270 N.C. App.—No. 2 Pages 204-373

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 9, 2021

MAILING ADDRESS: The Judicial Department
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COURT OF APPEALS

CASES REPORTED

Filed 3 March 2020

Cummings v. Carroll 204
Est. of Long v. Fowler 241
Green v. Black 258
Holdstock v. Duke Univ. Health Sys., Inc. 267
In re Est. of Giddens 282
Poulos v. Poulos 289
State v. Ditenhafer 300
State v. Leaks 317
State v. Mangum 327
State v. Nazzal 345
State v. Neira 359
State v. Pratt 363

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Cuevas v. Davis 372
Cunningham v. Principle Long Term Care, Inc. 372
Est. of Seymour v. Orange Cnty. Bd. of Educ. 372
Gordon v. Hancock 372
In re S.T. 372
Indus. Hemp Mfg., LLC v. Am. Hemp Seed Genetic, LLC 372
State v. Eskridge 372
State v. Griffin 372
State v. Guarascio 372
State v. Hodges 372
State v. Joyner 372
State v. Lemus 372
State v. McKoy 373
State v. Pocknett 373
State v. Scott 373
State v. Westbrook 373
State v. White 373
State v. Wilson 373
State v. Yates 373

HEADNOTE INDEX

APPEAL AND ERROR

Abandoned issue—breach of implied covenant of good faith and fair dealing—no argument or reply brief—In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim for breach of implied covenant of good faith and fair dealing against the sellers was deemed abandoned where plaintiffs failed to raise any argument in their brief or to file a reply brief in response to defendants' argument that the claim was abandoned. **Cummings v. Carroll, 204.**

Abandoned issue—personal liability—no argument—In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim against one of the individual sellers for personal liability was deemed abandoned where plaintiffs failed to raise any argument in their brief on this claim. **Cummings v. Carroll, 204.**

Abandonment of issues—raised for first time in reply brief—estate administration—In an estate dispute, where the decedent's children challenged in their reply brief—but not in their principal brief—the existence and legal effect of an agreement to apply the sale proceeds of the decedent's real property toward a deficiency judgment, the argument was waived because it was raised for the first time in the reply brief. **In re Est. of Giddens, 282.**

Abandonment of issues—unfair and deceptive trade practices—no argument or reply brief—In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim for unfair and deceptive trade practices against the sellers and the sellers' agents was deemed abandoned where plaintiffs failed to raise any argument in their brief or to file a reply brief responding to defendants' contention that the cause of action was abandoned. **Cummings v. Carroll, 204.**

Filing of appeal after order rendered but not entered—failure of record to show jurisdiction—motion to amend record—The Court of Appeals had jurisdiction to hear an appeal from a civil judgment for attorney fees in a criminal case, even though defendant entered notice of appeal and filed the record after the trial court rendered an oral ruling but before it entered a written order, because Rule 3 of the Rules of Civil Procedure allows for appeal of an order once it has been rendered by a trial court and the Court of Appeals had the authority to grant defendant's motion to amend the record to include the written order once it was filed. Assuming arguendo that amending the record failed to cure defendant's jurisdictional deficiency, defendant's petition for writ of certiorari was granted to obtain jurisdiction. **State v. Mangum, 327.**

Interlocutory appeal—denial of motion to dismiss—substantial right—collateral estoppel—In a wife's action for post-separation support, alimony, and equitable distribution (ED), which included a claim for relief in the form of a constructive trust—based on an allegation that her ex-husband fraudulently transferred marital assets to corporate defendants (multiple trusts and businesses)—the trial court's order partially denying defendants' motion to dismiss was not immediately appealable. No substantial right was affected where defendants' request for a jury trial was properly rejected as not being available in an ED case, and defendants failed to demonstrate that collateral estoppel—regarding issues addressed in a related complex business case—barred plaintiff's claim to the remedy of a constructive trust. **Poulos v. Poulos, 289.**

ATTORNEY FEES

Court-appointed attorneys—opportunity to be heard—In a trial for possession of a stolen motor vehicle and attaining habitual felon status, the trial court erred by ordering payment of attorney fees without affording defendant the opportunity to be heard. **State v. Mangum, 327**.

Criminal case—civil judgment—notice and opportunity to be heard—After defendant was convicted of multiple drug trafficking offenses, the trial court erred by entering a civil judgment against defendant for attorney fees without affording defendant notice and an opportunity to be heard as required by N.C.G.S. § 7A-455. **State v. Pratt, 363.**

CONTRACTS

Promissory note—language of contract—plain and unambiguous—meeting of the minds—In a dispute in which plaintiff alleged defendant defaulted on a promissory note, the challenged portion of the note was not ambiguous because it reflected a meeting of the minds to enter into a second promissory note in the event of default, but that portion was void because it lacked necessary specificity regarding the terms of the additional promissory note. **Green v. Black, 258.**

Promissory note—validity—severability of void provision—In a claim for breach of contract, a provision of the contract that was void for uncertainty and unenforceable was severable because it was not an essential provision of the contract since it reflected what the parties would do in the event of default and none of the essential elements of the contract depended on the provision. **Green v. Black, 258.**

Real estate purchase—breach of sales contract—false representation in disclosure statement—In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court properly granted a motion to dismiss plaintiffs' claim for breach of contract against the sellers (a corporate entity and an individual owner of that entity) because any representations in the real estate disclosure statement, false or otherwise, were not made a part of the sales contract's terms. In addition, the individual seller did not sign the sales contract in his individual capacity. **Cummings v. Carroll, 204.**

CRIMINAL LAW

Jury instructions—requested defense—entrapment—predisposition to commit crime—In a prosecution for multiple drug trafficking offenses, defendant was not entitled to a jury instruction on the defense of entrapment where the evidence showed defendant's predisposition to commit the offenses for which he was charged. Although the State's confidential informant encouraged defendant to obtain illegal drugs in order to trade them for home repair work, defendant first learned of the drugs-for-work idea from a third party unaffiliated with the State, and it was defendant who then brought the idea to the attention of the State's informant. **State v. Pratt, 363.**

ESTATES

Deficiency judgment—statutory spousal allowance—payment from sale of real estate—contractual agreement—Proceeds from the sale of decedent's real property were permitted to be used to pay the claims of decedent's estate—including a deficiency judgment for his wife's statutory year's allowance as surviving spouse (N.C.G.S. § 30-15)—where decedent's wife, children, and estate expressly agreed to the arrangement. **In re Est. of Giddens, 282.**

FIDUCIARY RELATIONSHIP

Breach of fiduciary duty—buyer's real estate agent—disclosure of material facts—reasonable diligence—In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court erred in granting a motion to dismiss plaintiffs' claim for breach of fiduciary duty against their real estate agents where there was a genuine issue of material fact regarding the reasonableness of the agents' efforts to discover the significant defects existing in the house or in the agents' hiring of an inspector who failed to perform a moisture test. **Cummings v. Carroll, 204.**

FRAUD

Fraud in the inducement—real estate purchase—disclosures—genuine issue of material fact—In an action by buyers of a beach house to recover damages after

discovering severe water damage that appeared to be intentionally concealed, the trial court improperly granted a motion to dismiss plaintiffs' claim for fraud in the inducement against the sellers and the sellers' real estate agents. The claims were not barred by the economic loss rule and genuine issues of material fact existed regarding: (1) whether the sellers were reasonable in representing in the disclosure statement that they had no knowledge of any defects based on a painter's tentative assertion that he repaired a leak, (2) whether the sellers' alleged misrepresentations in the disclosure statement induced plaintiffs or their inspector to forego further inquiry into the house's condition which might have led to discovery of the defects' extent, and (3) whether the sellers' and sellers' agents' knowledge of significant previous water intrusion issues in the house constituted material information not easily discoverable through reasonable diligence which required disclosure. **Cummings v. Carroll, 204.**

HOMICIDE

Request for jury view—scene of crime—abuse of discretion analysis—In a murder prosecution arising from an altercation between defendant and his ex-girlfriend's boyfriend, the trial court did not abuse its discretion under N.C.G.S. § 15A-1229(a) by denying defendant's motion for a jury view of the crime scene. The court made a reasoned decision based on the State's and defense counsel's intent to introduce photographs of the crime scene to the jury and the fact that the crime occurred in the daylight (indicating that eyewitnesses would be able to testify to events they saw clearly). **State v. Leaks, 317.**

Second-degree murder—malice—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss his second-degree murder charge arising from a car crash in which defendant—while driving on the highway at a high rate of speed, late at night, and in icy road conditions—struck and killed a man while trying to pass a parked tow truck by veering on to the shoulder of the road. There was substantial evidence of malice where defendant had an extensive record of driving-related offenses and involvement in car accidents, was driving with a revoked license during the crash, drove away from the scene without checking whether anyone was harmed, washed his damaged car (suggesting he was aware that he needed to remove blood from his vehicle), and downplayed the severity of the crash despite police informing him that he had killed someone. **State v. Nazzal, 345.**

Second-degree murder—request for jury instruction—accident as defense—harmless error—In a murder prosecution arising from a car crash, the trial court's decision not to instruct the jury on the defense of accident was, at most, harmless error where the court did instruct the jury on two lesser-included offenses (involuntary manslaughter and misdemeanor death by vehicle) that did not involve intentional killings, but the jury still convicted defendant of second-degree murder based on malice (thereby rejecting the idea that defendant acted unintentionally). **State v. Nazzal, 345.**

Self-defense—jury instruction—"necessary to kill" victim to avoid death or bodily harm—In a murder prosecution arising from an altercation between defendant and his ex-girlfriend's boyfriend, the trial court did not err when it instructed the jury that it could find defendant stabbed the boyfriend in self-defense if it found defendant believed it was "necessary to kill" the boyfriend to avoid death or bodily harm. Although a footnote in the North Carolina Pattern Instructions directs trial courts to substitute "to use deadly force against the victim" for "to kill the victim"

when the evidence shows a defendant intended to disable rather than kill the victim, binding Supreme Court precedent expressly held that this substitution was unnecessary. **State v. Leaks, 317.**

JURISDICTION

Motion to dismiss—sovereign immunity—individual versus official capacity—In a wrongful death action filed against individual employees of a state university (defendants), the trial court erred by granting defendants' motion to dismiss for lack of personal and subject matter jurisdiction under the theory of sovereign immunity because the case captions, relief sought, and allegations contained in the complaint all indicated that defendants were sued in their individual capacities rather than their official capacities. **Est. of Long v. Fowler, 241.**

LOANS

Promissory note—breach of contract—summary judgment—genuine issue of material facts—In a claim for breach of contract in which plaintiff alleged defendant defaulted on a promissory note, the trial court did not err by granting plaintiff's motion for summary judgment because there were no genuine issues of material fact pertaining to whether defendant defaulted on the note or the amount owed to plaintiff based on defendant's admissions in her answer (that she agreed to the note, she received money from plaintiff, and she failed to pay plaintiff in accordance with the note) and on plaintiff's complaint and supporting affidavits detailing the specific amount owed. **Green v. Black, 258.**

MEDICAL MALPRACTICE

Rule 9(j)—facial constitutional challenge—mandatory statutory requirements—determination by three-judge panel—In a medical malpractice case, the trial court's order striking the affidavit of plaintiffs' designated expert and granting summary judgment in favor of defendant-hospital pursuant to Civil Procedure Rule 9(j) was vacated because the trial court failed to comply with mandatory statutory requirements in addressing plaintiffs' facial constitutional challenge to Rule 9(j). The matter was remanded to the trial court for determination of whether plaintiffs properly raised a facial challenge to Rule 9(j) in their complaint (thereby invoking N.C.G.S. § 1-267.1(a1) and Civil Procedure Rule 42(b)(4)) and to resolve any issues not contingent upon the facial challenge to Rule 9(j) before deciding whether it is necessary to transfer the facial challenge to a three-judge panel of the Superior Court of Wake County. **Holdstock v. Duke Univ. Health Sys., Inc., 267.**

MOTOR VEHICLES

Driving while impaired—evidence of prior drug use—harmless error—On appeal from convictions for driving while impaired (DWI), second-degree murder, and other offenses arising from a car crash, the Court of Appeals declined to review the denial of defendant's motion to suppress evidence of his prior drug use where the evidence was used solely to prove defendant's impairment at the time of the crash, the Court of Appeals had already reversed defendant's DWI conviction for insufficient evidence of impairment, and the impairment issue was irrelevant to the other charges (thus, any error was harmless). **State v. Nazzal, 345**.

Driving while impaired—felony death by vehicle—sufficiency of the evidence—impairment—The trial court improperly denied defendant's motions to dismiss charges for driving while impaired and felony death by vehicle because the State presented insufficient evidence that defendant was appreciably impaired at the time he crashed his car, killing a man. Only one law enforcement officer opined that defendant was impaired after observing defendant approximately five hours after the crash, and the officer neither asked defendant to perform any field sobriety tests nor asked him if or when he had ingested any impairing substances. **State v. Nazzal, 345.**

Failure to maintain lane control—sufficiency of the evidence—The trial court properly denied defendant's motion to dismiss a charge of failure to maintain lane control where—while driving on the highway at a high rate of speed, late at night, and in icy road conditions—defendant veered to the right of a parked tow truck that partially obstructed the right lane, attempted to pass the truck on the shoulder of the road, and struck a man standing on the shoulder. There was substantial evidence from which a jury could infer that defendant tried to pass the truck in this manner without first ascertaining that he could do so safely. **State v. Nazzal, 345.**

Speeding to elude arrest—eligibility for expunction—offenses involving impaired driving—The trial court erred as a matter of law in determining that defendant's conviction for speeding to elude arrest was ineligible for expunction as an "offense involving impaired driving" under N.C.G.S. § 15A-145.5(a)(8a). Even though defendant committed the offense while drunk and was simultaneously convicted of driving while impaired, the offense itself does not meet the controlling statutory definition of an "offense involving impaired driving." **State v. Neira, 359**.

NEGLIGENCE

Gross negligence—proximate cause—sufficiency of pleading—In a wrongful death suit alleging gross negligence brought by decedent's wife against individual employees (defendants) of a state university where decedent worked as a pipefitter, the trial court erred in granting defendants' motion to dismiss for failure to state a claim because plaintiff's complaint sufficiently alleged that defendants' conduct in improperly shutting down a chiller unit showed an intentional disregard or indifference to decedent's safety and that they knew, or should have known, their conduct would be reasonably likely to cause injury or death. **Est. of Long v. Fowler, 241**.

Negligent misrepresentation—purchase of rental property—disclosure statement—In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court did not err by granting a motion to dismiss plaintiffs' claim for negligent misrepresentation against their own real estate agents based on the application of the economic loss rule (which prohibited a cause of action in tort for violation of contractual duties the agents owed to plaintiffs pursuant to their agency contract), or by granting dismissal of the same claim against the sellers' agents (who did not sign the disclosure statement which plaintiffs alleged they relied on to their detriment). However, the trial court improperly dismissed the same claim against the sellers because there was a genuine issue of material fact regarding whether their representation in the disclosure statement that they had no actual knowledge of any problems with the house—based on their assertion that the painter they hired had completely fixed the significant water issues—was reasonable. **Cummings v. Carroll, 204.**

Purchase of rental property—water damage—concealed—buyer's real estate agent—In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court properly granted a motion to dismiss plaintiffs' negligence claim against their real estate agency and agents because the claim was barred by the economic loss rule where the scope of the agents' duties owed to plaintiffs were specifically bargained for and laid out in the buyer agency agreement signed by plaintiffs and the agency, and where the agents' purported negligence in discovering and disclosing the defects was clearly related to the essence of the agency contract and the harm allegedly suffered by plaintiffs hinged on plaintiffs not receiving the benefit of the agreement. **Cummings v. Carroll, 204.**

Purchase of rental property—water damage—concealed—seller's real estate agent—In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court erred in granting a motion to dismiss plaintiffs' negligence claim against the sellers' real estate agents where there was a genuine issue of material fact about the meaning of statements made by a contractor and known to the agents that he "may have found" a water leak and that he "hope[d]" that he fixed it. Further, the economic loss rule was not applicable so as to bar plaintiffs' negligence claim because the sellers' contract with plaintiffs did not impose any contractual duties on defendant-agents with regard to disclosure of defects. **Cummings v. Carroll, 204.**

OBSTRUCTION OF JUSTICE

Sufficiency of evidence—evidence of deceit and intent to defraud—denial of access to child sexual abuse victim—There was sufficient evidence, taken in the light most favorable to the State, of deceit and intent to defraud to support defendant mother's conviction of felonious obstruction of justice where she took steps to frustrate law enforcement's investigation and denied officers and social workers access to her child after the child alleged she had been sexually assaulted by her adoptive father and after defendant mother observed the adoptive father sexually assaulting her child. **State v. Ditenhafer, 300.**

SENTENCING

Prior record level—calculation—prayer for judgment continued—proof of prior conviction—harmless error—In a murder prosecution, the trial court properly sentenced defendant as a prior record level IV based on eleven prior convictions, four of which defendant challenged. Specifically, the court correctly found that defendant's assault with a deadly weapon conviction, which resulted in a prayer for judgment continued, added one point to his prior record level; the court correctly added another point where the State proved by a preponderance of the evidence that defendant was convicted of breaking and entering and injury to real property (the charges were consolidated and defendant pleaded guilty); and, where the court potentially erred in counting a misdemeanor conviction as a felony, such error was harmless because defendant would have remained a prior record level IV under the correct calculation. **State v. Leaks, 317.**

SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

Additional dates to be determined; all dates are subject to change.

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

JAMES CUMMINGS and wife, CONNIE CUMMINGS, Plaintiffs
v.
ROBERT PATTON CARROLL; DHR SALES CORP. d/b/a RE/MAX COMMUNITY BROKERS; DAVID H. ROOS; MARGARET N. SINGER; BERKELEY INVESTORS, LLC; KIM BERKELEY T. DURHAM; GEORGE C. BELL; THORNLEY HOLDINGS, LLC; BROOKE ELIZABETH RUDD-GAGLIE f/k/a BROOKE ELIZABETH RUDD; MARGARET RUDD & ASSOCIATES, INC. and JAMES C. GOODMAN, Defendants

No. COA19-283

Filed 3 March 2020

1. Negligence—purchase of rental property—water damage—concealed—seller's real estate agent

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court erred in granting a motion to dismiss plaintiffs' negligence claim against the sellers' real estate agents where there was a genuine issue of material fact about the meaning of statements made by a contractor and known to the agents that he "may have found" a water leak and that he "hope[d]" that he fixed it. Further, the economic loss rule was not applicable so as to bar plaintiffs' negligence claim because the sellers' contract with plaintiffs did not impose any contractual duties on defendant-agents with regard to disclosure of defects.

2. Negligence—purchase of rental property—water damage—concealed—buyer's real estate agent

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court properly granted a motion to dismiss plaintiffs' negligence claim against their real estate agency and agents because the claim was barred by the economic loss rule where the scope of the agents' duties owed to plaintiffs were specifically bargained for and laid out in the buyer agency agreement signed by plaintiffs and the agency, and where the agents' purported negligence in discovering and disclosing the defects was clearly related to the essence of the agency contract and the harm allegedly suffered by plaintiffs hinged on plaintiffs not receiving the benefit of the agreement.

3. Negligence—negligent misrepresentation—purchase of rental property—disclosure statement

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally

concealed, the trial court did not err by granting a motion to dismiss plaintiffs' claim for negligent misrepresentation against their own real estate agents based on the application of the economic loss rule (which prohibited a cause of action in tort for violation of contractual duties the agents owed to plaintiffs pursuant to their agency contract), or by granting dismissal of the same claim against the sellers' agents (who did not sign the disclosure statement which plaintiffs alleged they relied on to their detriment). However, the trial court improperly dismissed the same claim against the sellers because there was a genuine issue of material fact regarding whether their representation in the disclosure statement that they had no actual knowledge of any problems with the house—based on their assertion that the painter they hired had completely fixed the significant water issues—was reasonable.

4. Fiduciary Relationship—breach of fiduciary duty—buyer's real estate agent—disclosure of material facts—reasonable diligence

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court erred in granting a motion to dismiss plaintiffs' claim for breach of fiduciary duty against their real estate agents where there was a genuine issue of material fact regarding the reasonableness of the agents' efforts to discover the significant defects existing in the house or in the agents' hiring of an inspector who failed to perform a moisture test.

5. Appeal and Error—abandonment of issues—unfair and deceptive trade practices—no argument or reply brief

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim for unfair and deceptive trade practices against the sellers and the sellers' agents was deemed abandoned where plaintiffs failed to raise any argument in their brief or to file a reply brief responding to defendants' contention that the cause of action was abandoned.

6. Contracts—real estate purchase—breach of sales contract—false representation in disclosure statement

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court properly granted a motion to dismiss plaintiffs' claim for breach of contract against the sellers (a corporate entity and an individual owner of that entity) because

any representations in the real estate disclosure statement, false or otherwise, were not made a part of the sales contract's terms. In addition, the individual seller did not sign the sales contract in his individual capacity.

7. Appeal and Error—abandoned issue—breach of implied covenant of good faith and fair dealing—no argument or reply brief

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim for breach of implied covenant of good faith and fair dealing against the sellers was deemed abandoned where plaintiffs failed to raise any argument in their brief or to file a reply brief in response to defendants' argument that the claim was abandoned.

8. Fraud—fraud in the inducement—real estate purchase—disclosures—genuine issue of material fact

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court improperly granted a motion to dismiss plaintiffs' claim for fraud in the inducement against the sellers and the sellers' real estate agents. The claims were not barred by the economic loss rule and genuine issues of material fact existed regarding: (1) whether the sellers were reasonable in representing in the disclosure statement that they had no knowledge of any defects based on a painter's tentative assertion that he repaired a leak, (2) whether the sellers' alleged misrepresentations in the disclosure statement induced plaintiffs or their inspector to forego further inquiry into the house's condition which might have led to discovery of the defects' extent, and (3) whether the sellers' and sellers' agents' knowledge of significant previous water intrusion issues in the house constituted material information not easily discoverable through reasonable diligence which required disclosure.

9. Appeal and Error—abandoned issue—personal liability—no argument

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim against one of the individual sellers for personal liability was deemed abandoned where plaintiffs failed to raise any argument in their brief on this claim.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Plaintiffs from order entered 31 July 2018 by Judge Alma L. Hinton in Brunswick County Superior Court. Heard in the Court of Appeals 17 October 2019.

Chleborowicz Law Firm, PLLC, by Christopher A. Chleborowicz and Elijah A.T. Huston, for Plaintiffs-Appellants.

Ward and Smith, P.A., by Ryal W. Tayloe and Alex C. Dale, for Defendants-Appellees Berkeley Investors, LLC, and George C. Bell.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Clay Allen Collier, for Defendants-Appellees Robert Patton Carroll and DHR Sales Corp. d/b/a Re/Max Community Brokers.

Wallace, Morris, Barwick, Landis & Stroud, P.A., by Stuart L. Stroud and Kimberly Connor Benton, for Defendants-Appellees Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd, Margaret Rudd & Associates, Inc., and James C. Goodman.

COLLINS, Judge.

Plaintiffs James and Connie Cummings appeal from the trial court's 31 July 2018 order granting summary judgment to Defendants Berkeley Investors, LLC, George C. Bell, Robert Patton Carroll, DHR Sales Corp. d/b/a Re/Max Community Brokers, Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd, Margaret Rudd & Associates, Inc., and James C. Goodman (collectively, "Defendants"[1]). Plaintiffs contend that material issues of fact exist that preclude summary judgment. We affirm in part and reverse and remand in part.

I. Background

In August 2014, Plaintiffs purchased a house located on Oak Island (the "House") from Berkeley Investors, LLC ("Berkeley"). Plaintiffs were represented in the transaction by Margaret Rudd & Associates, Inc., (the "Rudd Agency"), and the Rudd Agency's agents Brooke Rudd-Gaglie and James Goodman. Berkeley was represented in the transaction by DHR

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1. Although they were initially named as defendants, David H. Roos, Margaret N. Singer, Kim Berkeley T. Durham, and Thornley Holdings, LLC were voluntarily dismissed by Plaintiffs prior to entry of the trial court's order from which Plaintiffs have appealed.

Sales Corp. d/b/a Re/Max Community Brokers ("Re/Max") and Robert Carroll, Re/Max's agent in charge of listing the House. At all times relevant to this litigation, George Bell owned a fifty-percent interest in Berkeley, and Thornley Holdings, LLC, an entity owned by Kim Durham, owned the other fifty-percent interest.

The House was constructed in 2003. Berkeley purchased the House in 2005, intending to use it as a rental property. Over the course of its ownership of the House, Berkeley employed Oak Island Accommodations, Inc., ("OIA") to manage the House's rental, cleaning, and maintenance. OIA records demonstrate that over the course of Berkeley's ownership of the House, there were various reports about problems at the House requiring maintenance including, *inter alia*, damage to the roof, windows which would not close, various internal leaks, mold and other "foreign substances" growing within, and pests.

Berkeley first hired Carroll to list the House for sale in January 2013. On 14 January 2013 (Durham's signature) and 20 January 2013 (Bell's signature), Berkeley executed a State of North Carolina Residential Property and Owners' Association Disclosure Statement (the "Disclosure Statement"), which owners of certain residential real estate are required to provide to prospective purchasers in connection with a contemplated sale pursuant to N.C. Gen. Stat. § 47E. In the Disclosure Statement, Berkeley (through Durham and Bell) marked "No" in response to the following questions:

> Regarding the [House] . . . to your knowledge is there any problem (malfunction or defect) with any of the following:
>
> . . . .
>
> (1) FOUNDATION, SLAB, FIREPLACES/CHIMNEYS, FLOORS, WINDOWS (INCLUDING STORM WINDOWS AND SCREENS), DOORS, CEILINGS, INTERIOR AND EXTERIOR WALLS, ATTACHED GARAGE, PATIO, DESK OR OTHER STRUCTURAL COMPONENTS including any modifications to them? . . .
>
> (2) ROOF (leakage or other problem)? . . .
>
> (3) WATER SEEPAGE, LEAKAGE, DAMPNESS OR STANDING WATER in the basement, crawl space or slab? . . . .
>
> (4) PRESENT INFESTATION, OR DAMAGE FROM PAST INFESTATION OF WOOD DESTROYING INSECTS OR ORGANISMS which has not been repaired?"

The "Instructions to Property Owners" section of the Disclosure Statement sets forth that marking "No" on the form is a representation that the signatory has "no actual knowledge of any problem" regarding the relevant characteristic or condition at the time of signing. The instructions also charged Berkeley that if "something happens to the property to make your Disclosure Statement incorrect or inaccurate (for example, the roof begins to leak), you must promptly give the purchaser a corrected Disclosure Statement or correct the problem."

Evidence in the record shows that Bell and Durham discussed various issues with the House during Berkeley's ownership including, *inter alia*, mold, various water leaks, and ceiling leaks. Carroll was also party to certain of these communications, including a 14 October 2013 email regarding issues with the House between Carroll, Bell, and Durham, among others, in which Bell said they needed to "trace the source of the water leakage evident on the ceiling" and "[f]ix the separated/rotted wood in the guest room level from the water leakage. (it leaked while we were there last week and it looks as though the water may be coming in through the half moon window on the upper floor[,)]" and that he had "[f]ound a small plumbing leak in the kitchen" which he had "fixed with tape."

On 20 January 2014, Bell sent Durham an email noting that they needed to: (1) paint the exterior walls and the trim around the doors, as "the wooden trim around the doors is in real danger of beginning to rot"; (2) paint the "living area on the lower level" because "[t]here has been a lot of water intrusion that has come into that ceiling from wind driven rain from above and has stained it badly about 15 feet into the room ceiling. It's right in the center of the room and seems to originate on the upper level and flow down through the interior column between the doors"; and (3) "[f]ind and repair the source of this leak that is causing the damage. We'll need to get a few boards replaced on the columns as well; they are buckled from the water intrusion." OIA records from 13 February 2014 entitled "Work for Owner" indicate that OIA was seeking estimates to repair these issues, and indicated on 25 March 2014: "Owner is having this work completed by another vendor."

Carroll hired a painter named Randy Cribb to paint the house at some point in March 2014. In addition to painting a wall, the upper and lower decks, and the living room, the work Cribb bid included repairing "cracks" and "cracked caulk" in the living room ceiling. The record contains a screenshot of text messages exchanged between Carroll and Cribb at an unspecified date prior to 24 March 2014 in which Cribb said "I may have found that leak . . . I hope that was it. Everything else there

is tight[.]" In his deposition, Cribb testified that he did not look behind any walls to check for sources of water intrusion.

The Rudd Agency began representing Plaintiffs in their efforts to purchase the House on 26 June 2014, when Rudd-Gaglie (on the agency's behalf) and Plaintiffs executed an Exclusive Buyer Agency Agreement. That agreement set forth, *inter alia*, that: (1) the Rudd Agency had the duty of "disclosing to [Plaintiffs] all material facts related to the property or concerning the transaction of which [the Rudd Agency] has actual knowledge"; (2) Plaintiffs "[are] advised to seek other professional advice in matters of . . . surveying, wood-destroying insect infestation, structural soundness, engineering, and other matters pertaining to any proposed transaction"; and (3) while the Rudd Agency "may provide [Plaintiffs] the names of providers who claim to perform such services, [Plaintiffs] understand[] that [the Rudd Agency] cannot guarantee the quality of service or level of expertise of any such provider." The Exclusive Buyer Agency Agreement also provided that Plaintiffs agreed to "indemnify and hold [] harmless" the Rudd Agency (and its agents Rudd-Gaglie and Goodman) for any liability it might incur arising "either as a result of [Plaintiffs'] selection and use of any such provider or [Plaintiffs'] election not to have one or more of such services performed."

Berkeley accepted Plaintiffs' offer to purchase the House for $1.25 million on 12 (Plaintiffs' and Bell's signatures) and 13 July 2014 (Durham's signature). The Offer to Purchase and Contract (the "Contract") contemplated a 30-day due diligence period allowing Plaintiffs and their agents "to conduct all desired tests, surveys, appraisals, investigations, examinations and inspections of the Property as [Plaintiffs] deem[] appropriate," without limitation, and expressly contemplated that Plaintiffs were allowed to conduct "[i]nspections to determine . . . the presence of . . . evidence of excessive moisture adversely affecting any improvements on the Property" or "evidence of wood-destroying insects or damage therefrom[.]" The Contract also: (1) included an acknowledgment by Plaintiffs that they had received the Disclosure Statement (which, as mentioned above, Berkeley had executed in January 2013); (2) included an acknowledgement by Plaintiffs that "THE PROPERTY IS BEING SOLD IN ITS CURRENT CONDITION"; and (3) set forth that Berkeley was not providing Plaintiffs any warranty to Plaintiffs in connection with the sale.

Plaintiffs hired Jeff Williams, a licensed home inspector, to conduct an inspection of the House on 19 July 2014, which Carroll, Rudd-Gaglie, and Goodman also attended. In the inspection report he provided to

Rudd-Gaglie (to be provided to Plaintiffs), Williams set forth the scope of his inspection, including that he "shall[,]" *inter alia*: (1) "[r]eport signs of abnormal or harmful water penetration into the building or signs of abnormal or harmful condensation on building components"; and (2) "[p]robe structural components where deterioration is suspected[.]" But the Williams report also set forth that: (1) "[t]he inspection did not involve . . . inspecting behind furniture, area rugs or areas obstructed from view"; (2) Williams was "not required to: [e]nter any area or perform any procedure that may damage the property or its components" or "[d]isturb insulation, move personal items, panels, furniture, equipment, plant life, soil, snow, ice, or debris that obstructs access or visibility"; (3) Williams was not required to "report on . . . [t]he presence or absence of pests such as wood damaging organisms, rodents, or insects"; and (4) "[w]hile the inspector makes every effort to find all areas of concern, some areas can go unnoticed[.] Our inspection makes an attempt to find a leak but sometimes cannot. . . . It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report."

The Williams report noted a variety of issues with the House requiring repairs, including, *inter alia*: (1) minor damage to the roof; (2) areas on the exterior of the House needing "to be sealed to keep water and insect [sic] from entering the home"; (3) doors that failed to close or otherwise seal properly; (4) windows that exhibited rust stains and would not open; and (5) minor leaks causing mold to grow. Williams did not report that the House exhibited significant water-intrusion issues. At his deposition, Williams testified that he did not see any evidence of moisture intrusion during his inspection of the House, and therefore did not conduct any moisture testing, which would have involved intruding behind the walls. Williams also testified that he was not made aware of any history of water intrusion, which would have caused him to either conduct moisture testing or turn down the job. James Cummings ("Cummings") testified at his deposition that following Williams' inspection, he asked Carroll: "Is this a good, watertight, sound house?" and that Carroll responded "Jim, if I had the money, I'd buy it."

Rudd-Gaglie sent Plaintiffs the Williams report via email on 21 July 2014. In her email, Rudd-Gaglie said that Williams had told her the issues included "mostly small items" and that "the bigger items were the doors and windows[,]" and said that she and Plaintiffs should review the report in-depth and then "discuss how [Plaintiffs] would like to proceed with repairs."

On 11 August 2014 (Bell's signature) and 12 August 2014 (Durham's signature), Berkeley and Plaintiffs amended the Contract to require Berkeley to pay $4,500 of Plaintiffs' "expenses associated with the purchase of the Property[.]" Cummings testified at his deposition that the amendment was intended to compensate Plaintiffs for the cost of repairing the issues identified by Williams during his inspection, primarily replacing certain door locks and window cranks. The transaction closed on 15 August 2014.

Cummings testified that Plaintiffs and their family went to the House for Thanksgiving in 2014. Just before the holiday, there was a storm, and water began entering the House from the first-floor ceiling. Cummings and his son-in-law cut away a section of the wall with a knife, and noticed a nest of termites and mold. Cummings then called Rudd-Gaglie and apprised her of the problem. Rudd-Gaglie suggested Cummings call Craig Moore, a licensed general contractor, to come to inspect the House, and Cummings did so.

At his deposition, Moore testified that upon his first visit to the House soon thereafter, the ocean-side wall showed signs of flooding and "massive rot," which he testified was a "structural issue" that would have "take[n] quite a while" to develop. Moore also testified that he witnessed an active termite infestation causing damage to the House, and that in his experience such damage "doesn't happen in a couple of days."

Moore testified that the damage he witnessed showed that, in his opinion, the House had not been properly maintained, although "work had been done to make the house look better[,]" i.e., that the "previous damage to the house, wherever it was, was carefully painted and hidden so that the only way to discover that there was an ongoing water intrusion problem would have been to do extensive intrusion testing into the walls[.]" Moore also disagreed that "there [would] have been any reason for you if you went and looked at this house to cut a hole in the wall before you bought it to do intrusive testing[,]" although Moore testified that he would have identified the water-intrusion issues had he inspected the House for Plaintiffs, and told Plaintiffs that "this is why you should have a general contractor do your inspection instead of a home inspector because [general contractors] know what the repairs look like."

Moore testified that he did not believe that someone performing aesthetic work could have done their job without suspecting that they were covering up a major problem, but expressed his opinion that "[t]here would be no way to tell the extent of the condition without exposing the framing of the house," i.e., conducting moisture testing by intruding into the walls.

Later, once the interior sheetrock walls were removed, Moore observed extensive moisture intrusion and rot, and that there had been newspaper shoved into holes in the walls and then caulked over. Moore ultimately contracted with Plaintiffs to repair much of the damage he found.

Plaintiffs initially filed suit in this case on 2 September 2015. The trial court subsequently granted Plaintiffs' motion to amend the complaint, which was filed on 12 September 2016. Plaintiffs' amended complaint brought the following causes of action against Defendants:[2] (1) negligence, against Re/Max, Carroll, the Rudd Agency, Rudd-Gaglie, and Goodman; (2) negligent misrepresentation, against all Defendants; (3) breach of fiduciary duty, against the Rudd Agency, Rudd-Gaglie, and Goodman; (4) unfair and deceptive trade practices within the meaning of N.C. Gen. Stat. § 75-1.1, against Berkeley, Bell, Re/Max, and Carroll; (5) breach of contract, against Berkeley and Bell; (6) breach of the implied covenant of good faith and fair dealing, against Berkeley and Bell; (7) fraud and fraud in the inducement, against Berkeley, Bell, Re/Max, and Carroll; (8) fraud by concealment, against Berkeley, Bell, Re/Max, and Carroll; and (9) personal liability against Bell. In their amended complaint, Plaintiffs alleged that Defendants facilitated their purchase of the House in a defective condition—namely, that the House was damaged by undisclosed water-intrusion issues and was infested with termites—in derogation of various duties, and sought damages.

Defendants answered the amended complaint, asserted various affirmative defenses, and moved to dismiss on 18 October 2016, 14 November 2016, and 30 November 2016. Discovery ensued, after which Defendants moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, on 24 May 2018 and 31 May 2018.

Defendants' motions for summary judgment came on for hearing on 11 June 2018.[3] On 12 July 2018, the trial court emailed counsel for the parties indicating that she intended to grant Defendants' motions for

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2. Plaintiff's amended complaint also brought causes of action against the voluntarily dismissed defendants, *see supra* note 1, which are not relevant for purposes of this appeal.

3. During the hearing, Berkeley and Bell's counsel objected to Plaintiffs' reliance upon a document reflecting OIA maintenance records for the House from 2005 to 2010 on the basis that the document had not been authenticated in any deposition, and the trial court overruled the objection. The purportedly unauthenticated records—which Berkeley and Bell urge in their brief on appeal that we not consider in reviewing the trial court's order—are not material to our conclusions regarding whether summary judgment was appropriately granted on Plaintiffs' various causes of action, and we therefore need not analyze the trial court's ruling on Berkeley and Bell's objection to those records.

summary judgment on all of Plaintiffs' causes of action, and requested that counsel prepare proposed orders reflecting that ruling, as well as various findings of fact she said the proposed orders "should include[.]" The parties responded with various proposed orders over the next week, and suggested to the trial court that findings of fact were not necessary.

On 31 July 2018, the trial court entered an order granting Defendants' motions for summary judgment on all of Plaintiffs' causes of action, without any findings of fact. The trial court dismissed Plaintiffs' causes of action with prejudice and taxed Plaintiffs with costs.

Plaintiffs timely noticed appeal from the 31 July 2018 order.[4]

II. Discussion

Plaintiffs argue that the trial court erred by granting Defendants summary judgment because genuine issues of material fact exist that require trial. After stating the standard of review, we address each of Plaintiffs' causes of action in turn.

a. Standard of Review

This Court has said:

> Summary judgment is a somewhat drastic remedy, that must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue. The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed.
>
> Summary judgment is proper 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

4. In their notice of appeal, Plaintiffs also purported to appeal from the trial court's ruling sustaining Berkeley and Bell's objection to the introduction of certain evidence at the hearing on Defendants' motions for summary judgment. However, Plaintiffs make no arguments regarding that ruling in their brief on appeal, and as such, that aspect of Plaintiffs' appeal has been 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.").

> entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by
>
> (1) proving that an essential element of the plaintiff's case is non-existent, or
>
> (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or
>
> (3) showing that the plaintiff cannot surmount an affirmative defense.
>
> Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 211-12, 580 S.E.2d 732, 735 (2003) (internal quotation marks, brackets, and citations omitted).

"Our standard of review of an appeal from summary judgment is de novo. The evidence produced by the parties is viewed in the light most favorable to the non-moving party. If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied." *Nationstar Mortg. LLC v. Curry*, 822 S.E.2d 122, 125-26 (N.C. Ct. App. 2018) (internal quotation marks, brackets, and citations omitted).

b. Negligence

"[U]nder established common law negligence principles, a plaintiff must offer evidence of four essential elements in order to prevail: duty, breach of duty, proximate cause, and damages." *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 201, 505 S.E.2d 131, 135 (1998).

Plaintiffs brought their negligence cause of action against Re/Max and Carroll (collectively, "Berkeley's agents") and the Rudd Agency, Rudd-Gaglie, and Goodman (collectively, "Plaintiffs' agents"), and we address these two groups separately.

