991). Similarly, a real estate developer, like anyone else, has no duty to imagine all of the harms that might be caused by other people's negligence and then to take precautionary steps to avoid those harms. *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E.2d 276, 279 (1951).

Still, as explained below, the Copelands have advanced a theory of legal duty that survives summary judgment under these principles. They have forecast evidence that this development occurred on unusually steep, hilly terrain; that the construction would involve heavy equipment and materials; that there were foreseeable risks of roll-aways during

construction; and that a reasonably prudent developer would take steps to sequence construction or grade the area in advance to avoid foreseeable harm caused by these construction accidents. There are genuine issues of material fact on this theory of duty and we therefore reverse and remand for further proceedings on this legal claim.

Facts and Procedural History

The following recitation of facts represents the Copelands' version of events, viewed in the light most favorable to them. As the non-movant at the summary judgment stage, this Court must accept the Copelands' evidence as true. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

In 2013, Defendants Crescent Communities, LLC and Crescent Hillsborough, LLC, to which we refer collectively as "Crescent," began developing a residential planned community known as Forest Ridge. Crescent purchased more than 100 acres of steep, hilly land as the future site of the development.

Crescent recorded the necessary instruments to subdivide the site and create applicable covenants and declarations typical of planned communities. The company then sold lots to builders, who constructed homes consistent with the overall aesthetic and design elements of the community.

Although Forest Ridge is situated on hilly terrain, Crescent did not mass grade the entire community before selling lots to builders—meaning at least some of the lots had to be individually graded before a home could be built on them. "Grading" is the process of ensuring the earth on which construction will take place is either level, or appropriately sloped for the necessary construction. Grading typically involves heavy equipment including dump trucks, excavators, and bulldozers.

Crescent also did not sequence the construction of the community so that uphill lots were built before downhill ones. As a result, the Copelands moved into their home in Forest Ridge while at least some lots uphill from the Copelands' home had yet to be graded.

In late 2016, on a lot uphill from the Copelands' home, a subcontractor employed by the home builder began grading work. This grading work occurred on hilly, sloping terrain facing the Copelands' home. It involved a dump truck and heavy excavating equipment.

During the grading, the dump truck driver left the truck unattended. The dump truck was overloaded, had its engine running, and did not

have wheel chocks. The truck broke free and rolled downhill. Five-year-old Everett Copeland was playing outside near his home. The dump truck struck and killed Everett.

The Copelands, as administrators of their son's estate, sued Crescent for wrongful death, asserting several theories of negligence. After a full opportunity for discovery, Crescent moved for summary judgment, arguing that it owed no legal duty to the Copelands. The trial court granted Crescent's motion for summary judgment. The Copelands timely appealed.

Analysis

The Copelands appeal the trial court's grant of summary judgment in favor of Crescent. "Summary judgment is appropriate when viewed in the light most favorable to the non-movant, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 164, 665 S.E.2d 147, 152 (2008) (citations omitted). We review the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

To survive a motion for summary judgment in a negligence case, the plaintiff must establish a "prima facie case" by showing "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Lavelle v. Schultz*, 120 N.C. App. 857, 859–60, 463 S.E.2d 567, 569 (1995).

In their briefing, the parties focus entirely on the question of duty. "The duty of ordinary care is no more than a duty to act reasonably." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010). "The duty does not require perfect prescience, but instead extends only to causes of injury that were reasonably foreseeable and avoidable through the exercise of due care." *Id.* The Copelands assert several independent theories of legal duty in this case and we address each in turn below.

I. Duty to inspect or monitor the construction site

[1] We begin with the Copelands' argument that Crescent had a duty to "routinely inspect the construction going on in its subdivision." Crescent designed this planned community and recorded an

instrument containing covenants that included various architectural limits on homes constructed there. But the company did not actually build the homes. It sold the lots to builders, who would then construct homes consistent with the covenants and other restrictions included in the lot purchase agreement.

Those lot purchase agreements required builders to obtain permission from Crescent before clearing trees or grading the lot. There is evidence in the record showing the builder of the home from which the dump truck rolled away began grading the lot without permission from Crescent, and that the builder did not take routine safety measures such as installing a silt fence or creating a temporary gravel driveway. The Copelands argue that "Crescent violated the standard of care for a master developer because it failed to routinely inspect the construction going on in its subdivision" and that, had it done so, it would have discovered the builder's unauthorized and unsafe grading work, halted it, "and Everett Copeland would not have been killed."

This theory of legal duty is barred by precedent. The builder was not an employee of Crescent. It was, at most, an independent contractor performing construction work on property that was part of a planned community designed and managed by Crescent. When one hires an independent contractor to perform work, there is no legal duty "to take proper safeguards against dangers which may be incident to the work undertaken by the independent contractor." *Cook v. Morrison*, 105 N.C. App. 509, 515, 413 S.E.2d 922, 926 (1992). The legal responsibility for the safe performance of that work rests entirely on the independent contractor. *Id.*

The only exception to this rule concerns "inherently dangerous activities." *See Woodson v. Rowland*, 329 N.C. 330, 352–53, 407 S.E.2d 222, 235–36 (1991). Our caselaw does not establish a bright-line rule for determining which activities are inherently dangerous, but home construction is not inherently dangerous. *Id.* Our Supreme Court has long held that ordinary building construction work is not "of that character which the policy of the law requires that the owner shall not be permitted to free himself from liability by contract with another for its execution." *Vogh v. F. C. Geer Co.*, 171 N.C. 672, 676, 88 S.E. 874, 876 (1916).

Were we to hold that owners of property on which homes are being constructed have a legal duty to monitor the builder's grading work, it would be an unprecedented expansion of tort liability at odds with our Supreme Court's longstanding application of these negligence principles in the home construction context. As we have often explained,

"this Court is not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature." *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 126, 723 S.E.2d 352, 358 (2012).

The Copelands also suggest that Crescent retained sufficient control over the project to subject itself to liability for the negligence of the builder or its subcontractors. *See Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 489, 764 S.E.2d 203, 212 (2014). But this principle applies only in situations where the developer retains control over how the work is performed. In *Trillium Ridge*, for example, a developer hired a construction firm to act as "Asst Project Manager" but employees of the developer retained various "[c]onstruction duties & responsibilities." *Id.* at 490, 764 S.E.2d at 212.

Here, by contrast, there is no evidence that Crescent retained any construction responsibilities or had any control over the builder's decisions concerning grading work. To be sure, the declaration Crescent recorded when creating the Forest Ridge community imposed aesthetic restrictions on builders and required builders to obtain permission from Crescent before beginning various phases of construction. But there is no evidence that Crescent retained any control over the actual construction work performed by the builders. Accordingly, we reject the Copelands' argument that Crescent had a legal duty to monitor or inspect the grading work of a subcontractor of the builder.

II. Duty to take precautions against negligent construction work

[2] The Copelands next argue that when Crescent "decided to develop the Forest Ridge subdivision, it was undertaking a course of conduct that required it to exercise ordinary care to protect others from harm." This duty, according to the Copelands, included anticipating the risk of harm caused by negligent operation of heavy equipment at construction sites and taking reasonable precautionary steps to prevent that harm.

Again, this theory of duty is barred by precedent. "It is a well established principle in the law of negligence that a person is not bound to anticipate negligent acts or omissions on the part of others." *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E.2d 276, 279 (1951). This principle has been repeated by our State's appellate courts many times. *Britt v. Sharpe*, 99 N.C. App. 555, 558, 393 S.E.2d 359, 361 (1990) (citing Supreme Court cases).

Here, undisputed facts in the record demonstrate that the driver of a dump truck at the construction site left the vehicle unattended, with

its engine running, without wheel chocks. There is no dispute that the dump truck operator acted negligently and that this negligence proximately caused Everett Copeland's death. The Copelands concede this in their reply brief.

The law *could* impose a duty on Crescent, as the developer of a large planned community, to anticipate potential negligence on construction sites within the community and to take precautionary steps to prevent harm should that occur. But the tort law of our State, as it exists today, does not impose that duty. *Chaffin*, 233 N.C. at 380, 64 S.E.2d at 279.

Some tort scholars have criticized this type of bright-line rule and argued that there should be a "duty to take precautions against the negligence of others" when "a reasonable person would recognize the existence of an unreasonable risk of harm to others through the intervention of such negligence." W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 33, p. 199 (5th ed. 1984). But that is not what our law holds today. And, as explained above, we do not have the authority to change settled common law tort principles established by our Supreme Court. *Shera*, 219 N.C. App. at 126, 723 S.E.2d at 358.

To be sure, *Chaffin* and its progeny carve out an exception when the defendant is aware of any fact "which gives or should give notice" that the negligence will occur. *Chaffin*, 233 N.C. at 380, 64 S.E.2d at 279. But that is not the case here. There is no evidence that Crescent was aware of the negligent activities of the dump truck operator. Accordingly, we must reject this theory of legal duty because it would impose on a real estate developer a duty to take precautionary steps to protect against harm resulting from unknown negligence of others at a construction site. That theory is inconsistent with existing North Carolina law that the negligence of others is not reasonably foreseeable.

III. Duty to sequence construction or conduct mass grading

[3] We thus turn to the Copelands' third, and final, theory of duty. This theory is unlike the other two in a critical way—it does not depend on Crescent having failed to address negligence at the construction site, either through adequate supervision or adequate precautions.

Instead, the Copelands argue that there was a risk that the dump truck could have broken loose and rolled downhill even without negligence at the construction site. This is so, they contend, because there *always* is a risk of roll-away accidents during construction on steep terrain. And, the Copelands argue, developers of large planned communities have the ability to limit any harm from these accidents in a

way ordinary property owners do not. They contend that developers can choose the order in which homes in the development will be constructed and can choose which construction steps will occur all at once and which will occur lot-by-lot. Thus, the Copelands argue, developers of large projects on hilly terrain have a duty to sequence and manage construction to limit the risk that bystanders downhill might be harmed by foreseeable roll-away accidents.

We agree that the Copelands have forecast evidence creating a genuine issue of material fact on this theory of duty. They put forth experts who testified in depositions that there are various "hazards" and "risks" associated with roll-away equipment on hilly construction sites. Those experts testified that the risks of roll-away accidents are known in the planned development industry. They also testified that a reasonably prudent developer would undertake a "safety analysis" or "hazard analysis" and take steps such as sequencing development or conducting mass grading to eliminate the risk of injury from these roll-away accidents.

If all of these things are true, it would be sufficient to impose a duty of care. *See Fussell*, 364 N.C. at 226, 695 S.E.2d at 440; *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 406–07, 263 S.E.2d 313, 318 (1980). The Copelands will have established that a prudent planned community developer would foresee that the construction creates a risk of roll-away accidents and that sequencing the construction in various, reasonable ways will reduce the risk of injury resulting from those accidents.

Unsurprisingly, Crescent disputes *all* of the Copelands' evidence supporting this theory of duty—everything from the notion that developers can foresee these types of risks to the assertion that the Forest Ridge community is situated on hilly terrain.

Ordinarily, the determination of whether one owes another a duty of care is a question of law. But "when the facts are in dispute or when more than a single inference can be drawn from the evidence, the issue of whether a duty exists is a mixed question of law and fact. The issues of fact must first be resolved by the fact finder, and then whether such facts as found by the fact finder give rise to any legal duty must be resolved by the court." *Mozingo by Thomas v. Pitt Cty. Mem'l Hosp., Inc.*, 101 N.C. App. 578, 588, 400 S.E.2d 747, 753 (1991), *aff'd*, 331 N.C. 182, 415 S.E.2d 341 (1992). Because there are disputed issues of material fact on the question of duty, this matter cannot be resolved at summary judgment.

We note that, although the question of duty involves fact disputes that cannot be resolved as a matter of law, there may be other legal barriers to the relief the Copelands seek. The appellate briefing in this case

dealt entirely with the legal question of duty. Issues concerning intervening or superseding causation, and the admissibility of the rather vague discussions by the Copelands' experts of the risk of non-negligent rollaway accidents on hilly construction sites, were not briefed by the parties. Although our review of a summary judgment ruling is *de novo*, we decline to comb through the record and independently address issues not raised by the parties. *Johnson v. Causey*, 207 N.C. App. 748, 701 S.E.2d 404, 2010 WL 4288511, at *9 (2010) (unpublished); N.C. R. App. P. 28(b)(6). We leave for the trial court, on remand, the determination of whether there are other grounds on which to rule in this case as a matter of law, or whether the case must proceed to trial.

Conclusion

We reverse the trial court's grant of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judges BRYANT and MURPHY concur.

MISTY JENKINS DEANES, PLAINTIFF
v.
KEVIN MICHAEL DEANES, DEFENDANT

No. COA19-120

Filed 7 January 2020

1. Child Custody and Support—modification of custody—substantial change in circumstances—findings of fact—sufficiency

In an action to modify child custody, the trial court properly awarded primary custody of the parties' youngest son to the father and primary custody of their eldest son to the mother, where the court's findings of fact supported its determination that a substantial change in circumstances affected the children. Substantial evidence supported these findings, including that the father resolved his prior drinking problems, enjoyed unsupervised visits with his sons without incident, and was a good father to his child from a second marriage, and that the mother prevented him from visiting or communicating with their sons for about a year and a half (even though he called them 225 times in that period), resulting in a severed relationship between him and the eldest son.

2. Child Custody and Support—modification of custody—best interests of child—split custody

In an action to modify child custody, the trial court did not abuse its discretion by determining that awarding primary custody of the youngest child to the father and primary custody of the eldest child to the mother was in the children's best interests. The court found that the mother tried to sever the children's relationship with the father by refusing to cooperate with him, failing to notify him of the children's medical issues, and interfering with his visitation rights, and that—despite the damaged relationship between the father and his eldest son—the father's relationship with his youngest son remained strong. The court also accounted for the children's separation by ordering visitation enabling them to see each other often.

3. Contempt—civil—willful violation of child custody order—telephone communication—not equal to in-person visitation

In an action to modify child custody, the trial court properly held a mother in civil contempt for willfully violating a custody order by denying the father "reasonable telephone communication" with their two sons (for about a year and a half, she only allowed him to speak to the children five times even though he called them 225 times) and by failing to consult the father on major medical, educational, and religious decisions affecting the children. Although the order limited the father's in-person visitation if he consumed alcohol in front of the children, the mother incorrectly argued that those limits also applied to the father's telephone communication with their sons, because electronic communication is not a form of visitation equal to in-person visits.

4. Child Custody and Support—modification of child support—calculation—split custody worksheet—health insurance and childcare credits

In an action to modify child custody and support, where the trial court properly awarded primary custody of the parties' youngest son to the father and primary custody of their eldest son to the mother, the court properly calculated the father's support obligation using the "split custody" worksheet from the N.C. Child Support Guidelines. Nevertheless, the matter was remanded for the trial court to re-determine the appropriate health insurance and childcare credits the father should receive toward his support obligation.

Appeal by Plaintiff from an Order entered 13 November 2018 by Judge Teresa Freeman in Bertie County District Court. Heard in the Court of Appeals 19 September 2019.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr. and Lloyd C. Smith, III, for plaintiff-appellant.

Cordell Law, LLP, by Zach Underwood, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Misty Jenkins Deanes (now Gibbs) (Plaintiff) appeals from an Order modifying a previous child custody and support order and holding both parties in civil contempt. The Record tends to show the following:

Plaintiff and Kevin Michael Deanes (Defendant) married on 5 May 2007 and separated on 4 November 2011. The parties have two minor children from their marriage—Carter, born in 2006, and Bobby, born in 2010.[1] On 16 March 2012, Plaintiff filed a civil action seeking child custody, child support, and attorney's fees. On 4 April 2012, Defendant filed his Answer and Counterclaim. Defendant's Counterclaim requested child custody, equitable distribution, and attorney's fees.

The trial court entered an Order of Child Custody and Child Support on 27 December 2012 (2012 Order). The 2012 Order granted the parties joint legal custody and primary physical custody of the two minor children to Plaintiff. The 2012 Order provided Defendant with visitation supervised by his father and granted him "reasonable telephone communication with his minor children at reasonable times and for reasonable lengths with the same being between 7:00 o'clock p.m. and 8:00 o'clock p.m. every other weekday during the week."

Shortly after entry, the parties modified visitation under the 2012 Order as Defendant's father was unable to continue supervising. The parties presented conflicting evidence as to whether Defendant's now-wife agreed to supervise visitation in light of that change; however, the Record indicates the parties continued to operate under the framework of the 2012 Order with visitation being unsupervised until 26 November

1. Pseudonyms are used to protect the identities of the minor children.

2016.[2] On that evening, the two minor children were in Defendant's custody. Defendant, his new wife, and their combined four children—his wife's child from a previous marriage, his two children with Plaintiff, and the couples' biological daughter—were decorating for the holidays. Later that evening, Defendant's oldest son, Carter, remained awake after the other children went to bed. Around 10 p.m., Defendant and his wife left their residence to observe a neighbor's decorations. Defendant testified that he spoke with Carter before they left to make sure he was "agreeable to staying home alone with the other children for a short period of time." Defendant provided him with a cell phone so that he could contact Defendant if he became concerned. The duration of Defendant's absence is unclear from the Record; however, during that time Carter became worried and upset. Carter testified at trial he tried to reach Defendant but he could not unlock the cell phone he was given. He contacted Plaintiff from his own cell phone during Defendant's absence. In response to Carter's call, Plaintiff traveled through the night to Defendant's residence in Virginia. Around 4 a.m. the following morning, Plaintiff arrived at Defendant's residence and instructed her two children to leave Defendant's house without notifying Defendant. After the children were in Plaintiff's custody around 5 a.m., Plaintiff texted Defendant that she retrieved the children.

Defendant did not see his two minor children from the time Plaintiff retrieved them the morning of 27 November 2016 until the trial court's initial hearing on 11 June 2018. Defendant's phone records indicated that he called Plaintiff 225 times during that period, but he testified that he only spoke with his children five times from 27 November 2016 until the date of trial, 11 June 2018. On 9 November 2017, Defendant filed a Motion for Contempt and Motion for Modification of Custody. Plaintiff responded on 24 January 2018 and moved for modification of custody and child support as well as for Defendant to show cause why he should not be held in civil contempt.

On 13 November 2018, the trial court entered an Order for Modification of Custody, Child Support, and Contempt (2018 Order). In the 2018 Order, the trial court found a substantial change in circumstances that affected the minor children and accordingly determined

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2. The trial court found, in Findings of Fact 10 and 14, "the evidence from both parties showed that Defendant's supervised visits did not last more than six (6) months after entry of the [2012] Order." And further "that when Defendant's father stopped supervising the visits in 2013, Defendant's visits thereafter were no longer 'supervised,' and that since 2013 Defendant has exercised his visits without any sort of supervision." These Findings were not challenged by Plaintiff on appeal.

it was in the children's best interests to make several modifications to the 2012 Order. The trial court granted Defendant's Motion to Modify Custody, Plaintiff's Motion to Modify Child Support, and both parties' contempt Motions. The trial court entered a split custody arrangement: Plaintiff retained primary physical custody of Carter and was awarded primary legal custody. The 2018 Order granted Defendant primary legal and physical custody of the younger child, Bobby. The trial court also found both parties willfully violated the 2012 Order, holding both parties in civil contempt. As a result of the modification of child custody, the trial court also modified Defendant's child support obligation. Plaintiff timely appealed from the 2018 Order.

Issues

Plaintiff presents three primary issues before this Court. (I) Plaintiff contends the trial court erred in modifying the parties' child custody arrangement in the 2012 Order by (1) finding a substantial change in circumstances that materially affected the minor children and (2) determining that a split custody arrangement was in the best interests of the children. Plaintiff next contends the trial court erred by (II) holding Plaintiff in civil contempt of the 2012 Order and (III) in calculating Defendant's child support obligation.

Analysis

I. Modification of Child Custody

A. Standard of Review

"Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges[.]" *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citations and quotation marks omitted). The trial court examines whether to modify a child custody order in two parts. First, "[t]he trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Id.* "When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Id.* Findings of fact supported by substantial evidence "are conclusive on appeal, even if record evidence might sustain findings to the contrary." *Id.* at 475, 586 S.E.2d at 254 (citation and quotation marks omitted). We then "determine if the trial court's factual findings support its conclusions of law." *Id.*

Second, the trial court must "examine whether a change in custody is in the child's best interests." *Id.* at 474, 586 S.E.2d 253. "As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." *Stephens v. Stephens*, 213 N.C App. 495, 503, 715 S.E.2d 168, 174 (2011) (citation and quotation marks omitted)). "Under an abuse of discretion standard, we must determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.*

B. The 2018 Order

[1] In the 2018 Order, the trial court determined that there was a substantial change in circumstances that affected the minor children and that it was in the best interests of the minor children to enter a split custody arrangement. Plaintiff challenges the trial court's determination a substantial change in circumstances existed affecting the minor children and that modification of child custody was in the children's best interests. First, we review the trial court's determination that a substantial change in circumstances affected the minor children to see if the Findings of Fact are supported by competent evidence. We then review the trial court's determination of the best interests of the minor children for abuse of discretion.

1. Substantial Change in Circumstances that Affected the Minor Children

Plaintiff challenges the 2018 Order's Findings that support its ruling a substantial change in circumstances affected the minor children and further contends the trial court erred because "the Court made no findings of fact as to how any alleged significant change of circumstances had affected the minor children." "Where the 'effects of the substantial changes in circumstances on the minor child . . . are self-evident,' there is no need for evidence directly linking the change to the effect on the child." *Lang v. Lang*, 197 N.C. App. 746, 750, 678 S.E.2d 395, 398 (2009) (quoting *Shipman*, 357 N.C. at 479, 586 S.E.2d at 256) (alteration in original). Moreover, "both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child[ ] . . . may support a modification of custody on the ground of a change in circumstances." *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998).

Plaintiff challenges Finding of Fact 54, which determined a substantial change in circumstances existed because:

a. Six years have passed since the entry of the [2012] Order.

b. The children have grown from toddler/small children to elementary/middle-school aged children.

c. The Defendant is no longer exhibiting a drinking problem.

d. The Defendant enjoyed unsupervised visits with [Carter] and [Bobby] for years without incident . . . .

e. The Defendant has cared for his children that he shares with his current wife for years without incident.

f. Defendant has not been able to see or speak regularly by phone with [his children] since November 2016 as a direct consequence of Plaintiff's unilateral decisions, as further detailed in this Court's findings hereinabove.

Plaintiff argues the trial court erred in Findings 54(a),(b), and (f). Specifically, Plaintiff contends it was error for the trial court to find the time since entry of the 2012 Order and the age of the parties' children as facts supporting a substantial change in circumstances. Plaintiff cites to our Supreme Court's decision in *In re Peal* in support of her argument. 305 N.C. 640, 290 S.E.2d 664 (1982). However, in *Peal* our Supreme Court held the trial court correctly considered the age of the parties' son when it modified a previous custody order. *Id.* at 646-47, 290 S.E.2d at 668. We emphasize, as was the case in *Peal*, that here the trial court did not find the change in the children's age as the sole basis for its determination there was a substantial change in circumstances. In *Peal*, the trial court made additional findings and considered the child's testimony and preference. *Id.* Here, the age of the children and the time since the entry of the 2012 Order is but one of several factors used by the trial court and is therefore consistent with our Supreme Court's decision in *Peal*. Therefore, the trial court properly considered the time since entry of the 2012 Order and the age of the minor children as part of its determination.

Plaintiff contends the trial court erred in Finding 54(f) because Plaintiff did not unilaterally act to terminate Defendant's visitation and instead that Defendant's visitation rights terminated under the 2012 Order when he consumed alcohol in front of the minor children. We disagree. The 2012 Order stated "[i]f the Defendant possess or consumes said intoxicating substances, then his visitations will terminate immediately and his father is to return the children to the Plaintiff until such time as further orders are entered by [the trial court]." The 2012 Order

did not contemplate Plaintiff would have the sole authority to terminate Defendant's visitation. In fact, the 2012 Order named Defendant's father as the supervisor and, as such, designated him to "return the children to the Plaintiff until such time as further orders are entered by this Court[ ]" in the event Defendant consumed alcohol during a visitation. Therefore, the trial court vested the authority to terminate visitation with either a court-approved party—like Defendant's father—or by further order of the trial court, not with Plaintiff.

Furthermore, early in the morning of 27 November 2016, Plaintiff drove to Defendant's residence and instructed Carter and Bobby to leave without alerting Defendant. The Record evidences Defendant did not see his children from that time until the trial court's hearing and that he called Plaintiff over 200 times during that same period and was only able to speak with his children on five occasions. As such, we conclude there is substantial evidence in the Record to support Finding 54(f)—that due to Plaintiff's unilateral decision "Defendant has not been able to see or speak regularly by phone with [his children] since November 2016 . . . ."

Plaintiff concedes the trial court's Findings 54(c)-(e) "may be redeeming factors" but states "they are not a substantial change of circumstances which would justify a modification of [the 2012 Order]." Therefore, the trial court's Findings that Defendant "is no longer exhibiting a drinking problem[,] . . . enjoyed unsupervised visits with [his children] for years without incident[, and] . . . has cared for his children that he shares with his current wife for years without incident[,]"are conclusive on appeal. Furthermore, we disagree with Plaintiff and instead conclude these Findings support the trial court's determination a substantial change in circumstances exists that affected the minor children.

The trial court found the fact Defendant no longer exhibits a drinking problem or suffers from alcohol abuse as a substantial change in circumstances. From this Finding and other evidentiary findings made by the trial court, it is evident the change positively impacts Defendant's ability to care for his children, as highlighted in the trial court's next Finding "Defendant enjoyed unsupervised visits with [his children] for years without incident until November 2016[.]" As Plaintiff notes in her brief, the 2012 Order focused heavily on Defendant's alcohol consumption in denying his request for unsupervised visitation. Thus, the trial court's Finding—unchallenged on appeal—that Defendant no longer exhibits a drinking problem supports the trial court's determination that a substantial change in circumstances exists of which the effects are evident. *See Lang*, 197 N.C. App. at 750, 678 S.E.2d at 398. As such, the

trial court did not need to find "evidence directly linking the change to the effect on the child[ren.]" *Id.* (citations and quotation marks omitted).

The trial court's Findings—"Defendant enjoyed unsupervised visits with [his minor children] for years without incident until November 2016[,]" Defendant has a "new child with his current wife," and his minor children have a strong bond with his new child and his wife's first child—support the conclusion that a substantial change in circumstances affected his minor children. At the time of the 2012 Order, Defendant had not remarried. However, his subsequent marriage and the birth of his daughter with his new wife are linked to an effect on his minor children in the trial court's Finding that a strong bond existed between them. That Finding is supported by competent evidence and evidences the substantial change in circumstances affected the minor children.

As such, the trial court's determination a substantial change in circumstances existed is supported by the Findings of Fact, which also supports the trial court's determination the substantial change in circumstances affected the welfare of the parties' minor children.

Plaintiff also challenges Findings 62, 64, 65, 66, 67, and 68 as erroneous and not supported by the evidence.[3] Although we conclude the trial court sufficiently demonstrated a substantial change in circumstances affected the welfare of the minor children, we briefly address Plaintiff's additional challenges. The trial court's Findings, in relevant part, are as follows:

> 62. However, the Court also finds everything that has transpired in this case since November 26, 2016 is a direct result of Plaintiff's poor decision making as it relates to the minor children.
>
> . . . .
>
> 64. Instead of speaking with the Defendant prior to retrieving the minor children, [Plaintiff] did it herself. That demonstrates poor-decision making by Plaintiff, and

3. The trial court acknowledged:

> There are or may be mixed findings of fact and conclusions of law or conclusions of law set forth in the [Findings of Fact] . . . as the Court must make mixed findings of fact and conclusions of law in determining the best interest of the minor children, the type of visitation and custody that should be awarded, and the amount of child support which should be awarded."

this poor decision-making was not in the best interests of the children[.]

65. Plaintiff's decision to completely cut off all communication and visitation with Defendant was not in the best interests of the minor children.

66. Plaintiff's decision not to notify Defendant of the oldest child's therapy, or involve him in any way was not in the child's best interests.

67. Any parent who completely severs a child's relationship with the other parent, barring extreme circumstances, has shown a clear inability to act in the children's best interests. There are no such extreme circumstances present in this case. Plaintiff attempted to completely sever the children's relationship with Defendant, and has therefore shown an inability to act in the children's best interests.

68. Because of Plaintiff's poor decision making, the oldest minor child no longer wishes to have a relationship with his father of any kind.

The trial court's above Findings are supported by competent evidence in the Record. Namely, Plaintiff admits she utilized self-help to retrieve the minor children from Defendant's custody, without his knowledge, on the morning of 27 November 2016. The Record further reflects prior to 26 November 2016, Defendant was able to visit and communicate with his minor children regularly and without incident under the 2012 Order as modified by the parties. Yet, after the 26 November 2016 incident, Defendant did not see his children until the 11 June 2018 hearing and only spoke with them a combined five times. Despite the fact Defendant shared joint legal custody with Plaintiff and was to be informed of major medical decisions regarding their minor children under the 2012 Order, Plaintiff did not inform or consult with Defendant about Carter's mental health issues even though his therapist testified the 26 November 2016 event was a "major stressor" in his life. Moreover, Plaintiff did not inform Defendant of Bobby's dental surgeries or Carter's braces, and additional testimony elicited at trial indicated Carter no longer wishes to have a relationship with Defendant.

As such, we conclude there is competent evidence in the Record supporting the trial court's Findings Plaintiff attempted to completely sever the children's relationship with Defendant and that the events that

transpired after 26 November 2016 are the result of Plaintiff's poor decision-making. Thus, the trial court sufficiently demonstrated a substantial change in circumstances affected the minor children.

2. Best Interests

[2] Plaintiff contends the trial court incorrectly determined it was in the best interests of the minor children to grant Defendant primary physical and legal custody of the parties' younger son, entering a split custody arrangement. We disagree. "Trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child[,]" *Phelps v. Phelps*, 337 N.C. 344, 352, 446 S.E.2d 17, 22 (1994), and "[e]vidence of a parent's ability or inability to cooperate with the other parent to promote their child's welfare is relevant in a custody determination and material to determining the best interests of the child." *Cunningham v. Cunningham*, 171 N.C. App. 550, 559, 615 S.E.2d 675, 682 (2005). "As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." *Stephens*, 213 N.C App. at 503, 715 S.E.2d at 174 (citation and quotation marks omitted).

The trial court made Findings that the Defendant and the younger child "shared a strong relationship prior to November 26, 2016, and have maintained some phone contact since November 26, 2016. There was no evidence presented at trial that Defendant and the younger minor child currently have a strained relationship or unhealthy relationship." Further, the trial court found Plaintiff: cut off communication and visitation with Defendant and his minor children; did not notify Defendant of the older minor child's enrollment in therapy; and did not consult with Defendant regarding "how to proceed with such major medical procedures prior to them being carried out[ ]" for either of the minor children.

As this Court held, "[e]vidence of a parent's ability or inability to cooperate with the other parent . . . is relevant in a custody determination and *material* to determining the best interests of the child." *Cunningham*, 171 N.C. App. at 559, 615 S.E.2d at 682 (emphasis added). Moreover, "although interference alone is not enough to merit a change in the custody order, where interference with visitation becomes so pervasive as to harm the child's close relationship with the noncustodial parent, it may warrant a change in custody." *Stephens*, 213 N.C App. at 499, 715 S.E.2d at 172 (alterations, citations, and quotation marks omitted).

As previously discussed, the trial court's Findings reflect Plaintiff's inability to cooperate with Defendant and her interference with Defendant's visitation rights—Findings that are material to the trial

court's decision regarding the best interests of the minor children. The trial court determined the best interests of Carter were best served by ordering he remain with Plaintiff due to his damaged relationship with Defendant and, accordingly, ordering Defendant and Carter enroll in reunification therapy. However, the trial court determined that the best interests of Bobby were best served by granting Defendant primary physical and legal custody. The trial court's Findings support its determination that the best interests of Bobby are met by granting Defendant primary physical and legal custody because Plaintiff acted in opposition to the child's best interest when she attempted to completely sever the child's relationship with Defendant, which the trial court found to be strong, and by her demonstrated inability to cooperate with Defendant. "[T]he trial court 'need not wait for any adverse effects on the child to manifest themselves before the court can alter custody.' " *Id.* at 502-03, 716 S.E.2d at 174 (citation and quotation marks omitted). Therefore, we conclude the trial court did not abuse its discretion in ordering Defendant primary custody of Bobby.

Plaintiff additionally argues it was not in the best interests of the minor children to be separated and that the trial court did not consider the effect of separation on the best interests of the minor children. However, the trial court's 2018 Order evidences, in fact, that the trial court considered the effects of separation on the minor children. The trial court ordered: "In an effort to ensure both children still see each other and maintain their sibling relationship, the parties shall exchange the children such that the minor children spend every weekend together . . . ." "Prior to school releasing for the summer, the parties shall work together to develop a schedule for the summer where . . . the children are together." From the language of the 2018 Order, we conclude the trial court contemplated the separation of the minor children in the 2018 Order and accordingly ordered visitation to account for the change. Thus, the trial court did not abuse its discretion, and we affirm the 2018 Order's modification of child custody.

II. Contempt

[3] We review a trial court's determination of civil contempt to determine "whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted). The trial court's findings of fact "are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Id.* (citation and quotation marks omitted).

The trial court held Plaintiff in civil contempt of the 2012 Order for willfully violating two provisions. The trial court found Plaintiff violated the 2012 Order by denying Defendant reasonable telephone communication with his children and for failing to "consult as appropriate on major medical, educational, and religious decisions in the children's lives."

Plaintiff challenges the trial court's Findings 79, 80, 81, 82, 83, and 84 finding Plaintiff in contempt for her willful violation of Defendant's right to telephone visitation with his sons. The trial court found Defendant called Plaintiff over 200 times since 26 November 2016 and that she had answered five times. Plaintiff argued in response that Defendant's visitation, both in-person and telephone, terminated when he consumed alcohol in front of the parties' sons. Plaintiff erroneously relies on *Routten v. Routten* for her argument that electronic communication is an equal form of visitation. ___ N.C. App. ___, ___, 822 S.E.2d 436, 443 (2018), *disc. rev. denied*, ___ N.C. ___, 831 S.E.2d 77 (2019). *Routten*, however, simply points to N.C. Gen. Stat. § 50-13.2(e), which states "[e]lectronic communication with a minor child may be used to *supplement* visitation with the child. Electronic communication *may not* be used as a replacement or substitution for custody or visitation." N.C. Gen. Stat. § 50-13.2 (e) (2017) (emphasis added). As such, Plaintiff's contention that electronic communication is a form of visitation equal to that of in-person visitation is incorrect.

In addition, the 2012 Order addresses Defendant's right to electronic and in-person visitation separately. The 2012 Order grants Defendant supervised visitation on the condition that "[i]f the Defendant possesses or consumes said intoxicating substances, then his visitations will terminate immediately and his father is to return the children to the Plaintiff . . . ." In a separate paragraph, the 2012 Order provides "Defendant will be allowed reasonable telephone communication with his minor children at reasonable times and for reasonable lengths . . . ." The trial court did not limit Defendant's telephone communication on his consumption of alcohol as it did his supervised visits. As such, the trial court correctly determined Plaintiff was in civil contempt for denying Defendant telephone communication provided to him by the 2012 Order.

The trial court also held Plaintiff was in civil contempt for failing to "consult as appropriate on major medical, educational, and religious decisions in the children's lives." Plaintiff did not challenge this portion of the 2018 Order finding her in civil contempt. Therefore, we affirm the trial court's 2018 Order holding Plaintiff in civil contempt of the 2012 Order.

III. Child Support Modification

[4] Plaintiff contends the trial court erred using Worksheet C, provided by the North Carolina Child Support Guidelines, to calculate Defendant's child support obligation because the trial court should not have ordered a split custody arrangement. Considering our previous conclusion, we disagree and hold it was correct for the trial court to use Worksheet C to calculate Defendant's child support obligation.

Next, Plaintiff argues the trial court committed "plain error" in its inclusion of a one-hundred-dollar-per-month health insurance credit and a one-hundred-dollar-per-month childcare credit to Defendant in its child support calculation. There is no plain error review in civil trials. *Dogwood Dev. & Mgmt. Co., LLC, v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citation omitted) ("[P]lain error review is available in criminal appeals[.]"). Instead, a trial court's child support modification is reviewed for abuse of discretion. *See Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002).

Defendant contends, in brief, the parties consented to submit their proposed child support worksheets to the trial court after the trial court announced its award of split custody. This may well be true, but there is nothing in the Record before us reflecting Defendant's contention. Therefore, we are constrained to remand this matter to the trial court to make findings, supported by evidence and other materials properly before it, resolving this very limited issue of the appropriate health insurance and childcare cost credit to be given to Defendant in calculating his child support obligation.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's conclusion there was a substantial change of circumstances justifying a modification in child custody. We also affirm the trial court's holding Plaintiff in civil contempt. We vacate the 2018 Order in part and remand this matter to the trial court for further proceedings to redetermine the appropriate health insurance and childcare cost credit Defendant should be given for his child support calculation.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

ASHELY DEMINSKI, AS GUARDIAN AD LITEM ON BEHALF OF C.E.D., E.M.D., AND K.A.D., PLAINTIFFS
v.
THE STATE BOARD OF EDUCATION, AND THE PITT COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA18-988

Filed 7 January 2020

1. Appeal and Error—interlocutory order—governmental immunity—substantial right

In an action brought by a mother alleging violations of her children's constitutional right to education, the trial court's interlocutory order denying the county school board's motion to dismiss was immediately appealable as affecting a substantial right where the school board alleged the defense of governmental immunity.

2. Constitutional Law—North Carolina—right to education—harassment by other students

A mother's complaint failed to state a claim upon which relief could be granted where she alleged that her children were deprived of their constitutional right to an education due to persistent harassment at school by other students, which went unaddressed by school personnel. The trial court erred by denying the county board of education's motion to dismiss the constitutional claim because the harm alleged did not directly relate to the nature, extent, and quality of the educational opportunities made available to plaintiff's children.

Judge ZACHARY dissenting.

Appeal by defendant Pitt County Board of Education from order entered 3 July 2018 by Judge Vince M. Rozier, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 13 March 2019.

No brief filed for plaintiff-appellee.

Tharrington Smith, LLP, by Deborah R. Stagner, for defendant-appellant Pitt County Board of Education.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson, and the North Carolina

School Boards Association, by Allison Brown Schafer, for Amicus Curiae North Carolina School Boards Association.

STROUD, Judge.

The Pitt County Board of Education ("Defendant") appeals from the trial court's order denying its motion to dismiss the portion of Plaintiff's complaint alleging violations of the right to education guaranteed under the North Carolina Constitution. Because this case is controlled by *Doe v. Charlotte-Mecklenburg Board of Education*, 222 N.C. App. 359, 731 S.E.2d 245 (2012), we reverse the trial court's order denying Defendant's motion to dismiss the constitutional claims in the Plaintiff's complaint and remand for further proceedings.

I. Background

Plaintiff Ashley Deminski,[1] on behalf of her minor children C.E.D., E.M.D., and K.A.D. ("Minor Plaintiffs"), initiated this action against Defendant and the State Board of Education[2] by filing a verified complaint in Superior Court, Wake County on 11 December 2017.

The complaint was filed in response to Defendant's alleged "deliberate indifference" to the "hostile academic environment" at Lakeforest Elementary School while the Minor Plaintiffs were enrolled there. Plaintiff alleges that because of Defendant's conduct, the Minor Plaintiffs "were each denied their rights to a sound basic education."

According to the complaint, during the 2016-2017 academic year, Defendant allowed C.E.D. to be "repeatedly and severely bullied" by two particular students, and to be "repeatedly harassed sexually by two other students." For example, the complaint alleges that Defendant permitted Student #1 and Student #2 to "grab C.E.D. by the shoulders and push along [her] spine with sufficient force that [she] . . . had trouble breathing and swallowing." This happened "each week" and "at varying times during the school day."

The complaint also describes Student #3's repeated sexual harassment of C.E.D. for two full academic years while at Lakeforest Elementary, as follows:

> a. On multiple occasions, Student #3 put his hands in his pants to play with his genitals in C.E.D.'s presence;

1. Plaintiff Ashley Deminski's name was misspelled in the caption of the order.

2. The State Board of Education is not party to the instant appeal.

> b. On multiple occasions, Student #3 informed C.E.D. he "f***s like a gangster";
>
> . . . .
>
> d. On multiple occasions, Student #3 informed C.E.D. he has "got something special for you" before putting his hands in his pants to play with his genitals;
>
> e. On multiple occasions, Student #3 would play with his genitals and then attempt to touch C.E.D.;
>
> f. On at least one occasion, . . . Student #3 pulled down his pants in the hallway in C.E.D.'s presence to expose his penis and wiggle it to simulate masturbation; and,
>
> g. On at least one occasion, Student #3 pulled down his pants in the classroom in C.E.D.'s presence to expose his penis and show it to her.

This "was in addition to other harassing conduct, including staring at C.E.D., interrupting C.E.D. during tests and other assignments, and repeatedly talking to C.E.D. during instructional time."

School personnel also failed to act when Student #4 would subject C.E.D. to similar sexual harassment:

> 15. Student #4, perhaps encouraged by Student #3's lewd conduct going unaddressed, sexually harassed C.E.D. repeatedly:
>
> a. On multiple occasions, Student #4 would tell C.E.D. and other students that he and C.E.D. were dating and intimate;
>
> b. On at least one occasion, Student #4 rolled a piece of paper to approximate a penis and made motions simulating masturbation while in C.E.D.'s presence; and,
>
> c. On at least one occasion, . . . Student #4 rolled a piece of paper to approximate a penis, put it in his pants, walked over to C.E.D. and attempted to show C.E.D. how to insert himself into C.E.D.'s vagina. When C.E.D. attempted to get away from Student #4 and move to another seat, Student #4 attempted to reposition himself to attempt to get under where C.E.D. would be sitting.

Minor Plaintiffs E.M.D. and K.A.D. are diagnosed with autism, and during their enrollment as students at Lakeforest Elementary, services were provided to them under their Individualized Education Plans. The complaint alleges that Defendant allowed both E.M.D. and K.A.D. "to endure substantially the same conduct by Student #3, including sexual conduct, constant verbal interruptions laced with vulgarity, and physical violence including knocking students' items onto the floor, throwing objects, and pulling books and other items off shelves onto the ground."

According to the complaint, C.E.D. "repeatedly informed her teacher of each of the acts by the four students[,]" and Plaintiff also "repeatedly notified the teacher, Assistant Principal, and Principal in efforts to resolve the situation." However, school personnel's only response was to insist that the "process" would "take time;" meanwhile, "no substantive changes" were made, and "the bullying and harassing conduct continued unabated." The uncorrected harassment continued to such a degree that Plaintiff ultimately "obtained a transfer of the Minor Plaintiffs to a new school." Nevertheless, the complaint alleges that "[t]he academic performance of all three Minor Plaintiffs fell as a result of the perpetually chaotic school environment" at Lakeforest Elementary.

Plaintiff asserted one claim for violations of Article I, section 15 and Article IX, section 2 of the North Carolina Constitution, in that Defendant's deliberate indifference to the hostile academic environment at Lakeforest Elementary denied the Minor Plaintiffs "their rights to a sound basic education." As relief, the complaint requested, among other things, that Defendant "be compelled to make all necessary modifications to policy and/or personnel to bring its schools into compliance with the School Violence Prevention Act;"; that Plaintiff recover "compensatory damages . . . to be held in trust for the benefit of the Minor Plaintiffs"; and that the trial court "grant any such additional and further relief as [it] deems proper and just."

Defendant filed a motion to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted,[3] because Plaintiff's claims were barred by the doctrine of governmental immunity.[4] The trial

3. The State Board of Education likewise filed a motion to dismiss, which was granted. This order was not appealed.

4. Defendant also filed a motion to dismiss for lack of standing under Rules 12(b)(1) and (6), asserting that "Plaintiff Ashley Deminski has not been duly appointed by the Court to serve as guardian ad litem for the [Minor Plaintiffs]." However, the trial court did not specify the grounds upon which its order was based, and Defendant does not raise an argument concerning standing on appeal.

court denied Defendant's motion to dismiss Plaintiff's constitutional claim by order entered 3 July 2018.[5] Defendant appeals the interlocutory order to this Court.

On appeal, Defendant contends the trial court erred by denying its motion to dismiss Plaintiff's constitutional claim, arguing this Court "has clearly held that public school students do not have a claim for relief under article I or article IX of the North Carolina Constitution based on allegations of failure by school employees to prevent harm by a third party." Defendant maintains that Plaintiff "may not avoid the effect of the Board's governmental immunity by simply labeling a tort action as a constitutional claim." The North Carolina School Boards Association filed an amicus brief with this Court contending the same. Amicus further emphasizes that "[d]eclaring individual educational claims to be constitutional violations would be disastrous public policy for the State and boards of education."

II. Interlocutory Appeal

[1] The trial court's order denying Defendant's motion to dismiss Plaintiff's constitutional claim is interlocutory in that it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). This Court will not generally entertain an appeal from an interlocutory order. *Doe*, 222 N.C. App. at 363, 731 S.E.2d at 248. However, a party may immediately appeal an interlocutory order where the order "deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Id.*

Here, Defendant argues that the trial court's order denying its motion to dismiss Plaintiff's constitutional claim is immediately appealable because it affects Defendant's substantial right to governmental immunity. *See Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 230, 664 S.E.2d 649, 652 (2008) ("Cases which present defenses of governmental or sovereign immunity are immediately appealable because such orders affect a substantial right."). Although the doctrine of governmental immunity will not operate to bar a *constitutional* claim, for the reasoning articulated in *Doe v. Charlotte-Mecklenburg Board of Education*, we conclude that Defendant's appeal is properly before this Court. *See*

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5. Plaintiff's complaint also asserted a claim against Defendant for violation of the School Violence Prevention Act, North Carolina General Statute § 115C-407.15 *et seq.*, which the trial court dismissed. Plaintiff did not appeal the trial court's dismissal of this claim.

Doe, 222 N.C. App. at 365, 731 S.E.2d at 249 ("A failure to evaluate the validity of Plaintiff's constitutional claims would allow Plaintiff to simply re-label claims that would otherwise [be] barred on governmental immunity grounds as constitutional in nature, effectively circumventing the Board's right to rely on a governmental immunity bar.").

III. Standard of Review

[2] Upon appeal from the denial of a defendant's motion to dismiss under Rule 12(b)(6), this Court must review *de novo* "whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Christmas*, 192 N.C. App. at 231, 664 S.E.2d at 652 (ellipsis and brackets omitted). This Court "must consider the allegations in the plaintiff's complaint to be true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if the plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Doe*, 222 N.C. App. at 366, 731 S.E.2d at 250 (quotation marks and brackets omitted).

IV. The Right to Education

A. Governmental Immunity

Under the doctrine of governmental immunity, county boards of education are often shielded "entirely from having to answer for [their] conduct at all in a civil suit for damages." *See Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). As our Supreme Court has made clear, however, the doctrine of governmental immunity will not "stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights" under the North Carolina Constitution. *Corum v. University of North Carolina*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291 (1992).

It is, therefore, well settled that an individual may bring a direct claim under the North Carolina Constitution where the individual's constitutional rights have been abridged, but she is otherwise without an adequate remedy under state law—for example, when her common law claim would be barred by the doctrine of governmental immunity. *Id.* at 782, 413 S.E.2d at 289; *see also Craig*, 363 N.C. at 340, 678 S.E.2d at 355 ("Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim. But . . . plaintiff may move forward in the alternative, bringing his colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim.").

Accordingly, a colorable direct constitutional claim will survive a Rule 12(b)(6) motion to dismiss, notwithstanding the doctrine of governmental immunity. *Craig*, 363 N.C. at 340-41, 678 S.E.2d at 355-56. We now consider whether Plaintiff has stated such a claim here.

B. *Leandro v. State of North Carolina*

The North Carolina Constitution explicitly guarantees the "right to a free public education." *Leandro v. State of North Carolina*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). Specifically, Article I, section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. Article IX, section 2 further provides that "[t]he General Assembly shall provide . . . for a general and uniform system of free public schools, . . . wherein equal opportunities shall be provided for all students." *Id.* art. IX, § 2(1).[6]

In the landmark decision of *Leandro v. State of North Carolina*, our Supreme Court considered whether the right to education under Article I, section 15 and Article IX, section 2 has "any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality." 346 N.C. at 345, 488 S.E.2d at 254. The Supreme Court answered "in the affirmative," and concluded that

> the right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.

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6. Based on *Hoke County Board of Education v. State of North Carolina*, 358 N.C. 605, 599 S.E.2d 365 (2009) (*Leandro II*), and *Silver v. Halifax County Board of Commissioners*, 371 N.C. 855, 821 S.E.2d 755 (2018), our dissenting colleague notes, "the State is a necessary party to the instant action but has not been joined as such." We did not address this issue for two reasons. First, it was not raised by the parties. Second, even if the Plaintiff's claims fell within the constitutional right to a sound basic education, *Silver v. Halifax County* did not give this Court the authority to direct *sua sponte* that the State be added as a party. In *Silver*, the Supreme Court did not suggest that the State must be added as a party, despite its clear recognition of the State's duty: "[W]e are not confronted by a civil action that is merely imperfect, but rather we have been presented with an action that must fail because plaintiffs simply cannot obtain their preferred remedy against this particular defendant on the basis of the claim that they have attempted to assert in this case. The allegations in plaintiffs' complaint, if true, are precisely the type of harm *Leandro I* and its progeny are intended to address. In keeping with *Leandro*, however, *the duty to remedy these harms rests with the State, and the State alone.*" 371 N.C. at 869, 821 S.E.2d at 764 (emphasis added).

Id. Our Supreme Court proceeded to more particularly define a "sound basic education" as

> one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255.

In *Doe v. Charlotte-Mecklenburg Board of Education*, the plaintiff sued her local school board, alleging a violation of her constitutional right to education. 222 N.C. App. at 361, 731 S.E.2d at 247. The plaintiff's claims were based upon

> sexual abuse that she suffered at the hands of Defendant Richard Priode, her band teacher at South Mecklenburg High School. According to Plaintiff's complaint, Defendant Priode made sexual advances towards her and eventually induced her to engage in various types of sexual activity, including oral sex and vaginal intercourse, with him both on and off school grounds. Defendant Priode was later arrested, charged, and entered a plea of guilty to taking indecent liberties with a child as a result of his involvement with Plaintiff.

Id. Based upon these facts, the plaintiff in *Doe* asserted these claims:

> In her complaint, Plaintiff asserted claims against Defendant Board for negligent hiring, supervision, and retention; negligent infliction of emotional distress; and violation of Plaintiff's rights to an education and to proper educational opportunities as guaranteed by N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 1, and her right

to obtain a safe education as guaranteed by N.C. Const. art. I, § 19. According to Plaintiff, the Board should have recognized the signs that Defendant Priode posed a threat to her and taken action to prevent the sexual abuse which she suffered at his hands. More specifically, Plaintiff alleged, with respect to her constitutional claims, that:

> 40. As a separate and distinct cause of action, Plaintiff sues the Defendants for violating her constitutional rights pursuant to North Carolina State Constitution in the following particulars:
>
> a. Violation of Article I[,] Section 15 on the grounds that the Defendant allowed the conduct as alleged in this complaint and that this conduct deprived the Plaintiff of her right to an education that is free from harm:
>
> b. Violation of Article IX[,] Section 1 in that the Plaintiff was denied educational opportunities free from physical harm or psychological abuse; and
>
> c. Violation of Article I[,] Section 19 in that the Plaintiff has been deprived of her liberty, interest and privilege in an education free from abuse or psychological harm as alleged in this complaint.

Id. (alterations in original).

This Court concluded that the constitutional right to education did not encompass claims arising from abuse of a student, even on school premises. *Id.* at 370, 731 S.E.2d at 252-53. We noted *Leandro*'s enumeration of the right to education was strictly confined to the intellectual function of academics, and that neither this Court nor our Supreme Court had extended that right "beyond matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system." *Id.* Simply put, the right guaranteed to students under the North Carolina Constitution is the opportunity to receive a *Leandro*-compliant education, and that right is satisfied so long as such an education has, in fact, been afforded.[7]

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7. North Carolina General Statute § 115C-42 immunizes the State's educational entities from liability for harm suffered by students, short of constitutional deprivation. "[A]ny change in this doctrine should come from the General Assembly." *See Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435 (1992).

Because the psychological harm in *Doe* was alleged to have been suffered as the result of a "negligent failure to remain aware of and supervise the conduct of public school employees," *id.* at 371, 731 S.E.2d at 253, rather than of any inadequacy in the "nature, extent, and quality of the *educational opportunities made available to*" the plaintiff, the allegations failed to state a claim for violation of the constitutional right to education. *Id.* at 370, 731 S.E.2d at 253 (emphasis added). We therefore reversed the trial court's denial of the defendant's motion to dismiss that claim. *Id.* at 372, 731 S.E.2d at 254.

Here, the abuse was perpetrated by other students instead of a school employee as in *Doe*, but the claims are otherwise essentially the same. As in *Doe*, the Plaintiff alleges that school personnel were aware or should have been aware of the abuse the Minor Plaintiffs suffered at school but they failed to prevent it. Both alleged that the abuse they suffered deprived them of their constitutionally protected right to a sound basic education. The plaintiff in *Doe* alleged that she was deprived of her right to an education that is "free from physical harm or psychological abuse" under North Carolina's Constitution. *Id.* at 361, 731 S.E.2d at 247. The fact that the complaint in this case goes into more factual detail about the abuse and how it harmed the Minor Plaintiffs' educational opportunities does not change the result. Neither this Court nor our Supreme Court has recognized abuse, even repeated abuse, or an abusive classroom environment as a violation of the constitutional right to education.

This Court fully considered the rights addressed by *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997), in the context of physical or psychological abuse of a student at school in *Doe* and determined:

> To date, we are not aware of any decision by either this Court or the Supreme Court which has extended the educational rights guaranteed by N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 1, beyond matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system. Although the serious wrongfulness inherent in the actions in which Defendant Priode allegedly engaged should not be minimized in any way, we are unable to see how the allegations set out in Plaintiff's complaint state a claim for violating these constitutional provisions. Put another way, we are unable to discern from either the language of the relevant constitutional provisions or

> the reported decisions construing these provisions that North Carolina public school students have a state constitutional right to recover damages from local boards of education for injuries sustained as the result of a negligent failure to remain aware of and supervise the conduct of public school employees. As a result, Plaintiff's complaint "on its face reveals the absence of facts sufficient to make a good claim" under N.C. Const. art. I, § 15 or N.C. Const. art. IX, § 1, such that Plaintiff has failed to state a claim based on those constitutional provisions upon which relief may be granted.

Doe, 222 N.C. App. at 370-71, 731 S.E.2d at 252-53.

The factual allegations of Plaintiff's complaint, which we consider for purposes of a motion to dismiss as true, are extremely disturbing; no child should be subjected to this sort of harassment at school or anywhere else. The alleged failure of school personnel to take immediate action to protect the Minor Plaintiffs is troubling, but we cannot distinguish this case from *Doe*, 222 N.C. App. 359, 731 S.E.2d 245. Accordingly, Plaintiff's complaint stated "a defective cause of action," and Defendant's motion to dismiss should have been granted. *See Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 4, 745 S.E.2d 316, 319 (2013).

V. Conclusion

For the reasons set forth above, we reverse the trial court's denial of Defendant's motion to dismiss Plaintiff's constitutional claim and remand for further proceedings.

REVERSED AND REMANDED.

Judge INMAN concurs.

Judge ZACHARY dissents with separate opinion.

ZACHARY, Judge, dissenting.

The right to education set forth in the North Carolina Constitution requires that our State's educational entities provide their students with an education that meets a certain minimum standard of quality. "An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work

is devoid of substance and is constitutionally inadequate." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). Because the facts alleged in Plaintiff's complaint establish that Defendant failed to provide Minor Plaintiffs with the constitutionally adequate quality of education, I respectfully dissent.

Discussion

I. The Right to Education—*Leandro v. State of North Carolina*

It is undisputed that our state constitution explicitly guarantees the "right to a free public education." *Id*. Specifically, article I, section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. Article IX, section 2 further provides that "[t]he General Assembly shall provide . . . for a general and uniform system of free public schools, . . . wherein equal opportunities shall be provided for all students." *Id*. art. IX, § 2(1).

In its 1997 decision in *Leandro v. State*, our Supreme Court held that together, article I, section 15 and article IX, section 2, require the State to provide North Carolina children with a sound basic education. 346 N.C. at 345, 488 S.E.2d at 254.

Nonetheless, as the majority notes, the constitutional right to education has been narrowly interpreted in subsequent case law. *See*, *e.g.*, *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 370, 731 S.E.2d 245, 252 (2012). The majority, however, misconstrues this precedent as imposing an outright prohibition against the prosecution of any such claim grounded in tort. I find no support for such an interpretation. The post-*Leandro* jurisprudence does not limit the *conduct* that may give rise to a claim for violation of the constitutional right to education; any such judicial limitations have only pertained to the *scope* of the constitutional right that is subject to enforcement.

The majority's holding rests primarily upon this Court's analysis in *Doe v. Charlotte-Mecklenburg Board of Education*. *Id*. The plaintiff in *Doe* filed suit against her local school board, alleging a violation of her constitutional right to education. *Id*. In her complaint, the plaintiff alleged that her high school's band teacher had "made sexual advances towards her and eventually induced her to engage in various types of sexual activity, including oral sex and vaginal intercourse, with him both on and off school grounds." *Id*. at 361, 731 S.E.2d at 247. The plaintiff further claimed that in allowing this conduct to occur, the school board had "violated her 'right to an education *that was free from harm*' and

'*psychological abuse*.' " *Id.* at 370, 731 S.E.2d at 252 (emphases added) (brackets omitted).

This Court disagreed, and determined that the constitutional right to education is limited to "matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system." *Id.* at 370, 731 S.E.2d at 252-53.

In *Doe*, the school board's alleged "negligent failure to remain aware of and supervise the conduct of public school employees" was collateral to the "nature, extent, and quality of the educational opportunities made available to" the plaintiff. *Id.* at 370-71, 731 S.E.2d at 253. Thus, absent any allegation that the school board had failed to provide the plaintiff with a *Leandro*-compliant education, the school board's alleged negligence in allowing the illicit sexual activity to occur, though appalling, fell short of a *constitutional violation*.

The allegations presented in the case at bar are manifestly distinguishable from those in *Doe*. The conduct of which Plaintiff complains violates the constitutional ambit set forth in *Leandro*.

Here, unlike in *Doe*, Plaintiff explicitly charges Defendant with the failure to provide the Minor Plaintiffs with the very "nature, extent, and quality of the educational opportunities" to which all public school students are constitutionally entitled pursuant to *Leandro*. *Id.* at 370, 731 S.E.2d at 253. Plaintiff's complaint reveals that the hostile classroom environment at Lakeforest Elementary School was such that there was a persistent, two-year-long interruption of the Minor Plaintiffs' daily test-taking, assignment, and instructional opportunities. Due to Defendant's indifference to this environment, the "academic performance of all three Minor Plaintiffs fell . . . with the Minor Plaintiffs each suffering substantially adverse educational consequences."

Taking these allegations as true, as we must, Plaintiff's claim falls squarely within the constitutional deprivation that was contemplated in *Leandro*.[1] *See Leandro*, 346 N.C. at 345, 488 S.E.2d at 254 ("An education

1. In fact, our General Assembly has also recognized, through the enactment of Chapter 115C, Articles 27, 27A, and 29C, that providing an education of the standard guaranteed by the North Carolina Constitution necessarily requires an environment that is conducive to learning—or at the very least, one that does not hinder learning. *See, e.g.*, N.C. Gen. Stat. § 115C-390.2(f) (2017) ("Board policies shall . . . restrict[ ] the availability of long-term suspension or expulsion to . . . serious violations of the board's Code of Student Conduct that . . . threaten to substantially disrupt the educational environment."); *Id.* § 115C-397.1 ("Management and placement of disruptive students"); *Id.* § 115C-407.17 ("Schools shall develop and implement methods and strategies for promoting school

that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."); see also N.C. Const. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to *guard and maintain* that right." (emphasis added)).

Nevertheless, in its *amicus* brief to this Court, the North Carolina School Boards Association contends that "[d]eclaring individual educational claims to be constitutional violations would be disastrous public policy for the State and boards of education." Of course, the same could be said for *any* constitutional violation that the private right of action endeavors to deter.

Moreover, it would be credulous to differentiate, for constitutional purposes, between a student whose teacher refuses to teach math and a student whose teacher fails to intervene when other students' harassing and disruptive behavior prevents her from learning it.[2] In the latter instance, the instructional environment may be so disordered, tumultuous, or even violent that the student is denied the opportunity to receive a sound basic education. *Cf. King v. Beaufort Cty. Bd. Of Educ.*, 364 N.C. 368, 376, 704 S.E.2d 259, 264 (2010) ("The primary duty of school officials and teachers . . . is the education and training of young people. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." (citation omitted)).

This is precisely what Plaintiff has alleged in the instant case. At this stage in the proceedings, Plaintiff's allegations must be taken as true, and the trial court did not err by allowing her the opportunity to produce a forecast of evidence tending to prove the same. I would therefore affirm the trial court's order denying Defendant's motion to dismiss Plaintiff's constitutional claim. Accordingly, I respectfully dissent.

II. *Silver v. Halifax County Board of Commissioners*

Lastly, I note that the State is a necessary party to the instant action, but has not been joined as such.

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environments that are free of bullying or harassing behavior."); *see also Leandro*, 346 N.C. at 354, 488 S.E.2d at 259 ("To the extent that plaintiff[s] can produce evidence tending to show that defendants have committed . . . violations of chapter 115C alleged in the complaints and that those violations have deprived children . . . of the opportunity to receive a sound basic education, plaintiff[s] are entitled to do so.").

2. I would emphasize that "[n]one of the preceding cases contains any suggestion that the fundamental right to the opportunity for a sound basic education is limited to any particular context." *King v. Beaufort Cty. Bd. of Educ.*, 364 N.C. 368, 381, 704 S.E.2d 259, 267 (2010) (Timmons-Goodson, J., concurring in part and dissenting in part).

Historically, our courts have expressed no issue with a county board of education being a proper party to a claim alleging violation of various constitutional rights related to education. *See*, *e.g.*, *id.* at 378, 704 S.E.2d at 265; *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009); *Sneed v. Bd. of Educ.*, 299 N.C. 609, 264 S.E.2d 106 (1980); *see also* N.C. Gen. Stat. § 115C-47(1) (2017) ("It shall be the duty of local boards of education to provide students with the opportunity to receive a sound basic education . . . ."). As our Supreme Court explained in *Hoke County Board of Education v. State*, the appropriateness of joining a local board of education as a party to a claim alleging a violation of article I, section 15 rests upon the reality that any resulting decision is "likely to: (1) be based, in significant part, on their role as education providers; and (2) have an effect on that role in the wake of the proceedings." 358 N.C. 605, 617, 599 S.E.2d 365, 378 (2004) ("*Leandro II*"); *see also id.* at 617, 599 S.E.2d at 377-78 ("[T]he school boards clearly held a stake in the trial court's determination of whether or not the student plaintiffs were being denied their right to an opportunity to obtain a sound basic education.").

Proper parties notwithstanding, our Supreme Court recently held in *Silver v. Halifax County Board of Commissioners* that the State must be joined as a party defendant to any otherwise valid claim alleging a violation of article I, section 15.[3] *See generally* 371 N.C. 855, 821 S.E.2d 755 (2018). Indeed, the text of article I, section 15 provides: "The people have a right to the privilege of education, and it is the duty of *the State* to guard and maintain that right." N.C. Const. art. I, § 15 (emphasis added). Thus, "to the extent that a county, as an agency of the State, hinders the opportunity for children to receive a sound basic education, it is the State's constitutional burden to take corrective action." *Silver*, 371 N.C. at 868, 821 S.E.2d at 764.

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3. Necessary parties *must* be joined in an action. Proper parties *may* be joined. . . . A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence. A proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others.

Carding Devs. v. Gunter & Cooke, 12 N.C. App. 448, 451-52, 183 S.E.2d 834, 837 (1971) (citations omitted).

Therefore, although Defendant is indeed a proper party to the instant action,[4] the holding in *Silver* directs that the State will shoulder the "ultimate responsibility," and hence, must be joined as a necessary party. *Id.* at 866-67, 821 S.E.2d at 762-63. Plaintiff, however, did not join the State as a defendant, as *Silver* requires. Our Supreme Court did not issue its decision in *Silver* until 21 December 2018—one year after Plaintiff filed her complaint in the instant case, and nearly two months after briefs were filed in this Court.

Accordingly, although I would affirm the trial court's denial of Defendant's motion to dismiss Plaintiff's constitutional claim, I would remand the matter with instruction for the trial court to allow Plaintiff the opportunity to join the State as a party to the instant action. S*ee*, *e.g.*, *City of Albemarle v. Sec. Bank & Tr. Co.*, 106 N.C. App. 75, 77, 415 S.E.2d 96, 98 (1992) ("The absence of a necessary party under Rule 19, N.C. Rules of Civil Procedure, does not merit dismissal of the action."); *see also White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 203 (1983) ("Any such defect[,] [that is, absence of a necessary party,] should be corrected by the trial court *ex mero motu* in the absence of a proper motion [to join the necessary party] by a competent person.").

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4. For instance, Plaintiff's complaint seeks relief from Defendant in the form of a "permanent [injunction] from assigning any of the Minor Plaintiffs to attend Lakeforest Elementary School," as well as a mandatory injunction "to make all necessary modifications to policy and/or personnel to bring [Defendant's] schools into compliance with the School Violence Prevention Act." In that the General Assembly has delegated to county boards of education a corresponding statutory duty to provide students with the opportunity to receive a sound basic education, *see* N.C. Gen. Stat. § 115C-47(1), Defendant *does*, "on its own, have the authority to provide [this] relief." *Silver v. Halifax Cty. Bd. of Comm'rs*, 255 N.C. App. 559, 587, 805 S.E.2d 320, 339 (2017), *aff'd*, 371 N.C. 855, 821 S.E.2d 755 (2018); *e.g.*, *Sneed*, 299 N.C. at 611, 619, 264 S.E.2d at 109, 114 (requiring the defendant Greensboro City Board of Education to amend its "constitutionally infirm" fee waiver policy); *cf. Silver*, 371 N.C. at 861, 868, 821 S.E.2d at 759-60, 764 (affirming the trial court's Rule 12(b)(6) dismissal of the plaintiffs' claims for declaratory judgment and injunctive relief against the Halifax County Board of Commissioners for its alleged violation of the plaintiffs' constitutional right to education, which the plaintiffs alleged was caused by the Board's method of distributing local sales tax revenue, because (1) a board of county commissioners is not responsible for affording children the opportunity to receive a sound basic education, and (2) the General Assembly had already provided a statutory remedy for the allegedly inadequate funding of which the plaintiffs complained (citing N.C. Gen. Stat. § 115C-431)).

GENERAL FIDELITY INSURANCE COMPANY, PLAINTIFF
v.
WFT, INC., BLESSMATCH MARINE INSURANCE SERVICES, INC., ALPHA MARINE UNDERWRITERS, INC., AND PETER J. WILLIS FLEMING, DEFENDANTS

No. COA18-1103

Filed 7 January 2020

1. Creditors and Debtors—breach of fiduciary duty—constructive fraud—alter ego entities—avoidance of judgment

Where plaintiff insurance company became a creditor of a business entity through arbitration awards entered in its favor, that entity owed a fiduciary duty to plaintiff prior to the time it began winding down its business operation and transferring its assets to another entity. Summary judgment was therefore properly entered for plaintiff on its claims for breach of fiduciary duty and constructive fraud where there was evidence that the entity's president transferred assets to alter ego entities to benefit himself and to shield the assets from judgment.

2. Creditors and Debtors—fraudulent transfer—reasonably equivalent value—summary judgment

Summary judgment was properly granted for plaintiff creditor on its claim for fraudulent transfer where the business entity against which it was granted an award and judgment wound down its business and transferred its assets to another entity without receiving a reasonably equivalent value for the assets transferred.

3. Corporations—piercing the corporate veil—instrumentality rule

In an action by a creditor to enforce a judgment against a business entity that wound down its operation and transferred assets to another entity, summary judgment was properly granted to plaintiff creditor on its claim for piercing the corporate veil where the president of the business entity had full control over the rebranding of the original entity, which he acknowledged was nothing more than a name change, and where the trial court properly granted summary judgment for plaintiff on its claims for breach of fiduciary duty, constructive fraud, and fraudulent transfer.

4. Unfair Trade Practices—business activity—in or affecting commerce—asset transfer

In an action by a creditor seeking to enforce an award and judgment against a business entity, the creditor's claim for unfair and deceptive trade practices involved conduct in or affecting commerce where defendants transferred assets from the debtor entity to alter ego entities in an effort to shield those assets from liability for the judgment.

Appeal by defendants from order entered 12 January 2018 by Judge Eric L. Levinson and judgment entered 30 April 2018 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 May 2019.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, John R. Buric, and John R. Brickley, for plaintiff-appellee.

Lincoln Derr PLLC, by Sara R. Lincoln and Kathleen K. Lucchesi, for defendants-appellants.

ZACHARY, Judge.

Defendants appeal from two judgments. Defendants first argue that the trial court erred (1) by granting partial summary judgment in favor of Plaintiff on Plaintiff's claims for breach of fiduciary duty/corporate fraud and fraudulent transfer; and (2) by disregarding Defendants' corporate form and piercing the corporate veil, thereby enabling the court to enter judgment against all Defendants. Next, Defendants challenge a judgment entered against them for unfair and deceptive trade practices. Upon review, we affirm both judgments.

Background

Defendant WFT, Inc. ("WFT") was a North Carolina corporation with its principal place of business in Mecklenburg County. In 2005, WFT began working with General Fidelity Insurance Company ("Plaintiff"), a company organized in South Carolina with its principal place of business in New Hampshire. A dispute eventually arose, and arbitration proceedings commenced in Texas in June 2010. Following interim arbitration awards in 2012 and 2013, a final award was entered in favor of Plaintiff on 2 August 2013.

On 27 December 2013, a Texas court entered judgment on the arbitration award ("the Texas Judgment"). WFT was ordered to pay Plaintiff

the principal amount of $2,367,943.89, together with pre-judgment interest of $67,022.00, attorneys' fees of $218,586.69, and interest at the rate of 5% per year until fully paid. However, WFT was administratively dissolved on 7 January 2015, prior to fulfilling its obligation to Plaintiff under the Texas Judgment.

On 15 May 2014, Plaintiff filed the instant action in Mecklenburg County Superior Court seeking enforcement of the Texas Judgment. Plaintiff sued not only WFT, but also Blessmatch Marine Insurance Services, Inc. ("Blessmatch"), Alpha Marine Underwriters, Inc. ("Alpha Marine"), and Peter J. Willis Fleming ("Fleming").[1] Defendants are closely connected to one another. Blessmatch was incorporated in North Carolina in 2011 and administratively dissolved on 7 January 2015—the same day as WFT. Fleming was the registered agent and president of both WFT and Blessmatch. Fleming also formed Alpha Marine, which was incorporated in Delaware on 14 January 2013.

In its complaint, Plaintiff alleged that "sometime during the underlying arbitration, Defendants ceased conducting business through WFT and instead are now operating the same business through Blessmatch Marine and/or Alpha Marine[.]" Plaintiff further contended that these businesses were "the alter egos of each other," which were created to "avoid WFT paying Plaintiff the amounts due pursuant to the Texas Judgment." Plaintiff sought to enforce the Texas Judgment and pierce the corporate veil, and also asserted claims for (1) breach of fiduciary duty, (2) constructive fraud, (3) fraudulent transfer, (4) unfair and deceptive trade practices, and (5) facilitation of fraud and civil conspiracy.

On 13 July 2017, Plaintiff moved for summary judgment on all claims. The motion came on for hearing before the Honorable Eric L. Levinson in Mecklenburg County Superior Court on 17 August 2017 and 13 November 2017. By order entered 12 January 2018, Judge Levinson granted summary judgment in Plaintiff's favor as to its claims for (1) action on the Texas Judgment, (2) constructive fraud, (3) breach of fiduciary duty, and (4) fraudulent transfer; he also permitted recovery from Defendants jointly and severally, based on piercing the corporate veil. Judge Levinson denied Plaintiff's motion for summary judgment on its claim for unfair and deceptive trade practices, and granted summary judgment in favor of Defendants as to Plaintiff's claim for facilitation of fraud and civil conspiracy. The trial court denied Defendants' request

1. The four individual defendants will be collectively referred to as either "Defendants" or, for clarity, "all Defendants."

to certify the order for immediate appeal. On 19 January 2018, Fleming filed notice of appeal from the interlocutory summary judgment order.

On 22 January 2018, Fleming filed a Motion to Stay Proceedings Pending Appeal. The motion asserted that "[w]hile Fleming's appeal is interlocutory, he has a substantial right to immediately appeal the [summary judgment] order to avoid the possibility of two trials and inconsistent verdicts on the same issues." Plaintiff challenged the Motion to Stay, arguing that "Fleming's intent is clear – he simply seeks to delay this matter and avoid a trial where he faces liability" on Plaintiff's claim for unfair and deceptive trade practices. Plaintiff further asserted that postponing appeal until resolution of the unfair and deceptive trade practices claim would not affect any substantial right of Fleming, and that "there is no risk of inconsistent verdicts" because all of the claims are distinct.

On 1 February 2018, the remaining Defendants filed notice of appeal from Judge Levinson's summary judgment order, and four days later, they too filed a Motion to Stay Proceedings Pending Appeal. Defendants set forth two grounds for staying the proceedings: (1) they had undergone several changes in counsel; and (2) like Fleming, they were at risk "of two trials and inconsistent verdicts on the same issues."

On 12 February 2018, a bench trial was held before the Honorable Forrest D. Bridges in Mecklenburg County Superior Court on Plaintiff's remaining claim for unfair and deceptive trade practices.

On 20 March 2018, Judge Bridges entered an order denying both of Defendants' Motions to Stay. Judge Bridges concluded that there was little risk of inconsistent verdicts, and, although there may be some "overlapping facts" between the unresolved claim and those in the 12 January 2018 summary judgment order, the issues are "separate and apart" from each other. He also noted that "the matters will best be addressed by the appellate court when considered within the context of the case as a whole and not a series of piecemeal appeals."

On 30 April 2018, Judge Bridges entered judgment in Plaintiff's favor on its claim for unfair and deceptive trade practices. All Defendants timely appealed the judgment on 21 May 2018.

Discussion

On appeal, Defendants argue that (1) Judge Levinson erred in granting partial summary judgment in favor of Plaintiff; and (2) Judge Bridges erred by entering judgment in favor of Plaintiff on its claim for unfair and deceptive trade practices.

I.

We first consider whether the trial court erred in granting partial summary judgment in favor of Plaintiff on its claims for (1) breach of fiduciary duty/constructive fraud, and (2) fraudulent transfer, and (3) by piercing the corporate veil and entering judgment against all Defendants. We affirm the trial court's ruling and address each issue in turn.

A. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). On appeal, summary judgment orders are reviewed *de novo*. *Mancuso v. Burton Farm Dev. Co. LLC*, 229 N.C. App. 531, 536, 748 S.E.2d 738, 742 (quotation marks omitted), *disc. review denied*, 367 N.C. 279, 752 S.E.2d 149 (2013). "Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the non-moving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). "If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465, *aff'd*, 344 N.C. 730, 477 S.E.2d 150 (1996).

B. Breach of Fiduciary Duty/Constructive Fraud

[1] Constructive fraud "arises where a confidential or fiduciary relationship exists, which has led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Forbis v. Neal*, 361 N.C. 519, 528, 649 S.E.2d 382, 388 (2007) (internal citations and quotation marks omitted). To recover under a claim of constructive fraud, "a plaintiff must establish the existence of circumstances (1) which created the relation of trust and confidence, and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust[.]" *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 502, 764 S.E.2d 203, 219 (internal brackets and quotation marks omitted), *disc. review denied*, 766 S.E.2d 646 (2014). Unlike a claim for actual fraud, there is no element of intent to deceive. *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971).

"[D]irectors of a corporation owe a fiduciary duty to creditors of the corporation only where there exist circumstances amounting to a winding-up or dissolution of the corporation." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 31, 560 S.E.2d 817, 825 (internal quotations omitted), *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002). Once a fiduciary relationship is established, constructive fraud occurs when the director of the debtor-corporation takes advantage of the fiduciary relationship in order to benefit himself, and the plaintiff-creditor is injured as a result. *White*, 166 N.C. App. at 294, 603 S.E.2d at 156.

Several non-dispositive factors may be considered in determining whether circumstances amount to a "winding-up or dissolution of the corporation[,]" including

> (1) whether the corporation was insolvent, or nearly insolvent, on a balance sheet basis; (2) whether the corporation was cash flow insolvent; (3) whether the corporation was making plans to cease doing business; (4) whether the corporation was liquidating its assets with a view of going out of business; and (5) whether the corporation was still prosecuting its business in good faith, with a reasonable prospect and expectation of continuing to do so.

Keener Lumber Co., 149 N.C. App. at 31, 560 S.E.2d at 825.

In the present case, it is evident that Fleming created Blessmatch for the purpose of continuing WFT operations under the name of a separate corporate entity. Fleming testified that all of WFT's business and assets were transferred to Blessmatch, and that WFT became "insolvent at the time that Blessmatch was formed[.]" He further confirmed that WFT laid off its last employees and ceased operations sometime around 2013. WFT's operations were clearly winding up around the time when WFT's business and assets were transferred to Blessmatch. Thus, WFT owed a fiduciary duty to its creditors.

Nevertheless, Defendants contend that WFT owed no fiduciary duty to Plaintiff because Plaintiff was not a creditor of WFT when the Texas Judgment was entered. Defendants argue that "at the time the decision was made to rebrand WFT as Blessmatch and to transfer all the assets, [Plaintiff] was not a creditor of WFT. . . . [B]y the time the Texas Judgment was entered . . . Blessmatch had assumed the business of WFT[.]" We disagree.

Plaintiff became WFT's creditor prior to the entry of the Texas Judgment on 27 December 2013. In his deposition, Fleming confirmed

that WFT laid off its last employees and ceased operations sometime around 2013. However, Plaintiff was granted two interim awards—one in 2012 and another in April of 2013—in the binding arbitration proceedings prior to entry of the Texas Judgment. Plaintiff was also granted a final arbitration award in August of 2013. Accordingly, WFT owed a fiduciary duty to Plaintiff, its creditor since at least 2012, well before WFT's operations were winding down.

Alternatively, Defendants argue that if a fiduciary duty were owed to Plaintiff, a claim for constructive fraud cannot be maintained because Fleming did not act to benefit himself by transferring WFT's business and assets to Blessmatch. We reject this argument on several grounds.

First, by transferring WFT's business and assets to Blessmatch, Fleming ensured that his business would be shielded from liability for any judgments entered against WFT, including the Texas Judgment. Second, after the dissolution of WFT, Fleming received a total of $754,850 in salary, dividends, and interest from Blessmatch as its shareholder and director. Fleming could not have received this income but for his decision to transfer WFT's business to Blessmatch.

In sum, both the record and Fleming's actions establish no genuine issue of material fact, and therefore Plaintiff was entitled to summary judgment on its claim for breach of fiduciary duty/constructive fraud.

C. Fraudulent Transfer

[2] The Uniform Fraudulent Transfer Act provides, in pertinent part, that:

> A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

N.C. Gen. Stat. § 39-23.5(a) (2017).

"An essential element of a transfer in fraud of creditors claim . . . is that the transfer was made without the debtor receiving 'reasonably equivalent value.' " *Estate of Hurst v. Jones*, 230 N.C. App. 162, 169, 750 S.E.2d 14, 20 (2013). "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on

the debtor's estate and whether there has been a net loss to the debtor's estate as a result of the transaction." *Id.* A plaintiff who successfully proves a claim for fraudulent transfer may either avoid the transfer to the extent necessary to satisfy the claim, or obtain a judgment for the amount of the claim or transfer. N.C. Gen. Stat. § 39-23.7(a)(1), (b).

In this case, it is undisputed that Plaintiff's claim arose before the alleged fraudulent transfer. Our review is therefore limited to whether any genuine issue of material fact exists with respect to whether WFT received the reasonably equivalent value when its assets and business were transferred to Blessmatch.

Defendants argue that WFT received adequate value for its business and assets because WFT's liabilities were also transferred to Blessmatch. However, there is no indication in the record that any of WFT's liabilities were transferred to Blessmatch. By contrast, it is manifest that Blessmatch did not pay WFT for the transfer of its assets and business. Likewise, when asked specifically whether any "consideration" was exchanged for WFT's assets, Fleming responded, "I don't recall, but, no, I wouldn't have thought so." It is clear, then, that WFT did not receive reasonably equivalent value when its assets and business were transferred to Blessmatch, and that summary judgment was properly granted in Plaintiff's favor.

D. Piercing the Corporate Veil

[3] Ordinarily, corporations and their shareholders are treated as distinct and separate entities, and a corporation's liability to a creditor cannot be imputed to its shareholders. *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 438, 666 S.E.2d 107, 112 (2008). However, "while a corporation's separate and independent existence is not to be disregarded lightly," it is well established that courts should disregard the corporate form when recognizing it "would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim." *Id.* at 438-39, 666 S.E.2d at 112-13 (internal quotation marks omitted).

In determining whether to pierce the corporate veil and extend liability from a corporation to a shareholder, North Carolina courts apply the "instrumentality rule." *Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E.2d 570, 575 (1966) (quotation marks omitted). Our Supreme Court has explained the rule as follows: "[A] corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In

such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded." *Id.*

Under the instrumentality rule, a plaintiff is required to prove the following:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Glenn v. Wagner, 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985) (quotation marks omitted).

To determine whether each prong of the instrumentality test is satisfied, courts consider four primary factors: (1) inadequate capitalization; (2) lack of compliance with corporate formalities; (3) complete domination and control of the corporation such that it has no independent identity; and (4) excessive fragmentation. *Estate of Hurst v. Moorehead I, LLC*, 228 N.C. App. 571, 578, 748 S.E.2d 568, 574 (2013). A showing of constructive fraud or fraudulent transfer is sufficient to satisfy the second and third elements of the instrumentality rule. *See Hamby v. Thurman Timber Co.*, ___ N.C. App. ___, ___, 818 S.E.2d 318, 324 (2018).

In the instant case, Fleming was the president and sole stockholder of WFT and Blessmatch at all relevant times, including when he decided to transfer all of WFT's business and assets to Blessmatch. When asked whether "WFT, Alpha Marine, and Blessmatch are . . . one and the same" business, Fleming answered in the affirmative. Indeed, Fleming testified that the decision to rebrand WFT as Blessmatch amounted to nothing more than a "name change."

Defendants argue that WFT had a corporate board that was involved in the decision to rebrand WFT as Blessmatch, and that Fleming was therefore not in full control of the decision to transfer WFT's business and assets to Blessmatch. Fleming testified that "senior people" associated

with WFT would have been involved in the decision to change the name to Blessmatch.

However, the change from WFT to Blessmatch occurred in 2013, and only two employees remained affiliated with WFT after 2011. Fleming described one of those employees as his assistant, and the other was not one of the "senior people" he named in his deposition. More importantly, Fleming had full authority to transfer all of WFT's business and assets to Blessmatch at the time of the decision. Thus, Fleming, WFT, and Blessmatch had "no separate mind, will or existence of [their] own" with respect to the decision to transfer WFT's business and assets to Blessmatch. *See Glenn*, 313 N.C. at 455, 329 S.E.2d at 330.

Because we affirm the trial court's order with respect to Plaintiff's claims for breach of fiduciary duty/constructive fraud and fraudulent transfer, we need not continue our analysis on piercing the corporate veil. *See Hamby*, ___ N.C. App. at ___, 818 S.E.2d at 324. Accordingly, Judge Levinson did not err in granting partial summary judgment in favor of Plaintiff.

II.

[4] Defendants next argue that Judge Bridges erred by entering judgment in favor of Plaintiff on its claim for unfair and deceptive trade practices, in that the underlying conduct in this case was not "in or affecting commerce." We disagree.

A. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (quotation marks omitted). "While an appellant may challenge the sufficiency of the evidence supporting the findings of fact, we are bound by the trial court's findings so long as there is some evidence to support them—even if the evidence might sustain findings to the contrary." *Golver v. Dailey*, 254 N.C. App. 46, 50-51, 802 S.E.2d 136, 140 (2017) (internal citations and quotation marks omitted). Conclusions of law are reviewed *de novo*. *Id.* at 51, 802 S.E.2d at 140.

B. Unfair and Deceptive Trade Practices

Under North Carolina law, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or

affecting commerce, are . . . unlawful." N.C. Gen. Stat. § 75-1.1(a). To establish a prima facie case under the statute, the plaintiff must show: "(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995) (citation omitted).

Defendants concede that "[b]ecause the trial court had already granted summary judgment on the issue of fraud and injury to [Plaintiff], the only remaining issue for the trial court at the time of trial was whether the conduct at issue was 'in or affecting commerce.' " Chapter 75 of our General Statutes defines "commerce" as "all business activities, however denominated[.]" N.C. Gen. Stat. § 75-1.1(b). Our Supreme Court has also determined that "commerce" can be broadly read to include "intercourse for the purposes of trade in any form." *Johnson v. Phoenix Mut. Life Ins.*, 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Likewise, the term "business activities" "connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 32, 519 S.E.2d 308, 311, *reh'g denied*, 351 N.C. 191, 541 S.E.2d 716 (1999).

In the instant case, the trial court thoroughly explained its basis for concluding that Defendants' actions were "in or affecting" commerce. First, the trial court determined that "the regular *business activity* for which [Blessmatch and Alpha Marine] were formed was simply to aid in defeating the use of WFT's assets for satisfaction of claims of its creditors[.]" (Emphasis added). The trial court reasoned that, were this to be generally permitted, it would adversely affect the marketplace and consumers, because it "would allow corporate entities . . . to incur debts, be subject to judgments, and yet freely transfer assets to other entities in order to avoid payment of those obligations[.]" Such actions "would totally erode the marketplace and [the] free enterprise system and undermine the rule of law as it pertains to business operations."

The trial court's findings are well supported by the evidence, and its comprehensive analysis is bolstered by our existing case law. *See, e.g.*, *Shepard v. Bonita Vista Props., L.P.*, 191 N.C. App. 614, 624, 664 S.E.2d 388, 395 (2008) ("The purpose of [N.C. Gen. Stat. §] 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State,

and applies to dealings between buyers and sellers at all levels of commerce."), *aff'd per curiam*, 363 N.C. 252, 675 S.E.2d 332 (2009).

Defendants nevertheless contend that the transfer of assets from WFT to the other businesses did not affect commerce. In support of this claim, Defendants cite *Ivey v. ES2, LLC*, 544 B.R. 833 (Bankr. M.D.N.C. 2015), in which the court held that a dispute between a parent company and its subsidiary did not affect commerce. However, *Ivey* is manifestly inapposite for two simple reasons. First and foremost, this Court is not bound by bankruptcy court rulings. *See Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App 198, 209, 794 S.E.2d 898, 904 (2016). Second, in this case, Plaintiff is neither a parent company nor a subsidiary of Defendants, but rather a market participant which conducted business with Defendants.

Accordingly, we confine our analysis to the facts of this case: Plaintiff obtained a significant award and judgment against WFT; Fleming transferred all of WFT's assets to other companies, which either quickly failed or never conducted any business; the asset transfer prevented Plaintiff from enforcing its judgment against WFT; and all of this, in turn, had a harmful effect on commerce. Consequently, Defendants' final argument fails.

Conclusion

For the reasons stated herein, we affirm (1) Judge Levinson's grant of partial summary judgment in favor of Plaintiff; and (2) Judge Bridges's judgment entered against Defendants as to Plaintiff's claim for unfair and deceptive trade practices.

AFFIRMED.

Judges DILLON and BERGER concur.

GRIFFIN v. ABSOLUTE FIRE CONTROL, INC.

[269 N.C. App. 193 (2020)]

STACY GRIFFIN, EMPLOYEE-PLAINTIFF
v.
ABSOLUTE FIRE CONTROL, INC., EMPLOYER, EVEREST NATIONAL INS. CO. &
GALLAGHER BASSETT SERVS., CARRIER, DEFENDANTS

No. COA19-461

Filed 7 January 2020

1. Workers' Compensation—effort to obtain employment—conclusion of no reasonable job search—supported by finding

The Industrial Commission's finding that a pipe fitter (plaintiff) had not looked for work or filed any job applications was sufficient to support its determination that plaintiff did not make a reasonable effort to obtain suitable employment—in order to establish eligibility for disability payments—even though plaintiff continued to work for his employer in a different position.

2. Workers' Compensation—disability—futility of seeking employment—findings in conflict with conclusion

The Industrial Commission erred by concluding that plaintiff presented no evidence on the futility of seeking employment and that plaintiff had therefore failed to establish disability on that basis where the Commission made findings that plaintiff was forty-nine years old at the time of the hearing, had a ninth-grade education, had worked primarily in the construction industry, and had permanent physical restrictions due to his workplace injury. Pursuant to prior case law, these findings implicate all of the factors typically discussed when analyzing the futility prong of proving disability.

3. Workers' Compensation—disability—suitable employment—make-work position—availability in competitive job market

The Industrial Commission erred by concluding that a position in a fabrication shop, offered to plaintiff by his employer after his workplace injury as a pipe fitter rendered him unable to continue in that role, constituted suitable employment so as to make plaintiff ineligible for disability payments. The Commission failed to conduct an analysis of whether the fabrication shop job was a make-work position created for plaintiff or was a job that would have been available to others in a competitive marketplace.

Judge TYSON concurring in part and dissenting in part.

Appeal by Plaintiff from an opinion and award entered 25 January 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 October 2019.

Sellers, Ayers, Dortch & Lyons, PA, by Christian R. Ayers, and John F. Ayers, III, for Plaintiff.

Brotherton, Ford, Berry & Weaver, PLLC, by Demetrius Worley Berry, and Daniel J. Burke, for Defendant.

BROOK, Judge.

Stacy Griffin ("Plaintiff") appeals from the opinion and award of the North Carolina Industrial Commission (the "Commission") denying his request for disability compensation from Absolute Fire Control and its insurance carriers, Everest National Insurance Company and Gallagher Bassett Services (collectively "Defendants"). On appeal, Plaintiff argues the Commission erred in concluding he was not disabled and that his post-injury job was suitable employment. We affirm in part. We reverse in part and remand for additional findings.

I. Factual and Procedural Background

Plaintiff worked for Defendant from 4 June 2007 to 23 October 2014 as a pipe fitter in Charlotte, North Carolina. Plaintiff's job responsibilities included installing and hanging sprinkler pipes and operating power machines and grease fittings. Plaintiff worked ten hours a day, five days a week, and earned between $18 and $20 dollars per hour. Plaintiff testified that pipefitters are expected to be able to lift the pipes they are working with and that pipes could weigh anywhere from 25 to 300 pounds.

On 23 October 2014, while Plaintiff was operating a scissor lift at work, the machine malfunctioned and threw Plaintiff into the rails of the lift, which caused injuries to his upper left back and ribs. Plaintiff returned to work one month after his injuries but was restricted from lifting anything over 20 pounds, standing or walking over 30 minutes, and driving while taking hydrocodone. Plaintiff's pre-injury job duties were outside of his assigned restrictions, so Defendant offered Plaintiff work in the fabrication shop, which Plaintiff accepted. In the fabrication shop, Plaintiff cut rods, drove a truck, made deliveries, and boxed up materials needed at job sites. Plaintiff testified at the hearing before the Full Commission that he primarily was "helping" another employee in the shop who had been assigned to the shop around the same time as Plaintiff. That employee, according to Jeffrey Younts, Vice President of

Absolute Fire Control, replaced someone who had previously been in that position and was lifting more than 20 pounds. Plaintiff maintained his pre-injury work schedule and wage earnings.

After two years of therapy, treatment, and joint injections, Plaintiff's treating physician assigned Plaintiff permanent work restrictions of no lifting more than 20 pounds, to alternate sitting and standing, no bending, and to wear a brace while working.

In August 2016, Plaintiff underwent non-work-related heart surgery. When he returned to work in November 2016, Plaintiff asked his supervisor if he could return to work in the field. Plaintiff believed the additional walking in the field would help his back condition. Defendant allowed Plaintiff to return to the field as a helper, where his job duties included wrapping Teflon tape on sprinkler heads, putting pipe hangers together, and driving a forklift to load sprinkler pipe for the installation crews.

On 28 November 2016, Plaintiff filed a Form 33 "Request for Hearing" seeking a determination as to whether the fabrication shop and field helper positions were suitable jobs. A hearing was held before Deputy Commissioner Jesse M. Tillman, III, on 20 June 2017. Deputy Commissioner Tillman issued an opinion and award finding Plaintiff had failed to meet his burden of proving he was disabled and thus did not reach the question of whether the positions were suitable employment. Deputy Commissioner Tillman denied Plaintiff's request for temporary total and temporary partial disability payments.

Plaintiff appealed to the Full Commission (the "Commission"). After hearing the appeal on 7 May 2018, the Commission issued its opinion and award on 25 January 2019 affirming the Deputy Commissioner and additionally finding the fabrication shop position was suitable employment. The Commission found in part:

> 28. [Vice President of Absolute Fire Control] Mr. Younts testified the fabrication shop positions are permanent positions with Defendant-Employer. Mr. Younts testified the work within the fabrication shop is an essential part of what Defendant-Employer does through packaging material, putting the parts together so the pipe fitters and foreman can do the work at the job sites and Defendant-Employer continues to have a need to hire and employ workers in the fabrication shop.
>
> . . .

32. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that the fabrication shop is suitable employment. The fabrication shop position is a permanent position with Defendant-Employer for which Defendant-Employer has a regular and constant need to keep staffed. The fabrication shop position was not specifically tailored or created for Plaintiff. Further, the job duty requirements for the fabrication shop position are within Plaintiff's permanent restrictions and Plaintiff was physically able to perform these job duties for almost two years from November 24, 2014 until his non-work-related heart surgery in August 2016. The fabrication shop position entailed the same wages and hours as Plaintiff's pre-injury position.

33. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Defendant-Employer's unique hiring practices of hiring based upon word of mouth and personal recommendations does not render the fabrication shop position not suitable. Albeit confined to Defendant-Employer's unique "advertisement," the positions available with Defendant-Employer, including the fabrication shop position, are available to individuals in the marketplace.

34. With regard to Plaintiff's contention that the field helper job is not suitable employment, the Full Commission finds that Defendant-Employer never offered Plaintiff the field helper job as suitable employment. To the contrary, Plaintiff specifically requested to return to work in the field following his non-work-related heart surgery and Defendant-Employer accommodated Plaintiff's request. Further, at the time Plaintiff chose to return to work in the field, Defendant-Employer had suitable employment available for Plaintiff in the fabrication shop.

. . .

37. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to show that he is disabled. To the contrary, a preponderance of the evidence shows that Plaintiff is able to earn his pre-injury wages with Defendant-Employer in a suitable position that is within

> his permanent work restrictions. Furthermore, none of Plaintiff's treating physicians have removed him from work in any employment. He has not made a reasonable, but unsuccessful search for work nor has he shown that it would be futile due to preexisting factors to search for work. Plaintiff has not proven that he is disabled in employment outside of his employment with Defendant-Employer.

The Commission then concluded:

> 4. In controversy is whether the fabrication shop position that Plaintiff worked in from November 24, 2014 until August 2016 and field worker position that Plaintiff worked in following his return to work in 2016 are suitable jobs and indicative of his wage earning capacity. Plaintiff contends that although he remains employed by Defendant-Employer, the work he is performing for Defendant-Employer is "make-work" and if his employment with Defendant-Employer were to end, then he would be unable to earn his pre-injury wages in the competitive marketplace. . . . In the present case, a preponderance of the evidence shows that the fabrication shop position with Defendant-Employer is suitable employment as it is a permanent position with Defendant-Employer and it is essential to Defendant-Employer's business and is a position that Defendant-Employer has a regular and constant need to keep staffed. The fabrication shop position was not tailored or created specifically to fit Plaintiff's restrictions. The fabrication shop position is within Plaintiff's permanent restrictions and physical capacity to perform as evidenced by Plaintiff successfully performing the job duties of the fabrication shop position for almost two years and Plaintiff is working the same hours and earning the same wages he did in his pre-injury position. Further, the mere fact that Defendant-Employer confines the advertisement of its positions to the unique practice of word of mouth and/or personal recommendations does not render the positions with Defendant employer not suitable. . . . With regard to the field worker position, Defendant-Employer did not offer Plaintiff this position as suitable employment, instead Plaintiff requested to return to work in this position and Defendant-Employer

accommodated Plaintiff's request. Thus, the suitability of this position is moot.

5. Furthermore, Plaintiff has not otherwise proven that he is disabled as no medical evidence was produced by Plaintiff that he is physically or mentally, as a result of the work-related injury, incapable of work in any employment. No reasonable effort was made to obtain employment elsewhere. No evidence was presented that Plaintiff is capable of some work, but that seeking work would be futile because of preexisting conditions, such as wage, inexperience, or lack of education, to seek employment or that he is earning less than his pre-injury wages. Hilliard, 305 N.C. at 595, 290 S.E.2d at 683; Russell, 108 N.C. App. 762, 425 S.E.2d 454.

Plaintiff timely appealed.

II. Standard of Review

Our review of an opinion and award of the Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and marks omitted). The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence "even if there is evidence to support a contrary finding." *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234 (2009). The Commission's conclusions of law are reviewed *de novo*. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74 (2011).

III. Analysis

The Plaintiff challenges three of the Commission's conclusions that served to bar him from disability benefits. First, the Commission concluded that Plaintiff had not engaged in a reasonable but unsuccessful effort to obtain post-injury employment. Second, the Commission concluded "[n]o evidence was presented that Plaintiff is capable of some work, but that seeking work would be futile because of preexisting conditions, such as wage, inexperience, or lack of education, to seek employment or that he is earning less than his pre-injury wages." And, finally, Plaintiff takes issue with the Commission's conclusion that Defendant provided and, for a time, Plaintiff performed suitable employment.

We hold that the reasonable effort analysis reflects a well-reasoned application of the law to these facts but conclude that the Commission's futility and suitable employment assessments are built on a misapplication of the governing case law.

A. Disability and Suitable Employment Jurisprudence

Disability means incapacity, because of injury, to earn the wages the employee was receiving at the time of injury in the same or any other employment. N.C. Gen. Stat. § 97-2(9) (2017). The burden is on the employee to prove diminished earning capacity as the result of the work-related injury. *See Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553 (1989).

A determination of disability is a conclusion of law that must be supported by specific findings which show: (1) plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment; (2) plaintiff was incapable after his injury of earning the same wages he had earned before his injury at any other employment; and (3) the incapacity to earn was caused by plaintiff's injury.[1] *See Hilliard v. Apex Cabinet Co.*, 305 N.C. at 593, 290 S.E.2d at 682. The burden is on the employee to establish all three findings. *See Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014). The employee may offer proof of the first two findings through several methods, including:

> (1) By producing medical evidence that the employee is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment; or
>
> (2) By producing evidence that the employee is capable of some work, but after reasonable effort on the part of the employee has been unsuccessful in efforts to obtain employment; or
>
> (3) By producing evidence that the employee is capable of some work but that it would be futile because of pre-existing conditions, i.e. age, inexperience, lack of education, to seek other employment; or

1. There is no dispute in this case that Plaintiff is incapable of working in his pre-injury job after his accident (*Hilliard* factor 1). Similarly, the parties agree and the Commission found Plaintiff's incapacity to earn was caused by his injury (*Hilliard* factor 3). Our analysis, and the parties' arguments, are concerned only with whether Plaintiff is capable of earning his pre-injury wages at any other employment (*Hilliard* factor 2).

> (4) By producing evidence that the employee has obtained other employment at a wage less than that earned prior to the injury.

*Russell v. Lowes Product Distributio*n, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993).

Once the employee presents substantial evidence that he is incapable of earning the same wages in the same or any other employment, the burden shifts to the employer to show the employee is capable of suitable employment. *See Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 446-47 (1997). Suitable employment is "any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience." *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (internal marks and citation omitted).

However, "[t]he fact that an employee is capable of performing employment tendered by the employer [post-injury] is not, as a matter of law, an indication of plaintiff's ability to earn wages." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). For example, make-work positions are those which have been "so modified because of the employee's limitations" that they do not "accurately reflect the [employee]'s ability to compete with others for wages." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986). Central to determining whether employment constitutes make work is whether or not the post-injury job is "ordinarily available on the competitive marketplace." *Id.* at 437-38, 342 S.E.2d at 805-06 (reasoning earning capacity "must be measured . . . by the employee's own ability to compete in the labor market, . . . [because] [w]ages paid by an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity[]"); *Id.* ("The ultimate objective of the disability test is . . . to determine *the wage that would have been paid in the open market under normal employment conditions to [the employee] as injured.*") (emphasis in original). Indeed, "[i]f the proffered job is generally available in the market, the wages earned in it may well be strong, if not conclusive, evidence of the employee's earning capacity." *Id.* at 440, 342 S.E.2d at 807.

B. Plaintiff's Challenges to Full Commission Opinion

We now turn to whether the Full Commission correctly applied the law when it concluded that Plaintiff was barred from disability benefits based on its findings, addressing each of Plaintiff's three challenges on point in turn.

i. Reasonable Effort

[1] Plaintiff claims he demonstrated a reasonable but unsuccessful effort to obtain employment under the second *Russell* factor. He argues the Commission erred as a matter of law in concluding otherwise, and its findings as to these issues were not supported by competent evidence.

Though there is no general rule for determining the reasonableness of an employee's job search, *see Gonzalez v. Tidy Maids, Inc.*, 239 N.C. App. 469, 478, 768 S.E.2d 886, 894 (2015), the Commission is "free to decide" whether an employee made a reasonable effort to obtain employment, *see Perkins v. U.S. Airways*, 177 N.C. App. 205, 214, 628 S.E.2d 402, 408 (2006). On appeal, this Court defers to the Commission in its determination of whether or not a claimant engaged in a reasonable job search, so long as: (1) the Commission's conclusion is based upon findings that are not conclusory and sufficiently explains its determination; and (2) such findings are supported by competent evidence. *Patillo v. Goodyear Tire & Rubber Co.*, 251 N.C. App. 228, 239-41, 794 S.E.2d 906, 914 (2016). Consistent with this deferential approach, this Court has previously affirmed the Commission's conclusion that an employee established a reasonable but unsuccessful effort to find employment when he remained employed by his current employer. *Snyder v. Goodyear*, 252 N.C. App. 265, 796 S.E.2d 539, 2017 WL 900050 (2007) (unpublished).[2]

Here, the Commission's findings were supported by competent evidence and not conclusory. The Commission found:

> 36. Although he submitted a job list, Plaintiff testified he has not looked for work outside of Defendant-Employer's business nor has he filed any applications with any employer because he likes who he is working for and enjoys working for Defendant-Employer. Plaintiff

2. Plaintiff argues *Snyder* and a Deputy Commissioner opinion in *Gregory S. Carpenter v. Commonscope Holding Co., Inc.*, Op. Award, I.C. No. X30121 (N.C.I.C. Oct. 13, 2014) stand for the proposition that "there is no requirement in the law that an employee attempt to obtain employment elsewhere . . . if the employee continues to work with the employer in a make work job." This argument has two shortcomings. First, neither decision constitutes binding precedent. *See Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) (explaining that *stare decisis* mandates decisions by one court binds courts of the same or lower rank); N.C. R. App. P. 30(e)(3) (2019) (articulating the non-precedential value of unpublished opinions). Second, *Snyder* is first and foremost rooted in deference to a well-reasoned Full Commission reasonable effort determination. *Snyder* at *12 ("[O]ur holding is simply that, based on our limited standard of review, the Commission's unchallenged findings of fact support its determination that Plaintiff made reasonable efforts to find employment under the specific facts of this case.").

> remained employed with Defendant-Employer as of the date of the hearing before the Deputy Commissioner.

This finding, under these circumstances, provides a sufficient basis for the Commission's determination that Plaintiff did not engage in a reasonable job search. As in *Snyder*, we affirm the Commission's well-reasoned conclusion of law, which, on this occasion, holds that Plaintiff failed to establish he is disabled under the second *Russell* method.

ii. Futility

[2] Plaintiff next argues that the Commission erred in concluding that Plaintiff did not prove disability through a showing of futility because he brought forward "no evidence" on this point.

Under *Russell*, an employee may meet his burden of proving disability by showing "the employee is capable of some work, but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment." 108 N.C. at 766, 425 S.E.2d at 457; *see also Wilkes v. City of Greenville*, 243 N.C. App. 491, 500, 777 S.E.2d 282, 289 (2015), *rev. allowed*, *writ allowed*, 784 S.E.2d 468 (N.C. 2016), *aff'd as modified*, 369 N.C. 730, 799 S.E.2d 838 (2017) (holding employee met his burden of proof that it was futile to seek sedentary employment when he had a tenth grade education, was 60 years old, had an IQ of 65, and was physically incapable of performing previous job); *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 357, 734 S.E.2d 125, 128 (2012) (concluding it would be futile for the claimant to seek other employment because he was 45 years old, had only completed high school, his work experience was limited to heavy labor jobs, and he was restricted to lifting no more than 15 pounds); *Johnson v. City of Winston Salem*, 188 N.C. App. 383, 392, 656 S.E.2d 608, 615 (2008) (holding that evidence tended to show that effort to obtain sedentary light-duty employment, consistent with doctor's restrictions, would have been futile given plaintiff's limited education, limited experience, limited training, and poor health); *Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 383, 607 S.E.2d 348, 352-523 (2005) (upholding Commission's conclusion that plaintiff was disabled under prong three based on plaintiff's evidence that he was 61, had only a GED, had worked all of his life in maintenance positions, was suffering from severe pain in his knee, and was restricted from repetitive bending, stooping, squatting, or walking for more than a few minutes at a time).

In the present case, on the claim of futility, the Commission found:

> 37. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to show that he is disabled. . . . He has not . . . shown that it would be futile due to preexisting factors to search for work.

And then concluded:

> 5. Furthermore, Plaintiff has not otherwise proven that he is disabled. . . . No evidence was presented that Plaintiff is capable of some work, but that seeking work would be futile because of preexisting conditions, such as age, inexperience, or lack of education, to seek employment.

However, the Commission also found:

> 1. At the time of the hearing before the Deputy Commissioner, Plaintiff was forty-nine years old. Plaintiff has a ninth-grade education and has worked primarily in the construction industry building houses or as a pipefitter.
>
> 2. Plaintiff began working for Defendant-Employer on June 4, 2007 as a pipefitter and he has been employed by Defendant-Employer since that date.
>
> . . .
>
> 16. On March 21, 2016, Dr. Jaffe assigned Plaintiff permanent restrictions of no lifting more than twenty pounds, alternate sitting and standing, no bending, and to wear a brace while working. . . .
>
> . . .
>
> 21. With regard to Plaintiff reaching maximum medical improvement, on 2 June 2017, Dr. Jaffe recorded that it was his opinion, . . . There are some days [Plaintiff] needs to leave work because of increased pain.

It is unclear how the Commission concluded that Plaintiff presented "no evidence" on futility given its findings reflect factors our appellate courts have found to support a finding of futility. Plaintiff's circumstance is quite similar, for example, to that of the employee in *Thompson* in

the respective parties' ages, work experience, educational attainment, and work restrictions.[3] Plaintiff is 52 years old, 49 years old at the time of the hearing, has a ninth-grade education, has worked primarily in the construction industry building houses or as a pipefitter, and has been employed by Defendant for over ten years. *See Thompson*, 223 N.C. App. at 359, 734 S.E.2d at 129 ("[P]laintiff was, at the time of [the Commission's] decision, 45 years old, had only completed high school, and his work experience was limited to heavy labor jobs."). Plaintiff suffers from a ten percent permanent partial disability, which restricts him from lifting anything over 20 pounds and bending, and there "are some days [Plaintiff] needs to leave work because of increased pain." *Id.* ("[Plaintiff] was restricted to lifting no more than 15 pounds. . . . He was required to avoid repetitious bending, lifting, and twisting. . . . Further, plaintiff was experiencing steady pain, although that pain varied greatly in intensity."). These findings clearly constitute evidence consistent with a holding of disability as they implicate every factor stressed in *Russell*'s discussion of futility. 108 N.C. at 766, 425 S.E.2d at 457 ("[I]t would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment.").[4]

In short, the Commission's conclusion that there was no evidence to support Plaintiff's claim of futility reflects a misapplication of the governing precedent and is undermined by its own findings (and lack thereof).[5]

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3. Neither the employee in *Thompson* nor any of the employees in the cases cited above benefited from a presumption of disability. Each of the employees met their burden of proving disability through a showing of futility under *Russell* and through *Medlin*. *See*, *e.g.*, *Thompson*, 223 N.C. App. at 356, 734 S.E.2d at 127 ("In the instant case, plaintiff has met his initial burden to show that he was totally disabled from September 10, 2008 and continuing, by showing that a job search would be futile in light of his physical and vocational limitations.").