1. Berkeley's agents

[1] Plaintiffs alleged that Berkeley's agents owed them duties to, *inter alia*: (1) "take all reasonable steps to ascertain all known and readily available material facts about the condition" of the House, including by making inquiries of Berkeley, OIA, and their representatives regarding the House, and to disclose all known and ascertainable material facts regarding the House to Plaintiffs; (2) ensure that the water-intrusion issues at the House were effectively repaired by a proper professional; and (3) ensure that Berkeley's Disclosure Statement was materially accurate and fully disclosed any material defects to the House before providing the same to Plaintiffs. Plaintiffs alleged that Berkeley's agents breached those duties by: (1) failing to discover any ascertainable material defects to the House and disclose those defects to them; (2) hiring Cribb, a painter, to repair the water-intrusion issues; (3) allowing Berkeley to provide Plaintiffs with the Disclosure Statement in which Berkeley represented that it had no actual knowledge of defects to the House; and (4) failing to disclose the known history of water-intrusion issues at the House and any other known material facts about the House to them. Berkeley's agents' alleged negligence was a proximate cause of Plaintiffs closing on the House, the theory continues, which caused Plaintiffs injury when they repaired the defects to the House once they were discovered, and resulted in other damages.

We have described the duties a seller's agent owes to the buyer in a real-estate transaction as follows:

> It is well-settled that a broker who makes fraudulent misrepresentations or who conceals a material fact when there is a duty to speak to a prospective purchaser in connection with the sale of the principal's property is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller. Further, *a broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information. This duty applies, however, to material facts known to the broker and to representations made by the broker.*

Clouse v. Gordon, 115 N.C. App. 500, 508, 445 S.E.2d 428, 432-33 (1994) (emphasis added) (internal quotation marks, brackets, and citations omitted).

First, Plaintiffs' theory that Berkeley's agents were negligent because they failed to discover defects and disclose "ascertainable" material facts is misguided, because a seller's agent only has a duty to disclose material facts that are known to him. *Id.* Second, Berkeley's agents could not have become liable in negligence to Plaintiffs by failing to ensure that proper repair work at the House took place, because Berkeley's agents owed Plaintiffs no duty to ensure that the House was in any particular condition at the time of closing. And third, Berkeley's agents were not negligent by merely passing along Berkeley's Disclosure Statement to Plaintiffs, where the Disclosure Statement (1) was not signed by Berkeley's agents, (2) expressly set forth that "the representations are made by the owner and not the owner's agent(s) or subagent(s)[,]" and (3) only set forth representations regarding Berkeley's (and its representatives') actual knowledge. Plaintiffs have not directed our attention to any authority setting forth that a seller's agent has a duty to challenge or correct the statements made by its principal to a prospective buyer under such circumstances, and we are aware of no such authority.

However, the facts that Berkeley's agents owed Plaintiffs no duties to discover defects at the House, repair the House, or correct the Disclosure Statement does not mean that Berkeley's agents owed no duty to Plaintiffs to speak regarding the water-intrusion issues at the House, the circumstances surrounding Cribb's purported repair work to those issues, or the substance of Berkeley's Disclosure Statement, of which the record demonstrates Berkeley's agents had knowledge. As mentioned above, "a broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information." *Clouse*, 115 N.C. App. at 508, 445 S.E.2d at 432-33. Berkeley's agents do not dispute that they did not tell Plaintiffs about the previous water-intrusion issues or the circumstances surrounding Cribb's purported repairs, and so the question is whether those facts were material such that Berkeley's agents were required to disclose them, and were negligent by failing to do so.

The materiality of the past water-intrusion issues and Cribb's purported repairs to them depends upon whether Cribb's work was sufficient to justify a reasonable belief that the issues had been successfully

repaired,[5] and thus that the facts of the issues and the repairs—which would be material in the absence of successful repairs—were rendered no longer material such that the failure to disclose them to Plaintiffs was not negligence (or fraud, *see infra* Section II(h)). Because none of the Defendants have directed our attention to any authority tending to support the proposition that where a painter states that he "may have found" a leak at a residence and "hope[s]" that he repaired it, the facts of the previous water-intrusion issues at the residence and the efforts that were undertaken to repair them are rendered immaterial as a matter of law, we conclude that the question of the materiality of those facts must be answered by a jury following trial. *See Latta v. Rainey*, 202 N.C. App. 587, 599, 689 S.E.2d 898, 909 (2010) ("A misrepresentation or omission is 'material' if, had it been known to the party, it would have influenced the party's judgment or decision to act. Materiality is generally a question of fact for the jury." (citations omitted)).

Berkeley's agents argue, however, that the economic-loss rule bars Plaintiffs' negligence cause of action against them. This Court has explained the economic-loss rule as follows:

> [A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation. Where parties were privy to a contract, a viable tort action must be grounded on a

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5. *See* 2008-2009 Update Course, "Material Facts" 28 (N.C. Real Estate Comm'n, 2009), https://www.ncrec.gov/Pdfs/bicar/MaterialFacts.pdf ("Where the broker is reasonably certain that the repair was successful and cured the problem, then it may not need to be disclosed, such as a leaky faucet which has been fixed, or the purchase of a new water heater to replace the old one, etc."); *see also Friebel v. Paradise Shores of Bay Cty., LLC*, 2012 U.S. Dist. LEXIS 36384, at *9 (N.D. Fla. Mar. 19, 2012) ("Here, the only issue is whether the structural problems and the subsequent repairs were material facts which should have been disclosed. . . . Plaintiffs have not met their burden because the evidence in the record demonstrates that Defendant was reasonable in relying on the assurances of the engineer of record, the architect, their retained certified general contractor, the engineers at ECM, and the city issued certificate of occupancy. . . . Defendants were reasonable to believe that the repairs were adequate and that no disclosures had to be made."); *cf. Clouse*, 115 N.C. App. at 509, 445 S.E.2d at 433 (defendant "would have no reason to question [surveyor]'s affirmative representation and make her own independent investigation when [surveyor]'s expertise was specifically in the area of conducting surveys and when he was paid to specifically conduct such survey").

> violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties.

Boone Ford, Inc. v. IME Scheduler, Inc., 822 S.E.2d 95, 99 (N.C. Ct. App. 2018) (internal quotation marks and citations omitted).

However, Berkeley's agents did not have direct contractual privity with Plaintiffs. And as described below in Section II(f), we conclude that Berkeley's Contract with Plaintiffs did not impose a contractual duty upon Berkeley (or others) to (1) discover defects to the House and disclose them to Plaintiffs, (2) repair any known defects to the House for Plaintiffs, or (3) provide a Disclosure Statement free from misrepresentations to Plaintiffs, meaning that such alleged acts and omissions by Berkeley's agents could not breach the Contract. It follows, therefore, that the economic-loss rule is not applicable to Plaintiffs' negligence cause of action brought against Berkeley's agents: i.e., because neither Berkeley, Bell, nor Berkeley's agents are adequately alleged to have acted or failed to act in a way implicating any *contractual* duties Berkeley owed to Plaintiffs under the Contract—namely, to sell the House to Plaintiffs "IN ITS CURRENT CONDITION"—the economic-loss rule cannot bar Plaintiffs' causes of action alleged *in tort* against Berkeley, Bell, or Berkeley's agents.

For these reasons, we conclude that the trial court erred by granting Berkeley's agents summary judgment on the negligence cause of action Plaintiffs brought against them.

2. Plaintiffs' agents

[2] Plaintiffs alleged that Plaintiffs' agents had duties to: (1) discover material defects to the House, including the water-intrusion issues, and to disclose those defects to them; and (2) make proper recommendations regarding home inspectors. Plaintiffs alleged that Plaintiffs' agents breached those duties by (1) failing to discover and disclose the water-intrusion issues and (2) negligently recommending Williams, who did not perform moisture testing.

However, the scope of Plaintiffs' agents' duties which Plaintiffs alleged were breached were bargained for and set forth within the Exclusive Buyer Agency Agreement that the Rudd Agency executed with Plaintiffs, and Plaintiffs have not argued that the Exclusive Buyer Agency Agreement, or any term therein, was invalid. *See Andrews v. Fitzgerald*, 823 F. Supp. 356, 378 (M.D.N.C. 1993) (upholding

exculpatory clause in contract for the sale of securities: "Under North Carolina law, parties to a contract may agree to limit liability for ordinary negligence. Exculpatory provisions are not favored by the law and are strictly construed against parties relying on them. Exculpatory clauses will be held void if the agreement is (1) violative of a statute, (2) contrary to a substantial public interest, or (3) gained through inequality of bargaining power." (citations omitted)). Because Plaintiffs agreed to limit the scope of Plaintiffs' agents' duties within a valid contract, Plaintiffs' negligence cause of action against Plaintiffs' agents is barred by the economic-loss rule.[6] *See Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639, 643 S.E.2d 28, 30 (2007) (in the products-liability context, noting that the economic-loss rule "encourages contracting parties to allocate risks for economic loss themselves, because the promisee has the best opportunity to bargain for coverage of that risk or of faulty workmanship by the promisor").

The Exclusive Buyer Agency Agreement specifically (1) described the Rudd Agency's duties regarding the disclosure of material facts about the House, (2) advised Plaintiffs to seek professional advice regarding inspections of the House, and (3) set forth that Plaintiffs understood that the Rudd Agency was not responsible for the quality of services provided by any professionals it recommended to Plaintiffs. Accordingly, because Plaintiffs are in privity of contract with the Rudd Agency regarding the bases for the negligence cause of action Plaintiffs brought against the Rudd Agency, that cause of action is barred by the economic-loss rule.

Moreover, although Rudd-Gaglie and Goodman were not parties to the Exclusive Buyer Agency Agreement and therefore lacked privity of contract with Plaintiffs, we have held that the economic-loss rule bars negligence actions brought against a defendant acting on behalf of another with whom the plaintiff was in contractual privity where the defendant's acts and the harm suffered by the plaintiff were related to the essence of the contract. *See Beaufort Builders, Inc. v. White Plains Church Ministries, Inc.*, 246 N.C. App. 27, 37-38. 783 S.E.2d 35, 42 (2016) (rejecting the plaintiff's argument that the president/co-owner could not avail himself of the economic-loss rule because he lacked contractual

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6. The fact that Plaintiffs did not bring a breach-of-contract claim against Plaintiffs' agents in the amended complaint does control the application of the economic-loss rule here, as a holding to that effect would create an avenue by which litigants could effectively avoid the effect of bargained-for contractual terms where unfavorable by simply not bringing a claim for breach of contract and suing their counterparty in tort instead.

privity with the plaintiff, who had contracted with the construction company, rather than the president/co-owner in his individual capacity).

So here, where Rudd-Gaglie and Goodman's purported negligence in discovering and disclosing the purported defects to the House to Plaintiffs was clearly related to the essence of the Rudd Agency's contract with Plaintiffs to represent them in their efforts to purchase the House, and the harm Plaintiffs allegedly suffered was that they did not get the benefit of their bargain with the Rudd Agency, Plaintiffs may not avoid the application of the economic-loss rule to its claims against Rudd-Gaglie and Goodman in their individual capacities.

We accordingly conclude that the trial court did not err by granting Plaintiffs' agents summary judgment on the negligence cause of action Plaintiffs brought against them.

c. Negligent misrepresentation

[3] This Court has said:

> The tort of negligent misrepresentation occurs when a party [1] justifiably relies [2] to his detriment [3] on information prepared without reasonable care [4] by one who owed the relying party a duty of care. If the plaintiff could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.

Songwooyarn Trading Co. v. Sox Eleven, Inc., 213 N.C. App. 49, 54, 714 S.E.2d 162, 166 (2011) (internal quotation marks and citations omitted).

Plaintiffs brought their cause of action for negligent misrepresentation against all Defendants, alleging that Defendants breached their duties to discover and disclose material defects to the House to Plaintiffs, and that Plaintiffs justifiably relied to their detriment upon Defendants' representations that did not include disclosure of the defects.

As a threshold matter, this Court has said that the economic-loss rule can bar negligent-misrepresentation causes of action. *E.g.*, *Boone Ford*, 822 S.E.2d at 99. Accordingly, and for the same reasons described above in Section II(b) regarding Plaintiffs' negligence cause of action, the economic-loss rule bars Plaintiffs' negligent-misrepresentation claims concerning the discovery and disclosure of defects to the House brought against Plaintiffs' agents, but does not apply to Plaintiffs' negligent-misrepresentation claims brought against Berkeley, Bell, or Berkeley's agents.

The purportedly false representations attributed to Berkeley, Bell, or Berkeley's agents alleged by Plaintiffs in the negligent-misrepresentation count of the amended complaint are: (1) a statement "that the house was well built[,]" attributed elsewhere in the amended complaint to Carroll; and (2) the representation "NO" in the response to Question 1 on the Disclosure Statement, i.e., whether "to your knowledge is there any problem (malfunction or defect) with . . . [the] FOUNDATION, SLAB, FIREPLACES/CHIMNEYS, FLOORS, WINDOWS (INCLUDING STORM WINDOWS AND SCREENS), DOORS, CEILINGS, INTERIOR AND EXTERIOR WALLS, ATTACHED GARAGE, PATIO, DESK OR OTHER STRUCTURAL COMPONENTS including any modification to them?"

Carroll's statement that the House was well built could not have been justifiably relied upon on by Plaintiffs in deciding whether to purchase the House, as the amended complaint establishes that Plaintiffs knew that Carroll was a real-estate agent, and does not allege that Plaintiffs thought that Carroll had helped build the House or otherwise possessed peculiar knowledge regarding the House's construction. *See Libby Hill Seafood Rests., Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568 (1983) (vague statements of those lacking "peculiar knowledge" of the facts are not actionable misrepresentations).

Regarding the Disclosure Statement, any false representation made therein cannot be attributed to Berkeley's agents, who did not sign the Disclosure Statement, which expressly set forth that "the representations are made by the owner and not the owner's agent(s) or subagent(s)[.]" Misrepresentations within the Disclosure Statement can, however, be attributed to Berkeley and Bell, who signed the document. *See Wilson v. McLeod Oil Co.*, 327 N.C. 491, 518, 398 S.E.2d 586, 600 (1990) ("Corporate officers are liable for their torts, although committed when acting officially." (quotation marks and citation omitted)).

In its response to the Disclosure Statement's Question 1, Berkeley (through Bell and Durham) represented that as of January 2013 it was without actual knowledge of any defects to, *inter alia*, the House's windows, doors, ceilings, walls, or roof, and elsewhere within the Disclosure Statement expressly represented that it was not aware of any current issues with water leakage. In the event the Disclosure Statement became "incorrect or inaccurate[,]" the Disclosure Statement required Berkeley to furnish potential buyers with another, updated statement or to "correct the problem." The record reflects that Bell and Durham discussed significant water intrusion into the House flowing from the upper level and causing damage to the second-floor ceiling on 20 January 2014, and that Berkeley subsequently hired Cribb to paint the House; Cribb told

Carroll that he might have fixed a leak in the House. The record does not reflect that anyone else was hired to repair the water-intrusion issues identified in Bell and Durham's January 2014 correspondence, and does not reflect that an updated Disclosure Statement was ever completed and furnished to Plaintiffs.

The record thus tends to show that Berkeley and Bell: (1) were aware of significant water-intrusion issues; (2) did not hire anyone besides Cribb, a painter, to repair those issues; and (3) thereafter represented to Plaintiffs that they were not aware of any water-intrusion issues at the House before closing on the sale thereof. Although Berkeley and Bell argue that Cribb "fully repaired" the water-intrusion issues, we conclude that the record, viewed in the light most favorable to Plaintiffs, raises a genuine issue of material fact regarding whether hiring a painter to repair the water-intrusion issues was unreasonable such that Berkeley and Bell negligently misrepresented, in their response to Disclosure Statement Question 1, that they did not have actual knowledge of any problems with the House.

Berkeley and Bell counter that the fact that Plaintiffs were able to inspect and discover the water-intrusion issues themselves means that Plaintiffs did not justifiably rely upon the Disclosure Statement as a matter of law. As mentioned above, "[i]f the plaintiff could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Songwooyarn Trading*, 213 N.C. App. at 54, 714 S.E.2d at 166.

The amended complaint alleges that Cribb was hired to conceal the water-intrusion issues, which is effectively an allegation that Plaintiffs could not have learned of the water-intrusion issues through the exercise of reasonable diligence. The record shows that Plaintiffs hired Williams to inspect the House, who testified at his deposition that he did not conduct moisture testing and did not discover the water-intrusion issues. But the record also reflects Moore's testimony disagreeing that "there [would] have been any reason for you if you went and looked at this house to cut a hole in the wall before you bought it to do intrusive testing" and agreeing that "previous damage to the house, wherever it was, was carefully painted and hidden so that the only way to discover that there was an ongoing water intrusion problem would have been to do extensive intrusion testing into the walls[.]"

This evidence, taken in the light most favorable to Plaintiffs demonstrates a genuine issue of material fact as to whether Williams'

inspection amounted to the exercise of "reasonable diligence[,]" particularly because Defendants' alleged efforts to conceal the water-intrusion issues might have caused Plaintiffs to forego moisture testing and more reasonably rely upon the Disclosure Statement where Plaintiffs otherwise might not have. *See Songwooyarn Trading*, 213 N.C. App. at 55, 714 S.E.2d at 166 (rejecting justifiable reliance argument in negligent misrepresentation context: "A plaintiff is not barred from recovery because he had a lesser opportunity to investigate representations made by someone with superior knowledge."); *Willen v. Hewson*, 174 N.C. App. 714, 719-20, 622 S.E.2d 187, 191 (2005) (rejecting reasonable reliance argument in fraud context where "defendant deliberately concealed" material facts).

The question of whether a party's reliance was justifiable for purposes of a negligent-misrepresentation claim is "one for the jury, unless the facts are so clear as to permit only one conclusion." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, L.L.P.*, 350 N.C. 214, 225, 513 S.E.2d 320, 327 (1999). Because a jury could reach more than one conclusion on this issue, summary judgment for Berkeley and Bell was not appropriate on Plaintiffs' negligent-misrepresentation cause of action.

In summary, we conclude that the trial court (1) did not err by granting Plaintiffs' agents and Berkeley's agents summary judgment but (2) erred by granting Berkeley and Bell summary judgment on the negligent-misrepresentation cause of action brought against them.

d. Breach of Fiduciary Duty

[4] This Court has said:

> A real estate agent has the fiduciary duty to exercise reasonable care, skill, and diligence in the transaction of business entrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so. The care and skill required is that generally possessed and exercised by persons engaged in the same business. This duty requires the agent to make a full and truthful disclosure to the principal of all facts known to him, or discoverable with reasonable diligence and likely to affect the principal. The principal has the right to rely on his agent's statements, and is not required to make his own investigation.

Brown v. Roth, 133 N.C. App. 52, 54-55, 514 S.E.2d 294, 296 (1999) (internal quotation marks, brackets, and citations omitted).

Plaintiffs brought their cause of action for breach of fiduciary duty against Plaintiffs' agents,[7] alleging that Plaintiffs' agents breached their fiduciary duties "by failing to take all necessary steps to ascertain the history and status of the [House] and by referring a home inspector whom [sic] [Plaintiffs' agents] knew did not undertake the usual and customary testing and investigations which would have or could have independently disclosed and discovered the substantial water intrusion issues and damages" to the House.

Plaintiffs' agents argue that their duties regarding discovery and disclosure of any defects to the House were defined by their contract with Plaintiffs.[8] While we agree as discussed in Section II(b)(2) above that the Exclusive Buyer Agency Agreement contemplates those duties, a real-estate agent's fiduciary duty is not prescribed by contract, but is instead imposed by operation of law. *See Lockerman v. S. River Elec. Membership. Corp.*, 250 N.C. App. 631, 635-36, 794 S.E.2d 346, 351 (2016) (noting that *de jure* fiduciary duties, which "arise by operation of law" between "legal relations[,]" include those between "principal and agent" (citation omitted)). Plaintiffs' agents have not directed our attention to any authority setting forth that a party who undertakes to act as a fiduciary may limit the scope of that duty by contract, and we are aware of no such authority. Accordingly, the scope of the Exclusive Buyer Agency Agreement is not dispositive as to the scope of Plaintiffs' agents' duties that were owed to Plaintiffs.

While the Exclusive Buyer Agency Agreement sets forth that Plaintiffs' agents must only "disclos[e] to [Plaintiffs] all material facts related to the property or concerning the transaction of which [they] ha[ve] *actual knowledge*" (emphasis added), Plaintiffs' agents' fiduciary duty is not as limited: as noted above, a real-estate agent is required to "make a full and truthful disclosure to the principal of all facts known to him, *or discoverable with reasonable diligence* and likely to affect the principal." *Brown*, 133 N.C. App. at 54-55, 514 S.E.2d at 296 (1999) (emphasis added) (internal quotation marks, brackets, and citations omitted). Further, "[t]he principal has the right to rely on his agent's statements, and *is not required to make his own investigation*." *Id.* (emphasis added).

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7. Plaintiffs' agents concede in their brief on appeal that the Exclusive Buyer's Agency Agreement "create[ed] a contractual and fiduciary relationship between" Plaintiffs and Plaintiffs' agents.

8. Plaintiffs' agents do not argue in their brief on appeal that the economic-loss rule bars Plaintiffs' fiduciary-breach claims, so we do not reach that question.

Plaintiffs do not allege in the amended complaint that Plaintiffs' agents had actual knowledge of the water-intrusion issues or other defects to the House. Accordingly, the question is whether Plaintiffs' agents have established that the record reflects no genuine issue of material fact regarding Plaintiffs' agents' exercise of reasonable diligence in attempting to investigate and discover defects to the House and disclose the results of their investigation to Plaintiffs. Plaintiffs focus upon two acts that allegedly breached the fiduciary duty owed to them: (1) Plaintiffs' agents' failure to request and obtain OIA maintenance records for the House, which allegedly demonstrate a history of moisture intrusion and other defects to the House; and (2) Plaintiffs' agents' hiring of Jeff Williams to inspect the House, because Williams did not perform a moisture test, which Plaintiffs allege was "usual and customary."

Regarding the first allegation, Plaintiffs' agents argue that: (1) there is no "North Carolina Real Estate Commission ruling or advisory opinion that establishes a duty to request maintenance records for the sale of a house"; (2) Plaintiffs did not request that Plaintiffs' agents ask for the OIA maintenance records; and (3) Berkeley's agents were in possession of those records and that, if they showed material defects to the House, Berkeley's agents were obligated to produce them to Plaintiffs. But Plaintiffs' agents direct our attention to no authority setting forth that a real-estate agent's duty to investigate and disclose is limited, as a matter of law, by the North Carolina Real Estate Commission, the requests made by the agent's client, or the fact that another who may owe the client a duty of disclosure is in possession of the information at issue.

Regarding the second allegation, Plaintiffs' agents argue that the Exclusive Buyer Agency Agreement "indemnifies [them] from any liability related to the selection of the home inspector which was the [sic] explicitly the [Plaintiffs'] duty" and that "[t]here is absolutely no evidence that Jeff Williams failed to do anything during the inspection that should have been done or that he was otherwise failed [sic] to adequately conduct a home inspection." But as explained above: (1) we are aware of no authority setting forth that the scope of a real-estate agent's fiduciary duty may be delineated or limited by contract;[9] and (2) Moore testified at his deposition that he would have identified the water-intrusion problem had he inspected the House. Further, whether a moisture test is "usual and customary" for a home inspection is not clear to us from any

9. Plaintiffs' agents have directed our attention to no authority setting forth that a contractual indemnification provision can extinguish a cause of action, and we are aware of no such authority.

authorities cited by the parties, and we are therefore unable to conclude that Williams' failure to conduct such a test was unobjectionable.

As mentioned above, Plaintiffs had the right to rely upon Plaintiffs' agents' investigation and were not required to conduct their own. *Brown*, 133 N.C. App. at 54-55, 514 S.E.2d at 296. Because of that fact, and based upon the authorities cited by the parties and the record as viewed in the light most favorable to Plaintiffs, we are unable to say whether, as a matter of law, Plaintiffs' agents performed in keeping with the standard of care "generally possessed and exercised by persons engaged in the same business[,]" *Brown*, 133 N.C. App. at 54, 514 S.E.2d at 296, when they failed to request the OIA maintenance records and hired Williams to inspect the House.

Accordingly, we conclude that there exist genuine issues of material fact as to whether Plaintiffs' agents breached their fiduciary duties to Plaintiffs, and that the trial court erred by granting Plaintiffs' agents summary judgment on Plaintiffs' fiduciary-breach cause of action.

e. Unfair and/or Deceptive Trade Practices

[5] Although they mention the term, Plaintiffs make no argument in their brief concerning unfair and/or deceptive trade practices. Moreover, they did not file a reply brief to respond to Defendants' arguments that this cause of action was abandoned. *See* N.C. R. App. P. 28(h). We accordingly deem that aspect of Plaintiffs' appeal abandoned. N.C. R. App. P. 28(b)(6); *see Comstock v. Comstock*, 244 N.C. App. 20, 25 n.2, 780 S.E.2d 183, 186 n.2 (2015) (holding "cursory reference" insufficient to satisfy Appellate Rule 28(b)(6) where party "offers no actual substantive argument with regard to [an] issue"); *First Charter Bank v. Am. Children's Home*, 203 N.C. App. 574, 580, 692 S.E.2d 457, 463 (2010) ("It is not the role of the appellate courts to create an appeal for an appellant, nor is it the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein." (internal quotation marks, ellipsis, and citations omitted)).

f. Breach of Contract

[6] "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 216, 768 S.E.2d 582, 590 (2015) (quotation marks and citation omitted).

Plaintiffs brought their breach-of-contract cause of action against Berkeley and Bell, alleging breach of the Contract because Bell and

Durham represented (on Berkeley's behalf) in the attached Disclosure Statement that they had no actual knowledge of any defects to the House, when they allegedly knew or should have known of water-intrusion issues rendering certain of those representations false.

As a threshold matter, Bell is correct that because he did not contract in his individual capacity with Plaintiffs, he cannot be held individually liable for any breach of the Contract. *See Keels v. Turner*, 45 N.C. App. 213, 218, 262 S.E.2d 845, 847 (1980) ("[W]here individual responsibility is demanded, the nearly universal practice in the commercial world is that the corporate officer signs twice, once as an officer and again as an individual." (quotation marks and citation omitted)).

Regarding the remaining claim against Berkeley, our Supreme Court has said that " '[i]t is elementary that where a contract or transaction was induced by false representations, the representations and the contract are distinct and separable – that is, the representations are usually not regarded as merged in the contract.' " *Fox v. S. Appliances, Inc.*, 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965) (quoting 23 Am. Jur., *Fraud and Deceit*, § 23, pp. 775-76). Plaintiffs have cited no authority where any of our courts have held that a false representation in an N.C. Gen. Stat. § 47E disclosure statement furnished to a prospective buyer of a residence was sufficient to support a cause of action against the seller for breach of the sales contract, and we are aware of no such authority. Further: (1) the Disclosure Statement expressly sets forth that Plaintiffs understand that Berkeley's representations do not comprise warranties regarding the facts represented, and that the representations were not intended to be substitutes for Plaintiffs' own investigation; and (2) the Contract expressly provides that Berkeley was selling the House "IN ITS CURRENT CONDITION" and that Berkeley would not provide Plaintiffs with any warranties regarding the House as part of the sale. Neither Plaintiffs' amended complaint nor their brief on appeal direct our attention to any particular provision in the Contract setting forth that the representations made within the Disclosure Statement are terms of the Contract, and after a careful review of the Contract, we discern no provision reasonably read as creating such terms.

We therefore conclude that while a false representation within the Disclosure Statement may give Plaintiffs a basis for their cause of action alleging fraud—a tort which, if proven, allows for rescission of the contract and/or damages, *see Kee v. Dillingham*, 229 N.C. 262, 265-66, 49 S.E.2d 510, 512 (1948)—such a false representation cannot support Plaintiffs' cause of action alleging breach of the Contract, and that

the trial court did not err by granting Berkeley and Bell summary judgment thereupon.[10]

g. Breach of the Implied Covenant of Good Faith and Fair Dealing

[7] As with their cause of action alleging unfair and/or deceptive trade practices, Plaintiffs make no argument regarding the implied covenant of good faith and fair dealing in their initial brief, and did not file a reply brief. We therefore deem that aspect of Plaintiffs' appeal abandoned as well. N.C. R. App. P. 28(b)(6); *Comstock*, 244 N.C. App. at 25 n.2, 780 S.E.2d at 186 n.2.

h. Fraud

[8] Plaintiffs purported to bring separate causes of action for "Fraud and Fraud in the Inducement" and "Fraud by Concealment[.]" Because: (1) the purportedly distinct causes of action each allege false representations or omissions in inducing Plaintiffs to purchase the House; and (2) the respective elements of fraud, fraud in the inducement, and fraudulent concealment overlap on these facts, *compare Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 31, 588 S.E.2d 20, 29 (2003) (elements of fraud), *with Harton v. Harton*, 81 N.C. App. 295, 298-99, 344 S.E.2d 117, 119-20 (1986) (elements of fraud in the inducement), *with Friedland v. Gales*, 131 N.C. App. 802, 807, 509 S.E.2d 793, 797 (1998) (elements of fraudulent concealment), we analyze Plaintiffs' causes of action alleging fraud as separate theories of a single cause of action alleging fraud in the inducement.

This Court has said:

> The essential elements of fraud in the inducement are:
> (i) that defendant made a false representation or concealed a material fact he had a duty to disclose[;]
> (ii) that the false representation related to a past or existing fact;

10. Because Plaintiffs (1) have abandoned their appeal regarding the trial court's ruling on their cause of action alleging breach of the implied covenant of good faith and fair dealing, *see infra* Section II(g), and (2) make no arguments regarding the breach of any other implied terms within the Contract, we have no occasion to consider (a) the impact the breach of any implied contractual terms might have upon the trial court's ruling on Plaintiffs' breach-of-contract cause of action or (b) the impact such a breach might have upon the application of the economic-loss rule to Plaintiffs' tort claims. *First Charter Bank*, 203 N.C. App. at 580, 692 S.E.2d at 463.

(iii) that defendant made the representation knowing it was false or made it recklessly without knowledge of its truth;

(iv) that defendant made the representation intending to deceive plaintiff;

(v) that plaintiff reasonably relied on the representation and acted upon it; and

(vi) plaintiff suffered injury

Harton, 81 N.C. App. at 298-99, 344 S.E.2d at 119-20.

Plaintiffs brought their fraud cause of action against Berkeley, Bell, and Berkeley's agents, alleging that those four Defendants "made false representations and/or concealments of a material fact regarding the existence of long-standing, chronic and substantial water intrusion and damages as well as the history of not properly repairing the same." Plaintiffs alleged that all four Defendants were, by virtue of Plaintiffs' offer to purchase the House, under a duty to disclose all material facts regarding the House to them, and that: (1) Carroll defrauded Plaintiffs by saying that he would buy the House if he could; (2) Berkeley and Bell defrauded Plaintiffs by filling out the Disclosure Statement representing that they had no knowledge of water-intrusion issues at the House; and (3) all four Defendants defrauded Plaintiffs by failing to disclose the history of water-intrusion issues and the fact that the issues had not been properly repaired. Rather than properly repair the water-intrusion issues, Plaintiffs alleged that these four Defendants took active steps to conceal the issues and thereby deceived them, which both made Plaintiffs' reliance upon the alleged false representations reasonable and excused Plaintiffs' own failure to discover the issues. Plaintiffs acted upon the four Defendants' alleged fraud by closing on the House at full price, and suffered injury by, *inter alia*, repairing the House once the defects to the House became evident.

1. Carroll's statement

Carroll's statement that he would buy the House if he could is vague "puffing" that is not material and could not be reasonably relied upon by Plaintiffs in deciding whether to purchase the House, and accordingly is inadequate as an allegation of fraud. *See Rowan Cty. Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 659 (1992) ("mere puffing, guesses, or assertions of opinions" are not actionable as fraud).

2. Representations within the Disclosure Statement

As discussed above in Section II(b)(1), the record tends to show that Berkeley and Bell (1) were aware of water-intrusion issues at the House, (2) hired only a painter to address those issues, and (3) thereafter represented to Plaintiffs that they were not aware of any water-intrusion issues at the House.

Berkeley and Bell argue that: (1) the economic-loss rule bars Plaintiffs' fraud claims; (2) the record does not contain any evidence that any representation in the Disclosure Statement was made with knowledge of the representation's falsity; and (3) Plaintiffs cannot establish that they reasonably relied upon any of the alleged false representations.

The economic-loss rule does not apply to Plaintiffs' fraud causes of action, because the alleged false representations within the Disclosure Statement (like the alleged omissions discussed *supra* Section II(f)) could not have breached the terms of the Contract. Moreover, this Court has expressly set forth that the economic-loss rule does not bar fraud claims, even where the alleged fraud also breaches a contractual term between the parties. *See Bradley Woodcraft, Inc. v. Bodden*, 251 N.C. App. 27, 34, 795 S.E.2d 253, 259 (2016) ("while claims for negligence are barred by the economic loss rule where a valid contract exists between the litigants, claims for fraud are not so barred and, indeed, the law is, in fact, to the contrary: a plaintiff may assert both claims." (internal quotation marks, brackets, and citation omitted)).

Regarding Berkeley and Bell's second argument that the record does not contain any evidence that any representation in the Disclosure Statement was made with knowledge of the representation's falsity, we do not agree. The evidence in the record, viewed in the light most favorable to Plaintiffs, reflects a genuine issue of material fact regarding whether Berkeley and Bell were aware of unrepaired water-intrusion issues at the House at the time Berkeley furnished the Disclosure Statement to Plaintiffs representing that Berkeley (through Bell and Durham) was unaware of such issues. Because Defendants have not directed our attention to authority setting forth otherwise, the question of whether a painter's purported repair of a leak eliminated Bell and Durham's knowledge regarding the water-intrusion issues is appropriate for a jury to decide as a matter of fact, not a judge as a matter of law. *Cf. Clouse*, 115 N.C. App. at 509, 445 S.E.2d at 433 (defendant "would have no reason to question [surveyor]'s affirmative representation and make her own independent investigation when [surveyor]'s expertise was specifically in the area of conducting surveys and when he was paid

to specifically conduct such survey"). Indeed, even if Bell were to testify that he had no such knowledge, the jury would still be free to not credit that testimony and find otherwise in light of the other evidence in the record. *See Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979) ("It is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove.").

Finally, we also reject Berkeley and Bell's argument that the fact that Plaintiffs were able to inspect and discover the water-intrusion issues themselves means that Plaintiffs did not reasonably rely upon the Disclosure Statement as a matter of law, for the same reasons we reject Berkeley and Bell's argument regarding justifiable reliance above in Section II(c).

We have said that "[i]n an arm's-length transaction, when a purchaser of property has the opportunity to exercise reasonable diligence and fails to do so, the element of reasonable reliance is lacking and the purchaser has no action for fraud." *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2004) (internal quotation marks and citations omitted). But even if the plaintiff fails to make its own investigation, the plaintiff's fraud claim will not fail where "(1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations." *Id.* (internal quotation marks and citation omitted).

As discussed in more detail above in Section II(c), the record reflects that: (1) Plaintiffs hired Williams to inspect the House; Williams testified that he did not conduct moisture testing or discover the water-intrusion issues; and (2) Moore testified that he saw no reason to conduct moisture testing based upon a visual inspection of the House, and that he believed previous damage to the house had been carefully hidden so that the damage was only discoverable if such testing was undertaken. This evidence, taken in the light most favorable to Plaintiffs, demonstrates that genuine issues of material fact exist regarding whether (1) Williams' inspection amounted to the exercise of "reasonable diligence" and (2) whether Defendants induced Plaintiffs to forego moisture testing and rely upon their allegedly-false representations within the Disclosure Statement. *See Willen*, 174 N.C. App. at 719-20, 622 S.E.2d at 191 (rejecting reliance argument where "defendant deliberately concealed" material facts); *Libby Hill*, 62 N.C. App. at 698, 303 S.E.2d at 568 ("An action

in fraud for misrepresentations regarding realty will lie . . . where the purchaser has been fraudulently induced to forego inquiries which he otherwise would have made. . . . Thus, where material facts are available to the vendor alone, he or she *must* disclose them." (citations omitted)).

In the fraud context, "[t]he reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007). Because, for the aforementioned reasons, the record reasonably supports more than one conclusion, we conclude that genuine issues of material fact exist regarding whether Berkeley and Bell defrauded Plaintiffs by providing them with the Disclosure Statement, and that the trial court erred by granting Berkeley and Bell summary judgment on Plaintiffs' fraud cause of action.

3. Non-disclosure of water intrusion and repairs

Finally, Plaintiffs argue that Berkeley, Bell, and Berkeley's agents defrauded them by failing to disclose the history of water-intrusion issues and the fact that the issues had not been properly repaired.

This Court has said:

> A duty to disclose material facts arises where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser. In other words, in order to establish fraud based upon a seller's failure to disclose material defects, a buyer must, in part, show that the material defects were not discoverable in the exercise of the buyer's diligent attention or observation.

Everts v. Parkinson, 147 N.C. App. 315, 325, 555 S.E.2d 667, 674 (2001) (internal quotation marks, emphasis, and citations omitted). Moreover, a seller's real-estate agent has a duty to disclose known material facts to a prospective buyer, or else he may be personally liable for fraud. *Johnson v. Beverly-Hanks & Assocs., Inc.*, 328 N.C. 202, 210, 400 S.E.2d 38, 43 (1991) (reversing summary judgment for defendant broker on fraud claim because of conflicting testimony regarding whether defendant concealed material fact from buyer); *Clouse*, 115 N.C. App. at 508, 445 S.E.2d at 432-33. ("A broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information. This duty applies, however, to material facts known to the broker and to representations made by the broker." (internal quotation marks, brackets, and citation omitted)).

Because the four Defendants dispute neither (1) that they were aware of the previous water-intrusion issues at the House and the circumstances surrounding Cribb's purported repair work nor (2) that they did not disclose those facts to Plaintiffs, the question is whether the four Defendants had a duty to disclose those facts. That question itself requires consideration of whether those facts were (1) material and (2) "not discoverable in the exercise of the [Plaintiffs'] diligent attention or observation." *Everts*, 147 N.C. App. at 325, 555 S.E.2d at 674.

As set forth above in Sections II(b)(1) and II(c), these are questions for a jury to decide. First, because Defendants have not directed our attention to any authority setting forth that because a painter said he might have fixed a leak at a residence, the fact of previously-material water-intrusion issues at the residence and the circumstances surrounding the painter's work are rendered immaterial as a matter of law, we conclude that such a question presents a genuine issue of material fact. Second, we are also unable to say as a matter of law that the water-intrusion issues were discoverable in the exercise of Plaintiffs' diligent attention. Although Plaintiffs may have been able to but did not obtain the full OIA maintenance records or conduct moisture testing at the House, whether taking such steps is necessary for a buyer to be diligent for reasonable reliance purposes is less than clear from the authorities cited by the parties. Therefore, the questions of whether the four Defendants (1) owed Plaintiffs a duty to disclose the facts of the previous water-intrusion issues and what they undertook to repair those issues and (2) defrauded Plaintiffs by omission by failing to disclose those facts[11] depend upon the resolution of genuine issues of material fact, and we accordingly conclude that Plaintiffs must be given the opportunity to persuade a jury that the answers to those questions require that they be given relief on their alleged injuries.

In sum, we conclude that the trial court erred by granting the four Defendants summary judgment on Plaintiffs' fraud cause of action.

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11. It is worth noting the interplay between Plaintiffs' fraud theories. The fact that Berkeley and Bell made affirmative representations about the House in the Disclosure Statement may mean that their failure to disclose the water-intrusion issues and Cribb's purported repairs—which they might not have been required to disclose in the absence of such affirmative representations—amounted to fraud by omission. *See Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 501 (1974) ("even though a vendor may have no duty to speak under the circumstances, nevertheless if he does assume to speak he must make a full and fair disclosure as to the matters he discusses.").

i. Personal Liability

[9] Finally, Plaintiffs make no argument regarding their cause of action brought against Bell for personal liability, and we also deem that aspect of Plaintiffs' appeal abandoned. N.C. R. App. P. 28(b)(6).