4. While Defendant argues Plaintiff possesses "marketable skills" that show he would be able to find employment, the Commission made no findings that support Defendant's position.

5. The dissent states that we cannot review the Commission's futility conclusion. Specifically, the dissent argues that finding of fact 37, which "found," in part, that Plaintiff had not "shown that it would be futile . . . to search for work" "is binding upon this Court" as it was not challenged by Plaintiff on appeal. *Griffin*, *infra* at ___. It is well-established, however, that labels are not dispositive in our review of a lower court's factual findings and conclusions of law. *See State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987) ("Proper labeling [of findings of fact and conclusions of law] might have made this Court's task a little easier, but we nonetheless have been able to separate facts from conclusions in examining appellants' various assignments of error."). Concluding that Plaintiff had not shown futility requires legal reasoning, *see* discussion

iii. Suitable Employment

[3] We now turn to the Commission's holding that the fabrication shop position was suitable employment and not make work.

As previously discussed, makeshift positions or "made work" are those that have been so altered that they are not ordinarily available on the job market and thus are not indicative of an employee's earning capacity; this despite the fact the employee may be earning the same wages or more post-injury. *Peoples*, 316 N.C. at 437, 342 S.E.2d at 805. The harm the make-work inquiry aims to address is plain: "[i]f an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated." *Id.* at 438, 342 S.E.2d at 806.

Assessing whether a position exists with employers beyond a defendant-employer is an essential part of the make-work inquiry, because

> [t]he Worker's Compensation Act does not permit [employers] to avoid [their] duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which the employer could terminate at will, or . . . for reasons beyond its control.

Peoples, 316 N.C. at 439, 342 S.E.2d at 806. Thus, we look outward to the competitive marketplace to determine whether or not a position "accurately reflect[s] the person's ability to compete with others for wages . . . should the employee's job be terminated." *Id.* at 438, 342 S.E.2d at 806; *see Saums*, 346 N.C. at 765, 487 S.E.2d at 750 ("There is no evidence that employers, *other than defendant*, would hire plaintiff to do a similar job at a comparable wage.") (emphasis added); *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 489 S.E.2d 445 (1997) (holding a position make work when the employer failed to show that there were others who would hire claimant for a similar job at a similar wage).

In the instant case, the Commission's findings and conclusion failed to address the central tenet of the make-work analysis: whether the job is available with employers *other* than Defendant. There is no evidence

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supra Section III.B.ii, and, as such, constitutes a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law."). Further, the Plaintiff unmistakably challenges this legal reasoning, meaning it is subject to *de novo* review by our Court. *Gregory*, 212 N.C. App. at 295, 713 S.E.2d at 74.

in the record and no findings by the Commission as to whether the fabrication shop position exists in the competitive job market. Furthermore, there is no evidence that any employer, other than Defendant, would hire Plaintiff in the same or similar job. In fact, Plaintiff highlighted record evidence indicating that even Defendant might not have hired him if not for their longstanding relationship.[6]

The Commission's assessment of whether Defendant offered Plaintiff suitable employment is inwardly focused. Its holding that "Defendant's *unique* hiring practice of hiring based upon word of mouth and personal recommendations" means the position was "available to individuals in the marketplace" exemplifies this shortcoming.[7] Such a conclusion defines the competitive marketplace based on Defendant's admittedly idiosyncratic employment practices, i.e., if it exists with this employer, then it is necessarily available on the open market under normal conditions. This, of course, is not so. And, as noted above, the Workers' Compensation Act does not find suitable positions an employee "could find nowhere else[,]" thus leaving him or her unemployable should his or her employer no longer offer said position.[8] *Peoples*, 316 N.C. at 439, 342 S.E.2d at 806.

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6. Mr. Younts' testimony is particularly salient on this point, where in response to Defense counsel's question, "If someone in [Plaintiff's] position here, only being able to lift twenty pounds, applied for a job in the loose material side, would that discount him from [the fabrication position] job?" Mr. Younts testified, "Yes, it probably would . . . Not knowing him, walk – walking in off the street, not having any recommendations from any other employers, yes it probably would."

7. The narrowness of the Commission's conception of the marketplace is underlined when it concedes this position's sole connection to open competitive market is "confined to Defendant-Employer's unique 'advertisement[,]' " i.e., the aforementioned word of mouth and personal recommendations.

8. The Commission also found that Defendant had a "regular and constant need to keep staffed" the position in question and did not "specifically tailor[] or create[] [it] for Plaintiff." Though Plaintiff challenges whether these findings are supported by competent evidence, a review of the record shows Mr. Younts testified that the position was permanent, Defendant had a regular and constant need to keep it staffed, and Defendant did not specifically tailor the position for Plaintiff. Given that this Court's duty in reviewing factual findings "goes no further than to determine whether the record contains any evidence[,]" we conclude that the Commission's findings on these points are supported by competent evidence. *Adams v. AVX Corp.*, 349 N.C. at 681, 509 S.E.2d at 414. While these findings afford Defendant room to argue suitability on remand, they do not change the fact that the Commission's analysis was improperly skewed to focus on the employer's workplace as opposed to the broader marketplace.

IV. Conclusion

For the above reasons, we affirm the Commission's findings and conclusion that Plaintiff did not make a reasonable but unsuccessful effort to obtain employment.

We reverse and remand for additional findings as to whether Plaintiff made a showing of disability since the only factual findings in the record are consistent with a conclusion of disability under the futility method from *Russell*.

Lastly, we remand for further findings as to whether the fabrication shop position is available on the competitive marketplace such that it constitutes suitable employment.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Jude COLLINS concurs.

Judge TYSON concurs in part and dissents in part by separate opinion.

TYSON, Judge, concurring in part and dissenting in part.

The majority's opinion correctly determines and properly affirms the Commission's findings and conclusion that Plaintiff failed to make any reasonable efforts to obtain other employment. Plaintiff failed to carry and meet his burden to prove any disability.

Overruling the Commission's unchallenged findings and conclusion by asserting a double-negative burden on *Defendant* to disprove disability through a showing of non-futility is error. This Court cannot disregard our appellate standard of review and substitute new fact findings on the evidence.

It is unnecessary to address either the futility or suitable employment arguments. Remand is unnecessary. Applying the correct appellate standard of review and long-established burdens on the Plaintiff, I vote to affirm the Commission's findings and conclusions of law in the Commission's opinion and award in their entirety. I concur in part and respectfully dissent in part.

I. Standard of Review

The Supreme Court of North Carolina, and applied by this Court long ago, established the proper appellate standard of review of the

Industrial Commission's opinion and award. An appellate "[c]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/ Allegis Group*, 362 N.C. 657, 660, 689 S.E.2d 582, 584 (2008) (citation and quotations omitted).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). "It is the duty of the Commission to decide the matters in controversy and not the role of this Court to re-weigh the evidence." *Starr v. Gaston Cty. Bd. Of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008).

II. Futility

The Commission's unchallenged finding of fact thirty-seven states:

> Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to show that he is disabled. To the contrary, a preponderance of the evidence shows that Plaintiff is able to earn his pre-injury wages with Defendant-Employer in a suitable position that is within his permanent work restrictions. Furthermore, none of Plaintiff's treating physicians have removed him from work in any employment. He has not made a reasonable, but unsuccessful search for work nor has he shown that it would be futile due to preexisting factors to search for work. Plaintiff has not proven that he is disabled in employment outside of his employment with Defendant-Employer.

This finding of fact is supported by competent evidence in the record, is not challenged by Plaintiff, and is binding upon this Court on appeal. The majority's opinion disregards long-established precedents and purports to substitute, re-cast, and re-weigh the evidence before the Commission to arrive at its conclusion. The Commission, not this Court, is the "sole judge of the weight and credibility of the evidence." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

The majority's opinion seeks to re-classify finding of fact thirty-seven as a conclusion of law, to ignore long-established precedents in treating unchallenged findings of fact from the Commission as binding and to disregard the appellant's burden before the Commission and this Court. The majority's opinion's footnote cites a wholly inapposite juvenile neglect and dependency case. *In re Helms*, 127 N.C. App. 505, 510,

491 S.E.2d 672, 675 (1997) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.").

The very next sentence in *Helms*, omitted by the majority, states "[a]ny determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *Id.* (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982)). Unlike *Helms*, where the application of statutory legal principles was involved, unchallenged finding of fact thirty-seven does not involve the application of legal principles, merely "logical reasoning from the evidentiary facts," and is correctly designated as an unchallenged and binding on appeal finding of fact. *Id.*

Beyond the error of improperly classifying and re-weighing the evidence, the majority opinion's analysis and application of *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), is erroneous. All of the cases cited in the majority's opinion found competent evidence in their records *to uphold* the Commission's findings, properly applying the standard of review and the requirements of *Russell* to show futility. *See Wilkes v. City of Greenville*, 243 N.C. App. 491, 500, 777 S.E.2d 282, 289 (2015) (*upholding the futility* of seeking employment when plaintiff was sixty years old, had an IQ of 65, read at a second grade level, and was physically unable to complete the work), *aff'd as modified*, 369 N.C. 730, 799 S.E.2d 838 (2017); *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 359, 734 S.E.2d 125, 129 (2012) (*upholding the futility* of a forty-five year old, who completed high school, was restricted to lifting no more than fifteen pounds, and whose prior work experience was limited to heavy labor jobs); *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 392, 656 S.E.2d 608, 615 (2008) (*upholding the futility* of finding a job of a thirty-eight-year-old high school graduate with conflicting testimony regarding futility); *Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 383, 607 S.E.2d 348, 352-53 (2005) (*upholding the futility* of a sixty-one-year-old maintenance worker who had retired due to inability to work due to knee pain).

Our Supreme Court in *Wilkes* examined a similar issue regarding futility when it also *upheld* the findings and an award of the Commission that it was futile for that plaintiff to seek sedentary employment. The plaintiff in *Wilkes* had a tenth-grade education, was over the age of sixty years old, and had a limited IQ of 65. *Wilkes*, 369 N.C. at 745, 799 S.E.2d at 849. Our Supreme Court upheld the Commission's findings concerning how anxiety and depression affected his ability to work but remanded for additional findings related to his compensable tinnitus. *Id.* at 746, 799

S.E.2d at 850. The findings related to his alleged compensable tinnitus were absent from the conclusion that the plaintiff was disabled. *Id.* at 747-48, 799 S.E.2d at 850.

Here, the Commission found no evidence of Plaintiff showing it "would be futile due to pre-existing factors to search for work" as a result of Plaintiff's only complained of injury. The Commission also made no bifurcated analysis and made only one conclusion which included all of Plaintiff's alleged injuries. No other unaddressed injury exists upon which to remand to the Commission for further findings. The holding in *Wilkes* is inapposite and does not support the majority's conclusion. *See id.*

The Court in *Wilkes* relied, in part, on *Peoples v. Cone Mills Corp.*, where our Supreme Court held: "In order to prove disability, *the employee* need not prove he unsuccessfully sought employment *if the employee* proves he is unable to obtain employment." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986) (emphasis supplied). Under *Peoples*, Plaintiff, not Defendant, carries the burden to provide evidence of the futility of his established duty to find work, where disability has not been proven. *Id.* We all agree and concur in the Commission's finding and conclusion that Plaintiff failed to make any reasonable efforts to obtain other employment.

Here, the Commission found Plaintiff remains employed in a job at his original employer performing work his physician had approved at "his pre-injury wages," and hours, where he had been working for the past five years. Plaintiff, not his employer, carries the burden to prove he was unable to find work. *Id.* Nothing in the record supports the conclusion that Plaintiff made any effort to meet or carry this burden or demonstrate futility. *See id.*

In *Russell*, this Court *upheld* the Commission's findings of futility when a thirty-five-year-old fork-lift operator with a high school equivalency degree could no longer bend forward, engage in overhead activity, stand or sit for prolonged periods of time, or engage in prolonged lifting of any weight greater than twenty-five pounds. *Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457.

In *Thompson*, our Court *upheld* the Commission's finding of futility where the claimant was a forty-five-year-old high school graduate who could not lift more than fifteen pounds. *Thompson*, 223 N.C. App. at 359, 774 S.E.2d at 129. This Court concluded "the Commission's findings are sufficient to support its conclusion that plaintiff met his burden of showing futility." *Id.*

By re-weighing the evidence, and comparing the characteristics and injuries of Plaintiff, the majority's opinion misconstrues and misapplies the holding of *Russell* and its progeny by ignoring an unchallenged and binding finding of fact, "rummage[ing] through the record" to support its notion to shift the burden and to re-weigh the evidence to reach a contrary finding. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 118, 665 S.E.2d 493, 497 (2008) (citation omitted).

Compounding this error of burden shifting and factual comparisons, the majority's opinion further disregards long-established precedents from our Supreme Court. Our Supreme Court held: "The relevant inquiry under G.S. 97-29 is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity." *Little v. Anson Cty. Schs. Food Serv.*, 295 N.C. 527, 531, 246 S.E.2d 743, 746 (1978).

The majority's opinion applies broad generalizations based upon re-weighing characteristics and capabilities, instead of the individualized analysis our Supreme Court articulated in *Little*, and as the Commission correctly applied here. In all the above cases, the Court upheld the findings and a conclusion of disability by the Commission. *See id.*

This Court also upheld the Commission's finding of futility in *Johnson*, where there had been conflicting testimony before the Commission regarding futility. *Johnson*, 188 N.C. App. at 392, 656 S.E.2d at 615. In *Weatherford*, the treating physician testified that if the plaintiff had not retired, the plaintiff would not have been allowed to continue to work. *Weatherford*, 168 N.C. App. at 383, 607 S.E.2d at 352-53. Our Court upheld the Commission's finding of disability when the worker retired after unsuccessfully attempting to return to work due to knee pain. *Id.*

Unlike cases cited in the majority's opinion which all uphold and support the Commission's finding of futility, the majority's opinion disregards the standard of appellate review, shifts the burden to the employer to prove a double negative, re-weighs the evidence, and overrules the Commission's findings and conclusions.

Plaintiff testified to the background of how he had sustained his injury and his ability to continue working as a pipe fitter. Since his injury, Plaintiff continues to work with Defendant at the same hours and wages with his physician's approval. We all agree the Full Commission correctly found and concluded Plaintiff is not disabled and had made no efforts to obtain other employment. Nothing suggests Plaintiff searched for and cannot find a job. No evidence shows he would not be able to

find a job to fit his limitations, experience, and education after having been employed and working.

The majority's opinion unlawfully purports to shift and place a burden upon Defendant to prove competitive jobs exist in the market for which Plaintiff is qualified and can physically accomplish. This shifting of burden is error. Unless Plaintiff initially meets his *prima facie* case of proving disability, Defendant has no burden for production or proof. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Plaintiff continues to work for his same employer at the same pre-injury wages and hours with his physician's restrictions. We all agree Plaintiff failed to make any reasonable efforts to obtain other employment, and Plaintiff failed to carry and meet his burden to prove any disability.

III. Conclusion

Competent evidence in the whole record supports the Commission's unchallenged finding and conclusion that Plaintiff had not carried his burden to demonstrate disability or any futility to search for other suitable employment. The Commission's opinion and award is supported by undisputed facts: Plaintiff continues to work with his original employer, at his pre-injury hours, with his pre-injury schedule, and within his physician's restrictions. The Full Commission's findings of fact are unchallenged, and its conclusions and award is supported by competent evidence.

As the "sole judge of the weight and credibility of the evidence" the Commission's opinion and award is properly affirmed in its entirety. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. The majority's opinion disregards the appellate standard of review of the Commission's order, shifts and imposes a burden of proof upon Defendant without proof of disability, re-weights the evidence, and misapplies controlling precedents. *See id.* I vote to affirm the Commission's opinion and award in its entirety and respectfully dissent.

IN THE MATTER OF THE ESTATE OF JOHNNIE EDWARD HARPER

Nos. COA19-326, COA19-327

Filed 7 January 2020

1. Estates—removal of representative—appeal—standard of review—on the record

On appeal from the clerk of superior court's order removing respondent as administratix of her father's estate pursuant to N.C.G.S. § 28A-21-4, the superior court properly applied the "on the record" standard of review that applies to estate proceedings (N.C.G.S. § 1-301.3(d)) rather than conducting a de novo hearing.

2. Estates—sale of decedent's real property—appeal—standard of review—de novo

On appeal from the clerk of superior court's order allowing the public administrator of an estate to sell the decedent's real property to pay the estate's debts, the superior court erred by failing to conduct a de novo hearing, where the proper standard of review for a special proceeding pursuant to N.C.G.S. § 1-301.2 was de novo.

Appeal by respondent from orders entered 4 December 2018 and 18 December 2018 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 2 October 2019.

Respondent-appellant Kim L. Harper, pro se.

Stone & Christy, P.A., by James M. Ellis, for petitioner-appellee.

ZACHARY, Judge.

In COA19-326, the Buncombe County Clerk of Superior Court ordered, *inter alia*, the removal of Respondent Kim L. Harper as administratrix of the Estate of Johnnie Edward Harper. Harper appealed the clerk's order to the superior court. The superior court dismissed Harper's case, and she appealed to this Court. In COA19-327, the Buncombe County Clerk of Superior Court entered an order authorizing the public administrator to sell the real property of the decedent Johnnie Edward Harper to make assets to pay debts of his estate. Again, Harper appealed the clerk's order to the superior court. The superior court dismissed Harper's case, and she appealed to this Court. On 16 April 2019, the

cases were consolidated for hearing pursuant to the provisions of N.C.R. App. P. 40 by this Court.

On appeal, Harper argues that the superior court utilized the incorrect standard of review in both of these cases. After careful review, we affirm the order of the superior court in COA19-326, and vacate the order of the superior court in COA19-327 and remand this matter to the superior court for further proceedings.

Background

Johnnie Edward Harper ("the Decedent") died intestate on 1 June 2015. He was survived by four children: Harper, Beth, Sonya, and Rochelle. Harper qualified as administratrix of her father's estate on 28 June 2016.

On 7 August 2018, the assistant clerk of superior court issued an order directing Harper to file an account for the estate, and on 15 August 2018, a deputy sheriff personally served Harper with a copy of the clerk's order. The order provided, *inter alia*, that Harper could be removed as fiduciary for failure to comply with the terms of the order. Harper failed to file the account. As a result, on 5 September 2018, the assistant clerk of superior court *sua sponte* issued and personally served Harper with an "Order to Appear and Show Cause for Failure to File Inventory/Account," due to her failure to file an accounting of estate assets during the two years following her qualification as administratrix. The Order to Appear and Show Cause noted that Harper could be held in contempt or removed as fiduciary, and provided a hearing date of 27 September 2018.

At the hearing of this matter, Harper produced an account for filing, but did not file a proper account: the account did not balance, and she provided no supporting documentation of the listed disbursements or the balance held. On the date of the hearing, the estate had $139.30, no saleable personal property, and numerous debts. Harper had also moved into the decedent's house, and admitted that she had spent money belonging to the estate on her personal expenses.

On 4 October 2018, the clerk removed Harper as administratrix of the estate, and appointed James Ellis, the public administrator of Buncombe County, to serve as successor administrator of the estate. Harper timely appealed this order to superior court, and on 4 December 2018, this matter came on for hearing before the Honorable Marvin P. Pope, Jr. After reviewing the case file and hearing arguments from both parties, Judge Pope entered an order dismissing the appeal. Harper timely appealed to this Court, and this appeal was designated as COA19-326.

On 19 November 2018, the public administrator petitioned the clerk of superior court to sell the real property owned by the Decedent at the time of his death. The public administrator asserted that it was necessary to sell the real property in order to make assets to pay debts of the estate, and thus it would be in the best interest of the estate to sell the real property. On 6 December 2018, the clerk entered an order granting the public administrator (1) possession, custody, and control of the Decedent's real property; (2) the authority to remove Harper from the Decedent's house; and (3) the authority to sell the real property.

Harper appealed the clerk's order to the superior court, and on 18 December 2018, this matter came on for hearing before Judge Pope. After hearing arguments and examining the court file, Judge Pope entered an order dismissing the appeal. Harper timely appealed to this Court, and this appeal was designated as COA19-327.

Discussion

I. Standard of Review

"On appeal to the [s]uperior [c]ourt of an order of the [c]lerk in matters of probate, the trial court judge sits as an appellate court." *In re Estate of Pate*, 119 N.C. App. 400, 402, 459 S.E.2d 1, 2, *disc. review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995). Unchallenged findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *In re Estate of Warren*, 81 N.C. App. 634, 636, 344 S.E.2d 795, 796 (1986).

II. COA19-326

[1] Harper contends that the superior court erred by failing to conduct a hearing *de novo* upon her appeal of the clerk's order removing her as fiduciary of her father's estate. After careful review, we disagree.

The clerk of superior court has "jurisdiction of the administration, settlement, and distribution of estates of decedents[.]" N.C. Gen. Stat. § 28A-2-1 (2017). Moreover, the clerk has "original jurisdiction of estate proceedings[,]" *id.* § 28A-2-4(a), as well as "jurisdiction over special proceedings[.]" *Id.* § 28A-2-5.

The personal representative of an estate "has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent person would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate," with the purpose and goal of "settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law[.]" *Id.* § 28A-13-3(a).

One significant duty of a personal representative is to file with the clerk of superior court a final account of estate receipts, disbursements, and distributions. The final account must be filed within one year following the personal representative's qualification, unless the clerk extends the filing period. *Id.* § 28A-21-2(a). The personal representative must provide supporting documentation for all receipts, disbursements, and distributions listed on the account. *Id.* § 28A-21-1.

"If any personal representative or collector fails to account . . . or renders an unsatisfactory account, the clerk of superior court shall . . . promptly order such personal representative or collector to render a full satisfactory account within 20 days after service of the order." *Id.* § 28A-21-4. Upon failure to submit a proper account in compliance with the order, "the clerk may remove the personal representative or collector from office or may issue an attachment against the personal representative or collector for a contempt[.]" *Id.* This is in contrast to revocation of the letters of a personal representative pursuant to section 28A-9-1.

The first consideration in determining the standard of review on appeal to superior court is whether an appeal from a proceeding pursuant to section 28A-21-4 is to be conducted as a special proceeding or an estate proceeding. The clerk of superior court has "original jurisdiction of estate proceedings." *Id.* § 28A-2-4(a). "Estate proceedings" are defined as "matter[s] initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding." *Id.* § 28A-1-1(1b). Certain matters are designated by statute as special proceedings, such as those initiated against the unknown heirs of a decedent, *id.* § 28A-22-3; others are initially heard before the clerk of superior court as estate proceedings, but then appealed to superior court as special proceedings, such as the resignation of a personal representative, *see id.* §§ 28A-10-1 – 28A-10-8.

Although similar in some ways, proceedings to remove a personal representative pursuant to section 28A-21-4 and proceedings to revoke letters of a personal representative pursuant to section 28A-9-1 are not subject to the same standard of review on appeal to superior court. The revocation of letters issued to a personal representative pursuant to section 28A-9-1 is appealed as a special proceeding. *Id.* § 28A-9-4. On appeal, the superior court shall conduct a "hearing de novo." *Id.* § 1-301.2(e). By contrast, our statutes do not provide that the removal of a personal representative pursuant to section 28A-21-4 shall be appealed as a special proceeding. Hence, removal of a personal representative pursuant to section 28A-21-4 is an estate proceeding. On appeal, the superior court

shall review the matter "on the record." *See In re Estate of Lowther*, 271 N.C. 345, 355, 156 S.E.2d 693, 701 (1967).

In the instant case, it is evident that the proceeding instituted by the clerk pursuant to section 28A-21-4 that culminated in Harper's removal as administratrix was an estate proceeding, which should have been reviewed on the record on appeal to superior court.

The superior court's order dismissing Harper's appeal states, in pertinent part:

> The Court, having reviewed the Order of the Clerk of Court, and upon further examination of the file and arguments of counsel, and based thereon, the Court makes the following **CONCLUSIONS OF LAW**:
>
> 1. The findings of fact in the Clerk of Court's October 4, 2018 Order are supported by the evidence.
>
> 2. The conclusions of law in the Clerk of Court's October 4, 2018 Order are supported by the findings of fact.
>
> 3. The October 4, 2018 Order of the Clerk of Court is consistent with the conclusions of law and applicable law.

The superior court's order clearly follows the language of N.C. Gen. Stat. § 1-301.3(d), which provides:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of fact.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

In that section 1-301.3(d) applies to estate proceedings, and the instant appeal is an estate proceeding, the superior court applied the correct standard of review to Harper's appeal of the clerk's order in COA19-326.

The superior court properly reviewed the clerk's order removing Harper as administratrix of this estate pursuant to section 28A-21-4

consistent with the "on the record" standard. However, the superior court's order indicates that it dismissed Harper's case rather than affirming the clerk's order. Accordingly, this matter is affirmed and remanded for the limited purpose of allowing the superior court to correct the disposition.

III. COA19-327

[2] Harper also contends that the superior court erred by failing to conduct a hearing *de novo* upon Harper's appeal from the clerk's order allowing the public administrator to sell the Decedent's real property to make assets to pay debts of the estate. We agree.

It is well settled that "[t]he title to [non-survivorship] real property of a decedent is vested in the decedent's heirs as of the time of the decedent's death[.]" *Id.* § 28A-15-2(b); *Swindell v. Lewis*, 82 N.C. App. 423, 426, 346 S.E.2d 237, 239 (1986). However, "[a]ll of the real and personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against the decedent's estate in the absence of a statute expressly excluding any such property." N.C. Gen. Stat. § 28A-15-1(a).

If the personal representative of the estate determines that "it is in the best interest of the administration of the estate to sell . . . real estate . . . to obtain money for the payment of debts and other claims against the decedent's estate, the personal representative shall institute a special proceeding before the clerk of superior court[.]" *Id.* § 28A-15-1(c); *see also id.* § 28A-17-1; *Badger v. Jones*, 66 N.C. 305, 307 (1872); *Hyman v. Jarnigan*, 65 N.C. 96, 97 (1871) (per curiam); *Holcomb v. Hemric*, 56 N.C. App. 688, 690, 289 S.E.2d 620, 622 (1982).

An aggrieved party may appeal the clerk's order permitting the sale of the decedent's real property to superior court as a special proceeding for a trial *de novo*. "Appeals in special proceedings shall be as provided in [N.C. Gen. Stat. §] 1-301.2." N.C. Gen. Stat. § 28A-2-9(b). Section 1-301.2(e) provides, in relevant part, that "a party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal . . . for a hearing *de novo*." (Italics added).

This Court recently considered the meaning of a "hearing *de novo*" in the context of section 1-301.2(e). *In re Estate of Johnson*, __ N.C. App. __, __, 824 S.E.2d 857, 863, *disc. review denied*, 372 N.C. 292, 826 S.E.2d 701 (2019). We determined that this statute "expressly provides for a hearing *de novo* on appeal to the superior court, and not just *de*

novo or whole record review." *Id.* at ___, 824 S.E.2d at 863 (internal quotation marks omitted). Consequently, when sitting as an appellate court, the superior court shall proceed "as if no hearing had been held by the clerk and without any presumption in favor of the clerk's decision." *Id.* at ___, 824 S.E.2d at 863 (brackets and quotation marks omitted).

Here, the public administrator's action before the clerk to sell the Decedent's real property to make assets to pay debts was a special proceeding, and therefore, should have received a hearing *de novo* on appeal to superior court. The superior court's order dismissing Harper's appeal states, in pertinent part:

> The Court, having reviewed the Order of the Clerk of Court, and upon further examination of the file and arguments of counsel, and based thereon, the Court makes the following **CONCLUSIONS OF LAW**:
>
> 1. The findings of fact in the Clerk of Court's December 6, 2018 Order are supported by the evidence.
>
> 2. The conclusions of law in the Clerk of Court's December 6, 2018 Order are supported by the findings of fact.
>
> 3. The December 6, 2018 Order of the Clerk of Court is consistent with the conclusions of law and applicable law.

As in *Johnson*, the superior court's order "tracks the language of N.C. Gen. Stat. Section 1-301.3(d)." *Id.* at ___, 824 S.E.2d at 862.

N.C. Gen. Stat. § 1-301.3(d) provides, in relevant part:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of fact.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

In that section 1-301.3(d) does not apply to special proceedings that are "required in a matter relating to the administration of an estate," *id.* § 1-301.3(a), the superior court applied the incorrect standard of review.

On appeal of the clerk's order in this special proceeding, the superior court was required to conduct a hearing *de novo*, which it failed to do. Instead, the court appears to have mistakenly adopted the standard of review delineated in section 1-301.3(d), above. Although N.C. Gen. Stat. § 1-301.3(d) generally governs the trial court's review of "matters arising in the administration of trusts and of estates of decedents, incompetents, and minors[,]" subsection (a) explicitly provides that *section 1-301.2* shall apply "in the conduct of a special proceeding when a special proceeding is required in a matter relating to the administration of an estate." *Id.* § 1-301.3(a). "Ordinarily when a superior court applies the wrong standard of review . . . this Court vacates the superior court judgment and remands for proper application of the correct standard." *Johnson*, ___ N.C. App. at ___, 824 S.E.2d at 862 (quoting *Thompson v. Town of White Lake*, 252 N.C. App. 237, 246, 797 S.E.2d 346, 353 (2017)).

The superior court erred in failing to conduct a hearing *de novo* upon Harper's appeal of the clerk's order authorizing the public administrator to sell the Decedent's real property to make assets to pay debts of his estate. Accordingly, we vacate the trial court's order in COA19-327 and remand this matter to the superior court with instructions to conduct a *de novo* hearing.

COA19-326: AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

COA19-327: VACATED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

IN RE LOWE'S HOME CTRS., LLC

[269 N.C. App. 221 (2020)]

IN THE MATTER OF THE APPEAL OF LOWE'S HOME CENTERS, LLC

No. COA19-125

Filed 7 January 2020

Taxation—real property appraisals—in non-reevaluation year—correction of error—misapplication of schedules—misapprehension of facts

A county board of equalization and review was barred from changing the appraisal value of certain real property in a non-reevaulation year on the basis of correcting a misapplication of the schedule of values (N.C.G.S. § 105-287(a)(2)) where the board deemed that its reevaluation two years earlier—in which the board accepted the valuations that were suggested in the property owner's appeal from the board's initial evaluation—was based upon poorly selected comparison properties. The board's prior misapprehension of background facts was not a misapplication of the schedule of values.

Appeal by Union County from Final Decision entered 24 October 2018 of the Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 5 June 2019.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Collier R. Marsh, and Perry, Bundy, Plyler & Long, L.L.P., by Terry Sholar and Ashley McBride, for Union County-appellant.

Bell, Davis & Pitt, P.A., by John A. Cocklereece and Justin M. Hardy, for Lowe's Home Centers, LLC-appellee.

MURPHY, Judge.

Our statutes bar county boards of equalization and review from changing the appraisal value of—i.e. revaluating—real property in years in which general reappraisal is not made, except under certain specifically defined circumstances. One such reason for revaluation is to "[c]orrect an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal." N.C.G.S. § 105-287(a)(2) (2017). The only genuine issue in this case is whether the Union County Board of Equalization and Review's revaluation of Lowe's property values in a non-reappraisal year was, in fact, for the purpose of correcting a misapplication of the schedule of values. The revaluation did not correct a misapplication of the schedule

of values and was not authorized under our statutes. We affirm the decision of the Property Tax Commission below in favor of Lowe's.

BACKGROUND

At the beginning of 2015, the Union County Board of Equalization and Review ("the Board") revaluated three properties belonging to Appellee Lowe's Home Centers, LLC ("Lowe's") during a countywide revaluation pursuant to N.C.G.S. § 105-286(a)(1). During the revaluation process, property values were appraised according to the "Cost Approach," one of three assessment methods allowed by Union County's 2015 Uniform Schedule of Values, Standards, and Rules ("Schedule of Values") to assess market price:

> 1. Cost Approach: (also known as Depreciated Replacement Cost). This approach is based on the proposition that the informed purchaser would not pay more than the cost of producing a substitute property with the same use as the subject property. This approach is particularly applicable when the property being appraised is utilized at its highest and best use. It also applies when unique or specialized improvements are located on a site for which there exist no comparable properties in the market.
>
> 2. Market Data Approach: (also known as the Comparative Approach). This appraisal method is used to estimate the value of real property through a market search to ascertain the selling prices of similar properties. In this process, the appraiser compares the subject property to those which have sold, and estimates the value of the property by using those selling prices as a comparison.
>
> 3. Income Approach: [Not discussed in this case.]

The Board evaluated the three properties owned in fee simple by Lowe's according to the Cost Approach at $12,362,100.00, $9,204,600.00, and $14,667,400.00, respectively, and reported the proposed values to Lowe's. This was the first evaluation relevant to this case, and we will refer to it hereinafter as "the Initial Evaluation."

Later that same year, Lowe's properly appealed the evaluations with the assistance of an appraiser. Utilizing the Market Data Approach, it submitted documentation evincing that the properties were worth approximately half as much as the Board's initial assessment

suggested—$6,492,000.00, $4,386,800.00, and $6,555,100.00, respectively. Lowe's presented comparisons of properties ostensibly similar to those owned by Lowe's, all of which were represented as "big box" retail properties owned in fee simple. Satisfied that the properties owned by Lowe's were, in fact, analogous to those in the appeal, the Board accepted the appeal at "face value" and revaluated the listed values to exactly those proposed by Lowe's ("the 2015 Revaluation"). From 8 April 2015 to 7 April 2017, the three properties belonging to Lowe's were taxed according to these amended assessed values.

In 2017, a non-revaluation year under N.C.G.S. § 105-286(a)(1), the Board discovered what it deemed to be an error in the Lowe's property revaluations. During a hearing in which a separate retailer appealed its property values by comparison with the Lowe's properties, the Board recognized that the values assessed according to the 2015 Revaluation were abnormally low. In a five-minute hearing on 4 April 2017, the Board voted to restore the three Lowe's properties to their values under the Initial Evaluation—calculated according to the Cost Approach—as a matter of equity ("the 2017 Revaluation"), notifying Lowe's of its decision several days later.

As the basis for the unseasonable 2017 Revaluation, the Board cited N.C.G.S. § 105-322(g)(1)(c), which it alleged "permits a change in value of any property that, in the board's opinion, has been listed and appraised at a figure that is below or above" true market value. It was later discovered that Lowe's had compared its properties in the appeal which led to the 2015 Revaluation with properties subject to deed restrictions severely impairing their market value, while the Lowe's properties themselves had no such restrictions.

After unsuccessfully challenging the 2017 Revaluation before the Board, Lowe's appealed the decision to the Property Tax Commission sitting as the State Board of Equalization and Review ("the Commission"). At the hearing's conclusion, the Commission found that the Board did not have the requisite statutory authority to adjust the values of the properties as it did in the 2017 Revaluation. The Commission concluded N.C.G.S. § 105-287(g)(2) only authorizes such an adjustment if the Board was correcting an error arising from a misapplication of the Schedule of Values. Since the Board took Lowe's evidence at face value and "assigned exactly the value it intended on the properties," the Commission held the 2015 Revaluation did not constitute a misapplication of the Schedule of Values. As such, the Commission concluded the 2017 Revaluation was improper and ordered the Board to restore the accepted appraised values set out in the 2015 Revaluation. Union County timely appeals.

ANALYSIS

Union County argues the Commission's order was erroneous in two ways: first, in concluding there was no evidence that the Schedule of Values was misapplied in the 2015 Revaluation; and, second, in concluding the Board was not statutorily authorized to adjust the Lowe's properties' values in the 2017 Revaluation. The core question on appeal, which underlies both of Union County's arguments, is whether the Board's use of the Market Data Approach to compare the Lowe's properties owned in fee simple to deed-restricted properties in the 2015 Revaluation constitutes a misapplication of the Schedule of Values. If the Board's 2015 Revaluation was a "misapplication" of the Schedule of Values, the 2017 Revaluation was a proper use of the Board's statutory authority to correct misapplications. If not, the Commission's Order must be affirmed because the Board acted outside its statutory authority to change the assessed values.

N.C.G.S. § 105-322(g)(1)(c) prevents the Board from adjusting the appraised value of real property "except in accordance with the terms of [N.C.]G.S. 105-286 [governing revaluation-year adjustments] and 105-287." N.C.G.S. § 105-322(g)(1)(c) (2017). N.C.G.S. § 105-287 states, in relevant part:

> (a) In a year in which a general reappraisal of real property in the county is not made under G.S. 105-286, the property shall be listed at the value assigned when last appraised unless the value is changed in accordance with this section. The assessor shall increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in the property's value resulting from one or more of the following reasons:
>
> . . .
>
> (2) Correct an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal.

N.C.G.S. § 105-287(a)(2) (2017).

Union County contends the record before the Commission contained ample evidence that the Schedule of Values was misapplied in the 2015 Revaluation; namely that, in 2017, four witnesses attested to the variance between the three properties at issue and the properties Lowe's submitted for comparison under the Market Data Approach. However, the true issue on appeal is not whether evidence of the variance existed

but whether that variance between the Initial Evaluation and the 2015 Revaluation can be properly characterized under the statute as a "misapplication" of the Schedule of Values. Again, if the 2017 Revaluation was not to correct an error resulting from a "misapplication" in the 2015 Revaluation, the Board acted beyond its statutory authority by revaluating the appraised value of Lowe's properties. If, however, it was correcting a misapplication from the 2015 Revaluation, the 2017 Revaluation was made pursuant to the Board's statutory authority and the Commission erred in reaching a conclusion to the contrary. We hold the Board did not misapply the Schedule of Values in entering the 2015 Revaluation and affirm the Commission's decision.

The question of whether the 2015 Revaluation constituted a misapplication is an issue of law, which we review de novo. *In re Westmoreland-LG & E Partners North Carolina*, 174 N.C. App. 692, 696, 622 S.E.2d 124, 128 (2005) ("Appellate courts review all questions of law *de novo* and apply the 'whole record' test where the evidence is conflicting . . . .").

Union County advances two arguments as to why the Schedule of Values was "misapplied" in the 2015 Revaluation. First, because the properties used for comparison were deed-restricted such that they could not be used optimally as large retail stores, the Lowe's properties were not "similar" to the comparison properties under the Market Value Approach in the Schedule of Values. Second, the Commission improperly characterized the 2015 Revaluation as something other than a "misapplication," when it is most accurately classified as a misapplication arising from incorrect information.

In contrast, Lowe's argues at the time of the 2017 Revaluation "the County and Board were not aware of the [N.C.G.S. §] 105-287 limitation." Lowe's concludes, "[g]iven that the Board did not even discuss Section 105-287 or the Union County [S]chedule of [V]alues, the Commission properly concluded that the Board did not intend to 'correct an appraisal error resulting from a misapplication' of the [S]chedule of [V]alues" at the time of the 2017 Revaluation.

Our caselaw on this issue begins and ends with one case, *In re Ocean Isle Palms LLC*, 366 N.C. 351, 749 S.E.2d 439 (2013), in which our Supreme Court examined whether Brunswick County had corrected a misapplication of the schedule of values when it revaluated properties in a non-revaluation year to reflect new information. *Id.* at 358, 749 S.E.2d at 443. The new information before the board in *Ocean Isle* was twofold: (A) previously unknown market data indicating the properties

in question were more valuable than their revaluation-year assessments indicated, and (B) information that some of the market data used during the previous revaluation year had been inaccurate. *Id.* Based on this information, Brunswick County concluded that the "condition factor" test by which it had previously evaluated the properties no longer applied and changed the property values accordingly. *Id.*

Our Supreme Court reasoned that, despite Brunswick County's assertions to the contrary, the revaluation was not implemented to correct a misapplication of the Schedule of Values, but to apply a different standard altogether—a change that could only take place prospectively, not retroactively, under N.C.G.S. 105-287. *Id.* at 359, 749 S.E.2d at 444. Accordingly, the revaluation was not statutorily authorized. *Id.*

We are guided by *Ocean Isle* in addressing Union County's arguments on appeal. Brunswick County's basic contention in *Ocean Isle* was that, had it known during the evaluation year the information it learned later, it would have decided on different values for the properties. Thus, the schedule of values was misapplied. Union County's argument likewise suggests that the Board would not have relied upon the comparison properties submitted by Lowe's if it had had all the relevant information in 2015. There is no way to substantively differentiate this argument from that which our Supreme Court rejected in *Ocean Isle*. Here, as in *Ocean Isle*, the 2017 Revaluation was not implemented to correct a misapplication, but to retroactively adjust the property values to reflect newly discovered information.

Union County's only argument distinguishing this case from *Ocean Isle* is that, while Brunswick County had instituted a new revaluation system altogether in *Ocean Isle*, the Board in this case merely reinstated an evaluation system already used in the Initial Evaluation. In other words, it argues that where Brunswick County was attempting to impose a new standard onto a previous year, Union County simply corrected its previous evaluation consistent with its existing standards. This argument largely ignores the substance of the *Ocean Isle* decision and does not render the Commission's decision erroneous.

The manner in which the standard used in *Ocean Isle* differed from that of the foregoing revaluation year is the same manner in which the standard used in the 2017 Revaluation differs from that used in the 2015 Revaluation—the Board's understanding of the factual underpinnings changed and that resulted in a different assessment. Brunswick County's standard in *Ocean Isle* differed from that in the revaluation year because, with new information about the properties at issue and the surrounding market, its assessment of the properties' values changed. *Id.* at 358, 749

S.E.2d at 443. However, because there was no error in the application of its schedule of values to the facts as they were understood during the previous revaluation year, there was no misapplication. Consequently, Brunswick County lacked the statutory authority to adjust the property values. The same is true here.

Furthermore, our result is consistent with a plain reading of "misapplication." In common usage paralleling its use in N.C.G.S. § 105-287(a)(2), "apply" must take both a direct and an indirect object. The Schedule of Values was not just "applied," but applied to a set of facts as understood by the Board. For an assessment of a property's value to constitute a "misapplication of the schedules, standards, and rules," an error must have taken place in the manner the Schedule of Values was applied, not in the Board's apprehension of background facts. N.C.G.S. § 105-287(a)(2). The Schedule of Values here did not define "similar properties;" rather, it left the similarity of comparison properties to the discretion of the Board. The fact that the Board later came to consider the comparison property to which it applied the Schedule of Values unsuitable does not indicate that the Schedule of Values was "misapplied." It instead indicates poor discretion in selecting comparison properties—properties to which the Schedule of Values was properly applied—and lack of due diligence by the Board in accepting Lowe's contentions at "face value."

Additionally, Union County's argument that the issue at hand is merely an alternative type of misapplication ignores the plain meaning of the word misapplication. What occurred in this case was not a "misapplication" of the Schedule of Values, but a proper application of the Schedule of Values to poorly selected comparison properties. Consequently, the evidence does not support a conclusion that the Schedule of Values was misapplied during the 2015 Revaluation, and the Board lacked statutory authority to order the 2017 Revaluation.

CONCLUSION

The only genuine issue in this case is whether the Board, in fact, corrected a misapplication of the Schedule of Values in the 2017 Revaluation. We agree with the Commission's conclusion that it did not. The 2017 Revaluation of Lowe's properties was not authorized under N.C.G.S. §§ 105-322(g)(1) and 105-287, and we affirm the Commission's Order reversing the 2017 Revaluation.

AFFIRMED.

Judges TYSON and YOUNG concur.

IN THE MATTER OF S.C.

No. COA19-333

Filed 7 January 2020

1. Jurisdiction—petition for adult protective services—N.C.G.S. § 108A-105(a)—sufficiency of allegations

The Court of Appeals rejected an argument that, in order for a trial court to have jurisdiction over a petition filed by a county department of social services seeking authorization to provide protective services to a disabled adult who lacked capacity to consent, the petition must include as part of its "specific facts" (pursuant to N.C.G.S. § 108A-105(a)) allegations about other individuals able, responsible, and willing to perform or obtain for the adult essential services (a phrase forming part of the definition of "disabled adult" in N.C.G.S. § 108A-101(e)).

2. Disabilities—adult protective services—disabled adult—sufficiency of findings—AOC form order

The trial court's order determining that respondent was a disabled adult in need of protective services was supported by sufficient specific findings of the ultimate facts, and was not deficient even though the court included only one handwritten finding on the form used (AOC-CV-773) while the rest of the findings were typewritten.

Appeal by Respondent from order entered 10 October 2018 by Judge Brian DeSoto in Pitt County District Court. Heard in the Court of Appeals 15 October 2019.

The Graham.Nuckolls.Conner. Law Firm, PLLC, by Timothy E. Heinle, for the Petitioner-Appellee, Pitt County Department of Social Services.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for the Respondent-Appellant.

BROOK, Judge.

Stanley Corbitt ("Respondent") appeals from the trial court's order authorizing Pitt County Department of Social Services ("the Department") to provide or consent to the provision of protective services. The trial court concluded that Respondent was a disabled adult

who lacked capacity to consent to the provision of protective services. Respondent's appointed Guardian *ad Litem* counsel appeals. We affirm the order of the trial court.

I. Background

Respondent resides in Pitt County and presents a history of medical issues the treatment of which and his inability to follow recommended medical orders led to the involvement of the Department in his care. After receiving a report concerning Respondent's inability to care for himself and make decisions about his medical treatment in August 2018, the Department filed a petition on 3 October 2018 for an order authorizing the provision of protective services, alleging that Respondent lacked capacity to consent to the provision of protective services and was without a willing, able, and responsible person to perform or obtain these services.

At the 10 October 2018 hearing, District Court Judge Brian DeSoto heard testimony from Respondent and his brother, who had been his caretaker prior to the hearing, and a social worker employed by the Department. The social worker testified that Respondent suffered from numerous bacterial and fungal infections from wounds on his leg, arm, and skull, and was experiencing significant mental health issues. The social worker went on to testify that these issues had escalated while Respondent was hospitalized to the point where Respondent had taken "scissors and cut off tissue to the bone and the tendon [was] exposed." Respondent's brother testified that he believed Respondent could "pretty much take care of himself," explaining that he visited him at least once a week prior to his hospitalization. At the conclusion of the hearing the trial court found that Respondent was a disabled adult in need of protective services due to mental incapacity. The court entered an order to that effect the same day. Respondent's appointed Guardian *ad Litem* counsel entered timely written notice of appeal from that order.[1]

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1. Respondent argues that this appeal is not moot regardless of whether the conditions leading to entry of the 10 October 2018 order subsequently changed before this appeal could be heard by our Court because the appeal presents questions capable of repetition yet evading review. The Department does not argue that this appeal is moot and we agree that the questions presented by this appeal are capable of repetition yet evading review. "[C]ases which are 'capable of repetition[] yet evading review may present an exception to the mootness doctrine.' " *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, 241 N.C. App. 1, 8, 771 S.E.2d 920, 926 (2015) (quoting *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703 (2002)). Cases in this category must meet two requirements: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* (internal

II. Analysis

Respondent raises two arguments on appeal, which we address in turn.

A. Subject Matter Jurisdiction

[1] Respondent first argues that the trial court lacked subject matter jurisdiction to authorize the Department to provide or consent to provide protective services. Specifically, Respondent contends that the absence of allegations in the petition about other individuals able, responsible, and willing to provide or assist him to obtain protective services rendered the petition fatally defective, depriving the trial court of subject matter jurisdiction. We disagree.

"Chapter 108A, Article 6, of the North Carolina General Statutes, entitled the 'Protection of the Abused, Neglected, or Exploited Disabled Adult Act,' sets out the circumstances and manner in which the director of a county department of social services may petition the district court for an order relating to provision of protective services to a disabled adult." *In re Lowery*, 65 N.C. App. 320, 324, 309 S.E.2d 469, 472 (1983). In October 2018, the time the petition at issue was filed, the Act defined "disabled adult" as follows:

> The words "disabled adult" shall mean any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.

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marks and citation omitted). The 60-day order in this case meets these requirements. Appeals from 60-day orders authorizing protective services are in their "duration too short to be fully litigated prior to [their] cessation or expiration"; they also present "a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* Holding otherwise would render them unreviewable because of the standard timetable on which review by our Court is possible. This appeal, for example, was not heard until a year and five days after the trial court entered the order being appealed – 310 days after the expiration of Judge DeSoto's 10 October 2018 order.

N.C. Gen. Stat. § 108A-101(d) (2017).[2] Upon reasonable determination "that a disabled adult is being [] neglected . . . and lacks capacity to consent to protective services," N.C. Gen. Stat. § 108A-105(a) authorizes the Department to "petition the district court for an order authorizing the provision of protective services." N.C. Gen. Stat. § 108A-105(a) (2017). Subsection (a) goes on to require, "[t]he petition must allege *specific facts* sufficient to show that the disabled adult is in need of protective services and lacks capacity to consent to them." *Id.* (emphasis added). Subsection (a) does not elaborate on what "specific facts" must be alleged in the petition. *See id.*

Subsection (c) then provides:

> If, at the hearing, the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and lacks capacity to consent to protective services, he may issue an order authorizing the provision of protective services. This order may include the designation of an individual or organization to be responsible for the performing or obtaining of essential services on behalf of the disabled adult or otherwise consenting to protective services in his behalf. Within 60 days from the appointment of such an individual or organization, the court will conduct a review to determine if a petition should be initiated in accordance with Chapter 35A; for good cause shown, the court may extend the 60 day period for an additional 60 days, at the end of which it shall conduct a review to determine if a petition should be initiated in accordance

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2. This definition was amended in 2019 by Session Law 76 and went into effect on 1 October 2019. *See* S.L. 2019-76, § 14. The amended statute defines "disabled adult" as follows:

> The words "disabled adult" shall mean any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to *an intellectual disability*, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.

N.C. Gen. Stat. § 108A-101(d) (2019) (emphasis added). Neither party suggests that the amendment to the definition of "disabled adult," which replaced the phrase "mental retardation," with "an intellectual disability," *see* S.L. 2019-76, § 14, is relevant to the disposition of this appeal.

> with Chapter 35A. No disabled adult may be committed to a mental health facility under this Article.

Id. § 108A-105(c).

"When the trial court sits without a jury, the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citation omitted).

Respondent suggests that the definition of "disabled adult . . . in need of protective services" in N.C. Gen. Stat. § 108A-101(e) offers guidance on the *specific facts* that must be alleged under § 108A-105(a) for a court to enter an order authorizing the provision of protective services under § 108A-105(c). Section 108A-101(e) provides:

> A "disabled adult" shall be "in need of protective services" if that person, due to his physical or mental incapacity, is unable to perform or obtain for himself essential services and if that person is without able, responsible, and willing persons to perform or obtain for his essential services.

N.C. Gen. Stat. § 108A-101(e) (2017). Respondent argues that the petition § 108A-105(a) authorizes the Department to file must contain "specific facts" indicating that he was "without able, responsible, and willing persons to perform or obtain for his essential services," quoting the language of § 108A-101(e).

Respondent goes further than arguing that read together, N.C. Gen. Stat. §§ 108A-105(a) and 108A-101(e) create a pleading requirement for petitions for authorization of the provision of protective services, however. Not only does § 108A-101(e) supply the standard against which the "specific facts" required to be alleged by § 108A-105(a) must be measured, according to Respondent; the statutes read together establish a standard that is a jurisdictional prerequisite to a trial court's disposition of a petition for protective services. Respondent thus contends that the definition in § 108A-101(e) of "disabled adult . . . in need of protective services" combined with the authorization in § 108A-105(a) of the Department to petition for authorization to provide protective services creates a jurisdictional prerequisite similar to the verification requirement of N.C. Gen. Stat. § 7B-1104, applicable to petitions for termination of parental rights under the Juvenile Code. *See*, *e.g.*, *In re C.M.H.*, 187 N.C. App. 807, 809, 653 S.E.2d 929, 930 (2007) (holding that trial court lacked subject matter jurisdiction where petition for termination of

parental rights failed to comply with verification requirement of N.C. Gen. Stat. § 7B-1104). Respondent posits that the absence of sufficient details in the petition about individuals "able, responsible, and willing [] to perform or obtain . . . essential services" for a disabled adult deprives the trial court of subject matter jurisdiction to find "that the disabled adult is in need of protective services and lacks capacity to consent to protective services," and enter "an order authorizing the provision of protective services." N.C. Gen. Stat. § 108A-105(c) (2017). We disagree.

"Determined to protect the increasing number of disabled adults in North Carolina who are abused, neglected, or exploited, the General Assembly enact[ed] [] [the Protection of Abused, Neglected, or Exploited Disabled Adult Act (the "Act")] to provide protective services for such persons." N.C. Gen. Stat. § 108A-100 (2017). Notably, the language of subsection (a) of N.C. Gen. Stat. § 108A-105, the provision of the Act requiring "specific facts" to be alleged in a petition for protective services before a court may "issue an order authorizing the provision of protective services," *id.* § 108A-105(c), does not contain a requirement that these allegations be verified, unlike a petition for termination of parental rights under N.C. Gen. Stat. § 7B-1104. *See* N.C. Gen. Stat. § 7B-1104 (2017) ("The petition . . . shall be verified by the petitioner[.]"). Instead, under § 108A-105(a), the petition need only contain allegations "sufficient to show that the disabled adult is in need of protective services and lacks capacity to consent to them." *Id.* § 108A-105(a). Endorsing the rule advocated by Respondent would thus create a requirement unsupported by the text of § 108A-105.

Imposing such a requirement would also introduce practical challenges that undermine the Act's purpose. Grafting the definition provided by § 108A-101(e) onto the requirement of § 108A-105(a) to "allege specific facts" would impose a potentially more difficult to manage burden on the Department when petitioning for protective services under § 108A-105 than the Department bears when petitioning for termination of a parent's rights to a minor child under § 7B-1104. Rule 11(b) of the North Carolina Rules of Civil Procedure, the legal standard applicable to whether the verification requirement of § 7B-1104 has been met, *In re Triscari*, 109 N.C. App. 285, 287, 426 S.E.2d 435, 436-37 (1993), requires that the verification "state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true." N.C. Gen. Stat. § 1A–1, Rule 11(b) (2017). Determining whether the standard articulated in the definition of "disabled adult . . . in need of protective services" had been met

would be much less straightforward than comparing the verification of a petition for termination of parental rights to the language of Rule 11(b) to confirm compliance with § 7B-1104.