III. Conclusion

For the aforementioned reasons, we affirm the grant of summary judgment as to Plaintiffs' causes of action alleging: (1) negligence, against Plaintiffs' agents; (2) negligent misrepresentation, against Plaintiffs' agents and Berkeley's agents; (3) unfair and/or deceptive trade practices, against Berkeley, Bell, and Berkeley's agents; (4) breach of contract, against Bell; (5) breach of the implied covenant of good faith and fair dealing, against Berkeley and Bell; and (6) personal liability, against Bell.

For the aforementioned reasons, we reverse the grant of summary judgment as to Plaintiffs' causes of action alleging: (1) negligence, against Berkeley's agents; (2) negligent misrepresentation, against Berkeley and Bell; (3) breach of fiduciary duty, against Plaintiffs' agents; (4) fraud and fraud in the inducement, against Berkeley, Bell, and Berkeley's agents; and (5) fraud by concealment, against Berkeley, Bell, and Berkeley's agents, all of which we remand for further proceedings consistent with this opinion.

AFFIRMED IN PART. REVERSED AND REMANDED IN PART.

Judge HAMPSON concurs.

Judge ARROWOOD concurs in part and dissents in part per separate opinion.

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

I concur fully with that portion of the opinion in so far as it affirms the grant of summary judgment to the defendants on any claims. I also concur with that portion of the opinion which reverses summary judgment with respect to negligent misrepresentation, and the fraud claims in whatever form pled against defendants Berkeley and Bell.

However, for the reasons set forth below, I dissent from that portion of the majority's opinion that reverses summary judgment with respect to any claim against either plaintiffs' or Berkeley's real estate agents.

The majority reversed the grant of summary judgment with respect to: (1) breach of fiduciary duty against plaintiffs' agents; (2) negligence against Berkeley's agents; (3) fraud and fraud in the inducement, against Berkeley, Bell, and Berkeley's agents; and (4) fraud by concealment, against Berkeley, Bell, and Berkeley's agents. I address the claims against plaintiffs' agents first, and then defendant-Berkeley's agents.

1. Breach of Fiduciary Duty

I first address plaintiffs' claim against their real estate agents for breach of fiduciary duty. As the majority noted, in *Brown v. Roth*, we described a real estate agent's fiduciary duty as follows:

> A real estate agent has the fiduciary duty to exercise reasonable care, skill, and diligence in the transaction of business [e]ntrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so. The care and skill required is that generally possessed and exercised by persons engaged in the same business. This duty requires the agent to make a full and truthful disclosure [to the principal] of all facts known to him, or discoverable with reasonable diligence and likely to affect the principal.

133 N.C. App. 52, 54-55, 514 S.E.2d 294, 296 (1999) (quotation marks and citations omitted). Plaintiffs contend that their real estate agents failed to exercise reasonable care because they did not provide plaintiffs with information that plaintiffs assert would have been discoverable with reasonable diligence. Specifically, plaintiffs allege that their agents, the Rudd agency, Rudd-Gaglie, and Goodman, violated their fiduciary duties when they (1) failed to discover and disclose water intrusion issues in the House and (2) negligently recommended Williams, who did not perform moisture testing. The majority asserts that whether the real estate agents acted with reasonable diligence is a question for the jury. However, the facts of this case reveal that while the plaintiffs' real estate agents did not take every possible action they could to discover every single piece of information about the House, they certainly took reasonable actions to do so.

This is not a case where a buyer's agent failed to disclose material information or failed to take actions usually taken by competent real estate agents. On the contrary, plaintiffs' agents obtained all information and documents requested by plaintiffs, procured a qualified home inspector to inspect the home prior to purchase, connected plaintiffs with various repairmen, and obtained a termite inspection. Although

the home inspector, Williams, ultimately decided not to conduct a moisture test based upon his professional opinion that it was not necessary to perform one, this decision cannot be attributed to plaintiffs' agents. Plaintiffs have not presented any evidence Williams was incompetent or otherwise not qualified to perform the inspection. Thus, plaintiffs' agents' fiduciary duty to plaintiffs was satisfied upon their suggestion to plaintiffs of a home inspector and general contractor who was well-qualified to perform the inspection. Plaintiffs' agents, who are not licensed and experienced home inspectors or general contractors, exercised reasonable diligence to discover any defects in the House by suggesting a qualified home inspector, and they reasonably relied on Williams' assessment of the home. *See Clouse v. Gordon*, 115 N.C. App. 500, 509, 445 S.E.2d 428, 433 (1994) (holding it was reasonable for real estate agent to rely on expert opinion of independent surveyor of property).

The one action plaintiffs' agents failed to take was one that plaintiffs have failed to show was either customary or necessary – requesting the OIA maintenance records. While the maintenance records would have revealed past issues with the House that had presumably been dealt with, it was reasonable for plaintiffs' agents to arrange for a home inspection because the home inspection was expected to reveal present issues with the House that needed to be fixed. Thus, the home inspection should have, and in fact did, reveal the same type of information that the maintenance reports contained. Though the home inspection did not reveal the significant water intrusion issues, this was only because Williams did not believe a moisture test was necessary.

In addition, as plaintiffs' own expert, Moore, testified, there would have been no reason for a home inspector to conduct intrusive moisture testing because the water damage was not readily apparent. Neither the plaintiffs nor the majority is able to provide any support for the proposition that a real estate agent who took reasonable actions to discover material information about the House at issue breached their fiduciary duty by not taking every action possible to obtain information about the House. Moreover, plaintiffs' agents also complied with the Rules of Real Estate Commission throughout their dealings with plaintiffs and met all of the duties set forth in the Exclusive Buyer's Agency Agreement with plaintiffs. I therefore respectfully disagree with the majority that the trial court erred in granting summary judgment for plaintiffs' agents on this issue.

2. Negligence and Fraud by Berkeley's Agents

Plaintiffs additionally contend defendants Carroll and RE/MAX, Berkeley's real estate agents, were negligent. To establish negligence,

plaintiffs must show that defendants (1) owed them a duty, (2) breached that duty, (3) plaintiffs suffered injury, and (4) the breach of duty was the proximate cause of the injury to plaintiffs. *Id.* at 508, 445 S.E.2d at 432 (quoting *Simpson v. Cotton*, 98 N.C. App. 209, 211, 390 S.E.2d 345, 346 (1990)). As the majority explained, "[a] broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information." *Johnson v. Beverly-Hanks & Assoc.*, 328 N.C. 202, 210, 400 S.E.2d 38, 43 (1991) (citing *Spence v. Spaulding and Perkins, Ltd.*, 82 N.C. App. 665, 347 S.E.2d 864 (1986)). "This duty [only] applies, however, to material facts known to the broker and to representations made by the broker." *Clouse*, 115 N.C. App. at 508, 445 S.E.2d at 432-33. In addition, the purchaser also has a duty to protect their own interests, as "it is the policy of the courts not to encourage negligence and inattention to one's own interest." *Id.* at 509, 445 S.E.2d at 433.

In the present case, Carroll had a duty to disclose all material facts known to him. After Carroll listed the property, he was made aware that the House had a water leakage problem which left a stain on the living room ceiling and caused some rotting in one of the guest bedrooms. Carroll hired Cribb to perform work on the House which included painting various areas of the House and repairing cracks. After completing the requested work on the House, Cribb represented to Carroll that he thought he found the leak causing the water intrusion problems and repaired it as well. The majority believes there is a question as to whether the water intrusion issue was successfully repaired such that it was no longer a material fact that Carroll needed to disclose. However, the evidence shows Carroll was told that the leak was repaired and he did not see any signs of water intrusion thereafter. Plaintiffs' own professional inspection of the House, which occurred three days after it had rained in the area, also did not reveal any significant water intrusion issues.

As we noted in *Clouse*, a real estate agent would have no reason to question the expert opinion of a professional surveyor, or in this case, inspector. *Id.* Thus, even if Carroll had initially not been completely certain the water leak had been repaired, it would have been reasonable for him to rely on the inspection report as an accurate assessment of the present condition of the House. Furthermore, plaintiffs also had a duty to preserve their own interests. *Id.* Though the inspection report did not reveal any significant water intrusion, it did, however, alert plaintiff to the presence of minor leaks and areas on the exterior of the House that needed to be sealed in order to keep out water and insects. Plaintiffs were thus made aware of leaks and potential water intrusion problems

in the House prior to their purchase, further rendering Carroll's knowledge of the prior leak immaterial. The report also advised plaintiffs to conduct additional inspection with respect to the recommended repairs, yet they neglected to do so. This Court has recognized that contributory negligence is a complete bar to a plaintiff's negligence claim. *Swain v. Preston Falls East, L.L.C.*, 156 N.C. App. 357, 361-62, 576 S.E.2d 699, 702-703 (2003). Berkeley's real estate agents should not be held responsible for plaintiffs' own negligence.

I am thus unable to conclude Berkeley's agents were negligent as a matter of law and would affirm the trial court's grant of summary judgment on the matter. I also note that the majority does not cite to any authority supporting the proposition that a real estate agent's duty should extend so far. In my view, the proper party to sue for negligence here would be the home inspector, who neglected to conduct a moisture test despite discovering minor leaks in the House.

Furthermore, I am also unable to concur with the majority's opinion that Berkeley's agents committed fraud in the inducement and by concealment by not informing plaintiffs of prior water intrusion issues. "A broker who makes fraudulent misrepresentations or *who conceals a material fact* when there is a duty to speak . . . is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller." *Johnson*, 328 N.C. at 210, 400 S.E.2d at 43 (emphasis in original) (citation omitted). For the same reasons I would hold Carroll and RE/MAX were not negligent, I also find they did not commit fraud.

Carroll did not conceal a material fact that he had a duty to disclose, and also made no false representations. Carroll did not inform plaintiffs of prior water intrusion issues in the House because he reasonably believed the source of the water leak had been repaired. Thus, his nondisclosure did not amount to concealing a material fact in order to induce plaintiffs to purchase the House. Rather, there is evidence in the record showing that Carroll did not mention the water leak because he simply believed it was no longer an issue, and was thus immaterial. As such, Carroll was under no duty to disclose that information.

This Court addressed a similar issue in *MacFadden v. Louf*, 182 N.C. App. 745, 643 S.E.2d 432 (2007). There, we rejected the home-purchaser's fraud claim based on a lack of reasonable reliance, holding that "[p]laintiff failed to establish that her reliance was justifiable because she conducted a home inspection before closing and that inspection report put her on notice of potential problems with the home." *Id.* at

748, 643 S.E.2d at 434. We reasoned that the inspection report pointed out potentially serious problems and advised the plaintiff to conduct an additional inspection. *Id.* at 749, 643 S.E.2d at 435. Similarly, in the present case, the inspection report noted a variety of issues with the House requiring repairs, including: (1) minor damage to the roof; (2) areas on the exterior of the House needing "to be sealed to keep water and insect [sic] from entering the home"; (3) doors that failed to close or otherwise seal properly; (4) windows that exhibited rust stains and would not open; and (5) minor leaks causing mold to grow. The report also provided that "[i]t is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report."

As the majority correctly noted, this Court has said that "[i]n an arm's-length transaction, when a purchaser of property has the opportunity to exercise reasonable diligence and fails to do so, the element of reasonable reliance is lacking and the purchaser has no action for fraud." *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2001) (citing *Calloway v. Wyatt*, 246 N.C. 129, 134, 97 S.E.2d 881, 885-86 (1957)). Because plaintiffs were made aware of water leakage issues and were advised to have the House undergo further inspection but neglected to do so, I would hold they did not exercise reasonable diligence and cannot now claim they were fraudulently induced by Berkeley's agents. Accordingly, I would affirm the trial court's grant of summary judgment on the matter, and respectfully dissent.

ESTATE OF MELVIN JOSEPH LONG, by and through MARLA HUDSON LONG, Administratrix, Plaintiff-Appellant,
v.
JAMES D. FOWLER, Individually, DAVID A. MATTHEWS, Individually, DENNIS F. KINSLER, Individually, ROBERT J. BURNS, Individually, MICHAEL T. VANCOUR, Individually, and MICHAEL S. SCARBOROUGH, Individually, Defendants-Appellees

No. COA19-785

Filed 3 March 2020

1. Jurisdiction—motion to dismiss—sovereign immunity—individual versus official capacity

In a wrongful death action filed against individual employees of a state university (defendants), the trial court erred by granting defendants' motion to dismiss for lack of personal and subject matter jurisdiction under the theory of sovereign immunity because the case captions, relief sought, and allegations contained in the complaint all indicated that defendants were sued in their individual capacities rather than their official capacities.

2. Negligence—gross negligence—proximate cause—sufficiency of pleading

In a wrongful death suit alleging gross negligence brought by decedent's wife against individual employees (defendants) of a state university where decedent worked as a pipefitter, the trial court erred in granting defendants' motion to dismiss for failure to state a claim because plaintiff's complaint sufficiently alleged that defendants' conduct in improperly shutting down a chiller unit showed an intentional disregard or indifference to decedent's safety and that they knew, or should have known, their conduct would be reasonably likely to cause injury or death.

Judge TYSON dissenting.

Appeal by Plaintiff from order entered 3 May 2019 by Judge Josephine K. Davis in Person County Superior Court. Heard in the Court of Appeals 5 February 2020.

Hardison & Cochran, PLLC, by John Paul Godwin, and Sanford Thompson, PLLC, by Sanford Thompson, IV, for Plaintiff.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall, Patrick M. Meacham, and Catherine R. L. Lawson, for Defendants.

BROOK, Judge.

Marla Hudson Long ("Plaintiff"), as Administratrix of the Estate of Melvin Joseph Long ("Mr. Long"), appeals from the trial court's order dismissing her claims against James D. Fowler, David A. Matthews, Dennis F. Kinsler, Robert J. Burns, Michael T. Vancour, and Michael S. Scarborough (collectively "Defendants") for the wrongful death of her husband, Mr. Long. For the following reasons, we reverse the order of the trial court.

I. Factual and Procedural Background

On 20 January 2017, Mr. Long, a pipefitter with Quate Industrial Services, was tasked with reconnecting the water pipes of a portable chiller machine at North Carolina State University's ("NCSU") Centennial Campus that had been turned off for winter break. When Mr. Long began to loosen a 13.1-pound metal flange on a water pipe, pressurized gas, which had built up within the machine, forcefully projected the flange into his head. Mr. Long suffered severe head trauma and died five days later at the hospital.

Plaintiff commenced an action in the Industrial Commission on 15 March 2018 for wrongful death on behalf of the estate of her husband, Mr. Long, against NCSU, Randy Woodson, Allen Boyette, and "John Doe," the then-"unidentified employee/agent of [NCSU]'s machine shop and/or Maintenance and Operations Division."[1] Plaintiff alleged that John Doe had improperly shut down the chiller unit, which caused high pressure gas to leak into the water pipes so that when Mr. Long loosened the metal flange, compressed gas was exposed to air and caused the flange to explode.

Plaintiff subsequently filed a wrongful death action in Person County Superior Court on 13 November 2018 against Defendants, employees in the maintenance and HVAC department at NCSU, seeking compensatory and punitive damages.[2] Plaintiff alleged Defendants negligently shut down the chiller unit on 21 December 2016, which led to the explosion that killed Mr. Long. The complaint's case caption read as follows:

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1. At the time of the filing of the Industrial Commission complaint, Randy Woodson was NCSU's Chancellor and Allen Boyette was the director of NCSU's Building Maintenance and Operations Division.

2. Plaintiff's counsel stated during the hearing on the motions to dismiss at issue that they learned the identity of Defendants through discovery in the Industrial Commission proceedings.

JAMES D. FOWLER, Individually,
DAVID A. MATTHEWS, Individually,
DENNIS F. KINSLER, Individually,
ROBERT J. BURNS, Individually,
MICHAEL T. VANCOUR, Individually,
and MICHAEL S. SCARBOROUGH, Individually,
Defendants.

The complaint sought relief from each of the abovenamed Defendants, jointly and severally, as follows:

1. Compensatory damages from defendant Fowler in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

2. Punitive damages from defendant Fowler in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

3. Compensatory damages from defendant Matthews in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

4. Punitive damages from defendant Matthews in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

5. Compensatory damages from defendant Kinsler in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

6. Punitive damages from defendant Kinsler in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

7. Compensatory damages from defendant Burns in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

8. Punitive damages from defendant Burns in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

9. Compensatory damages from defendant Vancour in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

10. Punitive damages from defendant Vancour in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

> 11. Compensatory damages from defendant Scarborough in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).
>
> 12. Punitive damages from defendant Scarborough in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

Proceedings in the Industrial Commission were stayed pending final adjudication of the superior court matter.

On 19 February 2019, Defendants filed motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. The trial court heard arguments on Defendants' motions to dismiss on 8 April 2019. Defense counsel argued that Defendants were sued in their official capacity, which meant they were entitled to share in their government-employer's sovereign immunity, and the Industrial Commission maintained exclusive jurisdiction over the action. Defense counsel also argued that the complaint failed as a matter of law to properly allege negligence, gross negligence, and state a claim for punitive damages. The trial court granted Defendants' motions to dismiss on 3 May 2019.

Plaintiff timely appealed.

II. Analysis

On appeal, Plaintiff contends the trial court erred in granting Defendants' motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(2) because Defendants were sued in their individual, not official, capacities, and, as such, sovereign immunity does not apply to the case at bar.

Plaintiff next argues the trial court erred in allowing Defendants' motion to dismiss under Rule 12(b)(6) because the complaint gave sufficient notice of a legally cognizable claim of negligence and gross negligence as well as, based on allegations of willful and wanton conduct by Defendants, punitive damages.

For the following reasons, we agree with Plaintiff.

A. Rule 12(b)(1) and Rule 12(b)(2) Motions to Dismiss

[1] First, we consider whether the trial court properly dismissed Plaintiff's claim pursuant to Rules 12(b)(1) and 12(b)(2) for lack of subject matter and personal jurisdiction, which requires determining

whether Defendants were sued in their official capacity and are thus protected from suit under the doctrine of sovereign immunity.[3]

i. Standard of Review

The standard of review of a motion to dismiss for lack of subject matter jurisdiction is de novo. *Brown v. N.C. Dept. of Public Safety*, 256 N.C. App. 425, 427, 808 S.E.2d 322, 324 (2017). When a trial court grants a motion to dismiss for lack of personal jurisdiction, the standard of review is "whether the record contains evidence that would support the Court's determination that the exercise of jurisdiction over defendants would be inappropriate." *Stacy*, 191 N.C. App. at 134, 664 S.E.2d at 567 (citation omitted).

ii. Merits

At common law, the doctrine of sovereign immunity protected the state from any liability for negligent or tortious conduct on the part of the state or its agents. *See Moody v. State Prison*, 128 N.C. 9, 12, 38 S.E. 131, 132 (1901), *superseded by statut*e, N.C. Gen. Stat. § 143-291 (2019), *as recognized in Hocheiser v. North Carolina Dep't of Transp.*, 82 N.C. App. 712, 715, 348 S.E.2d 140, 141 (1986).

The North Carolina Tort Claims Act partially waived state immunity and allows tort claims against state agencies to be maintained in the exclusive jurisdiction of the North Carolina Industrial Commission. N.C. Gen. Stat. § 143-291 (2019). The Tort Claims Act provides in pertinent part:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education,

3. "A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina." *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257 (2012). "[F]ederal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) . . . or a Rule 12(b)(2) motion." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327-28, 293 S.E.2d 182, 184 (1982). However, the "distinction becomes crucial in North Carolina" in cases like that of *Teachy v. Coble Dairies, Inc.* when the denial of a Rule 12(b)(2) motion allows for immediate appeal while the denial of a Rule 12(b)(1) motion does not. *Id.* at 328, 293 S.E.2d at 184. The distinction is not crucial to our determination of the instant case as this case is before us as an appeal from a final judgment in superior court under N.C. Gen. Stat. § 7A-27(b)(1) (2019), *see Stacy v. Merrill*, 191 N.C. App. 131, 134, 664 S.E.2d 565, 567 (2008) (reviewing whether sovereign immunity prevented plaintiffs from bringing suit against defendants when suit was dismissed pursuant to both Rules 12(b)(1) and 12(b)(2)), and Plaintiff prevails regardless of the governing standard of review.

> the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Id. § 143-291(a). "[A] statutory waiver of sovereign immunity must be strictly construed." *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 885 (1997). "Therefore, the Tort Claims Act applies only to actions against state departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State." *Id.* at 107, 489 S.E.2d at 885-86.

As a corollary, "[a] plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence." *Id.* at 108, 489 S.E.2d at 886 (citation omitted); *see also Chastain v. Arndt*, 253 N.C. App. 8, 15, 800 S.E.2d 68, 75 (2017) (explaining plaintiff could bring suit against the state agency in the Industrial Commission and suit against the negligent employee in his individual capacity alleging gross negligence and willful and wanton conduct). The "threshold issue to be determined" in a common law action is whether the negligence suit is brought against the employee in an official or individual capacity. *Mullis v. Sechrest*, 347 N.C. 548, 551, 495 S.E.2d 721, 723 (1998). When an actor is sued in his or her official capacity, the suit is effectively one against his or her employer, and the defendant is immune to the same extent as the government entity itself unless there has been a waiver of immunity. *Wright v. Town of Zebulon*, 202 N.C. App. 540, 543, 688 S.E.2d 786, 789 (2010) (citation omitted). In an individual capacity suit, on the other hand, a plaintiff seeks recovery from the defendant directly and sovereign immunity does not protect the negligent employee. *See Chastain*, 253 N.C. App. at 15, 800 S.E.2d at 74.[4]

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4. As our Court explained in affirming the trial court's denial of a motion to dismiss in *Chastain*, allowing an individual capacity negligence suit and Tort Claims Act suit to both proceed out of a common factual origin does not permit a plaintiff to receive a double recovery in excess of the damages sustained. 253 N.C. App. at 15, 800 S.E.2d at 74.

Differentiating between an official and individual capacity suit turns on "the nature of the relief sought, *not the nature of the act or omission alleged*." *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887 (citations omitted) (emphasis added).

> It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words "in his official capacity" or "in his individual capacity" after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity.

Mullis, 347 N.C. at 554, 495 S.E.2d at 724-25. Beyond the four corners of the complaint, if money damages are sought "it is appropriate to consider the course of the proceedings . . . to determine the capacity in which defendant is being sued." *Id.* at 553, 495 S.E.2d at 724.

Mullis v. Sechrest, involving an injury to student Blaine Mullis in Harry Sechrest's shop class at a high school in the Charlotte-Mecklenburg school system, demonstrates how this inquiry operates in practice. *Id.* at 549-50, 495 S.E.2d at 721-22. First, our Supreme Court noted "plaintiffs failed to specify whether they were suing defendant Sechrest in his individual or official capacity" in the caption or elsewhere in the complaint. *Id.* at 553, 495 S.E.2d at 724. Along the same lines, though the complaint specifically named the teacher when it alleged he had failed to give reasonable or adequate instructions, our Supreme Court "note[d] it was necessary to allege defendant [teacher's] negligence in the complaint" in order to establish liability for the school board. *Id.* The plaintiffs furthermore had set forth only one claim for relief, which was that "the Defendant Charlotte[-]Mecklenburg School System provided, permitted and directed the operation of a Rockwell tilting arbor saw, model # 34-399 in its industrial arts class." *Id.*; *see also White v. Cochran*, 216 N.C. App. 125, 131, 716 S.E.2d 420, 425 (2011) (using the phrase "joint and several" indicates relief is sought in the defendants' individual capacities). Finally, in reviewing the course of proceedings, the Court noted that the plaintiffs had amended their complaint to reference the defendants' liability insurance. *Mullis*, 347 N.C. App. at 553, 495 S.E.2d at 724. Generally, the purchase of liability insurance waives

immunity for cities and counties, *see Meyer*, 347 N.C. at 108, 489 S.E.2d at 886, which is relevant in an official capacity action but not an individual capacity suit, *see id.* at 111, 489 S.E.2d at 888. "Taken as a whole, the amended complaint, along with the course of proceedings in the present case, indicate[d] an intent by plaintiffs to sue defendant Sechrest in his official capacity." *Mullis*, 347 N.C. at 554, 495 S.E.2d at 725.

Defendants argue that the superior court action is impermissibly duplicative of the claim pending in the Industrial Commission. They note that the allegations in the Industrial Commission and superior court complaints are "identical, and the monetary damages sought by Appellant in the two cases are based on the same alleged actions by Appellees." They further argue that, in spite of the fact that Plaintiff "did not include an agency theory in th[e superior court] case[,]" this is, at bottom, the theory upon which the suit proceeds.

Though Defendants are correct that the two cases arise out of the same event, Plaintiff may commence both actions for two related reasons. First, as noted above and despite the common factual origin, Plaintiff is permitted to bring both an action against NCSU in the Industrial Commission and against Defendants in the superior court so long as she has properly alleged an individual capacity suit. *See Meyer*, 347 N.C. at 108, 489 S.E.2d at 886. Second,

> [w]hether the allegations relate to actions outside the scope of defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity. To hold otherwise would contradict North Carolina Supreme Court cases that have held or stated that public employees may be held individually liable for mere negligence in the performance of their duties.

Id. at 111, 489 S.E.2d at 888 (citations omitted); *see also Boyd v. Robeson County*, 169 N.C. App. 460, 477-78, 621 S.E.2d 1, 12 (concluding plaintiff intended an individual capacity suit against detention officers notwithstanding "the substantive allegations related solely to actions undertaken by the deputy as part of his official duties.").

Focusing our inquiry as the case law dictates, the complaint and the course of proceedings reveal Plaintiff intended to bring an individual capacity suit. The case caption clearly states that Defendants are being sued in their individual capacities and does not name the state, a state entity, or NCSU. *See Mullis*, 347 N.C. at 552, 495 S.E.2d at 724 ("[P]leadings should . . . clearly state[] the capacity in which [defendants

are] being sued."). Likewise, in the prayer for relief, Plaintiff explicitly notes relief is sought "individually" as well as "jointly and severally." *See Schmidt v. Breeden*, 134 N.C. App. 248, 257, 517 S.E.2d 171, 177 (1999) (concluding the language of joint and several in "plaintiff's request for relief indeed implies that damages [we]re [being] sought from the . . . pocket" of defendants in their individual capacities).

As to the allegations in the superior court complaint, Plaintiff pled six causes of action against the six individual Defendants, naming them individually liable. For example, Plaintiff alleged that

> 149. Between December 21, 2016 and January 20, 2017 at all times pertinent to this action, *defendant Fowler*, individually, and or jointly with the other defendants, was negligent by one or more of the following acts or omissions:
>
> > a. *He* improperly drained water from the carrier chiller;
> >
> > b. *He* did not fill the Carrier chiller with glycol, ethylene glycol or some other anti-freeze after draining water from it;
> >
> > c. *He* left the Carrier chiller outside when he knew or should have known there was still water in the chiller tubes[.]

(Emphasis added.) And so on for the five other defendants, demonstrating an intent to bring suit against Defendants individually and not against NCSU. In contrast, Plaintiff alleged in the Industrial Commission amended complaint,

> 39. That the *Defendant North Carolina State University* was responsible for seeing that the chiller was inspected, maintained, and operating according to manufacturer specifications and industry standards.
>
> . . .
>
> 46. That the *Defendant North Carolina State University* and its agents and employees knew, or through the exercise of reasonable care should have known, that attempting to drain and purge a chiller unit with damaged and deteriorating tubes that were leaking would cause coolant and/or other substances to remain in the system.

(Emphasis added.)

Furthermore, the allegations in the superior court action specifically contemplate the public official and public employee distinction, which is pertinent in an individual capacity suit but not in a suit against the state entity. In an individual capacity claim, the defendant's status as a public official or public employee can protect him or her from liability for injuries he or she has caused. *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888 ("Public officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties; public employees can.") (citations omitted). The distinction is immaterial in an official capacity suit. *Epps v. Duke Univ.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850 (1996) ("A suit against a public official in his official capacity is basically a suit against the public entity (*i.e.*, the state) he represents. Therefore, an official capacity suit operates against the public entity itself, as the public entity is ultimately financially responsible for the compensable conduct of its officers.").

Turning finally to the course of proceedings, Plaintiff first brought suit in the Industrial Commission, following the proper pleading format for an action against a state entity by filing an affidavit that contained: (1) the name of the claimant, the Estate of Mr. Long; (2) the name of the institution and the name of the state employee upon whose alleged negligence the claim was based, NCSU and "John Doe," the "as-yet unidentified negligent employee"; (3) the time and place where the injury occurred, NCSU's campus on 20 January 2017; (4) a brief statement of the facts and circumstances surrounding the injury giving rise to the claim; and (5) the damages sought to be recovered. *See* N.C. Gen. Stat. § 143-297 (2019) (setting forth these requirements in order to invoke the jurisdiction of the Industrial Commission in a claim against a state agency). After learning of Defendants' identity during discovery in the Industrial Commission proceedings, Plaintiff then filed a complaint against the allegedly negligent employees in superior court. As explained above, this filing followed the pleading requirements for an individual capacity suit against an alleged negligent state employee as explained in *Mullis*. 347 N.C. at 554, 495 S.E.2d at 724-25. This progression follows our case law's guidance for seeking recovery from both State and named individual defendants.

We therefore conclude that Plaintiff seeks recovery against Defendants in their individual capacities. Consequently, we reject Defendants' characterization of this action as an official capacity suit from which they are immune. The trial court thus erred in granting Defendants' motion to dismiss for lack of subject matter and personal jurisdiction.

B. Rule 12(b)(6) Motion to Dismiss

[2] Next, we consider whether the trial court properly dismissed Plaintiff's claim under Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

i. Standard of Review

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

ii. Merits

A motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). When analyzing a Rule 12(b)(6) motion, this Court is to take all factual allegations as true but should not presume legal conclusions. *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000). "The function of a motion to dismiss is to test the law of a claim, not the facts which support it." *Snyder v. Freeman*, 300 N.C. 204, 209, 266 S.E.2d 593, 597 (1980) (internal marks and citations omitted). "[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton*, 277 N.C. at 103, 176 S.E.2d at 166 (citation omitted). We also note that a motion to dismiss under Rule 12(b)(6) "is disfavored by the courts and the pleadings will be liberally construed in the light most favorable to the nonmovant." *Mabrey v. Smith*, 144 N.C. App. 119, 124, 548 S.E.2d 183, 187 (2001).

Defendants argue that Plaintiff's complaint is deficient for two reasons. First, Plaintiff failed to properly allege proximate cause; that is, that Mr. Long's injury was a reasonably foreseeable consequence of Defendants' alleged conduct. And second, that Plaintiff failed to include well-pled factual allegations that Defendants' conduct was either grossly negligent or willful and wanton.

1. Proximate Cause

"A wrongful death negligence claim must be based on actionable negligence under the general rules of tort liability." *Id.* at 122, 548 S.E.2d at 186 (citation omitted). The elements of negligence are: (1) legal duty; (2) breach of that duty; (3) actual and proximate causation; and (4) injury. *Id.* (citation omitted).

> The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant. Questions of proximate cause and foreseeability are questions of fact to be decided by the jury. Thus, since proximate cause is a factual question, not a legal one, it is typically not appropriate to discuss in a motion to dismiss.

Acosta v. Byrum, 180 N.C. App. 562, 568-69, 638 S.E.2d 246, 251 (2006) (internal marks and citations omitted). When a "complaint adequately recites the element of causation, an issue of fact for the jury to decide, plaintiff has made a sufficient pleading of causation under Rule 12(b)(6)." *See Demarco v. Charlotte-Mecklenburg Hosp. Authority*, ___ N.C. App. ___, ___, 836 S.E.2d 322, 328 (2019).

Defendants argue that the allegations in Plaintiff's complaint as to proximate cause are "conclusory." Defendants specifically label the complaint's assertions that Defendants "knew or should have known, pressure could build up inside the chiller" and yet failed to warn Mr. Long "that there was high pressure gas behind the metal flanges . . . [as] unwarranted deductions of fact and unreasonable inferences."

Here, the complaint alleges that each Defendant worked as a facilities maintenance technician in the maintenance and operations department at NCSU. It then alleges that the chiller and operating manual warned that it was not possible to drain all the water from the chiller, and, in order to "prevent freeze-up damage," the unit had to be filled with anti-freeze. The complaint asserts that each Defendant failed to follow these shutdown procedures, water froze in the pipes, the pipes burst, and pressure built within the machine. It then alleges that a 13.1-pound metal flange capped in place by the individual Defendants "was blown off by pressurized refrigerant gas inside the water pipe." Finally, it alleges that each Defendant "knew[] or should have known" his negligence "would be reasonably likely to result in injury or death," and Mr. Long's death was "a direct and proximate result of one or more acts or omissions of [each] defendant." Plaintiff's allegation of foreseeability is not an unreasonable inference but clearly is supported by the allegations within the complaint. Moreover, the complaint "adequately recites the element of causation." *Demarco*, ___ N.C. App. at ___, 836 S.E.2d at 328.

We conclude Plaintiff's allegations as to proximate cause were sufficient to withstand a motion to dismiss under Rule 12(b)(6).

2. Gross Negligence

"Gross negligence has been defined as wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92 (2002) (citations and internal marks omitted). "Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages." *Id.* (citations omitted).

Defendants argue that Plaintiff's allegations fail to meet the standard for gross negligence. Defendants claim no factual basis supports the assertion that Defendants knew or should have known that pressurized gas would build within the chiller's water pipes, much less that such conduct rises to the level of gross negligence.

As noted above, Plaintiff alleged here that Defendants did not exercise reasonable care to prevent the 13.1-pound metal flange from becoming exposed to pressure from the inside of the chiller, ignored winterization and shutdown procedures, knew or should have known pressurized gas would build within the machine, and failed to warn Mr. Long or his employer of this improper shutdown. The complaint further expressly alleges that in their acts, omissions, and failures, each Defendant "demonstrated a conscious or intentional disregard or indifference to the rights and safety of others, including [Mr.] Long, which [D]efendant[s] knew, or should have known, would be reasonably likely to result in injury or death and as such constituted willful or wanton conduct." Such allegations are sufficient to withstand a Rule 12(b)(6) motion. *See Suarez v. American Ramp. Co. (ARC)*, ___ N.C. App. ___, ___, 831 S.E.2d 885, 893 (2019). We thus conclude Plaintiff's complaint adequately states a claim for gross negligence, and the trial court erred in granting Defendants' motion to dismiss.

III. Conclusion

For the reasons stated above, we reverse the trial court's dismissal of Plaintiff's claims.

REVERSED AND REMANDED.

Judge HAMPSON concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

I. Sovereign Immunity

The question before the trial court and before this Court on Plaintiff's appeal is limited and boils down to a simple and single issue: whether any of the purported negligent acts or omissions of these five individuals, acting together or individually, occurred outside of or were unrelated to their public employment by North Carolina State University ("NCSU"). If not, the trial court's dismissal must be affirmed. The matter pending before the Industrial Commission is the exclusive and sole procedure for the recovery for the wrongful death of Melvin Joseph Long arising from injuries he allegedly suffered while working at NCSU.

"A motion to dismiss based on sovereign immunity is a jurisdictional issue." *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257 (2012). When ruling upon Defendants' motion to dismiss, the "threshold issue to be determined" is whether a negligence suit is brought against the employees for alleged acts which occurred in official or individual capacities. *Mullis v. Sechrest*, 347 N.C. 548, 551, 495 S.E.2d 721, 723 (1998).

When a defendant, who is a public employee, is sued for actions arising during his official capacity, the suit is effectively one against his public employer. Defendants are immune to the same extent as the government-employer entity itself, unless there has been a waiver of immunity. *See Wright v. Town of Zebulon*, 202 N.C. App. 540, 543, 688 S.E.2d 786, 789 (2010) (citation omitted). "[A] statutory waiver of sovereign immunity must be strictly construed." *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 885 (1997).

II. Motions to Dismiss

On 19 February 2019, these five individual Defendants filed motions to dismiss asserting: lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. Defendants argue they were being sued for negligent acts occurring while at work and in their official capacity and all are entitled to their government-employer's sovereign immunity. Defendants argue the Industrial Commission maintains exclusive jurisdiction over Plaintiff's claims.

Plaintiff's complaint failed as a matter of law to properly allege negligence, gross negligence, or state a claim for punitive damages against Defendants individually by asserting actions for conduct arising

during and solely out of their public employment. The trial court granted Defendants' motions to dismiss on 29 April 2019.

Plaintiff acknowledged at oral argument this action was filed after she had asserted and filed a wrongful death action under the State Tort Claims Act in the Industrial Commission involving the identical acts she asserts here. Plaintiff's allegations before the Industrial Commission and in her superior court complaint are "identical, and the monetary damages sought by [Plaintiff] in the two cases are based on the same alleged actions by [Defendants]."

Plaintiff also "did not include an agency theory in th[e superior court] case[,]" the only theory upon which that suit proceeds. Nothing alleges any Defendant committed *any acts* that occurred outside of their employment with the State. Plaintiff also admitted at oral arguments that, after invoking a state tort claim against NCSU before the Industrial Commission and engaging in discovery, she moved to stay the proceeding pending before the Industrial Commission, rather than resolving her claims in that chosen forum.

No allegation shows any of the individuals named in the complaint ever knew of or had met the deceased, had any knowledge of his presence, or owed any individual duties to an unknown plaintiff. There is simply no allegation of the Defendants' asserted negligence that is independent of and apart from their public employment by NCSU, which places exclusive jurisdiction within and before the Industrial Commission. *Wright*, 202 N.C. App. at 543, 688 S.E.2d at 789.

Defendants argue the trial court properly dismissed Plaintiff's complaint as deficient for two reasons: (1) Plaintiff failed to properly allege proximate cause; that is, Mr. Long's injury was a reasonably foreseeable consequence of Defendants' alleged conduct; and, (2) Plaintiff failed to include well-pled factual allegations that Defendants' conduct was either grossly negligent or willful and wanton.

III. Foreseeability and Proximate Cause

Palsgraf v. Long Island Railroad Co., 162 N.E. 99, 99 (N.Y. 1928), is the leading case in American tort law addressing the issue of a defendant's liability to an unforeseeable plaintiff. Judge (later Justice) Cardozo explained proximate cause and reasonable foreseeability of distant and remote acts and impact on an unknown plaintiff as follows: "the conduct of the defendants . . . if a wrong in its relation to the[ir employer], was not a wrong in its relation to the plaintiff, standing far away. Relative[] to her it was not negligence at all." *Id.* at 102. Judge

Cardozo quoted *Pollock on Torts* and cited several cases for the proposition that "proof of negligence in the air, so to speak, will not do." *Id.* Only if there is a duty to the injured plaintiff, the breach of which causes injury, can there be liability. *See id.*

Negligence which does no one harm is not a tort. It is not enough, Judge Cardozo found, to prove negligence by the Defendants and damage to the Plaintiff's husband. There must be a breach of a duty these Defendants owed to Plaintiff's husband. Judge Cardozo traced the history of the law of negligence. He noted and concluded that negligence evolved as an offshoot from the law of trespass, and Plaintiff cannot sue for trespass committed against a third party. *Id.*

Our Supreme Court has agreed with this analysis: "The breach of duty must be the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established." *Smith v. Whitley*, 223 N.C. 534, 535, 27 S.E.2d 442, 443 (1943) (citation omitted).

IV. Willful and Wanton Conduct

Addressing Defendants' second contention, Plaintiff failed to include well-pled factual allegations that Defendants' conduct was either grossly negligent or willful and wanton. Nothing in the complaint alleges grossly negligent, or willful and wanton conduct to support a cause of action. Gross negligence and willful and wanton conduct describe the same conduct. *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 50, 524 S.E.2d 53, 59 (1999). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Green v. Kearney*, 217 N.C. App. 65, 72, 719 S.E.2d 137, 142 (2011) (citation omitted). Gross negligence is "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Greene v. City of Greenville*, 225 N.C. App. 24, 26, 736 S.E.2d 833, 835 (2013) (citations omitted).