A comparison of § 108A-101(e) to a petition for protective services would not quickly resolve the question of whether there had been compliance with the rule advocated by Respondent because of the language used in § 108A-101(e), which contains certain indefinite terms. *See id.* § 108A-101(e) (referring to an indefinite number of "*persons* to perform or obtain . . . essential services" in defining "disabled adult . . . in need of protective services") (emphasis added). Compliance with such a rule would presumably require an undefined number of people to be identified and details about these people to be set out in allegations in a petition for protective services as a prerequisite to the disposition of the petition by the trial court. It is unclear how compliance with such a rule could be confirmed by a court disposing of a petition for protective services or a court reviewing such a disposition. What is more, compliance with this jurisdictional pleading requirement would be dependent upon the sufficiency of allegations to meet an indefinite standard, rendering the rule difficult to administer. Adopting such an interpretation of the rule is not only unsupported by the text of the relevant statute, N.C. Gen. Stat. § 108A-105, but also would undermine the purpose of the Act.

For a trial court to enter "an order authorizing the provision of protective services," N.C. Gen. Stat. § 108A-105(c), a petition for protective services need not specify facts about individuals "able, responsible, and willing [] to perform or obtain . . . essential services," *id.* § 108A-101(e). A fair reading of the provisions of Article 6 of Chapter 108A of the General Statutes do not support grafting the definition of "disabled adult . . . in need of protective services," *id.*, onto the requirement to "allege specific facts" in a petition for protective services, *id.* § 108A-105(a), or holding that such a requirement is jurisdictional. Accordingly, we overrule this argument.

B. Sufficiency of Findings

[2] Respondent next argues that the trial court failed to make sufficient findings of fact to support its conclusions that he was a disabled adult in need of protective services. Specifically, Respondent contends that use of the February 2012 version of form AOC-CV-773, developed by the North Carolina Administrative Office of the Courts, failed to satisfy the specificity required of factual findings for an order authorizing protective services where the order contained only one handwritten

factual finding by the trial judge and the rest of the findings were typewritten. We disagree.

As noted previously, § 108A-105(a) provides that

> [i]f the director [of the Department] reasonably determines that a disabled adult is being abused, neglected, or exploited and lacks capacity to consent to protective services, then the director may petition the district court for an order authorizing the provision of protective services. The petition must allege *specific facts* sufficient to show that the disabled adult is in need of protective services and lacks capacity to consent to them.

N.C. Gen. Stat. § 108A-105(a) (2017) (emphasis added). The court may enter an order authorizing the provision of protective services "[i]f . . . the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and lacks capacity to consent to protective services[.]" *Id.* § 108A-105(c). A trial court's order, however, need only include "specific findings of the ultimate facts," not the subsidiary or evidentiary facts whose proof may be required to establish the ultimate facts. *Kelly v. Kelly*, 228 N.C. App. 600, 606-07, 747 S.E.2d 268, 276 (2013) (citation omitted).

We hold that the trial court's order in this case contained specific findings of the ultimate facts to show that Respondent was a disabled adult in need of protective services who lacked capacity to consent to protective services. The trial court's order reads as follows:

> This matter comes on for hearing on the Petition for Order Authorizing Protective Services filed under the statutory authority of the director of the county department of social services. Based on the record, testimony and other evidence presented to the Court, the Court makes the following findings of fact by clear, cogent and convincing evidence:
>
> 1. The respondent is
>
> A resident of this county or can be found in this county.
>
> A disabled adult 61 years of age . . . present in the State of North Carolina and is physically or mentally incapacitated as defined in G.S. 108A-101(d).
>
> 2. The petition was filed on [] 10/3/2018 and respondent was served pursuant to G.S. 1A-1, Rule 4(j) on [] 10/5/2018.

3. The respondent is in need of protective services due to physical or mental incapacity and unable to obtain essential services without a willing, able and responsible person to perform or obtain essential services. The respondent is in need of protective services in that: the Respondent lacks capacity and is unable to make a safe discharge plan.

4. The respondent lacks the capacity to consent to the provision of protective services.

Based on the findings of fact, the Court concludes that:

1. This matter is properly before the Court and the District Court has jurisdiction over the subject matter and over the respondent.

2. Respondent is a disabled adult in need of protective services and lacks the capacity to consent to such services as required by G.S. 108A-105.

3. It is in the best interest of the respondent that this order be entered.

It is ORDERED:

1. That Pitt County Department of Social Services is authorized to provide or consent to, without further orders of the Court, the essential services set out in G.S. 108A-1010(i).

2. That this order shall remain in effect for 60 days unless:

   a. Protective services are no longer needed;

   b. The respondent regains capacity to consent to the provision of protective services;

   c. A guardian of the person or general guardian has qualified; or

   d. For good cause shown the Court extends the order for up to 60 additional days at the end of which time the order expires.

3. This Matter shall be reviewed, unless previously dismissed, without further notice to the parties on [] 12/4/2018 at [] 2:00 pm in Courtroom DC04 to determine whether a petition should be filed for guardianship pursuant to G.S. Chapter 35A.

While it is true, as Respondent contends, that the trial court used form AOC-CV-773 developed by the North Carolina Administrative Office of the Courts in authorizing the Department to provide protective services, and only one of the factual findings of the trial court on this form was handwritten, we hold that the order contained ultimate findings of sufficient specificity to authorize the Department to provide protective services. This argument is overruled.

III. Conclusion

We hold that the trial court had subject matter jurisdiction to authorize the provision of protective services and that the trial court's order authorizing the provision of protective services contained ultimate factual findings of sufficient specificity to support its conclusions of law, which in turn justified the relief awarded by the court in the decretal portion of its order. We affirm the order of the trial court authorizing the provision of protective services.

AFFIRMED.

Judges BRYANT and TYSON concur.

JAMES B. MYERS, JR., PLAINTIFF
v.
CHARLOTTE K. MYERS, DEFENDANT

No. COA18-1210

Filed 7 January 2020

1. Evidence—expert witness—advance disclosure—Rule 26(b)(4) amendment—required even without discovery request—sanction discretionary

Under amended N.C.G.S. § 1A-1, Rule 26(b)(4)(a)(1), a wife was required to disclose in advance the expert witness she intended to have testify at an alimony trial even though the husband did not submit a discovery request asking about expert witnesses. However, where the statute did not include a timeframe or method for disclosure, the trial court's conclusion that it was required to exclude the wife's expert as a matter of law for lack of disclosure was improper because it did not exercise its inherent authority and discretion in determining whether exclusion was the appropriate remedy.

2. Divorce—alimony—N.C.G.S. § 50-16.3A factors—findings required

In an alimony action, the trial court failed to make findings addressing all the factors in N.C.G.S. § 50-16.3A for which evidence was presented. The trial court was required to make findings addressing evidence of the husband's marital misconduct, and to carefully consider the parties' accustomed standard of living developed during the marriage, as distinguished from the wife's actual expenses incurred after separation, including that they regularly saved and invested for retirement. Finally, where the trial court erroneously excluded the wife's evidence regarding tax ramifications of the alimony award, on remand the court was directed to determine whether to allow the evidence and if so, to address any bearing the evidence had on tax consequences.

3. Divorce—alimony—amount—basis—findings

The trial court failed to make sufficiently specific findings regarding how it determined the amount of an alimony award—the court failed to account for the reduction in the wife's income due to tax deductions, the husband's child support obligation, or the wife's accustomed standard of living during the marriage.

4. Divorce—alimony—retroactive—denial—findings

In an alimony action, the trial court failed to make sufficient findings to support its denial of the wife's claim for retroactive alimony—although there was some evidence that the husband paid support after the date of separation, it could not be determined from the record what the amounts were and whether they were sufficient to meet the husband's child support and alimony obligations, information necessary to calculate whether the wife was entitled to retroactive support.

Appeal by defendant from order entered 4 April 2018 by Judge Jena P. Culler in District Court, Mecklenburg County. Heard in the Court of Appeals 22 May 2019.

James, McElroy & Diehl, P.A., by Christopher T. Hood, Jonathan D. Feit and Haley E. White, for plaintiff-appellee.

Hamilton Stephens Steele + Martin, PLLC, by Amy E. Simpson, for defendant-appellant.

STROUD, Judge.

Defendant-Wife appeals from the trial court's Equitable Distribution Judgment and Alimony Order. Wife argues the trial court erred by excluding her expert witness's testimony regarding potential tax consequences of an alimony award, by failing to make sufficient findings to support the amount of prospective alimony awarded, and by failing to award retroactive alimony. Because the trial court erred in its legal determination that North Carolina General Statute § 1A-1, Rule 26(b)(4)(a)(1) required exclusion of Wife's expert witness, the trial court failed to exercise its discretion to decide whether to admit her testimony and we remand for further consideration. Because the trial court did not make sufficient findings to support the amount of alimony awarded or explain why it denied Wife's claim for retroactive alimony, we reverse and remand the order as to the amount of the prospective alimony and as to the denial of retroactive alimony.

I. Background

Husband and Wife were married in 1994 and separated on 26 July 2014. Two children were born to the marriage, in 2005 and 2007. After the first child was born, Wife stopped working outside the home to care for the children or worked only part-time, and Husband was the primary wage earner. On 6 November 2015, Husband filed a complaint with claims for child custody, child support, equitable distribution, and absolute divorce. On 21 January 2016, Wife filed her answer and counterclaims for child custody, child support, post-separation support, alimony, equitable distribution, and attorney fees. On 2 March 2016, the trial court entered a judgment of absolute divorce, reserving all other pending claims. On 22 March 2016, Husband filed his affirmative defenses and reply, alleging marital misconduct by Wife as a defense to alimony. On 23 January 2017, with leave of court, Wife filed her amended answer and counterclaims, adding allegations of marital misconduct by Husband. The parties engaged in discovery regarding all pending claims.

About a week before trial on the equitable distribution and alimony claims, the parties entered a Consent Order regarding permanent child custody and child support. Under the Consent Order, Husband was required to pay child support of $1,700.00 per month, starting on 1 September 2017, and 75% of the children's uninsured medical expenses and certain extracurricular activities. The Consent Order did not address how child support was calculated and did not mention retroactive or past prospective child support.

The trial court held a hearing on equitable distribution and alimony on 13 and 14 September 2017 and entered its order on these claims on 4 April 2018. The trial court granted an unequal distribution of the

marital property, granting Wife 52% of the net marital estate. In making the unequal distribution, the trial court specifically considered several factors under North Carolina General Statute § 50-20(c), including that Husband's income "greatly exceeded that of" Wife during the marriage and his "career growth potential is also far greater than" hers; Husband's higher expectations of pension or retirement benefits; Wife's contributions as a homemaker and primary parent; and Wife's support for Husband in advancing his career. Neither party challenges the equitable distribution provisions of the order on appeal.

On the alimony claim, the trial court made extensive findings of fact addressing Husband's allegations of marital misconduct by Wife early in their marriage but determined that he was aware of the incident and condoned it. Although Wife presented evidence regarding allegations of illicit sexual misconduct by Husband in support of her alimony claim, the trial court made no findings on this issue. The trial court also made detailed findings of fact regarding the parties' incomes and expenses and required Husband to make monthly alimony payments of $1,200.00. We will address the trial court's findings regarding alimony in more detail below. Wife timely appealed from the trial court's order.

II. Exclusion of Expert Testimony

A. Standard of Review

[1] Wife's first issue arises from the trial court's exclusion of testimony of her expert witness based upon her failure to disclose the identity of the witness sufficiently in advance of trial. As a general rule, we review the trial court's rulings regarding discovery for abuse of discretion. *See Miller v. Forsyth Mem'l Hosp., Inc.*, 174 N.C. App. 619, 620, 625 S.E.2d 115, 116 (2005) ("It is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion. In addition, the appellant must show not only that the trial court erred, but that prejudice resulted from that error. This Court will not presume prejudice." (citations and quotation marks omitted)). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). However, if the trial court makes a discretionary ruling based upon a misapprehension of the applicable law, this is also an abuse of discretion. *See State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) ("[A]n abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A [trial] court by definition abuses its discretion when it makes an error

of law." (alterations in original) (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047) (1996))). And if the trial court's ruling depends upon interpretation of a statute, we review the ruling *de novo*. *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) ("[W]hen a trial court's determination relies on statutory interpretation, our review is de novo because those matters of statutory interpretation necessarily present questions of law."). Where the language of a statute is clear, we need not construe the statute and must simply apply the plain meaning of the statute. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). If the statute is ambiguous or unclear, we must consider the purpose of the statute and intent of the legislature as expressed in the statute.

> When the plain language of a statute proves unrevealing, a court may look to other indicia of legislative will, including: the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. The intent of the General Assembly may also be gleaned from legislative history. Likewise, later statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute. Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole. Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each.

Insulation Sys., Inc. v. Fisher, 197 N.C. App. 386, 390, 678 S.E.2d 357, 360 (2009) (quoting *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003)). Where, as in this case, the Legislature has recently amended a statute, we also "presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts." *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992) (citing *Lumber Co. v. Trading Co.*, 163 N.C. 314, 317, 79 S.E. 627, 628-29 (1913)).

B. Motion to Exclude Expert Testimony

Wife contends the trial court erred by striking testimony and evidence from her expert witness, Victoria Coble. Wife attempted to

present evidence regarding the tax consequences of alimony, tax rates, "cash flow issues and hypothetical rates of return on cash investments." Wife hired Ms. Coble a week prior to the trial and did not disclose her as an expert witness until the afternoon of 12 September 2017, the day before the trial. Husband moved to exclude Ms. Coble's testimony at the start of the trial, but the trial court initially denied Husband's motion, ordered that all of Ms. Coble's materials be produced to Husband in the courtroom and directed that she could be called to testify on the second day of trial. On the second day, Husband renewed his objection to Ms. Coble's testimony and made additional arguments to the trial court based upon the 2015 amendments to Rule 26 of the North Carolina Rules of Civil Procedure, including a blog post on the issue published by Professor Ann Anderson of the University of North Carolina School of Government (hereinafter School of Government).

Although the parties had engaged in discovery, Husband had done no discovery requesting disclosure of expert witnesses. There was no discovery conference or pretrial conference addressing evidence or witnesses in the alimony portion of the case; the only pretrial order addressed the equitable distribution claim, and that order did not mention potential witnesses, including any expert witnesses. Wife argued that under North Carolina General Statute § 1A-1, Rule 26(a) and (e), Husband had not requested her to identify any expert witnesses and she thus had no duty to supplement any prior responses. In addition, we note that the Mecklenburg County Local Rules do not require disclosure of expert witnesses and do not require a pretrial order in an alimony claim. Both parties had timely produced financial affidavits and income information as required by the Local Rules.

Based upon the blog post, the trial court noted in open court that "Professor Anderson seem[s] to have a different opinion about how to interpret [Amended Rule 26]" than the trial court had the previous day. The trial court allowed Wife to proffer Ms. Coble's testimony in full but took the matter under advisement and contacted Professor Anderson by email. The trial court later disclosed Professor Anderson's response to the parties and allowed them to respond to this information. Ultimately, the trial court changed its ruling and determined Wife was required to disclose the identity of the expert witness under North Carolina General Statute § 1A-1, Rule 26(b)(4)(a)(1) in advance of trial, even with no interrogatories or other discovery by Husband. Although Rule 26(b)(4)(a)(1) did not set a particular time for identification of experts, the trial court determined Wife had failed to give sufficient or fair notice as "24 hours in advance would pretty much [be] under anyone's interpretation, not reasonably in advance" of the trial and excluded the testimony.

C. Trial Court's Communication with Disinterested Expert

The ruling in question on appeal depends upon the interpretation of North Carolina General Statute § 1A-1, Rule 26, and particularly Rule 26(b)(4)(1)(a). Upon Husband's request, the trial court considered a blog post by Professor Anderson published on 4 September 2015; it states in part as follows:

> The General Assembly has amended the rule of procedure in civil cases for discovery of information about another party's expert witness. North Rule of Civil Procedure 26(b)(4) has largely been unchanged since 1975. With the amendments made by House Bill 376, S.L. 2015-153, the rule updates the methods of disclosing and deposing experts and implements some explicit work-product-type protections. The Rule now looks more like the corresponding provisions in Federal Rule of Civil Procedure 26 (after that Rule's own significant round of changes in 2010). The changes to North Carolina Rule 26(b)(4) apply to actions commenced on or after October 1, 2015. The rule now provides the following:
>
> > **Expert witness disclosure.** A party is now required to disclose the identity of an expert witness that it may use at trial (that is, a witness that may be used to "present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence"). It appears that the other party is no longer required to first submit formal interrogatories requesting the disclosure, but, as discussed below, that party has the option of doing so.
> >
> > **Written report provision.** If the expert is one "retained or specifically employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony," the disclosing party has the option of submitting a written report prepared by the expert that includes: a complete statement of the witness's opinions and the bases and reasons for them; facts the witness considered in forming the opinions; exhibits that will be used to summarize or support them; the witness's qualifications and a list of certain publications; certain

> prior expert testimony by the witness; and a statement of the expert's compensation. (This report is *required* under the Federal rule.) In the absence of this report, the other party may discover through interrogatories the subject matter of an expert's expected testimony; the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds for each opinion.
>
> **Time frames for disclosure.** The rule sets default time frames for submitting written reports of experts or interrogatory responses: 90 days before trial or, for rebuttals, 30 days after the opposing party's disclosure. These requirements may—and surely in many cases will be—altered by stipulation or court order.

Ann M. Anderson, "*North Carolina's Expert Witness Discovery Rule – Changes and Clarifications*," School of Gov't (4 Sept. 2015), https://civil.sog.unc.edu/north-carolinas-expert-witness-discovery-rule-changes-and-clarifications/.

This Court observes that the School of Government provides continuing education for many public officials in North Carolina, including District Court judges, Superior Court judges, the Court of Appeals, and the Supreme Court, as well as many other local and state elected and appointed officials. As noted on the School of Government's website,

> As the largest university-based local government training, advisory, and research organization in the United States, the School of Government offers up to 200 courses, webinars, and specialized conferences for more than 12,000 public officials each year.
>
> Faculty members respond to thousands of phone calls and e-mail messages each year on routine and urgent matters and also engage in long-term advising projects for local governing boards, legislative committees, and statewide commissions.
>
> In addition, faculty members annually publish approximately 50 books, manuals, reports, articles, bulletins, and other print and online content related to state and local government. Each day that the General Assembly is in session, the School produces Daily Bulletin Online, which reports on the day's activities for members of the

> legislature and others who need to follow the course of legislation.

School of Government, https://www.sog.unc.edu/about/mission-and-history (last visited 5 Dec. 2019).

Although a trial judge must always carefully consider any communications with a disinterested expert regarding a question arising in a trial, the trial court fully advised the parties of the communication in open court and gave them an opportunity to review the information and respond to it. This procedure is not required by any statute or rule and is not possible or practicable in every situation. The North Carolina Code of Judicial Conduct allows judges to consult "a disinterested expert on the law applicable to a proceeding before the judge," but it does not set out any parameters for the consultation:

> A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.

North Carolina Code of Judicial Conduct Canon 3(A)(4).[1] Here, the trial court's disclosure of the communication to the parties eliminated any possibility of confusion or unfairness to the parties and provided a clear basis for appellate review, since the communication is addressed in the transcript.

D. Analysis of Rule 26(b)(4)(a)(1):

Under North Carolina General Statute § 1A-1, Rule 26(b), each party is required to disclose the identity of expert witnesses it may use at trial:

> (b) Discovery scope and limits.--Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

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1. In contrast, regarding consultation with a disinterested expert, the American Bar Association Model Code of Judicial Conduct requires a judge to "give[] advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited," and to "afford[] the parties a reasonable opportunity to object and respond to the notice and to the advice received." ABA Model Code of Judicial Conduct Canon 2, Rule 2.9(A)(2). North Carolina has *not* adopted the ABA Model Code of Judicial Conduct and does not require notice to the parties and an opportunity to respond.

. . . .

(4) Trial Preparation; Discovery of Experts. — Discovery of facts known and opinions held by experts, that are otherwise discoverable under the provisions of subdivision (1) of this subsection and acquired or developed in anticipation of litigation or for trial, may be obtained only as provided by this subdivision:

a. 1. In general. — In order to provide openness and avoid unfair tactical advantage in the presentation of a case at trial, a party must disclose to the other parties in accordance with this subdivision the identity of any witness it may use at trial to present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence.

N.C. Gen. Stat. § 1A-1, Rule 26(b) (2017).

This subsection of Rule 26 was substantially revised in an amendment adopted in 2015.[2] Before the amendment, it read:

1. A *party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness* at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

2. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to sub-subdivision (b)(4)b. of this rule, concerning fees and expenses as the court may deem appropriate.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a) (2013) (emphasis added).

Thus, before the 2015 Amendment, Rule 26(b)(4)(a)(1) provided that a party "may through interrogatories" require an opposing party to disclose expert witnesses[3] expected to testify at trial. *Id.* The 2015

2. The amended rule was effective on 1 October 2015. Husband filed his complaint on 6 November 2015.

3. Throughout this opinion, we will use the term "expert witness" to refer to a witness who may be used at trial to "present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence." N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1) (2017).

Amendment to this subsection removed the language regarding interrogatories and states instead that a party "must disclose" expert witnesses.[4] *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1) (2017).

As Professor Anderson's blog post correctly noted, subsection (b)(4)(a)(1) which requires disclosure is now more similar to Federal Rule of Civil Procedure 26. In addition, other amendments to Rule 26 adopted at the same time also made North Carolina's Rule 26 more similar to its federal counterpart. But since North Carolina has not adopted many of the other related provisions of the Federal Rules, the similarity is somewhat superficial. Regarding the 2015 amendments to Rule 26, Shuford's North Carolina Civil Practice and Procedure notes that North Carolina Rule 26 and Federal Rule 26 both deal "with substantive aspects of discovery," but they are

> fundamentally different in their respective approaches. Since 1993, when Federal Rule 26 was substantively rewritten, the discovery procedures were substantially changed to establish what amounts, through mandatory discovery requirements, to standing interrogatories and requests for disclosure and production. The matter must be produced no later than 14 days before a scheduled conference to formulate a joint written discovery plan. While the North Carolina Rule now lays out the framework for a discovery plan and conference to be creased, it is not mandatory unless one of the parties requests to have a discovery meeting.

Alan D. Woodlief, Jr., *Shuford North Carolina Civil Practice and Procedure* § 26:28 (2018).

Because the 2015 Amendments to Rule 26 incorporated the concept of required disclosure of expert witnesses but set no procedure or timing for the disclosure, Rule 26(b(4)(a)(1) is ambiguous. The trial court appreciated this ambiguity, noting, "I think the rule is clear as mud." We must therefore review the trial court's interpretation of the 2015 Amendment to Rule 26 *de novo*. *See Moore v. Proper*, 366 N.C. at 30, 726 S.E.2d at 817.

In conducting *de novo* review of the 2015 Amendment to Rule 26(b)(4)(a)(1),we must first "determine whether [the] amendment

4. The 2015 Amendment changed other portions of Rule 26 as well, as noted by Professor Anderson's blog. The other changes to Rule 26 are not directly relevant to the issue on appeal.

is clarifying or altering." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (2012). An "altering amendment" is intended to change the substance of the original statute, but a "clarifying amendment" is not intended to "change the substance of the law but instead [to give] further insight into the way in which the legislature intended the law to apply from its original enactment." *Id.* Even if the statutory language is plain, we consider the title of the act to assist in "ascertaining the intent of the legislature." *Id.* at 8, 727 S.E.2d at 681. The Bill which made these amendments is entitled, "An Act Amending the Rules of Civil Procedure to Modernize Discovery of Expert Witnesses and Clarifying Expert Witness Costs in Civil Actions." S.L. 2015-153 (H.B. 376) (original in all caps). "To determine whether the amendment clarifies the prior law or alters it requires a careful comparison of the original and amended statutes." *Ray*, 366 N.C. at 10, 727 S.E.2d at 682 (quoting *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 659, 435 S.E.2d 309, 315 (1993)). Considering the purpose of the amendment—"to modernize discovery of expert witnesses"—and the comparison of the original and amended statutes, the 2015 Amendment was an "altering amendment" which was intended to change the substance of Rule 26(b)(4)(a)(1).[5]

In seeking to construe Rule 26(b)(4)(a)(1), we have also considered it in the context of Rule 26 in its entirety and Rule 37, which provides for enforcement and sanctions for violations of Rule 26. We have also compared North Carolina's Rule 26 to Federal Rule 26, as the amendments do make North Carolina's rule somewhat more similar to the federal rule. Most relevant to the issue presented here, the 2015 Amendment to North Carolina's Rule 26 did not incorporate several related provisions of Federal Rule 26 addressing *how* and *when* experts must be disclosed. Federal Rule 26(a)(1)(C) directs that certain required disclosures be made and sets out when "initial disclosures" must be provided. *See* Fed. R. Civ. P. 26(a)(1)(A) ("Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, *without awaiting a discovery request*, provide to the other parties[.]"). North Carolina's Rule 26—in contrast to the required initial disclosures in the Federal rules—still requires the parties to ask for discovery.[6] *See*

5. This analysis does not apply to the portion of the amendments addressing expert witness costs. That portion of the rule is not an issue in this case and the title of the bill expressly characterizes those changes as a "clarifying" amendment.

6. "Discovery methods. — Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission." N.C. Gen. Stat. § 1A-1, Rule 26(a).

N.C. Gen. Stat. § 1A-1, Rule 26(a). In addition, Federal Rule 26(a)(2)(B) also *requires* the parties to provide a written report from the expert witnesses identified, while in North Carolina providing a report is optional. *Compare* Fed. R. Civ. P. 26(a)(2)(B) *with* N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(2). Federal Rule 26(f) *requires*, unless exempted, a conference regarding discovery and a discovery plan. Fed. R. Civ. P. 26(f). The analogous provisions in North Carolina's Rules are optional. N.C. Gen. Stat. § 1A-1, Rule 26(f). Overall, unless the parties have agreed to exchange reports from expert witnesses, have stipulated to a schedule, or there is a discovery plan or order setting times for disclosure, North Carolina's Rule 26(b)(4)(a)(1) puts the parties in the difficult position of being bound by a vague requirement to disclose expert witnesses without any particular time or method set for making that disclosure.[7]

And even assuming Wife violated Rule 26(b)(4)(a)(1), our analysis cannot end there, as this Court has noted that Rule 37 sanctions "puts the teeth" in the other substantive rules governing discovery.

> The substantive law governing discovery is contained in N.C.G.S. § 1A-1, Rules 26-36. However, it is Rule 37 which governs discovery sanctions and which puts teeth in the other rules. As this Court stated in *Green v. Maness*, 69 N.C. App. 292, 299, 316 S.E.2d 917, 922, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 922 (1984):
>
> > Our courts and the federal courts have held consistently that the purpose and intent of [Rule 37] is to prevent a party who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery . . . . In addition to its inherent authority to regulate trial proceedings, the trial court has express authority under G.S. 1A–1, Rule 37, to impose sanctions on a party who balks at discovery requests.
>
> Therefore, although the trial court found that Brown violated several discovery rules, we must first find a basis in Rule 37 to support the trial court's imposition of sanctions.

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7. Rule 26(b)(4)(f) sets a time for disclosure of testifying expert witnesses *if* the parties have agreed to "submission of written reports pursuant to sub-sub-subdivision 2. of sub-subdivision a. of this subdivision" *or* by interrogatories. N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(f). The time for disclosure may also be set by stipulation, discovery plan, or court order. *Id.*

Pugh v. Pugh, 113 N.C. App. 375, 378, 438 S.E.2d 214, 216 (1994) (alterations in original).

The interpretation of Rule 37 as described above has been followed by our appellate courts for many years. We must presume the Legislature was aware of this interaction between Rule 26 and Rule 37 when the 2015 amendment to Rule 26(b)(4)(a)(1) was adopted, without any related amendment to Rule 37.

> "The legislature's inactivity in the face of the Court's repeated pronouncements" on an issue "can only be interpreted as acquiescence by, and implicit approval from, that body." Such legislative acquiescence is especially persuasive on issues of statutory interpretation. When the legislature chooses not to amend a statutory provision that has received a specific interpretation, we assume lawmakers are satisfied with that interpretation.

Brown v. Kindred Nursing Centers E., L.L.C., 364 N.C. 76, 83, 692 S.E.2d 87, 91-92 (2010) (citation omitted). Assuming that Wife was required by Rule 26(b)(4)(a)(1) to disclose Ms. Coble as her expert witness sooner than she did, we will first attempt to "find a basis in Rule 37 to support the trial court's imposition of" the sanction of excluding the expert witness. *See Pugh*, 113 N.C. App. at 378, 438 S.E.2d at 216. The answer to this question would be simple under Federal Rule 37, entitled "Failure to Make *Disclosures* or to Cooperate in Discovery; Sanctions":

> Failure to Disclose, to Supplement an Earlier Response, or to Admit.
>
> (1) Failure to Disclose or Supplement. *If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless*. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and

> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Fed. R. Civ. P. 37(c) (emphasis added).

The Advisory Committee Notes to Federal Rule 37 note it was amended in 1993 "*to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.*" Fed. R. Civ. P. 37(emphasis added) (1993 Amendment Notes). The revisions to subdivision (c) provided a "self-executing sanction" for failure to provide disclosures required under Rule 26:

> The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).
>
> Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.
>
> Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Id.

The answer is not so simple under North Carolina's Rule 37; it has no "self-executing sanction" for failure to make a disclosure under Rule 26(b)(4)(a)(1). In fact, Rule 37 does not address any sort of disclosure

other than responses to discovery requests. *See* N.C. Gen. Stat. § 1A-1, Rule 37. North Carolina's Rule 37 is entitled "Failure to make discovery; sanctions." *Id.* As the title accurately implies, it addresses sanctions only for failure to respond to *discovery requests*. *Id.* It does not address sanctions for failure to disclose the identity of an expert witness under Rule 26(b)(4)(a)(1) in the absence of any discovery request, discovery plan, or court order requiring disclosure.[8] *See id.* North Carolina General Statute § 1A-1, Rule 37 was not amended to accommodate the changes to Rule 26(b)(4)(a)(1) in 2015, and it has not been amended since 2015.

North Carolina cases interpreting Rule 37 have generally held that a party seeking sanctions must first demonstrate a violation of a substantive rule of discovery, based upon Rules 26 through 36, obtain a court order to compel discovery, and *then* Rule 37 sanctions may be imposed.[9]

> Generally sanctions under Rule 37 are imposed only for the failure to comply with a court order. Rule 37(d), however, expressly contemplates a limited number of circumstances where a court order is not required before sanctions can be imposed.

Pugh, 113 N.C. App. at 379, 438 S.E.2d at 217 (citation omitted). Therefore, even assuming Wife did not timely identify Ms. Coble as an expert witness under Rule 26(b)(4)(a)(1), North Carolina's Rule 37 provides no specific authority for sanctions since Husband never propounded any

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8. "Motion for order compelling discovery. — A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows: . . . . (2) Motion. — If a deponent *fails to answer a question propounded or submitted* under Rules 30 or 31, or a corporation or other entity *fails to make a designation under Rule 30(b)(6) or 31(a)*, or a party *fails to answer an interrogatory* submitted under Rule 33, or if a party, in *response to a request for inspection* submitted under Rule 34, fails to respond that inspection will be permitted as requested or *fails to permit inspection as requested*, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question shall complete the examination on all other matters before the examination is adjourned, in order to apply for an order. If the motion is based upon an objection to production of electronically stored information from sources the objecting party identified as not reasonably accessible because of undue burden or cost, the objecting party has the burden of showing that the basis for the objection exists." N.C. Gen. Stat. § 1A-1, Rule 37(a) (emphasis added).

9. None of the prior cases interpreting Rule 37 sanctions in this context were decided after or based upon the 2015 disclosure provision of Rule 26(b), but they are still binding precedent as to the application of Rule 37 sanctions.

discovery on this issue and did not obtain a court order requiring Wife to disclose anything.

Recognizing the absence of authority for sanctions for a violation of rule 26(b)(4)(a)(1) under North Carolina's Rule 37, Husband argues that the "trial court properly exercised its inherent authority by granting [Husband's] motion and excluding Ms. Coble's expert testimony as a sanction for [Wife] violating the expert disclosure mandate of Amended Rule 26." Inherent authority has been defined as the court's power

> to do only those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction. Inherent powers are limited to those powers which are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction.

Matter of Transp. of Juveniles, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991) (citations and emphasis omitted).

In the context of discovery, prior cases indicate that the exercise of a trial court's inherent authority to impose sanctions for failure to comply with discovery rules first requires a violation of a particular rule—usually an intentional or repeated violation—or some behavior by counsel or a party which shows disrespect or defiance of the trial court's authority. *See generally Pugh*, 113 N.C. App. at 379, 438 S.E.2d at 217. Upon reviewing the cases cited by Husband to support the trial court's inherent authority to impose sanctions for abuse of discovery and other cases discussing a trial court's inherent authority in the context of discovery, we have been unable to find any instance of a sanction imposed based only upon inherent authority, without a clear and repeated failure of the party sanctioned to comply with a substantive rule of discovery. For example, Husband cites to *Cloer v. Smith*, where the Plaintiff repeatedly refused with no valid legal basis to answer deposition questions. 132 N.C. App. 569, 512 S.E.2d 779 (1999). This Court upheld the trial court's imposition of sanctions for discovery violations based upon Rule 30(c) and Rule 37; it also noted that "[t]he trial court also retains inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rule 37." *Id.* at 573, 512 S.E.2d at 782. Husband also cites to *Telegraph Co. v. Griffin*, where the trial court held the plaintiff in contempt and sanctioned plaintiff for its repeated failure to respond to interrogatories and violation of an order compelling the plaintiff to respond. 39 N.C. App. 721, 251 S.E.2d 885 (1979). Although this Court noted generally that "Rule 37 allowing the trial court to impose sanctions is flexible, and a 'broad discretion must be given to the trial judge

with regard to sanctions[,]' " the holding was based upon the plaintiff's repeated failure to respond to interrogatories under the authority granted by Rule 37, not inherent authority alone. *See id.* at 727, 251 S.E.2d at 888. But all of these cases were decided prior to the 2015 amendments to Rule 26, and since Rule 37 does not address failure to disclose expert witnesses without a discovery request, enforcing the requirement of Rule 26(b)(4)(a)(1) is "reasonably necessary for the administration of justice within the scope of [the trial court's] jurisdiction," and thus it is within the inherent authority of the trial court to impose a sanction. *See Matter of Transp. of Juveniles*, 102 N.C. App. at 808, 403 S.E.2d at 559.

Here, on the first day of trial, the trial court initially ruled that Wife's expert witness would be permitted to testify because Husband had never asked Wife to identify any expert witnesses in written discovery or her deposition. Referring to Rule 26(b)(4) "in its entirety" and subdivision (b)(4)(a)(1), the trial court initially denied Husband's motion to exclude the testimony:

> Reading those in accordance with each other must disclose in accordance with this subdivision the identity of a witness tells me that they have to provide the answer and the interrogatories if they're asked.
>
> They weren't asked. Reading it as a whole, I don't think you can complain if you never asked.

On the second day of trial, after communication with Professor Anderson, additional argument by the parties, and further consideration of the meaning of the 2015 Amendment to Rule 26(b)(4)(a)(1), the trial court determined that the 2015 Amendment limited the trial court's discretion to allow Wife's expert testimony and required its exclusion.[10] The trial court therefore revised its ruling and excluded Ms. Coble's testimony.

On appeal, both parties argue the trial court had the discretion to either allow or exclude testimony by Ms. Coble. Both Wife's and Husband's arguments present factors the trial court may consider in exercising its discretion to exclude the expert testimony or to allow it. Wife argues the trial court abused this discretion, and Husband argues the trial court properly exercised its discretion. But examination of

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10. Husband argued, "The legislature has told us that Rule 26(a)(4), (a)(1), in particular has been amended, such that it now requires, *with no discretion*, when it says, 'In order to provide openness and avoid unfair tactical advantage in the presentation of a case at trial, a party must disclose to the other parties in accordance with this subdivision, the identity of any witness it may use at trial to present evidence under Rule 702, 703 or 705 of the North Carolina 3 Rules of Evidence.'" (Emphasis added.)

the transcript and the trial court's stated basis for its initial ruling to allow the testimony and later decision to exclude it demonstrates that the trial court's ultimate ruling was not a discretionary ruling. Instead, the trial court determined as a matter of law it did not have the discretion to allow Ms. Coble's testimony because Wife had not identified the expert prior to trial under Rule 26(b)(4)(a)(1), even with no discovery request for identification of expert witnesses. The trial court stated its concern that Rule 26(b)(4)(a)(1) lacked a time frame for disclosure but based upon interpretations of *Federal* Rule 26 determined the expert witness testimony must be excluded.[11]

Since North Carolina General Statute § 1A-1, Rule 26(b)(4)(a)(1) does not include a timeframe for voluntary disclosure and the North Carolina Rules of Civil Procedure do not include the other related rule provisions which give Federal Rule 26(a)(2)(D) clear time requirements and the Federal Rule 37 provisions which give it "teeth," North Carolina's Rule 26(b)(4)(a)(1) leaves the matter of a party's compliance and any sanction or remedy for noncompliance within the trial court's inherent authority and discretion.[12] The guiding purpose of disclosure in Rule 26(b)(4)(a)(1) is "to provide openness and avoid unfair tactical advantage in the presentation of a case at trial[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1). Thus, the trial court must make a discretionary determination of whether Wife's failure to disclose the expert sufficiently in advance of the trial gave her an "unfair tactical advantage" at trial or defeated the purpose of "providing openness" as contemplated by Rule 26(b). Since Rule 26 does not set a particular time or method for disclosure, the trial court must make this discretionary determination based upon the particular circumstances. Since Rule 37 does not address sanctions for failure to disclose, the trial court has inherent authority to grant a remedy for the failure to disclose, which may include exclusion of the testimony or other remedies or sanctions as appropriate to the circumstances. Here, the trial court's interpretation of Rule 26(b)(4)(a)(1) as *requiring* exclusion of Ms. Coble's testimony was in error. Essentially, the trial court misapprehended the law by

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11. Based upon her communication with Professor Anderson, the trial court noted, "this Federal Rule's interpretation has been that the interrogatories are not required."

12. Although Federal Rule 37 has a "self-executing" sanction for failure to disclose, it also allows the trial judge some discretion, since "the [non-disclosing] party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless*." Fed. R. Civ. P. 37(c)(1) (emphasis added). The trial court also has discretion to impose sanctions other than exclusion of the testimony. *Id.*

determining that it did not have the discretion to allow Ms. Coble's testimony, as demonstrated by the change in its ruling on the issue.[13] The trial court's failure to exercise its discretion was an abuse of discretion. *See Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008) ("A discretionary ruling made under a misapprehension of the law, may constitute an abuse of discretion.").

Upon *de novo* review of Rule 26(b)(4)(a)(1), we hold the Rule does require advance disclosure of expert witnesses who will testify at trial, even without a discovery request, discovery plan, or court order. The trial court had inherent authority to impose a sanction for failure to disclose sufficiently in advance of trial. The trial court also has discretion to allow or to exclude Ms. Coble's evidence or to impose another sanction for the failure to disclose, but the trial court failed to exercise this discretion and determined the testimony *must* be excluded based upon Rule 26(b)(4)(a)(1). We therefore reverse the trial court's ruling as to the admissibility of Ms. Coble's testimony and remand for reconsideration. On remand, the trial court should exercise its discretion either to allow or exclude Ms. Coble's testimony (or to impose some other sanction) upon consideration of whether the expert testimony gives Wife an "unfair tactical advantage" based upon the factors each party has argued on appeal in support of this discretionary decision and any other factors it deems appropriate.

III. Consideration of Factors Under North Carolina General Statute § 50-16.3A(b)

A. Standard of Review

"To support the trial court's award of alimony . . . the trial court's findings must be sufficiently specific to allow the reviewing court to determine if they are supported by competent evidence and support the trial court's award." *Wise v. Wise*, ___ N.C. App. ___, ___, 826 S.E.2d 788, 792 (2019). We review the trial court's determination of the amount of alimony for abuse of discretion." *Hill v. Hill*, ___ N.C. App. ___, ___, 821 S.E.2d 210, 224 (2018).

B. Analysis

[2] Wife argues the trial court erred by failing to consider each of the 16 factors under North Carolina General Statute § 50-16.3A(b) for

13. On the first day of trial, the trial court exercised its discretion to deny Husband's motion but also took into consideration the lack of relevant discovery requests, a discovery plan, and a pretrial order.

which evidence was presented in determining the amount of the alimony award.

> The term "alimony" is defined as "an order for payment of the support and maintenance of a spouse or former spouse." In determining the amount of alimony, the trial court "shall consider all relevant factors," including the sixteen (16) factors set forth in N.C. Gen. Stat. § 50-16.3A(b). "In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings."
>
> The factors set forth in N.C. Gen. Stat. § 50-16.3A are as follows:
>
> > (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
> >
> > (2) The relative earnings and earning capacities of the spouses;
> >
> > (3) The ages and the physical, mental, and emotional conditions of the spouses;
> >
> > (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
> >
> > (5) The duration of the marriage;
> >
> > (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
> >
> > (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
> >
> > (8) The standard of living of the spouses established during the marriage;

> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> (11) The property brought to the marriage by either spouse;
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The relative needs of the spouses;
>
> (14) The federal, State, and local tax ramifications of the alimony award;
>
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
>
> (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

Collins v. Collins, 243 N.C. App. 696, 707-09, 778 S.E.2d 854, 861 (2015) (citations and brackets omitted) (quoting N.C. Gen. Stat. 50-16.3A (2013)).

> "The requirement for detailed findings is thus not a mere formality or an empty ritual; it must be done." "Although the trial judge must follow the requirements of this section in determining the amount of permanent alimony to be awarded, the trial judge's determination of the proper amount is within his sound discretion and his determination will not be disturbed on appeal absent a clear abuse of that discretion."

Lamb v. Lamb, 103 N.C. App. 541, 545, 406 S.E.2d 622, 624 (1991) (citation omitted).

Wife contends that the trial court failed to make findings on these factors for which evidence was presented: (1) marital misconduct of Husband; (2) the tax consequences of the alimony award, and (3) the "standard of living of the spouses established during the marriage."

(1) Marital Misconduct of Either Spouse

As to marital misconduct, Wife notes that the trial court did make findings of fact addressing her misconduct, a part of Husband's defense to her alimony claim, but did not address her contentions of marital misconduct by Husband. Husband contended Wife had committed marital misconduct early in their marriage. The trial court made findings regarding this evidence and determined Husband had known about the misconduct and condoned it. Wife presented evidence regarding Husband's marital misconduct during the marriage, but the trial court's findings do not address this evidence at all. It is possible the trial court determined that even if Husband committed marital misconduct as Wife alleged, the trial court determined it would not change Wife's entitlement to alimony or the amount awarded, but evidence was presented on this factor, so the findings should have addressed it.

(2) Federal, State, and Local Tax Ramifications of the Alimony Award

As to the tax consequences of the alimony award, the trial court is required to make findings on a factor only if evidence is presented on that factor. Wife sought to present evidence on this factor by Ms. Coble's expert testimony, but the trial court excluded this evidence for the reasons discussed above. Since we have determined the trial court erred by failing to exercise its discretion and excluding Ms. Coble's testimony based upon a misapprehension of the law, on remand the trial court must determine whether, in its discretion, it will consider Ms. Coble's evidence. If so, the trial court's findings on remand should address the evidence on this factor.[14]

(3) The Standard of Living of the Spouses Established During the Marriage

As to the standard of living during the marriage, Wife contends that she presented evidence of the "shared family expenses in three different ways: (1) the amount consistent with the standard of living of the parties while married ($5,138.67 per month); (2) the amount actually being

14. Wife's brief notes that since the trial, there have been changes in the income tax laws applicable to alimony. Any discussion of exactly how changes in the tax laws may affect the alimony award is beyond the scope of this appeal, but on remand the trial court may consider this issue. We also decline to address the potential relevance of Ms. Coble's testimony on remand as she discussed financial issues other than the taxable nature of alimony payment. For example, she testified regarding the tax ramifications of renting a home as compared to making mortgage payments and the amount of income Wife might earn from investing funds she received from the sale of the former marital home.

spent by [Wife] at the time of trial ($4,246.27); and (3) the amount [Wife] would need if she purchased a home (which is consistent with how the parties lived during the marriage) instead of continuing to rent (as she had been since separation) ($5,015.94)." Wife also presented evidence of her individual expenses based upon the standard of living during the marriage of $3,681.00, and the reduced amount she was actually spending at the time of trial, $3,174.51. She argues the trial court considered only her actual expenses as of the time of trial but did not consider the other values based upon the accustomed standard of living during the marriage. She also notes that the trial court found that Husband's reasonable expenses included many of types of discretionary expenses which both parties had enjoyed during the marriage, but, after separation, only Husband could afford, such as home ownership, entertainment and recreation, meals out, Christmas and birthday gifts, and home furnishings. Husband also had surplus funds even after continuing his pattern of saving and investing in retirement assets established during the marriage, but the trial court did not include savings or retirement as part of Wife's reasonable expenses, although the parties had saved for retirement during the marriage and she has no retirement plan at her new employment.

Husband contends that the trial court did not have to accept Wife's contentions regarding her reasonable expenses or the standard of living during the marriage. *See Nicks v. Nicks*, 241 N.C. App. 487, 501, 774 S.E.2d 365, 376 (2015) ("This Court has long recognized that the determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." (brackets and quotation marks omitted) (quoting *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982))). He also notes that the trial court made findings of fact in the equitable distribution portion of the order regarding the parties' "comfortable lifestyle;" the 3,700 square foot marital home which had net sales proceeds of $372,255.00, and the Lexus car Wife drove for several years. He also notes the distribution of various bank accounts, stock, and retirement assets, so Wife had the benefit of her portion of those assets—although Husband also received his portion of those assets. The parties had no marital debt mentioned in the order.

Our Supreme Court has made it clear that the "accustomed standard of living" established during the marriage is "more than a level of mere economic survival:"

> We think usage of the term accustomed standard of living of the parties completes the contemplated legislative meaning of maintenance and support. The latter phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. For us to hold otherwise would be to completely ignore the plain language of G.S. 50-16.5 and the need to construe our alimony statutes *in pari materia*. This we are unwilling to do.

Rea v. Rea, ___ N.C. App. ___, ___, 822 S.E.2d 426, 432 (2018) (quoting *Williams v. Williams*, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980)).

Although the trial court made detailed findings as to the shared family expenses and reasonable individual expenses for Husband and Wife, these findings appear to be based upon the evidence of expenses for each party at the time of trial. Wife contends her actual living expenses after separation were reduced due to her inability to maintain the same standard of living as established during the marriage without assistance from Husband. No findings indicate any difference between Wife's *actual expenses* after separation as compared to the *accustomed standard of living* during the marriage as reflected in the equitable distribution portion of the order. The trial court does not have "to accept at face value the assertion of living expenses," *Nicks*, 241 N.C. App. at 501, 774 S.E.2d at 376, but it does have to consider the parties' accustomed standard of living during the marriage and not just Wife's actual expenses at the time of trial. Based upon the findings in the equitable distribution portion of the order as to the parties' "comfortable lifestyle," large home, luxury vehicle, and substantial savings and investments during the marriage, it appears Wife's standard of living on her own after separation was significantly reduced from the level established during the marriage. Even the trial court's findings of some of the parties' expenses show the difference between Husband's standard of living at the time of trial, which appears to be more similar to the accustomed standard during the marriage as alleged by Wife, and Wife's reduced standard. For example, the trial court found Husband had reasonable expenses for "activities" of $460.20 per month; Wife's expense is only $75.00. Husband was allowed $300 per month for "meals out;" Wife was allowed only $150.00. Husband

was allowed $200.00 per month for "home furnishings;" Wife was allowed only $45.00.[15] Husband's gross monthly income was $17,780.26; at the time of trial, Wife's gross income was $4,244.28. Certainly, there is no requirement that Wife enjoy the same lifestyle as Husband's current lifestyle, but the trial court must consider the accustomed standard of living developed during the marriage in determining Wife's reasonable need for support.

Wife also notes that Husband was continuing to save and invest for retirement and contends the parties had a pattern of saving during the marriage. Husband's affidavit showed he was investing $1,458.00 per month during the marriage, and he was investing $1,372.50 per month at the time of trial. Wife was either unemployed or worked part-time after the children were born, so their accumulation of retirement assets during the marriage was based largely upon Husband's contributions and his evidence would tend to show the accustomed level of retirement investment during the marriage. Based upon the equitable distribution findings, the parties accumulated substantial retirement savings and other investments during the marriage. Husband was continuing this pattern of savings, but after separation Wife was unable to do so. The trial court made no findings regarding this monthly expense.

Where the parties have established a pattern of saving for retirement as part of their accustomed standard of living during the marriage, this expense can be part of the standard of living and should be considered for purposes of alimony.

> This Court recently held in *Glass v. Glass*, 131 N.C. App. 784, 789-90, 509 S.E.2d 236, 239 (1998), that an established pattern of contributing to a retirement or savings plan may be considered by the trial court in determining the parties' accustomed standard of living. *Glass* cautioned, however, that a party's savings should not be used to "reduce his or her support obligation to the other by merely increasing his or her deductions for savings plans," nor should a spouse be able to "increase an alimony award by deferring a portion of his or her income

15. Husband's shared family expenses were based upon one-third of the total household expense since he has remarried and the trial court allocated a portion of the expenses to his wife, although Husband testified he was paying 100% of the expenses. Wife's shared family expenses were based upon one-half of the total household expense. Since Husband's expenses were one-third of his actual expenditures, he was actually spending $1380.00 per month on "activities;" $900.00 per month on meals out; and $600.00 per month on furnishings.

> to a savings account," emphasizing that "the purpose of alimony is not to allow a party to accumulate savings."
>
> Then, in *Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000), (a case which we note, was decided by this Court after the trial court in the case *sub judice* had entered its order denying alimony), we clarified our holding in *Glass*, finding that although the parties' pattern of savings may not be determinative of a claim for alimony, the trial court must at least consider this pattern in determining the parties' accustomed standard of living.

Vadala v. Vadala, 145 N.C. App. 478, 481, 550 S.E.2d 536, 539 (2001) (citation omitted).

We see no indication the trial court considered the parties' pattern of savings and investment for retirement as part of their accustomed standard of living during the marriage. We realize the trial court distributed the marital assets accrued during the marriage in the equitable distribution provisions of the order, but that distribution does not negate the need to consider the pattern of savings and investment as a part of the accustomed standard of living during the marriage for purposes of alimony.

IV. Basis for Amount of Alimony Awarded

[3] Wife also contends that the trial court findings of fact are not sufficient to support the award of $1200.00 per month. "To support the trial court's award of alimony . . . the trial court's findings must be sufficiently specific to allow the reviewing court to determine if they are supported by competent evidence and support the trial court's award." *Wise v. Wise*, ___ N.C. App. at ___, 826 S.E.2d at 792. Although the amount of alimony is in the trial court's discretion, based upon the findings of fact we are simply unable to determine how the trial court arrived at the amount of alimony of $1,200.00 per month. The trial court found that Wife's gross income was $4,244.28, which is "subject to deduction for federal tax, state tax, Medicare, and Social Security," but the trial court did not make a finding as to the amount of these deductions, although this information was in evidence.[16] The trial court found her total expenses, including shared family expenses and individual expenses, as $5,565.54. Under the Consent Order, Husband was paying $1,700.00 monthly in child support, but the order does not mention the child support payment

16. Even without Ms. Coble's testimony, the parties' financial affidavits, pay stubs, and income tax returns included evidence of tax deductions and net incomes.

at all. Even based upon the trial court's findings, it appears that Wife had greater reasonable needs than $1,200.00 per month, and Husband had the ability to pay substantially more. And if the trial court considers the standard of living during the marriage instead of Wife's reduced standard after separation, her needs may actually be higher. Based upon the trial court's findings, this is not a case where the trial court limited the alimony award because Husband lacked the ability to pay more alimony, nor was the alimony award reduced based upon any marital fault by Wife. The only issue was Wife's reasonable needs based upon the accustomed standard of living established during the marriage. We must therefore vacate the trial court' s order as to the amount of the monthly prospective alimony obligation and remand for additional findings of fact to address the issues noted and entry of a new order for prospective alimony. *See Collins*, 243 N.C. App. at 707, 778 S.E.2d at 861.

V. Retroactive Alimony

A. Standard of Review

"To support the trial court's award of alimony . . . the trial court's findings must be sufficiently specific to allow the reviewing court to determine if they are supported by competent evidence and support the trial court's award." *Wise v. Wise*, ___ N.C. App. at ___, 826 S.E.2d at 792. If the trial court denies alimony, the findings must also set forth the reasons for the denial. N.C. Gen. Stat. § 50-16.3A(c) (2017) ("The court shall set forth the reasons for its award *or denial* of alimony and, if making an award, the reasons for its amount, duration, and manner of payment. (emphasis added)).

B. Analysis

[4] Wife last argues that the trial court erred by denying her claim for alimony retroactive to either the date of separation or the date of filing of the claim for post-separation support and alimony because the findings do not address the reason for denial. The order on appeal does not include any findings regarding support Husband voluntarily paid after separation, either as child support or alimony, although the evidence showed that he did make house payments until sale of the marital home and he did pay some other support for the benefit of the children and Wife. The only finding in the order mentioning past alimony is finding of fact 91:

> In its discretion, the Court declines to find that [Husband] owes any arrears for PSS or alimony and this Order shall superseded and supplant any prior Order of this Court regarding spousal support.

This finding implies there *was* a prior order for alimony, since the term "arrears" normally refers to accrued payments owed under an order, and to the extent Husband failed to pay all sums required under the "prior order," the trial court did not award any "arrears." But the trial court never entered a "prior order" regarding post-separation support or alimony, nor was there a "prior order" to supersede or supplant. This finding is thus not supported by the record. The trial court did not enter an order for child support either, until the Consent Order entered just before the alimony and equitable distribution trial.

Husband agrees there was no prior order for alimony or child support but argues that he voluntarily paid "tax-free spousal support, in the absence of a court order, from the time the parties separated up through the alimony trial." He argues that he paid cash support of $1,000 or $1,100 twice each month and paid for groceries and car insurance as well as the mortgage and other expenses associated with the marital residence where Wife resided until it was sold in July 2015. After the sale of the marital residence, Husband contends that he continued to pay "tax-free cash support" in various amounts. Husband argues that "[o]ne may logically infer" that since the trial court ordered alimony of $1,200.00 per month, and he had paid more than that, the trial court did not err in failing to award retroactive alimony. Husband also argues that Wife did not preserve any claims for retroactive child support or child support arrears in their Consent Order.

This Court has held that a dependent spouse may be entitled to alimony from the date of separation forward:

> In construing the prior version of the statute governing alimony, N.C. Gen. Stat. § 50–16.3 (repealed by 1995 N.C. Sess. Laws ch. 319, § 1, effective 1 October 1995), this Court held that a dependent spouse may be entitled to alimony not merely from the date the claim for alimony is filed but rather from the date of the parties' separation.
>
> In 1995, the General Assembly "effected a 'wholesale revision' in North Carolina alimony law" by repealing § 50–16.3 and replacing it with § 50–16.3A. In *Brannock*, this Court held that the 1995 changes to the alimony statute were so extensive that a claim for alimony under the current statute is "fundamentally different" than a claim under the prior, now repealed, statute.
>
> Defendant relies on our holding in Brannock to argue that under the current statute – § 50–16.3A – alimony may

> not be awarded "retroactively." However, while Brannock does discuss the changes in North Carolina law regarding alimony, nothing in the opinion references any intent by the General Assembly to eliminate retroactive alimony or to abrogate our rulings in Austin and its progeny.

Smallwood v. Smallwood, 227 N.C. App. 319, 332-33, 742 S.E.2d 814, 823-24 (2013) (citations and brackets omitted).

Husband is correct there was evidence regarding payments he made after separation for the benefit of Wife and the children, but that evidence is not as clear as he contends. He testified that his Exhibit 27 was a chart showing "all the cash support that I provided since the date of separation." But in our record, Husband's Exhibit 27 is a bank statement; we have been unable to find a chart showing the cash support. Husband also testified about a "flash drive [with] all of the backup supporting documentation used to create this chart," but our record does not include a flash drive and does not indicate what documents were on the flash drive.

Even if we assume Husband presented the chart and "backup supporting documentation" as evidence of the payments, the trial court did not make any findings regarding support Husband may have paid after the date of separation, either as child support or alimony, and this Court cannot make findings of fact. *See Horton v. Horton*, 12 N.C. App. 526, 529, 183 S.E.2d 794, 797 (1971). We cannot determine that Husband paid any particular amounts after separation, and we have no way of determining how much of the sums he paid should be allocated to child support and how much to alimony, nor can we determine how much he should have paid as compared to what he actually paid. During much of the time after separation, Wife was not employed, or not employed full time, and when she did become employed, she testified that she would incur work-related child care costs. The amounts owed by Husband for child support alone would have varied over time based upon Wife's earnings, or lack thereof, at the time. At the time of trial, she was employed full-time and thus her ability to support herself and the children was greater than it had been at any time since separation.

As to Husband's argument of waiver, at the trial, there was some discussion of Wife's retroactive child support claim but no resolution. Near the beginning of the trial, Wife's counsel stated that retroactive child support was also an issue to be resolved at the trial, and the trial court noted that it believed the Consent Order had entirely resolved the child support claim. But the Consent Order specifically resolves only permanent

child custody and permanent prospective child support, effective from 1 September 2017 forward, in the amount of $1,700.00 per month. The Consent Order does not mention retroactive child support or waive any claim for retroactive child support. Wife's counsel argued that she could still pursue back child support since the Consent Order did not address anything prior to 1 September 2017. The trial court stated, "I don't know that there's an issue to take up--- . . . based on---[.]" Unfortunately, the trial court was interrupted and the discussion moved on to another topic. The question was never resolved, at least in our record.

Later in the trial, Husband argued that Wife's need for both retroactive child support and alimony was decreased after the marital home was sold and Wife received her portion of the proceeds since she could have invested the proceeds in the stock market and earned substantial returns from the investment. Husband even asked the trial court to take judicial notice of her potential returns from investing in stock market, which the trial court very appropriately declined to do.[17]

During arguments at the close of the trial, Husband noted that the Consent Order on child support had set support based upon the child support guidelines, but that there was no need to consider work-related day care because Husband was available to care for the children since he works mostly from home. Wife testified that she would need day care while working. Wife also noted that under the Consent Order, Husband would have more custodial time than he had since the parties' separation and the prospective child support was set based upon the new custodial schedule. In any event, we cannot determine any amounts or expenses the Consent Order as to child support was based upon because it has no findings of fact or explanation of how support was calculated. In fact, the trial court also noted that under the Child Support Guidelines, based upon the parties' incomes, "it doesn't calculate to $1700.00," the amount of child support in the Consent Order. The Consent Order does not include any findings of fact to explain how the child support was calculated. The order states, "The parties have waived the necessity of the Court making additional findings of fact and/or conclusions of law in support of the order except as set forth below." There are no findings of the parties' incomes or expenses in the Consent Order and no indication

17. Rule 201 of the North Carolina Rules of Evidence provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b).

that the Guidelines were actually used to set the amount of $1,700.00 per month.[18] In any event, the issues before us on appeal are not based upon the child support claim; the issue on appeal is the denial of Wife's claim for retroactive alimony, and the Consent Order surely did not waive that.

The trial court did not make sufficient findings to explain why it denied Wife's claim for retroactive alimony. Based upon the evidence, it appears Husband voluntarily paid Wife after their separation, but the amounts varied over time, and he had obligations for both child support and post-separation support. If he voluntarily paid sufficient amounts to meet *both* of these obligations, the trial court could deny Wife's claim for retroactive alimony, but the trial court did not make any findings of fact or conclusions of law to support denial of Wife's claim, as required by North Carolina General Statute § 50-16.3A(c).[19] The order does not "set forth the reasons for its . . . denial of alimony" from the period after the date of separation forward. N.C. Gen. Stat. § 50-16.3A(c). We must therefore vacate and remand for the trial court to make findings of fact and conclusions of law regarding Wife's entitlement to retroactive alimony and if the sums already paid by Husband were not sufficient to meet both his child support and alimony obligations, to determine how much retroactive support is due to Wife.

VI. Conclusion

We reverse the trial court's decision to exclude Wife's expert testimony and remand for reconsideration of whether to exclude Ms. Coble's proffered testimony and evidence. We also reverse and remand the 4 April 2018 order as to the amount of the prospective alimony and as to the denial of retroactive alimony. The portions of the order regarding Equitable Distribution were not a subject of Wife's appeal and thus those portions of the order stand. On remand, the trial court shall make additional findings of fact and conclusions of law to address the issues noted above. At the request of either party, the trial court shall allow the parties to present additional evidence and argument limited to the issues to be addressed on remand. If neither party requests additional hearing, the trial court may in its discretion either receive additional evidence and argument or may make its findings

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18. The order does provide for modification of the child support based upon the Guidelines when Husband has an obligation to support only one child.

19. We express no opinion on the issue of retroactive child support other than to note it appears to be a pending claim and is not resolved in either the Consent Order or the order on appeal.

and conclusions and enter a new order regarding retroactive and prospective alimony based upon the current record.

REVERSED IN PART AND REMANDED.

Judges HAMPSON and BROOK concur.

NANNY'S KORNER DAY CARE CENTER, INC., PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF CHILD DEVELOPMENT, DEFENDANT

No. COA19-416

Filed 7 January 2020

Statutes of Limitation and Repose—Tort Claims Act—three-year statute of limitations—exhaustion of administrative remedies—no tolling

A day care facility's claim under the Tort Claims Act against a state regulatory agency—for negligent failure to conduct an independent investigation of alleged child abuse at the facility prior to initiating disciplinary action—was barred by the Act's three-year statute of limitations, which was not tolled while plaintiff pursued administrative remedies under the N.C. Administrative Procedure Act (APA), because the facility sought monetary damages for its claim of negligence, a remedy which was not available under the APA.

Appeal by Plaintiff from order entered 21 December 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 October 2019.

Ralph T. Bryant, Jr., for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles Whitehead, for Defendant-Appellee.

COLLINS, Judge.

Nanny's Korner Day Care Center, Inc. ("Plaintiff"), appeals from order entered on 21 December 2018 by the North Carolina Industrial Commission dismissing Plaintiff's claim against the North Carolina

Department of Health and Human Services, Division of Child Development ("Defendant"), under the North Carolina Tort Claims Act. Because Plaintiff's claim is barred by the statute of limitations, we affirm.

I. Factual and Procedural History

This is the third time the parties have been before this Court in the last five years. A detailed factual history of this case can be found at *Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Human Servs.*, 825 S.E.2d 34 (N.C. Ct. App. 2019) ("*Nanny's Korner II*"). The facts relevant to this case are as follows:

On 23 April 2010, Defendant notified Plaintiff that Defendant had decided to issue administrative disciplinary action based on substantiation by the Robeson County Department of Social Services that child abuse had occurred at Plaintiff's day care facility. Defendant then issued a notice of administrative action to Plaintiff on 15 June 2010, invoking disciplinary action. Plaintiff appealed Defendant's decision through the administrative appeal process, first to the Office of Administrative Hearings, then to Wake County Superior Court, and then to this Court. On 20 May 2014, this Court held that Defendant had violated Plaintiff's rights by not conducting an independent investigation into the alleged child abuse, and reversed Defendant's decision. *Nanny's Korner Care Ctr. v. N.C. Dep't of Health & Hum. Servs.*, 234 N.C. App. 51, 64, 758 S.E.2d 423, 431 (2014) ("*Nanny's Korner I*").

On 23 January 2017, Plaintiff filed a claim with the Industrial Commission under the Tort Claims Act, seeking $600,000 in compensatory and consequential damages due to Defendant's negligent failure to conduct an independent investigation prior to initiating disciplinary action. Defendant responded by filing a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the ground, inter alia, that Plaintiff failed to file the tort affidavit within three years of Defendant's 15 June 2010 administrative action, as required by the Tort Claims Act. After a hearing on 19 April 2017, Deputy Commissioner Robert J. Harris issued an order on 4 May 2017, dismissing Plaintiff's claim with prejudice because the claim was barred by the statute of limitations. Plaintiff appealed to the Full Commission (the "Commission").

The Commission conducted a hearing on 18 October 2017. On 21 December 2018, the Commission issued an order dismissing Plaintiff's claim with prejudice, holding that the claim was barred by the statute of limitations. The Commission concluded that "the time period for Plaintiff to bring a claim for damages under the Tort Claims Act began

on 15 June 2010 and its Affidavit, filed on 23 January 2017, fell outside of the Tort Claims Act's three-year statute of limitations."

Plaintiff timely filed notice of appeal to this Court.

II. Discussion

Plaintiff argues that the Commission erred by dismissing Plaintiff's claim as barred by the Tort Claims Act's three-year statute of limitations. Plaintiff contends that (1) the statute of limitations was tolled while Plaintiff exhausted administrative remedies; (2) the Court of Appeals' May 2014 decision in *Nanny's Korner I* signified Plaintiff's exhaustion of administrative remedies and, accordingly, marked the beginning of the three-year limitations period; and (3) therefore, Plaintiff's January 2017 claim was timely filed. We disagree.

We review a decision by the Commission under the Tort Claims Act "for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2018). When considering a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, "[t]he question for the court is 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 . . . ." *Grant Const. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001) (internal quotation marks and citation omitted). We review an order allowing a motion to dismiss for failure to state a claim de novo. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

"The statute of limitations may be raised as a defense by a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the plaintiff's action." *Laster v. Francis*, 199 N.C. App. 572, 576, 681 S.E.2d 858, 861 (2009) (citation omitted). After a defendant has raised this affirmative defense, the burden shifts to the plaintiff to prove that he commenced the action within the statutory period. *Id.*

The Tort Claims Act prescribes a three-year statute of limitations for negligence claims. N.C. Gen. Stat. §143-299 (2018).

> The accrual of the statute of limitations period typically begins when the plaintiff is injured or discovers he or she has been injured. However, when the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts. Nevertheless, the

> exhaustion of administrative remedies doctrine is inapplicable when the remedies sought are not considered in the administrative proceeding. Under those circumstances, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court.

Nanny's Korner II, 825 S.E.2d at 39-40 (internal quotation marks, brackets, and citations omitted). *See White v. Trew*, 217 N.C. App. 574, 579-80, 720 S.E.2d 713, 719 (2011) (holding that plaintiff's libel claim seeking monetary damages caused by false statements was not barred by the exhaustion doctrine because the statutory remedy was to remove statements from employee file, not to award damages), *rev'd on other grounds*, 366 N.C. 360, 736 S.E.2d 166 (2013). Money damages are not available under the North Carolina Administrative Procedure Act ("NCAPA"). *Nanny's Korner II*, 825 S.E.2d at 40.

In *Nanny's Korner II*, Plaintiff made a similar argument to the one it makes in this case, but in the context of a procedural due process claim filed in the trial court:

> Plaintiff argues the statute of limitations was tolled while Plaintiff exhausted its administrative remedies through the appeal of Defendant's final agency decision in *Nanny's Korner I*. Plaintiff contends the exhaustion of administrative remedies doctrine required Plaintiff to exhaust its remedy through the claim under the NCAPA before Plaintiff's right to bring a constitutional claim arose. Accordingly, Plaintiff argues that its cause of action for the alleged due process violation did not accrue until 9 June 2014, when this Court issued its mandate in *Nanny's Korner I*.

Id.

We disagreed and concluded that Plaintiff's constitutional procedural due process claim was properly dismissed under Rule 12(b)(6) because the statute of limitations on Plaintiff's constitutional claim was not tolled while Plaintiff exhausted its administrative remedies. *Id.* at 40-41. This Court held that

> the statute of limitations began to run on or about 15 June 2010, when Defendant issued the written warning to Plaintiff. Defendant's written warning was the "breach" that proximately caused—in Plaintiff's own words—a "real, immediate, and inescapable" injury. The statute of

> limitations began to run when Plaintiff was injured or discovered the injury, which in this case happened almost simultaneously. The statute of limitations was not tolled while Plaintiff pursued its administrative remedies in *Nanny's Korner I* because in that action, Plaintiff sought a remedy not available through the NCAPA—namely, monetary damages. In its complaint, Plaintiff acknowledges that the NCAPA "does not provide a remedy for . . . lost income and profits." Therefore, the statute of limitations was not tolled while Plaintiff pursued its administrative remedies, and the filing of the instant claim on 22 May 2017 fell outside the statute of limitations.

Id. at 40.

The same analysis is applicable in this case. Despite the fact that Plaintiff brought this action before the Commission under the Tort Claims Act, as opposed to the superior court with a constitutional claim in *Nanny's Korner II*, the statute of limitations began to run on or about 15 June 2010, when Defendant issued the written warning to Plaintiff. The statute of limitations was not tolled while Plaintiff pursued its administrative remedies in *Nanny's Korner I* because Plaintiff seeks monetary damages, a remedy not available under the NCAPA. Accordingly, the filing of the instant claim on 23 January 2017 fell outside the three-year statute of limitations prescribed in the Tort Claims Act. *See* N.C. Gen. Stat. §143-299.

Plaintiff argues that *Abrons Family Prac. & Urgent Care, PA v. N.C. Dep't of Health & Human Servs.*, 370 N.C. 443, 810 S.E.2d 224 (2018), demands application of the exhaustion of administrative remedies doctrine. In *Abrons*, plaintiffs—all of whom were health care providers—filed suit against DHHS and Computer Sciences Corporation ("CSC"). *Id.* at 444-45, 810 S.E.2d at 226. DHHS had entered into a contract with CSC to implement a new Medicaid Management Information System. *Id.* at 445, 810 S.E.2d at 226. After the system went live, plaintiffs began submitting claims to DHHS for Medicaid reimbursements. *Id.* However, glitches in the software resulted in delayed, incorrectly paid, or unpaid reimbursements to plaintiffs. *Id.* Plaintiffs filed claims—including claims for monetary damages—alleging that CSC was negligent in its design and implementation of the system and that DHHS breached its contracts with each of the plaintiffs by failing to pay Medicaid reimbursements. *Id.* Further, plaintiffs alleged that "they had a contractual right to receive payment for reimbursement claims and that this was 'a property right

that could not be taken without just compensation.' " *Id.* Moreover, plaintiffs "sought a declaratory judgment that the methodology for payment of Medicaid reimbursement claims established by DHHS violated Medicaid reimbursement rules." *Id.* at 445, 810 S.E.2d at 227.

After receiving adverse determinations on their reimbursement claims, plaintiffs failed to request a reconsideration review or file a petition for a contested case, as specifically required by DHHS procedures. *Id.* at 448, 810 S.E.2d at 228; *see also id.* at 446-47, 810 S.E.2d at 227-28 (discussing DHHS regulations and provisions of the NCAPA which specifically require Medicaid providers to request a reconsideration review and file a petition for a contested case hearing before obtaining judicial review). As a result, our Supreme Court held that the trial court correctly dismissed plaintiffs' claims because they failed to exhaust their administrative remedies and failed to demonstrate that such exhaustion would be futile. *Id.* at 453, 810 S.E.2d at 232. The Court explained: "Because resolution of the reimbursement claims must come from DHHS, simply inserting a prayer for monetary damages does not automatically demonstrate that pursuing administrative remedies would be futile. Notwithstanding the claims that are outside the relief that can be granted by an administrative law judge, the reimbursement claims 'should properly be determined in the first instance by the agenc[y] statutorily charged with administering' the Medicaid program." *Id.* at 452, 810 S.E.2d at 231 (quoting *Jackson ex rel. Jackson v. N.C. Dep't of Human Res.*, 131 N.C. App. 179, 188-89, 505 S.E.2d 899, 905 (1998)).

In this case, Plaintiff has filed a claim with the Commission under the Tort Claims Act, seeking compensatory and consequential damages due to Defendant's negligence. Unlike the relevant claims in *Abrons*, this claim is exclusively one for negligence and, therefore, it is not a mere "insertion of a prayer for monetary damages" into what is otherwise a claim that is primarily administrative. *Id. See Intersal, Inc. v. Hamilton*, 834 S.E.2d 404, 416 (N.C. 2019) (distinguishing *Abrons*: "Here, plaintiff has filed a claim against the State Defendants for their alleged violations of plaintiff's media rights under the 2013 Settlement Agreement. Unlike the relevant claims in *Abrons*, this claim is exclusively one for common law breach of contract and, therefore, it is not a mere 'insertion of a prayer for monetary damages' into what is otherwise a claim that is primarily administrative.") (citation omitted).

III. Conclusion

Because the statute of limitations on Plaintiff's claim began to run on or about 15 June 2010, the filing of the instant claim on 23 January

2017 fell outside the three-year statute of limitations prescribed by the Tort Claims Act. Accordingly, we affirm the Commission's order dismissing Plaintiff's claim with prejudice.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

JOSHUA D. PAYNICH, PLAINTIFF
v.
HOLLY B. VESTAL,[1] DEFENDANT

No. COA19-185

Filed 7 January 2020

1. Child Visitation—right to reasonable visitation—finding of unfitness—severe restrictions

The trial court was not required to find that defendant-mother was an unfit person to have reasonable visitation in its order allowing defendant unsupervised overnight visits with her child every other weekend, unsupervised daytime visits on special days, and supervised visits of up to five nights during school breaks for Thanksgiving and Christmas. The visitation parameters were not the type of severe restrictions that amounted to denial of the right of reasonable visitation.

2. Child Visitation—supervised visits—support by factual findings—stress and confusion caused by parent

The trial court's conclusion that it was in the child's best interests to allow defendant-mother supervised (rather than unsupervised) visitation during extended visits was supported by the findings of fact, including that the child's well-being had deteriorated ever since defendant had been allowed unsupervised visitation, that defendant continually persisted in causing unnecessary incidents that confused and stressed the child, and that the child would benefit from overnight visits with defendant if defendant could avoid actions that would cause the child psychological harm.

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1. The caption in the order on appeal erroneously lists DEFENDANT B. VESTAL, Defendant. All other orders and motions in the Record on Appeal before this Court reference HOLLY B. VESTAL, Defendant.

3. Child Custody and Support—access to medical and educational records—sufficiency of findings—risk of harm

In a child custody and visitation case, the trial court erred by prohibiting defendant-mother from accessing her child's medical, educational, and counseling records where there was no determination that her access to those records could harm her child or any third party helping the child.

Appeal by Defendant from order entered 13 August 2018 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 1 October 2019.

Siemens Family Law Group, by Jim Siemens, for Plaintiff-Appellee.

Michael E. Casterline for Defendant-Appellant.

COLLINS, Judge.

Defendant Holly B. Vestal appeals the trial court's 13 August 2018 child custody modification order allowing her certain visitation with her child and denying her access to the child's school, medical, and counseling records. Defendant argues that the trial court erred in awarding her unreasonable visitation without finding her unfit, and erred in denying her access to the child's records. We affirm the order for visitation and reverse the order denying her access to the child's records.

I. Procedural History and Factual Background

Plaintiff Joshua D. Paynich and Defendant Holly B. Vestal were married in 1997. Their daughter was born in March 2011, and the parties separated a year later. In June 2012, Plaintiff filed a complaint for child custody, seeking joint custody. Defendant filed an answer and counterclaim, seeking primary custody. The parties divorced in May 2013. The trial court found this case to be one of high conflict, and appointed Linda Shamblin, PhD, to act as parenting coordinator on 23 September 2013. The parties shared custody of the child until 18 June 2014, when the trial court entered an emergency custody order, placing sole care, custody, and control of the child with Plaintiff. On 16 September 2014, the Court entered an order for a parenting capacity evaluation. Pursuant to this order, Defendant was awarded supervised visitation. Smith Goodrum, PhD, was appointed to conduct the parenting capacity evaluation.

After a custody hearing on 15 January 2015, the trial court entered a child custody order on 30 January 2015, finding and concluding that Plaintiff is a fit parent; Defendant is "not presently fit to parent, except

under supervised conditions[;]" awarding Plaintiff sole care, custody, and control of the child; and awarding Defendant four hours of supervised visitation with the child two times per week, as well as opportunities for supervised visits on special days. Defendant was ordered to undergo additional mental health evaluation and engage in therapy two times per week. Both parents were allowed access to the child's medical, dental, and educational records.

In 2016, pursuant to a motion to modify custody filed by Defendant, the court conducted another custody hearing. The court found a substantial change of circumstances in that Defendant appeared to be parenting appropriately within the confines of periodic supervised visitation; Ms. Georgia Pressman, MA, LPC, was providing therapy for the child and should "be in a position to report to the parenting coordinator if the Defendant's visitation with the minor child is compromising the minor child's proper development[;]" and the child was then five years old. The trial court maintained the child's sole care, custody, and control with Plaintiff. Defendant was allowed unsupervised visits with the child on Tuesdays from 3 p.m. to 7 p.m., and every other Saturday from 10 a.m. to 6 p.m. Beginning in January 2017, absent a contrary recommendation from Ms. Pressman, Defendant could also have unsupervised visits on alternate Thursdays from 3 p.m. to 7 p.m. Defendant could request additional daytime visits on special occasions through the parenting coordinator. Defendant was also allowed to request supervised, extended visits of up to five overnights during the Thanksgiving and Christmas holidays.

In January 2018, Defendant filed an amended motion to modify custody. The hearing on Defendant's motion was conducted over four days in June 2018. On 13 August 2018, the trial court entered a child custody modification order. The trial court made numerous findings of fact, including that "Defendant's conduct and the minor child's deterioration since entry of the August 11, 2016 Order are causally related, and constitute substantial changes of circumstance adversely and substantially affecting and pertaining to the minor child." The trial court continued sole care, custody, and control of the child with Plaintiff. The trial court concluded that the child's visitation with Defendant should be restructured. Defendant was allowed unsupervised, overnight visitation with the child on alternate weekends from 11 a.m. on Saturday to 3 p.m. on Sunday. The court ordered that holidays would continue to be shared as set out in the August 2016 order, which allowed Defendant unsupervised, daytime visits on special days, such as the child's birthday and Mother's Day, and during school recesses for Thanksgiving and Christmas, but required Defendant to request such visits from the

parenting coordinator at least three weeks in advance. Extended holiday visits of up to five overnights would still require that Defendant be supervised.

The order denied Defendant access to the child's school, medical, and counseling records. It further denied her the right to attend school events and performances; to participate in making medical decisions involving the child; and to participate in the child's counseling, unless requested by the child's treatment provider. From the 13 August 2018 order, Defendant appeals.

II. Discussion

A. Visitation

[1] Defendant first argues that the trial court erred by denying her reasonable visitation without finding that she was an unfit person to have reasonable visitation, thus violating the mandate of N.C. Gen. Stat. § 50-13.5(i).

"The guiding principle to be used by the court in a custody hearing is the welfare of the child or children involved." *Brooks v. Brooks*, 12 N.C. App. 626, 630, 184 S.E.2d 417, 420 (1971). "While this guiding principle is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial [court]." *Id.* The trial court "has the opportunity to see the parties in person and to hear the witnesses, and [its] decision ought not to be upset on appeal absent a clear showing of abuse of discretion." *Id.* (citation omitted). An abuse of discretion "is shown only when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Barton v. Sutton*, 152 N.C. App. 706, 710, 568 S.E.2d 264, 266 (2002) (internal quotation marks and citation omitted).

"A noncustodial parent's right of visitation is a natural and legal right which should not be denied 'unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child.' " *Johnson v. Johnson*, 45 N.C. App. 644, 646-47, 263 S.E.2d 822, 824 (1980) (quoting *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971)). "In awarding visitation privileges the court should be controlled by the same principle which governs the award of primary custody, that is, that the best interest and welfare of the child is the paramount consideration." *Johnson*, 45 N.C. App. at 647, 263 S.E.2d at 824 (citation omitted).

"However, a trial court's discretionary authority is not unfettered." *Hinkle v. Hartsell*, 131 N.C. App. 833, 838, 509 S.E.2d 455, 459 (1998).

N.C. Gen. Stat. § 50-13.5(i) provides, "In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child." N.C. Gen. Stat. § 50-13.5(i) (2018). Thus, before the trial court may completely deprive a custodial parent of visitation, the statute requires a specific finding either (1) that the parent is an unfit person to visit the child or (2) that such visitation rights are not in the best interest of the child. *Johnson*, 45 N.C. App. at 647, 263 S.E.2d at 824 (citing *King v. Demo*, 40 N.C. App. 661, 253 S.E.2d 616 (1979)). This Court in *Johnson* "construe[d] the statute to require a similar finding when the right of *reasonable* visitation is denied. Thus, where severe restrictions are placed on the right, there should be some finding of fact, supported by competent evidence in the record, warranting such restrictions." *Johnson*, 45 N.C. App. at 647, 263 S.E.2d at 824.

This Court has consistently held that limiting a parent to supervised visitation is a severe restriction which effectively denies a parent the right to reasonable visitation, and thus requires a finding of fact supporting such restriction. *See Hinkle*, 131 N.C. App. at 838-39, 509 S.E.2d at 459 (defendant awarded only supervised visitation every other Saturday and Sunday from 9:00 a.m. to 3:00 p.m., and specified times on holidays, and "the trial court's findings [were] insufficient to support these severe restrictions on defendant's visitation rights"); *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985) (defendant awarded visitation privileges in North Carolina at plaintiff's home with others present; these "severe restrictions" were supported by the trial court's findings of fact); *Johnson*, 45 N.C. App. at 647, 263 S.E.2d at 824 (respondent awarded only supervised visitation one weekend a month and the trial court failed to make sufficient finding to support such restriction); *Holmberg v. Holmberg*, No. COA19-52, 2019 WL 4453850, at *3 (N.C. Ct. App. Sept. 17, 2019) (unpublished) (plaintiff awarded only occasional supervised visitation and the trial court's findings failed to satisfy the statutory mandate).

In this case, Defendant was allowed unsupervised, overnight visits every other weekend from Saturday at 11 a.m. to Sunday at 3 p.m. She was also allowed unsupervised, daytime visits on special days, such as the child's birthday and Mother's Day, and during school recesses for Thanksgiving and Christmas. Defendant was additionally allowed supervised, extended visits of up to five overnights during school recesses for Thanksgiving and Christmas. Although Defendant's extended overnight

visits during school recesses for Thanksgiving and Christmas must be supervised, the vast majority of her time with the child is unsupervised.

Defendant argues that absent a finding that Defendant is unfit, "she should be receiving far more time with her daughter, even if the time is confined to weekends[,]" and "it is unreasonable and unlawful, under *Johnson v. Johnson*, . . . to require supervision of any of [Defendant's] visits with her daughter." However, we conclude that the parameters placed on Defendant's visitation are not the type of "severe restrictions" our case law has determined effectively deny the right of reasonable visitation. Accordingly, N.C. Gen. Stat. § 50-13.5(i)'s mandate, as interpreted by *Johnson*, is not applicable here, and the trial court did not err by entering the visitation order without finding that Defendant was an unfit person to have reasonable visitation.

[2] Defendant also argues that the supervised visitation ordered during Defendant's extended visits with the child is unsupported by the findings or the evidence. Defendant argues, "Having concluded that regular, unsupervised overnight weekend visits with [Defendant] are beneficial to the minor child, it is irrational for the trial court to require extended holiday visits – visits which are limited to five nights, by the previous order – to be supervised."

The trial court made the following relevant findings of fact:

> 11. The Court received testimony from Georgia Pressman, the minor child's therapist. . . . With respect to Ms. Pressman's testimony, the Court finds[:]
>
> a. Ms. Pressman's therapy with the minor child began in June of 2015 and has continued until recently.
>
> b. The minor child was 4 years old when therapy began. Ms. Pressman described that at the beginning of therapy, the minor child was "integrated" which the Court takes to mean developing appropriately.
>
> c. Ms. Pressman has seen, over the course of her treatment of the minor child, a gradual decline in the minor child's well-being. . . .
>
> . . . .
>
> g. The minor child commenced Kindergarten and commenced unsupervised visits with the Defendant in August of 2016. The Plaintiff shared with Ms. Pressman that the minor child was pushing limits and

behaving aggressively following unsupervised contact with the Defendant. The Court finds the Plaintiff's report credible.

. . . .

l. On December 16, 2016, the Plaintiff advised Ms. Pressman that the minor child was soiling her underpants several times a day, since visitation with the Defendant over the 2016 Thanksgiving holiday. Prior to the holiday, these accidents were happening only 1-2 times per month. The Court finds the Plaintiff's report to Ms. Pressman to be credible.

. . . .

o. On August 2, 2017, the minor child met with Ms. Pressman after an extended visit with the Defendant and maternal grandparents. In private session, Ms. Pressman noted the minor child's dollhouse play was aggressive and Ms. Pressman noted that play between imaginary children and Defendant was aggressive.

. . . .

x. Ms. Pressman stated that the minor child is traumatized by . . . Defendant's behaviors such as those witnessed by the minor child on February 1, 2018, more particularly described below.

. . . .

12. The minor child was developing appropriately, relatively healthy, and happy, and integrated, as testified to by Georgia Pressman, when the order of August 11, 2016 was entered. At the time of this hearing, the credible and competent evidence suggests that the minor child is struggling developmentally, mentally, emotionally, and physically.

. . . .

20. The Defendant was called as her own witness in this proceeding. From her testimony, the Court finds that:

. . . .

c. The Defendant has unnecessarily complicated the minor child's life and caused the minor child stress.

d. The Defendant admits that she played a game with the minor child that involved the child touching her breast, that it was funny to her and that the minor child laughed to the point that she wet herself. The Defendant is unwilling or unable to acknowledge that this degree of stimulation for the minor child is not healthy for the minor child and compromises the minor child to [sic] return to homeostasis following visits.

e. That the Defendant did testify that she respects the Plaintiff's religious beliefs and has no objection to the minor child being raised in a Christian home, however, she believes that her education should be separate and apart from that, as a considerable amount of school time is devoted to such studies and the child should be exposed to religion, but ultimately able to choose her own path.

f. The Defendant is unable or unwilling to follow the court Order with respect to picking up the minor child, dropping off the minor child and has consistent difficulty maintaining boundaries with the Plaintiff and others. Specific incidences of this behavior include, but are not limited to, the following:

i. On June 20, 2017, the Defendant vandalized the Plaintiff's truck during an exchange of [the child];

ii. On September 12, 2017, the Defendant was unable to follow directions in a car pick up line. The Defendant's behavior was angry and irrational and on full display to the minor child. This incident was unnecessary and confusing for the minor child.

iii. On February 1, 2018, the Defendant caused a scene in Ms. Dowdy's classroom in front of the minor child. At an exchange that night, the Defendant admits leaning against the Plaintiff's vehicle. The vehicle was again scratched, though the Defendant denies scratching the vehicle. The Defendant left the place of exchange and drove to the Plaintiff's house, parking in proximity to the Plaintiff's driveway. As the Plaintiff returned from the exchange to his home, with the minor child in

the car, the Defendant stood between the Plaintiff's vehicle and the Plaintiff's driveway. The Defendant stood in the headlights, in plain view of the minor child, and struck a pose, patting her posterior. The Defendant appears not to understand that this strange behavior traumatizes the minor child, who was traumatized. This incident was unnecessary and confusing for the minor child.

. . . .

v. On March 28, 2018, the Defendant refused to exchange the minor child on time and refused to exchange in the typical place of exchange. The Defendant and her friend Maria Curran hid the minor child from the Plaintiff, causing him to run back and forth between the typical place of exchange, and Hickory Tavern where the Defendant claimed to be. The Plaintiff ultimately found the Defendant and minor child on the street in vicinity to Hickory Tavern. This incident was unnecessary and confusing for the minor child.

vi. On April 1, 2018, the Defendant dropped the minor child off at the Plaintiff's house while the Plaintiff was waiting at the usual place of exchange. No one was at the Plaintiff's house, though the Defendant assumed otherwise. The Plaintiff left the place of exchange, returned to his home, and found the minor child walking on his driveway. This incident was unnecessary. This incident was unnecessary and confusing for the minor child.

. . . .

viii. All the foregoing incidents have occurred while the Defendant has been in regular therapy with Dr. Katy Flagler. Despite therapy, the Defendant has been unable to regulate her behavior in order to avoid unnecessary incidents that are confusing for the minor child. These behaviors appear to be overlooked by the Defendant's own therapist.

ix. All the 2018 incidents recited above have occurred since the Defendant filed her Motion to

> Modify custody, seeking additional time with the minor child. Despite knowing that her conduct would be explored in the course of a hearing on her motion to modify custody, the Defendant has persisted in unnecessary incidents that are confusing for the minor child.
>
> . . . .

24. While there have been several events in the minor child's life that have been unsettling to her since August 11, 2016, the Court finds that the minor child's relationship with the Defendant, and her visitations doing [sic] the school week, with the Defendant, have been deleterious to the minor child's well-being developmentally, mentally, emotionally, and physically.

25. In finding that the minor child's well-being has declined since August 11, 2016, the Court relies heavily on testimony received from Georgia Pressman, the minor child's therapist during the relevant period; testimony from Melanie Dowdy, the minor child's 1st grade teacher at Asheville Christian Academy; testimony from Susan Montgomery, Head of the Lower School at Asheville Christian Academy; and, from Dr. Deidre Christy, who performed the Psychoeducational Evaluation.

29. The Court finds that the Defendant has disrupted the minor child's education, and increased the minor child's stress level, unnecessarily.

30. The stress the Defendant has caused the minor child is evident in the records of Ms. Pressman, and a part of the environmental stress identified by Dr. Christy.

31. The stress the Defendant causes the minor child must be mitigated so that the minor child can learn, and so that any learning difference or disorder, if any, can be properly identified and so that further interventions, if any are required, can be implemented.

. . . .

35. That the child would benefit from having her time with the Defendant normalized and be able to spend an

> overnight at in [sic] the home of the Defendant, provided the Defendant can engage with the minor child in a manner that does not cause the minor child psychological harm.
>
> . . . .
>
> 38. The Defendant's conduct and the minor child's deterioration since entry of the August 11, 2016 Order are casually [sic] related, and constitute substantial changes of circumstance adversely and substantially affecting and pertaining to the minor child.

"In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Cox v. Cox*, 238 N.C. App. 22, 26, 768 S.E.2d 308, 311 (2014) (citation omitted). Any unchallenged findings are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Although Defendant asserts that "[t]here is no evidence that [Defendant] is engaged in any behavior which would create any risk to her daughter[,]" Defendant does not specifically challenge any findings of fact as unsupported by the evidence; they are thus binding on this Court. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Moreover, the findings are supported by record evidence, including the testimony of Ms. Pressman, Melanie Dowdy, Susan Montgomery, and Defendant herself. These findings specifically indicate that the child's well-being has declined since August 11, 2016; Defendant's behavior has caused the child stress; the child's relationship with Defendant has been deleterious to the child's well-being; numerous incidents of Defendant's misbehavior have occurred since Defendant filed her motion to modify custody, seeking additional time with the child, despite knowing that her conduct would be explored in the course of a hearing on her motion to modify custody; Defendant has been unable to regulate her behavior in order to avoid unnecessary incidents that are confusing for the child; Defendant has persisted in unnecessary incidents that are confusing for the child; the child behaved aggressively following unsupervised contact with Defendant; after an extended visit with Defendant, the child's play was aggressive; the child would benefit from being able to spend an overnight in the home of Defendant, provided that Defendant can engage with the child in a manner that does not cause the child psychological harm. These findings amply support the trial court's conclusion and decree that it is in the best interest of the child that Defendant be supervised for extended visits.

B. Access to Records

[3] Defendant next argues that the trial court erred by denying her access to her daughter's medical, educational, and counseling records, when there was no determination that her access to those records would negatively impact her daughter's welfare.

We review a trial court's order denying a parent access to a child's records involving the health, education, and welfare of the child under an abuse of discretion standard. *Brooks*, 12 N.C. App. at 630, 184 S.E.2d at 420 (a trial court's decision in a child custody matter "ought not to be upset on appeal absent a clear showing of abuse of discretion").

Pursuant to N.C. Gen. Stat. § 50-13.2(b), "each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child[,]" "[a]bsent an order of the court to the contrary[.]" N.C. Gen. Stat. § 50-13.2(b) (2018). It is well established that the fundamental principle underlying North Carolina's approach to controversies involving child custody is that "the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984).

In *Huml v. Huml*, 826 S.E.2d 532 (N.C. Ct. App. 2019), this Court affirmed the trial court's order prohibiting defendant from obtaining "any information concerning the minor child including, but not limited to, requesting information through third party care givers, teachers, medical professionals, instructors or coaches[,]" where the findings of fact supported a determination that such prohibition was in the child's best interest. *Id.* at 540. While "agree[ing] that it is unusual for a parent to have such limited rights regarding his child," *id.* at 548, this Court determined that the trial court did not abuse its discretion by eliminating his defendant's access to information based upon the specific facts of the case:

> In Finding of Fact 68, which has 23 subsections, the trial court noted the factual basis for the restrictions even to obtaining information from third parties. Father's actions and threats affected many third parties associated with the family, to the detriment of Susan. Mother's employer required her to "work from home because of safety concerns at her employer's office." At the time of the hearing, Mother had been working from home almost a year. Father's threats and actions made third-party professionals trying to help this family sufficiently concerned about their own safety they would not see him unless

another person was present and at one point the child's pediatrician stopped seeing her because of Father's actions. The trial court found that Father's "anger and rage" are disturbing and have "had a detrimental impact on not only the minor child to not feel safe around the Defendant but the Plaintiff, her parents, Plaintiff's friends, Plaintiff's co-workers and various professionals involved with this family."

The trial court also made detailed findings regarding Father's failure to follow the requirements of prior orders. Based upon the trial court's findings, if Father could continue to contact third parties such as teachers, physicians, and coaches to get information about the child, based upon his past behavior, it is likely that his anger and threats would make them fearful for their own safety, just as the third parties described in the order were. And to protect their own safety and the safety of their workplaces, these third parties may reasonably refuse to work with Susan, continuing to interfere with her ability to lead a normal life.

Besides endangering the third parties who deal with Susan, allowing Father to contact them to get information about Susan would endanger Mother and Susan directly. Some of Father's actions were unusual and disturbing, such as taking the child to sit in a rental car in a parking garage with him when he was supposed to be visiting in a public place. Father had a car of his own but rented a car and backed into a parking space for these visits, apparently to avoid detection; this surreptitious behavior raises additional concerns. And if he were allowed to get information from third parties, Father would necessarily learn the addresses and locations where Mother and Susan could be found. For example, if Father were permitted to obtain Susan's educational information, he would have to know the name and location of her school, and he would learn from the school records which classes Susan attends and her usual daily schedule; he could then easily find Mother's home simply by following Susan's school bus or following any person who picks her up from school.

Id. at 548-49. This Court determined that "[u]nder these circumstances, it is in Susan's best interest to prevent Father from having access to

information about her education and care because it protects Mother, Susan, and third parties who deal with them." *Id.* at 549. Thus, "[t]he trial court's detailed and extensive findings of fact support the decretal provisions, including barring Father from obtaining information from third parties." *Id.*

Although this Court did not tie its analysis to the provisions of N.C. Gen. Stat. § 50-13.2(b), we find its analysis instructive here. In the present case, the trial court made the following findings of fact relevant to its determination to deny Defendant access to the child's records:

> 15. The Court received testimony from Dr. Chris Mulchay, Clinical Psychologist.
>
> . . . .
>
> j. Dr. Mulchay did not identify any issues which give him concern as to the Defendant's risk as a parent.
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> . . . .
>
> 17. The Court received testimony from Dr. Linda Shamblin, the parenting coordinator in this case. With respect to Dr. Shamblin's testimony, the Court finds that:
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> . . . .
>
> c. Dr. Shambling (sic) has encouraged the Defendant to communicate with the school and teachers but not with the minor child's therapist. That Dr. Shambling did so to protect the child/therapist relationship, with the hope that the child therapist would not get embroiled in the parent's relationship.
>
> d. Dr. Shamblin testified that the information sharing between the parents is not good. . . .
>
> . . . .
>
> u. Dr. Shamblin testified about her relationship with [Asheville Christian Academy] and denies having "set it up" in a way that was adverse to the Defendant. That the school asked what the Defendant had done to get such restrictive visitation and whether it involved drugs or criminal behavior. That the school was clearly trying to make sure that it was keeping its other students safe. That Dr. Shamblin did tell the school [Defendant] had

mental health issues however, Dr. Shamblin told the school authorities that she felt that the school would be safe and that the Defendant did not pose a threat to the safety of the other students.

v. That the Defendant's animosity toward Dr. Shamblin has compromised Dr. Shamblin's ability to effectively fulfill her role as the parenting coordinator.

w. Dr. Shamblin does not desire to stay in the case, but she is not asking to withdraw. Dr. Shamblin would prefer the Court make a decision to whether or not a new parenting coordinator would be ultimately, in the best interest of the minor child.

18. The Court received testimony from Melody Dowdy. Melody Dowdy was the minor child's First Grade Teacher at Asheville Christian Academy. With respect to Ms. Dowdy's testimony, the Court finds that:

. . . .

e. Ms. Dowdy has had conflict with the Defendant in her classroom. On February 1, 2018, the Defendant became visibly agitated in Ms. Dowdy's classroom, in front of the minor child, classmates and other parents, at pick up time. The Defendant abruptly left the classroom without taking the minor child then was heard to call out for "little Danika" in the hallway. Ms. Dowdy sent the minor child to her Defendant.

f. Ms. Dowdy had a second incident with the Defendant in her classroom on February 6, 2018 when the Defendant was expressing frustration related to not receiving information from the school. In front of the minor child, the Defendant advised Ms. Dowdy that she would be returning to Court to address her dissatisfaction with the level of information she was being provided. This second incident also made Ms. Dowdy uncomfortable. This second incident also occurred in front of classmates and other parents.

g. Ms. Dowdy has observed other unusual behaviors from the Defendant. These include the Defendant coming in Ms. Dowdy's classroom while class is in session while Ms. Dowdy is still teaching and sitting

in the hallway outside Ms. Dowdy's class with a raincoat over her head covering her person while Ms. Dowdy's class is in session. The minor child witnesses these incidents.

. . . .

19. The Court received testimony from Ms. Susan Montgomery who is the Head of the Lower School at Asheville Christian Academy. From Ms. Montgomery's testimony the Court finds:

. . . .

b. Ms. Montgomery has had several interactions with the Defendant that have been negative. The first coincided with the beginning of school when the Defendant detected an irregularity on [the child's] name card, which read Paynich rather than Vestal.

c. The second incident occurred in the school pick up line on September 12, 2017 when the Defendant was unable to follow directions. The Defendant became angry during this incident, using profanity to address Ms. Montgomery, in a lo[u]d voice, audible to parents, teachers, staff and students, including the minor child. Ms. Montgomery relayed a credible account of this incident, which could have been avoided by the Defendant.

d. After the September 12, 2017 incident, the February 1, 2018 incident and the February 6, 2018 incident, the Defendant was banned from school.

. . . .

g. Allowing the minor child to return to Asheville Christian Academy for Second Grade was a difficult choice for the school, but [the minor child] can return for Second Grade.

29. The Court finds that the Defendant has disrupted the minor child's education, and increased the minor child's stress level, unnecessarily.

Based upon these findings, the trial court ordered, adjudged, and decreed, in relevant part, as follows:

> 2. The Defendant shall not have a right to school records, nor shall the Defendant have a right to attend school events or performances at this time.
>
> 3. The Defendant shall not have a right to medical records of the minor child and shall not have a right to participate in making medical decisions at this time.
>
> 4. The Defendant shall not have a right to counseling records of the minor child and shall not have a right to participate in the minor child's counseling unless it is at the request of the minor child's counselor/treatment care provider.

The findings of fact do not support a conclusion that it was in the best interest of the child to prevent Defendant from accessing the child's school, medical, or counseling records. While the findings indicate that Defendant's behavior at the child's school was disruptive, caused the child unnecessary stress, caused the child's teacher discomfort, and resulted in the head of the lower school banning Defendant from the school property, unlike in *Huml*, the findings do not indicate that her behavior "made third-party professionals trying to help this family sufficiently concerned about their own safety[.]" *Huml*, 826 S.E.2d at 548. To the contrary, "Dr. Shamblin told the school authorities that she felt that the school would be safe and that the Defendant did not pose a threat to the safety of the other students." Moreover, the disruption, stress, and discomfort caused by Defendant's actions at the school were addressed by the school banning her from its premises and the trial court's order prohibiting her from attending school events and performances, and eliminating her weekday visitation thereby eliminating her responsibility to pick up her daughter from school.

Additionally, unlike in *Huml*, the findings do not indicate that Defendant's continued ability to contact teachers, physicians, and other third parties to get her child's records would make them fearful for their own safety, or have any other direct or indirect negative effect on the child. Most significantly, unlike in *Huml* where the findings showed that it was in the child's best interest to prevent Father from having access to information about her education and care because it protected the child, the child's mother, and third parties who dealt with them, no findings in the order before us show that Defendant's access to the information contained in the records would have a dangerous or even negative effect on the child or anyone dealing with the child, or that preventing Defendant from having access to the information contained in the records would protect the child or anyone dealing with the child.

As the trial court's findings of fact do not support a determination that it is in the child's best interest to prevent Defendant from having access to the child's school, medical, or counseling records, we reverse the decretal provisions denying her such access.

III. Conclusion

We affirm the 13 August 2018 order as it relates to Defendant's visitation and reverse the decretal provisions of the order denying Defendant access to the child's school, medical, and counseling records.

AFFIRMED IN PART and REVERSED IN PART.

Chief Judge McGEE and Judge HAMPSON concur.

STATE OF NORTH CAROLINA, EX. REL., MICHAEL S. REGAN, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WASTE MANAGEMENT, PLAINTIFF

v.

WASCO, LLC, DEFENDANT

No. COA19-355

Filed 7 January 2020

1. Estoppel—estoppel by judgment—law of the case—mootness—action against landfill operator—failure to secure post-closure permit

In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, where plaintiff sought to enforce a prior Court of Appeals decision holding defendant liable for securing a Part B post-closure permit as the facility's "operator" under the Resource Conservation and Recovery Act, the Court of Appeals' holding in the prior action constituted the law of the case, and therefore the doctrine of estoppel by judgment precluded defendant from further challenging his liability for obtaining the permit. At any rate, where recent changes to regulations governing "generators" of hazardous waste had no bearing on defendant's responsibilities as a landfill "operator," the trial court properly denied defendant's motion to dismiss plaintiff's second action as moot.

2. Parties—necessary party—joint and several liability—action against landfill operator—failure to secure post-closure permit

In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, where plaintiff sought to enforce a prior Court of Appeals decision holding defendant liable for securing a Part B post-closure permit as the facility's "operator" under the Resource Conservation and Recovery Act, the trial court properly denied defendant's motion to dismiss for failure to join the facility's current owner as a necessary party. Defendant and the facility owner had joint and several liability for submitting the permit application, and therefore plaintiff could sue defendant individually.

3. Environmental Law—action against landfill operator—failure to secure post-closure permit—summary judgment—no genuine issue of material fact

In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, where plaintiff sought to enforce a prior Court of Appeals decision holding the company liable for securing a Part B post-closure permit as the facility's "operator" under the Resource Conservation and Recovery Act, the trial court properly entered summary judgment in plaintiff's favor because no genuine issue of material fact remained as to defendant's liability to obtain the permit.

4. Injunctions—action against landfill operator—order to submit post-closure permit application—no impossibility defense

In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, the trial court did not abuse its discretion by enjoining defendant to apply for a Part B post-closure permit under the Resource Conservation and Recovery Act because it was not impossible for defendant to comply with the injunction order. Despite evidence showing that the facility's current owner refused to sign any future permit applications—which, per the applicable regulations, would cause the application to be denied—defendant could still comply with the order by submitting an unsigned application because the order only required defendant to make good-faith efforts to submit the application in an approvable form.

5. Appeal and Error—appeal from unsuccessful motion for reconsideration—Rule 3(d)—jurisdictional default in notice of appeal

In an action between the Department of Environmental Quality (plaintiff) and the operator of a landfill (defendant), where the trial court entered summary judgment in plaintiff's favor and an injunction order against defendant, the Court of Appeals lacked jurisdiction to remand the case for an advisory opinion on defendant's motion for reconsideration, which defendant filed after the trial court no longer had jurisdiction in the case. Because the trial court did not enter any order or judgment denying defendant's motion, defendant's purported appeal was defective for failure to designate an "order or judgment from which appeal is taken," pursuant to Appellate Rule 3(d).

Appeal by Defendant from orders denying Defendant's motion to dismiss, entering summary judgment for Plaintiff, and permanently enjoining Defendant entered 27 November 2018 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorneys General Michael Bulleri and T. Hill Davis, III, for the State.

Troutman Sanders LLP, by Christopher G. Browning, Jr., Sean M. Sullivan, and Lisa Zak, for the Defendant.

BROOK, Judge.

WASCO, LLC, ("Defendant") appeals from trial court orders denying Defendant's motion to dismiss, entering summary judgment for the North Carolina Department of Environmental Quality, Division of Waste Management ("Plaintiff"), and permanently enjoining Defendant. Because this Court has previously held that Defendant is liable for submitting a Part B post-closure permit as the operator of a facility under the Resource Conservation and Recovery Act ("RCRA") in *WASCO LLC v. N.C. Dep't of Env't & Nat. Res.*, 253 N.C. App. 222, 799 S.E.2d 405 (2017) ("*WASCO I*"), we affirm.

I. Factual Background

The pertinent factual background is fully laid out in *WASCO I*, and we repeat only the facts necessary to decide the instant appeal.

The facility at issue is a former textile manufacturing facility located in Swannanoa, North Carolina ("the Facility"). *WASCO I*, 253 N.C. App. at 225, 799 S.E.2d at 408. Prior to Defendant's purchase of the Facility, underground tanks were used to store virgin and waste perchloroethylene ("PCE"), a dry-cleaning solvent. *Id.* PCE leaked from the tanks and contaminated the soil. *Id.* The tanks were removed, and the resulting pits were filled with the contaminated soil. *Id.*

In 1990, the then-operator of the facility, Asheville Dyeing & Finishing ("AD&F"), a division of Winston Mills, Inc., entered into an Administrative Order on Consent with Plaintiff that set forth a plan to close the Facility. *Id.* The Facility was certified closed in 1993. *Id.* In 1995, Winston Mills and its parent corporation, McGregor Corporation, sold the site to Anvil Knitwear, Inc. and provided Anvil Knitwear indemnification rights for "environmental requirements." *Id.* Culligan International Company ("Culligan") co-guaranteed Winston Mills's performance of indemnification for environmental liabilities. *Id.*

In 1998, Defendant's predecessor in interest, United States Filter Corporation, acquired stock of Culligan Water Technologies, Inc., which owned Culligan. *Id.* Defendant then provided Plaintiff with a trust fund to the benefit of Plaintiff as financial assurance on behalf of Culligan, as well as an irrevocable standby letter of credit for the account of AD&F. *Id.* In 2004, Defendant sold Culligan and agreed to indemnify the buyer as to identified environmental issues at the Facility. *Id.* at 225-26, 799 S.E.2d at 408. From that point forward, Part A permit applications signed by Defendant's director of environmental affairs identified Defendant as the operator of the facility. *Id.* at 226, 799 S.E.2d at 408.

In 2007, Defendant received a letter from Plaintiff indicating that the Facility required corrective action to develop a groundwater assessment plan to address the migration of hazardous waste in the groundwater. *Id.* Defendant, its hired consultant, and Plaintiff continued to develop a groundwater assessment plan. *Id.* The following year, in 2008, Anvil Knitwear sold the property to Dyna-Diggr, LLC.[1] *Id.* At that point, both Defendant and Anvil disclaimed responsibility for post-closure actions at the Facility. *Id.*

Litigation resulting from the disagreement regarding responsibility for post-closure actions resulted in the decision reached by this Court in *WASCO I*.

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1. In various filings in the record, the current owner of the facility is called "Dyna-Diggr," "Dyna Diggr," "Dyna-Digr," and "Dyna Digr."