Our Court has found a substantial difference between alleged acts of negligence and gross negligence. "Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence." *Green*, 217 N.C. App. at 71, 719 S.E.2d at 142 (citations and quotations omitted). Wanton conduct is done "in conscious and intentional disregard of and indifference to the rights and safety of others." *Id.* (citations and quotations omitted). Here, Plaintiff's complaint asserts no factual basis or to warrant inferring that Defendants knew or should have known about the risk of pressurized gas build-up in the chiller's water pipes or acted

with “intentional disregard of and indifference to the rights and safety of others.” *Id.*

V. Conclusion

As noted, Plaintiff admitted that her claims before the Industrial Commission are identical to those in her dismissed complaint without the allegation of Defendants’ employment and agency with the State and NCSU. Under the State’s sovereign immunity, the only basis for liability and recovery for Defendants’ alleged negligent acts while public employees, is a claim under the State Tort Claims Act before the Industrial Commission. The General Assembly’s “statutory waiver of sovereign immunity must be strictly construed.” *Meyer*, 347 N.C. at 107, 489 S.E.2d at 885.

Plaintiff’s allegations against Defendants as public employees judicially estops Plaintiff’s identical assertions to impose individual liability upon Defendants for identical conduct that occurred as public employees. She cannot have it both ways. The trial court correctly ruled Plaintiff’s complaint did not invoke the subject matter jurisdiction of the courts, nor against these Defendants personally or individually, and that her complaint had failed to state a claim in the superior court.

Plaintiff has chosen the Industrial Commission as her forum for the resolution of her claim for her husband’s wrongful death for the asserted negligence of public employees of the State under a waiver of the State’s sovereign immunity. *See Walls*, 347 N.C. at 107, 489 S.E.2d at 885. The trial court’s dismissal of Plaintiff’s complaint was proper, lawful, and is properly affirmed. I respectfully dissent.

GREEN v. BLACK

[270 N.C. App. 258 (2020)]

SUSAN GREEN, Plaintiff
v.
LISA BLACK, Defendant

No. COA19-661

Filed 3 March 2020

1. Contracts—promissory note—language of contract—plain and unambiguous—meeting of the minds

In a dispute in which plaintiff alleged defendant defaulted on a promissory note, the challenged portion of the note was not ambiguous because it reflected a meeting of the minds to enter into a second promissory note in the event of default, but that portion was void because it lacked necessary specificity regarding the terms of the additional promissory note.

2. Contracts—promissory note—validity—severability of void provision

In a claim for breach of contract, a provision of the contract that was void for uncertainty and unenforceable was severable because it was not an essential provision of the contract since it reflected what the parties would do in the event of default and none of the essential elements of the contract depended on the provision.

3. Loans—promissory note—breach of contract—summary judgment—genuine issue of material facts

In a claim for breach of contract in which plaintiff alleged defendant defaulted on a promissory note, the trial court did not err by granting plaintiff's motion for summary judgment because there were no genuine issues of material fact pertaining to whether defendant defaulted on the note or the amount owed to plaintiff based on defendant's admissions in her answer (that she agreed to the note, she received money from plaintiff, and she failed to pay plaintiff in accordance with the note) and on plaintiff's complaint and supporting affidavits detailing the specific amount owed.

Appeal by Defendant from order entered 26 November 2018 by Judge C.W. McKeller in Henderson County District Court. Heard in the Court of Appeals 7 January 2020.

Cosgrove Law Office, by Timothy R. Cosgrove, for Plaintiff-Appellee.

Stam Law Firm, by R. Daniel Gibson, for Defendant-Appellant.

COLLINS, Judge.

Defendant Lisa Black appeals from the trial court's 26 November 2018 order granting Plaintiff Susan Green's motion for summary judgment made pursuant to North Carolina Rule of Civil Procedure 56. Defendant contends that there exist genuine issues of material fact regarding (1) the construction of the promissory note that is central to the parties' dispute and (2) whether the parties breached that note, and that the trial court erred by granting Plaintiff summary judgment. We affirm.

I. Background

On 21 April 2015, Plaintiff loaned Defendant $50,000 in exchange for a promissory note (the "Note"). Under the terms of the Note, which Defendant drafted, Defendant promised to pay Plaintiff the $50,000 principal plus "interest payable on the unpaid principal at the rate of 2% per annum (or a total of $1000 USD), calculated yearly and not in advance." The Note also set forth as follows:

> 2. This Note will be paid on December 1, 2015. If any additional amount is required to fulfill the obligation of $51,000 USD total to [Plaintiff], an additional Note will be created for the remaining amount due. All diligence will be made to meet this payment obligation on the first date it is due.

As of 1 December 2015, Defendant had paid only $32,000 of the $51,000 the parties agree Defendant owed Plaintiff under the Note. Thereafter, Defendant paid an additional $6,150 towards the outstanding debt she owed to Plaintiff under the Note, which Plaintiff accepted. Defendant also attempted to make other partial payments on the debt which Plaintiff refused to accept.

On 26 June 2018, Plaintiff filed a verified complaint in which she (1) alleged that Defendant had defaulted on the Note and (2) sought the remaining $12,850 she alleged she was owed under the Note. Defendant answered the complaint on 27 July 2018. In her answer, Defendant admitted that she had not fully paid her debt obligation under the Note, but argued that she "has never refused to pay back this loan, is not in default of this loan, and is waiting for a reasonable payment schedule to be written and agreed to between [Plaintiff] and [Defendant] for this loan." Defendant further stated that she "has in good faith made payments to the Plaintiff on the first of each month, voluntarily beginning on [sic] January 2016, until the Plaintiff would meet to create a new Note

and mutually agreed upon payment schedule." Regarding the "payment schedule" she sought, Defendant pled that:

> Item Number 2 of the Note states that the Note be paid on December 1, 2015, and if any additional amount is still owed of the $51,000USD, after that date, of the personal loan to [Plaintiff], that an additional new Note will be created between [Plaintiff] and [Defendant] with a mutually agreed upon payment schedule for the remaining amount due. Both [Plaintiff] and [Defendant] on th[e Note] were fully aware of this fact and it was communicated at length upon the signed acceptance of the [Note] by both parties.

Defendant moved to dismiss[1] Plaintiff's complaint on 21 August 2018, and filed a memorandum of law in support arguing, *inter alia*, that the complaint should be dismissed because "Defendant is willing to repay the loan, but is waiting for a meeting with the Plaintiff to be able to create a new repayment Note with mutually agreed upon repayment terms and schedule."[2]

Plaintiff moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, on 24 October 2018. On that same date, Plaintiff also filed an affidavit of her own in support of her motion for summary judgment, in which she stated that the Note "contains ambiguous language upon which the Defendant is relying as a defense to the Plaintiff's complaint." On 15 November 2018, Plaintiff's counsel filed an affidavit in support of Plaintiff's motion for summary judgment noting that there were checks written by Defendant to Plaintiff in 2016 which "Plaintiff refused to cash upon advice of Counsel" and for which "Defendant has mistakenly credited herself" in her filings to the trial court. Both Plaintiff and Plaintiff's counsel attested that the sum due under the Note was $12,850, as sought by the complaint. Defendant did not respond to Plaintiff's motion for summary judgment with an opposing motion or any affidavit or other proffer of evidence of her own.[3]

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1. The *pro se* motion to dismiss does not specify the procedural rule under which the motion was brought.

2. The record does not reflect whether the trial court ruled upon Defendant's motion to dismiss.

3. Defendant's *pro se* filings reflected within the record on appeal are not verified. Accordingly, Defendant's filings contain mere allegations, which are not evidence, and do not create triable issues of fact in the face of contradictory evidence. *Cf. Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.").

On 26 November 2018, the trial court entered an order granting Plaintiff's motion for summary judgment, and Defendant timely appealed.

II. Discussion

This Court has said:

> The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed.
>
> Summary judgment is proper 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. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
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> . . . .
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 211-12, 580 S.E.2d 732, 735 (2003) (internal quotation marks, brackets, and citations omitted).

> Our standard of review of an appeal from summary judgment is de novo. The evidence produced by the parties is viewed in the light most favorable to the non-moving party. If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied.

Nationstar Mortg. LLC v. Curry, 822 S.E.2d 122, 125-26 (N.C. Ct. App. 2018) (internal quotation marks, brackets, and citations omitted).

[1] Defendant contends that the trial court erred by granting Plaintiff's motion for summary judgment "because (1) the Note's terms are ambiguous or, if they are unambiguous, [Defendant] was not in default and (2) the Note contains an unenforceable agreement to agree or, if it is enforceable, [Plaintiff] breached the Note." Both the purported ambiguity and the agreement to agree upon which Defendant's arguments on appeal focus are found within Section 2 of the Note. Accordingly, based upon the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[,]" N.C. Gen. Stat. § 1A-1, Rule 56 (2018), we must determine whether Section 2 (1) reflects an ambiguity or (2) if it does not, was breached by Plaintiff, such that Plaintiff is not entitled to judgment as a matter of law on her breach of contract claim.

As noted above, Section 2 reads as follows:

> 2. This Note will be paid on December 1, 2015. If any additional amount is required to fulfill the obligation of $51,000 USD total to [Plaintiff], an additional Note will be created for the remaining amount due. All diligence will be made to meet this payment obligation on the first date it is due.

Defendant argues that Section 2 is ambiguous because it is

> susceptible to at least two interpretations. First, [Defendant] will pay on 1 December 2015 and, if she does not, she is in default. Second, [Defendant] should make a diligent effort to pay by 1 December 2015 but this is only the "first date" the loan is due. If [Defendant] does not pay by 1 December 2015, the parties will create an "additional Note" for the amount remaining due.

In effect, then, Defendant argues that it was impossible for her to default on the Note, because the second sentence of Section 2 (the "Second Sentence") contemplated that "an additional Note will be created for the remaining amount due" if Defendant did not pay in full on the "first date." As mentioned above, in her answer, Defendant pled that she "has never refused to pay back this loan, is not in default of this loan, and is waiting for a reasonable payment schedule to be written and agreed to between [Plaintiff] and [Defendant] for this loan." Plaintiff does not contest Defendant's construction of the Second Sentence, but argues that because it "would leave [Plaintiff] at the mercy of [Defendant] and could result in [Plaintiff] not ever getting paid," the Second Sentence is "wholly repugnant to the original intent of the parties" and "serves

to undo the very basis of the bargain[,]" and "should be set aside or rejected."

Like the parties, we read the Second Sentence as the parties' agreement that in the event Defendant did not fully pay off her debt under the Note by 1 December 2015, the parties would then negotiate an additional promissory note for the outstanding debt. The Second Sentence therefore reflects a mutual conditional offer to execute an additional promissory note—importantly, on unspecified terms, and therefore subject to future agreement by the parties—in the event of Defendant's default. Because the record demonstrates that there was a meeting of the minds regarding the Second Sentence, the Note is not ambiguous.[4]

However, the question remains whether the Second Sentence is enforceable. If enforceable, Plaintiff's failure to execute an additional promissory note with Defendant upon Defendant's default would itself be a breach of the Note's terms, such that Defendant's breach arguably might be excused.

"An offer to enter into a contract in the future must, to be binding, specify all of the essential and material terms and leave nothing to be agreed upon as a result of future negotiations." *Young v. Sweet*, 266 N.C. 623, 625, 146 S.E.2d 669, 671 (1966).

The Second Sentence contains no specifics regarding the terms of the additional promissory note, and Defendant repeatedly argues that that new note's terms, including its "payment schedule[,]" and any rate of interest accruing upon the unpaid debt, would have to be "mutually agreed upon" by the parties before the new note could be executed. Because it does not contain specifics, and instead leaves *everything* "to be agreed upon as a result of future negotiations[,]" we conclude that the Second Sentence is void for uncertainty and unenforceable.[5] *See Young*, 266 N.C. at 625, 146 S.E.2d at 671 (in real-estate context, "[a] covenant to let the premises to the lessee at the expiration of the term

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4. Plaintiff's statement in her affidavit that the Note contains unspecified "ambiguous language" does not control our analysis. *See International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989) ("A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law." (citation omitted)).

5. Were we to hold the Second Sentence to be enforceable, Defendant would have court-enforced leverage to refuse to pay back the unpaid debt except for on wildly-unjust terms: e.g., Defendant could hold firm that she would only agree to a new note that allowed her to pay one cent every fifty years, without any interest, in which case inflation would render the unpaid debt wholly valueless.

without mentioning any price for which they are to be let, or to renew the lease upon such terms as may be agreed on, in neither case amounts to a covenant for renewal, but is altogether void for uncertainty.").

[2] The next question is whether the void Second Sentence may be set aside and the remainder of the Note enforced, or whether the entire Note is unenforceable by virtue of the unenforceable provision. Our Supreme Court has said:

> When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced. It is well established that the fact that a stipulation is unenforceable because of illegality does not affect the validity and enforceability of other stipulations in the agreement, provided they are severable from the invalid portion and capable of being construed divisibly.

Rose v. Vulcan Materials Co., 282 N.C. 643, 658, 194 S.E.2d 521, 531-32 (1973) (internal quotation marks and citations omitted). This Court has said that the question of whether an unenforceable contractual provision is severable depends upon whether the provision is "the main purpose or essential feature of the agreement[,]" or whether other such provisions are "dependent on" the unenforceable provision. *Robinson, Bradshaw, & Hinson, P.A. v. Smith*, 129 N.C. App. 305, 314, 498 S.E.2d 841, 848 (1998) (upholding summary judgment on contingency-fee contract: "Despite the invalidity of this section of the contract, the remainder of the contingency fee contract is still enforceable because it is also severable from, and not dependent in its enforcement upon, the void portion. The severable portion is not the main purpose or essential feature of the agreement." (citation omitted)); *Am. Nat'l Elec. Corp. v. Poythress Commercial Contractors, Inc.*, 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) (upholding summary judgment for defendant: "We therefore conclude that the 'pay when paid' clause of the contract is indeed unenforceable, but that it is severable from the rest of the contract and does not defeat the other portions of the contract, such as the notice of delay provision, which are in no way dependent on the illegal provision.").

The main purpose of a promissory note is to memorialize an agreement to exchange money for a promise to pay the money back with interest on a date certain. The amount of the principal loaned, the amount of interest that accrues thereupon, and the date when the borrower is

required to pay back the principal with accrued interest to the lender are all examples of essential provisions of a promissory note that cannot be severed from the note. The Second Sentence, which only contemplated what the parties would do in the event of default, and upon which none of the Note's essential provisions described above depend,[6] is not such an essential provision. We accordingly conclude that it is severable from the Note and should be set aside, and that the remainder of the Note may be enforced.

[3] The final question is therefore whether Plaintiff has established via the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[,]" N.C. Gen. Stat. § 1A-1, Rule 56, that there are no genuine issues of material fact regarding whether (1) Defendant defaulted on the Note (construing the Second Sentence as stricken therefrom) and (2) Plaintiff is owed $12,850 as a result, such that Plaintiff is entitled to judgment as a matter of law for that amount.

Regarding the default, Defendant admitted in her answer that she (1) agreed to the Note, (2) received $50,000 from Plaintiff, and (3) had not paid Plaintiff the entirety of the principal and interest due under the Note as of 1 December 2015. As mentioned above, Defendant argues in her brief on appeal that the Note could be interpreted to mean that 1 December 2015 was the "first date" the loan is due, which—rather than creating a date upon which Defendant's failure to pay would create a default—merely triggered the Second Sentence's obligation to create an "additional Note" for the amount outstanding. However, Defendant has directed our attention to no authority setting forth that a loan can become due on multiple dates such that the legal import of nonpayment by the borrower upon the "first date" the loan is due is somehow qualified by a latter due date, and we are aware of no such authority. In the absence of authority to the contrary, we reject Defendant's theory that the Note contemplated multiple due dates as an unreasonable construction that

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6. An argument that the Second Sentence effectively renders the due-date provision meaningless—and that the due-date provision therefore is "dependent on" the Second Sentence—would fail, because the parties agree that the Note's due date was 1 December 2015. The determination of the Note's due date therefore is "dependent on" nothing else. *See infra* (rejecting Defendant's argument that the Note had multiple due dates).

Further, if construed to render the due-date provision meaningless, the Second Sentence is irreconcilable with the first sentence of Section 2—i.e., the due-date provision—and is repugnant to the general purpose of the Note, which further supports our conclusion that the Second Sentence must be set aside as unenforceable. *See Davis v. Frazier*, 150 N.C. 447, 451, 64 S.E. 200, 201 (1909) ("It is an undoubted principle that a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside." (internal quotation marks and citation omitted)).

would render an absurd result. *See Fairbanks, Morse & Co. v. Twin City Supply Co.*, 170 N.C. 315, 321, 86 S.E. 1051, 1054 (1915) ("All instruments should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results[.]"). The admissions within Defendant's answer accordingly amount to an admission that Defendant defaulted on the Note.

Regarding the amount owed, Defendant admitted in her answer to owing $12,250 to Plaintiff under the Note as of 27 July 2018. Later, in her 21 August 2018 memorandum in support of her motion to dismiss, Defendant stated that the amount she owed was $11,050. As mentioned above, both Plaintiff and her counsel stated in their affidavits that Defendant owed Plaintiff $12,850, as sought in the complaint.

The affidavit submitted by Plaintiff's counsel in support of Plaintiff's motion for summary judgment (1) explains that the difference in the amounts of outstanding debt claimed by the parties is the result of checks written by Defendant to Plaintiff in 2016 which "Plaintiff refused to cash upon advice of Counsel" and for which "Defendant has mistakenly credited herself" and (2) attaches a 5 July 2016 letter written by Defendant contemplating that she had written checks to Plaintiff which were "Not Cashed" as of that date. Defendant did not respond to Plaintiff's motion for summary judgment with any opposing motion or any affidavits or other evidence of her own,[7] and nowhere has (1) argued that Plaintiff's counsel's characterization of any particular check as uncashed is inaccurate or (2) disputed that she wrote the letter in the record indicating that various attempts by Defendant to pay Plaintiff had been refused. Accordingly, because Defendant has not directed our attention to any authority standing for the proposition that Plaintiff was required to cash Defendant's checks or otherwise accept anything offered by Defendant in partial payment for the outstanding debt owed by Defendant under the Note, we conclude that it was proper for the trial court to conclude as a matter of law that Defendant owed Plaintiff $12,850 under the Note as the complaint and Plaintiff's affidavits claimed.

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7. As mentioned above, *see supra* note 3, Defendant's *pro se* filings are not verified, and therefore cannot create triable issues of fact in the face of Plaintiff's affidavits. N.C. Gen. Stat. § 1A-1, Rule 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

III. Conclusion

Because we conclude that Plaintiff has demonstrated that no genuine issue of material fact exists and that Plaintiff is entitled to judgment as a matter of law on her breach of contract claim, we affirm the trial court's 26 November 2018 order granting Plaintiff summary judgment thereupon.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

REBECCA HOLDSTOCK AND LOUIS HOLDSTOCK, PLAINTIFFS
v.
DUKE UNIVERSITY HEALTH SYSTEM, INC., D/B/A DUKE UNIVERSITY MEDICAL CENTER, DUKE UNIVERSITY HOSPITAL AND/OR DUKE HEALTH, DEFENDANTS

No. COA18-1312

Filed 3 March 2020

Medical Malpractice—Rule 9(j)—facial constitutional challenge—mandatory statutory requirements—determination by three-judge panel

In a medical malpractice case, the trial court's order striking the affidavit of plaintiffs' designated expert and granting summary judgment in favor of defendant-hospital pursuant to Civil Procedure Rule 9(j) was vacated because the trial court failed to comply with mandatory statutory requirements in addressing plaintiffs' facial constitutional challenge to Rule 9(j). The matter was remanded to the trial court for determination of whether plaintiffs properly raised a facial challenge to Rule 9(j) in their complaint (thereby invoking N.C.G.S. § 1-267.1(a1) and Civil Procedure Rule 42(b)(4)) and to resolve any issues not contingent upon the facial challenge to Rule 9(j) before deciding whether it is necessary to transfer the facial challenge to a three-judge panel of the Superior Court of Wake County.

Judge BERGER concurring in result only.

Appeal by Plaintiffs from order entered 25 July 2018 by Judge Orlando Hudson in Superior Court, Durham County. Heard in the Court of Appeals 6 August 2019.

Bailey & Glasser, LLP, by Benjamin J. Hogan, pro hac vice, and George B. Currin, for Plaintiffs-Appellants.

Yates, McLamb & Wyher, L.L.P., by Dan J. McLamb and Lori Abel Meyerhoffer, and Robinson Bradshaw, by Mark W. Merritt and Brian L. Church, for Defendants-Appellees.

McGEE, Chief Judge.

Rebecca Holdstock ("Ms. Holdstock") and Louis Holdstock (collectively, "Plaintiffs") appeal from an order striking the affidavit of Plaintiffs' designated expert and granting summary judgment in favor of Duke University Health System, Inc., d/b/a Duke University Medical Center, Duke University Hospital and/or Duke Health ("Defendant Duke").

I. Factual and Procedural History

Ms. Holdstock contacted Duke Health in early 2013 complaining of dizziness and "syncopal episodes." Dr. Scott A. Strine, a neurologist, ordered an MRI of Ms. Holdstock's brain, which was performed on 1 March 2013 (the "2013 MRI"). Dr. Hasan A. Hobbs, a radiologist and neuroradiology fellow, and Dr. Jenny K. Hoang, a neuroradiologist, interpreted the 2013 MRI as an "unremarkable brain MR." At a follow-up appointment on 21 March 2013, Dr. Strine reviewed the results of the 2013 MRI and found the images of Ms. Holdstock's brain "completely unremarkable."

Ms. Holdstock returned to Duke Health on 21 September 2015 complaining of "headaches, vision changes, nausea, photophobia, worsening tinnitus and questionable hearing loss." Audiological testing confirmed Ms. Holdstock was suffering from decreased hearing in her left ear, and a second MRI was ordered. At the follow-up appointment on 23 September 2015, Dr. David Kaylie, an otolaryngologist, diagnosed Ms. Holdstock with an acoustic neuroma in her left ear. Ms. Holdstock testified in her deposition that when Dr. Kaylie reviewed the 2013 MRI, he stated "[t]his is awkward. They missed something two-and-a half years ago on your MRI. You have an acoustic neuroma. This explains everything that you've been through."

Subsequently, physicians at the Mayo Clinic removed the acoustic neuroma in Ms. Holdstock's left ear. Post-operative audiological testing revealed Ms. Holdstock "had suffered a complete hearing loss in her left ear."

Plaintiffs' counsel e-mailed Dr. Marc L. Bennett ("Dr. Bennett") on 14 November 2016 and requested he "review the records and advise us

if you believe there was any negligence in failing to diagnose the acoustic neuroma in the first instance and, secondly, what harm was occasioned by the delay in diagnosis[.]" Plaintiffs' counsel sent Plaintiffs an e-mail on 7 December 2016, stating "I spoke with the ENT reviewer Dr. Marc Bennett from Vanderbilt. Without getting into great detail, he says the neuroma is very clear on the original MRI and should never have been missed."

Plaintiffs filed a complaint on 16 December 2016 against Dr. Strine, Dr. Hobbs, Dr. Hoang ("Defendant Doctors") and Defendant Duke (collectively, "Defendants"), alleging professional negligence of Defendant Doctors, negligence of Defendant Duke, and imputed negligence of Defendant Doctors to Defendant Duke. Plaintiffs filed an amended complaint on 19 December 2016, which included the certification language required by Rule 9(j) for medical malpractice actions:

> Plaintiff asserts that the medical care, treatment and all medical records pertaining to the alleged negligence that are available to plaintiff after a reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

In addition to Plaintiffs' allegations of negligence, Plaintiffs also alleged that "the pre-filing requirements of Rule 9(j) of the NC Rules of Civil Procedure [are] unconstitutional."

Defendants filed an answer on 21 March 2017, asserting Defendants' actions complied with the standard of care and denying any negligence. Plaintiffs filed answers to Defendants' Rule 9(j) interrogatories on 4 June 2018. Plaintiffs identified Dr. Bennett as the "person[] who . . . [Plaintiffs] reasonably expect to qualify as an expert witness . . . and who is willing to testify that the medical care of Scott Strine, D.O., Hasan Hobbs, M.D. and Jenny Hoang, M.D. did not comply with the applicable standard of care."

Dr. Bennett was deposed on 3 January 2018. Defendants' counsel asked Dr. Bennett, "you were never willing to testify that Dr. Strine, Dr. Hoang, or Dr. Hobbs violated the standard of care; is that correct?" Dr. Bennett answered, "[c]orrect." Dr. Bennett was asked, "you were never willing – you have never been willing to testify that the medical care of Scott Strine, Hasan Hobbs, or Jenny Hoang did not comply with the applicable standard of care; is that correct?" Dr. Bennett responded, "[y]es, that's correct." Plaintiffs' counsel intervened and stated on the record:

> I don't understand these questions. We didn't designate him as a standard of care expert. He's not in the same specialty as . . . these doctors. We wouldn't have asked him to render a standard of care . . . You asked him if he was a specialist in these specialties. He said no. You've asked him before whether he's offered standard of care opinions or would he be willing to, and he said no because they are different specialists. . . . I can represent [Dr. Bennett] wasn't asked to look at the standard of care for Dr. Strine, Dr. Hoang, or Dr. Hobbs. I wouldn't ask him to do it because he's in a different specialty and he never expressed standard of care opinions to me. [] I'm not going to ask him about standard of care at the time of trial.

Defendant Duke filed a motion to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6) or, in the alternative, a motion for summary judgment pursuant to Rule 56 on 1 June 2018. Defendant Duke alleged that Plaintiffs failed to comply with the requirements of Rule 9(j) because Dr. Bennett "was not reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence," did not form the opinion that "any health care provider breached the applicable standard of care," and was unwilling "to testify that the medical care did not comply with the applicable standard of care under Rule 9(j)."

Plaintiffs filed an affidavit from their counsel and an affidavit from Dr. Bennett "to clarify" Dr. Bennett's deposition testimony on 15 June 2018. In his affidavit, Dr. Bennett explained:

> I advised counsel for Ms. Holdstock that I was willing to testify the MRI images taken in 2013 clearly show an acoustic neuroma that should not have been missed and that the ultimate delay in diagnosis of the acoustic neuroma led to a loss of chance for her to preserve hearing because of the growth of the tumor caused by the delay in diagnosis.

Plaintiffs' counsel explained in his affidavit:

> That based on Dr. Bennett's education, training and experience, coupled with his review of the medical records and MRI images, I believed that I had met the requirements of Rule 9(j) in getting a qualified expert to review the matter and who held the opinion that a deviation from the standard of care occurred prior to filing the lawsuit and in response to the Defendant's Rule 9(j) interrogatories.

Plaintiffs filed a response to Defendant Duke's motion to dismiss or, in the alternative, motion for summary judgment on 2 July 2018. Defendant Duke filed a motion to strike Dr. Bennett's affidavit on 5 July 2018 stating it was "in direct conflict with Dr. Bennett's prior deposition testimony." Following a hearing on 10 July 2018, the trial court orally ruled "[P]laintiff's [sic] have failed to comply with Rule 9(j); the motion to strike Dr. Bennett's affidavit is allowed. The motion for summary judgment is allowed for the reasons argued by the defense."

The trial court then entered an order striking Dr. Bennett's affidavit and granting summary judgment pursuant to Rule 9(j) and Rule 56 on 25 July 2018, concluding that Rule 9(j) was constitutional, Dr. Bennett's affidavit was a "sham affidavit" that should be stricken, Plaintiffs failed to comply with the requirements of Rule 9(j), and "[t]he facially valid Rule 9(j) certification of the Plaintiffs' amended complaint [was] not supported by the facts." Plaintiffs appeal.

II. Analysis

Plaintiffs make two substantive arguments on appeal. First, Plaintiffs contend the trial court erred by striking Dr. Bennett's affidavit and granting Defendant Duke's motion for summary judgment because the record demonstrates that Plaintiffs satisfied the requirements of Rule 9(j) at the time the complaint was filed. Second, Plaintiffs argue Rule 9(j) violates the open courts guarantee preserved in the North Carolina Constitution and the equal protection clauses of the North Carolina and United States Constitutions. We do not consider the merits of Plaintiffs' arguments because, assuming *arguendo* Plaintiffs properly "raised" a constitutional facial challenge to Rule 9(j), N.C.G.S. § 1-267.1(a1) (2017) and N.C.G.S. § 1-81.1 (2017) required that Plaintiffs' facial challenge be heard and decided by a three-judge panel in the Superior Court of Wake County. Because this did not occur, Plaintiffs' purported facial challenge has yet to be resolved and the 25 July 2018 order from which Plaintiffs purport to appeal is interlocutory. We therefore vacate and remand.

A.

In order to reach our ultimate holding, we must conduct an analysis of N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1—which require certain challenges to the acts of the General Assembly to be decided by a three-judge panel in Superior Court, Wake County, in order to determine if and how these statutes apply in this case. N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1 only apply to "facial challenge[s] to the validity of an act of the General Assembly[,]" not as-applied challenges, N.C.G.S. § 1-267.1(a1), and only

apply to civil proceedings, N.C.G.S. § 1-267.1(d). "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, ___ U.S. ___, ___, 192 L. Ed. 2d 435, 443 (2015); *see also State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998). Presuming it was properly "raised" in the complaint, Plaintiffs' stated constitutional challenge presents a "facial" challenge to Rule 9(j), not an "as-applied" challenge, when Plaintiffs allege: "Rule 9(j) is an unconstitutional violation of the Seventh and Fourteenth Amendments of the United States Constitution and Article I, Sections 6, 18, 19, 25 and 32, and Article IV, Sections 1 and 13 of the North Carolina Constitution."

The General Assembly amended both N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1 in 2014 to require civil proceedings that challenge the facial validity of an act of the General Assembly to be heard and decided by a three-judge panel in the Superior Court of Wake County. 2014 N.C. Sess. Law 100, §§ 18B.16.(a) and (b). N.C.G.S. § 1-267.1(a1) states in relevant part:

> *[A]ny facial challenge* to the validity of an act of the General Assembly *shall be transferred* pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and *shall be heard and determined* by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.

N.C.G.S. § 1-267.1(a1) (emphasis added). The language of N.C.G.S. § 1-267.1(a1) appears to require that "any facial challenge" to an act "shall be transferred" "and shall be heard and determined by a three-judge panel." *Id.* Although this language initially appears to mandate the transfer of *every* kind of facial challenge in a civil proceeding to the "validity of an act of the General Assembly[,]" N.C.G.S. § 1-267.1(a1) also states that transfer to a three-judge panel must be conducted *pursuant* to Rule 42(b)(4) (or "the Rule"), which limits the application of the statute in multiple ways. N.C.G.S. § 1-267.1(a1).

Further, Rule 42(b)(4) is written in such a manner that not all its requirements are clear on a first reading. It states in relevant part:

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly . . . shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive

> pleading. In that event, the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity. For a motion filed under Rule 11 or Rule 12(b)(1) through (7), the original court shall rule on the motion, however, it may decline to rule on a motion that is based solely upon Rule 12(b)(6). If the original court declines to rule on a Rule 12(b)(6) motion, the motion shall be decided by the three-judge panel. The original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

N.C.G.S. § 1A-1, Rule 42(b)(4) (2017).

Because Rule 42(b)(4) includes multiple conditions, which are not presented in procedurally chronological order, we will consider the mandates of the Rule in an order that more clearly represents its dictates. The Rule first tracks the language of N.C.G.S. § 1-267.1(a1): "*[A]ny* facial challenge to the validity of an act of the General Assembly . . . *shall* be heard by a three-judge panel[.]" N.C.G.S. § 1A-1, Rule 42(b)(4) (emphasis added). However, the Rule then limits the application of N.C.G.S. § 1-267.1(a1) to only those facial challenges that were first "raised" in a complaint or an amended complaint; or "raised" by the "defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading." *Id.*[1] To simplify, we will refer to any facial challenge "raised" in a plaintiff's complaint or amended complaint, or in a defendant's answer, responsive pleading, or by

1. The word "raised" is not defined, and it is therefore uncertain whether "raising" a facial challenge in a complaint is synonymous with "pleading" a facial challenge, and subject to the pleading requirements set forth in Rule 8. *See* N.C.G.S. § 1A-1, Rule 8 (2017).

another appropriate means within thirty days of the filing of the defendant's answer or responsive pleading as "a properly raised challenge" or "properly raised challenges."

Rule 42(b)(4) further requires: "[T]he court shall, *on its own motion*, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel[.]" *Id.* (emphasis added). In other words, it is the trial court's role to recognize that a facial challenge has been made and, if appropriate, transfer the matter, *sua sponte*, at a time in accordance with the dictates of the Rule. We will discuss the timing requirements in detail below. Because we are not considering the merits of Plaintiffs' appeal, we make no determination concerning whether Plaintiffs properly "raised" their facial challenge to Rule 9(j) in their complaint; thus, upon remand, that will be for the trial court to decide. Because the trial court's decision on this matter will determine what courses of action are open to Plaintiffs, and we cannot presume what will happen upon remand, we believe a broader consideration of the relevant statutes is warranted.

Although the Rule requires that facial challenges raised in a complaint *must* be transferred, *sua sponte*, for a ruling by a three-judge panel, the language of the Rule does not expressly *prohibit* the trial court from deciding a facial challenge if it is *not* filed in accordance with the limitations included in Rule 42(b)(4). For example, Rule 42(b)(4), and therefore N.C.G.S. § 1-267.1(a1), does not *expressly* prohibit a facial challenge that is *first* raised in a motion for summary judgment filed *more* than thirty days after the filing of the defendant's answer or responsive pleading.[2] Further, the Rule mandates that the trial court transfer a facial challenge to a three-judge panel in certain circumstances, but does not *expressly prohibit* the trial court, in its discretion, from transferring a facial challenge that does not comply with the requirements of Rule 42(b)(4). *See Webster Enters., Inc. v. Selective Ins. Co.*, 125 N.C. App. 36, 46, 479 S.E.2d 243, 249–50 (1997) ("The trial court is vested with broad discretionary authority in determining whether to bifurcate a trial. This Court will not superimpose its judgment on the trial court absent a showing the trial court abused its discretion by entering an order manifestly unsupported by reason.") (citations omitted). Unfortunately, neither N.C.G.S. § 1-267.1(a1) nor Rule 42(b)(4) provide guidance on how

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2. *See also*, N.C.G.S. § 1A-1, Rule 12(h)(2) ("A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.").

facial challenges in civil proceedings should be resolved when they are "raised" outside the Rule 42(b)(4) requirements.

Subsection (c) of N.C.G.S. § 1-267.1 serves to answer some of the questions concerning the authority of the trial court to rule on facial challenges, but also raises other questions. It states:

> No order or judgment [in a civil proceeding] shall be entered . . . [that] finds . . . an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County organized as provided by . . . subsection (b2) of this section.

N.C.G.S. § 1-267.1(c). Pursuant to a plain reading of N.C.G.S. § 1-267.1(c), *no court*, other than a three-judge panel granted jurisdiction pursuant to N.C.G.S. § 1-267.1, is permitted to make an initial ruling, and enter a judgment or order thereon, that an act of the General Assembly violates the North Carolina Constitution or any federal law. N.C.G.S. § 1-267.1(c).[3]

In addition, venue for facial challenges of the acts of the General Assembly is addressed in N.C.G.S. § 1-81.1(a1), which states:

> Venue lies exclusively with the Wake County Superior Court with regard to any claim seeking an order or judgment of a court, either final or interlocutory, to restrain the enforcement, operation, or execution of an act of the General Assembly, in whole or in part, based upon an allegation that the act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law. Pursuant to G.S. 1-267.1(a1) and G.S. 1 1A, Rule 42(b)(4), claims described in this subsection that are filed or raised in courts other than Wake County Superior Court or that are filed in Wake County Superior Court shall be transferred to a three-judge panel of the Wake County Superior Court if, after all other questions of law in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any issues in the case.

N.C.G.S. § 1-81.1(a1). This statute, like N.C.G.S. § 1-267.1(a1), contains facially conflicting mandates. It states that "[v]enue lies exclusively with

3. We do not address whether this statute is meant to apply to our appellate courts.

the Wake County Superior Court with regard to any claim" requesting that an act of the General Assembly not be enforced because it "is facially invalid on the basis that the act violates the North Carolina Constitution or federal law." N.C.G.S. § 1-81.1(a1). A reading of the plain language of this sentence would prevent any court other than the Superior Court of Wake County from considering any constitutional facial challenge to an act. However, the second sentence of the statute restricts the transfer *requirement* to only properly raised challenges as set forth in Rule 42(b)(4). Also, like N.C.G.S. § 1-267.1(a1), N.C.G.S. § 1-81.1(a1) does not expressly address how trial courts should resolve facial challenges that are not "properly raised" pursuant to Rule 42(b)(4).

Considered *in pari materia*, a plain reading of N.C.G.S. § 1-81.1(a1), N.C.G.S. §§ 1-267.1(a1) and (c), and Rule 42(b)(4), prohibits entry of any order or judgment in a civil proceeding that rules an act of the General Assembly facially unconstitutional, *unless*: (1) it was made by a three-judge panel granted jurisdiction pursuant to N.C.G.S. § 1-267.1; *and* (2) the underlying facial challenge to the act was "a properly raised challenge" as required by Rule 42(b)(4). A facial challenge made in a motion *later* than thirty days from the filing of the defendant's answer or responsive pleading, as determined by the Rule, is *not required* to be transferred to a three-judge panel by N.C.G.S. § 1-267.1 or N.C.G.S. § 1-81.1(a1), and there is nothing in these statutes expressly prohibiting the trial court from considering a facial challenge, *but* if the trial court were to determine that an act was facially unconstitutional or contrary to federal law, N.C.G.S. § 1-267.1(c) prohibits the trial court from entering any order or judgment to that effect. The plain language of both N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1(a1) does not prohibit a trial court from considering a facial challenge to an act, making a ruling, and entering a judgment or order thereon *so long as*: (1) the trial court's ruling in its judgment or order determines that the challenged act is *not* facially unconstitutional; and (2) the facial challenge was *not* filed in accordance with Rule 42(b)(4). N.C.G.S. § 1-267.1(c).

B.

The plain language of these three statutes, read *in pari materia*, raises issues concerning procedure, the rights of the parties to make facial challenges both during the period set by Rule 42(b)(4) and those facial challenges that arise later in the action, and the authority of the trial court to act in its discretion when a facial challenge is not expressly covered by Rule 42(b)(4). We review Plaintiffs' alleged facial challenge considering the relevant requirements of N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1(a1).

We first note it is well settled that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (citations omitted). Therefore, because Plaintiffs argue that the trial court erred in granting summary judgment on *both* constitutional and non-constitutional grounds, this Court would normally consider Plaintiffs' non-constitutional argument first. However, N.C.G.S. § 1-267.1(a1), including Rule 42(b)(4), governs our jurisdiction in this matter, and we must determine if Plaintiffs' claim is governed by the Rule. If so, we must then determine whether Plaintiffs and the trial court have handled Plaintiffs' claims in accordance with N.C.G.S. § 1-267.1(a1), which requires the transfer of a facial challenge to a three-judge panel be accomplished pursuant to the dictates of Rule 42(b)(4). Rule 42(b)(4) states that transfer of a facial challenge is only required if Plaintiffs "raise[d] such a challenge in [Plaintiffs'] complaint or amended complaint[.]" N.C.G.S. § 1A-1, Rule 42(b)(4).

Plaintiffs' complaint states in relevant part:

> Plaintiff[s] object[] to the pre-filing requirements of Rule 9(j) of the NC Rules of Civil Procedure as unconstitutional. Rule 9(j) effectively requires Plaintiff[s] to prove their case before factual discovery is undertaken, denies malpractice plaintiffs their rights of due process of law, or equal protection under the law, of the right to open courts, and of the right to a jury trial, in violation of the United States and North Carolina Constitutions. Rule 9(j) is an unconstitutional violation of the Seventh and Fourteenth Amendments of the United States Constitution and Article I, Sections 6, 18, 19, 25 and 32, and Article IV, Sections 1 and 13 of the North Carolina Constitution.

Therefore, it was the trial court's first duty to determine whether Plaintiffs' complaint "raised" a facial challenge to an act of the General Assembly in accordance with the Rule. The trial court's determination of this issue then would dictate the actions thereafter required. When a facial challenge is properly "raised" pursuant to Rule 42(b)(4), N.C.G.S. § 1-267.1 determines the jurisdiction over the action, or parts of the action, of the trial court, the three-judge panel, and the appellate courts. Under the requirements of the Rule, if Plaintiffs properly "raised" a facial challenge in their complaint, the facial challenge could only be heard and decided by a three-judge panel:

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly . . . shall be heard by

> a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State[.]

N.C.G.S. § 1A-1, Rule 42(b)(4).

The trial court in this case had no jurisdiction to decide any facial challenge that was first "raised" in Plaintiffs' complaint. Instead, if the trial court determined Plaintiffs had properly "raised" a facial challenge to Rule 9(j) in their complaint, the trial court was required to determine "if, after all other matters in the action have been resolved, a determination as to the facial validity of [Rule 9(j)] must be made in order to completely resolve any matters in the case." *Id.* "All other matters" under Rule 42(b)(4) means "all matters that are [not] contingent upon the outcome of the challenge to the act's facial validity[.]" *Id.* Therefore, in this case, the trial court should have determined if there were any matters that were not "contingent upon the outcome of [Plaintiffs'] challenge to [Rule 9(j)'s] facial validity[.]" *Id.* If the trial court determined there *were* matters not "contingent upon the outcome of [Plaintiffs'] challenge to [Rule 9(j)'s] facial validity[,]" *id.*, the trial court was required to resolve those matters *prior* to considering whether Rule 42(b)(4) mandated transfer of Plaintiffs' facial challenge to the three-judge panel. *Id.* However, if the trial court determined that there were no such matters, Rule 42(b)(4) mandates that "the court *shall*, on its *own motion*, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel[.]" *Id.* (emphasis added).

In the present case, if the trial court had determined there were matters not "contingent upon the outcome of [Plaintiffs'] challenge to [Rule 9(j)'s] facial validity[,]" *id.*, and had decided such matters, it then would have had to decide whether "a determination as to the facial validity of [Rule 9(j)] [had to] be made in order to completely resolve any [remaining] matters in the case." *Id.* For example, if the trial court had found reason to grant summary judgment in favor of either Plaintiffs or Defendants, based upon matters not contingent on Plaintiffs' facial challenge, the trial court would not have transferred Plaintiff's facial challenge to a three-judge panel because the underlying action would have already been decided in full. However, if the trial court had decided all matters not "contingent upon the outcome of" resolution of Plaintiffs' facial challenge, but matters contingent on resolution of the facial challenge remained "in order to completely resolve" the action, the trial court would have been required, "on its own motion, [to] transfer that portion of the action challenging the validity of [Rule

9(j)] . . . for resolution by a three-judge panel[.]" *Id.*

Pursuant to Rule 42(b)(4), when a trial court transfers a facial challenge to a three-judge panel, it "maintain[s] jurisdiction over all matters other than the challenge to the act's facial validity." *Id.* However, once the transfer occurs:

> *The original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted.* Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

Id. (emphasis added). Thus, upon transfer, a trial court *must* stay any outstanding matters that cannot be fully resolved without resolution of the facial challenge by the three-judge panel. Only after final resolution of the facial challenge will that portion of the action be remanded or transferred back to the original trial court for final resolution of any remaining issues and entry of a final judgment. *Id.*

In the present case, the trial court granted summary judgment in favor of Defendant Duke. Even though findings of fact and conclusions of law are not required in an order granting summary judgment, and are not binding on this Court, *McArdle Corp. v. Patterson*, 115 N.C. App. 528, 531, 445 S.E.2d 604, 606 (1994), the trial court included the following findings and conclusions in its order granting summary judgment: "The [trial court] considered [P]laintiffs['] arguments that Rule 9(j) was unconstitutional; the [trial court] found no appellate authority in North Carolina to support that contention and the [trial court] concludes that Rule 9(j) is constitutional." Initially we note that the trial court's order is not in conflict with the express language of N.C.G.S. § 1-267.1(c)—*because it ruled in favor of the constitutionality of Rule 9(j)*. Based on a plain language reading of N.C.G.S. § 1-267.1(c), the statute would have prohibited entry of the order if the trial court had agreed with Plaintiffs and ruled that Rule 9(j) was facially *unconstitutional*.

However, because Plaintiffs included, *in their complaint*, a facial challenge to Rule 9(j), the trial court was required to proceed according to the provisions of N.C.G.S. § 1-267.1(a1) and Rule 42(b)(4). The trial court should have first determined whether Plaintiffs had properly "raise[d] . . . a [facial] challenge in [their] complaint or amended complaint

in any court in this State[.]" N.C.G.S. § 1A-1, Rule 42(b)(4). Assuming, *arguendo*, that Plaintiffs' complaint properly "raised" a facial challenge, the trial court was required to proceed pursuant to Rule 42(b)(4). There is no evidence that the trial court complied with the requirements of Rule 42(b)(4), which it must do *sua sponte*, if not raised by the parties. *Id.* If Plaintiffs' facial challenge was "raised" in their complaint, Rule 42(b)(4) mandated: "Pursuant to G.S. 1-267.1, [Plaintiffs'] facial challenge to the validity of [Rule 9(j)] . . . *shall* be heard by a three-judge panel[.]" *Id.* (emphasis added).[4] The trial court was required to transfer any properly "raised" facial challenge for decision by a three-judge panel "after all other matters in the action ha[d] been resolved[,]" *i.e.*, "all matters that [were not] contingent upon the outcome of the challenge to [Rule 9(j)'s] facial validity[.]" *Id.*

Further, the only other issue decided by the trial court in its 25 July 2018 order granting summary judgment was that Plaintiffs had failed to meet the pleading requirements of Rule 9(j), in large part based on the trial court's granting of Defendant Duke's motion to strike Dr. Bennett's affidavit. Although we are not deciding these matters on their merits, the trial court's ruling that Plaintiffs had failed to comply with Rule 9(j) would be rendered moot, effectively overruled, if the three-judge panel subsequently ruled that Rule 9(j) was unconstitutional on its face.

The statutes do not provide guidance for determining what matters constitute "matters that are contingent upon the outcome of the challenge to the act's facial validity[,]" but the trial court is in a far superior position than this Court to make the initial determination, based on the pleadings, filings, evidence, and legal arguments made directly to the trial court. Unlike the trial court, this Court cannot ask questions that might help resolve issues or prompt responses necessary to create a complete record. For this reason and others, we believe the trial court should generally make the determinations required by N.C.G.S. § 1-267.1(a1) and Rule 42(b)(4) in the first instance. On the facts before us, we hold that the trial court is required to make these determinations, including whether to transfer Plaintiffs' facial challenge, in the first instance.

Because the trial court did not act in accordance with N.C.G.S. § 1-267.1(a1), Plaintiffs' facial challenge, if it was properly "raised," has not been "heard by a three-judge panel" and decided. *Id.* The trial court was without jurisdiction to enter an order ruling on the facial

4. There is no exception in Rule 42(b)(4) that would allow Plaintiffs' facial challenge, if properly "raised" in their complaint, to be decided by the trial court on summary judgment.

constitutionality of Rule 9(j), and also without authority to enter an order ruling against Plaintiffs on the merits of the non-constitutional issue, because the ultimate decision of that issue was contingent on the three-judge panel's resolution of the facial challenge. Therefore, Plaintiffs' appeal is also interlocutory, and there is no right of interlocutory appeal provided by N.C.G.S. § 1-267.1(a1).

Though there are unanswered questions raised by the manner in which the relevant statutes are worded, in order to decide this appeal we hold it is the duty of the trial court to first determine whether Plaintiffs "raised" a facial challenge to Rule 9(j) in their complaint, thus invoking the provisions of N.C.G.S. § 1-267.1(a1) and Rule 42(b)(4). If Plaintiffs did properly "raise" a facial challenge in this case, the trial court is without jurisdiction to rule on the facial constitutionality of Rule 9(j) because sole jurisdiction to decide that matter resides with "the Superior Court of Wake County[,]" and the matter is required to "be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2)" of N.C.G.S. § 1-267.1. N.C.G.S. § 1-267.1(a1). The trial court also has to determine what issues, if any, are *not* "contingent upon the outcome of the challenge to the act's facial validity[,]" and resolve those issues before deciding whether it is necessary to transfer the facial challenge to the three-judge panel. If the trial court decides, after all issues not contingent on the outcome of Plaintiffs' facial challenge are resolved, that resolution of Plaintiffs' facial challenge to Rule 9(j) is still required to permit resolution of remaining issues, it shall, "on its own motion, transfer that portion of the action challenging the validity of [Rule 9(j)] to the Superior Court of Wake County for resolution by a three-judge panel[,]" and "stay all matters that are contingent upon the outcome of the challenge to [Rule 9(j)'s] facial validity pending a ruling on that challenge and until all appeal rights are exhausted." N.C.G.S. § 1A-1, Rule 42(b)(4).

III. Conclusion

Because the trial court did not comply with the mandatory requirements of N.C.G.S. § 1-267.1, it was without jurisdiction to enter its 25 July 2018 order. Thus, we vacate and remand this matter to the trial court to comply with the statutory mandates of N.C.G.S. § 1-267.1(a1) and N.C.G.S. § 1A-1, Rule 42(b)(4).

VACATED AND REMANDED.

Judge BERGER concurs in result only.

Judge COLLINS concurs.

IN THE ESTATE OF DAVID MAC GIDDENS

No. COA19-792

Filed 3 March 2020

1. Appeal and Error—abandonment of issues—raised for first time in reply brief—estate administration

In an estate dispute, where the decedent's children challenged in their reply brief—but not in their principal brief—the existence and legal effect of an agreement to apply the sale proceeds of the decedent's real property toward a deficiency judgment, the argument was waived because it was raised for the first time in the reply brief.

2. Estates—deficiency judgment—statutory spousal allowance—payment from sale of real estate—contractual agreement

Proceeds from the sale of decedent's real property were permitted to be used to pay the claims of decedent's estate—including a deficiency judgment for his wife's statutory year's allowance as surviving spouse (N.C.G.S. § 30-15)—where decedent's wife, children, and estate expressly agreed to the arrangement.

Appeal by Respondents from order entered 23 May 2019 by Judge Mary Ann Tally in Sampson County Superior Court. Heard in the Court of Appeals 4 February 2020.

Daughtry, Woodard, Lawrence & Starling, by Luther D. Starling, Jr., for Petitioner-Appellee.

Gregory T. Griffin for Respondents-Appellants.

INMAN, Judge.

This case concerns whether a decedent's estate, with the agreement of the administrator and all beneficiaries, can use surplus proceeds from the sale of real property to satisfy a deficiency judgment awarded to the surviving spouse for her statutory allowance. Even though two of the beneficiaries had a change of heart prompting this appeal, we affirm the trial court's enforcement of that agreement.

Respondents Allen Mac Giddens and Tonya Giddens Brown ("Respondents") appeal from the trial court's order vacating an order of the Sampson County Clerk of Superior Court and authorizing the use

of proceeds from the sale of real property to satisfy a spousal allowance deficiency judgment awarded to Petitioner Betty Jean Giddens ("Petitioner"). Respondents contend that a deficiency judgment for a spousal allowance can never be paid out of proceeds from the sale of real estate. After careful review, we disagree and affirm the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

Petitioner's husband and Respondents' father, David Mac Giddens, died intestate on 30 September 2015. Petitioner, who was also the administrator of her husband's estate (the "Estate"), requested her $30,000 statutory year's allowance as the surviving spouse pursuant to N.C. Gen. Stat. § 30-15 (2017).[1] That statute authorizes the surviving spouse of a decedent to claim an allowance "out of the personal property of the deceased spouse[.]"[2] *Id.*

The personal property in the Estate was insufficient to satisfy Petitioner's full allowance, so the clerk of superior court entered a deficiency judgment for the unsatisfied amount of $13,030.00 (the "Deficiency Judgment"). That Deficiency Judgment was later partially satisfied by an assignment from the Estate of $3,482.70 on 26 July 2016, leaving the final amount of deficiency at $9,547.30.[3]

With no personal property left in the Estate, the only asset available to satisfy its outstanding debts was a tract of real property known as the "Homeplace," which was owned by David Mac Giddens in life and passed in equal one-third undivided interests to Petitioner and Respondents on his death. Counsel for the Estate filed a motion to authorize the sale of the Homeplace and, on 28 December 2017, the clerk entered a consent order recognizing an agreement between Petitioner, Respondents, and the Estate to use the proceeds from the sale to "pay the claims

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1. The amount of the statutory spousal allowance was raised to $60,000 in 2019. N.C. Gen. Stat. § 30-15 (2019).

2. A surviving spouse may elect to receive an allowance of $60,000 outright, N.C. Gen. Stat. § 30-15 (2019), or may request a calculation of an allowance "sufficient for the support of petitioner according to the estate and decedent." N.C. Gen. Stat. § 30-31 (2019). That calculation must consider other persons entitled to any allowances and may not exceed one half of the deceased's average annual income for the past three years. N.C. Gen. Stat. § 30-31. The allowance itself "is designed to furnish members of the decedent's family a measure of security while the estate is being administered. It is an attempt to meet the daily needs of food and shelter until the estate is distributed." Wiggins, *The Law of Wills and Trusts in North Carolina*, § 15:1(a) (5th ed. 2019).

3. A clerical error in the Deficiency Judgment lists the final deficiency as "$9,5470.30" rather than the correct amount of $9,547.30.

of the Estate of David Mac Giddens and the cost of the administration of the estate."

The Homeplace sold for $50,400 and the co-commissioners of the sale filed a final report and account on 30 August 2018. That report listed $21,568.94 in funds available to "pay claims and costs of the Estate, [the] balance of which will be distributed to the heirs when the Estate is closed, if any[.]"

On 26 October 2018, counsel for the Estate filed a motion with the clerk seeking authorization for the payment of the Deficiency Judgment from those funds, averring that the "$21,568.94 is sufficient to pay all the claims, debts, costs and administration of the Estate, including the [D]eficiency [J]udgment[.]" Respondents opposed the motion, and the clerk denied the Estate's motion in an order entered 22 February 2019. The clerk's order cited N.C. Gen. Stat, § 30-18 (2019), which provides that the spousal allowance "shall be made in money or other personal property of the deceased spouse[,]" and concluded that it prohibited the use of the surplus sale proceeds to pay the Deficiency Judgment after quoting the following language from *Denton v. Tyson*, 118 N.C. 542, 24 S.E. 116 (1896):

> [T]he widow will not be entitled to any further payment on her year's support out of money arising from the sale of land. And if the land sold should bring more than is sufficient to pay the proper expenditures of the plaintiff in the course of his administration, the residue will remain real estate.

118 N.C. at 544, 24 S.E. at 116. The clerk's order did not address whether the parties had otherwise agreed to pay the Deficiency Judgment out of the proceeds from the sale of the Homeplace.

The Estate appealed the clerk's ruling to the superior court pursuant to N.C. Gen. Stat. § 1-301.3 (2019) and presented additional evidence to the trial court in a hearing. The trial court entered an order vacating the clerk's order. The trial court concluded that the clerk committed prejudicial error in failing to consider evidence of the agreement between the parties to use the Homeplace sale proceeds "to pay all claims against the Estate, specifically including the [Deficiency J]udgment referenced in Petitioner's motion[.]" The trial court further concluded that the language relied upon by the clerk from *Denton* was non-binding *dicta* and that, in any event, *Denton* was distinguishable. The trial court also made new findings of fact based on the additional evidence presented at the hearing, including findings that the parties had expressly agreed to

satisfy the Deficiency Judgment with the surplus proceeds from the sale of the Homeplace. Having distinguished *Denton* and based on the findings of an express agreement, the trial court allowed the Estate's motion to pay the Deficiency Judgment out of the Homeplace sale proceeds. Respondents now appeal.

II. ANALYSIS

A. Standard of Review

"On appeal to the Superior Court of an order of the clerk in matters of probate, the trial judge sits as an appellate court. . . . The standard of review in this Court is the same as in the Superior Court." *In re Estate of Pate*, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2-3 (1995) (citations omitted). Where the appellant asserts error in the findings of fact or conclusions of law made by the clerk in the order appealed, the superior court—and by extension this Court—applies the whole record test. *Id.* The superior court "reviews the Clerk's findings and may either affirm, reverse, or modify them." *Id.* at 403, 459 S.E.2d at 2 (citation omitted); *see also* N.C. Gen. Stat. § 1-301.3(d) (instructing the trial court to review whether the findings are supported by the evidence, whether the conclusions are supported by the findings, and whether the order comports with the conclusions and applicable law). Any "[e]rrors of law are reviewed *de novo*." *Overton v. Camden Cty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002) (citation omitted). N.C. Gen. Stat. § 1-301.3 also provides that when reviewing an appeal from the clerk's decision in a probate matter, the trial court may determine whether there was prejudicial error in the exclusion or admission of evidence and may take additional evidence to resolve the pertinent factual issue. N.C. Gen. Stat. § 1-301.3(d).

B. Respondents' Appeal

[1] In their principal brief, Respondents present the following arguments: the prohibition in *Denton* against using proceeds from the sale of real property prohibits the satisfaction of Petitioner's Deficiency Judgment out of the Homeplace sale proceeds, *Denton*'s holding accords with the current year's allowance statutes, and the trial court therefore erred in disregarding *Denton*'s holding. Respondents' principal brief does not challenge the trial court's findings and conclusions that: (1) the clerk committed prejudicial error in excluding evidence of an agreement between the parties to pay the Deficiency Judgment from the sale proceeds; (2) the parties had, in fact, entered into an express agreement to apply the sale proceeds toward the Deficiency Judgment; and (3) the proceeds could be used to satisfy the Deficiency Judgment in

accordance with that agreement. Respondents' principal brief also does not contend that the trial court applied the incorrect standard of review to the clerk's order, or that the trial court's order does not conform to the procedure set forth in N.C. Gen. Stat. § 1-301.3.

We acknowledge that Respondents' *reply* brief does challenge the existence and legal effect of the agreement found and enforced by the trial court. But our appellate rules expressly provide that "[i]ssues not presented and discussed in a party's brief are deemed abandoned[,]" N.C. R. App. P. 28(a) (2019), and appellants may not raise new arguments for the first time in their reply briefs. *See*, *e.g.*, *State v. Triplett*, ___ N.C. App. ___, ___, 810 S.E.2d 404, 407-08 (2018) ("Defendant may not use his reply brief to make new arguments on appeal. A reply brief is not an avenue to correct the deficiencies contained in the original brief." (citations, quotation marks, and alterations omitted)). Respondents' arguments concerning the validity, effect, and application of the agreement are therefore waived. *See*, *e.g.*, *Hazard v. Hazard*, 46 N.C. App. 280, 283, 264 S.E.2d 908, 910 (1980) (deeming the appellant's argument that a contract was contrary to law and public policy waived when he failed to preserve the argument under the then-applicable appellate rules).

Limiting our review to the issues properly raised by the Respondents, we hold that the express agreement found by the trial court distinguishes this case from *Denton* and we affirm the trial court's judgment as a result.

C. Denton and Its Application

[2] It is unsurprising that both the clerk and the trial court considered the applicability of *Denton* to this case, as that opinion appears to be the only appellate decision in this state directly addressing whether proceeds from the sale of real estate may be used to satisfy a deficiency in a surviving spouse's year's allowance. In *Denton*, a widow claimed her allowance and received all of the estate's personal property and $89.06 in cash from the administrator in partial satisfaction of the allowance. 118 N.C. at 543, 24 S.E. at 116. That payment exhausted the fungible assets of the estate, so the administrator paid $104 in outstanding administration costs and estate debts out of his own pocket. *Id.* The administrator then sought to recoup those expenses by petitioning for the sale of real property that was held by the decedent at his time of death and had since passed to several heirs. *Id.* Those heirs objected, arguing that if the administrator had not exhausted the estate by paying the spousal allowance first, the personal property and cash on hand would have been sufficient to cover the debts owed by the estate. *Id.* Our Supreme Court disagreed with the heirs, holding that the statutory spousal allowance

must be paid first and ahead of any creditors. *Id.* at 543-44, 24 S.E. at 116. It then held that the proceeds from the sale of the real property could be used to repay the administrator. *Id.* at 544, 24 S.E. at 116. The Court continued:

> But the widow will not be entitled to any further payment on her year's support out of money arising from the sale of land. And if the land sold should bring more than is sufficient to pay the proper expenditures of the plaintiff in the course of his administration, the residue will remain real estate.

Id.

Here, the trial court concluded in its order that the above language was non-binding *dicta*, despite the fact that it receives treatment as black-letter law in various treatises on estate administration in North Carolina. *See*, *e.g.*, Wiggins, § 15:3 (citing *Denton* for the proposition that proceeds from the sale of real estate may not be used to satisfy a deficiency in a claim for spousal year's allowance). We need not go so far as to declare the quoted passage *dicta*, however, and instead affirm the trial court's order solely because we agree that *Denton* is distinguishable from the facts presented in this case. *Denton* addresses only the statutory rights of a surviving spouse in receiving payment on her year's allowance; it does not determine whether heirs may, by agreement, consent to the use of proceeds from the sale of real estate to pay any deficiency once the estate's other debts have been paid. In other words, *Denton* stands for the singular proposition that a spouse is not entitled *by statute* to the satisfaction of her allowance out of real estate sale proceeds. 118 N.C. at 544, 24 S.E. at 116. So, while *Denton* held that the law will not recognize a *statutory* right to satisfaction of a deficiency out of the sale of real estate, its holding does not prohibit the creation and recognition of a private *contractual* claim to such proceeds where, as here, all other debts of the estate have been satisfied.

As detailed above, the trial court found that the parties expressly agreed that the Estate would pay the Deficiency Judgment from the surplus Homeplace sale proceeds, and it concluded that such an agreement was enforceable.[4] Respondents failed to challenge or address those findings and conclusions in their principal brief, and we will not disturb them. Respondents' only rebuttals—including the contention that such

4. It is unclear from the record whether the agreement was supported by consideration on Petitioner's part. However, Respondents make no argument that the agreement is unenforceable based on a lack of consideration.

a contract is contrary to law and public policy—are found only in their reply brief and are, per our earlier analysis, waived.

Even if we were to assume, *arguendo*, that Respondents' policy argument was preserved, it would fail on the merits. As previously explained, nothing in *Denton* restricts the rights of heirs and the estate to agree, by private contract, to settle a year's allowance deficiency judgment in this manner after all debts of the estate have been paid.[5] Nor are we aware of—and Respondents have not identified—any public policy concern that would prohibit the heirs and estate from mutually agreeing to such an arrangement. In actuality, our precedents suggest that the opposite is true:

> "Family settlements, . . . when fairly made, and when they do not prejudice the rights of creditors, are favorites of the law. . . . They proceed from a desire on the part of all who participate in them to adjust property rights, not upon strict legal principles, however just, but upon such terms as will prevent possible family dissensions, and will tend to strengthen the ties of family affection. The law ought to, and does respect such settlements; it does not require that they shall be made in accord with strict rules of law . . . ." Our Superior Courts will exercise their equity jurisdiction to affirm and approve family agreements when fairly and openly made. . . . Family settlements are almost universally approved.

In re Will of Pendergrass, 251 N.C. 737, 742-43, 112 S.E.2d 562, 566 (1960) (quoting *Tise v. Hicks*, 191 N.C. 609, 613, 132 S.E. 560, 562 (1926)). In light of the above, we hold that the trial court acted properly in vacating the clerk's order and allowing the Estate's motion to satisfy the Deficiency Judgment out of the surplus Homeplace sale proceeds.

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5. The year's allowance statutes, like *Denton*, also do not appear to prohibit parties from contracting as they did here. *See* N.C. Gen. Stat. §§ 30-15 *et seq.* (2019). Those statutes simply provide that the spousal allowance "shall be made in money or other personal property of the estate of the deceased spouse[,]" N.C. Gen. Stat. § 30-18, and that the clerk shall enter a judgment for any deficiency "to be paid when a sufficiency of such assets shall come into the personal representative's hands." N.C. Gen. Stat. § 30-20. So, while the year's allowance is "purely statutory[,]" *Broadnax v. Broadnax*, 160 N.C. 432, 433, 76 S.E. 216, 216 (1912), nothing in those statutes prohibits the recognition of the contractually created obligations at play in this case.

III. CONCLUSION

For the foregoing reasons, we affirm the order of the trial court vacating the clerk's order, allowing the Estate's motion, and remanding for further proceedings.

AFFIRMED.

Judges BRYANT and DILLON concur.

MARIA HONTZAS POULOS, Plaintiff
v.
JOHN EMANUEL POULOS, AJ PROPERTIES OF FAYETTEVILLE, LLC, BEAR ONE INVESTMENTS, LLC, BEAR PLUS ONE, LLC, BEAR SIX INVESTMENTS, LLC, CUMBERLAND RESEARCH ASSOCIATES, LLC, FAYETTEVILLE ENDOSCOPY, LLC, FAYETTEVILLE GASTROENTEROLOGY ASSOCIATES, PA, ICARIAN PARTNERS, LLC, JBV RENTAL PROPERTY, LLC, JEEM, LLC, JEP INVESTMENTS, LLC, JZJ, LLC, KPC COMMERCIAL, LLC, LUMBERTON SQUARE II, LLC, MEEJ, LLC, MEEJ II, LLC, PK PROPERTIES OF FAYETTEVILLE, LLC, VILLAGE AMBULATORY SURGERY ASSOCIATES, INC., OCIE F. MURRAY, JR., as Trustee of the JOHN E. POULOS FAMILY TRUST, JOHN EMANUEL POULOS, as Trustee of the KOULA POULOS REVOCABLE TRUST, Defendants

No. COA19-340

Filed 3 March 2020

Appeal and Error—interlocutory appeal—denial of motion to dismiss—substantial right—collateral estoppel

In a wife's action for post-separation support, alimony, and equitable distribution (ED), which included a claim for relief in the form of a constructive trust—based on an allegation that her ex-husband fraudulently transferred marital assets to corporate defendants (multiple trusts and businesses)—the trial court's order partially denying defendants' motion to dismiss was not immediately appealable. No substantial right was affected where defendants' request for a jury trial was properly rejected as not being available in an ED case, and defendants failed to demonstrate that collateral estoppel—regarding issues addressed in a related complex business case—barred plaintiff's claim to the remedy of a constructive trust.

Appeal by Defendants from Order entered 2 October 2018 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 1 October 2019.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and L. Lamar Armstrong, III, for plaintiff-appellee.

Player McLean, LLP, by Lonnie M. Player, Jr., for defendants-appellants AJ Properties of Fayetteville, LLC, Bear One Investments, LLC, Bear Plus One, LLC, Bear Six Investments, LLC, Cumberland Research Associates, LLC, Icarian Partners, LLC, JBV Rental Property, LLC, JEEM, LLC, JEP Investments, LLC, JZJ, LLC, KPC Commercial, LLC, Lumberton Square II, LLC, MEEJ, LLC, MEEJ II, LLC, PK Properties of Fayetteville, LLC, and John Emanuel Poulos, as Trustee of the Koula Poulos Revocable Trust.

Adams, Burge & Boughman, PLLC, by Harold Lee Boughman, Jr. and Vickie L. Burge, for defendant-appellant John Emanuel Poulos.

Hamilton Stephens Steele + Martin, PLLC, by Kenneth B. Dantinne and Sarah J. Sawyer, for defendant-appellant Ocie F. Murray, Jr., as Trustee of the John E. Poulos Trust.

HAMPSON, Judge.

AJ Properties of Fayetteville, LLC, Bear One Investments, LLC, Bear Plus One, LLC, Bear Six Investments, LLC, Cumberland Research Associates, LLC, Icarian Partners, LLC (Icarian), JBV Rental Property, LLC, JEEM, LLC, JEP Investments, LLC, JZJ, LLC, KPC Commercial, LLC, Lumberton Square II, LLC, MEEJ, LLC, MEEJ II, LLC, PK Properties of Fayetteville, LLC (Corporate Defendants), John Emanuel Poulos, individually (Defendant Poulos) and as Trustee of the Koula Poulos Revocable Trust (KP Trust), and Ocie F. Murray, Jr., as Trustee of the John E. Poulos Trust (JEP Trust), (collectively, Defendants)[1] appeal from an Order on Motions to Dismiss (Motion to Dismiss Order) denying in part Defendants' Motions to Dismiss. We, however, determine the Motion to Dismiss Order from which Defendants appeal is an interlocutory order that does not affect a substantial right of Defendants. Therefore, we dismiss this appeal.

1. Defendants Fayetteville Endoscopy, LLC, Fayetteville Gastroenterology Associates, PA, and Village Ambulatory Surgery Associates, Inc. did not appeal the trial court's Order and are not parties to this appeal.

Factual and Procedural Background

Defendant Poulos and Maria Hontzas Poulos (Plaintiff) were married on 25 January 1992. On 12 July 2013, Defendant Poulos and Plaintiff separated. On 15 July 2013, Plaintiff filed her original Complaint (Complaint) in this action against Defendant Poulos in Cumberland County District Court (Divorce Case). Plaintiff's Complaint alleged three claims—Post-Separation Support, Alimony, and Equitable Distribution. Thereafter, on 8 October 2014, they were granted a judgment of absolute divorce.

On 11 February 2015, Plaintiff filed a separate lawsuit against Defendant Poulos, Icarian, MEEJ, LLC, JEP Investments, LLC, and the JEP Trust in Cumberland County Superior Court, which action was subsequently designated a mandatory complex business case and assigned to a special superior court judge for complex business cases in North Carolina Business Court (Business Court Case). In the Business Court Case, Plaintiff asserted claims for Fraud, Constructive Fraud, Breach of Fiduciary Duty, Fraudulent Transfers in violation of the North Carolina Uniform Voidable Transactions Act (UVTA), Setting Aside the JEP Trust under the North Carolina Uniform Trust Code (UTC), and an Accounting. Plaintiff also alleged Defendant Poulos had engaged in a pre-divorce "fraudulent scheme" whereby Defendant Poulos, beginning in late 2010 or early 2011, "transferred, concealed, and siphoned away marital assets to prevent [Plaintiff] from receiving distribution of this property in the" Divorce Case by transferring marital assets to third-party LLCs. Specifically, Plaintiff alleged Defendant Poulos transferred large portions of marital property from various Corporate Defendants to Icarian—an LLC in which Defendant Poulos was allegedly the sole interest owner—and in turn, Defendant Poulos caused Icarian to transfer a ninety-percent membership interest in Icarian to the JEP Trust. Plaintiff further contended these transfers breached the fiduciary duty Defendant Poulos owed her as his wife and constituted fraud. Therefore, Plaintiff requested the JEP Trust be voided and she be granted an accounting of the assets held by the JEP Trust.

After extensive discovery in the Business Court Case, the Business Court granted partial summary judgment on 26 September 2016, dismissing Plaintiff's claims for Constructive Fraud, Fraudulent Transfers under the UVTA under N.C. Gen. Stat. § 39-23.5(a), Breach of Fiduciary Duty in part, and Setting Aside the JEP Trust under the UTC and denying Defendants' motions for summary judgment on Plaintiff's remaining claims (Business Court Summary Judgment Order).

Defendants subsequently filed a motion to clarify the Business Court Summary Judgment Order, and Plaintiff filed a motion for reconsideration. On 6 June 2017, the Business Court entered its Order on Motion to Clarify, Motion for Reconsideration, and Motion to Revise Summary Judgment Order (Business Court Clarification Order). Relevant to the appeal *sub judice*, the Business Court Clarification Order identified four transfers at issue in the Business Court Case:

> [T]he MEEJ Transfers, the JEP Transfer, the Trust Transfer, and the Maria Transfer (collectively, the MEEJ Transfers, JEP Transfers, and Trust Transfer are referred to as the "Transfers"). The [Business Court Summary Judgment Order] defined the MEEJ Transfers as the real property deeded by MEEJ to Icarian on January 28, 2011 . . . and the JEP Transfer as the real property deeded by JEP to Icarian on January 28, 2011. . . . The [Business Court Summary Judgment Order] defined the Trust Transfer as the transfer of a 90% interest in Icarian into the [JEP Trust] on February 11, 2011.

First, the Business Court clarified, "the claims remaining for trial against [Defendant] Poulos individually are Plaintiff's claims for breach of fiduciary duty and fraud regarding the MEEJ Transfers and the JEP Transfer, and Plaintiff's claims under [N.C. Gen. Stat.] § 39-23.4(a)(1) regarding the MEEJ Transfers, the JEP Transfer, and the Trust Transfer. The MEEJ Transfers do not include transfers of security investments or other funds to Icarian." Second, the Business Court noted "issues of material fact existed regarding whether [Defendant] Poulos was the 100% owner of Icarian." On 13 July 2017, Plaintiff voluntarily dismissed without prejudice all claims remaining in the Business Court Case.

On 14 February 2018, Plaintiff filed an Amended Complaint (Amended Complaint) in the current action in Cumberland County District Court against Defendants.[2] In her Amended Complaint, Plaintiff added additional facts pertaining to the fraudulent scheme she alleged in the Business Court Case but asserted the same three claims as in her original Complaint—Post-Separation Support, Alimony, and Equitable Distribution. In addition, Plaintiff added a fourth "claim for relief" seeking a constructive trust. This fourth claim for relief alleged the following:

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2. Pursuant to certain Joinder Orders, the trial court joined all remaining Corporate Defendants, JEP Trust, and KP Trust in this action as necessary parties.

129. [Defendant] Poulos transferred legal title and ownership of [Plaintiff's] and [Defendant] Poulos' substantial marital property as stated above and summarized as follows:

    a. [Defendant] Poulos transferred his membership interests in the Corporate Defendants into Icarian.

    b. [Defendant] Poulos fraudulently induced [Plaintiff] to transfer her membership interests in the Corporate Defendants into Icarian.

    c. On 11 February 2011, [Defendant] Poulos created the JEP Trust and purported to assign and transfer ninety percent (90%) membership interest in Icarian into the JEP Trust.

    d. [Defendant] Poulos transferred substantial marital property into Icarian, and thus the JEP Trust.

    e. [Defendant] Poulos transferred substantial marital property into the KP Trust.

    f. Other assignments and transfers of marital property to third parties and to himself as shown above and as otherwise proven at trial.

    (collectively, "the Transfers").

130. As a result of the Transfers, the KP Trust, the JEP Trust, and the Corporate Defendants hold legal title to property that was marital property before the Transfers (the Transferred Property).

131. The Trust Defendants and the Corporate Defendants acquired legal title to the Transferred Property through [Defendant] Poulos' fraud, breach of duty, or some other circumstance making it inequitable for the Trust Defendants and Corporate Defendants to retain title to the Transferred Property.

132. [Plaintiff] is entitled to imposition of a constructive trust placed on the Transferred Property.

Accordingly, Plaintiff requested imposition of a constructive trust on the Transferred Property held by the Trust Defendants and Corporate Defendants.

From 17 April to 23 April 2018, Defendants filed Motions to Dismiss alleging, *inter alia*, Plaintiff's Amended Complaint was subject to dismissal because the doctrine of collateral estoppel barred Plaintiff's claims. After a hearing on Defendants' Motions to Dismiss, the trial court entered its Motion to Dismiss Order granting in part and denying in part Defendants' Motions. In light of the Business Court Case, the trial court granted Defendants' Motions "only as to the issues of whether the JEP Trust was validly created, and therefore whether the JEP Trust itself (not including any assets held in the JEP Trust) can be dissolved or in any way altered, through claims for breach of fiduciary duty, constructive fraud, or intentional fraud" based on the doctrine of collateral estoppel. Defendants timely filed Notices of Appeal from the trial court's Motion to Dismiss Order.

Appellate Jurisdiction

We must first address whether we have jurisdiction to review the trial court's Motion to Dismiss Order. As Defendants acknowledge, the trial court's Motion to Dismiss Order is interlocutory. *See Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007) ("Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment." (citation and quotation marks omitted)). "Generally, there is no right of immediate appeal from interlocutory orders and judgments. However, immediate appeal of an interlocutory order is available where the order deprives the appellant of a substantial right which would be lost without immediate review." *Whitehurst Inv. Props., LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (citations and quotation marks omitted).

Defendants argue the Motion to Dismiss Order affects two substantial rights. First, Defendants contend the Order is "immediately appealable based on its denial of the Defendants' alternative requests for jury trial." Second, Defendants assert the Order affects a substantial right where its Motions to Dismiss made "a colorable assertion that the [Plaintiff's] claim is barred under the doctrine of collateral estoppel." We address each argument in turn.

With respect to Defendants' alleged right to a jury trial, our Court has explained a trial court's denial of a defendant's request for a jury

trial *may* in certain circumstances affect a substantial right, thereby rendering it immediately appealable. *See, e.g.*, *Dept. of Transportation v. Wolfe*, 116 N.C. App. 655, 656, 449 S.E.2d 11, 12 (1994) (citations omitted). However, our Supreme Court has long held no right to a jury trial exists in an equitable distribution action. *See Kiser v. Kiser*, 325 N.C. 502, 511, 385 S.E.2d 487, 492 (1989). As for the issue of a right to a trial by jury on the question of a constructive trust in the context of an equitable distribution action, our Court has stated:

> [T]he issue of constructive trust is not a cause of action which is to be severed from other actions, but rather is a request for equitable relief within the equitable distribution action itself. As such, all issues pertaining to the constructive trust are questions of fact arising in a proceeding for equitable distribution of marital assets, and thus, there is no constitutional right to trial by jury.

Sharp v. Sharp, 133 N.C. App. 125, 131, 514 S.E.2d 312, 316 (Timmons-Goodson, J., dissenting) (citation and quotation marks omitted), *rev'd per curiam for the reasons stated in dissent*, 351 N.C. 37-38, 519 S.E.2d 523 (1999). Thus, under *Sharp*, Defendants are not deprived of a substantial right by the trial court's denial of their alternative requests for a jury trial. *See id.*

Defendants next argue the trial court's interlocutory Motion to Dismiss Order affects a substantial right where the Order "was based in part on [the trial court's] rejection of the defense of collateral estoppel raised by each of the Defendants." It is well established "the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). Nevertheless, we have also recognized "[i]ncantation of the [doctrine of collateral estoppel] does not, however, automatically entitle a party to an interlocutory appeal of an order rejecting [that defense]." *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534 (2007). Thus, we must determine whether, at this preliminary stage, Defendants have made a colorable argument that the doctrine applies in this context in order to allow us to exercise jurisdiction over this appeal.

"Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Turner*, 363 N.C. at 558, 681 S.E.2d at 773 (alteration,

citation, and quotation marks omitted). "The issues resolved in the prior action may be either factual issues or legal issues." *Doyle v. Doyle*, 176 N.C. App. 547, 549, 626 S.E.2d 845, 848 (2006). The party alleging collateral estoppel must demonstrate

> that the earlier suit resulted in a final judgment on the merits, that the *issue in question was identical to an issue actually litigated* and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.

State ex rel. Tucker v. Frinzi, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (emphasis added) (alteration, citation, and quotation marks omitted).

For issues to be considered "identical" to ones "actually litigated and necessary" to a previous judgment:

> (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citation omitted). "The burden is on the party asserting [collateral estoppel] to show with clarity and certainty what was determined by the prior judgment." *Miller Building Corp. v. NBBJ North Carolina, Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998) (citation and quotation marks omitted).

Here, Defendants argue, "[i]n the Amended Complaint, Plaintiff contends that the Trust Defendants and Corporate Defendants acquired legal title to the Transferred Property, which Plaintiff alleges to be marital property or formerly marital property, through Defendant Poulos' 'fraud, breach of duty, or some other circumstance' making it inequitable for the Trust Defendants and Corporate Defendants to retain title to the Transferred Property. These issues, concerning fraud, breach of fiduciary duty, constructive fraud, etc. were *actually litigated* in the prior action, and were necessary to the judgment." Accordingly, Defendants contend collateral estoppel bars Plaintiff's request for a constructive trust over the Transferred Property. This contention, however, fails to

appreciate the nature of Plaintiff's equitable distribution claim and the issues necessary to its determination.