II. Procedural Background

In *WASCO I*, this Court held that Defendant was liable for securing a post-closure permit as an operator of the Facility. *WASCO I*, 253 N.C. App. at 237, 799 S.E.2d at 415. After this Court's unanimous decision in *WASCO I*, Defendant filed a Petition for Discretionary Review under N.C. Gen. Stat § 7A-31 in the North Carolina Supreme Court. *WASCO LLC v. N.C. Dep't of Env't & Nat. Res., Div. of Waste Mgmt.*, 370 N.C. 276, 805 S.E.2d 684, 685 (2017). The Supreme Court denied review. *Id.*

Despite the decision of this Court, Defendant did not seek a post-closure permit as required by 40 C.F.R. § 270.10(b) and 40 C.F.R. § 270.1, incorporated by reference in 15A NCAC 13A.0113. Instead, Defendant filed a Petition for Rule Making before the Environmental Management Commission ("EMC"), seeking to change the definition of the term "operator" in the North Carolina Administrative Code. EMC denied Defendant's petition on 8 March 2018. Defendant then filed a Petition for Declaratory Ruling before the EMC on 8 December 2017, requesting a ruling that Plaintiff "lacks the authority to require WASCO to obtain a post-closure permit or a post-closure order for the Facility pursuant to 15A NCAC [13A].0113(a) (adopting 40 C.F.R. § 270.1(c))." Defendant amended this petition on 27 February 2018 seeking the same ruling. On 3 March 2018, Defendant filed a new Petition for Declaratory Ruling before the EMC, seeking the same ruling. Defendant withdrew the first amended Petition for Declaratory Ruling, and the new Petition was scheduled for hearing at the time Plaintiff commenced this action.

On 18 April 2018, Plaintiff filed a Complaint and Motion for Preliminary and Permanent Injunctive Relief. Plaintiff sought a mandatory injunction requiring Defendant to, among other things, "[s]ubmit, within 90 days of issuance of an Order, a complete application for a RCRA Part B post-closure permit in accordance with 40 CFR 270.10 addressing all of the applicable requirements of Chapter 40 of the Code of Federal Regulations and the State Hazardous Waste Program[.]"

Defendant filed a Motion to Dismiss on 9 July 2018, alleging that Plaintiff had "fail[ed] to join the current owner and operator of the Facility, Dyna-Diggr, LLC ('Dyna-Diggr') and Brisco, Inc. (an additional current operator of the Facility), as well as the former owners and operators of the Facility, as necessary parties."[2] Plaintiff then filed a Motion

2. At the hearing on the motion to dismiss and motion for summary judgment, Defendant argued that Dyna-Diggr only must be joined as a necessary party. Despite identifying Brisco, Inc. as a current operator in its Motion to Dismiss, Defendant has not raised

for Summary Judgment, alleging "that there are no disputed issues of material fact and that Plaintiff is entitled to judgment as a matter of law" because Defendant failed to comply with this Court's decision in *WASCO I* requiring Defendant to submit a Part B post-closure permit application under RCRA.

A hearing on the motions was held before Judge R. Gregory Horne on 31 October 2018. The trial court determined that Plaintiff had not failed to join any necessary parties and denied Defendant's motion to dismiss. The trial court made the following oral findings of fact and conclusions of law to support the denial of Defendant's motion to dismiss and the grant of Plaintiff's motion for summary judgment:

> THE COURT: All right, thank you. . . . the Court of Appeals and the Supreme Court often . . . talk about changing horses midstream in litigation. And oftentimes . . . they're talking about a situation in which there was not an issue raised in the trial courts, so as a result, the trial court didn't have an opportunity to consider or rule upon the issue. But prior to [] getting to the appellate courts and prior to hearing, [] the parties change horses or change legal theories, change legal strategies and bring up issues that were not brought up in trial court. Of course, appellate cases indicate that that is not allowed to be done.
>
> Now, I must again say that . . . I'm far from an expert in the area of the EPA . . . . This is an area that clearly is a specialty, even folks who are specialized in it, I think, would have frequent updates and interpretations throughout.
>
> However, initially, when I looked at it it appeared to me that the defendant WASCO, the plaintiff in the original case before the Court of Appeals, was changing horses midstream in that, although somewhat differently, . . . it was heard first with an administrative law judge, went through the trial court, and then went to the Court of Appeals and then not receiving relief, changed horses and repackaged and attempted to relitigate. I hear from WASCO that, in fact, they are looking at some new regulations that have come out that weren't present at the time.

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this argument with regard to any party other than Dyna-Diggr in its brief. Therefore, we deem this argument abandoned regarding any parties other than Dyna-Diggr. N.C. R. App. P. 28(a).

> What this Court does understand is that this Court is bound by the decision of the North Carolina Appellate Courts, and the decision as I read it is clear. I had underlined and underscored a number of cases, the State has quoted some, but indicated it's WASCO's responsibility to obtain a postclosure permit for the site that is at issue in the present case. And there's a quote—additionally, Part A permit – it's on page six. (As read) Application signed by WASCO's director of environmental affairs identified WASCO as the operator, and WASCO continued to pay consultants and take action at the site.
>
> The [C]ourts in their conclusion indicate, (as read) We hold WASCO as an operator of a landfill for purposes of the postclosure permitting requirement at the site.
>
> So it is the Court's belief and, indeed, that . . . upon petition for discretionary review, the North Carolina Supreme Court denying that, Court believes it is the law of the case at this time.
>
> So that brings us to the present action in 18 CVS 1731 in which the department is seeking a motion for summary judgment. Court having considered the submissions, having respectfully considered the arguments of counsel, the Court would find and conclude that there remains no genuine issue of material fact, and that Plaintiff, then, the department and the division are entitled to judgment as a matter of law. Court therefore grants the summary judgment motion and requires WASCO to submit to [sic] this Part B postclosure permit application within 90 days of signing and filing of this order.

Following the hearing, the trial court entered an order denying Defendant's motion to dismiss on 12 December 2018 and an order entering summary judgment for Plaintiff. The order denying Defendant's motion to dismiss included the following findings and conclusions:

> 1. On April 18, 2017, the Court of Appeals issued a unanimous decision holding that Defendant "WASCO was the party responsible for and directly involved in the postclosure activities subject to regulation" at the former Asheville Dyeing & Finishing Plant located at 850 Warren Wilson Road, Swannanoa ("the Facility") in Buncombe County. *WASCO LLC v. N.C. Dep't of Env't and Natural*

Res., No. COA 16 414 (N.C. Ct. App. Apr. 18, 2017). The Court of Appeals framed the issue as follows: "It is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case." *Id* at page 5. The Court of Appeals opinion affirmed the final order and judgment of the trial court and held that "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site". *Id* at page 22.

2. WASCO was the only party to this Court of Appeals' decision other than the Department of Environmental Quality.

3. On November 1, 2017, the North Carolina Supreme Court denied WASCO's petition for discretionary review of the decision of the Court of Appeals.

4. WASCO remains the operator of the Facility and, as the issue was framed in the Court of Appeals' decision, is responsible for post-closure care and for obtaining a post-closure permit for the Facility.

5. In the present action, the State is seeking to enforce the decision of the Court of Appeals against WASCO. WASCO has not obtained the required permit and has ceased performing any post-closure activities at the Facility.

6. WASCO's responsibilities as an operator are distinct from the responsibilities of the Facility's owner, or of past owners or operators. The owner of the Facility has its own responsibilities under the State Hazardous Waste Rules that arise from its status as owner of the Facility, which are not affected by the present action.

7. Liability under the State Hazardous Waste Rules is joint and several.

8. Enforcing the Court of Appeals' decision against WASCO will not directly affect the interests of any person who is not a party to this action.

Upon these findings and conclusions, the trial court denied Defendant's motion to dismiss.

The order granting summary judgment included the following findings and conclusions:

1. On April 18, 2017, the Court of Appeals issued a unanimous decision holding that Defendant "WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation" at . . . ("the Facility") in Buncombe County. . . . The Court of Appeals framed the issue as follows: "It is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case." . . . The Court of Appeals opinion affirmed the final order and judgment of the trial court and held that "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site." . . . Thus, the Court of Appeals' ruling obligated WASCO to comply with the post-closure permitting obligations at the Facility under the Resource Conservation and Recovery Act ("RCRA"), as incorporated and adopted by the North Carolina Solid Waste Management Act, Chapter 130A, Article 9 of the North Carolina General Statutes, and the rules promulgated thereunder and codified in Subchapter 13A of Title 15A of the North Carolina Administrative Code (collectively, "the State Hazardous Waste Program").

2. The North Carolina Supreme Court denied WASCO's Petition for Discretionary Review of the Court of Appeals' decision on November 1, 2017, establishing the Court of Appeals' decision as the final ruling in this matter.

3. In the year since, WASCO has not submitted a Part B permit application for a post-closure permit for the Facility pursuant to 40 CFR 270.1 and 40 CFR 270.10, adopted by reference at 15A NCAC 13A.0113. WASCO has since entry of the order ceased all activity at the Facility. WASCO has stated in its briefing in response to the instant motion that "WASCO is not now—nor does it have any intention of—taking any further action of any kind at the Facility."

4. All of the arguments raised by WASCO in response to the Department's motion were raised, or could have been raised, in the prior litigation culminating in the decision of the Court of Appeals. WASCO's arguments are therefore barred by the doctrines of res judicata, estoppel, and the law of the case.

5. Recent changes in the rules governing generators of hazardous waste have no bearing on WASCO's status and

> responsibilities as an operator of the Facility. Moreover, these new rules do not retroactively alter the fact that the Facility was closed as a landfill and is subject to post closure regulation, including permitting requirements, under RCRA and the State Hazardous Waste Program. This too is res judicata and the law of the case, and WASCO is estopped from relitigating these issues.
>
> 6. WASCO remains the operator of the Facility and, as the issue was framed in the Court of Appeals' decision, is responsible for post-closure care and for obtaining a post-closure permit for the Facility.

On these findings and conclusions, the trial court granted Plaintiff's motion for summary judgment.

The court then issued an injunction requiring that "[w]ithin ninety (90) days of entry of this Order, WASCO shall submit a RCRA Part B post-closure permit application for the Facility to the Department." The injunction required that "WASCO shall in good faith make best efforts to submit this application in an approvable form" and that "WASCO shall work diligently and in good faith, using best efforts, to correct as expeditiously as possible any deficiencies identified by the Department in the permit application submitted[.]"

Defendant properly noticed appeal from the denial of its motion to dismiss, the grant of summary judgment, and the injunction on 27 December 2018. The same day Defendant noticed appeal, it filed a motion for reconsideration and motion to stay with the trial court "request[ing] that the Court reconsider the Orders and stay their effectiveness while such reconsideration occurs, or, alternatively, stay the effectiveness of the Orders pending WASCO's appeal of the same." On 23 January 2019, the trial court denied Defendant's motion to stay. It also denied Defendant's motion for reconsideration for lack of jurisdiction. On 1 August 2019, Plaintiff submitted a supplement to the appellate record, and Defendant filed a Motion to Strike Appellee's Record Supplement on 19 August 2019.

III. Jurisdiction

Jurisdiction lies with this Court as an appeal from a final judgment under N.C. Gen. Stat. § 7A-27(b)(1).

IV. Analysis

Defendant argues that the trial court erred in failing to dismiss Plaintiff's claim as moot, in failing to dismiss the claim for failure to

join Dyna-Diggr as a necessary party, in granting summary judgment for Plaintiff, and in issuing an injunction ordering that Defendant secure a post-closure permit. We address each claim in turn.

A. Denial of Motion to Dismiss

i. Standard of Review

The denial of a motion to dismiss for failure to join a necessary party is reviewed as a question of law. *Merrill v. Merrill*, 92 N.C. 657, 660 (1885). "[W]e review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Rooks*, 196 N.C. App. 147, 150, 674 S.E.2d 738, 740 (2009) (citation omitted). "We review the trial court's findings of fact to determine whether they are supported by competent record evidence[.]" *Id.* (internal marks and citation omitted).

ii. Merits

1. Mootness

[1] Defendant argues that because EMC promulgated new regulations affecting generators of hazardous waste, Plaintiff's "directive that [Defendant] must apply for a RCRA Part B Permit became moot[,]" and that the superior court erred in failing to dismiss Plaintiff's action as moot. However, Defendant's liability as an operator was decided by this Court in *WASCO I*, and nothing about Defendant's liability as an operator has changed subsequent to that opinion. Therefore, we reject Defendant's argument according to the doctrine of the law of the case and judgment by estoppel, explained in *Poindexter v. First Nat'l Bank of Winston Salem*, 247 N.C. 606, 101 S.E.2d 682 (1958): "[W]hen a fact has been agreed on or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed[.]" *Id.* at 618, 101 S.E.2d at 691.

"Owners and operators of . . . landfills . . . must have post-closure permits . . . for the 'treatment,' 'storage,' and 'disposal' of any 'hazardous waste' as identified or listed in [the statute]." 40 C.F.R. § 270.1(c) (2018). In *WASCO I*, this Court held "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site." 253 N.C. App. at 237, 799 S.E.2d at 415. The Facility "was certified closed as a landfill in 1993." *Id.* at 231, 799 S.E.2d at 411. Therefore, as an operator of a landfill, Defendant "must have [a] post-closure permit[]" for the Facility. *Id.* (quoting 40 C.F.R. § 270.1(c) (incorporated by reference in 15A NCAC 13A.01139a)).

Generators are separately defined as "any person, by site location, whose act, or process produces 'hazardous waste' identified or listed in 40 CFR part 261." 40 C.F.R. § 270.2(b)(2) (2018). Defendant points to the Hazardous Waste Generator Improvements Rule, 81 Fed. Reg. 85732 (Nov. 28, 2016), adopted by EMC as of 1 March 2018, in arguing its responsibilities have somehow changed. 32 N.C. Reg. 738 (rule submitted for approval by Rules Review Commission); 32 N.C. Reg. 1803 (approval of Rule by Rules Review Commission). The Hazardous Waste Generator Improvements Rule was promulgated

> to improve compliance and thereby enhance protection of human health and the environment[;] . . . revise certain components of the hazardous waste *generator* regulatory program; . . . provide greater flexibility for hazardous waste *generators* to manage their hazardous waste in a cost-effective and protective manner; reorganize the hazardous waste *generator* regulations to make them more user-friendly and thus improve their usability by the regulated community[.]

81 Fed. Reg. 57918 (emphasis added).

In *WASCO I*, this Court did not determine Defendant's liability as a hazardous waste *generator* but rather as an *operator* of a landfill. 253 N.C. App. at 237, 799 S.E.2d at 415. It made this determination under 40 C.F.R. § 270.1(c), which remains in effect in the same form as when *WASCO I* was decided. The Hazardous Waste Generator Improvements Rule has no bearing on Defendant's liability as an operator of a landfill under a distinct statute.

Our conclusion in *WASCO I* is the law of the case. That doctrine provides that "once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994); *see also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, . . . a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Defendant "therefore is foreclosed from relitigating the question of [its liability as an operator] in this or any other subsequent proceeding. Furthermore, under general rules of estoppel by judgment, [Defendant] is similarly precluded from relitigating an issue adversely determined against him." *Weston*, 11 N.C. App. at 418, 438 S.E.2d at 753. Finally, the recently promulgated generator rule does nothing to change these legal realities.

2. Failure to Join Necessary Party

[2] Defendant also contends that the trial court erred in failing to dismiss the complaint for failure to join a necessary party, Dyna-Diggr, the current owner of the Facility. North Carolina Rule of Civil Procedure 19 provides that "those who are united in interest must be joined as plaintiffs or defendants[.]" It provides also that

> [t]he court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. Gen. Stat. § 1A-1, Rule 19(b) (2017). "A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party." *Law Offices of Mark C. Kirby, P.A. v. Indus. Contractors, Inc.*, 130 N.C. App. 119, 124, 501 S.E.2d 710, 713 (1998); *see also Boone v. Rogers*, 210 N.C. App. 269, 270-71, 708 S.E.2d 103, 105 (2011) (explaining that necessary parties have "material interests . . . [that] will be directly affected by an adjudication of the controversy." (citation omitted)); *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972) ("Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined." (citation omitted)).

The relevant regulation provides that "[w]hen a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application." 40 C.F.R. § 270.10(b) (2018) (incorporated by reference at 15A NCAC 13A.0113(b)). Defendant asserts that because Dyna-Diggr, as the current owner of the Facility, "must also sign the permit application[,]" it is a necessary party to a suit regarding Defendant's duties to obtain a permit as the operator of the facility. Defendant, however, fails to grapple with the impact that joint and several liability has on the current controversy. Accordingly, we disagree.

First, federal courts interpreting RCRA generally "impose[] . . . joint and several liability" on responsible parties such as owners and operators. *United States v. Ne. Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986); *see also United States v. Ottati & Goss, Inc.*, 630 F.

Supp. 1361, 1396 (D.N.H. 1985) (holding multiple defendants jointly and severally liable under RCRA); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 199 (W.D. Mo. 1985) ("Congress . . . has authorized the imposition of joint and several liability to ensure complete relief [under RCRA.]"). Defendant cannot prevail in asserting that Dyna-Diggr is a necessary party because, in cases of joint and several liability, "the matter can be decided individually against one defendant without implicating the liability of other defendants." *Harlow v. Voyager Commc'ns V*, 348 N.C. 568, 571, 501 S.E.2d 72, 74 (1998). Here, Defendant's liability as an operator has been settled by *WASCO I*, and Dyna-Diggr was not a party to that case. Additionally, because Defendant's and Dyna-Diggr's liability is joint and several, Dyna-Diggr's "interests [will not] be directly affected by the adjudication of the controversy" between Defendant and Plaintiff such that Dyna-Diggr is a necessary party. *Durham Cty. v. Graham*, 191 N.C. App. 600, 604, 663 S.E.2d 467, 470 (2008).

We also note that granting a defendant's request for dismissal without prejudice is the appropriate remedy only where a necessary party cannot be joined; where the trial court identifies a necessary party, "the court shall order such other parties summoned to appear in the action." N.C. Gen. Stat. § 1A-1, Rule 19(b); *see Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 453 183 S.E.2d 834, 838 (1971) (reviewing trial court order joining necessary party). In other words, dismissal would have been an appropriate remedy only had the trial court determined Dyna-Diggr to be a necessary party and that Dyna-Diggr could not be joined as a party.

We hold the trial court did not err in denying Defendant's motion to dismiss for failure to join a necessary party.

B. Grant of Summary Judgment

[3] Defendant also contends that the trial court erred in granting Plaintiff's motion for summary judgment because there are unsettled factual issues in dispute. We disagree.

i. Standard of Review

We review an order granting a motion for summary judgment *de novo*. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47, 727 S.E.2d 866, 869 (2012). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal marks and citation omitted).

ii. Merits

A trial court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen Stat. §1A-1, Rule 56(c) (2017). Here, the only issue of material fact was whether Defendant's "failure to obtain a post-closure permit [wa]s a violation of 40 CFR 270.1(c) and 15A NCAC 13A .0113(a)." This issue was decided in *WASCO I*. *See WASCO I*, 253 N.C. App. at 231-32, 799 S.E.2d at 411-12 (holding that WASCO is an operator of a landfill and therefore required by 40 C.F.R. § 270.1(c) (incorporated by reference in 15A NCAC 13A.0113(a)) to acquire a post-closure permit). As we have already explained, this holding is the law of the case, and the trial court correctly granted Plaintiff's motion for summary judgment because no issue of material fact remained to be settled.

C. Order to Submit Permit Application

[4] Defendant next argues that the trial court's order "requires WASCO to undertake something that cannot possibly be achieved in compliance with applicable law and EPA guidance[.]" Defendant specifically contends that because Dyna-Diggr may not live up to its obligation to "sign the permit application," *see* 40 C.F.R. § 270.10(b) ("When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application."), Defendant will be subject to contempt sanctions. Defendant misconstrues the breadth of the trial court's order, which is narrower and more mindful of these particular circumstances than Defendant suggests. Accordingly, we disagree.

i. Standard of Review

We review grants of equitable relief such as injunctions for an abuse of discretion. *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 401, 474 S.E.2d 783, 788 (1996). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Indeed, "[a] ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

ii. Merits

Nothing in these facts or the law on point supports Defendant's argument of impossibility. Plaintiff cites *South Carolina v. United*

States, 907 F.3d 742, 765 (4th Cir. 2018) in support of its argument that the trial court did not abuse its discretion in granting the injunction, in part because it is not impossible for Defendant to comply with the order. In that case, the U.S. Court of Appeals for the Fourth Circuit reviewed a district court's order requiring the Department of Energy ("DOE") to remove a metric ton of defense plutonium from South Carolina. *Id.* at 764. In determining that the district court did not abuse its discretion, the Fourth Circuit considered that "DOE failed to produce any evidence showing that its compliance with a two-year removal deadline was truly impossible." *Id.*

The same is true here. Defendant claims it would be impossible to comply with the order, presenting evidence of Dyna-Diggr's preemptive refusal to sign the permit application. But submitting an application without Dyna-Diggr's signature, in and of itself, would not violate the order which requires only that Defendant act "in good faith [to] make best efforts to submit th[e] application in an approvable form."

Defendant's argument that it may face contempt sanctions is similarly unavailing. In *South Carolina*, the Fourth Circuit held that the lower court "did not abuse its discretion in ruling that DOE could raise its impossibility argument at a later time—if necessary—after the [i]njunction was entered." *Id.* at 765 (explaining that courts can compel compliance with statutory obligations and that parties may raise impossibility defenses at any subsequent contempt proceedings); *see Robertson v. Jackson*, 972 F.2d 529, 535 (4th Cir. 1992) ("In the event that a contempt order should be issued against the [defendant], the defense of impossibility of compliance would be available if he had done everything within his power to comply with the district court's order."). Relatedly, should Dyna-Diggr refuse to sign the application as the current owner of the Facility, Defendant will not be subject to contempt sanctions so long as it has "in good faith made best efforts to submit th[e] application in an approvable form." Further, should Defendant in good faith submit an RCRA Part B permit application absent Dyna-Diggr's signature, and should that application be denied, Defendant would be in compliance with the court's order should it continue to act in good faith and cooperate with Plaintiff, "work[ing] diligently . . . using best efforts[] to correct as expeditiously as possible any deficiencies identified by the Department[.]"

Finally, Defendant acknowledges that "North Carolina's environmental regulations provide a process when the owner of the facility refuses to cooperate—the issuance of an administrative order requiring appropriate action." *See* 42 U.S.C. § 6928(h) (2018). Should Defendant's

permit application be denied for lack of Dyna-Diggr's signature, Plaintiff could initiate separate proceedings against Dyna-Diggr, proceedings which would not involve Defendant.

In short, only Defendant's refusal to comply with the court order, not Dyna-Diggr's inaction, could result in contempt sanctions against Defendant per the trial court order at issue. As such, we cannot hold that the injunction is "manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833 (1985).

D. Motion for Reconsideration

[5] Defendant argues, in the alternative, that this Court should remand this matter to the superior court for an advisory opinion on Defendant's motion for reconsideration.

Proper notice of appeal requires a party to "designate the judgment or order from which appeal is taken." N.C. R. App. P. 3(d). "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). "A jurisdictional default [] precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

Here, the trial court did not enter a judgment or order on Defendant's motion for reconsideration because jurisdiction was no longer vested with the trial court at the time Defendant filed its motion. As such, Defendant did not appeal from the denial of its Rule 60(b) motion. Therefore, jurisdiction is not properly with this Court to consider remand.

V. Conclusion

The trial court correctly determined that this Court's decision in *WASCO I* settled the question of Defendant's liability as an operator of the Facility as the law of the case. No intervening developments have changed this reality; thus, we hold that the trial court did not err in failing to dismiss Plaintiff's complaint as moot. Nor did the trial court err in failing to dismiss Plaintiff's suit for failure to join a necessary party; Defendant's liability as the operator is separate from Dyna-Diggr's liability as the owner of the Facility. The trial court similarly did not err in entering summary judgment for Plaintiff because no genuine issues of material fact remained to be resolved; Defendant's liability as the operator of the Facility had been decided by this Court in *WASCO I*. Finally, its issuance of the injunction was within the trial court's discretion and

does not require anything "impossible" of the Defendant. The trial court orders are affirmed.[3]

AFFIRMED.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
ARTHRYSIA BRASWELL, DEFENDANT

No. COA19-434

Filed 7 January 2020

Sentencing—prior record level—section 15A-1340.14(f) factors—burden of proof—not met

The State failed to meet its burden of proving defendant's prior record level by a preponderance of the evidence by any of the methods listed in N.C.G.S. § 15A-1340.14(f) where defendant did not stipulate to the prior record level and the State did not submit either originals or copies of prior convictions or other records that would satisfy its burden. Further, neither defendant's acknowledgment of her "criminal record" during a colloquy with the court nor her notation of the roman numeral "IV" on her transcript of plea (next to all the felonies to which she pled guilty) were sufficient to constitute a stipulation to or otherwise establish the accuracy of the twelve prior record level points or level IV for sentencing. The matter was remanded for resentencing on the charges subject to the guilty plea.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered upon plea of guilty on 12 December 2018 by Judge Walter H. Godwin, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 30 October 2019.

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3. We dismiss as moot Defendant's Motion to Strike Appellee's Record Supplement because, as the preceding illustrates, our decision does not require reliance upon the material Defendant requests be stricken.

Attorney General Joshua H. Stein, by Assistant Attorney General Marie Hartwell Evitt, for the State.

Attorney Meghan Adelle Jones, for Defendant.

BROOK, Judge.

Arthrysia Braswell ("Defendant") appeals from judgment entered upon her guilty plea. Defendant argues the State failed to establish her prior record level by a preponderance of the evidence. We agree. We therefore reverse and remand for resentencing.

I. Background

Defendant was arrested for felony malicious conduct by a prisoner, felony possession of a controlled substance on jail premises, driving while impaired, and driving while license revoked on 8 March 2018. On 27 July 2018, she was arrested and charged with first-degree burglary. Defendant was also charged with larceny of a motor vehicle, possession of a stolen motor vehicle, and misdemeanor hit and run on 21 September 2018. She was subsequently indicted for driving while impaired, driving while license revoked, malicious conduct by a prisoner, possession of a controlled substance on prison or jail premises, and first-degree burglary. An information was also filed charging her with larceny of a motor vehicle.

On 12 December 2018, Defendant entered a plea of guilty to felonious breaking and entering, malicious conduct by a prisoner, driving while impaired, and larceny of a motor vehicle. As part of the plea agreement, the State dismissed the other charges against her, including first-degree burglary, driving while license revoked, and possession of a controlled substance on jail premises; the agreement did not countenance a particular sentence.

Judge Walter H. Godwin, Jr., accepted her plea and entered judgment upon the plea. The State submitted a prior record level worksheet for sentencing purposes. The worksheet alleged Defendant to have 12 record level points, placing her in sentencing category level IV. The State did not proffer a stipulation by the parties, an original or copy of the court record of any of the prior convictions, or a copy of records maintained by the Department of Public Safety or the Administrative Office of the Courts. Neither Defendant nor defense counsel signed the prior record level worksheet to indicate Defendant stipulated to the information set out in the worksheet or agreed to the prior record level included therein.

The trial court sentenced Defendant to 24 months in the misdemeanant confinement program on the charge of driving while impaired,[1] 25 to 39 months' imprisonment on the charge of felony breaking and entering, and 9 to 20 months' imprisonment on the charge of larceny of a motor vehicle, the sentences to run consecutively. The trial court referenced Defendant's alleged record level only while announcing the sentence, stating:

> [A]s to the felonious breaking and entering, the Class H, I'm going to consolidate that with the malicious conduct by a prisoner to Class F, therefore, Class F, she is Record Level IV for purposes of punishment. The Court is going to make no findings in aggravation or mitigation. Going to impose a sentence within the presumptive range. She's hereby sentenced to not less than 25, no more than 39 months in the North Carolina Department of Corrections.
>
> Then in the larceny of a motor vehicle case, Class H—I mean, yeah, Class H Felon, she is Record Level IV[.]

The trial court did not ask the State or defense counsel to respond to the sentence before adjourning the sentencing hearing, and defense counsel did not object to this statement.

Defendant noticed appeal on 13 December 2018 but failed to list this Court as the court to which the appeal was being made. N.C. R. App. P. 4(b) (2019). Appeal from a final judgment entered upon a plea of guilty lies of right with this Court under N.C. Gen. Stat. § 15A-1444(a2)(1) where the defendant alleges an incorrect finding of her prior record level or prior conviction level under N.C. Gen. Stat. § 15A-1340.14. *See*, *e.g.*, *State v. Riley*, 159 N.C. App. 546, 555, 583 S.E.2d 379, 386 (2003). Appellate counsel was appointed on 25 January 2019, and Defendant thereafter filed a petition for writ of *certiorari*. This Court has the discretion to grant a petition for writ of *certiorari* and hear an appeal.[2] *See State v. McCoy*,

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1. The trial court determined Defendant to be a record Level I for purposes of DWI sentencing, and Defendant does not challenge this determination. We address here only Defendant's claim that the State did not meet its burden of proving her 12 record level points or Level IV category for purposes of her remaining charges.

2. The petitioner need not show it is certain to prevail on the merits if *certiorari* is granted. Indeed, our appellate courts commonly grant such writs only to affirm the underlying judgment of the trial court. *See*, *e.g.*, *State v. Green*, 350 N.C. 400, 514 S.E.2d 724 (1999); *In re Kirkman Furniture Co.*, 258 N.C. 733, 129 S.E.2d 471 (1963); *State v. Hamrick*, 110 N.C. App. 60, 428 S.E.2d 830 (1993); *State v. McNeil*, ___ N.C. App. ___, 822 S.E.2d 317 (2018).

171 N.C. App. 636, 638, 615 S.E.2d 319, 320-21 (2005) ("While this Court cannot hear defendant's direct appeal [for failure to comply with Rule 4], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*[.]"). Accordingly, we exercise that discretion here.

II. Standard of Review

The determination of a defendant's prior record level for sentencing purposes is subject to *de novo* review. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). We review for "whether the competent evidence in the record adequately supports the trial court's" determination of Defendant's prior record level. *Id.*

III. Analysis

Defendant argues that the State did not prove her prior record level by a preponderance of the evidence. While Defendant did not object to the record level at sentencing, "[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.*

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction[s]." *Id.* at 634, 681 S.E.2d at 804 (citation omitted). Under the Structured Sentencing Act, the State may prove a defendant's prior convictions and thereby establish the defendant's prior record level through any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2017). On one hand, a prior record level worksheet submitted by counsel for the State, standing alone, is never sufficient to meet the State's burden. *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). On the other hand, an explicit stipulation by the defendant is not necessary for the State to carry its burden. *See id.* at 828, 616 S.E.2d at 917. Our case law provides useful guidance on what suffices to establish a defendant's prior record level.

In *State v. Alexander*, the trial court asked defense counsel "whether he had anything 'to say' with respect to sentencing." *Id.* at 826, 616 S.E.2d at 916. Defense counsel directed the court to the worksheet, telling the trial court that "up until this particular case [the defendant] had no felony convictions, as you can see from his worksheet." *Id.* The Court held that this "exchange between the trial judge and defense counsel constituted a stipulation," *id.* at 827-28, 616 S.E.2d at 917, because it "indicate[d] not only that defense counsel was cognizant of the contents of the worksheet, but also that he had no objections to it," *id.* at 830, 616 S.E.2d at 918. The Court in *Alexander* considered also that the plea agreement between the defendant and the State included an agreement to a particular sentence, evidencing knowledge of and an agreement to a prior record level. *Id.* at 825, 616 S.E.2d at 915.

In coming to this conclusion, the Court instructed that "a stipulation need not follow any particular form, [but] its terms must be definite and certain[.]" *Id.* at 828, 616 S.E.2d at 917 (citation omitted). Indeed, "[s]ilence, under some circumstances, may be deemed assent." *Id.* (citation omitted). For example, silence can constitute a stipulation where either counsel for the State or the trial judge has mentioned the defendant's prior record points or record level before turning explicitly to defense counsel for an opportunity to object. *See State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85-86 (2007) (trial judge stated defendant's prior record level before offering defense counsel opportunity to object); *State v. Hurley*, 180 N.C. App. 680, 684, 637 S.E.2d 919, 923 (2006) (prosecutor stated defendant's prior convictions and record level before defense counsel had opportunity to be heard); *State v. Mullinax*, 180 N.C. App. 439, 444, 637 S.E.2d 294, 298 (2006) (trial judge stated defendant's prior record level and asked defendant and defense counsel to review worksheet); *State v. Eubanks*, 151 N.C. App. 499, 504-05, 565 S.E.2d 738, 742 (2002) (trial judge stated defendant's prior record level before offering defense counsel opportunity to object).

Riley illustrates the circumstances under which silence does not suffice to constitute a stipulation. In *Riley*, counsel for the State referenced the defendant's prior record level, and defense counsel did not object but "asked for mercy with regard to any sentence imposed[.]" *Id.* at 557, 583 S.E.2d at 387. Additionally, in *Riley*, the prosecutor and the trial court exchanged the following colloquy:

> [Prosecutor]: The first thing I would like to do is hand up a prior record worksheet (handing). This obviously is pertaining to the four charges that don't have a mandatory sentence, that being three counts of assault with a deadly

> weapon with intent to kill, and possession of a firearm by a felon.
>
> I'm showing the worksheet which shows some prior felonies, three prior—actually, four prior felonies, some though—two of them on the same day, basically possession of schedule I and possession with intent to sell and deliver schedule II. Those were the subject of the prior felony. These were from 1999, and were the subject of the firearm by felon case that we have.
>
> Also, in September of last year the defendant was convicted of assault with a deadly weapon inflicting serious injury; also possession of a firearm by a felon. So by the time you add the points, plus the extra point for having the same offense, the firearm by a felon, I'm showing seven points. That would make him a Level III offender for sentencing on those cases.
>
> THE COURT: So he's a Level III on three of the cases, and he's a Level what on the other?
>
> [Prosecutor]: Well, actually he's a Level III for everything but the first-degree murder. First-degree murder, he would technically be a Level III as well, but since there's a mandatory statutory sentence, it really doesn't matter what the record level is.

Id. at 556, 583 S.E.2d at 386-87 (alterations in original). Defense counsel did not object to these calculations. *Id.* at 557, 583 S.E.2d at 387. Neither defense counsel's lack of objection to these statements, nor the prior record level worksheet, alone or in combination, were sufficient to meet the State's burden. *Id.*

Additionally, this Court held in *State v. Jeffery*, 167 N.C. App. 575, 605 S.E.2d 672 (2004), that the "[d]efendant's agreement to six presumptive range sentences [wa]s not a 'definite and certain' indication that defendant ha[d] a prior record level III. It [wa]s merely indicative of the bargain into which he entered with the State." *Id.* at 581, 605 S.E.2d at 676. Simply put, the mere fact of a plea agreement does not necessarily amount to a stipulation of a prior record level. *See id.*; *Alexander*, 359 N.C. at 828, 616 S.E.2d at 917.

Here, the State failed to meet its burden. Defense counsel did not stipulate to Defendant's prior record level. In fact, neither the trial judge nor the prosecutor mentioned Defendant's prior record level, prior

record level points, or the fact of each of her prior convictions in a manner that offered defense counsel any opportunity to object to the same. The first and only time the trial judge stated Defendant's prior record level was immediately before adjourning the hearing. And, as in *Riley*, "the State submitted no records of conviction [and] no records from the agencies listed in N.C.G.S. § 15A- 1340.14(f)(3)[.]"[3] 159 N.C. App. at 557, 583 S.E.2d at 387.

The State points to the plea transcript as a stipulation of Defendant's prior record level. The State contends that in the column labeled "Pun. Cl." for "Punishment Class," Defendant listed "IV" next to the felony offenses to which she was pleading guilty, that is, felony breaking and entering, malicious conduct by a prisoner, and larceny of a motor vehicle. The State submits that "Defendant clearly contemplated being sentenced as a level IV for sentencing by including the roman numerals in the 'Pun. Cl.' Column" and that "[t]he inclusion amounts to a stipulation by [D]efendant and counsel[.]" This Court should assume, the State suggests, that Defendant stipulated to being sentenced at a Level IV because "this column should [instead] contain a letter, to identify a felony punishment, or 1, 2, 3, or A1 to identify the appropriate misdemeanor punishment." However, it was the State's burden to prove by a preponderance of the evidence that these roman numerals on the plea transcript indicated that Defendant stipulated to the sentencing level, and we cannot find here that this ambiguous evidence amounts to a "definite and certain" stipulation, as required. *Alexander*, 359 N.C. at 828, 616 S.E.2d at 917 (citation omitted).

The State points also to a colloquy between the trial court and Defendant in which the trial court asked Defendant whether she had "anything [she]'d like to say to the Court[.]" In response, Defendant stated:

> I apologize to the Court, to the man whose fence it was . . . . I also apologize to the person [] whose residence I entered. I was, I've had a lot taken from me actually and since I got a criminal record everytime [sic] I report something happens to me it's threw out of court without even going before a judge.

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3. The trial court referenced a prior DWI conviction and a corresponding case number during the sentencing hearing. However, no copy of records maintained by the Department of Motor Vehicles ("DMV") appears in the record, and the State does not contend that the submission of a DMV record proved Defendant's prior convictions by a preponderance of the evidence, as required by N.C. Gen. Stat. § 15A-1340.14(f).

The State, citing *Alexander*, contends that this reference by Defendant to her criminal record amounts to a stipulation by Defendant that she had 12 prior record level points and a stipulation to being sentenced at Level IV. In *Alexander*, however, defense counsel explicitly referenced the prior record level worksheet, drawing the trial court's attention to Defendant's lack of any prior felony convictions, 359 N.C. at 826, 616 S.E.2d at 916, and, in so doing, tacitly endorsed its accuracy, *id.* at 830, 616 S.E.2d at 918. In contrast, the exchange between Defendant and the trial court here in which she referenced having a "criminal record" does not suggest that Defendant "was cognizant of the contents of the worksheet . . . [and] had no objections to it[,]" that she stipulated to being sentenced at a Level IV, or that she stipulated to the 12 record level points. *Id.*

The colloquy between Defendant and the trial court here shares more characteristics with *Riley* than it does with *Alexander*. Defendant's reference to her criminal record resembles the colloquy in *Riley* in which the "[d]efendant asked for mercy with regard to any sentence imposed and did not object to the information on the worksheet or the statements made by the prosecutor in reference to defendant's prior record level." 159 N.C. App. at 557, 583 S.E.2d at 387. In fact, in *Riley*, counsel for the State had a more extensive colloquy with the trial court regarding the calculation of the defendant's points and prior record level. *Id.* at 556, 583 S.E.2d at 386-87. Defense counsel in *Riley* did not object to the State's explanation of the record level calculation, and this Court still found that the State had not met its burden of proving the defendant's prior record level by stipulation. *Id.* at 557, 583 S.E.2d at 387.

The State points also to the following exchange between Defendant and the trial court to support its assertion that Defendant "clearly contemplated being sentenced as a level IV for felony sentencing":

> THE COURT: Do you understand that you're pleading to felonious breaking and entering carrying a maximum punishment of 39 months; pleading guilty to malicious conduct by a prisoner which is a Class F Felon [sic] carrying a maximum punishment of 59 months; driving while impaired, which is a misdemeanor, maximum punishment three years; and larceny of a motor vehicle which is a Class H misdemeanor carrying a maximum punishment of 39 months for a total maximum punishment of 137 months, plus three years. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

However, as in *Jeffery*, Defendant's acknowledgement of her "sentence[] is not a 'definite and certain' indication that [D]efendant has a prior record level [IV]." 167 N.C. App. at 581, 605 S.E.2d at 676. Indeed, the above colloquy does not reflect Defendant's actual sentence; it reflects the total potential maximum permitted by statute and therefore cannot be interpreted to constitute a stipulation by Defendant that she should be sentenced at a Level IV. This colloquy does no work toward furthering the State's burden of proving Defendant's prior convictions.

Moreover, the State submitted neither originals nor copies of records of prior convictions nor records from agencies listed in N.C. Gen. Stat. § 15A-1340.14(f). Defendant did not stipulate to the prior record level explicitly. Further, the roman numerals listed on the plea, Defendant's reference to the existence of her criminal record, and her acknowledgment of the statutory maximum sentence, considered either individually or in combination, do not amount to an implicit stipulation to or otherwise serve to reliably establish her record level.[4]

IV. Remedy

Where an error occurs during the sentencing phase of a proceeding, the appropriate remedy is generally to remand for resentencing. This is true in criminal proceedings involving jury trials. *See*, *e.g.*, *Riley*, 159 N.C. App. at 557, 583 S.E.2d at 387 (remanding solely for resentencing where State did not carry its burden to establish prior record level after conviction upon jury verdicts). It is also true in proceedings involving guilty pleas and plea agreements. *See*, *e.g.*, *State v. Murphy*, ___ N.C. App. ___, ___, 819 S.E.2d 604, 609 (2018) (remanding solely for resentencing after concluding trial court erred in ordering defendant to pay restitution where defendant had pleaded guilty to underlying charges); *State v. Bright*, 135 N.C. App. 381, 383, 520 S.E.2d 138, 140 (1999) (remanding solely for resentencing after concluding trial court erred in varying from presumptive sentence where defendant had pleaded guilty); *State v. Jones*, 66 N.C. App. 274, 280, 311 S.E.2d 351, 354 (1984) (remanding solely for resentencing after concluding trial court erred in varying from presumptive sentence where defendant had pleaded

4. We note that our colleague in dissent finds pertinent that "[a]t no point in her brief or petition for *certiorari* does Defendant . . . argue prejudice, assert the record level calculation is incorrect, or that she would be eligible to receive a different or lower sentence." Tyson, J., dissenting *infra*. While this fact has been noted in cases in which our appellate courts have found a stipulation has occurred, neither these cases, nor the more similar cases in which no such stipulation occurred, nor our governing statutes suggest that a defendant must show prejudice in order to receive the benefit of a fair process in which the State meets its burden under N.C. Gen. Stat. § 15A-1340.14(f).

guilty to underlying charges). Consistent with this binding precedent, we remand for resentencing.[5]

V. Conclusion

Having held that the State failed to meet its burden of proving Defendant's prior record level by a preponderance of the evidence, we must vacate and remand for a resentencing hearing on the charges of felonious breaking and entering, malicious conduct by a prisoner, and larceny of a motor vehicle.

VACATED AND REMANDED.

Judge COLLINS concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's form-over-substance ruling places Defendant at risk of losing a very beneficial plea bargain on the four charges she pled guilty to committing and allows the State to reinstate all the other nineteen charges that were dismissed. Defendant fails to argue or show any error or prejudice or that she is entitled to receive any sentence other than what she received.

Defendant's petition does not allege or demonstrate any prejudice and her arguments are wholly without merit. The majority's opinion erroneously issues our writ, reaches the merits of Defendant's purported appeal and reverses the judgments entered upon Defendant's knowing guilty plea pursuant to a plea agreement. I respectfully dissent.

I. Presumption of Correctness

The Supreme Court of North Carolina has held the defendant carries the burden to overcome the presumption of correctness and to

5. The dissent asserts we must instead set aside the entire plea agreement. The cases cited in support of this contention, however, are readily distinguishable. Defendant does not seek to repudiate any portion of her plea agreement. *State v. Green*, ___ N.C. App. ___, ___, 831 S.E.2d 611, 618 (setting aside plea agreement). And our opinion does not render any plea agreement terms unfulfillable. *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (2012) (Steelman, J., concurring in part and dissenting in part), *rev'd for the reasons stated in the dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012) (same). There was no agreement to a particular sentence in the plea agreement here; thus, the commensurate remedy is remand for resentencing.

demonstrate prejudicial error to warrant any relief. "The general rule is that a judgment is presumed to be valid and will not be disturbed absent a showing that the trial judge abused his discretion. When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right." *State v. Bright*, 301 N.C. 243, 261, 271 S.E.2d 368, 379-80 (1980).

> The defendant, attacking a sentence, however, is confronted by the presumption that the trial judge acted fairly, reasonably, and impartially in the performance of the duties of his office. Our entire judicial system is based upon the faith that a judge will keep his oath. Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed.

State v. Harris, 27 N.C. App. 385, 386-87, 219 S.E.2d 306, 307 (1975) (citations, ellipses and internal quotation marks omitted).

The "presumption of lower court correctness and the wide discretion afforded our trial judges in rendering judgment" is based upon the view the trial judge participated in the disposition of the case and is in "the best position to determine appropriate punishment for the protection of society and rehabilitation of the defendant." *Id.* at 387, 219 S.E.2d at 307 (citation and internal quotation marks omitted).

These presumptions are not overcome in Defendant's petition and Defendant shows no prejudice. The trial court received and reviewed the signed plea arrangement between Defendant and the State and the sentencing worksheet. The trial court heard from Defendant's counsel, Defendant, and the State before it imposed a sentence within the presumptive range for a level IV offender. At no point does Defendant argue that her sentence was incorrect, her prior record level was calculated incorrectly, or she was entitled to a different sentence.

Defendant has not demonstrated how she was prejudiced by the trial court's acceptance of her plea arrangement and subsequent presumptive sentence. The majority's opinion ignores the presumption of correctness and relieves Defendant of her burden to show prejudice to reverse the trial court's judgment. She demonstrates no merit and is not entitled to this Court's discretionary writ.

II. N.C. Gen. Stat. §§ 15A-1442 and 1444

Contrary to the majority opinion's assertion, Defendant does not have any appeal of right under these facts. Defendant voluntarily pled guilty and was sentenced within the presumptive range for the felonies

to which she committed and knowingly admitted. *See* N.C Gen. Stat. § 15A-1444(a1) (2017). She asserts, despite her in-court acknowledgement of her past criminal record, her signed Transcript of Plea, and her colloquy with the trial court, that she did not agree or stipulate to her prior record level.

Defendant failed to and cannot assert her prior record level was incorrectly calculated or that points for prior convictions were attributed incorrectly. *See* N.C. Gen. Stat. § 15A-1444 (a2)(1). She never asserts either an erroneous record level or any prejudice she has suffered.

Under N.C. Gen. Stat. § 15A-1442, "Grounds for correction of error by appellate division," Defendant meets none of the statutory criteria.

> The following constitute grounds for correction of errors by the appellate division.
>
> . . . .
>
> (5b) Violation of Sentencing Structure.–The sentence imposed:
>
> > a. Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
> >
> > b. Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
> >
> > c. Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class or offense and prior record or conviction level.
>
> (6) Other Errors of Law.–Any other error of law was committed by the trial court *to the prejudice of the defendant*.

N.C. Gen. Stat. § 15A-1442 (2017) (emphasis supplied).

III. Petition for Writ of Certiorari

It is uncontested that Defendant filed a defective notice of appeal. Subsequently, Defendant filed a petition for a writ of certiorari. To warrant consideration, Defendant's "petition for the writ must show merit or that error was probably committed below. *In re Snelgrove*, 208 N.C. 670,

672, 182 S.E. 335 [1935]. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown. *Womble v. Gin Company*, 194 N.C. 577, 579, 140 S.E. 230 [1927]." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). Without an allegation of prejudice, review by certiorari is not available to either by statute or by precedent to Defendant. N.C. Gen. Stat. § 15A-1442; N.C. Gen. Stat. § 15A-1444(g); *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

To warrant issuance of the writ, Defendant's petition must show the purported issue on appeal has potential merit and, if meritorious, that she suffered prejudice. While her petition is not required to show she is certain to *prevail* on the merits, it alleges no *potential* of merit, asserts no prejudice or probability of a different sentence on remand. I vote to deny the meritless petition.

The majority's opinion does not state any basis to allow the petition or invoke Rule 2, but nonetheless grants Defendant's petition and addresses the merits. As such, I address lack of demonstrated merit or prejudice in the underlying issue and the substantial risks to Defendant on remand.

IV. Stipulation

It is undisputed Defendant voluntarily and knowingly entered a guilty plea. Consistent with her plea, Defendant was sentenced as a prior record level IV within the presumptive range for felonious breaking and entering, malicious conduct by a prisoner, driving while impaired, and larceny of a motor vehicle.

In exchange for Defendant's guilty plea to these four charges, the State dismissed the following *nineteen* additional charges: (1) first-degree burglary; (2) driving with license revoked; (3) resisting a public officer; (4) felony possession of a schedule II substance; (5) misdemeanor child abuse; (6) possession of a controlled substance in jail premises; (7) possession of a stolen vehicle; (8) *three* counts of hit and run; (9) failure to maintain lane control; (10) driving while license revoked due to impaired driver's license revocation; (11) aggressive driving; (12) driving while impaired; (13) malicious conduct by a prisoner; (14) larceny of a motor vehicle; (15) larceny of a dog; (16) driving without liability insurance; and, (17) transporting a child not in rear seat.

During Defendant's plea colloquy and sentencing hearing, the State submitted a Transcript of Plea, *signed* by Defendant *and* her counsel. Also a prior record level worksheet and a copy of Defendant's driving record were presented without objection. The sentencing worksheet

indicated Defendant had accrued twelve prior conviction sentencing points. Four of those points came from two prior class H felony convictions and eight points derived from a combination of multiple Class A1 and Class 1 misdemeanors. The majority's opinion correctly notes Defendant does not challenge the record level determination for her driving while impaired conviction.

Defendant's sole argument asserts only she did not sign the stipulation in Section III of her prior record level/conviction level worksheet. Defendant's petition does not deny any of the underlying convictions nor argue her twelve prior record points were not correctly computed. She does not assert that she is entitled to a different sentence if the judgment on her plea is reversed. After hearing from both parties, including Defendant individually, the trial court sentenced Defendant in the presumptive ranges as a prior record level IV on the felony counts.

The State bears the burden of proving by a preponderance of the evidence that a prior conviction exists. *See State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). The State can prove a defendant's prior convictions and establish the defendant's prior record level under the statute by any of the following:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2017).

Defendant's express, explicit or signed affirmation is not necessary for the State to carry its burden. *Alexander*, 359 N.C. at 829, 616 S.E.2d at 917. The Supreme Court of North Carolina stated "a stipulation need not follow any particular form, [but] must be definite and certain[.]" *Id.* at 828, 616 S.E.2d at 917 (citation omitted). "Silence, under some circumstances, may be deemed assent." *Id.* (citation omitted).

A. *State v. Riley*

The majority's opinion cites this Court's opinion in *State v. Riley* to support its conclusion to reverse. *State v. Riley*, 159 N.C. App. 546, 583 S.E.2d 379 (2003). In *Riley*, the State submitted the defendant's prior

record worksheet and asserted the defendant was a prior record level III offender for sentencing after the jury had convicted him. *Id.* at 556, 583 S.E.2d at 387. The State asserted the crimes were committed for the benefit of gang activity and sought a sentence within the aggravated range. *Id.*

In response, the "[d]efendant asked for mercy with regard to any sentence imposed and did not object to the information on the worksheet or the statements made by the prosecutor in reference to defendant's prior record level." *Id.* at 557, 583 S.E.2d at 387. This Court held that the sentencing worksheet filled out by the prosecutor and unsupported statements about the defendant's prior record level were insufficient to carry the State's burden to show the prior convictions. *Id.*

Riley is inapposite to these facts and does not support the majority's conclusion. The defendant in *Riley* did not plead guilty, and no voluntary and knowing plea bargain was made. No Transcript of Plea, signed by both defense counsel and the defendant, containing a listed and correct punishment level was produced in *Riley*. No plea colloquy occurred as was done in the present case. The majority opinion's reliance upon *Riley* to support its outcome is without foundation.

B. *State v. Alexander*

The majority's opinion also misapplies and discounts the holding in *State v. Alexander*. In *Alexander*, our Supreme Court held that the dialogue between the trial court and defense counsel constituted a stipulation. *Id.* at 828, 616 S.E.2d at 917. After the plea colloquy, the defendant Alexander stipulated to a factual basis for his plea. *Id.* at 825, 616 S.E.2d at 916. Our Supreme Court was persuaded by the defense counsel's directing the trial court to the sentencing worksheet, the trial court's reliance on defense counsel's statements about defendant's prior offenses, and the trial court's knowledge of the plea agreement as proof of the defendant's stipulation and the accuracy of the record level calculation. *Id.* at 832, 616 S.E.2d at 919.

The Court noted its "previous decisions make it clear that counsel need not affirmatively state what a defendants prior record level is for a stipulation with respect to that defendants prior record level to occur." *Id.* at 830, 616 S.E.2d at 918 (citing *State v. Albert*, 312 N.C. 567, 579-80, 324 S.E.2d 233, 241 (1985)).

Here, as in *Alexander*, Defendant and her counsel both signed the Transcript of Plea. The Transcript includes numerous sections, one of which is labeled "Pun. CL.," an abbreviation for "punishment conviction

level." Defendant's Transcript noted a roman numeral "IV" next to all the felonies to which she pled guilty.

In addition to the signed Transcript of Plea, the trial court and Defendant engaged in the plea colloquy. Defendant acknowledged she understood the terms and conditions of her plea arrangement and agreed there was factual basis for her guilty pleas. The trial court then asked for Defendant's driving record. While the prosecutor sought the record, defense counsel provided the court with information about Defendant. The court offered Defendant the opportunity to be heard and she apologized for her criminal conduct and acknowledged having "a criminal record."

C. *State v. Wade*

Many opinions by this Court provide precedents to affirm the judgment in the present case. Where a sentencing worksheet is the only proof of previous convictions submitted to the trial court, this Court will look to the record and dialogue between the parties to determine if a defendant stipulated to prior convictions. *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 86 (2007).

In *Wade*, the defendant failed to object to his sentencing worksheet. *Id.* at 299, 639 S.E.2d at 86. At sentencing, defense counsel spoke on behalf of the defendant and described mitigating factors to the trial court. *Id.* This Court held the defendant's failure to object, when he had the opportunity to do so, constituted a stipulation to the prior offenses. *Id.*

D. *State v. Eubanks*

In *State v. Eubanks*, 151 N.C. App. 499, 504-05, 565 S.E.2d 738, 742 (2002), after defendant Eubanks was convicted by a jury, the State submitted a sentencing worksheet that was not signed by the defendant or defense counsel. The trial court asked defense counsel if he had seen the worksheet and counsel answered affirmatively. *Id.* Further the court asked if he had any objections. *Id.* This Court held that the defendant's opportunity to object and his failure to do so clearly constituted his stipulation to his unsigned prior record level worksheet. *Id.* at 506, 565 S.E.2d at 742.