In the equitable distribution context, the trial court is required, *inter alia*, to classify, value, and distribute marital property. *See* N.C. Gen. Stat. § 50-20(a) (2019). Section 50-20 defines "marital property" as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned[.]" *Id.* § 50-20(b)(1). "[B]oth legal and equitable interest in real and personal property are subject to distribution under section 50-20." *Upchurch v. Upchurch*, 122 N.C. App. 172, 175, 468 S.E.2d 61, 63 (1996) (citations omitted). Further, "an equitable interest in property can be established in several situations, namely . . . constructive trusts." *Id.* (citation omitted). Regarding constructive trusts, *Upchurch* stated:

> A constructive trust is a duty imposed by courts of equity to prevent the unjust enrichment of the holder of title to property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it. It is not necessary to show fraud in order to establish a constructive trust. Such a trust will arise by operation of law against one who *in any way* against equity and good conscience holds legal title to property which he should not. The burden is on the party wishing to establish a trust to show its existence by clear, strong and convincing evidence. The determination of whether a trust arises on the evidence requires application of legal principles and is therefore a conclusion of law.

Id. at 175-76, 468 S.E.2d at 63 (alterations, citations, and quotation marks omitted); *see also Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 530, 723 S.E.2d 744, 752 (2012) (noting a trial court can impose a constructive trust even in the absence of a breach of fiduciary duty).

Here, the Business Court resolved the following issues in favor of Defendants in the Business Court Case: (1) Plaintiff could not show a fiduciary duty existed between her and Defendant Poulos regarding the creation of the JEP Trust and the Trust Transfer because Plaintiff was not a party to the agreements or transactions creating the JEP Trust and the Trust Transfer; (2) regarding the Constructive-Fraud Claim, Plaintiff presented no evidence Defendant Poulos benefited himself at Plaintiff's

expense to support this claim because the types of benefits Plaintiff alleged were not the types of *tangible* benefits required under North Carolina caselaw; and (3) Plaintiff's Fraud Claim based on the creation of the JEP Trust and the Trust Transfer also had to be dismissed because they did not involve an agreement or transaction between Plaintiff and Defendant Poulos.

These issues, however, are not necessary to a determination of whether Plaintiff is entitled to a *constructive trust* in the current equitable distribution action. Our Court has recognized, "a trial court may impose a constructive trust, *even in the absence of fraud or a breach of fiduciary duty*, upon the showing of either (1) some other circumstance making it inequitable for the defendant to retain the funds against the claim of the beneficiary of the constructive trust, or (2) that the defendant acquired the funds in an unconscientious manner." *Houston v. Tillman*, 234 N.C. App. 691, 697, 760 S.E.2d 18, 21 (2014) (emphasis added) (citations omitted). Accordingly, the fact the Business Court Case found Plaintiff could not prove claims for fraud, breach of fiduciary duty, or constructive fraud in the creation of the JEP Trust or the Trust Transfers because Plaintiff was not a party to the agreements or transactions creating the JEP Trust and the Trust Transfer is irrelevant to the question of whether Plaintiff is entitled to a constructive trust over a portion of the Transferred Property that constitutes marital or divisible property. *See id.* (citations omitted); *Variety Wholesalers, Inc.*, 365 N.C. at 530, 723 S.E.2d at 752 (noting a breach of fiduciary duty is not required for imposition of a constructive trust); *Upchurch*, 122 N.C. App. at 175, 468 S.E.2d at 61 ("It is not necessary to show fraud in order to establish a constructive trust."); *see also Weatherford v. Keenan*, 128 N.C. App. 178, 178-80, 493 S.E.2d 812, 813-14 (1997) (upholding constructive trust in equitable distribution action even absent any mention of fraud, breach of fiduciary duty, or wrongdoing).[3]

As the trial court below correctly noted, the Business Court Case only determined the issues of whether the JEP Trust was validly created, answering in the affirmative, and thus whether the JEP Trust could be *dissolved* through claims of breach of fiduciary duty, constructive fraud, or intentional fraud, answering in the negative. However, the resolution of these issues does not prevent Plaintiff from establishing a constructive trust over the *assets* held by this Trust because a constructive trust

3. We note the Business Court expressly declined to address dismissal of a constructive-trust remedy regarding the "assets that may be determined to have been improperly transferred in the MEEJ and JEP transfers" because it did not believe this was the subject of Defendants' Motion to Dismiss.

does not and cannot dissolve a trust and does not necessarily depend on proving breach of fiduciary duty, constructive fraud, or intentional fraud. *See Houston*, 234 N.C. App. at 697, 760 S.E.2d at 21 (citations omitted). Further, the fact the JEP Trust was validly created does not mean it is not marital or divisible property to which a constructive trust could attach. *See Weatherford*, 128 N.C. App. at 180, 493 S.E.2d at 814 ("In an action for equitable distribution, the trial court is entitled to create a constructive trust in order to . . . prevent the unjust enrichment of the holder of legal title to property." (citations omitted)). Indeed, the Business Court Summary Judgment Order left open numerous issues that would be relevant to such a determination, such as whether Defendant Poulos "misrepresented or failed to disclose the purpose behind the MEEJ and JEP transfers, and did not inform her that he had created the Family Trust or made the Trust Transfer." Thus, at this preliminary stage, Defendants have not shown the elements of collateral estoppel have been met.

Accordingly, because at this motion-to-dismiss stage Defendants have not shown collateral estoppel serves as a bar to Plaintiff's *remedy* of a constructive trust, Defendants have failed to meet their burden of demonstrating that the trial court's Motion to Dismiss Order "deprive[d] [Defendants] of a substantial right which would be lost without immediate review." *Whitehurst Inv. Props., LLC*, 237 N.C. App. at 95, 764 S.E.2d at 489 (citations omitted). Therefore, we lack jurisdiction over this appeal.

Conclusion

Accordingly, for the foregoing reasons, we dismiss Defendants' appeal.

DISMISSED.

Chief Judge McGEE and Judge COLLINS concur.

[270 N.C. App. 300 (2020)]

STATE OF NORTH CAROLINA
v.
MARDI JEAN DITENHAFER

No. COA16-965-2

Filed 3 March 2020

Obstruction of Justice—sufficiency of evidence—evidence of deceit and intent to defraud—denial of access to child sexual abuse victim

There was sufficient evidence, taken in the light most favorable to the State, of deceit and intent to defraud to support defendant mother's conviction of felonious obstruction of justice where she took steps to frustrate law enforcement's investigation and denied officers and social workers access to her child after the child alleged she had been sexually assaulted by her adoptive father and after defendant mother observed the adoptive father sexually assaulting her child.

Judge TYSON dissenting.

Appeal by Defendant from judgments entered 1 June 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 15 May 2017. By opinion issued 20 March 2018, a divided panel of this Court affirmed in part and reversed in part the judgments of the trial court. The State filed a petition for discretionary review with the Supreme Court of North Carolina. After granting review, by opinion dated 1 November 2019, the Court affirmed in part and reversed in part the Court of Appeals' decision and remanded to the Court of Appeals with directions.

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

Jarvis John Edgerton, IV, for Defendant.

McGEE, Chief Judge.

Mardi Jean Ditenhafer ("Defendant") was convicted of two counts of felony obstruction of justice and one count of felony accessory after the fact to sexual activity by a substitute parent. In an opinion issued 20 March 2018, this Court held the trial court did not err in denying

Defendant's motion to dismiss the charge of felony obstruction of justice by pressuring the daughter to recant; however, the trial court did err in dismissing: (1) the charge of obstruction of justice based on denying investigators access to the daughter, and (2) the charge of being an accessory after the fact for her failure to report a crime. *State v. Ditenhafer*, ___ N.C. App. ___, 812 S.E.2d 896, *review on additional issues allowed*, ___ N.C. ___, 818 S.E.2d 107 (2018), *and aff'd in part, rev'd in part and remanded*, ___ N.C. ___, 834 S.E.2d 392 (2019). Because we held there was insufficient evidence to support Defendant's conviction for obstruction of justice based on Defendant's actions in denying investigators access to her daughter, we did not address whether there was sufficient evidence to enhance the charge from a misdemeanor to a felony under N.C.G.S. § 14-3(b). *Id.* at ___, 812 S.E.2d at 905.

In an opinion filed 1 November 2019, the North Carolina Supreme Court affirmed this Court's decision to the extent it held the trial court erred by denying Defendant's motion to dismiss the charge of accessory after the fact to sexual activity by a substitute parent but reversed this Court's holding that the trial court erred by denying Defendant's motion to dismiss the charge of obstruction of justice based on denying investigators access to the daughter. *State v. Ditenhafer*, ___ N.C. ___, ___, 834 S.E.2d 392, 401 (2019). The Supreme Court has instructed this Court, on remand, to determine whether there was sufficient evidence presented "to enhance the charge of obstruction of justice for denying access to [the daughter] from a misdemeanor to a felony under N.C.G.S. § 14-3(b)." We are therefore tasked with determining whether there was substantial evidence that Defendant acted with deceit and the intent to defraud when she obstructed justice by denying law enforcement access to the daughter. *See* N.C.G.S. § 14-3(b) (2017) ("If a misdemeanor offense as to which no specific punishment is prescribed be . . . done . . . with deceit and intent to defraud, the offender shall . . . be guilty of a Class H felony."). We hold that the evidence, viewed in the light most favorable to the State, supports a reasonable inference that Defendant acted with deceit and the intent to defraud necessary to commit felony common law obstruction of justice in denying access to the daughter.

Factual and Procedural History

A full recitation of the underlying factual and procedural history of this case can be found in the Supreme Court's decision in *Ditenhafer*, ___ N.C. ___, 834 S.E.2d 392. A brief discussion of facts pertinent to our decision follows: The State's evidence tended to show that Defendant and her husband, William Ditenhafer ("William") had two children. Their daughter ("the daughter") was Defendant's biological child and

William's adopted child and their son ("the son") was the biological child of both Defendant and William. When the daughter was approximately fifteen years old, William began giving the daughter full-body massages to "help [her] self-esteem," with Defendant's knowledge. One night, after massaging the daughter, William instructed the daughter to discard her towel and sit next to him; he then guided her hand along his penis until he ejaculated. After weeks of similar behavior, William began to force the daughter to perform oral sex on him. Following the daughter's sixteenth birthday, William engaged in vaginal intercourse with her on several occasions.

While visiting her relatives in Arizona in the Spring of 2012, the daughter told her paternal aunt that she was being sexually abused by William. The daughter's aunt promptly reported the abuse to Arizona law enforcement and to Defendant. The daughter returned to North Carolina but, on the way home from the airport, Defendant told the daughter she did not believe her and that she needed to recant her allegations of abuse.

As part of the investigation, Defendant and the daughter met with Susan Dekarske ("Ms. Dekarske"), a social worker with the Wake County Child Protective Services ("CPS"), and Detective Stan Doremus ("Detective Doremus") with the Wake County Sheriff's Department ("WCSD") on 11 April 2013 at Defendant's home. Over the following months, the daughter met with Ms. Dekarske several times, with Defendant present or "in listening distance." Ms. Dekarske testified that "[f]or the majority part of the investigation, [the daughter] continued to inform me that [Defendant] was pressuring her to recant the story." The daughter's therapist testified that "[the daughter] said that [Defendant] asked her to lie to me, to CPS, to the detectives, that her mother did not believe her and wanted her to recant because [the abuse] didn't happen."

During a meeting with Defendant, the daughter, Ms. Dekarske, and Detective Doremus on 21 June 2013, Defendant was seated "[s]houlder to shoulder" with the daughter, and "had her hand on [the daughter's] thigh virtually the whole time[.]" Detective Doremus testified that, when the daughter was asked questions, "Defendant was answering the questions for [the daughter]. The questions that were being asked of her, as soon as [the daughter] opened her mouth to talk, [D]efendant would answer the questions." During the interview, Defendant told Detective Doremus that "there is some truth to everything that [the daughter] says but not all of it is true" and told Ms. Dekarske that "she believes [the daughter] in regards to what she had disclosed; however, she still did not believe it was William who did that to her." Defendant told Detective

Doremus that she would not permit the daughter to speak with him alone and, when Detective Doremus informed her that she could not prohibit such a meeting, Defendant reiterated that she was not going to authorize the daughter to meet with Detective Doremus one-on-one.

In the car on the way to meet with Ms. Dekarske and Detective Doremus at CPS's office on 11 July 2013, the daughter told Defendant that, because she could no longer handle the pressure of Defendant's constant scolding her about her report of sexual abuse, she would recant her story. Defendant coached the daughter and told her what she should say. As a result of the daughter's promise to recant, Defendant allowed the daughter to meet with Ms. Dekarske and Detective Doremus alone.

Defendant sent text messages to her daughter throughout the course of the interview demanding information about what was being said and how long the interview would take. Detective Doremus testified that Defendant's conduct on 11 July 2013, including her sending text messages to the daughter, "moved [him] into investigator mode" because he "knew [he] probably had a limited amount of time to talk to [the daughter] before her mom pulled her out of that meeting[.]" Indeed, Defendant eventually did exactly that, cutting short Detective Doremus's opportunity to question the daughter about documentary evidence of the abuse. Detective Doremus testified that Defendant interrupted the interview and sat down at the table with a smirk; when he informed Defendant that the daughter had not recanted, Defendant's expression changed, and she grew angry. Defendant then ended the interview.

A few weeks later, on 5 August 2013, Ms. Dekarske met with the daughter and Defendant at Defendant's home. As Ms. Dekarske was pulling out of the driveway to leave, the daughter approached her car window and told her that she had made up everything. The daughter delivered the recantation in a "very robotic [manner], saying something that [had] been rehearsed for her to say" and Ms. Dekarske observed Defendant watching the exchange from a window. Two days later, on 7 August 2013, the daughter contacted Detective Doremus by phone and recanted her report of abuse. During the call, Detective Doremus heard another person on the line besides himself and the daughter. The daughter later e-mailed a recantation to Detective Doremus, with Defendant "prompt[ing] [the daughter] on what to write, and [the daughter] typ[ing] it up in [her] e-mail."

Detective Doremus went to the daughter's school on 29 August 2013 and the daughter told him, "I'm not supposed to talk to you." Detective Doremus assured the daughter that he was not going to ask her any

questions and informed her that the investigation into her report of abuse was ending as a result of the recantation and her being "in a home where [she was] not being supported[.]" The daughter testified that, during this time, she never wanted to recant her story and, if she had not been pressured by Defendant, she never would have recanted. Defendant's husband William, who had moved out of the family home when the investigation began, returned when the investigation was closed.

On 5 February 2014, William again demanded sex from the daughter. While William and the daughter were engaged in intercourse, Defendant entered the bedroom and witnessed the abuse. Later that day, Defendant instructed the daughter to accompany her to a McDonald's parking lot, where she was supposed to meet Detective Doremus to pick up a cell phone that had been searched in the earlier investigation. Defendant parked in the parking lot and the daughter told her everything she had reported in the investigation was true, to which Defendant replied, "I'm not sure if I believe you or not, but I just – I need to handle this first." Defendant exited the car and retrieved the phone from Detective Doremus. Defendant did not allow the daughter to get out of the car to speak with Detective Doremus. Having witnessed firsthand William's abuse of her daughter, Defendant failed to report it in a face-to-face meeting with law enforcement hours later. Defendant then instructed the daughter to not tell anyone about the abuse "[b]ecause it was family business." Defendant specifically instructed the daughter to not talk to social workers or law enforcement.

Defendant called her brother-in-law on 19 March 2014 and told him she had witnessed William's abuse of the daughter. Defendant assured her brother-in-law that the daughter and William were going to therapy together, and that she "was doing everything correctly and . . . to not involve anyone else or the authorities because that would cost . . . more money and time."

Defendant's brother-in-law sent an email to CPS to report William's abuse of the daughter on or around 28 April 2014. Defendant called her brother-in-law, was "very angry" with him, accused him of reporting the abuse to CPS, and told him that the investigation "was a nightmare." After receiving the report from Defendant's brother-in-law, a CPS assessor, Robin Seymore ("Ms. Seymore"), met the daughter at her school. The daughter immediately asked Ms. Seymore if Defendant was aware that Ms. Seymore was speaking with the daughter. When Ms. Seymore informed the daughter that Defendant did not know, the daughter said, "[c]an I go out and talk to my mom? I want to call my mom first."

The daughter attempted to call Defendant; however, she only reached her voicemail. The daughter told Ms. Seymore she "didn't really want to talk about it" and denied the abuse "[b]ecause it's what [she] was told to do by [Defendant]." Ms. Seymore described the daughter's demeanor as "very anxious . . . she kept saying, 'I want to call my mom. I need to talk to my mom.' " The daughter eventually got in touch with Defendant and Defendant picked the daughter up from school. They then traveled to the son's school, where Defendant burst into the room where Ms. Seymore was interviewing the son and said, "[a]bsolutely not. You're not going to talk to him. You are not going to talk to him. This is not happening."

Two days later, on 30 April 2014, Defendant agreed to speak to CPS at her home. Defendant refused to allow Ms. Seymore inside her home and insisted, despite heavy rain, wind, and forecasted thunderstorms, the interview take place outside in the downpour. Defendant informed Ms. Seymore that she was separated from William and that he was no longer allowed in the house "to avoid any more lies from [the daughter]." Defendant did not tell Ms. Seymore she had witnessed William's abuse of the daughter. Defendant instructed Ms. Seymore that CPS and its agents were not permitted to speak to her children at school unless a parent or attorney was present, and that the only place she would authorize contact would be outside of her house.

Warrants for Defendant's arrest were issued on 1 May 2014 for felony obstruction of justice and felony accessory after the fact to William's abuse of the daughter. On the same day, Detective Doremus accompanied other law enforcement officers and CPS's representative to Defendant's house for the purpose of removing the daughter from the home and arresting Defendant. Detective Deremus observed Defendant drive towards her home with the daughter and the son in her car; however, upon seeing the law enforcement officers, Defendant turned around in a driveway and drove off in the other direction. Detective Doremus and another investigator activated their blue lights and followed Defendant's car, stopping it before it exited the subdivision. Detective Doremus and a CPS worker approached Defendant's car, but she rolled up her car windows and locked the doors. At that point, Defendant told the daughter, "[d]on't say anything. Don't get out of the car. . . . If they try and take you away . . . don't go. Refuse to go. You know, lower your arm. Run down the street. Just don't go." Defendant finally exited the car and Detective Doremus allowed her to drive her children back to her home. Upon returning home, the daughter was instructed to collect her belongings; however, Defendant took the daughter's laptop and phone and would not allow her to take them with her.

Analysis

The North Carolina Supreme Court held there was sufficient evidence presented at the trial to support Defendant's conviction for obstruction of justice based on Defendant denying access to the daughter and, accordingly, held the trial court did not err in denying Defendant's motion to dismiss. *Ditenhafer*, ___ N.C. at ___, 834 S.E.2d at 401. The elements of felony obstruction of justice are: (1) unlawfully and willfully (2) acting to prevent, obstruct, impede, or hinder justice (3) in secret and with malice or with deceit and intent to defraud. *See, e.g.*, *State v. Cousin*, 233 N.C. App. 523, 531, 757 S.E.2d 332, 339 (2014)[1] (holding no error in denying a motion to dismiss a charge of felony obstruction of justice where there was sufficient evidence the defendant "(1) unlawfully and willfully (2) obstructed justice by providing false statements to law enforcement officers investigating [a crime] (3) with deceit and intent to defraud"). If the State introduces substantial evidence of the third element demonstrating deceit and intent to defraud, the obstruction charge may be elevated from a misdemeanor to a felony. *See* N.C.G.S. § 14-3(b).

Our Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). Such substantial evidence may be "direct, circumstantial, or both[,]" *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988), and we consider it "in the light most favorable to the State with every reasonable inference drawn in the State's favor." *Cousin*, 233 N.C. App. at 529–30, 757 S.E.2d at 338 (citation omitted).

The dissent asserts "the majority's opinion cannot draw a legally culpable distinction or definition between solely obstructing access as is alleged in the indictment and condemning Defendant with felonious 'deceit and intent to defraud.' " The Supreme Court explicitly held that the State presented sufficient evidence that Defendant did, in fact, obstruct justice by denying officers and social workers access to the daughter throughout their investigation. *Ditenhafer*, ___ N.C. at ___, 834 S.E.2d at 401. The *only* question before this Court is whether there is sufficient evidence of deceit and the intent to defraud to elevate the

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1. The dissent would read *Cousin*, 233 N.C. App. 523, 757 S.E.2d 332, to hold that absent evidence of a substantial burden imposed on investigators, Defendant's illegal acts were not done with deceit and the intent to defraud. However, *Cousin* imposes no such requirement on the State. *Id.* at 531, 757 S.E.2d at 339. Instead, *Cousin* simply held that such evidence, like other circumstantial evidence of intent, supported a felony obstruction of justice charge. *Id.*

charge of obstruction of justice from a misdemeanor to a felony. To the extent the dissent points to facts demonstrating Defendant did not obstruct justice by denying access to the daughter, we are bound by the law of the case. *See Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994) ("According to the doctrine of the law of the case, 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." (citation omitted)).

Defendant's argument on appeal that she was acting in service of the truth is entirely inconsistent with the evidence discussed below. The record demonstrates that the State introduced evidence, taken in the light most favorable to it, that Defendant acted with deceit and the intent to defraud. For example, the State's evidence showed Defendant believed the daughter had been abused by someone. Defendant told Ms. Dekarske "she believe[d the daughter] in regards to what she had disclosed; however, she still did not believe it was William who did that to her" and told Detective Doremus that "there is some truth to everything that [the daughter] sa[id] but not all of it is true." Despite believing abuse had occurred, Defendant took steps to frustrate attempts by law enforcement and social workers to investigate that abuse. Defendant remained within hearing distance or was present in almost every interview with CPS and WCSD, did not permit her daughter to answer questions and answered for her in one interview, sent text messages and physically interrupted another interview, and sought to constantly influence her daughter's statements in those interviews by verbally abusing and punishing the daughter for the statements she was making. Defendant also instructed the daughter not to speak with investigators and directed investigators not to speak with the daughter in private, ensuring that the daughter did not have the opportunity to give investigators truthful statements regarding the abuse.

Evidence of Defendant's intent goes beyond her efforts to intervene in the investigation. Defendant controlled the narrative by coaching the daughter on what to say, listening on the line when the daughter recanted her story to Detective Doremus, and "prompt[ing the daughter] on what to write" in the email in which the daughter recanted her story. Notably, Defendant did not merely encourage the daughter to tell the truth as Defendant believed it; she specifically pressured the daughter to *lie*. The daughter's therapist testified that "[the daughter] said that [Defendant] asked her to lie to me, to CPS, to the detectives, that her mother did not believe her and wanted her to recant because [the abuse]

didn't happen." Thus, the evidence of Defendant's conduct surrounding and during the interviews with investigators was sufficient to allow a reasonable juror to infer that her denial of access was committed with deceit and intent to defraud.

The State also introduced evidence of Defendant's actions *after* she witnessed the abuse firsthand demonstrating she acted with deceit and the intent to defraud during the time period alleged in the indictment. After catching William in the act of raping her daughter, she instructed the daughter to not tell anyone about the abuse "[b]ecause it was family business" and specifically directed the daughter to not talk to social workers or law enforcement. Subsequently, when Ms. Seymore met with the daughter at her school, the daughter was "very anxious," insisted on calling her mom, and denied the abuse "[b]ecause it's what [she] was told to do by [Defendant]." Defendant finally agreed to meet Ms. Seymore at her house; however, she insisted the interview take place outside in a rainstorm. Defendant instructed Ms. Seymore that CPS and its agents were not permitted to speak to her children alone at school and she would only authorize contact outside, but not inside, of her house. A few days later, upon realizing officers were at her home to arrest her, Defendant instructed the daughter, "[d]on't say anything. Don't get out of the car." This evidence of Defendant's actions after witnessing the abuse firsthand was sufficient to allow a reasonable juror to infer that, between 11 July and 1 September 2013, Defendant acted with deceit and the intent to defraud by denying investigators access to the daughter.

The dissent asserts that "[t]he only relevant evidence to elevate the obstruction of access to a felony must have occurred between the alleged dates of between 11 July to 1 September 2013" and "[t]he lengthy recitation of facts in the majority's opinion regarding Defendant's actions that led to her daughter's recanting allegations are outside of the time frame and dates alleged in the indictment before us and are also not before us on remand." Evidence regarding Defendant's actions after 1 September 2013 provides circumstantial evidence of her deceit and intent to defraud during the relevant period. *State v. Smith*, 211 N.C. 93, 95, 189 S.E. 175, 176 (1937) ("Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred."). Moreover, the Supreme Court considered evidence of Defendant's actions *after* 1 September 2013 in holding that there was sufficient evidence supporting Defendant's conviction for obstruction of justice based upon Defendant's actions in denying access to the daughter. *Ditenhafer*, ___ N.C. at ___, 834 S.E.2d at 400–01.

We also reject the dissent's argument that there is no independent evidence to prove Defendant acted with deceit and the intent to defraud in denying access to the daughter. To the extent the dissent makes a double jeopardy argument by asserting the same evidence cannot be used to support both the charge of felony obstruction of justice by denying access to the daughter and felony obstruction of justice for encouraging the daughter to recant, Defendant has not made this argument on appeal. *State v. Collington*, ___ N.C. App. ___, ___, 814 S.E.2d 874, 883–84 (2018) ("Where a defendant's appellate counsel fails to raise an argument on appeal, that argument is deemed abandoned, as it is not the job of this Court to make a defendant's argument for him." (internal quotation marks, citation, and brackets omitted)). This Court has recognized that:

> even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

State v. Murray, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988). The facts alleged in the indictment alleging obstruction of justice for pressuring the daughter to recant are different than the facts alleged in the indictment alleging obstruction of justice for denying access to the daughter. As proof of an additional fact is required for each obstruction charge, double jeopardy does not apply. *See id.*

Finally, the inferences the dissent draws from the evidence presented at trial are contrary to our standard of review. *See State v. Morris*, 102 N.C. App. 541, 544, 402 S.E.2d 845, 847 (1991) ("When the trial court is ruling on a defendant's motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference which can be drawn from the evidence presented; all contradictions and discrepancies are resolved in the State's favor."). First, the dissent asserts that Defendant's instructions to investigators to not meet with the daughter alone "does not show she acted with deceit and intent to defraud to deny access within the specific dates alleged in the indictment." This inference is clearly drawn in favor of Defendant. The same is true of the dissent's contention that "[t]he detective's assertion that he could meet and speak with the daughter without seeking an order or warrant tends to show these multiple charges

were duplicative and in response to Defendant-mother's demand for the investigators to follow the law and obey the Constitution, if they desired additional unrestricted access to this minor female." Such a conclusion is plainly prohibited by our standard of review; further, this Court will not presume that prosecutors acted in bad faith, certainly short of any evidence in this regard.

Conclusion

Viewing all the evidence in the light most favorable to the State and giving it the benefit of every reasonable inference drawn therefrom, as we are required to do, we conclude that it was sufficient to allow a reasonable inference that Defendant acted with deceit and the intent to defraud necessary to commit felony common law obstruction of justice in denying access to the daughter.

NO ERROR.

Judge INMAN concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

Upon remand from the Supreme Court, this Court is directed to determine "whether there is sufficient evidence to enhance the charge of obstruction of justice for denying access to [the daughter] from a misdemeanor to a felony pursuant to N.C.G.S. § 14-3(b)." *State v. Ditenhafer*, ___ N.C. ___, ___, 834 S.E.2d 392, 401 (2019). This statute provides: "If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony." N.C. Gen. Stat. § 14-3(b) (2019).

To elevate misdemeanor obstruction of justice for denial of access to a felony, the statute requires the State to additionally prove Defendant's obstruction was committed "with deceit and intent to defraud." *Id.* The Supreme Court held the State's evidence is sufficient to overcome Defendant's motion to dismiss and submit obstruction of justice based upon denial of access to the jury. *Ditenhafer*, ___ N.C. at ___, 834 S.E.2d at 401.

I do not, and cannot, minimize the trauma and abuse this young woman experienced by her stepfather, William. He pled guilty to six

rape, assault, and abuse crimes and is serving long prison sentences for his crimes. His acts and crimes are not before us here. The repeated recitation of his crimes in the majority's opinion has no relevance to the issue our Supreme Court tasked this Court on remand.

The lengthy recitation of facts in the majority's opinion regarding Defendant's actions that led to her daughter's recanting allegations are outside of the time frame and dates alleged in the indictment before us and are also not before us on remand. Defendant stands convicted for her felonious actions underlying that separate obstruction crime.

The majority's opinion agrees with the State's assertion Defendant is subject to additional felony criminal liability for obstructing justice, because she failed to provide law enforcement with access to her daughter throughout the course of the investigation, and she additionally acted feloniously with deceit and intent to defraud. N.C. Gen. Stat. § 14-3(b). This conclusion is not what the indictment alleges nor what the State's evidence shows.

The only relevant evidence to elevate the obstruction of access to a felony must have occurred between the alleged dates of between 11 July to 1 September 2013. After reciting the repetitive, inflammatory, and extraneous facts, the majority's opinion cannot draw a legally culpable distinction or definition between solely obstructing access as is alleged in the indictment and condemning Defendant with felonious "deceit and intent to defraud." The evidence shows Defendant presented her daughter and allowed access every time upon request. This fact negates "deceit and intent to defraud." Such evidence is not argued to be "deceit and intent to defraud" nor so proven by the State. I respectfully dissent from the majority's opinion.

I. Analysis

Defendant is under no legal obligation to: (1) voluntarily provide *any* access to her minor daughter; (2) allow investigators into her home without an order or warrant; (3) voluntarily transport her minor daughter to and from the repeated interviews and sessions; (4) sit silently or be excluded without an order or warrant, while her minor daughter was interrogated, examined, and probed by strangers concerning the most intimate aspects and details of the assaults and rapes by her stepfather.

Our Supreme Court has defined common law obstruction of justice as "any act which prevents, obstructs, impedes or hinders public or legal justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) (citation omitted); *see also State v. Wright*, 206 N.C. App. 239, 241, 696 S.E.2d

832, 834-835 (2010). No credible evidence supports elevating the charge of obstruction of justice by Defendant purportedly acting with deceit and intent to defraud for the investigators' alleged lack of access to the daughter, when they did absolutely nothing legally required to gain that access in the absence of consent by her mother.

Merriam-Webster defines access, in part, as "permission, liberty, *or ability . . . to approach or communicate with a person*[.]" *Access*, Merriam-Webster, https://www.merriam-webster.com/dictionary/access (last visited Feb. 18, 2020) (emphasis supplied). The record clearly indicates, and the State acknowledges, Defendant provided both Detective Doremus of WCSD and Ms. Dekarske of CPS with repeated access and permission to interview her minor daughter to negate "deceit and intent to defraud."

Defendant voluntarily signed a safety agreement and required the stepfather to move out of the marital residence. Defendant also voluntarily transported her underage daughter to and from several interviews, and she allowed the daughter to be interviewed both at home and at the CPS office *each time* such access was requested.

The record is replete with evidence of such meetings taking place between April 2013, when the investigation opened, and August 2013. Even within the narrowed dates alleged within this specific indictment, 11 July to 1 September 2013, unchallenged and uncontested evidence shows Defendant voluntarily provided access to investigators to interview her minor daughter multiple times which negates Defendant acting with deceit and intent to defraud.

During the specific time period alleged in the indictment, the record evidence shows at least three specific times when Defendant voluntarily allowed CPS investigators to interview the daughter: (1) an in-person meeting on 11 July; (2) an in-person meeting on 25 July; and, (3) an in-person meeting on 5 August. The WCSD detective was also present at the 11 July interview. In addition, the daughter called the CPS investigator two additional times, on 22 July and 24 July, both within the dates alleged in the indictment.

In addition to these interviews, Defendant drove her daughter to and from, and the daughter consistently attended, CPS-requested therapy sessions; at least three of those sessions occurred within the date range specified in the indictment. These sessions continued through January 2014 and also negate that Defendant acted with "deceit and intent to defraud."

The majority's opinion points to the 11 July meeting with Detective Doremus and Ms. Dekarske as a specific example to show Defendant acted with deceit and intent to defraud to deny investigators access to her daughter. The record evidence shows Defendant voluntarily drove her daughter to the meeting and waited outside while the daughter went in and met alone with both the WCSD detective and the CPS investigator.

Any evidence concerning Defendant texting or "putting pressure" on her daughter *to recant*, which may support the other indictment and conviction for obstruction of justice, is simply not applicable for this separate charge of obstruction by denying "access" by Defendant feloniously acting with deceit and intent to defraud.

In support of her argument asserting the State did not prove deceit and intent, Defendant points to the undisputed fact that she told the detective that he could not speak with her daughter without a third party in the room. She argues a requirement that a third party be present shows the opposite of any intention by her to deceive.

In *State v. Cousin*, this Court reviewed a defendant's assertion that the trial court had erred by denying his motions to dismiss the charges of felonious obstruction of justice and accessory after the fact based upon the insufficiency of the evidence. *State v. Cousin*, 233 N.C. App. 523, 529, 757 S.E.2d 332, 338 (2014). The defendant in *Cousin* argued there was no evidence his statements were intentionally false or misleading. *Id.* at 531, 757 S.E.2d at 339. This Court listed the eight written statements the defendant provided to law enforcement. *Id.* at 530, 757 S.E.2d at 338.

In two statements, the defendant in *Cousins* denied being at the murder scene but identified others who were present. *Id.* In the next four statements, the defendant admitted being present but identified various others as the perpetrator of the murder. *Id.* at 530-31, 757 S.E.2d at 339. A State Bureau of Investigation ("SBI") agent testified to the significant burden imposed on the investigation resulting from the conflicting statements.

The SBI eventually determined each person named by the defendant had an alibi. This Court held "when viewed in the light most favorable to the State, a jury question existed as to whether Defendant (1) unlawfully and willfully (2) obstructed justice by providing false statements to law enforcement officers investigating the death of [the victim] (3) with deceit and intent to defraud." *Id.* at 531, 757 S.E.2d at 339. This Court held the trial court had properly denied the defendant's motion to dismiss the felonious obstruction of justice charge. *Id.*

No testimony from the State shows a significant burden imposed upon the sheriff's department or CPS resulting from Defendant's denial of access to make her conduct felonious. No additional evidence shows Defendant's deceit and intent to defraud, other than the underlying actions the State used to prove the other obstruction charge to recant that is not before us.

The State must offer other substantial evidence of each element charged. *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.*

Detective Doremus and Ms. Dekarske were able to interview the daughter alone for a period of time before Defendant ended the meeting. Defendant was clearly within her parental rights to terminate the interview without the investigators from WCSD and CPS possessing or seeking a noninterference order or a warrant. Defendant cooperated with CPS' request that her daughter begin therapy and selected a therapist for her daughter. She allowed investigators into her home without a warrant to interview her daughter and drove the daughter to and from requested meetings held in other locations.

If the investigators were inhibited by Defendant feloniously acting with deceit and intent to defraud to deny them access to interfere with their investigation, they were obligated to seek a warrant based upon probable cause or to petition the court for a noninterference order. U.S. Const. amend. IV; *see* N.C. Gen. Stat. § 7B-303(a) (2019) ("If any person obstructs or interferes with an assessment . . . the director may file a petition naming that person as respondent and requesting an order directing the respondent to cease the obstruction or interference.").

Detective Doremus also expressly told Defendant at the 21 June 2013 meeting that Defendant could not prohibit him from speaking with her daughter alone. If so, he should have applied for a warrant and demonstrated probable cause before a magistrate. The State, not Defendant, carries the burden to explain investigators' failures to either demonstrate probable cause for the warrant or petition for the order. Trying to draw a line to find Defendant obstructed justice by not providing access, while feloniously acting with deceit and intent to defraud, creates arbitrary and unworkable distinctions in our jurisprudence and is error.

The State's evidence does not support the elements and allegations in this indictment of Defendant acting with deceit and intent to defraud to elevate the obstruction of access from a misdemeanor to a felony. Neither Defendant's presence at nor her ending of the investigators'

discussions with her daughter, without investigators and detectives seeking a noninterference order or asserting probable cause for a warrant, justifies elevating this charge of obstruction by failing to provide access from a misdemeanor to a felony. *See Wright*, 206 N.C. App. at 241, 696 S.E.2d at 834-35.

II. Conclusion

We and the Supreme Court agreed that the State presented sufficient evidence to allow the jury to convict Defendant of felony obstruction of justice for her actions leading her daughter to recant her allegations. That same evidence cannot also be used to support the same elements of felony obstruction on lack of access within the dates alleged within this specific indictment, 11 July to 1 September 2013. No independent evidence proves Defendant-mother failed to deliver and present her minor daughter for all requested meetings and therapy sessions and wanted a third party present, while additionally acting with deceit and intent to defraud.

The State failed to present evidence of the elements of felony obstruction of justice by Defendant-mother allegedly acting with deceit and intent to defraud to restrict access of investigators from WCSD and CPS without them securing either a noninterference order or a warrant to gain unrestricted access to further interview her minor daughter alone. She is not obligated under threat of felony to do their jobs, make them easier, or be punished for making investigators follow the statutory procedures and obey the Constitution for a warrant.

Defendant told the investigator not to meet with her minor daughter without her consent or without a third party being present. This demand, as a mother of a minor daughter, she unquestionably had the right to assert and enforce without felonious criminal liability. Her asserting these parental rights does not show she acted with deceit and intent to defraud to deny access within the specific dates alleged in the indictment.

In contrast, during the specific time periods alleged in the indictment, the record clearly shows Defendant voluntarily transported her underage daughter three (3) times to and from interviews; she allowed the daughter to be interviewed both at home and at the CPS office *each time* such access to her was requested and drove her to therapy sessions three (3) times, with two (2) additional phone calls between the daughter and CPS. Defendant agreed to and signed a safety agreement and required the abusive stepfather to move out of the marital residence.

Our Supreme Court concluded the State presented evidence to support a misdemeanor obstruction charge on access to survive Defendant's motion to dismiss and support a conviction, but remanded and questioned whether the evidence is sufficient to prove a felony. It is not an obstruction with fraud or deceit to demand and compel governmental agents to comply with the statutes and Constitution, petition for and secure the statutory noninterference order, or to show probable cause to obtain a warrant from a magistrate.

These investigators did neither. Government agents should not be excused from their failure to do so and attempt to shift their failures onto Defendant, who possesses statutory and Constitutional rights as both a parent and an individual under the Fourth Amendment, through seeking felony criminal obstruction charges against her. U.S. Const. amend. IV; N.C. Gen. Stat. § 7B-303(a).

The detective's assertion that he could meet and speak with the daughter without seeking an order or warrant tends to show these multiple charges were duplicative and in response to Defendant-mother's demand for the investigators to follow the law and obey the Constitution, if they desired additional unrestricted access to her minor daughter.

This Court and our Supreme Court have both concluded some of these charges were so without merit to not survive Defendant's motion to dismiss. There is no evidence within the specific time period alleged in the indictment that Defendant acted to deny access with deceit and an intent to defraud to obstruct justice to elevate this charge from a misdemeanor to a felony. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD LEAKS

No. COA19-479

Filed 3 March 2020

1. Homicide—request for jury view—scene of crime—abuse of discretion analysis

In a murder prosecution arising from an altercation between defendant and his ex-girlfriend's boyfriend, the trial court did not abuse its discretion under N.C.G.S. § 15A-1229(a) by denying defendant's motion for a jury view of the crime scene. The court made a reasoned decision based on the State's and defense counsel's intent to introduce photographs of the crime scene to the jury and the fact that the crime occurred in the daylight (indicating that eyewitnesses would be able to testify to events they saw clearly).

2. Homicide—self-defense—jury instruction—"necessary to kill" victim to avoid death or bodily harm

In a murder prosecution arising from an altercation between defendant and his ex-girlfriend's boyfriend, the trial court did not err when it instructed the jury that it could find defendant stabbed the boyfriend in self-defense if it found defendant believed it was "necessary to kill" the boyfriend to avoid death or bodily harm. Although a footnote in the North Carolina Pattern Instructions directs trial courts to substitute "to use deadly force against the victim" for "to kill the victim" when the evidence shows a defendant intended to disable rather than kill the victim, binding Supreme Court precedent expressly held that this substitution was unnecessary.

3. Sentencing—prior record level—calculation—prayer for judgment continued—proof of prior conviction—harmless error

In a murder prosecution, the trial court properly sentenced defendant as a prior record level IV based on eleven prior convictions, four of which defendant challenged. Specifically, the court correctly found that defendant's assault with a deadly weapon conviction, which resulted in a prayer for judgment continued, added one point to his prior record level; the court correctly added another point where the State proved by a preponderance of the evidence that defendant was convicted of breaking and entering and injury to real property (the charges were consolidated and defendant pleaded

guilty); and, where the court potentially erred in counting a misdemeanor conviction as a felony, such error was harmless because defendant would have remained a prior record level IV under the correct calculation.

Appeal by Defendant from Judgment entered 8 August 2018 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 December 2019.

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

William D. Spence for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

James Edward Leaks (Defendant) appeals from Judgment entered 8 August 2018 upon his conviction for Second-Degree Murder. The Record before us, including evidence presented at trial, tends to show the following:

On the afternoon of 16 August 2016, around 4:00 p.m., Sylvia Moore (Ms. Moore), her brother Eric Moore (Mr. Moore), and Darrell Cureton (Decedent) were outside Ms. Moore's apartment doing yardwork. Ms. Moore and Decedent had been dating for approximately two years. Some time prior to her relationship with Decedent, Ms. Moore had dated Defendant for approximately five years. Ms. Moore testified her relationship with Decedent was "pretty good" after they broke up and that there had been no confrontations between Defendant and Decedent prior to 16 August 2016.

Decedent began cutting the grass while Ms. Moore watered her plants. After Decedent finished mowing the lawn, Ms. Moore heard a voice ask Mr. Moore for a cigarette. Ms. Moore looked up and saw Defendant and a man, later identified as Calvin Mackin (Mackin), standing by her yard. Conflicting testimony was presented at trial as to what transpired following that interaction; however, an altercation erupted between Defendant and Decedent, resulting in Defendant stabbing Decedent in the chest. Although Emergency Management Services was called to the scene, Decedent died from his injuries. Later that same day, the Charlotte-Mecklenburg Police Department arrested Defendant for first-degree murder. At Defendant's trial, the Medical Examiner testified

Decedent's cause of death was a stab wound to the chest, stating it appeared the "knife was coming out at least partially and going back in three separate times."

Defendant's trial came on for hearing on 30 July 2018. During pretrial motions, Defendant submitted a Motion for Jury View (Motion for Jury View), requesting a jury view of the crime scene, which the trial court, in its discretion, denied. The State began its case by calling Ms. Moore. Ms. Moore testified after she heard the men asking Mr. Moore for a cigarette, she heard a crashing in some bushes behind her and saw Defendant on her porch. She observed Defendant exit her porch, "bump" into Decedent, and run off. Ms. Moore further testified after the encounter she saw Defendant holding a knife. She turned to Decedent to find him holding his chest. Ms. Moore testified she saw a little bit of blood, and she told Mr. Moore to call 911. On cross-examination, Ms. Moore admitted she was not paying much attention to the events until she noticed Defendant on her porch.

Mr. Moore also testified at trial to his recollection of the 16 August 2016 events. Mr. Moore testified that he was at Ms. Moore's residence to help with yardwork. As Mr. Moore was sitting on Ms. Moore's steps, Defendant and Mackin stopped and asked him for a cigarette. Mr. Moore testified that, at that time, Decedent was on the side of the house doing yardwork. Mr. Moore gave Defendant and Mackin each a cigarette. By that point, Decedent had walked over and was standing behind Mr. Moore. Defendant stared at Decedent and "patted his knife." Decedent then walked to his truck and picked up a two by four, telling Defendant to "go on." Mr. Moore testified Decedent held the two by four with a hand on each end across his chest. Mr. Moore witnessed Defendant move toward Decedent, causing Decedent to drop the two by four and attempt to run. Mr. Moore then saw Defendant stab Decedent. Mr. Moore called 911 as Defendant walked away.

The State also called Theresa McCormick-Dunlap (Dunlap) as a witness. Dunlap testified that as she was exiting a house across the street accompanied by her friend Veronica Streeter (Streeter), she saw the two men fighting, one in retreat, Decedent, and one in pursuit, Defendant. Dunlap described Decedent as holding a "long piece of wood" to "shield himself" and described Defendant as "making jabbing motions" but she could not see anything in Defendant's hands. Dunlap testified Defendant "swaggered off" after he "landed a good blow or whatever . . . ." She then saw Decedent stagger toward the stairs to sit down. Dunlap ran over and saw blood on Decedent's shirt. She stayed at the scene until the

ambulance arrived. The next day, Dunlap gave a recorded statement to the Charlotte-Mecklenburg Police Department.

Defendant testified at trial in his defense. Defendant testified on the afternoon of 16 August 2016 he was walking to the 7-Eleven with his cousin Mackin. Defendant recounted Mackin asking Mr. Moore for a cigarette while Mr. Moore was sitting on the steps. He described Ms. Moore as being on the front porch and Decedent in front of the home as well. Defendant continued: "[Mackin] was coming back across the street with the cigarette and he said look out," and that was when Decedent "swung at [him] with the two by four." Defendant "started to fear for [his] life" as Decedent was holding the two by four as a baseball bat. Defendant testified after Decedent hit him a couple more times with the two by four, he stabbed Decedent one time in the chest with his knife. Defendant stated he stabbed Decedent with the intent to "get him off me," and he stated he did not intend to kill Decedent.

At the close of trial, the State and Defense Counsel both submitted proposed jury instructions. In Defendant's proposed instructions, Defense Counsel modified North Carolina Pattern Instruction 206.10, in line with footnote four of the pattern instructions, to read: "First, the defendant believed it was necessary to *use deadly force against* the victim in order to save the defendant from death or great bodily harm." The trial court declined to adopt Defendant's proposed modification and presented the following unmodified instruction to the jury: "The Defendant would be excused of first-degree murder and second-degree murder on the ground of self-defense if, first, the Defendant believed it was necessary to *kill* the victim in order to save the Defendant from death or great bodily harm."

On 8 August 2018, the jury returned a verdict finding Defendant guilty of Second-Degree Murder, a Class B1 felony. The trial court sentenced Defendant in the presumptive range. The trial court calculated Defendant had eleven prior-record-level points, rendering his prior-record level IV. Defendant objected to the trial court's determination of his prior-record level. Defendant gave Notice of Appeal in open court.

Issues

There are three issues before this Court on appeal: (I) whether the trial court abused its discretion in denying Defendant's Motion for Jury View; (II) whether the trial court erred in its jury instructions when it stated the Defendant "believed it was necessary to *kill* the victim" instead of "necessary to *use deadly force against* the victim"; and (III)

whether the trial court erred by determining Defendant has a prior-record level of IV.

Analysis

I. Defendant's Motion for Jury View

[1] Defendant first contends the trial court abused its discretion when it denied his Motion for Jury View. We disagree.

> [N.C. Gen. Stat.] § 15A-1229(a) provides that the decision to permit a jury view lies within the discretion of the trial court. The decision will not be disturbed absent an abuse of that discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.

State v. Fleming, 350 N.C. 109, 134, 512 S.E.2d 720, 737 (1999) (citations and quotation marks omitted); *see* N.C. Gen. Stat. § 15A-1229(a) (2019) ("The trial judge in his discretion may permit a jury view.").

In the present case, the trial court heard arguments on Defendant's Motion for Jury View from the State and Defense Counsel. Defendant argued a jury view was important to give the jury "an accurate view of what [the testifying eyewitnesses] would have been able to see and what kind of obstruction would have been in the line of sight that they would have, the area where this was occurring, as well as the distance involved[.]" The State and Defendant both indicated their intent to introduce photographs of the crime scene for the jury. The trial court considered "the availability of photographs, diagrams, and other material [ ]" and noted the alleged crime occurred during daylight and, in its discretion, denied Defendant's Motion. Accordingly, the trial court's denial of Defendant's Motion for Jury View was the result of a reasoned decision and was not an abuse of discretion.

II. Jury Instructions

[2] Defendant next contends the trial court erred in its instructions to the jury pertaining to Defendant's requested instruction on self-defense. Specifically, Defendant argues the trial court erred in instructing the jury that "the defendant believed it was necessary to *kill* the victim in order to save the defendant from death or great bodily harm[,]" and instead should have instructed the jury that Defendant "believed it was necessary to *use deadly force against* the victim." Defendant's argument raises a question of law, which we review de novo. *See State v. Edwards*,

239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) ("We hold that where the request for a specific instruction raises a question of law, the trial court's decisions regarding jury instructions are reviewed de novo by this Court." (citation and quotation marks omitted)).

At the close of evidence, the trial court held a charge conference with counsel for both parties. Both parties submitted proposed instructions; Defense Counsel requested the trial court instruct the jury, in part: "The defendant would be excused of first degree murder and second degree murder on the ground of self-defense if: First, the defendant believed it was necessary to *use deadly force against* the victim in order to save the defendant from death or great bodily harm." N.C.P.I. –Crim 206.10 (June 2014). This modification was supported by a footnote in the pattern instructions directing the trial court to "[s]ubstitute 'to use deadly force against the victim' for 'to kill the victim' when the evidence tends to show that the defendant intended to use deadly force to disable the victim, but not to kill the victim. *See State v. Watson*, 338 N.C. 168 (1994)." N.C.P.I.–Crim. 206.10 n.4. The trial court, after hearing arguments, held Defendant was entitled to an instruction on self-defense; however, the trial court declined Defendant's requested modification and instructed the jury in accordance with the unmodified pattern instructions.

Defendant argues the trial court's instruction of "to kill" instead of "to use deadly force against" prejudiced Defendant because "an instruction that a defendant must have believed he needed to kill, might be construed by a jury as allowing it to reject defendant's self-defense claim on the ground that defendant did not entertain such a belief[.]" We first recognize "[t]he preferred method of instructing the jury is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *State v. Solomon*, 117 N.C. App. 701, 706, 453 S.E.2d 201, 205 (1995). Here, the trial court's instruction to the jury, other than the modification at issue, was identical to the North Carolina Pattern Jury Instruction in N.C.P.I.–Crim. 206.10 submitted by Defendant.

In *State v. Richardson*, our Supreme Court addressed the specific language at issue in the present case. 341 N.C. 585, 587, 461 S.E.2d 724, 726 (1995). The *Richardson* Court, engaging in a thorough analysis of North Carolina's self-defense instructions, held:

> The language in *Watson* indicating that in certain situations, the self-defense instruction should read that it was necessary 'to shoot or use deadly force' was *dicta*, and that language is now expressly disavowed. We conclude that it is not necessary to change the self-defense instruction to

> read necessary 'to shoot or use deadly force' in order to properly instruct a jury on the elements of self-defense.[1]

Id. at 592, 461 S.E.2d at 729. The *Richardson* Court emphasized "the [to kill] language in the self-defense instruction does not read into the defense an 'intent to kill' that is not an element of second-degree murder." *Id.* at 594, 461 S.E.2d at 730.

Defendant acknowledges our Supreme Court's decision in *Richardson* discussing the relevant language in *Watson* as *dicta*; however, Defendant argues the 2011 enactment of N.C. Gen. Stat. §§ 14-51.2, 14-51.3, creating statutory rights to self-defense, supersedes *Richardson*. In particular, N.C. Gen. Stat. § 14-51.3, titled "Use of force in defense of person; relief from criminal or civil liability," provides

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> > (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
> >
> > (2) Under the circumstances permitted pursuant to G.S. 14-51.2.

N.C. Gen. Stat. §14-51.3 (a) (2019).

Specifically, Defendant argues Section 14-51.3 does not require a person believe it necessary to *kill* his or her assailant in order to save himself or herself from death or bodily harm. Section 14-51.3 authorizes the use of deadly force if a person is "in any place he or she has the lawful right to be" and "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself . . . ."

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1. The North Carolina Supreme Court revisited this same issue eight years later in *State v. Carter* and expressly reaffirmed its holding in *Richardson*. *State v. Carter*, 357 N.C. 345, 361, 584 S.E.2d 792, 803-04 (2003) ("In *Richardson*, we approved a jury instruction that was, in all relevant respects, identical to the instruction at issue in the present case. Since *Richardson*, we have declined opportunities to reconsider the issue. After carefully examining defendant's argument, we find no reason to depart from our prior holdings." (citations omitted)).

Id. Defendant contends the trial court's instruction allowing the jury to excuse Defendant of first-degree or second-degree murder "if, first, the Defendant believed it was necessary to *kill* the victim in order to save the Defendant from death or great bodily harm" imputes an "intent to kill" requirement that was not retained in N.C. Gen. Stat. § 14-51.3. We acknowledge the extent to which our general statutes codifying the right to self-defense, including Section 14-51.3, supplements or supersedes *Richardson* and its progeny is unsettled. *See State v. Lee*, 370 N.C. 671, 678, 811 S.E.2d 563, 568 (2018) ("In 2011, however, the General Assembly enacted N.C.G.S. §§ 14-51.3 and 14-51.4, which at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense and defense of another." (Martin, C.J., concurring)). However, until our Supreme Court provides further guidance on this issue, we are bound by its decision in *Richardson*. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) ("[The Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (alterations in original) (quotation marks omitted)).

Accordingly, we conclude the trial court did not err when it instructed the jury according to N.C.P.I Crim–206.10. The North Carolina Pattern Jury Instructions were revised in 2014 and include efforts to harmonize our common law right to self-defense with the 2011 enactment of Sections 14-51.2, 14-51.3, and 14-51.4. *See* N.C.P.I.–Crim 206.10 n.6 ("Pursuant to N.C. Gen. Stat. § 14-51.4(1), self-defense is also not available to a person who used defensive force and who was [attempting to commit] [committing] [escaping after the commission of] a felony. If evidence is presented on this point, then the instruction should be modified accordingly to add this provision."); N.C.P.I.–Crim 206.10 n.8 ("N.C. Gen. Stat. §14-51.3 (a)"). "[Our Supreme Court] has previously stated that as long as the trial court gives a requested instruction in substance, it is not error for a trial court to refuse to give a requested instruction verbatim, even if the request is based on language from this Court." *State v. Lewis*, 346 N.C. 141, 146, 484 S.E.2d 379, 382 (1997) (citations and quotation marks omitted). Our Supreme Court's decision in *Richardson*, reaffirmed in *Carter*, expressly held that an instruction including the disputed phrase "to kill" was correct. *Richardson*, 341 N.C. at 592, 461 S.E.2d at 729. Thus, the trial court did not err in its instructions to the jury.

III. Prior-Record-Level Determination

[3] Defendant contends the trial court erred by incorrectly calculating he was a prior-record level IV, arguing instead that Defendant is

a prior-record level III. "[I]n evaluating defendant's challenge to his prior record level calculation, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, [and] the trial court's conclusions of law are reviewed *de novo* by this Court." *State v. Mullinax*, 180 N.C. App. 439, 442, 637 S.E.2d 294, 296 (2006). Under N.C. Gen. Stat. § 15A-1340.14(f)(4), the State must prove the existence of a prior conviction by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f)(4) (2019).

The trial court determined Defendant had eleven prior-record-level points, thereby rendering his prior-record level IV. Defendant contends the evidence at trial supports only nine prior-record-level points, rendering his prior-record level III. Prior to sentencing, Defendant challenged four convictions that were submitted by the State on Defendant's Prior Record Level Worksheet; specifically, a 1992 Felony Breaking and Entering, a 1991 Misdemeanor Breaking and Entering, a 1991 Injury to Real Property, and a 1989 Assault with a Deadly Weapon. The trial court requested and received certified copies from the Clerk of Superior Court of Defendant's criminal records.

Defendant contends the 1989 Misdemeanor Assault with a Deadly Weapon incorrectly added one prior-record-level point to his Prior Record Level Worksheet because the Record does not show "exactly what defendant was convicted of nor the sentence." Our review of the Record reflects that a finding of guilty was entered and Defendant received a Prayer for Judgment Continued (PJC) for twelve months. This Court has held a PJC may be used when calculating a defendant's prior-record level. *See*, *e.g.*, *State v. Graham*, 149 N.C. App. 215, 220, 562 S.E.2d 286, 289 (2002) ("formal entry of judgment is not required in order to have a conviction" (citations and quotation marks omitted)). Thus, the trial court did not err by finding Defendant's 1989 conviction, which resulted in a PJC, added one prior-record-level point to his Prior Record Level Worksheet.

Defendant next challenges both of his 1991 convictions. The Record reflects the trial court added one point to Defendant's calculation for two convictions: Misdemeanor Breaking and Entering and Injury to Real Property. Defendant argues these convictions should carry no points because the Record shows no sentence. However, the Record reflects these charges were consolidated and a plea of guilty entered. Thus, the State submitted sufficient evidence for the trial court to find by a preponderance of the evidence that Defendant was convicted of Misdemeanor Breaking and Entering and Injury to Real Property, and the trial court

did not err in adding one prior-record-level point to Defendant's Prior Record Level Worksheet.

For the 1992 Breaking and Entering, Defendant argues the conviction was erroneously counted as a felony, resulting in the addition of two prior-record-level points to his Prior Record Level Worksheet instead of one prior-record-level point for a misdemeanor. Defendant contends the Record is insufficient and unclear because the certified copy of his criminal record submitted to the trial court lists the Charge Offense only as "M charge change Felonious B & E." Assuming this evidence was insufficient to establish Defendant's 1992 conviction was indeed a felony instead of a misdemeanor, this would result in the reduction of one prior-record-level point from Defendant's Prior Record Level Worksheet. With ten prior-record-level points, Defendant would remain a prior-record level IV, rendering the purported error harmless. *See State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (2000) (holding that an error in calculating prior-record-level points is harmless if it does not affect the ultimate prior-record-level determination). Thus, Defendant was correctly sentenced as a prior-record level IV.

Conclusion

Accordingly, for the foregoing reasons, we conclude the trial court did not abuse its discretion when it denied Defendant's Motion for Jury View. We further conclude the trial court did not err in its self-defense instructions to the jury, and the trial court did not err when it sentenced Defendant as a prior-record level IV.

NO ERROR.

Judges BRYANT and COLLINS concur.

STATE OF NORTH CAROLINA
v.
BILLY RAY MANGUM, JR., DEFENDANT

No. COA18-850

Filed 3 March 2020

1. Appeal and Error—filing of appeal after order rendered but not entered—failure of record to show jurisdiction—motion to amend record

The Court of Appeals had jurisdiction to hear an appeal from a civil judgment for attorney fees in a criminal case, even though defendant entered notice of appeal and filed the record after the trial court rendered an oral ruling but before it entered a written order, because Rule 3 of the Rules of Civil Procedure allows for appeal of an order once it has been rendered by a trial court and the Court of Appeals had the authority to grant defendant's motion to amend the record to include the written order once it was filed. Assuming arguendo that amending the record failed to cure defendant's jurisdictional deficiency, defendant's petition for writ of certiorari was granted to obtain jurisdiction.

2. Attorney Fees—court-appointed attorneys—opportunity to be heard

In a trial for possession of a stolen motor vehicle and attaining habitual felon status, the trial court erred by ordering payment of attorney fees without affording defendant the opportunity to be heard.

Judge BERGER concurring with separate opinion.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 4 April 2018 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 23 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.

McGEE, Chief Judge.

I. Procedural and Factual Background

Billy Ray Mangum, Jr. ("Defendant") was indicted on 5 March 2018 for possession of a stolen motor vehicle and attaining habitual felon status. Defendant pleaded guilty to the charges on 4 April 2018, and the trial court sentenced Defendant to twenty-four to forty-one months' imprisonment. Following its oral rendering of Defendant's sentence, the trial court stated that "[c]ourt costs and attorney's fees are taxed against [Defendant] as a civil judgment." The trial court entered judgment ordering "all costs and attorney fees to be docketed as a civil judgment." The amount of costs and attorney's fees were not indicated in court or in the judgment. Defendant filed written notice of appeal on 10 April 2018.

Defendant's sole proposed issue on appeal is: "Did the trial court err by failing to give [] Defendant the opportunity to be heard on attorney's fees?" Defendant filed his appellate brief on 24 September 2018 in which, citing N.C.G.S. § 7A-27(b)(1) (2019) and *State v. Pell*, 211 N.C. App. 376, 377, 712 S.E.2d 189, 190 (2011), he stated that he had a right of appeal from the part of the 4 April 2018 judgment that ordered him to pay attorney's fees because that part of the judgment was a civil judgment and he had timely entered written notice of appeal. Defendant simultaneously filed a petition for writ of certiorari ("PWC") "out of an abundance of caution," "in the event this Court deem[ed] his notice of appeal insufficient."

The State responded to Defendant's PWC on 28 September 2018, arguing the PWC should be dismissed because it did not contain a "certified cop[y] of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition[,]" *see* N.C. R. App. P. 21(c) and, quoting *Searles v. Searles*, 100 N.C. App. 723, 725, 398 S.E.2d 55, 56 (1990), contending " 'this Court is without authority to entertain an appeal where there has been no entry of judgment.' " The State filed a motion to dismiss Defendant's appeal on 28 September 2018, quoting *State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007), and arguing this Court lacked jurisdiction to consider Defendant's appeal because the record contained no "civil judgment . . . ordering payment of attorney fees," and the record must contain the order or judgment from which Defendant appeals in order to confer jurisdiction on this Court for review. The State further argued that Defendant "failed to comply with the mandatory requirements of Rule 3." The State filed its brief on 2 October 2018, in which it also argued that this Court lacked jurisdiction to consider Defendant's appeal.

Defendant filed his response to the State's motion to dismiss and filed a motion to amend the record on appeal, both on 10 October 2018. In his response, Defendant noted that the civil judgment ordering Defendant to pay $390.00 in attorney's fees was not entered until 3 October 2018, but his 10 April 2018 notice of appeal was sufficient to preserve appellate review of the 3 October 2018 order because judgment was rendered on 4 April 2018, and "rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice, while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 804, 486 S.E.2d 735, 738 (1997) (emphasis in original) (citations omitted). In his motion to amend the record, Defendant requested this Court allow amendment of the record to include the 3 October 2018 order, entered under the same file number as the 4 April 2018 judgment—18-CRS-50682. The State responded to Defendant's motion to amend the record on 28 October 2018, arguing that the notice of appeal in this matter was only from "the judgment entered in this cause on April 4, 2018[,]" not from the "rendering" of the civil judgment concerning attorney's fees in open court.

II. Jurisdiction

[1] While we agree with the State that Defendant did not follow the correct procedure for appealing the entry of the 3 October 2018 civil judgment ordering him to pay attorney's fees, Defendant's procedural missteps have not deprived this Court of jurisdiction to consider his appeal, either upon direct appeal or by granting certiorari. As with a judgment requiring a defendant to register as a sex offender, even though Defendant in this case was convicted of a crime, the order at issue is civil in nature, accomplished through entry of a civil judgment. *Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842; *see also Pell*, 211 N.C. App. at 377, 712 S.E.2d at 190. "Therefore, an appeal from a sentence requiring a defendant to [pay attorney's fees as a civil judgment] is controlled by civil procedure," *id.* (citations omitted), and by Rule 3 of our Rules of Appellate Procedure. *Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842. As in this case, the underlying criminal judgment from which the defendant in *Pell* appealed was based upon a guilty plea. *Pell*, 211 N.C. App. at 376, 712 S.E.2d at 190. In this case, the State argues that N.C.G.S. § 15A-1444 (2019), involving appeals from a guilty plea, removes appellate jurisdiction to consider Defendant's arguments. However, in *Pell*,

> [the d]efendant specifically appeal[ed] from the portion of his sentence requiring him to register as a sex offender. While a defendant is entitled to appeal from a guilty plea in

> limited circumstances, *see* N.C. Gen. Stat. § 15A-1444(a2) (2009), *Defendant's appeal does not arise from the underlying convictions*, therefore these limitations are inapplicable to the current action. Accordingly, Defendant's appeal is properly before this Court for appellate review.

Id. at 377, 712 S.E.2d at 190 (emphasis added). The defendant's notice of appeal in *Pell* did not specifically mention mandatory registration as a sex offender, as the notice of appeal in this case does not specifically mention attorney's fees. As with imposition of SBM in *Pell*, Defendant's appeal in this case "does not arise from the underlying convictions" and N.C.G.S. § 15A-1444(a2) does not deprive this Court of jurisdiction. *Id.* at 377, 712 S.E.2d at 190.

A. *Rule 3*

Rule 3(a) requires: "Any party entitled by law to appeal from a judgment or order of a superior . . . court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court . . . within the time prescribed by subsection (c) of this rule." N.C. R. App. P. 3(a). The dissenting opinion argues that this Court lacks jurisdiction because "Rule 3(a) and binding Supreme Court precedents . . . prohibit this Court from granting Defendant's motion to amend the record of a purported appeal that does not exist, and consequently, over which this Court unquestionably does not possess and cannot assert jurisdiction[.]" Concerning the time for filing notice of appeal in a civil matter, this Court held in *Abels*: "Notwithstanding defendant's protestations that plaintiff's appeal was premature, . . . plaintiff timely appealed in that her notice was filed and served subsequent to the trial court's rendering of its order, albeit prior to entry of said order." *Abels*, 126 N.C. App. at 804, 486 S.E.2d at 738. This is because "rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice, while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served [in civil matters]. N.C. R. App. P. 3(c)." *Id.* (citations omitted); *see also State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574–75 (2012) (citation omitted) (in criminal cases "written notice may be filed at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order"). Therefore, Defendant's 10 April 2018 written notice of appeal from the *rendering* of the civil judgment for attorney's fees on 4 April 2018 was sufficient to *preserve* Defendant's right to appeal the civil judgment ordering attorney's fees *once that judgment was entered* on 3 October 2018. Defendant's notice

of appeal was timely filed. However, Defendant's appeal was *docketed* in this Court prior to entry of the 3 October 2018 judgment.

B. *Sufficiency of Record*

Defendant's mistake was not in the timing of the filing of his notice of appeal, *Abels*, 126 N.C. App. at 804, 486 S.E.2d at 738, but in the timing of the filing of the record. The State did not object or otherwise respond to Defendant's proposed record on appeal within thirty days of service, so the record was settled pursuant to N.C. R. App. P. 11(b), and the appeal was docketed pursuant to N.C. R. App. P. 12(b) when the record was filed with this Court on 22 August 2018. However, since the judgment from which appeal was taken, being the order imposing attorney's fees, had not yet been entered, the record was not in compliance with Rule 9(a)(1)(h.) when it was docketed. "To make [the trial court's] purpose a judgment, it must be entered of record, and until this shall be done, there is nothing to appeal from." *Logan v. Harris*, 90 N.C. 7, 7 (1884). Defendant should not have filed the record and proceeded with this appeal until *after* entry of the 3 October 2018 order, and that order needed to be included in the record on appeal in order to confer regular appellate jurisdiction on this Court. *Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842 ("[B]ecause there is no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had no subject matter jurisdiction on this issue. *See* N.C. R. App. P. 3(a); *id.* 9(a)(1)(h).").

The dissenting opinion, citing Rule 3(a), contends that this Court cannot grant "Defendant's motion to amend the record of a purported appeal . . . over which this Court unquestionably does not possess and cannot assert jurisdiction[.]" However, Defendant filed a motion pursuant to N.C. R. App. P. 9(b)(5) on 10 October 2018, requesting amendment of the record to include the 3 October 2018 civil judgment ordering Defendant to pay attorney's fees. Motions pursuant to Rule 9(b)(5) are routinely granted in order to amend the record for the purpose of correcting jurisdictional defects caused by violations of the appellate rules. Rule 9(b)(5) states in relevant part:

> *Motions Pertaining to Additions to the Record.* On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content.

N.C. R. App. P. 9(b)(5)(b.). Our Supreme Court has made clear this Court's authority to amend the record to obtain jurisdiction over an appeal:

> In *Felmet*, the defendant moved for leave to amend the record to include "the judgment of the district court which reflected defendant's appeal therefrom to the superior court" to show how the superior court obtained subject matter jurisdiction over his case. *Felmet*, 302 N.C. at 174, 273 S.E.2d at 710. The Court of Appeals denied the motion. We concluded that the denial was a decision within the discretion of the Court of Appeals and that we could find no abuse of that discretion. Nevertheless, we held the record should be amended to reflect subject matter jurisdiction so that we could reach the substantive issue of the appeal. In so holding, we stated, "[this] is the better reasoned approach and avoids undue emphasis on procedural niceties."
>
> While we find no abuse of discretion on the part of the Court of Appeals in denying the State's motion to amend, we elect as we did in *Felmet* to allow the State leave to amend.
>
> When the record is amended to add the presentment, it is clear the superior court had jurisdiction over these misdemeanors under N.C.G.S. § 7A-272(2) [and, therefore, appellate jurisdiction also existed].

State v. Petersilie, 334 N.C. 169, 177–78, 432 S.E.2d 832, 837 (1993) (citations omitted); *see also State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (our Supreme Court "decided to allow the amendment [pursuant to Rule 9(b)(5)(b.)] to reflect subject matter jurisdiction and then pass upon the substantive issue of the appeal"); *Williams v. United Cmty. Bank*, 218 N.C. App. 361, 367, 724 S.E.2d 543, 548 (2012) ("The original record on appeal contained no notice of appeal[.] However, . . . the . . . [p]laintiffs moved to amend the record on appeal pursuant to Rules 9(b)(5) and 37 of the North Carolina Rules of Appellate Procedure. We allow the . . . [p]laintiffs' motion to amend the record on appeal to include the notice of appeal" and address the merits.).

As noted by our Supreme Court, whether to grant or deny a motion to amend the record is "a decision within the discretion of the Court of Appeals" that constitutes a legitimate application of our appellate rules absent "an abuse of discretion." *Petersilie*, 334 N.C. at 177, 432 S.E.2d at 837 (citation omitted). Contrary to the dissenting opinion's assertion,

this Court has the authority and the jurisdiction to amend a record that does not confer jurisdiction for appellate review into one that demonstrates our appellate jurisdiction.[1] *Id.* In any event, no grant of certiorari is required for this Court to allow Defendant's motion to amend the record, Rule 9(b)(5)(b.) provides that authority. *Petersilie*, 334 N.C. at 177–78, 432 S.E.2d at 837 (and other opinions cited above).

We decide, in our discretion, to grant Defendant's motion to amend the record to include the 3 October 2018 judgment. *Felmet*, 302 N.C. at 176, 273 S.E.2d at 711. Although Defendant's appeal was docketed on 22 August 2018 when the record was filed, it only became "properly perfected" through granting Defendant's motion to amend the record to include the 3 October 2018 judgment. *Swilling v. Swilling*, 329 N.C. 219, 225, 404 S.E.2d 837, 841 (1991) (citation omitted). Therefore, because the 3 October 2018 judgment is now properly part of the record before us, the jurisdictional defects cited in *Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842, are no longer an issue in this matter and we address the merits of Defendant's appeal.

C. *Certiorari*

1. Rule 21(a)(1)

Assuming, *arguendo*, the rule set forth in *Abels*, 126 N.C. App. at 804–05, 486 S.E.2d at 738, does not apply, and our amendment of the record to include the 3 October 2018 judgment did not cure the jurisdictional deficiency, Defendant also petitioned this Court to grant a writ of certiorari, stating correctly: "Under N.C. R. App. P 21(a)(1), this Court may issue its writ of certiorari . . . to permit review of a trial tribunal's order 'when the right to prosecute an appeal has been lost by the failure to take timely action[.]' " In *Anderson v. Hollifield*, 345 N.C. 480, 480 S.E.2d 661 (1997), the appellant failed to file a notice of appeal, and the appellee argued "that such a failure to file a notice of appeal deprives the appellate courts of jurisdiction to rule upon the merits[.]" *Id.* at 482, 480 S.E.2d at 663. Our Supreme Court noted that the failure to file a notice of appeal eliminated jurisdiction for regular appellate review, but held: "[W]e conclude that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Therefore, we conclude that the Court of Appeals properly granted certiorari in

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1. Of course, if amendment of the record fails to confer jurisdiction for appellate review, this Court will either dismiss the appeal, or consider whether it can obtain jurisdiction through grant of certiorari.

this case." *Id.* This use of certiorari is proper even though "[c]ompliance with the requirements for entry of notice of appeal is jurisdictional. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197–98, 657 S.E.2d 361, 365 (2008)." *Oates*, 366 N.C. at 266, 732 S.E.2d at 573; *Dogwood*, 362 N.C. at 197 n.3, 657 S.E.2d at 365 n.3 (citations omitted) ("We recognize that discretionary avenues of appellate jurisdiction exist in addition to those routes of mandatory review conferred by statute."). We grant Defendant's petition for writ of certiorari, and thereby obtain jurisdiction to consider the merits of Defendant's appeal even if Defendant's right to appeal the 3 October 2018 judgment "has been lost by failure to take timely action." N.C. R. App. P 21(a)(1); *Anderson*, 345 N.C. at 482, 480 S.E.2d at 663; *see also* N.C.G.S. § 7A-32(c) and *State v. Ledbetter*, 371 N.C. 192, 196–97, 814 S.E.2d 39, 42–43 (2018).

2. N.C.G.S. § 7A-32(c)

The dissenting opinion argues that Defendant's appeal "does not exist" due to Rule 3 violations and "binding Supreme Court precedents"; therefore, we are without jurisdiction to amend the record pursuant to Rule 9(b)(5), and that "review by certiorari is not available . . . by statute or by precedents to Defendant." Defendant's PWC and his motion to amend the record are separate requests, and we do not need to grant certiorari in order to grant Defendant's motion to amend. Further, the dissenting opinion appears to conflate this Court's jurisdiction to consider arguments raised on direct appeal with this Court's jurisdiction to consider arguments pursuant to the authority given this Court by the General Assembly to grant extraordinary writs such as certiorari. Direct appeal and certiorari are two distinct avenues by which this Court may obtain jurisdiction over a matter: When "this Court cannot hear defendant's direct appeal [due to violation of a jurisdictional appellate rule], it does have the discretion to consider the matter by granting a petition for writ of *certiorari[.]*" *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320–21 (2005) (citation omitted).[2] Violations of certain appellate rules, such as Rule 3, can divest this court of jurisdiction to consider an appellant's *direct appeal. Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005). However, our Supreme Court has repeatedly held that when N.C.G.S. § 7A-32(c), or any other act of the General Assembly, has provided jurisdiction for this Court to grant certiorari in its discretion, that jurisdiction be cannot revoked or limited by our appellate rules:

2. There are, of course, jurisdictional defects that cannot be "cured" by granting certiorari. For example, if the trial court lacked subject matter jurisdiction, its judgment would be a nullity, and we could not obtain jurisdiction to review that judgment by granting certiorari.

> [T]he General Assembly has stated that the Court of Appeals "has jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . *in aid of its own jurisdiction*, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A-32(c).

State v. Stubbs, 368 N.C. 40, 42, 770 S.E.2d 74, 76 (2015) (emphasis added). Our Supreme Court subsequently reaffirmed this holding: "[A]s we explained in *Stubbs*, if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away." *State v. Thomsen*, 369 N.C. 22, 27, 789 S.E.2d 639, 643 (2016) (citation omitted).

In *State v. Ledbetter*, 250 N.C. App. 692, 794 S.E.2d 551 (2016), *rev'd*, 371 N.C. 192, 814 S.E.2d 39 (2018), this Court reviewed *Stubbs* and *Thomsen*, then held that even if a statute granted this Court *jurisdiction*, the Rules of Appellate Procedure could still restrict our *authority* to exercise that jurisdiction. *Id.* at 697, 794 S.E.2d at 555. Our Supreme Court disagreed:

> By concluding it is procedurally barred from exercising its discretionary authority to assert jurisdiction in this appeal, the Court of Appeals has, as a practical matter, set its own limitations on its jurisdiction to issue writs of certiorari. . . . .
>
> [However], the Court of Appeals had both the jurisdiction and the discretionary authority to issue defendant's writ of certiorari. *Absent specific statutory language limiting the Court of Appeals' jurisdiction*, the court maintains its jurisdiction and discretionary authority to issue the prerogative writs, including certiorari. Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued.

Ledbetter, 371 N.C. at 196–97, 814 S.E.2d at 42–43 (emphasis added).

General statutory authority to grant Defendant's PWC and review his arguments is provided in N.C.G.S. § 7A-32(c); therefore, the proper inquiry is whether another *statute* serves to limit that jurisdiction. *Id.* We have found no limiting statute; however, we do find substantial precedent, cited above, that this Court may grant certiorari in support of our appellate jurisdiction for the purpose of considering the merits of an appeal otherwise jurisdictionally precluded from review on direct

appeal.[3] *See State v. Smith*, __ N.C. App. __, __, 832 S.E.2d 921, 924 (2019) (citation omitted) ("Due to questions about trial counsel's notice of appeal, Defendant has filed a petition for writ of certiorari in order to preserve his right to appeal the immediate matter. Writs of certiorari are considered to be 'extraordinary remedial writ[s]' and can serve as substitutes for an appeal."). Similar to this case, "[i]n *State v. Friend*, the trial court did not inform the defendant of his right to be heard on the issue of attorney's fees and costs. [T]his Court granted the defendant's untimely appeal as to the civil judgment." *State v. Baker*, __ N.C. App. __, __, 817 S.E.2d 907, 909–10 (2018) (citations omitted). This Court held that "[b]ased on the facts of the case *sub judice*, we grant Defendant's petition for writ of certiorari to review this issue on appeal[.]" *Id.* at __, 817 S.E.2d at 910 (citation omitted); *see also State v. Patterson*, __ N.C. App. __, __ S.E.2d __, 2020 WL 542812 (filed 4 Feb. 2020) (granting the State's motion to dismiss the defendant's appeal for failure to file a written notice of appeal from civil judgment entering attorney's fees, but allowing the defendant's motion to amend the record to include the civil judgment, granting certiorari to consider the merits, and vacating civil judgment for remand and hearing affording the defendant an opportunity to contest the amount of fees assessed).

This Court is also free to grant certiorari *ex mero motu* in order to allow appellate review in circumstances similar to those before us: *Matter of E.A.*, __ N.C. App. __, __, 833 S.E.2d 630, 631 (2019) (citations omitted) (certiorari properly granted even though "the order [from which the appellant purported to appeal] was filed *after* [the appellant] filed his notice of appeal[,]" because "this Court has the discretionary authority . . . to 'treat the purported appeal as a petition for writ of certiorari and grant it in our discretion' ");[4] *see also Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (analysis and cases cited). "When *certiorari* is granted, the case is before us in all respects as an appeal." *Furr v. Simpson*, 271 N.C. 221, 223, 155 S.E.2d 746, 748 (1967) (citation omitted). Assuming, *arguendo*, Defendant's appeal violates Rule 3, we exercise our discretion and grant certiorari for the purpose of considering the merits of Defendant's arguments on appeal.

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3. Again, with certain clear exceptions such as lack of jurisdiction in the trial court, or if no judgment or order has been entered in the matter by the trial court.

4. In *E.A.* this Court did not address the rule set forth in *Abels*, 126 N.C. App. at 804–05, 486 S.E.2d at 738, and *Oates*, 366 N.C. at 268, 732 S.E.2d at 574–75.

D. *State v. McKoy*

We note that the dissenting opinion cites our opinion in *State v. McKoy*, __, N.C. App. __, __ S.E.2d __, (2020) (unpublished), filed concurrently with this opinion, in support of its contention that "a purported appeal [] taken before and docketed without any order or judgment having been entered . . . must be dismissed. There is no final entered order nor anything else properly before this Court to review." However, in *McKoy* the defendant specifically argued that he was *not* appealing the civil judgment ordering restitution itself, but the trial court's *rendering* of that judgment at trial. We denied the defendant's PWC, not on a jurisdictional basis, but based on our conclusion that he could not demonstrate any prejudice and, therefore, review of the merits of his appeal would be pointless. *Id. McKoy* is unpublished, and it contains no holding relevant to this case. Further, in this case we granted Defendant's motion to amend the record, and the 3 October 2018 civil judgment is properly before us for review. N.C. R. App. P. 9(b)(5)(b.). In *McKoy* the defendant did not seek to amend the record to include the civil judgment, if one existed.