E. *State v. Hurley*

In *State v. Hurley*, 180 N.C. App. 680, 685, 637 S.E.2d 919, 923 (2006), the defendant was convicted by a jury of committing robbery. He failed to object to the convictions on his sentencing worksheet at sentencing. Instead of objecting to his sentencing worksheet, defense counsel

asked for the defendant to be placed on work release. *Id.* This Court held defense counsel's conduct constituted defendant's stipulation to his prior convictions. *Id.*

F. *State v. Mullinax*

In *State v. Mullinax*, 180 N.C. App. 439, 440, 637 S.E.2d 294, 295 (2006), the defendant pled guilty to second-degree murder. At the plea hearing, "after determining that there was no maximum sentence listed on the plea transcript, the trial court explained that it would calculate the sentence for defendant." *Id.* at 444, 637 S.E.2d at 297. The trial court asked the prosecutor and defense counsel if "two hundred and ninety-four months on the Level 2 sounded correct?" *Id.*, 637 S.E.2d at 298 (emphasis omitted). Both counsels answered affirmatively. *Id.*

This Court held the statements made defense counsel were to be "construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet." *Id.* at 445, 637 S.E.2d at 298. This Court further noted the numerous opportunities for the defendant and his counsel to interject: "(1) when the trial court asked if [the sentence term] was accurate; (2) when they reviewed and *defendant signed the Transcript of Plea*; (3) after the State's summary of the evidence; (4) during their *statements at the factual basis*; and (5) during the sentencing phase." *Id.* at 445-46, 637 S.E.2d at 298 (emphasis supplied). This Court also noted, as here, the defendant did not contest the prior convictions as listed on his worksheet. *Id.*

The majority opinion's attempt to explain away or diminish these precedents, all of which support affirming the trial court's judgment, is unpersuasive.

V. Set Aside Plea Arrangement

The majority's opinion concludes to "reverse and remand for a resentencing hearing on the charges of felonious breaking and entering, malicious conduct by a prisoner, and larceny of a motor vehicle." This mandate itself is error and is not supported by precedents.

"Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature. A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain." *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993). As a bilateral contract where one party rejects the terms or breaches the performance, the proper mandate under the majority's conclusion is to vacate and set aside the plea arrangement. *State v. Green*,___ N.C. App. __, __ 831 S.E.2d 611, 618 (2019). This returns

the parties to status quo and results in Defendant facing all the original charges. *See id.* Rescission of the agreement by the non-breaching party and the parties' return to status quo is the remedy available in every contract. *Gilbert v. West*, 211 N.C. 465, 466, 190 S.E. 727, 728 (1937) ("When a court, in the exercise of its equitable jurisdiction, cancels a contract or deed, it should seek to place the parties in status quo[.]").

In *Green*, this Court held that the defendant's stipulation was invalid. This Court further held that since the sentence was imposed as part of a plea agreement, the "plea agreement must be set aside in its entirety, and the parties may either agree to a new plea agreement or the matter should proceed to trial on the original charges in the indictments." *Green*, __ N.C. App. at __ 831 S.E.2d at 618.

Green and its predecessor, *State v. Rico*, are controlling. *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding plea agreement must be set aside and judgment must be vacated and remanded for disposition of original charge where trial court erroneously imposed aggravated sentence based solely upon defendant's plea agreement and stipulation to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

The defendants in *Green* and *Rico* struck plea bargains with the State. *Green*, __ N.C. App. at __, 831 S.E.2d at 613; *Rico*, 218 N.C. App. at 111, 720 S.E.2d at 802. The issue in those cases is the same as here: was the plea bargain legally correct and binding? Once the appellate determinations were made, defendants Green and Rico were returned to the trial court to re-negotiate a new plea bargain with the State or proceed to trials on the original charges. *Green*, __ N.C. App. at __, 831 S.E.2d at 618; *Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809.

The results of *Green* and *Rico* are consistent with our Court's longstanding precedent of affording the defendant and the State the opportunity to re-negotiate a plea arrangement or proceed to trial where the plea arrangement was rejected or ruled invalid.

Ten years after this Court's formation, *State v. Fox* was decided. *State v. Fox*, 34 N.C. App. 576, 239 S.E.2d 471 (1977). In *Fox*, the defendant was charged by warrant with two counts of felony breaking and entering and larceny. *Id.* at 576, 239 S.E.2d at 472. The defendant pled guilty to two misdemeanor counts pursuant to plea arrangement in district court and then appealed for trial *de novo* in superior court. *Id.* at 577, 239 S.E.2d at 472. The superior court refused to allow a trial. *Id.*

This Court held that the defendant was entitled to trial *de novo* in superior court. *Id.* at 578, 239 S.E.2d at 473. However, the defendant at his new trial would be subject to the possibility of being tried on indictments for the original felonies. *Id.* at 579, 239 S.E.2d at 473. In the opinion authored by Chief Judge Brock, the Court held: "*Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge.*" *Id.* (emphasis supplied).

The cases cited in the majority's opinion, *State v. Murphy*, *State v. Bright* and *State v. Jones* do not support the majority's outcome. In those cases, the trial court, not a party, had erroneously veered from the plea arrangements, rather than the situation present here. Defendant has elected to challenge her own undisputed agreement, after she received everything the State had agreed to, and without showing any potential prejudice.

In *Murphy*, the trial court ordered restitution outside of the plea arrangement. *State v. Murphy*, __ N.C. App. __, 819 S.E.2d 604 (2018). The trial court had ordered restitution for victims of cases which had been dismissed. This Court held, "As defendant never agreed to pay restitution as part of the plea agreement, the invalidly ordered restitution was not an 'essential or fundamental' term of the deal. Accordingly, we hold the proper remedy here is not to set aside defendant's entire plea agreement but to vacate the restitution order and remand for resentencing solely on the issue of restitution." *Id.* at __, 819 S.E.2d at 609.

In *Bright*, the plea arrangement allowed the defendant to plead to a lesser included offense with sentencing in the trial court's discretion. *State v. Bright*, 135 N.C. App. 381, 382, 520 S.E.2d 138, 139 (1999). The court failed to make the required written findings of aggravation and mitigation. *Id.* In its brief, the State conceded the error. *Id.* at 383, 520 S.E.2d at 140. This was not a case of either party challenging their agreement. The judgment in *Bright* was properly remanded for resentencing. *Id.*

In *State v. Jones*, 66 N.C. App. 274, 280, 311 S.E.2d 351, 354 (1984), the trial court erroneously considered an additional aggravating factor in sentencing. This Court held "that the trial judge made numerous errors in his findings of factors in aggravation, and the defendant's sentence must be vacated and the case remanded for resentencing." *Id.*

The present case is also distinguishable from the facts of *Rodriguez*, where this Court allowed a defendant to be re-sentenced upon remand of his appeal of his plea arrangement. *Rodriguez*, 111 N.C. App. at 148, 431 S.E.2d at 792. In *Rodriguez*, the prosecutor violated the terms of the

plea arrangement. This Court held the prosecutor's actions constituted a due process violation and the only relief available was to abandon the arrangement and allow the defendant's sentencing hearing to be conducted before a different trial judge. *Id.*

Rodriguez and the factual and procedural backgrounds of the cases cited in the majority's opinion are wholly different from the present case. The State and Defendant each honored their agreement with a guilty plea and the State dismissed nineteen charges as a condition of the plea. Here, where Defendant seeks to undo the arrangement in an unmeritorious, but allowed petition before this Court, the only proper remedy is rescission and to vacate the plea arrangement and the judgment and return the parties to where they stood prior to the plea.

VI. Conclusion

Defendant has: (1) no right to appeal; (2) failed to preserve appellate review when she knowingly and voluntarily entered her guilty pleas; (3) failed to forecast, any basis to allow her petition for writ of certiorari; (4) presented no meritorious argument; and, (5) failed to demonstrate any prejudice.

The majority's opinion does not cite any basis to allow Defendant's petition and issue the writ or invoke Rule 2. Defendant pled guilty, she and her counsel both signed the Transcript of Plea, engaged in a plea colloquy with the trial judge, and she had ample opportunities to object to her sentencing calculation at her sentencing hearing.

Defendant and her counsel presented her prior history and her counsel discussed potential treatments for Defendant while she would serve her sentence. Defendant acknowledged her own prior criminal history to the Court. Defendant received the full benefit of her plea bargain, has not shown any prejudice, or that a different result will occur by setting aside her sentence.

The dialogue, colloquy, the conduct of counsel and Defendant, Defendant's failure to object to her sentencing calculation at the trial court, and her and counsel's signed Transcript of Plea and notation of "IV" at the punishment conviction level on the transcript are sufficient to sustain the State's burden that Defendant stipulated to her sentencing level. N.C. Gen. Stat. § 15A-1340.14(f)(1). Defendant's petition is entirely without merit. At no point in her brief or petition for certiorari does Defendant show merit, argue prejudice, assert the prior record level calculation is incorrect, or that she would be eligible to receive a different or lower sentence.

Defendant's plea bargain and prior record level calculation can be sustained under "[a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f)(4). I vote to affirm the trial court's judgment and sentencing of Defendant as a level IV offender. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
DIANNA MICHELLE CARTER, DEFENDANT

No. COA19-44

Filed 7 January 2020

1. Appeal and Error—preservation of issues—motion to dismiss—only some charges—different argument on appeal

In a prosecution for credit card fraud, where defendant used two different cardholders' information in six transactions, but where defense counsel only moved to dismiss two of defendant's six identity theft charges at trial for insufficient evidence, defendant's argument that the trial court should have denied all six charges was not preserved for appellate review. Moreover, with respect to the two charges that defense counsel moved to dismiss, defendant improperly raised a different argument on appeal than what defense counsel raised at trial.

2. Identity Theft—involving credit card fraud—fraudulent intent—sufficiency of evidence—effective assistance of counsel

In a prosecution for credit card fraud, where defendant used two different cardholders' information in six transactions, defendant did not receive ineffective assistance of counsel where her attorney did not move to dismiss all six charges of identity theft for insufficient evidence of fraudulent intent. Even if defendant's attorney had made that motion at trial, it would have been unsuccessful because the State presented substantial evidence (including defendant's confession, receipts from each transaction, and testimony from those she transacted with) showing that, even though defendant never stated the cardholders' names during these transactions or signed any receipts in their names, defendant intended to represent that she was either cardholder when she used their credit card information.

3. Identity Theft—involving credit card fraud—jury instructions—false or contradictory statements by defendant

In a prosecution for credit card fraud, where defendant used two different cardholders' information in six transactions, the trial court did not err by instructing the jury on defendant's prior false or contradictory statements to law enforcement about these transactions (at first, she told police that her ex-boyfriend and his girlfriend committed the identity theft, but she later admitted to police, both in person and in a handwritten confession, that she had done it). These statements were relevant to proving that defendant committed the charged crimes and provided "substantial probative force" tending to show she had a guilty conscience.

Appeal by Defendant from judgments entered 1 February 2018 by Judge Joshua W. Willey, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 17 September 2019.

Attorney General Joshua H. Stein, by Deputy General Counsel Blake W. Thomas and Duplin County Assistant District Attorney Michele-Ellen Morton, for the State-Appellee.

Kimberly P. Hoppin for Defendant-Appellant.

COLLINS, Judge.

Defendant Dianna Michelle Carter appeals from judgments entered upon jury verdicts of guilty of financial card fraud, obtaining property by false pretenses, identity theft, and attaining habitual felon status. On appeal, Defendant argues that the trial court erred by denying her motion to dismiss the charges of identity theft for insufficient evidence and by instructing the jury on false or conflicting statements. We discern no error.

I. Procedural History

A jury found Defendant guilty in July 2017 of financial card fraud, obtaining property by false pretenses, identity theft, and attaining the status of habitual felon.[1] The trial court entered judgments upon the jury's

1. The charges were brought in two file numbers: 15 CRS 52497 (included four counts of identity theft involving the use of credit card information of two victims) and 17 CRS 111 (included two counts of identity theft involving the use of credit card information of one of the victims).

verdicts on 1 February 2018, sentencing Defendant to consecutive prison terms of 133 to 172 months and 96 to 128 months. Defendant gave oral notice of appeal in court.

II. Factual Background

The State's evidence at trial tended to show: On 29 August 2015, Corporal Jerry Wood of the Wallace Police Department received a phone call from the regional manager of Aaron's Rental ("Aaron's"), reporting suspected fraud by Defendant. Aaron's had been charged back for four credit card transactions wherein Defendant provided payment to Aaron's by credit card over the phone, and payment to the credit card companies was subsequently refused by the credit card holders. Wood learned in telephone interviews with the regional manager and the sales manager that Defendant called Aaron's on 8 June 2015 and 7 July 2015 to make payments on her own account at Aaron's, and on her daughter's account. Each time, Defendant identified herself as Dianna Carter and gave the sales manager a credit card number, expiration date, and security code for payment. The sales manager recognized Defendant's voice during the phone calls because the sales manager had spoken on the phone with Defendant several times before. The regional manager was also familiar with Defendant, as he had met with Defendant in person and spoken with her several times by phone.

Lieutenant James P. Blanton, Jr., took over as the lead investigator on the case. During his first interview with Defendant at the police station, Defendant told Blanton that "she didn't do it, that it was her exboyfriend and his girlfriend" who were responsible. When Defendant returned to the police station a few days later, she told Blanton that "she was the one that did it" and specifically admitted to the four transactions at Aaron's. Defendant explained that she had obtained credit card information through an online customer service job. Upon Blanton's request, Defendant returned to the station a couple of days later with a hand-written confession. In the signed statement, Defendant admitted that she had obtained other people's credit card information about a year earlier "through an at-home job." Although she intended when she obtained the information to use it right away, she did not do so until she later felt "backed into a corner" in June and July 2015, when she conducted the fraudulent transactions.

Blanton's investigation revealed that Defendant used the credit card information of Kathryn L. Griffin for two of the transactions at Aaron's and that of Janice K. Mooney for the other two transactions.

Blanton also learned that Defendant used Mooney's credit card information to make two purchases in person on 6 June 2015 at First Class Tanning in Wallace.[2] Defendant gave the credit card information, which Defendant had written on a piece of paper, verbally to the sales attendant and signed her own name on the receipts. First Class Tanning was charged back for both of these purchases when payment was refused by the credit card holder. The employees at First Class Tanning were familiar with Defendant because she had been a customer there for about five years.

At trial, the State presented evidence including Defendant's handwritten confession, testimony of Aaron's and First Class Tanning employees involved in the transactions, receipts for payments made at Aaron's, chargeback documents for the four Aaron's transactions, credit card statements and receipts for Griffin, bank records and a fraud statement for Mooney, and testimony by the investigating officers. Defendant did not present any evidence.

III. Discussion

A. Motion to Dismiss for Insufficient Evidence

Defendant contends that the trial court erred by denying her motion to dismiss the six charges of identity theft for insufficient evidence that Defendant "intended to represent that she was either Janice Mooney or Kathryn Griffin, or anyone other than herself, in any of these transactions."

Preservation of Argument for Appellate Review

[1] As a preliminary matter, we address the State's contention that Defendant's argument is not properly before us because Defendant's motion at trial only challenged the two counts of identity theft related to Kathryn Griffin and presented a different argument than Defendant now raises on appeal.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). A general motion to dismiss for insufficient evidence

2. File number 15 CRS 52497 included four counts of identity theft (two counts for using Griffin's credit card information at Aaron's and two counts for using Mooney's credit card information at Aaron's). File number 17 CRS 111 included two counts of identity theft for using Mooney's credit card information at First Class Tanning.

preserves a defendant's arguments on all elements of all charged offenses, even if the defendant proceeds to specifically argue about fewer than all of the elements or charges. *State v. Pender*, 243 N.C. App. 142, 153, 776 S.E.2d 352, 360 (2015). If, however, a defendant's motion to dismiss does not present a general challenge, and instead only challenges the sufficiency of the evidence of specific elements of specific offenses, the defendant preserves for appellate review only those arguments as to the specified elements of the specified offenses. *State v. Walker*, 252 N.C. App. 409, 413, 798 S.E.2d 529, 532 (2017).

Moreover, "the law does not permit parties to swap horses between courts in order to get a better mount before an appellate court." *Geoscience Grp., Inc. v. Waters Constr. Co.*, 234 N.C. App. 680, 691, 759 S.E.2d 696, 703 (2014) (internal quotation marks and citation omitted). "Consequently, when a defendant presents one argument in support of her motion to dismiss at trial, she may not assert an entirely different ground as the basis of the motion to dismiss before this Court." *State v. Chapman*, 244 N.C. App. 699, 714, 781 S.E.2d 320, 330 (2016) (citation omitted).

In this case, at the close of the State's evidence, Defendant moved to dismiss the two charges of identity theft which pertained to Kathryn Griffin, based on the argument that there was no evidence that those transactions were not authorized by Ms. Griffin, stating:

> Well, I think, at this time, it would be appropriate for me to make a motion. I don't know that I wish to be heard on all of the charges in the indictments, but there are some of them I would like to specifically . . . talk to the Court about.
>
> . . . .
>
> . . . . And those charges would deal with – in 15 CRS 52497, Ms. Carter is charged with numerous counts that deal with a Wells Fargo Bank Visa card that Ms. Kathryn Griffin was the holder of. . . .
>
> . . . .
>
> So the counts I pointed out there in 15 CRS 52497, financial card fraud being one; obtaining property being one; identity theft being one; I don't think any evidence about obtaining property by false pretense. I don't think there's been any evidence, if you take it in the light most favorable to the State, that those transactions

> weren't authorized by Ms. Griffin. And we would ask the Court to dismiss those. I don't wish to be heard as to the other charges.

Defendant renewed her motion to dismiss at the close of all of the evidence, "rel[ying] upon [her] earlier arguments," and her motion was denied.

Defendant does not raise the same argument on appeal, however. Instead, Defendant now argues that the trial court erred by denying her motion to dismiss the six charges of identity theft for insufficient evidence that Defendant "intended to represent that she was either Janice Mooney or Kathryn Griffin[.]" Defendant failed to preserve any argument as to the four charges of identity theft pertaining to Mooney. Likewise, Defendant failed to preserve the specific argument—that there was insufficient evidence that Defendant intended to represent that she was Griffin—which she now seeks to make on appeal. We thus decline to reach the merits of her argument. *See Chapman*, 244 N.C. App. at 714, 781 S.E.2d at 330.

Defendant argues that "[t]he interest of justice would be served if this Court reviewed the sufficiency of the evidence in this case" by invoking Rule 2 of the Appellate Rules to suspend or vary the preservation requirements.

An appellate court may address an unpreserved argument "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2. However, "the authority to invoke Rule 2 is discretionary, and this discretion should only be exercised in exceptional circumstances in which a fundamental purpose of the appellate rules is at stake." *Pender*, 243 N.C. App. at 148-149, 776 S.E.2d at 358 (internal quotation marks, citations, and ellipsis omitted). This case does not involve exceptional circumstances, and we, in our discretion, decline to invoke Rule 2.

Ineffective Assistance of Counsel

[2] Alternatively, Defendant argues that her trial counsel provided ineffective assistance of counsel ("IAC") by failing to preserve this argument for appellate review.

Claims of ineffective assistance of counsel generally should be considered through motions for appropriate relief. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, we may decide the merits of this claim because the trial transcript reveals that no further investigation is required. *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)) ("[IAC] claims brought on direct review will be decided

on the merits when the cold record reveals that no further investigation is required . . . .").

To prevail on a claim for IAC, a defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Banks, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

To establish whether an attorney's error satisfies the first prong of *Strickland*, a defendant must overcome the strong presumption that defense counsel's conduct falls within the wide range of reasonable professional assistance. *State v. McNeill*, 371 N.C. 198, 219, 813 S.E.2d 797, 812-13 (2018) (internal quotation marks and citation omitted).

Defendant argues on appeal that Defendant's motion to dismiss would have been granted at trial because the State did not put on evidence that Defendant used the names of the two credit card holders, Griffin and Mooney, when she used their credit card information to make purchases. We disagree.

Denial of a motion to dismiss is proper if there is substantial evidence of each essential element of the offense and that the defendant was the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (internal quotation marks and citation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Jones*, 367 N.C. 299, 304, 758 S.E.2d 345, 349 (2014) (internal quotation marks and citation omitted) (explaining that evidence may be direct, circumstantial, or both). When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and give the State the benefit of "every reasonable inference supported by that evidence." *Id.*

A person is guilty of identity theft when she (1) "knowingly obtains, possesses, or uses identifying information of another person, living or

dead," (2) "with the intent to fraudulently represent that [she] is the other person for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences . . . ." N.C. Gen. Stat. § 14-113.20(a) (2015). Identifying information includes credit card numbers. N.C. Gen. Stat. § 14-113.20(b)(5) (2015).

"[I]ntent is seldom provable by direct evidence and ordinarily must be proved by circumstances from which it may be inferred." *State v. Hardy*, 299 N.C. 445, 449, 263 S.E.2d 711, 714 (1980). In *Jones*, the Supreme Court applied this well-settled principle to determining fraudulent intent for identity theft: "Based upon the evidence that [defendant] had fraudulently used other individuals' credit card numbers, a reasonable juror could infer that he possessed [the victims'] credit card numbers with the intent to fraudulently represent that [defendant] was those individuals for the purpose of making financial transactions in their names." *Id.* at 305, 758 S.E.2d at 350 (internal quotation marks and citation omitted).

Our Supreme Court also specifically addressed in *Jones* whether a literal interpretation of the "in the other person's name" language in the identity-theft statute is required to establish fraudulent intent. *See id.* at 306, S.E.2d at 350; N.C. Gen. Stat. § 14-113.20(a) ("with the intent to fraudulently represent that [she] is the other person for the purposes of making financial or credit transactions *in the other person's name*") (emphasis added). The defendant gave merchants fictitious names that were different from the card holders' names when making purchases with victims' credit card numbers. *Jones*, 367 N.C. at 305-06, 758 S.E.2d at 350. The defendant argued that N.C. Gen. Stat. § 14-113.20(a) required the State to prove that the defendant intended to represent to the merchants *that he was* each of the victims, "and not some other individual or an authorized user." *Id.* at 306, 758 S.E.2d at 350. The Court rejected this argument, explaining:

> We generally construe criminal statutes against the State. However, this does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing common sense and legislative intent. Where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, . . . the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. We cannot conclude that the Legislature intended for individuals to escape criminal

> liability simply by stating or signing a name that differs from the cardholder's name. Such a result would be absurd and contravene the manifest purpose of the Legislature to criminalize fraudulent use of identifying information.

Id. (internal quotation marks and citation omitted). "Because the State's evidence was sufficient to raise an inference of [the defendant's] fraudulent intent in possessing [the victims'] credit card numbers, the trial court did not err by denying [the defendant's] motion to dismiss the charge of identity theft." *Id.*

This case is analogous to *Jones*. Here, Defendant argues that this Court must strictly construe the statute and require the State to present evidence that Defendant intended to fraudulently represent that she *was* Griffin and Mooney for the purposes of making financial or credit transactions *in their names*. Defendant contends that she did not purport to the merchants to be Griffin or Mooney when she presented their credit card information, as Defendant did not verbalize or sign the victims' names when making the purchases. Defendant bolsters her argument by emphasizing that the Aaron's and First Class Tanning employees who processed the transactions were familiar with Defendant personally.

Notwithstanding the merchants' familiarity with Defendant, the State presented evidence that Defendant presented credit card information belonging to Griffin and Mooney in order to conduct transactions with the merchants. The State's evidence included Defendant's hand-written confession, testimony of Aaron's and First Class Tanning employees involved in the transactions, receipts for payments made at Aaron's, chargeback documents for the four Aaron's transactions, credit card statements and receipts for Griffin, bank records and a fraud statement for Mooney, and testimony by the investigating officers.

In light of this evidence that Defendant fraudulently used Griffin's and Mooney's credit card information, a reasonable juror could infer from the circumstances that Defendant possessed this information with the intent to fraudulently represent that she was Griffin and Mooney for the purpose of making financial transactions in their names, *see Hardy*, 299 N.C. at 449, 263 S.E.2d at 714, even if Defendant did not explicitly state the card holders' names or sign the credit card receipts in their names, *see Jones*, 367 N.C. at 306, 758 S.E.2d at 350. As the Supreme Court explained in *Jones*, a literal interpretation of the "in the other person's name" language in the identity-theft statute is not required, and demanding it here would lead to an absurd result—a person who fraudulently uses identifying information could "escape criminal liability

simply by stating or signing a name that differs from the cardholder's name." *Jones*, 367 N.C. at 306, 758 S.E.2d at 350.

Because the State presented substantial evidence of fraudulent intent, the trial court would have denied Defendant's motion to dismiss for insufficient evidence even if presented with this argument. Accordingly, defense counsel did not commit error, much less a serious error falling below the reasonableness standard set forth in *Strickland*, by failing to assert this futile argument. Defendant's argument that she was denied effective assistance of counsel is meritless.

B. Jury Instruction

[3] Defendant argues that the trial court committed reversible error by instructing the jury on Defendant's prior false or contradictory statements. Defendant contends that the instruction impugned her character and on this basis requests a new trial.

This Court reviews challenges to a trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Under a de novo review, this Court "considers the matter anew and freely substitutes its judgment" for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). Generally, a new trial is required if an error in jury instructions is prejudicial. *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009). Prejudice is established by a showing that " 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *Id.* (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

"Our Supreme Court has held that false, contradictory, or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate himself." *State v. Scercy*, 159 N.C. App. 344, 353, 583 S.E.2d 339, 344 (2003) (citations omitted). "The probative force of such evidence is that it tends to show consciousness of guilt." *Id.* (citation omitted).

A trial court may only use a jury instruction to this effect if the defendant's statement is relevant to proving that she committed the crime

and indeed provides "substantial probative force, tending to show consciousness of guilt." *State v. Walker*, 332 N.C. 520, 537, 422 S.E.2d 716, 726 (1992). "The instruction is proper not only where defendant's own statements contradict each other but also where defendant's statements flatly contradict relevant evidence." *Id.* at 537-38, 422 S.E.2d at 726. The instruction is inappropriate if it fails to make clear to the jury that the falsehood does not create a presumption of guilt. *State v. Myers*, 309 N.C. 78, 88, 305 S.E.2d 506, 512 (1983).

In Defendant's first statement to Blanton at the police station, she initially denied the crime and blamed it on her ex-boyfriend. However, in her second, hand-written statement, Defendant expressly stated:

> [T]o whom it may concern, I would like to admit to the fraudulent transactions . . . . These transactions were completed . . . by myself . . . . I obtained these numbers through an at-home job I was working. I have had these two numbers for about a year and never used. At the time of getting these, I had intentions of using them but never did because I rethought my actions. Then I was backed into a corner and didn't think – I am very sorry for my actions and will do what is necessary to keep from being prosecuted.

Thus, the trial court did not err in determining that Defendant made two conflicting statements. The trial court gave the following pattern jury instruction on false, contradictory, or conflicting statements by the defendant:

> The State contends, and the defendant denies, that the defendant made false, contradictory, or conflicting statements. If you find that the defendant made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience seeking to divert suspicion or exculpate the person, and you should consider that evidence, along with all other believable evidence in this case. However, if you find that the defendant made such statements, they do not create a presumption of guilt and such evidence standing alone is insufficient to establish guilt.

See N.C.P.I.—Crim. 105.21 (2017).[3]

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3. North Carolina Pattern Jury Instruction 105.21 contains the following note: *NOTE WELL: This instruction is ONLY proper where the defendant's statements and/or trial testimony is contradictory to highly relevant facts proven at trial. HOWEVER, this*

In this case, it was proper for the jury to consider the existence of Defendant's false, contradictory, and conflicting statements as "a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [her] self." *Scercy*, 159 N.C. App. at 353, 583 S.E.2d at 344. In her first statement to police, Defendant sought to exculpate herself by blaming her ex-boyfriend. Not only was Defendant's second statement contradictory to the first, but it was relevant to proving that she committed the crime, and it indeed provided "substantial probative force, tending to show consciousness of [her] guilt." *Walker*, 332 N.C. at 537, 422 S.E.2d at 726. Use of this jury instruction on these facts is consistent with the Supreme Court's application of the instruction because Defendant's own statements contradicted each other and they flatly contradicted evidence presented at trial. *See id.* at 537-38, 422 S.E.2d at 726. Moreover, the trial court made clear in the jury instruction that the statements "d[id] not create a presumption of guilt[,] and such evidence standing alone is insufficient to establish guilt." *Myers*, 309 N.C. at 88, 305 S.E.2d at 512. For these reasons, we conclude that the instruction was proper.

IV. Conclusion

We conclude that the trial court did not err by denying Defendant's motion to dismiss for insufficient evidence of identity theft or by instructing the jury regarding false or contradictory statements.

NO ERROR.

Judges BRYANT and YOUNG concur.

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instruction should NOT be used if the statements are completely irrelevant and without substantial probative force in tending to show a consciousness of guilt. EXTREME care should be used in first degree murder cases as such evidence may not be considered as tending to show premeditation and deliberation. . . . EXTREME care should also be taken to insure that the defendant's Fifth Amendment right to remain silent is not used against the defendant. N.C.P.I.—Crim. 105.21 (2017) (emphasis in original). As explained in Discussion, Part B, Defendant's contradictory statements are highly relevant to proving Defendant's "possess[ion] of a guilty conscience seeking to divert suspicion and to exculpate [her]self." *Scercy*, 159 N.C. App. at 353, 583 S.E.2d at 344. Thus, the jury instruction does not run afoul of the prohibitions or cautions contained in this note.

STATE OF NORTH CAROLINA
v.
THOMAS EUGENE CRANE, DEFENDANT

No. COA19-369

Filed 7 January 2020

Appeal and Error—waiver—invited error—admission of testimony—prosecution for driving while impaired

In a prosecution for driving while impaired after defendant crashed his moped into a car on the highway, defendant waived appellate review of his argument that the trial court committed plain error by admitting an officer's testimony about how and where the accident occurred. Defendant elicited the officer's testimony on cross-examination and even gave similar testimony when he took the witness stand, so any resulting error was invited error.

Appeal by Defendant from judgment entered 23 October 2018 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 17 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Defendant-Appellant.

COLLINS, Judge.

Defendant Thomas Eugene Crane raises one evidentiary issue on appeal from judgment entered upon a jury verdict of guilty of driving while impaired. Because Defendant has waived appellate review of this issue due to invited error, we dismiss the appeal.

I. Procedural History

Defendant was issued a citation for driving while impaired on 28 November 2015. He pled no contest to the offense in Macon County District Court on 17 January 2017 and was sentenced to 12 months' imprisonment, suspended for 36 months' probation. Defendant appealed to Macon County Superior Court. After a jury trial, the jury found Defendant guilty of driving while impaired. The trial court sentenced

Defendant to 10 months' imprisonment. Defendant gave notice of appeal in open court.

II. Factual Background

The State's evidence tended to show that Defendant was driving a moped on U.S. Highway 23 on 28 November 2015 at around 8:30 p.m., when he was struck by a car. When North Carolina State Highway Patrol Trooper Jonathan Gibbs arrived at the scene of the accident, emergency personnel were talking with Defendant and preparing to place him in an ambulance. The moped was in the grass to the right side of the road and was inoperable. Gibbs spoke with Defendant after he had been placed in the ambulance and noted that Defendant's eyes were red and glassy and that he had a strong odor of alcohol on his breath. When Gibbs asked Defendant if he had been drinking, Gibbs admitted to having "some drinks throughout the day." Defendant refused to take a portable breath test.

Gibbs also interviewed the driver of the car, who explained that he was driving about 40 miles per hour in the right lane of the highway when he came upon "a dim red light" that he believed was a tail light "all of the sudden in the right-hand lane." Although the driver of the car braked and swerved to the left, his car struck the moped.

Gibbs investigated the crash, making observations of the road and the vehicles and taking measurements that he later used to create a diagram and a crash report. Gibbs visited Defendant at the hospital, again detecting an odor of alcohol on his breath. When Gibbs asked Defendant for the second time if he had been drinking, Defendant admitted to having "some mixed drinks" and that he "did not stop drinking until after dark that night." Gibbs issued Defendant a citation for driving while impaired. Based upon results of a blood test performed at the hospital, it was later determined that Defendant's blood alcohol concentration was 0.16 grams of alcohol per 100 milliliters of whole blood.

III. Discussion

Defendant argues that the trial court plainly erred by admitting into evidence Gibbs' testimony about how and where the accident occurred. Defendant contends that this was improper lay opinion testimony because Gibbs did not witness the accident, and it was not admissible as expert testimony because Gibbs was not qualified as an expert in accident reconstruction.

The State argues that Defendant has waived his right to appellate review of this issue due to invited error. We agree.

"A defendant is not prejudiced by . . . error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443 (2018). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001). "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) (citation omitted). Moreover, where a defendant himself offered testimony that is similar to the testimony from the witness that defendant challenges on appeal, the defendant has waived his right to appellate review of any error that may have resulted from the admission of the challenged testimony. *State v. Steen*, 226 N.C. App. 568, 576, 739 S.E.2d 869, 876 (2013).

In this case, Defendant challenges the following testimony by Gibbs: (1) the moped was being driven in the right-hand lane at the time of the collision, and (2) the tire marks Gibbs observed indicated the point of impact. However, Gibbs did not give this challenged testimony on direct examination. Gibbs' testimony on direct examination about the observations and measurements he made at the scene of the accident included the following:

> [State]: And what happened when you got that call?
>
> [Gibbs]: I received a call from our communications center about a motor vehicle accident involving a moped and a car. When I arrived there was first responders, EMS, was already on the scene. Whenever I got out I noticed the moped was off to the right of the road, over in the grass. And a car was on up the road past that with its flashers on. When I exited the vehicle, my vehicle, I went up and was talking to EMS. At that time they was working with [Defendant] trying to get him into the ambulance.
>
> . . . .
>
> [State]: And after you spoke with the other driver, what happened?
>
> [Gibbs]: After that I got the measurements and everything I needed for that wreck. I got the wrecker to come for the moped. The driver of the vehicle 1, Mr. Warner, his vehicle was still -- he was going to have the other, the tow company, Ridgecrest Towing, it was still drivable. He was going to be able to get it to where he could still drive

home and not need a wrecker. Once that took place, I left there and went to the hospital to see [Defendant].

. . .

[State]: And the vehicle, this moped, could you kind of describe it for the jury?

[Gibbs]: At the time it was laying, the moped, was laying on its side over in the grass. It was a small, small moped. I think it was a TaoTao 2012 moped. Yes, 2012. And the moped itself would not be drivable in the condition that it was in from the wreck.

During cross-examination, defense counsel questioned Gibbs more about his observations and measurements at the scene of the accident:

[Defense Counsel]: Okay. And did you at some point then create some sort of diagrams that describe in effect the collision?

[Gibbs]: A diagram, yes, we -- yes.

[Defense Counsel]: And you do one just by hand basically?

[Gibbs]: We got one that we do which is – what that's for is it's at scene measurements diagram, yes.

[Defense Counsel]: And do you take the same information to create something on some sort of true graphic using some sort of software or something?

[Gibbs]: Yes.

[Defense Counsel]: And that's the same data that goes into both graphic depictions of the collision?

[Gibbs]: That would be correct. We would use the measurement sheet that we do on the side of the road, it's just a sketch to, you know, have all the like road width measurements and that stuff to later be entered into the what's called eCrash. It's a crash site that we use.

[Defense Counsel]: Okay. *And was it your conclusion that at the time of the collision the moped was in the middle of the right-hand lane traveling north?*

[Gibbs]: It was in the right-hand lane, yes, traveling north.

It is apparent from the transcript that the first challenged item of Gibbs' testimony—that the moped was being driven in the right-hand land at the time of the collision—was elicited by defense counsel during cross-examination. As a result, even if it would otherwise have been error to allow Gibbs to testify to the location of the vehicles in an accident without being tendered as an expert, the error was invited by Defendant, and thus Defendant cannot be prejudiced as a matter of law. *See Gobal*, 186 N.C. App. at 319, 651 S.E.2d at 287. *See State v. Rivers*, 324 N.C. 573, 575-76, 380 S.E.2d 359, 360 (1989) (citation omitted) (holding that defendant waived appellate review of a challenge to the admissibility of testimony because defense counsel elicited the testimony during cross-examination of the witness and failed to object to the testimony at trial). As a result of Defendant's invited error, he has waived appellate review of this testimony, including plain error review. *See Barber*, 147 N.C. App. at 74, 554 S.E.2d at 416.

The State then asked Defendant on cross-examination about the testimony that Gibbs had already provided, as elicited by defense counsel:

> [State]: And you heard Trooper Gibbs testify that based on his investigation he believed your moped to be in the middle of the lane at the time of the impact, correct, you heard him say that?
>
> [Defendant]: That what he said on the stand but that's not . . . what he told my daughter and I. . . .
>
> . . . .
>
> The only conclusion I can draw from why he hit me is that he said he jerked it when he seen me. He had to be over on the shoulder when he first seen me. Because when he jerked it back, that's when he just barely missed me walking and hit the scooter.
>
> [State]: So to be clear, you're saying that he had to have been off over the white line in order to hit you?
>
> [Defendant]: Yes.
>
> [State]: Okay.
>
> [Defendant]: I'm not saying he had to be but that's the most logical conclusion that – because I know where I was at. Mr. Gibbs met my daughter and I out at the accident scene after I was released from the hospital. He helped us look

> for my keys that had flown out of the scooter for an hour, for about a good hour. At that point in time he showed me exactly *where the impact had taken place* because there was *two big black marks* right out to the side like that. And I couldn't understand why they were out to the side. *And he said that was where the tire exploded when the impact was made.* And it was that far from the white line, not nowhere near the middle of the road.

Thus, it is also apparent from the transcript that Defendant offered testimony about Gibbs' identification of the point of impact based on the tire marks. On rebuttal, the State echoed Defendant's testimony when asking Gibbs about his observation of tire marks:

> [State]: Trooper, when you conducted your wreck investigation did you see any tire marks in the roadway at the point of impact?
>
> [Gibbs]: Yes, sir.
>
> [State]: Where were those tire marks?
>
> [Gibbs]: In the center lane, as I diagram[m]ed on a HP-49A that is done at the scene of the investigation.

Defendant cannot now challenge Gibbs' rebuttal testimony regarding the point of impact based on the tire marks because Defendant himself had already offered testimony of similar character. *See Steen*, 226 N.C. App. at 576, 739 S.E.2d at 876. Defendant has thus waived appellate review of any error that may have resulted from the admission of this challenged testimony. *See id.*

IV. Conclusion

Because any error in admitting the officer's testimony was invited error, Defendant waived all review, including plain error review. Accordingly, Defendant's appeal is dismissed.

DISMISSED.

Judges ARROWOOD and HAMPSON concur.

STATE v. HOQUE

[269 N.C. App. 347 (2020)]

STATE OF NORTH CAROLINA
v.
EHTASHAM M. HOQUE, DEFENDANT

No. COA19-134

Filed 7 January 2020

1. Motor Vehicles—driving while impaired—sufficiency of evidence—signs of intoxication and odor of alcohol—controlled substances in blood—refusal to submit to intoxilyzer test

The State presented sufficient evidence to convict defendant of driving while impaired where a police officer found defendant slumped over and apparently sleeping in his car, which was idling in the middle of the road; officers detected a strong odor of alcohol on defendant's breath and observed other signs of intoxication; and defendant failed field sobriety tests. In addition, the presence of controlled substances in defendant's blood and defendant's refusal to submit to an intoxilyzer test each separately constituted sufficient evidence of impairment.

2. Police Officers—resisting a public officer—sufficiency of evidence—driving while impaired—blood draw

The State presented sufficient evidence to convict defendant of resisting a public officer where defendant resisted officers while they were attempting to investigate whether defendant had been driving while impaired, while they were arresting him for driving while impaired, and while they were attempting to execute a warrant to draw his blood.

3. Alcoholic Beverages—possession of an open container—sufficiency of evidence—open vodka bottle between driver's legs

The State presented sufficient evidence to convict defendant of possessing an open container of alcohol where officers observed an open bottle of vodka between defendant's legs while defendant was slumped over and apparently sleeping in the driver's seat of a running car that was idling in the middle of the road. The amount of alcohol missing from the container was irrelevant, and the fact that the officer poured out the container's contents went to the weight of the evidence rather than its sufficiency.

4. Search and Seizure—driving while impaired—blood draw—use of force—reasonableness

Police officers' use of force—pinning defendant to a hospital bed—to assist a nurse in taking a blood sample from defendant pursuant to a search warrant, when defendant refused to comply, was objectively reasonable and did not violate his Fourth Amendment rights.

5. Motor Vehicles—driving while impaired—blood draw—qualified person

In a driving while impaired case, the trial court's findings that police officers had a search warrant to obtain a blood sample from defendant, took defendant to the emergency room, and witnessed a nurse perform the blood draw were sufficient to support the conclusion that a qualified person (pursuant to N.C.G.S. § 20-139.1(c)) drew defendant's blood—even though the officers could not identify the nurse by name or offer evidence to prove her qualifications.

6. Appeal and Error—abandonment of issues—no citation to legal authority

Defendant's argument, that the trial court abused its discretion by admitting a vodka bottle that police officers had poured out, was deemed abandoned because defendant cited no legal authority in support of his argument.

7. Police Officers—body cameras—failure to use—during forced blood draw—due process rights

In a driving while impaired case, police officers' failure to use their body cameras, pursuant to department policy, during defendant's forced blood draw did not deny defendant his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). It could not be said that the State suppressed body camera evidence where none existed in the first place; further, defendant could not show that a body camera recording of the blood draw would have been favorable to him.

Appeal by Defendant from judgments entered 5 September 2018 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 22 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorneys General Kathryne E. Hathcock and Jonathan E. Evans, for the State-Appellee.

Arnold & Smith, PLLC, by Paul A. Tharp, for Defendant-Appellant.

COLLINS, Judge.

Defendant Ehtasham Hoque appeals from judgments entered upon jury verdicts of guilty of driving while impaired and resisting a public officer, and responsible for possessing an open container of alcoholic beverage. Defendant argues that the trial court (1) erred by denying his motion to dismiss; (2) erred by denying his motion to suppress; (3) abused its discretion by admitting certain evidence; and (4) erred in determining that law enforcement officers did not violate his constitutional rights. We discern no error or abuse of discretion.

I. Procedural History

On 16 April 2018, Defendant was indicted for driving while impaired ("DWI"), resisting a public officer, and driving a motor vehicle on a highway with an open container of alcoholic beverage after drinking. A trial commenced on 4 September 2018. On the second day of the trial, Defendant filed a motion to suppress the results of a chemical analysis of Defendant's blood and requested special jury instructions on spoliation of evidence, specifically a vodka bottle and body-camera recordings. The trial court denied Defendant's motion to suppress the blood test results, agreed to give a spoliation instruction for the vodka bottle, and refused to give a spoliation instruction for the body-camera recordings. At the close of the State's evidence, Defendant made a motion to dismiss all charges for insufficient evidence. The trial court granted the motion as to misdemeanor possessing an open container after drinking, allowing an infraction charge of possession of an open container to go forward. The trial court denied the motion to dismiss as to the charges of DWI and resisting a public officer. On 5 September 2018, the jury found Defendant guilty of DWI and resisting a public officer, and responsible for possessing an open container.

The trial court entered judgment upon the jury's verdicts. Defendant timely appealed.

II. Factual Background

The State's evidence tended to show the following: At around 6:00 a.m. on 20 February 2018, Officer Joshua Richard of the Shelby Police Department was dispatched in response to a call reporting a stationary car in the middle of Earl Street. Upon his arrival, Richard observed a beige Toyota Prius in the "dead middle of the roadway" with its headlights turned on and the engine running. Richard approached the car and observed a male, later identified as Defendant, "slumped over appearing

to be asleep in the driver's seat." Richard did not see any other passengers in the car. When Richard knocked on the driver's side window, Defendant would not speak to him. Richard asked Defendant to roll down his window, but Defendant refused. Richard opened the door, asked Defendant his name, and engaged Defendant in conversation. Richard observed that Defendant was "groggy" and his breath smelled of alcohol.

While waiting for other officers to arrive, Richard tried to determine Defendant's name. Defendant produced a bank card as his only form of identification. Richard saw an open New Amsterdam vodka bottle in between Defendant's legs. Defendant then "revved his engine very high" and "pressed the gas." After Richard turned the engine off by depressing the keyless push-button, Defendant tried to restart the car several times. Richard realized he had not turned on his chest-mounted body camera, so he activated it at that time.

Defendant asked if he could pull the car forward and attempted to start the car "a couple more times," despite Richard telling him to stop. Defendant also stated that he was at home; Richard explained to Defendant that he was actually in the middle of the road. Richard observed that Defendant appeared "disheveled" and that his "eyes were very glossy and bloodshot-appearing."

Officers Smith, Kallay, Torres, and Hill arrived on the scene and activated their body cameras. Smith observed Defendant sitting in the driver's seat of the car and engaged Defendant in conversation. Defendant told Smith that "he had just a few sips [of alcohol] just a couple hours ago." Smith smelled a "very strong odor of alcohol" on Defendant's breath and noticed that Defendant's eyes were red and glassy, and that his movements were slow and labored. Smith thought Defendant's movements were labored due to alcohol consumption. Upon Smith's request, Defendant got out of the car for field sobriety testing. Smith performed a horizontal gaze nystagmus test; Defendant failed, showing all six signs of impairment. Defendant also failed a vertical gaze nystagmus test, which led Smith to believe that Defendant was "significantly high."

While Smith was performing the field sobriety tests, Torres observed that Defendant was "very slow to react" and had "red, glassy eyes" and "slurred speech." Defendant did not understand where he was or what time it was, and he had a hard time answering questions. Torres saw the open alcohol bottle between Defendant's legs.

Smith asked Defendant to provide a breath sample on the portable alcosensor. Although Defendant initially agreed, he refused 10 to 12 times when asked to give a sample. Defendant repeatedly placed

his hands in his pockets, which Smith told him not to do. Because Defendant was making Smith feel concerned for his own safety, Smith grabbed Defendant's right wrist to pull it out of Defendant's pocket and said, "The games are over. We're not going to put our hands back in our pockets anymore." After Defendant refused one last opportunity to provide a breath sample, Smith began to arrest him.

Because Defendant "tensed up" and "pulled his arms back," Richard and Torres assisted Smith in placing Defendant under arrest. Defendant continued to struggle with the officers, fell down to his knees, and began shouting and crying. Smith and Torres adjusted Defendant's handcuffs, and Defendant stopped shouting and crying. When Smith and Torres tried to place Defendant into the patrol car, Defendant was uncooperative and would not put his legs in the car. Torres grabbed Defendant's legs, placed them inside the car, and shut the door. Torres smelled alcohol on Defendant's breath. Kallay retrieved the vodka bottle and gave it to Smith. Smith poured the liquid out of the bottle in accordance with the police department's common practice and placed the bottle in the patrol car. After Defendant was in the back of the patrol car, Smith turned off his body camera.

Smith transported Defendant to the Law Enforcement Center annex for a chemical analysis of his breath and explained Defendant's implied consent rights to him. Smith did not have his body camera turned on while at the Law Enforcement Center annex, in violation of his department's policy. Defendant refused to sign the implied rights form and did not request an attorney. Smith gave Defendant one more opportunity to submit a breath sample. Defendant did not put his mouth on the intoxilyzer machine or attempt to blow. After Smith marked Defendant as refusing to provide a breath sample, Smith obtained a search warrant for Defendant's blood from the magistrate.

Smith transported Defendant to the hospital to have a blood sample taken. At the hospital, Defendant told the nurse that she did not have his permission to take his blood. Hospital staff told Smith that Defendant would need to be held down for the blood draw, because he was refusing to cooperate, despite the search warrant. Smith and Kallay placed Defendant in handcuffs and placed him on his stomach. Because Defendant was "somewhat combative and did not want his blood drawn," two nurses assisted the officers in holding Defendant down, and a nurse was able to draw Defendant's blood.

Defendant testified that he did not refuse to provide a blood sample but was only asking to see the search warrant. He also testified that a doctor and a nurse were in the hospital room with him when his blood

was collected. He said, "They forced me to the table. Not forced. They asked me to lay down." He also testified that unknown persons got on top of him, forced his head into a pillow, and forcibly drew his blood.

A chemical analysis of Defendant's blood by technicians at the North Carolina State Crime Laboratory revealed a blood alcohol concentration of 0.07 and the presence of the following substances: cannabinoids (specifically the substances tetrahydrocannabinol ("THC") and tetrahydrocannabinol carboxylic acid ("THCA")), amphetamine, and methamphetamine.

III. Issues Presented

Defendant presents the following issues on appeal: (1) the trial court erred by denying his motion to dismiss for insufficient evidence of each offense; (2) the trial court erred by denying his motion to suppress the results of the blood test; (3) the trial court abused its discretion by allowing into evidence the vodka bottle that police officers had emptied at the scene of the arrest; and (4) the trial court erred in determining that the officers' "intentional suppression" of body-camera recording evidence did not violate Defendant's constitutional rights.

IV. Discussion

A. Motion to Dismiss

Defendant first argues that the trial court erred by denying his motion to dismiss for insufficient evidence of each charge.

Upon a motion to dismiss for insufficient evidence, the trial court must determine whether the State presented "substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "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) (internal quotation marks and citation omitted). The trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000). 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).

1. Driving While Impaired

[1] Defendant argues that the trial court erred by denying his motion to dismiss the DWI charge, because the State failed to present sufficient evidence that Defendant drove a vehicle and was impaired.

Under N.C. Gen. Stat. § 20-138.1(a):

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

N.C. Gen. Stat. § 20-138.1(a) (2018).

A person "drives" within the meaning of the statute if he is "in actual physical control of a vehicle which is in motion or which has the engine running." N.C. Gen. Stat. § 20-4.01(7) and (25) (2018) (noting that the terms "operator" and "driver" are synonymous). *See State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985) (holding that defendant sitting behind the wheel of a car in the driver's seat with the engine running drove within the meaning of the statute, even though defendant claimed that the car was running only to heat the car). An individual who is asleep behind the wheel of a car with the engine running is in actual physical control of the car, thus driving the car within the meaning of the statute. *State v. Mabe*, 85 N.C. App. 500, 504, 355 S.E.2d 186, 188 (1987).

In this case, when Richard responded to a call reporting a stationary vehicle on the road, he found Defendant in the driver's seat of the vehicle with the headlights on and the engine running. Initially, Defendant appeared to be asleep. When Richard was able to engage Defendant in conversation, Defendant asked if he could pull his car forward and repeatedly revved the engine. No other passengers were in the car. When Richard asked Defendant to exit the car, Defendant exited from the driver's side. This evidence was sufficient to establish that Defendant drove the car within the meaning of the statute. *See Fields*, 77 N.C. App. at 406, 335 S.E.2d at 70; *Mabe*, 85 N.C. App. at 504, 355 S.E.2d at 188.

Defendant also argues that the State did not provide sufficient evidence that he was impaired, because his blood alcohol concentration

was less than 0.08, and he only failed the horizontal gaze nystagmus test due to a medical problem.

The acts of driving while under the influence of an impairing substance, driving with a blood alcohol concentration of 0.08, and driving with a controlled substance or its metabolites in one's blood or urine are three "separate, independent[,] and distinct ways by which one can commit the single offense of [DWI]." *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984) (emphasis omitted). The trial court only instructed the jury on the driving while under the influence of an impairing substance prong. Thus, the State need not have presented evidence that Defendant had a blood alcohol concentration of 0.08 or above in order to have presented sufficient evidence of DWI. *See id.*

"The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol." *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002) (citations omitted). Additionally, a defendant's blood alcohol concentration or the presence of any other impairing substance in the defendant's body, as shown by a chemical analysis, and a defendant's refusal to submit to an intoxilyzer test are admissible as substantive evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(a) (2018) (chemical analysis); N.C. Gen. Stat. § 20-139.1(f) (2018) (intoxilyzer refusal). An impairing substance is defined as alcohol, a controlled substance, "any other drug or psychoactive substance capable of impairing a person's physical or mental faculties," or any combination of these substances. N.C. Gen. Stat. § 20-4.01(14a) (2018). Amphetamine, methamphetamine, marijuana, and tetrahydrocannabinols are controlled substances, *see* N.C. Gen. Stat. §§ 90-89, 90-94 (2018), and are thus impairing substances within the meaning of the statute.

Here, Richard testified that he found Defendant slumped over and apparently sleeping in the driver's seat. Richard, Smith, and Torres detected a strong odor of alcohol on Defendant's breath and observed that Defendant's speech was slurred and that his eyes were red, watery, glassy, and bloodshot. Richard and Torres saw an alcohol bottle between Defendant's legs. Defendant was confused and disoriented, and he admitted that he had consumed alcohol. Smith observed that Defendant's movements were labored. Smith conducted horizontal and vertical nystagmus tests, which Defendant failed. Smith testified that Defendant mentioned having eye trouble but also displayed erratic behavior, leading Smith to believe that Defendant was impaired. Because the officers' opinions that Defendant was impaired were not based solely on the odor

of alcohol, they were sufficient evidence of impairment. *See Mark*, 154 N.C. App. at 346, 571 S.E.2d at 871.

Additionally, the State presented a chemical analysis of Defendant's blood, which indicated that it contained alcohol, THC, THCA, amphetamine, and methamphetamine. This was sufficient evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(a). Moreover, the State also presented evidence that Defendant refused to submit to an intoxilyzer test, which was also sufficient evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(f).

Viewed in the light most favorable to the State, this evidence was sufficient to support the conclusion that Defendant was "under the influence of an impairing substance" at the time of the arrest. *See* N.C. Gen. Stat. § 20-138.1(a)(1). Because the State presented sufficient evidence of each element of the DWI offense, the trial court properly denied Defendant's motion to dismiss.

2. Resisting a Public Officer

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of resisting a public officer for insufficient evidence. Defendant contends that any negative interactions he had with the police were due to his confusion and pain at the time of his arrest.

"If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of" the offense of resisting a public officer. N.C. Gen. Stat. § 14-223 (2018). "The conduct proscribed under [N.C. Gen. Stat. §] 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties." *State v. Lynch*, 94 N.C. App. 330, 332, 380 S.E.2d 397, 398 (1989) (holding that defendant resisted officers by "continu[ing] to struggle after the officers apprehended him" for the purpose of identifying him). *See also State v. Burton*, 108 N.C. App. 219, 225, 423 S.E.2d 484, 488 (1992) (explaining that obstruction may be direct or indirect opposition or resistance to an officer lawfully discharging his duty, and holding that defendant resisted officers when he spoke in a "loud and hostile manner" while standing beside an officer's patrol car, because defendant's behavior interfered with the officer's attempt to use his radio to check the vehicle registration). The State "does not have to prove that the officer was permanently prevented from discharging his duties by defendant's conduct." *Id.*

In this case, Defendant impeded the officers' attempts to fulfill their duties at three different points. First, when Richard approached Defendant's car and asked Defendant to roll down his window so Richard could speak with him, Defendant refused. Defendant also attempted to start the car several times and revved the engine after Richard ordered him to stop. Defendant would not provide a breath sample when asked 10 to 12 times to do so. When Smith conducted the horizontal gaze nystagmus test, Defendant continued to place his hands in his pockets after being told several times to keep his hands down by his sides. Through these actions and his inaction, Defendant directly opposed the officers in their efforts to discharge their investigative duties of identifying him, speaking with him, and performing field sobriety tests. Thus, Defendant resisted the officers within the meaning of the statute, *see Lynch*, 94 N.C. App. at 332, 380 S.E.2d at 398, even though the officers were eventually able to fulfill their investigative duties, *see Burton*, 108 N.C. App. at 225, 423 S.E.2d at 488.

Defendant also resisted the officers while being arrested. Defendant "tensed up" and refused to cooperate when Smith tried to handcuff him, which required Smith, Richard, and Torres to work together to gain control of Defendant. Defendant then fell to the ground and started shouting and crying when the officers tried to move him to the patrol car. Defendant refused to place his legs inside the patrol car, so Torres had to grab Defendant's legs and put them inside the car in order to close the door. Thus, Defendant also resisted, delayed, and obstructed officers in their efforts to place him under arrest and put him in the patrol car. *See Lynch*, 94 N.C. App. at 332, 380 S.E.2d at 398.

Finally, Defendant resisted, delayed, and obstructed officers at the hospital when they attempted to execute a search warrant to draw blood. Defendant refused to give a nurse permission to draw his blood, so Smith placed Defendant on his stomach while Defendant was handcuffed. Because Defendant was still resisting the blood draw and was combative, Smith, Kallay, and two nurses held Defendant down in order to collect a blood sample. Thus, Defendant also resisted, obstructed, and delayed officers in their efforts to execute the search warrant. *See id.*

Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence that Defendant resisted, obstructed, and delayed public officers as they attempted to discharge their duties of investigation, arrest, and execution of a search warrant. Accordingly, the trial court did not err by denying Defendant's motion to dismiss this charge.

3. Possessing an Open Container

[3] Defendant also argues that the trial court erred by denying his motion to dismiss for insufficient evidence the offense of possessing an open container, because Richard testified that the bottle did not have a significant amount of alcohol missing from it, and Smith admitted pouring out the bottle's contents.

"No person shall possess an alcoholic beverage other than in the unopened manufacturer's original container, or consume an alcoholic beverage, in the passenger area of a motor vehicle while the motor vehicle is on a highway or the right-of-way of a highway." N.C. Gen. Stat. § 20-138.7(a1) (2018). In *State v. Squirewell*, 256 N.C. App. 356, 808 S.E.2d 312 (2017), this Court affirmed the denial of a defendant's motion to dismiss for insufficient evidence of possessing an open container. The Court based its holding on the following:

> Besides the evidence that there was an open can of beer near the console area of the vehicle defendant was driving, which was visible to the state trooper upon his approach to the driver's side of the vehicle, the evidence also showed that defendant initially provided the state trooper a false name, defendant's eyes were red and glassy, there was a strong odor of alcohol coming from the vehicle, and defendant's speech was slurred. The state trooper further testified that he had defendant come back to his patrol car for further questioning. At that time, the trooper noticed an odor of alcohol on defendant's breath . . . .

Id. at 363, 808 S.E.2d at 318.

The evidence in this case is similarly sufficient. Richard and Torres testified that they saw an opened bottle of New Amsterdam vodka in between Defendant's legs while Defendant was seated in the driver's seat of a running car parked on Earl Street. The officers testified that the bottle contained liquid, which Smith poured out at the scene of the arrest. Richard testified that he found Defendant slumped over and apparently asleep in the driver's seat. Richard, Smith, and Torres detected a strong odor of alcohol on Defendant's breath and observed that Defendant's speech was slurred and that his eyes were red, watery, glassy, and bloodshot. Smith observed that Defendant's movements were labored. Defendant was confused and disoriented, and he admitted that he had consumed alcohol.

Defendant argues that, because Richard testified that the bottle did not have a significant amount of alcohol missing when he found it, and Smith admitted pouring out the contents, that the State failed to present substantial evidence of the offense. However, the amount of alcohol missing from the container is irrelevant for purposes of this offense, because a container is opened "[i]f the seal on [the] container of alcoholic beverages has been broken." N.C. Gen. Stat. Section 20-138.7(f) (2018). Additionally, the fact that Smith poured out the contents of the container goes to the weight of the evidence, not its sufficiency.

Viewed in the light most favorable to the State, this was sufficient evidence that Defendant "possess[ed] an alcoholic beverage other than in the unopened manufacturer's original container." *See* N.C. Gen. Stat. § 20-138.7(a1). Accordingly, the trial court did not err by denying Defendant's motion to dismiss this offense.

B. Motion to Suppress

Defendant next argues that the trial court erred by denying his motion to suppress the results of the blood test.

As a threshold issue, the State argues that Defendant failed to preserve this issue for appellate review, because Defendant failed to move for suppression prior to trial. Although Defendant did not move for suppression prior to trial, the trial court, in its discretion, heard the motion and denied it on its merits. Defendant's argument is thus properly before us. *See State v. Detter*, 298 N.C. 604, 619, 260 S.E.2d 567, 579 (1979) (reviewing a constitutional question presented in defendant's motions to suppress despite their untimeliness, because the trial court considered and overruled them on their merits).

This Court reviews a trial court's ruling on a motion to suppress to determine whether the "underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the . . . ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We review a trial court's conclusions of law de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

1. Officers' Use of Force

[4] Defendant first argues that the trial court erred by denying his motion to suppress the results of the blood test, because Defendant's blood was drawn by excessive and unreasonable force, in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution.

In its written order denying the motion to suppress, the trial court included 72 paragraphs of interspersed findings of fact and conclusions of law. Findings relevant to the force used in connection with obtaining Defendant's blood sample include:

> 3. Officer Smith asked [Defendant] 10-12 times to blow into the alcosensor device.
>
> 4. [Defendant] never provided a sample for the portable breath test.
>
> 5. When officers attempted to handcuff [Defendant], he tensed up and the officers forced him onto the hood of a patrol vehicle.
>
> 6. [Defendant] was placed in handcuffs and put into a patrol car.
>
> 7. [Defendant] started screaming after he was handcuffed. Once the handcuffs were adjusted, he stopped screaming.
>
> 8. [Defendant] was transported to the law enforcement annex for an intoxilyzer test.
>
> 9. After being advised of his rights, [Defendant] refused to sign the rights form.
>
> 10. [Defendant] did not provide a breath sample. He never put his mouth on the tube or attempted to blow into the machine.
>
> 11. After asking [Defendant] multiple times to provide a breath sample, [O]fficer Smith recorded the result of the intoxilyzer test as a "Refusal."
>
> 12. Smith then prepared an application for a search warrant to take a blood sample from [Defendant].
>
> 13. After the magistrate issued the search warrant, Smith took [Defendant] to the hospital in order to obtain the blood sample.
>
> 14. At the emergency room, Smith advised the charge nurse that he had a search warrant for a blood sample.
>
> 15. Smith also advised [Defendant] that he had a search warrant to take a blood sample.
>
> 16. Officer Smith read the search warrant to [Defendant].

17. Officer Smith did not indicate whether he gave [Defendant] a copy of the search warrant.

18. Officer Smith took [Defendant] to a room in the emergency room and they waited for a nurse.

19. Smith indicated that a nurse came to perform the blood draw.

20. [Defendant] also indicated that a nurse was in the room.

21. Smith observed the blood draw and the nurse signed on the rights form.

22. Officer Smith did not recall the name of the nurse and he could not read the signature on the rights form.

23. Hospital personnel obtained an EKG from [Defendant] prior to taking the blood sample to check on his medical condition.

24. The nurse asked [Defendant] if he minded if she took his blood and [Defendant] replied that she could not have his blood.

25. [Defendant] advised the nurse that she could not take his blood.

26. [Defendant] tensed up and told the nurse that she was not going to take his blood.

27. [Defendant] was handcuffed as he sat on a bed in the room waiting to have his blood drawn.

28. [Defendant] was combative and would not allow his blood to be drawn.

29. [Defendant] testified that he would not agree for his blood to be taken without a search warrant.

30. [Defendant] testified that he was never given a copy of the search warrant.

31. [Defendant] testified that he did not object to giving a blood sample and that he was willing to provide the sample. The Court does not find these statements to be credible.

> 32. The officers pinned [Defendant] to the bed in order to take his blood.
>
> 33. [Defendant] in this case does not challenge the validity of the search warrant to take samples of his blood. Instead, [Defendant] challenged the use of force to take these samples despite [Defendant's] resistance to the execution of the search warrant.

Defendant argues that findings of fact 16 and 21 are not supported by competent evidence.[1] We disagree. Smith's testimony indicating that he read the search warrant to Defendant at the hospital and that Smith was present and aware that a nurse was drawing Defendant's blood provide competent evidence to support both findings of fact. The remaining, unchallenged findings of fact are binding on appeal. *State v. Taylor*, 178 N.C. App. 395, 412-13, 632 S.E.2d 218, 230 (2006) (citation omitted).

Defendant also argues that that the findings of fact do not support the trial court's conclusion of law 57: "The force used to execute the search warrant in this instance was not unreasonable under the Fourth Amendment."

Schmerber v. California, 384 U.S. 757 (1966), is the seminal case involving the forced extraction of blood from an accused. In *Schmerber*, the Court held that blood alcohol evidence could be taken without a driving-under-the-influence suspect's consent and without a warrant when probable cause and exigent circumstances existed, e.g., rapid elimination of blood alcohol content by natural bodily functions. *Id.* at 770-771. However, the *Schmerber* Court emphasized that a blood draw remains subject to Fourth Amendment standards of reasonableness. *Id.* at 768. Specifically, the procedure must be conducted without unreasonable force and in a medically acceptable manner. *Id.* at 771.

In *Graham v. Connor*, 490 U.S. 386 (1989), the Court clarified that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* at 395. "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth

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1. Defendant also argues that "[t]he trial court's findings and conclusions in Paragraphs 34 through 45 of its Order are not supported by competent evidence, and the findings fail to support the court's legal conclusions." However, Paragraphs 34 through 45 contain no findings of fact, but consist mainly of recitation of legal rules from applicable case law.

Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (citation omitted). "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' " *id.* (citation omitted), its application

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Courts have likewise analyzed claims of excessive force in effectuating a blood draw under a reasonableness standard. *See Schmerber*, 384 U.S. at 768.

Defendant cites no published North Carolina case law analyzing an officer's use of force in effectuating a search warrant to draw a defendant's blood, and our research reveals none.[2] The trial court relied upon *United States v. Bullock*, 71 F.3d 171 (5th Cir. 1995), wherein that court considered whether the force used during a blood draw authorized by a search warrant was excessive. In *Bullock*,

> the FBI obtained a search warrant to obtain samples of [the defendant's] blood and hair for DNA and other analysis. [The defendant] refused to comply with the warrant, so a seven member "control team" was used to subdue him and get the blood and hair samples. [The defendant] was cuffed and shackled between two cots that were strapped together. He physically resisted by kicking, hitting and attempting to bite the agents. A towel was placed on [the defendant's] face because he was spitting on the agents. A registered nurse took blood from [the defendant's] hand and then combed and plucked twenty hair samples from his scalp.

Id. at 174.

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2. In an unpublished opinion, this Court determined that the findings of fact supported the trial court's conclusion that the defendant's blood draw was performed pursuant to a valid search warrant, which was executed in a reasonable manner. *State v. Davis*, 243 N.C. App. 675, 779 S.E.2d 787 (2015).

The *Bullock* court concluded that "[t]he use of force in taking the samples was caused by [the defendant's] refusal to comply with a lawful warrant and was reasonable." *Id.* at 176. "When [the defendant] resisted the sample-taking, the agents used the force necessary to restrain him while samples were taken." *Id.* Noting that the defendant "had no right to resist execution of a search warrant [and i]n fact, his actions may even have risen to the level of criminal conduct [under] . . . 18 U.S.C. § 111 (assaulting or resisting a federal agent carrying out duties punishable by up to three years in prison)[,]" *id.* at 176 n.4, the court explained that the defendant "was given multiple opportunities to comply with the warrant; he was the one who decided that physical force would be necessary." *Id.* at 176. It was the defendant's "refusal to comply with a lawful warrant which forced the situation." *Id.* at 177. The court explained that a defendant "cannot resist a lawful warrant and be rewarded with the exclusion of evidence." *Id.*

In this case, the officers were authorized to require Defendant to provide a blood sample, because they possessed a valid search warrant. *See* N.C. Gen. Stat. § 15A-241 (2018) ("A search warrant is a court order and process directing a law-enforcement officer to search designated . . . persons for the purpose of seizing designated items and accounting for any items so obtained to the court which issued the warrant."). Defendant's blood was drawn by medical personnel, *see* § III.B.2., *infra*, in a hospital, which the U.S. Supreme Court has identified as a reasonable manner in which to draw blood. *See Schmerber*, 384 U.S. at 771 (emphasizing the importance of defendant's health and safety by contrasting the described acceptable conditions—by medical personnel in a hospital—with unreasonable conditions that threaten "personal risk of infection and pain," such as police officers drawing blood in the privacy of a police station). Regarding the officers' use of force, we are persuaded by the reasoning in *Bullock* and conclude that the use of force in taking the blood sample in this case was caused by Defendant's refusal to comply with a lawful warrant and was reasonable.

Defendant admitted that he was initially asked to lie down so that his blood could be drawn. When Defendant refused and resisted the blood draw, the officers used the force necessary to restrain him while the sample was taken. Defendant had no right to resist execution of a search warrant and, in fact, his actions rose to the level of criminal conduct under N.C. Gen. Stat. § 14-223, for resisting a public officer. *See* § III.A.2., *supra*. As in *Bullock*, Defendant was given multiple opportunities to comply with the warrant, and it was his "refusal to comply with a lawful warrant which forced the situation." *See Bullock*, 71 F.3d at 177.

Defendant "cannot resist a lawful warrant and be rewarded with the exclusion of evidence." *See id.*

In summary, the trial court's findings of fact support a conclusion that the officers' use of force was objectively reasonable in light of the facts and circumstances confronting the officers at the time they executed the search warrant. *See Graham*, 490 U.S. at 395-97. Therefore, the trial court's findings of fact support its legal conclusion that the force used to execute the search warrant was not unreasonable under the Fourth Amendment. Accordingly, the trial court did not err by denying Defendant's motion to suppress the results of the blood test on this ground.

2. Qualifications of Medical Professional

[5] Defendant also argues that the trial court erred by denying his motion to suppress the results of the blood test, because the State did not meet its burden to demonstrate that the person who drew the blood was qualified.

When a law enforcement officer requires a blood test to be administered, "a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample." N.C. Gen. Stat. § 20-139.1(c) (2018). An officer's trial testimony regarding the qualifications of the person who withdrew the blood is sufficient evidence of the person's qualifications. *See, e.g.*, *State v. Hinchman*, 192 N.C. App. 657, 663, 666 S.E.2d 199, 203 (2008) (holding that an officer's testimony that the person who drew defendant's blood worked in a restricted area in a blood lab and wore a lab technician's uniform was sufficient to establish qualification under the statute); *Richardson v. Hiatt*, 95 N.C. App. 196, 199, 381 S.E.2d 866, 868 (1989) (holding that an officer's testimony that a nurse authorized to draw blood in fact drew blood satisfied the State's burden to show qualification); *State v. Watts*, 72 N.C. App. 661, 664, 325 S.E.2d 505, 507 (1985) (holding that an officer's testimony that a blood technician at a hospital drew the blood sample was sufficient to show that blood was drawn by a qualified person).

The trial court made the following relevant findings of fact:

> 14. At the emergency room, Smith advised the charge nurse that he had a search warrant for a blood sample.
>
> . . . .
>
> 18. Officer Smith took [Defendant] to a room in the emergency room and they waited for a nurse.

> 19. Smith indicated that a nurse came to perform the blood draw.
>
> 20. [Defendant] indicated a nurse was in the room.
>
> 21. Smith observed the blood draw and the nurse signed on the rights form.
>
> 22. Officer Smith did not recall the name of the nurse and he could not read the signature on the rights form.
>
> . . . .
>
> 24. The nurse asked [Defendant] if he minded if she took his blood and [Defendant] replied that she could not have his blood.
>
> 25. [Defendant] advised the nurse that she could not take his blood.
>
> . . . .
>
> 60. The individual who drew [D]efendant's blood was not identified by name and no evidence was offered to prove this individual's qualifications.

Defendant does not challenge any of these findings; they are thus binding upon us. *See Taylor*, 178 N.C. App. at 412-13, 632 S.E.2d at 230.[3] These findings support the trial court's conclusion that that "[t]he evidence offered in this case was sufficient to prove that a qualified person drew [Defendant's] blood." *See*, *e.g.*, *Hinchman*, 192 N.C. App. at 663, 666 S.E.2d at 203; *Richardson*, 95 N.C. App. at 199, 381 S.E.2d at 868; *Watts*, 72 N.C. App. at 664, 325 S.E.2d at 507.

As the State met its burden to demonstrate that the person who drew the blood was qualified within the meaning of N.C. Gen. Stat. § 20-139.1(c), the trial court did not err by denying Defendant's motion to suppress the results of the blood test on this ground.

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3. Defendant argues that "[t]he trial court's findings that 'a law enforcement officer testified that the sample was drawn by a blood technician at the hospital' and 'the only evidence before the trial court was that a nurse was present to withdraw the blood, and there was no evidence to the contrary,' were not supported by competent evidence." Defendant's challenge is misguided as the trial court made no such findings; the challenged statements were portions of conclusions of law citing supporting authority.

C. Admission of Evidence

[6] Defendant next asserts that "[t]he trial court abused its discretion when it admitted into evidence, over [Defendant's] objection, a bottle purporting to have contained some quantity of vodka, which the State's officers admitted to destroying prior to [Defendant's] trial."

Defendant notes that "[a]t trial, the trial court overruled [Defendant's] objections to the admission of a vodka bottle found in a vehicle on the grounds that the contents of the bottle had been destroyed and the chain-of-custody of the bottle had not been properly established." Defendant's sole argument on appeal is that he is entitled to a new trial as a result of the trial court's admission of the bottle into evidence, because it was prejudicial, i.e., there was "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" *See State v. Hawk*, 236 N.C. App. 177, 180, 762 S.E.2d 883, 885 (2014) (internal quotation marks and citation omitted).

However, as we would only reach a prejudice analysis after determining that the admission of the evidence was erroneous, and Defendant cites no legal authority on appeal as to why the trial court's admission of the bottle into evidence was erroneous, Defendant's argument is thus deemed abandoned. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned. . . . The body of the argument . . . shall contain citations of the authorities upon which the appellant relies.").

D. Officers' Use of Body Cameras

[7] In his final argument, Defendant presents the following issue on appeal: "The trial court erred in its determination that the intentional suppression of body-camera recording evidence did not violate [Defendant's] rights under the Sixth and Fourteenth Amendments to the Constitution of the United States." Citing *State v. Williams*, 362 N.C. 628, 669 S.E.2d 290 (2008), Defendant "respectfully requests that the Court of Appeals dismiss the prosecution against him or, in the alternative, award him a new trial."

We first address the State's contention that this issue is not properly before us. The sole legal argument advanced on appeal is that "[t]he intentional decisions of Officers Richard and Smith not to employ their body cameras in a manner consistent with police policy . . . served to deny [Defendant] his due process rights under *Brady v. Maryland*[,]" 373 U.S. 83 (1963). Due process rights are Fourteenth Amendment rights. *See* U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any

person of life, liberty, or property, without due process of law . . . ."). As Defendant makes no Sixth Amendment argument on appeal, that portion of Defendant's issue is deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Turning to Defendant's Fourteenth Amendment argument on appeal, Defendant has not preserved for appellate review any argument that the trial court erred by failing to dismiss the prosecution against him due to a *Brady* violation, because Defendant failed to move to dismiss the case for such a violation. In *Williams*, which Defendant cites in support of his argument, our Supreme Court affirmed the Court of Appeals, which had affirmed a trial court's order allowing the defendant's motion to dismiss a criminal charge for prosecutorial misconduct under N.C. Gen. Stat. § 15A-954(a)(4). *Williams*, 362 N.C. at 639-40, 669 S.E.2d at 298-99. Pursuant to that section,

> The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that: . . . [t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

N.C. Gen. Stat. § 15A-954(a)(4) (2018). In a pretrial hearing in *Williams*, the State "admitted to the existence, possession, and destruction of material evidence favorable to defendant and acknowledged that it was impossible to produce the evidence at that time or, by implication, at any future trial." *Williams*, 362 N.C. at 629, 669 S.E.2d at 292. Based on these circumstances, the Court concluded that "the State flagrantly violated defendant's constitutional rights and irreparably prejudiced the preparation of his defense." *Id.* Accordingly, the Court found the requirements of N.C. Gen. Stat. § 15A-954(a)(4) satisfied and affirmed the order allowing the motion to dismiss. *Id.*

Unlike in *Williams*, Defendant in this case did not move to dismiss the charges in the trial court pursuant to N.C. Gen. Stat. § 15A-954(a)(4). We are therefore precluded from reviewing any denial of such motion, and Defendant's request that this Court "dismiss the prosecution against him" is itself dismissed.[4]

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4. Defendant also argued at trial that he was entitled to a spoliation of the evidence instruction based on the officers' failure "to record the entire encounter." Defendant does

However, Defendant did argue at the suppression hearing that the officers' failure "to record the forcible withdrawal of blood [was] . . . a due process violation, and it's a violation of departmental policy." Defendant now argues on appeal that the officers' failure to record the encounter "served to deny [Defendant] his due process rights under *Brady v. Maryland*." We thus address whether the trial court erred by denying his motion to suppress, such that he may be entitled to a new trial, because Richard's and Smith's failure to employ their body cameras in a manner consistent with police policy denied Defendant his due process rights under *Brady*.

This Court reviews alleged violations of constitutional rights de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

In *Brady*, the Supreme Court of the United States determined that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires in state criminal cases "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is "material if there is a reasonable probability of a different result had the evidence been disclosed." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (internal quotation marks and citation omitted).

First, we cannot conclude that the State "suppressed" the body-camera video, because the State never possessed it; it never existed. Under *Brady*, the State is required "to disclose only those matters in its possession." *State v. Thompson*, 187 N.C. App. 341, 353, 654 S.E.2d 486, 494 (2007) (internal quotation marks and citation omitted). Defendant essentially asks this Court to extend *Brady's* holding to include evidence not collected by an officer, which we decline to do.

Moreover, Defendant cannot show that video of the blood draw, if collected, would have been favorable to him; it may have corroborated the officers' testimony. Although the officers' failure to record the interaction violated departmental policy, such violation did not amount to a denial of Defendant's due process rights under *Brady* in this case.

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not argue on appeal that the trial court erred in refusing to give this instruction, and it is therefore deemed abandoned. *See* N.C. R. App. P. 28.

Accordingly, the trial court did not err in denying Defendant's motion to suppress.

V. Conclusion

We conclude that the trial court did not (1) err by denying Defendant's motion to dismiss; (2) err by denying Defendant's motion to suppress; (3) abuse its discretion by admitting certain evidence; or (4) err in determining that law enforcement officers did not violate Defendant's constitutional rights.

AFFIRMED IN PART; NO ERROR IN PART.

Judges BERGER and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
LEONARD SCHALOW, DEFENDANT

No. COA19-215

Filed 7 January 2020

1. Criminal Law—vindictive prosecution—after successful appeal—presumption of vindictiveness

The State violated defendant's due process rights by vindictively prosecuting him after he successfully appealed a conviction by charging him with new crimes for the same underlying conduct. Defendant was entitled to a presumption of prosecutorial vindictiveness because the new charges carried significantly increased potential punishments and the same prosecutor had tried the prior case; the State failed to overcome the presumption where the prosecutor stated that his charging decision was conditioned on the outcome of defendant's appeal of his original conviction and that he would do everything he could to ensure that defendant remained in custody for as long as possible.

2. Criminal Law—joinder—failure to join charges—prosecutor's awareness of evidence—same evidence in second trial

The State impermissibly failed to join related charges—based on the same alleged conduct—against defendant as required by N.C.G.S. § 15A-926 where the prosecutor was aware during the first trial of substantial evidence that defendant had also committed the

crimes for which he was later indicted (in a second trial, after he successfully appealed his original conviction) and where the State's evidence at the second trial would be the same as the evidence presented at the first. Because the State offered no good explanation for its failure to join all of the charges in one trial, the Court of Appeals concluded that the prosecutor withheld the later indictments in order to circumvent section 15A-926 and that defendant was entitled to dismissal of the charges.

Appeal by Defendant from order entered 7 August 2018 by Judge W. Robert Bell in Henderson County Superior Court. Heard in the Court of Appeals 17 September 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for Defendant-Appellant.

COLLINS, Judge.

Defendant Leonard Schalow appeals from the trial court's 7 August 2018 order denying his motion to dismiss the charges against him. Defendant contends that the trial court erred by denying his motion to dismiss because: (1) the State violated his rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution by bringing the charges against him; (2) the State violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution by vindictively prosecuting the charges against him; and (3) the State impermissibly failed to join the charges in his earlier prosecution as required by N.C. Gen. Stat. § 15A-926. Because we conclude that Defendant is entitled to a presumption of prosecutorial vindictiveness that the State has failed to overcome and that the charges brought against him should have been dismissed pursuant to N.C. Gen. Stat. § 15A-926, we reverse and remand.

I. Background

In late February 2014, warrants issued for Defendant's arrest for the alleged commission of various acts of violence against his wife, Erin Schalow. These warrants found probable cause to arrest Defendant for (1) assault on a female (N.C. Gen. Stat. § 14-33(C)(2)), (2) assault

inflicting serious injury with a minor present (N.C. Gen. Stat. § 14-33(D)), (3) assault with a deadly weapon (N.C. Gen. Stat. § 14-33(C)(1)), (4) assault by strangulation (N.C. Gen. Stat. § 14-32.4(B)), and (5) assault inflicting serious bodily injury (N.C. Gen. Stat. § 14-32.4).

Defendant was indicted on 10 March 2014 under file number 14 CRS 50887 for "ATTEMPT [sic] FIRST DEGREE MURDER" for "unlawfully, willfully and feloniously . . . attempt[ing] to murder and kill Erin Henry Schalow" (the "First Prosecution"). The State subsequently dismissed the other charges pending against Defendant.

Following the empanelment of a jury and the presentation of evidence on the "ATTEMPT [sic] FIRST DEGREE MURDER" charge, the trial court noted that the indictment failed to allege malice aforethought, a required element of attempted first-degree murder under the short-form indictment statute, N.C. Gen. Stat. § 15-144. Over Defendant's objection that the indictment sufficiently alleged attempted voluntary manslaughter under N.C. Gen. Stat. § 15-144 and that jeopardy had attached once the jury was empaneled, the trial court declared a mistrial and dismissed the indictment as fatally defective.

On 18 May 2015, Defendant was re-indicted under file number 15 CRS 50922, again for "ATTEMPT [sic] FIRST DEGREE MURDER[,]" this time for "unlawfully, willfully and feloniously . . . with malice aforethought attempt[ing] to murder and kill Erin Henry Schalow by torture" (the "Second Prosecution"). Defendant moved to dismiss on 22 May 2015 arguing, *inter alia*, that because jeopardy had attached in the First Prosecution on the dismissed indictment for attempted voluntary manslaughter, the Double Jeopardy Clause prohibited the State from prosecuting him for the greater offense of attempted first-degree murder. Following a hearing, the trial court denied Defendant's motion. Defendant was subsequently tried, convicted, and sentenced to 157 to 201 months' imprisonment.

Defendant appealed to this Court. In *State v. Schalow*, 251 N.C. App. 334, 354, 795 S.E.2d 567, 580 (2016) ("*Schalow I*"), *disc. review improvidently allowed*, 370 N.C. 525, 809 S.E.2d 579 (2018), we held that Defendant's indictment, prosecution, trial, and conviction in the Second Prosecution violated Defendant's double-jeopardy rights, and accordingly vacated the conviction and underlying indictment.

On 4 January 2017, the State obtained additional indictments against Defendant for 14 counts of felony child abuse (N.C. Gen. Stat. § 14-318.4(a5)). The following day, the State petitioned our Supreme Court to review *Schalow I*. On 9 January 2017, Henderson County

District Attorney Greg Newman was quoted in the press saying: "If . . . the Supreme Court refuses to take up the case, then I have a plan in place to address that circumstance and will take additional action to see that [Defendant] is held accountable for his actions. . . . I will do everything that I can to see that [Defendant] remains in custody for as long as possible."

On 6 March 2018, after our Supreme Court determined discretionary review had been improvidently allowed in *Schalow I*, Newman was quoted on Facebook as saying that "things do not always go our way, so I will make my adjustments and prosecute [Defendant] again" and that "[Defendant] will not get out of custody, but will instead be sent back to the Henderson County jail where new felony charges await him. My goal is to have [Defendant] receive a comparable sentence to the one originally imposed" in the Second Prosecution. On 19 March 2018, Defendant was indicted for three counts of assault with a deadly weapon with intent to kill inflicting serious injury (N.C. Gen. Stat. § 14-32(a)) ("ADWIKISI"), two counts of assault inflicting serious bodily injury (N.C. Gen. Stat. § 14-32.4(a)) ("AISBI"), and one count of assault by strangulation (N.C. Gen. Stat. § 14-32.4(b)) ("ABS"). Like the charges at issue in the First and Second Prosecutions, the new child abuse and assault charges are all based upon various acts of violence that Defendant allegedly committed against his wife in 2014.

On 19 July 2018, Defendant moved to dismiss the new charges on grounds of, *inter alia*, double jeopardy, vindictive prosecution, and statutory joinder. Following a hearing, the trial court denied Defendant's motion. Defendant filed a petition for a writ of certiorari seeking immediate review of the order denying his motion to dismiss, which we allowed.

II. Discussion

Defendant contends that the trial court erred by denying his motion to dismiss because (1) the State violated his double-jeopardy rights by bringing the new charges; (2) the State violated his due-process rights by vindictively prosecuting the new charges against him; and (3) the State impermissibly failed to join the new charges as required by N.C. Gen. Stat. § 15A-926.

A. Vindictive Prosecution

[1] In *North Carolina v. Pearce*, 395 U.S. 711 (1969), limited by *Alabama v. Smith*, 490 U.S. 794 (1989), the United States Supreme Court reviewed the constitutionality of a sentence given upon reconviction to a criminal defendant after the defendant had successfully appealed from his initial

conviction. An issue in *Pearce* was whether, because he was subjected upon reconviction to a greater punishment than that imposed following the first trial, the defendant's due-process rights under the Fourteenth Amendment to the United States Constitution had been violated. *Pearce*, 395 U.S. at 723-26. The Court said that an "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law." *Id.* at 724. Noting that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," the Court held that an increased sentence could not be imposed following retrial unless the sentencing judge made findings in the record providing objective justification for the increased punishment "so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.* at 725-26.

The Court later extended *Pearce*'s holding that defendants must be freed from apprehension of retaliation by sentencing judges to retaliation by prosecutors:

> A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.
>
> Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process.

Blackledge v. Perry, 417 U.S. 21, 28 (1974) (internal citation omitted). The *Blackledge* Court clarified that a defendant need not show that the prosecutor actually acted in bad faith; instead, where the reviewing court determines that "a realistic likelihood of 'vindictiveness' " exists, a presumption of vindictiveness may be applied. *Id.* at 27-29.

This Court has articulated the test for prosecutorial vindictiveness under *Pearce* and its progeny as follows:

> in cases involving allegations of prosecutorial vindictiveness, a defendant is constitutionally entitled to relief from judgment if he can show through objective evidence that either:
>
> (1) his prosecution was actually motivated by a desire to punish him for doing what the law clearly permits him to do, or

> (2) the circumstances surrounding his prosecution are such that a vindictive motive may be presumed and the State has failed to provide affirmative evidence to overcome the presumption.

State v. Wagner, 148 N.C. App. 658, 661, 560 S.E.2d 174, 176 (emphasis omitted), *rev'd in part on other grounds*, 356 N.C. 599, 572 S.E.2d 777 (2002). Thus, if a defendant shows that his prosecution was motivated by actual vindictiveness or that the presumption of vindictiveness applies and is not overcome by the State, the charges against the defendant and any resulting convictions must be set aside. *See Blackledge*, 417 U.S. at 28-29. We review Defendant's allegations of prosecutorial vindictiveness, like any alleged violation of constitutional rights, under a *de novo* standard. *See State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

This is the third time that District Attorney Newman has attempted to try Defendant for crimes based upon the same alleged conduct. Each time, Defendant has been charged with offenses carrying "significantly increased potential period[s] of incarceration," *Blackledge*, 417 U.S. at 28, relative to the charges he faced before:

- In the First Prosecution, Defendant was indicted for a single count of attempted voluntary manslaughter, a Class E felony, without alleged aggravating factors, which corresponds to a maximum presumptive-range sentence (at Prior Record Level I) of **42 months' imprisonment**.
- In the Second Prosecution, Defendant was indicted for a single count of attempted first-degree murder, a Class B2 felony, without alleged aggravating factors, which corresponds to a maximum presumptive-range sentence (at Prior Record Level I) of **201 months' imprisonment**.
- In the instant case, Defendant has been indicted for the following offenses, corresponding to a cumulative maximum sentence (at Prior Record Level I) of **627 months' imprisonment**:[1]
    - 14 counts of child abuse, a Class G felony, without alleged aggravating factors, resulting in a cumulative

1. These calculations are based upon N.C. Gen. Stat. § 15A-1340.17, and the calculation of the cumulative maximum sentence for the new charges involves the reduction of the sentence contemplated by N.C. Gen. Stat. § 15A-1354(b)(1).

maximum presumptive-range sentence 350 months' imprisonment;

- Three counts of ADWIKISI, a Class C felony, including alleged aggravating factors, resulting in a cumulative maximum aggravated-range sentence of 369 months' imprisonment;
- Two counts of AISBI, a Class F felony, including alleged aggravating factors, resulting in a cumulative aggravated-range sentence 66 months' imprisonment; and
- One count of ABS, a Class H felony, including aggravating factors, resulting in a maximum aggravated-range sentence of 19 months' imprisonment.

Therefore, the "increased potential period of incarceration" Defendant now faces relative to what he potentially faced in the Second Prosecution is *more than 35 years of incarceration* in aggregate. *Id.* And were Defendant to be convicted of the new charges and sentenced to the longest prison term legally-supportable by the indictments—i.e., as a Prior Record Level VI, at the high end of the aggravated range, for all charges—Defendant would be sentenced to a maximum of 1331 months for the new charges, relative to a maximum sentence of 592 months for the attempted first-degree murder charge, a difference of *more than 60 years of incarceration*. *See State v. Lucas*, 353 N.C. 568, 596, 548 S.E.2d 712, 731 (2001) ("[U]nless the statute describing the offense explicitly sets out a maximum sentence, the statutory maximum sentence for a criminal offense in North Carolina is that which results from: (1) findings that the defendant falls into the highest criminal history category for the applicable class offense and that the offense was aggravated, followed by (2) a decision by the sentencing court to impose the highest possible corresponding minimum sentence from the ranges presented in the chart found in [N.C. Gen. Stat.] § 15A-1340.17(c)."), *overruled on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

Blackledge and *Wagner* stand for the proposition that where a defendant is indicted on charges carrying a "significantly increased potential period of incarceration" after the defendant "do[es] what the law clearly permits him to do"—here, appealing from the judgment in the Second Prosecution—a reviewing court may apply a presumption of vindictiveness. *Blackledge*, 417 U.S. at 28; *Wagner*, 148 N.C. App. at 661, 560 S.E.2d at 176. Such a presumption is particularly appropriate here, where the same prosecutor issued all of the relevant indictments, giving the

prosecutor a "personal stake in the outcome" of defendant's prosecution writ large that raises the prospect that the prosecutor was motivated by "self-vindication" in seeking the new indictments. *Cf. Wagner*, 148 N.C. App. at 663, 560 S.E.2d at 177 (distinguishing *Pearce* and *Blackledge* and declining to apply a presumption of prosecutorial vindictiveness, in part, because the prosecutor in *Wagner* had not previously prosecuted the defendant). Therefore, based upon the decades of additional incarceration Defendant potentially faces from the indictments in the instant case relative to what he faced from the indictment in the Second Prosecution—upon which Defendant was tried and convicted, and from which Defendant successfully exercised his statutory right to appeal—we conclude that Defendant is entitled to a presumption of prosecutorial vindictiveness.

The State relies extensively upon this Court's decision in *State v. Rodgers*, 68 N.C. App. 358, 315 S.E.2d 492 (1984), to support its argument that a presumption of vindictiveness is not warranted where the State seeks merely to remedy "pleading defects[.]" For several reasons, *Rogers* does not help the State. First, the relevant change in the charging decision here—from a single attempted first-degree murder charge to 20 child-abuse and assault charges—did not merely amount to the clarification of "pleading defects[.]" And second, we declined to apply a presumption of vindictiveness in *Rogers*, in part, because the defendant showed "neither an increase in the number of charges brought against him nor an increase in his potential punishment under the superseding indictment." *Id.* at 379, 315 S.E.2d at 507. Here, where the State has brought 19 more charges and dramatically increased the potential punishment Defendant faces, *Rogers* is clearly distinguishable.

We therefore turn to the question of whether the State has provided affirmative evidence in rebuttal which overcomes the presumption, as contemplated by *Wagner*, 148 N.C. App. at 661, 560 S.E.2d at 176. The State has failed to provide such evidence. In fact, the only affirmative evidence in the record concerning the rationale for the prosecutor's charging decisions makes clear that the charging decisions were (1) expressly conditioned upon the outcome of the State's appeal from *Schalow I* and (2) influenced by the prosecutor's stated determination to "do everything that [he] can to see that [Defendant] remains in custody for as long as possible." While the State argues, citing *State v. Van Trussell*, 170 N.C. App. 33, 612 S.E.2d 195 (2005), that "seeking to ensure that the defendant suffers some consequences for his criminal conduct is a sufficient—not vindictive—justification for praying judgment when a separate conviction is set aside on appeal[,]" there is nothing

in the record indicating that this case involves a Prayer for Judgment Continued such as was at issue in *Van Trussell*, and the State's argument is therefore misguided.

Even assuming *arguendo* that the record evidence described above fails to show *actual* vindictiveness on behalf of the prosecutor—which we need not decide because we hold that Defendant has shown entitlement to a presumption of vindictiveness—and instead demonstrates an intent to punish Defendant for suspected criminal activity, to hold such evidence can be sufficient to overcome a presumption of vindictiveness would effectively eviscerate the presumption altogether, and thereby render *Pearce* and its progeny nugatory. *See United States v. Goodwin*, 457 U.S. 368, 372-73 (1982) ("The imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity" such as appealing from a conviction). This we of course cannot do. *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (when interpreting federal constitutional rights, "a state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding"). We therefore reject the State's argument.

Because we conclude that Defendant is entitled to a presumption of prosecutorial vindictiveness and that the State has failed to overcome the presumption, dismissal of the new charges is required.

B. Statutory Joinder

[2] N.C. Gen. Stat. § 15A-926 ("Section 926") provides as follows, in relevant part:

> (a) Joinder of Offenses. – Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. . . .
>
> . . . .
>
> (c) Failure to Join Related Offenses.
>
> . . . .

> (2) A defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense. The motion to dismiss must be made prior to the second trial,[2] and must be granted unless
>
> > a. A motion for joinder of these offenses was previously denied, or
> >
> > b. The court finds that the right of joinder has been waived, or
> >
> > c. The court finds that because the prosecutor did not have sufficient evidence to warrant trying this offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted.

N.C. Gen. Stat. § 15A-926(a), (c)(2) (2018).

In *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924 (1977), our Supreme Court entertained a challenge to indictments that the defendant argued should have been dismissed as joinable offenses under Section 926. Noting that the indictments at issue had not been returned before the prior trial purportedly requiring dismissal had begun, the *Furr* Court held that the indictments could not have been joined with the offense previously tried. *Id.* at 724, 235 S.E.2d at 201. Because it found "nothing whatever in the record to indicate that the state held the [challenged] charges in reserve pending the outcome of the [previous] trial[,]" the *Furr* Court held Section 926 was not applicable in that case, and overruled the defendant's argument. *Id.*

Several years later, in *State v. Warren*, 313 N.C. 254, 328 S.E.2d 256 (1985), the Court elaborated upon the language above, and set forth what we will call the "*Warren* exception":

> If a defendant shows that the prosecution withheld indictment on additional charges solely in order to circumvent the statutory joinder requirements, the defendant is entitled under [N.C. Gen. Stat. §] 15A-926(c)(2) to a dismissal of the additional charges. The defendant must bear the burden of persuasion in such cases. . . .

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2. Where, as here, a second trial has already taken place, and the anticipated trial on the offenses at issue will therefore be the defendant's third or subsequent trial, the motion to dismiss contemplated by Section 926(c)(2) must be made prior to the anticipated trial that has yet to take place.

> If a defendant can show, for example, that during the first trial the prosecutor was aware of substantial evidence that the defendant had committed the crimes for which he was later indicted, this would be some evidence that the delay in bringing the later indictment was for the purpose of circumventing the statute. A showing that the State's evidence at the second trial would be the same as the evidence presented at the first would also tend to show that the prosecutor delayed indictment on the additional crimes for such purpose. A finding of either or both circumstances would support but not compel a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute.

Id. at 260, 328 S.E.2d at 261 (emphasis omitted). The *Warren* Court added that "[w]hen reviewing the trial court's denial of the defendant's motion to dismiss . . . we may only consider the evidence before the trial court when it made its ruling at the conclusion of the pretrial hearing." *Id.*

Defendant argues that he showed both of the circumstances that the *Warren* Court said "would support but not compel a determination by the trial court that the prosecutor withheld the additional indictment[s] in order to circumvent" Section 926, *id.*, and that the trial court accordingly erred by denying his motion to dismiss. In support of his argument, Defendant points to (1) the charges the State previously dismissed in the case and (2) certain concessions the State made at the hearing on Defendant's motion to dismiss regarding the evidence to be presented to prove the new charges.

As mentioned above, Defendant was charged by arrest warrant in early 2014—before the State obtained the initial indictment in the First Prosecution for "ATTEMPT [sic] FIRST DEGREE MURDER"—with (1) assault on a female, (2) assault inflicting serious injury with a minor present, (3) assault with a deadly weapon, (4) assault by strangulation, and (5) assault inflicting serious bodily injury. These arrest warrants indicate that a magistrate found probable cause to arrest Defendant for those offenses based upon the same conduct for which Defendant is currently charged.

First, the new indictments charging Defendant with ADWIKISI are based upon the grand jury's finding that Defendant attacked his wife with a crutch and a knife, and two of the dismissed warrants charged Defendant with assault with a deadly weapon based upon probable cause that Defendant attacked his wife with a crutch and a knife. Second,

the new indictments charging Defendant with AISBI are based upon the grand jury's finding that Defendant hit his wife in the face, struck her in the mouth, ripped her ear, kicked her in her body, and caused her a ruptured spleen, broken ribs, broken facial bones, and severe bruising on her body, and two of the dismissed warrants charged Defendant with assault on a female and AISBI based upon probable cause that Defendant hit and punched his wife in the face, struck her in the mouth, ripped her ear, kicked her in her body, and caused her a ruptured spleen, broken ribs, broken facial bones, and severe bruising to her body. Third, the new indictments charging Defendant with ABS are based upon the grand jury's finding that Defendant used his hands to squeeze his wife's throat, and one of the dismissed warrants charged Defendant with ABS for forcibly placing his hands around his wife's neck and squeezing. Finally, the new indictments charging Defendant with child abuse are based upon the grand jury's finding that Defendant committed unspecified "grossly negligent acts in the omission of caring for [his son], show[ing] a reckless disregard for human life and . . . result[ing] in serious mental injury to" his son, and two of the dismissed warrants charged Defendant with assault on a female and assault inflicting serious injury with a minor present for attacking his wife in the presence of his son.[3]

The prosecutor's dismissal of the arrest warrants prior to the trial in the Second Prosecution indicates that the prosecutor was at least constructively aware of evidence sufficient to convince a magistrate that there was probable cause to believe that Defendant had engaged in the conduct described therein before the prosecutor took that case to trial. And the State told the trial court that there had been no additional steps taken to develop evidence in the case since the trial in the Second Prosecution ended in 2015:

> THE COURT: 2015. All right. Since that time has there been any additional investigation, interviews of witnesses or anything done in the case, Mr. Mundy or Mr. Newman?

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3. While the child-abuse indictments do not specifically allege what the "grossly negligent acts" were, because (1) the child-abuse indictments are based upon purported mental injury to Defendant's son, (2) the dismissed warrants charged Defendant with committing a number of assaults on his wife in the presence of his son, (3) Defendant's previous prosecution for attempted first-degree murder was based upon alleged attacks by Defendant on his wife, and (4) as described below, the prosecutor represented at the hearing on Defendant's motion to dismiss that there would be no new non-opinion evidence introduced regarding the child-abuse charges that the State had not previously introduced in support of its attempted first-degree murder prosecution, we conclude that the State's theory of mental injury to Defendant's son must be based upon the child's purported presence at the time of the alleged attacks upon Defendant's wife, which the dismissed warrants described.

> MR. NEWMAN: There has not been, Your Honor. The only thing new is the addition of Dr. Mumpower that we would add at trial in terms of information.

These considerations convince us that Defendant has shown the first *Warren* circumstance, i.e., that "during the first trial the prosecutor was aware of substantial evidence that the defendant had committed the crimes for which he was later indicted[.]" *Warren*, 313 N.C. at 260, 328 S.E.2d at 261 (emphasis omitted).

Furthermore, the State represented at the hearing on Defendant's motion to dismiss that the State would seek to introduce no new non-opinion evidence to prove the new charges that had not been introduced in support of its attempted first-degree murder prosecution:

> [The] defense has everything that we have. And this goes back to the, you know, time, I guess, in 2014 and '15, thereabouts. And so they have all of the reports. That's what we are going to us[e] again. Of course, the same witnesses. They have examined all of these witnesses. They have seen the documents. The[y] have disks of interviews. There -- I mean, there's a trial transcript. I think they have that. There are [Department of Social Services] documents that were not used at the first trial. I don't think we would use those now, but give some insight to our case here. . . .
>
> So everything that we would present on any of these cases the defense has had and has had [sic] for quite sometime [sic]. But we -- I understand -- but they have the discovery in the case. And we -- I don't think they are going to see or hear anything particularly new from us.

Indeed, as mentioned above, the State told the trial court that "[t]he only thing new is the addition of Dr. Mumpower that we would add at trial in terms of information." The State told the trial court that Mumpower is a psychologist who "examined nothing with respect to the case" and did not prepare an expert report, but that the State wished to put Mumpower on the stand to testify regarding a hypothetical, i.e., to "give him some facts and ask him to — see if he has an opinion on that basis." Pursuant to the State's concession that it only seeks to add unspecified hypothetical testimony from a witness who knows nothing about the case, we conclude that Defendant has also shown the second *Warren* circumstance, i.e., "that the State's evidence at the second trial would be

the same as the evidence presented at the first[.]"[4] *Warren*, 313 N.C. at 260, 328 S.E.2d at 261.

That Defendant has shown both *Warren* circumstances does not end the inquiry, however. In *Warren*, our Supreme Court specifically said that "[a] finding of either or both circumstances would *support but not compel* a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute." *Id.* (emphasis added). Defendant directs us to no case in which our courts have applied *Warren* to overturn a denial of a motion to dismiss, and we are aware of no such case.

In *Warren* itself, our Supreme Court found that the trial court was not compelled to determine that the prosecutor withheld the indictments there at issue to circumvent Section 926 because, *inter alia*, the State at the hearing on the defendant's motion to dismiss forecast new, "much stronger evidence" of the defendant's guilt on the new charges than was previously available at the time of the first trial. *Id.* at 263, 328 S.E.2d at 263. *Warren* is therefore distinguishable from this case, where the State has said that no new evidence will be presented besides certain unspecified expert-opinion testimony. And in the lone case we have found that appears to have applied *Warren* in the context of a Section 926 challenge, this Court rejected the defendant's Section 926 argument without analyzing either *Warren* circumstance, and did not provide any other analysis applicable here. *State v. Tew*, 149 N.C. App. 456, 459-60, 561 S.E.2d 327, 330-31 (2002).

We are thus left with no precedent regarding what, beyond the two *Warren* circumstances, a defendant needs to show in order to implicate the *Warren* exception. Accordingly, in our view, because (1) Defendant has shown that both *Warren* circumstances are present, (2) the State has had multiple previous opportunities to join the offenses on which it now seeks to try Defendant, and (3) the State has neither argued that it was somehow unable to try the offenses at an earlier time nor proffered any explanation for why the offenses were not tried along with the earlier charge, we hold that the *Warren* exception should apply.

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4. A holding that *Warren*'s second circumstance is not shown where the State forecasts unspecified hypothetical opinion testimony from a witness who knows nothing about the case would effectively render that part of *Warren* meaningless, and we cannot make such a holding. *See Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008) ("[T]his Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions until otherwise ordered by our Supreme Court." (quotation marks, ellipsis, brackets, and citation omitted)).

We therefore conclude that Defendant has made a showing that should have compelled a determination by the trial court that the prosecutor withheld the indictments here at issue in order to circumvent Section 926, and that Defendant is entitled to dismissal of the new charges under Section 926(c)(2), as well.

C. Double Jeopardy

Because we conclude that Defendant's motion to dismiss should have been granted on both vindictive-prosecution and statutory-joinder grounds, we do not address Defendant's double-jeopardy arguments.

III. Conclusion

Because we conclude that Defendant is entitled to a presumption of prosecutorial vindictiveness which the State has failed to overcome and that the charges brought against him should have been joined pursuant to Section 926(c)(2), we reverse the 7 August 2018 order and remand to the trial court with instructions to dismiss the charges against Defendant.

REVERSED AND REMANDED.

Judges BRYANT and YOUNG concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JANUARY 2020)

CHAPPELL v. CHAPPELL No. 19-11	Burke (12CVD1555)	Affirmed in Part, Reversed in Part, and Remanded
CLEMENT v. CUMBERLAND CNTY. No. 19-414	Cumberland (18CVS4649)	Reversed
CONDE v. JESSUP No. 19-16	Union (17CVS3144)	Reversed and Remanded
CROP PROD. SERVS., INC. v. PEARSON No. 19-260	Randolph (16CVS1372)	Affirmed in Part, Reversed in Part and Remanded
IN RE A.D.S. No. 19-258	Wayne (18JB104)	Affirmed
IN RE D.B. No. 19-387	Wake (18SPC5553)	Affirmed
IN RE K.A. No. 19-455	Person (17JB63)	Affirmed
KANISH, INC. v. TAYLOR No. 19-482	Mecklenburg (17CVS14152)	NO ERROR, JNOV AND NEW TRIAL RULING AFFIRMED, AWARD OF ATTORNEY FEES VACATED AND REMANDED.
LEFTWICH v. MORRIS No. 19-656	Robeson (17CVS1950)	Dismissed
MARTIN v. IRWIN No. 19-559	Surry (17CVM583) (18CVD1147)	Affirmed
SIKES v. FARRELL No. 19-238	Mecklenburg (18CVS7024)	Affirmed
STATE v. COLLIER No. 19-174	Vance (16CRS85)	NO ERROR IN PART, REMANDED FOR RESENTENCING.
STATE v. CURLEE No. 19-451	Davidson (17CRS2618) (17CRS56168)	No Error

STATE v. DAVIS No. 19-227	Carteret (12CRS52930) (12CRS52934)	No Error
STATE v. GARCIA No. 19-360	Wake (17CRS219732)	No Error
STATE v. HAZELWOOD No. 19-121	Wake (04CRS88496-97)	Affirmed
STATE v. HERNANDEZ-GONZALEZ No. 19-448	Buncombe (16CRS81849-51)	Reversed and Remanded
STATE v. HERRING No. 19-221	Wake (16CRS200507) (16CRS200824-25)	No Error
STATE v. HEWITT No. 19-382	Wilson (16CRS53737)	No plain error; remanded for correction of clerical error
STATE v. JONES No. 19-14	Wake (17CRS211949)	No Error
STATE v. LITAKER No. 19-189	Rowan (16CRS51603) (16CRS51634)	No Error
STATE v. LITTLEJOHN No. 19-347	Cleveland (17CRS56086)	Dismissed
STATE v. LOCKLEAR No. 19-487	Robeson (17CRS52801)	Affirmed
STATE v. LOFTON No. 17-716-2	Wayne (15CRS50319)	No Error
STATE v. MARTIN No. 19-130	Davidson (17CRS51965) (17CRS51966)	Dismissed in part; Vacated and remanded in part.
STATE v. McCORD No. 19-517	Wake (17CRS2362)	Affirmed; remanded for correction of judgment
STATE v. MIDGETTE No. 19-463	Wayne (13CRS55207)	NO PREJUDICIAL ERROR
STATE v. MIZE No. 19-161	Catawba (16CRS50126-27)	No Error

STATE v. MOORE No. 19-301	Onslow (17CRS53747) (17CRS53749)	NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART.
STATE v. MOORE No. 19-183	Wake (16CRS210610-11) (16CRS210612)	Affirmed
STATE v. MYERS No. 19-173	Cherokee (16CRS396-398)	NO ERROR; NO PLAIN ERROR.
STATE v. PATRICK No. 19-571	Mecklenburg (16CRS221987) (17CRS13742)	Affirmed
STATE v. PHOEUN No. 19-190	Guilford (17CRS68022)	Affirmed
STATE v. SIMMONS No. 19-519	Forsyth (16CRS60434) (16CRS60970)	No Error
STATE v. WEBSTER No. 19-257	Wake (15CRS222446)	No Error
STATE v. WHEELER No. 18-1272	Catawba (16CRS1890)	Affirmed
STATE v. WHITMIRE No. 19-550	McDowell (16CRS727)	Affirmed
STATE v. WILLIAMS No. 18-1130	Iredell (14CRS4302) (14CRS54550)	Affirmed
STEELE-CORRELL v. PRICE No. 19-551	Rowan (17CVS1395)	Affirmed
SUMMIT & CROWNE CAP. PARTNERS, LLC v. KORTH DIRECT MORTG., LLC No. 19-413	Mecklenburg (18CVS11381)	Affirmed in part; Reversed and Remanded in part.
TR. FOR TRADEWINDS AIRLINES, INC. v. SOROS FUND MGMT LLC No. 19-356	Guilford (16CVS5433)	Affirmed

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