III. Defendant's Appeal

[2] Defendant contends that the trial court erred in ordering payment of attorney fees without affording him an opportunity to be heard. We agree.

While trial courts are permitted "to enter a civil judgment against an indig[e]nt defendant following his conviction in the amount of the fees incurred by the defendant's appointed trial counsel[,]" it is well established that defendants must first "be given notice and an opportunity to be heard[.]" *Baker*, __ N.C. App. at __, 817 S.E.2d at 911. In this case, the trial court simply stated that it was going to enter a civil judgment against Defendant for the repayment of his attorney's fees, and it provided Defendant no opportunity to be heard on the matter. As this Court stated in *State v. Friend*, __ N.C. App. __, 809 S.E.2d 902 (2018):

> [B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware

> of the opportunity to be heard on the issue, and chose not to be heard.

Id. at __, 809 S.E.2d at 907 (citations omitted); *see also* N.C.G.S. § 7A-455 (2019); *Baker*, __ N.C. App. at __, 817 S.E.2d at 911–12; *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005) ("this Court vacated a civil judgment imposing attorney's fees on the defendant where, notwithstanding a signed affidavit of indigency, there was 'no indication [in the record] that [the] defendant received any opportunity to be heard on the matter' of attorney's fees").

"Therefore, in light of the foregoing, we vacate the trial court's imposition of attorney's fees in this matter" and remand. *Id.* at 236, 616 S.E.2d at 317. "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that [D]efendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.* Defendant does not otherwise challenge the judgment entered 4 April 2018, and the remainder of that judgment is unaffected by our decision.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judge BERGER concurs with separate opinion.

Judge TYSON dissents.

BERGER, Judge, concurring in separate opinion.

$390.00. That is what this appeal concerns.

Defendant knows from the initial appointment of counsel that he is responsible for his court-appointed attorney's fees. But, this Court has created an avenue for these procedural appeals where defendants suffer no prejudice. These appeals cost countless man-hours and tens-of-thousands of dollars, and elevate form over substance. Because our precedent has opened this door, I concur in result only. However, anyone interested in efficiencies and saving taxpayer dollars should hope the Supreme Court of North Carolina takes advantage of this opportunity to return us to the plain language of N.C. Gen. Stat. § 15A-1444(a2).

TYSON, Judge, dissenting.

I vote to dismiss this purported appeal and Defendant's motion to amend the record, and to deny Defendant's petition for a writ of certiorari. I respectfully dissent.

"It is not the role of the appellate courts to create an appeal for an appellant. . . . Our Supreme Court previously stated that the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 118-19, 665 S.E.2d 493, 497-98 (2008) (quoting *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005)); *see also State v. Bursell*, __ N.C. __, __, 827 S.E.2d 302, 304 (2019) ("[F]ailure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice. Accordingly, the Rules of Appellate Procedure are mandatory and not directory." (citations and internal quotation marks omitted)).

I. No Jurisdiction, No Merit, No Prejudice

Our Supreme Court and this Court have previously analyzed and addressed each of the issues presented here. "This Court is without authority to entertain appeal of a case which lacks entry of judgment. Announcement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (citations omitted), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

Under the statute, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2017). Multiple precedential and procedural rules hold that, absent an entry of judgment, this Court is without jurisdiction or authority to entertain this appeal. *Abels*, 126 N.C. App. at 803, 486 S.E.2d at 737; *see also State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007) (citing N.C. R. App. P. 3(a), 9(a)(1)(h)) (where "there is no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had no subject matter jurisdiction on this issue.").

Defendant seeks to excuse his jurisdictional failures and criminal, civil, and appellate rules violations with a circuitous path of unsupported motions and specious arguments. His arguments are machinations to dodge and weave through the jurisdictional and procedural bars, and multiple violations of the Rules and precedents in

an attempt to give credence to Defendant's un-merited notions and non-prejudicial motions.

None of these notions or motions carry Defendant's burden to demonstrate appellate jurisdiction, merit, or any prejudice. Defendant has failed to invoke the jurisdiction of this Court with his notice or record on appeal, to demonstrate any merit in his claim, or to suffer any prejudice from the trial court's civil judgment.

Defendant requested and was appointed defense counsel. He knowingly and voluntarily pled guilty to all charges, including attaining the status of a habitual felon. Defendant was also informed by the trial court and agreed that his appointed counsel is not a free counsel, and in the event he pled or was found guilty, he was responsible for reimbursing his state-paid counsel's fees. *See* N.C. Gen. Stat. § 7A-455 (2019).

Defendant was present in court and was ordered to pay his attorney's fees at sentencing. He was free to question or challenge the court's order, but failed to do so. Defendant did not inform the State or trial court that his guilty pleas were conditioned upon appeal to preserve any issue to seek appellate review. *See* N.C. Gen. Stat. § 15A-1444 (2019).

The trial court determined the "extraordinary sum" of $390.00 in attorney's fees was owed and to be reimbursed to the State. The trial court entered a civil judgment to reimburse the taxpayers on 3 October 2018. *State v. Baker*, __ N.C. App. __, __, 817 S.E.2d 907, 911 (2018) (trial courts are permitted "to enter a civil judgment against an indig[e]nt defendant following his conviction in the amount of the fees incurred by the defendant's appointed trial counsel" (citation omitted)). The majority's opinion recognizes this sum is a valid debt owed by Defendant to be entered again on remand. Defendant cannot demonstrate any merit in his argument nor any prejudice to pay what he owes.

We all agree with the State's arguments that Defendant has wholly failed to comply with the mandatory appellate rules and criminal and civil procedures for appealing from the entry of the 3 October 2018 civil judgment, which ordered him to reimburse his agreed-upon and justly-due attorney's fees. Defendant's failure to comply with the multiple Rules deprives this Court of jurisdiction to consider his assertions upon direct appeal. *Abels*, 126 N.C. App. at 803, 486 S.E.2d at 737. We all also agree that multiple prior precedents hold that violations of certain appellate rules, including Rule 3, divest this Court of jurisdiction to consider an appellant's *direct appeal* and mandates dismissal: "Failure to follow the rules will subject an appeal to dismissal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d

361, 363 (2008) (citations and alterations omitted). Defendant's appeal is properly dismissed.

II. Amendment Does Not Cure Jurisdictional Defaults

We also all agree Defendant was required by the Rules to file the record and proceed with this appeal only *after* entry of the 3 October 2018 order, and that entered order was required to be included in the record on appeal in order to confer regular appellate jurisdiction on this Court. *See* N.C. R. App. P. 3(d); *see also Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842 ("because there is no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had *no subject matter jurisdiction* on this issue" (emphasis supplied) (citations omitted)).

"The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case." *Dogwood*, 362 N.C. at 197, 657 S.E.2d at 364-65 (citations omitted). "It is fundamental that a court cannot create jurisdiction where none exists." *Ponder v. Ponder*, 247 N.C. App. 301, 306, 786 S.E.2d 44, 48 (2016) (citations and internal quotation marks omitted).

Appellate Rule 3(a) requires: "Any party entitled by law to appeal from a judgment or order of a superior . . . court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court . . . within the time prescribed by subsection (c) of this rule." N.C. R. App. P. 3(a). The State correctly argues: (1) Defendant failed to comply with the mandatory requirements of Rule 3; (2) this Court *lacks jurisdiction* to consider Defendant's purported notice of appeal; and, (3) the appeal must be dismissed. *Id.*; *see also Viar*, 359 N.C. at 401, 610 S.E.2d at 361. "Stated differently, a jurisdictional default brings a purported appeal to an end before it ever begins." *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365.

"It is well established in this jurisdiction that it is the duty of the appellant to see that the record on appeal is properly made up and transmitted." *State v. Dellinger*, 308 N.C. 288, 294, 302 S.E.2d 194, 197 (1983) (citation omitted). The record on appeal was proposed by Defendant and became the settled record on this appeal as a matter of law on 20 August 2018, after the State decided not to challenge or to serve notice of approval or objections, amendments, or an alternative proposed record. *See* N.C. R. App. P. 11(b).

Defendant's purported appeal was taken and docketed in this Court prior to entry of the 3 October 2018 civil judgment from which he

purports to appeal. The record was not compliant with Rules 9(a)(1)(h) and 11(b) and long-standing precedents when it was docketed without and prior to the civil judgment being entered. Over 136 years ago, our Supreme Court held: "To make [the trial court's] purpose a judgment, it must be entered of record, and until this shall be done, there is nothing to appeal from." *Logan v. Harris*, 90 N.C. 7, 7 (1884). Compliance with the requirements for entry of notice of appeal is jurisdictional. *Dogwood*, 362 N.C. at 197-98, 657 S.E.2d at 365. Appellate Rule 2 cannot be used to grant appellate review, where no jurisdiction exists. *See Ponder*, 247 N.C. App. at 306, 786 S.E.2d at 48.

In its response to Defendant's motion seeking to amend the record to add the missing judgment, the State also correctly argues that binding precedents show Defendant's notice of appeal was only from "the judgment entered in this cause on April 4, 2018," and not from the "rendering" of the civil judgment concerning attorney's fees in open court. As a result, the State also correctly argues that N.C. Gen. Stat. § 15A-1444 limits appeals from guilty pleas and removes this Court's appellate review to consider Defendant's arguments here. *See* N.C. Gen. Stat. § 15A-1444; *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

Rule 3(a) and binding Supreme Court precedents also prohibit this Court from granting Defendant's motion to amend the record of a purported appeal that does not exist, and consequently, over which this Court unquestionably does not possess and cannot assert jurisdiction, *i.e.*, the *power* to act. N.C. R. App. P. 3(a) (2019); *Logan*, 90 N.C. at 7. None of these binding precedents or Rules, facts, or arguments are refuted by Defendant or explained away in the majority's opinion, which expressly recognizes the Rules and precedents. Defendant's purported direct appeal is properly dismissed and is not saved through Defendant's motion for a purported amendment.

III. <u>Petition for Writ of Certiorari</u>

It is uncontested that Defendant filed a defective notice of appeal. Subsequently, Defendant filed a petition for a writ of certiorari ("PWC").

"*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). To warrant consideration, our Supreme Court held Defendant's "petition for the writ must show merit or that error was probably committed below." *Id.* (citation omitted). Without threshold allegations of merit and prejudice, review by certiorari is not

available to either by statute or by precedents to Defendant. *Id.*; N.C. Gen. Stat. §§ 15A-1442, 15A-1444(g).

To warrant issuance of the writ, Defendant's petition must show the purported issue on appeal has potential merit and, even if meritorious, that he suffered prejudice. *Id.* While his petition is not required to show he is certain to prevail on the merits, it alleges no potential of merit, asserts no prejudice or probability of a different result on remand. Defendant's meritless petition is properly denied. *See id.*

The majority's opinion does not state any basis to allow the petition or invoke Rule 2, but nonetheless grants Defendant's petition, purports to amend the record, and address the merits. As such, I also address Defendant's lack of demonstrated merit or prejudice in the underlying issue.

Defendant recognizes "his notice of appeal [was] insufficient" to invoke jurisdiction. As a result, he filed a PWC "out of an abundance of caution." In response to Defendant's PWC, the State again correctly states and argues our rules and precedents require the purported PWC be dismissed, as required by the Appellate Rules. N.C. R. App. P. 21(c) ("petition shall contain a . . . certified cop[y] of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition."). The State also correctly asserts, "this Court is without authority to entertain an appeal where there has been no entry of judgment." *Searles v. Searles*, 100 N.C. App. 723, 725, 398 S.E.2d 55, 56 (1990) (citation omitted).

Unlike here, all cases cited in the majority's opinion *allowing* an amendment added an *existing* judgment entered *prior* to the appeal being taken to the record on appeal, but was mistakenly omitted therefrom. *State v. Petersilie*, 334 N.C. 169, 177-78, 432 S.E.2d 832, 837 (1993); *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (our Supreme Court "decided to allow the amendment [pursuant to Rule 9(b)(5)(b)] *to reflect* subject matter jurisdiction and then pass upon the substantive issue of the appeal" (emphasis supplied)); *Williams v. United Cmty. Bank*, 218 N.C. App. 361, 367, 724 S.E.2d 543, 548 (2012).

None of these cases support allowing an amendment to include a judgment, which had *not yet been entered* when the appeal was taken and docketed, in order to retroactively supply jurisdiction, which did not exist when Defendant's appeal was taken or docketed.

We also all agree that even if a civil judgment has been entered, because Defendant failed to include it in the record, this Court lacks

jurisdiction to review it, and no relief from that order could be granted. By extension, if a purported appeal is taken before and docketed without any order or judgment having been entered, the appeal must be dismissed. There is no final entered order nor anything else properly before this Court to review. *Logan*, 90 N.C. at 8; *State v. McKoy*, No. COA18-599, __ N.C. App. __, __ S.E.2d __ (2020) (unpublished); *Searles*, 100 N.C. App. at 725, 398 S.E.2d at 56.

IV. Conclusion

The record on appeal contains no entered order that Defendant properly appealed from to invoke appellate jurisdiction for this Court to review. Defendant's purported notice of appeal is fatally defective and must be dismissed. *See* N.C. R. App. P. 3(a). Amendment does not provide jurisdiction to an appeal taken and docketed months prior to the entry of the civil judgment on 3 October 2018 and also does not include the judgment purportedly appealed from.

Defendant's purported notice of appeal only asserts review of Defendant's criminal judgment entered upon his guilty pleas, which is barred by statute. N.C. Gen. Stat. § 15A-1444(a1) (2019). We all agree Defendant does not otherwise challenge the sentence or judgment entered on 4 April 2018 pursuant to his guilty pleas and those judgments are undisturbed.

Defendant has failed to demonstrate any prejudice. The majority's decision remands for the trial court to again enter the *same judgment* it has already entered. The purported appeal does not invoke this Court's appellate jurisdiction and the Defendant's PWC is wholly without merit.

I also concur with Judge Berger's separate concurring in the result only opinion, wherein he concludes these procedural appeals cost countless hours of labor and tens-of-thousands of dollars, and "elevates form over substance. . . . [A]nyone interested in efficiencies and saving taxpayer dollars should hope the Supreme Court of North Carolina takes advantage of this opportunity to return us to the plain language of N.C. Gen. Stat. § 15A-1444(a2)."

Scarce judicial resources and taxpayer funds are wasted with these purported "appeals," which show no jurisdiction, assert no merits, result in no prejudice, and where the trial court will enter the same civil judgment of $390.00 on remand that Defendant acknowledged he owes.

There is nothing before this Court to properly review or remand. I vote to dismiss Defendant's purported appeal and motion to amend, and to deny his PWC. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
MICHAEL ADDIB NAZZAL, Defendant

No. COA19-552

Filed 3 March 2020

1. Motor Vehicles—driving while impaired—felony death by vehicle—sufficiency of the evidence—impairment

The trial court improperly denied defendant's motions to dismiss charges for driving while impaired and felony death by vehicle because the State presented insufficient evidence that defendant was appreciably impaired at the time he crashed his car, killing a man. Only one law enforcement officer opined that defendant was impaired after observing defendant approximately five hours after the crash, and the officer neither asked defendant to perform any field sobriety tests nor asked him if or when he had ingested any impairing substances.

2. Motor Vehicles—failure to maintain lane control—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss a charge of failure to maintain lane control where—while driving on the highway at a high rate of speed, late at night, and in icy road conditions—defendant veered to the right of a parked tow truck that partially obstructed the right lane, attempted to pass the truck on the shoulder of the road, and struck a man standing on the shoulder. There was substantial evidence from which a jury could infer that defendant tried to pass the truck in this manner without first ascertaining that he could do so safely.

3. Homicide—second-degree murder—malice—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss his second-degree murder charge arising from a car crash in which defendant—while driving on the highway at a high rate of speed, late at night, and in icy road conditions—struck and killed a man while trying to pass a parked tow truck by veering on to the shoulder of the road. There was substantial evidence of malice where defendant had an extensive record of driving-related offenses and involvement in car accidents, was driving with a revoked license during the crash, drove away from the scene without checking whether anyone was harmed, washed his damaged car (suggesting

he was aware that he needed to remove blood from his vehicle), and downplayed the severity of the crash despite police informing him that he had killed someone.

4. Motor Vehicles—driving while impaired—evidence of prior drug use—harmless error

On appeal from convictions for driving while impaired (DWI), second-degree murder, and other offenses arising from a car crash, the Court of Appeals declined to review the denial of defendant's motion to suppress evidence of his prior drug use where the evidence was used solely to prove defendant's impairment at the time of the crash, the Court of Appeals had already reversed defendant's DWI conviction for insufficient evidence of impairment, and the impairment issue was irrelevant to the other charges (thus, any error was harmless).

5. Homicide—second-degree murder—request for jury instruction—accident as defense—harmless error

In a murder prosecution arising from a car crash, the trial court's decision not to instruct the jury on the defense of accident was, at most, harmless error where the court did instruct the jury on two lesser-included offenses (involuntary manslaughter and misdemeanor death by vehicle) that did not involve intentional killings, but the jury still convicted defendant of second-degree murder based on malice (thereby rejecting the idea that defendant acted unintentionally).

Appeal by defendant from judgments entered 22 February 2018 by Judge Rebecca W. Holt in Orange County Superior Court. Heard in the Court of Appeals 5 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

M. Gordon Widenhouse, Jr., for defendant.

ARROWOOD, Judge.

Michael Addib Nazzal ("defendant") appeals from judgments sentencing him upon his convictions for second-degree murder, driving while impaired ("DWI"), felony death by motor vehicle, and failure to maintain lane control. For the following reasons, we reverse defendant's convictions for DWI and felony death by motor vehicle. We otherwise hold that defendant's trial was free of prejudicial error.

I. Background

This case arises from an automobile collision caused by defendant on Interstate 40 West ("I-40 West") resulting in the death of Francisco Nolasco ("Mr. Nolasco"). As a result of this collision, defendant was indicted on 15 May 2017 for felony hit and run causing death, driving while license revoked ("DWLR"), DWLR for impaired driving, displaying revoked tags, operating a vehicle without insurance, failing to maintain lane control, DWI, felony death by motor vehicle, and second-degree murder. Defendant's case came on for trial before the Honorable Rebecca W. Holt at the 12 February 2018 Criminal Session of Orange County Superior Court. The evidence at trial tended to show the following.

Just before 2:00 a.m. on 17 December 2016, Mr. Nolasco's pickup truck was involved in a single-vehicle accident requiring assistance on I-40 West in Orange County. Road conditions that night were wet and icy. Mr. Nolasco called his friend and tow truck driver Omar Castillo ("Mr. Castillo") for assistance, and he arrived shortly thereafter. Upon realizing that Mr. Nolasco's pickup was precariously positioned partially in the right lane of traffic, Mr. Castillo immediately set about removing the vehicle from the road.

Mr. Castillo testified that he then positioned his tow truck in front of Mr. Nolasco's pickup, partially in the right lane of traffic. For unknown reasons, the tow truck's cable system failed to lift the pickup onto its rollback. At this time, Mr. Nolasco was standing on the shoulder of the road, with the tow truck between himself and the westbound lanes of traffic. Mr. Castillo began walking around the front of the tow truck to address the cable system malfunction. As he was in front of the tow truck, he heard screeching tires, dove over the guardrail, and observed a black Honda crash into the guardrail and hurdle forward, hitting the pickup and tow truck before proceeding down the shoulder between the tow truck and guardrail, hitting Mr. Nolasco and knocking him into the road.

Mr. Castillo testified that he went into the road to assist Mr. Nolasco and found him unconscious. He tried to signal oncoming cars but they did not see him, and he had to leave Mr. Nolasco in the road to preserve his own safety. Then another car traveling about forty seconds behind defendant ran over Mr. Nolasco. Based on his observation of the collision's intensity and Mr. Nolasco's unconscious body in the roadway, Mr. Castillo opined that defendant's black Honda killed him before the second car arrived. He testified that the second car stopped immediately after hitting Mr. Nolasco, but defendant only stopped briefly and then continued.

Austin Phillips ("Mr. Phillips"), the driver of the second car, testified that he saw the tow truck's flashing lights and switched from the right to left lane of westbound traffic in order to "avoid any contact with the person that may be getting out of the tow truck[.]" After realizing he had run over a human body, Mr. Phillips immediately pulled over and called 911 for assistance.

Trooper Kyle Underwood testified that he, Trooper Matthew Morrison, and one other highway patrolman arrived at the scene at 1:54 a.m. and began taking measurements, recording witness statements, and investigating the wreckage and other evidence at the scene. Trooper Underwood noted damage to the shoulder's guardrail at a position prior to the tow truck, damage to Mr. Nolasco's pickup, and a missing passenger side mirror on the tow truck. He discovered the front bumper of a black Honda 99 feet away.

After searching the serial number on the bumper, the troopers discovered that it belonged to a 2010 Honda Accord registered to defendant's name at a Greensboro address. They also determined that defendant's tags and registration were currently revoked due to a failure to carry insurance and his driver's license was currently suspended for a previous DWI conviction. The troopers then contacted the Guilford County Sheriff's Office for assistance locating defendant.

Sergeant James Meacham and Master Corporal Todd Riddle of the Guilford County Sheriff's Office arrived at defendant's Greensboro address just after 4:00 a.m. Thirty minutes later, defendant arrived in a black Honda Accord with significant front-end damage. This damage included deployed airbags, no front bumper, a shattered windshield, damage to the hood, missing headlights, and general body damage on the front of the car. Sergeant Meacham called Trooper Morrison and informed him that they had detained defendant at his residence. In his conversation with the deputies, defendant admitted that he had been involved in a collision but said "it wasn't a very bad one[,]" so he drove away. Sergeant Meacham testified that "[defendant's] actions indicated just a very carefreeness [sic] attitude about what had transpired[.]" The two deputies were relieved by deputies on the day shift at around 6:00 a.m.

Troopers Underwood and Morrison obtained an arrest warrant for felony hit and run and arrived at defendant's residence in Greensboro at around 7:00 a.m. Trooper Morrison observed that defendant's car was covered in droplets of ice and appeared to be much cleaner than his own patrol vehicle covered in road salt, despite both cars making a similar drive from Orange County to Greensboro in identical weather

conditions. Defendant was arrested and transported by the troopers to the Orange County Sheriff's Office for booking. Two cell phones found on defendant's person at the time of his arrest were seized.

Based upon his observations of defendant while they were en route to the sheriff's office, Trooper Underwood testified that he formed an opinion that defendant was appreciably impaired to the extent that it was unsafe for him to drive an automobile at the time of the collision five hours earlier. In addition to the mere nature of the collision site and his flight therefrom, Trooper Underwood based this opinion on the following evidence. When he observed defendant at approximately 7:00 a.m., defendant had red, glassy eyes, was unsteady on his feet, and at times was "speaking out of his head" and "rambling, going on with half sentences, speaking [in a way] that just did not make sense." Defendant also made contradictory statements regarding his location at the time of the collision, seeming confused about where it occurred. Additionally, defendant fell asleep on the ride to the sheriff's office. Trooper Underwood found this very strange because defendant had just been told the jarring news that he had killed a man. He stopped his patrol vehicle and had Trooper Morrison shake defendant awake, upon which defendant stated that he was fine. No other testifying officer formed the opinion that defendant was impaired at the time of the collision. Nor did any investigating officer ever subject defendant to any of the numerous field tests for impairment utilized by law enforcement.

A later search of defendant's phones revealed text messages tending to suggest he had been attempting to buy crack cocaine earlier in the day before the collision. The search also led the State to two testifying witnesses. Tiffany Haynes ("Ms. Haynes") testified that defendant called her for a "date" the day of the collision, stating that he would drive from Cary to her motel room in Greensboro that night. Because they had done the same thing on a previous "date" three weeks prior, Ms. Haynes believed that defendant intended to smoke crack with her, engage her in sexual intercourse, and then smoke marijuana. Robert Tate testified that defendant had bought an ounce of high-grade marijuana from him the day before the collision.

Defendant moved to dismiss the charges against him at the close of the State's evidence. The trial court denied the motions. The jury returned verdicts finding defendant guilty of DWLR, DWLR for impaired driving, displaying revoked tags, operating a vehicle without insurance, failing to maintain lane control, DWI, felonious hit and run causing injury, felony death by motor vehicle, and second-degree murder. The trial court arrested judgment on defendant's convictions for DWI

and felony death by motor vehicle. The court consolidated judgment on defendant's remaining convictions and sentenced him to 175 to 222 months' imprisonment. Defendant timely appealed.

II. Discussion

On appeal, defendant argues that the trial court erred by: (a) denying his motions to dismiss the charges of second-degree murder, DWI, felony death by motor vehicle, and failure to maintain lane control; (b) denying his motion to suppress evidence obtained from a search of his cell phones; (c) admitting prejudicial testimony of prior drug use; and (d) refusing to instruct the jury on the defense of accident. For the foregoing reasons, we reverse defendant's convictions for DWI and felony death by vehicle and otherwise hold his trial was free of prejudicial error.

A. Motions to Dismiss

Defendant argues that substantial evidence did not support his convictions for DWI, felony death by vehicle, and failure to maintain lane control, and thus the trial court erred in denying his motion to dismiss those charges. He further contends that the trial court erred in denying his motion to dismiss his second-degree murder charge, because the jury was instructed that defendant would need to be found guilty of either DWI or failure to maintain lane control to be guilty of second-degree murder.

We hold that the trial court erred in denying defendant's motion to dismiss the DWI and felony death by vehicle charges due to insufficient evidence of impairment. The trial court properly submitted the failure to maintain lane control charge to the jury. Substantial evidence supported the element of malice in defendant's commission of this offense, therefore the trial court did not err in submitting the second-degree murder charge to the jury.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss." *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997) (citation omitted).

2. DWI and Felony Death by Vehicle

[1] Defendant maintains that the trial court erred in denying his motions to dismiss the charges of DWI and felony death by vehicle because the State presented insufficient evidence that he was appreciably impaired at the time he caused the collision and hit Mr. Nolasco. We agree.

"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 . . . [w]hile under the influence of an impairing substance . . . ." N.C. Gen. Stat. § 20-138.1(a)(1) (2019). The person must "hav[e] his physical or mental faculties, or both, appreciably impaired by an impairing substance." N.C. Gen. Stat. § 20-4.01(48b) (2019).

We find our opinion in *State v. Eldred* to be instructive in the instant case. 259 N.C. App. 345, 815 S.E.2d 742 (2018). In *Eldred*, officers got a report of a wrecked, abandoned car on the roadside at 8:30 p.m. *Id.* at 346, 815 S.E.2d at 743. Though he did not testify how soon after the report the interaction occurred, an officer observed the defendant walking along the roadside approximately two to three miles from the car. *Id.* The defendant had visible head injuries, stated that he was "smoked up on meth" and needed medical attention, and exhibited signs of impairment such as twitching and having difficulty walking straight. *Id.* at 346-47, 815 S.E.2d at 743 The defendant was then taken to the hospital, where a highway patrolman observed him at 9:55 p.m. *Id.* at 346, 815 S.E.2d at 743. He told the patrolman that he had been driving his car and set out on foot when it ran out of gas, later indicated that he had been hurt in a car wreck "a couple of hours ago[,]" and stated that he was currently "on meth." *Id.* at 347, 815 S.E.2d at 743 (internal quotation marks omitted). After observing the defendant exhibit numerous signs of impairment at the hospital, the patrolman formed the opinion that the defendant was appreciably impaired. *Id.*

This Court held this evidence insufficient to prove that the defendant was appreciably impaired at the time he wrecked his car. It observed that:

> [The first officer], who first found Defendant after he had walked two or three miles beyond his vehicle, did not determine whether Defendant's condition was caused by an impairing substance or by the injury that resulted in emergency medical personnel taking Defendant to the hospital. [The patrolman], who interviewed Defendant in the hospital, did not obtain information concerning when or where Defendant had consumed meth or any other impairing substance. Neither officer even knew when Defendant's vehicle had veered off the highway.

Id. at 350, 815 S.E.2d at 745.

In the instant case, Trooper Underwood formed his opinion of impairment entirely through passive observation of defendant. He did not request defendant to perform any of the several field tests law enforcement officers often use to gauge a motorist's impairment. Moreover, as in *Eldred*, he did not ask defendant if or when he had ingested any impairing substances. Trooper Underwood was the only law enforcement officer that observed defendant and formed an opinion that he was appreciably impaired. These observations occurred at 6:48 a.m., approximately five hours after the collision occurred. This lapse of time is over three times longer than the one that was found unacceptable in *Eldred*.

The State argues that the signs of impairment observed by Trooper Underwood five hours later, when coupled with the very nature of the collision, defendant's immediate flight from the scene, and his gross understatement of the collision's severity, provide substantial evidence that defendant was appreciably impaired at the time of the collision. We disagree. Hit and run and DWI are separate offenses for a reason. Without more, the former cannot suffice as substantial evidence of the latter. Furthermore, defendant's understatement of the collision's severity can more readily be interpreted as downplaying his culpability than an impaired perception of events. Again, without more this cannot suffice as substantial evidence of appreciable impairment at the time of the collision. There must be some evidence closer to that time which more than circumstantially implies that defendant was impaired. *See State v. Rich*, 351 N.C. 386, 398-99, 527 S.E.2d 299, 305-306 (2000) (upholding trial court's admission of officer opinion of appreciable impairment

based upon investigation of accident scene, defendant's high rate of speed, observation of defendant's combative behavior with EMS at scene and bloodshot, watery eyes shortly after wreck, no indication of injuries to defendant, and smell of alcohol observed at hospital two hours later).

Therefore, the trial court erred in denying defendant's motion to dismiss the DWI charge. The trial court also erred in denying defendant's motion to dismiss the felony death by motor vehicle charge, because DWI is a necessary element of this offense. *See* N.C. Gen. Stat. § 20-141.4(a1)(2) (2019). Since the trial court arrested judgment on both convictions, we reverse them without remand.

3. Failure to Maintain Lane Control

[2] Defendant argues that the State failed to present substantial evidence that he violated N.C. Gen. Stat. § 20-146(d)(1) (2019) by veering to the right of Mr. Castillo's tow truck and attempting to pass it on the shoulder of the road. We disagree.

"Whenever any street has been divided into two or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." *Id.* Defendant argues that because the evidence showed that Mr. Castillo's tow truck partially obstructed the right lane in which he was traveling, it was not "practicable" for him to drive entirely within that lane of traffic.

According to defendant, the offense has not been committed if a motorist recklessly veers out of his lane when it is no longer practicable to remain there due to an upcoming obstruction. In other words, defendant interprets the statute such that impracticability is an absolute defense. Although defendant's Memorandum of Additional Authority includes N.C.P.I. Crim. 207.90 (2019), which he argues supports this interpretation, we note that on appeal defendant has not challenged any of the trial court's jury instructions omitting the practicability element from the offense.

We do not interpret N.C. Gen. Stat. § 20-146(d)(1) to apply only to situations where it is practicable for a motorist to stay within his current lane of traffic. Rather, this provision contains two disjunctive mandates. A motorist must drive his vehicle "as nearly as practicable entirely within a single lane[.]" *Id.* A motorist must also refrain from changing lanes unless he "has first ascertained that such movement can be made with safety." *Id.*

Here, there was substantial evidence from which the jury could infer that defendant did not ascertain that veering onto the shoulder and passing the tow truck on its right side could be done with safety. Viewing the evidence in a light most favorable to the State, defendant was driving late at night at a speed unreasonably fast for the icy conditions. Upon seeing Mr. Castillo's tow truck partially obstructing his current lane of traffic, defendant decided to pass the vehicle on the shoulder without first determining what, if any, further perils lay in his redirected course. The tow truck obstructed his view of at least some portion of the shoulder through which he would soon drive. As evidenced by the testimony of Mr. Phillips, a reasonable motorist would not have attempted to pass the tow truck to its right along the shoulder. A motorist traveling 40 seconds behind defendant ascertained that passing the tow truck on the shoulder-side could not be done with safety. From this evidence a reasonable juror could find that defendant did not make such a determination before conducting his maneuver.

Even under defendant's interpretation of N.C. Gen. Stat. § 20-146(d)(1), there was substantial evidence on each side of the practicability issue from which the jury could make its own determination. In negligence *per se* cases interpreting N.C. Gen. Stat. § 20-146(d)(1), we have previously held that where a plaintiff puts forth evidence that the defendant crossed the center line into oncoming traffic and the defendant puts forth evidence that it was impracticable to stay within his lane "for reasons other than his own negligence," the conflicting evidence "merely . . . raise[s] an issue of credibility for the jury to resolve." *Sessoms v. Roberson*, 47 N.C. App. 573, 579, 268 S.E.2d 24, 28 (1980) (citations omitted). Mr. Castillo testified that road conditions were icy, he heard screeching tires before the collision, and defendant's vehicle passed his tow truck traveling at a high rate of speed. From this a reasonable juror could infer that, had defendant been traveling at a reasonable speed for conditions, it may have been practicable for him to come to a complete stop, or significantly slow his speed before proceeding, without departing from the right lane of I-40 West.

Therefore, substantial evidence supported submission of the failure to maintain lane control charge to the jury. The trial court did not err in denying defendant's motion to dismiss this charge.

4. Second-Degree Murder

[3] Defendant argues that the State failed to present substantial evidence of certain elements of second-degree murder. We disagree.

In the instant case, the jury was instructed that defendant would need to be found guilty of either DWI or failure to maintain lane control to be guilty of second-degree murder. *See State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (limiting review of substantial evidence supporting conviction to limited theory of conviction on which jury was instructed). On appeal, defendant does not dispute that the State presented substantial evidence that he drove the car that hit Mr. Nolasco and proximately caused his death. Defendant's only argument is that a lack of substantial evidence supporting malice and either DWI or failure to maintain lane control mandates reversal of his conviction for second-degree murder.

Because we uphold defendant's conviction for failure to maintain lane control, our only remaining task is to determine whether the State presented substantial evidence of defendant's malice in the commission of this offense.

> Second-degree murder is an unlawful killing with malice, but without premeditation and deliberation. Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice. . . . Accordingly, in [cases where the defendant is charged with committing second-degree murder by vehicle], it [i]s necessary for the State to prove only that [the] defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind. The State [i]s not required to show that [the] defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill.

Rich, 351 N.C. at 395, 527 S.E.2d at 304 (internal quotation marks and citations omitted).

Viewing the evidence in a light most favorable to the State, defendant was driving while his license was revoked both for prior DWI and non-DWI offenses. He failed to insure his car. It was late at night, and road conditions were icy. Defendant was driving at a speed that was irresponsible in these driving conditions and did not allow him to maintain control of his vehicle and make safe maneuvers around potential hazards. He became aware that a tow truck with flashing lights was in the process of loading another car onto its rollback, sitting partially within his current lane of traffic. Rather than switching to the left lane as Mr. Phillips did, defendant veered his vehicle to the right in an attempt to

pass the tow truck along the shoulder of the interstate. In so doing, he was unaware of what additional obstacles or people may be on the portion of the shoulder obstructed from his view by the tow truck. *See State v. Schmieder*, __ N.C. App. __, __, 827 S.E.2d 322, 328 (finding substantial evidence of malice where, in addition to extensive driving record, defendant "was driving above the speed limit, following too close to see around the cars in front of him, and passing across a double yellow line without using turn signals"), *disc. rev. dismissed*, 372 N.C. 711, 830 S.E.2d 832 (2019).

Defendant lost control of his vehicle and hit the guard rail, the tow truck, and Mr. Nolasco. He stopped briefly. The collision was so severe that it ripped the front bumper from his car, cracked the windshield, broke the headlights, and deployed the airbags. Despite the severity of the collision, defendant did not try to ascertain if anyone was harmed or attempt to render assistance of any sort. He drove away and washed his car, suggesting he was aware that he had hit someone and needed to remove blood and other evidence from his vehicle. *See State v. Tellez*, 200 N.C. App. 517, 525, 684 S.E.2d 733, 739 (2009) (finding substantial evidence of malice where, among other things, defendant fled scene of accident and took steps to avoid apprehension without rendering any assistance or checking on safety of others involved in accident). In his interactions with law enforcement officers at his home, he casually downplayed the severity of the collision despite being informed that he had killed someone.

The State published a redacted version of defendant's extensive driving record to the jury. In addition to six speed-related offenses, two willful refusals to submit to a chemical test for intoxicants, and two prior convictions for driving while license revoked, defendant's driving record revealed that his license was revoked for a DWI conviction at the time of the collision. The jury also heard testimony from a law enforcement officer that arrested defendant on suspicion of DWI on a prior occasion. Defendant had boasted to this officer that he "kn[e]w how to work [the system]" and avoid the consequences of his conduct behind the wheel. Furthermore, defendant's driving record revealed that he had been involved in five car accidents in the last twenty years, two of which caused personal injury. *Schmieder*, __ N.C. App. at __, 827 S.E.2d at 326 ("This Court has held evidence of a defendant's prior traffic-related convictions admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide. Likewise, whether defendant knew that he was driving with a suspended license tends to show that he was acting recklessly, which in turn tends to show malice.") (internal quotation marks, citations, and alterations omitted).

Thus, the jury could infer that defendant was aware of the risk to human life caused by his behavior on the road.

From all this evidence, the jury could infer that defendant was well aware of the dangers to human life posed by his pattern of behavior behind the wheel, and on this occasion once again engaged in dangerous driving with indifference to its consequences. Therefore, substantial evidence supported the element of malice by reckless disregard for human life. Accordingly, the trial court did not err in submitting the second-degree murder charge to the jury.

B. Motion to Suppress and Admission of Witness Testimony

[4] Defendant next argues that the trial court erred in denying his motion to suppress evidence obtained as fruits of the search of his two cellular phones. He further argues that the trial court erred in admitting the testimony of Ms. Haynes relating to his prior use of crack cocaine.

We have determined that substantial evidence supported defendant's second-degree murder conviction on the theory of failure to maintain lane control with malice. We have also reversed defendant's conviction for DWI. We agree with the concession of defendant's counsel at oral argument: the evidence obtained from his cell phones was used solely to prove his impairment at the time of the collision. Because we have vacated the driving while impaired conviction, we need not address defendant's arguments regarding the alleged error in the denial of defendant's motion to suppress and admission of evidence obtained as fruits of the search of his phones. Because this evidence is not relevant to the remaining charges, any error is harmless.

C. Jury Instruction on Accident

[5] Defendant's final argument is that the trial court erred by denying his request for a jury instruction on accident. Accepting defendant's position *arguendo*, we find this error harmless in light of other instructions given to the jury.

"The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another." *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731 (1995) (internal quotation marks and citation omitted). We have previously held that failure to give an instruction on accident in a trial court's instructions on murder is harmless error if the jury is instructed on lesser-included offenses that do not require a *mens rea* of intent. *Id.* at 343-44, 457 S.E.2d at 732. In *Riddick*, the trial court gave an instruction on involuntary manslaughter as a

lesser-included offense and the jury found the defendant guilty of first-degree murder. *Id.* Assuming *arguendo* that failure to give an accident instruction was error, we held that this error was harmless. *Id.* Because first-degree murder requires specific intent to kill, we reasoned that the jury's verdict expressed rejection of any notion that defendant's conduct was accidental. *Id.*

In the instant case, the trial court instructed the jury on second-degree murder and the lesser-included offenses of involuntary manslaughter and misdemeanor death by vehicle, noting that both lesser offenses involved killings that were unintentional. The jury chose to convict defendant of second-degree murder, which requires a *mens rea* of malice: that defendant intentionally performed "an inherently dangerous act or omission, done in . . . a reckless and wanton manner . . . manifest[ing] a mind utterly without regard for human life and social duty and deliberately bent on mischief." N.C. Gen. Stat. § 14-17(b)(1) (2019). As in *Riddick*, the jury's verdict rejects the notion that defendant's passing of the tow truck along the shoulder was unintentional. Therefore, any error in failing to give an instruction on accident was harmless.

III. Conclusion

For the foregoing reasons, we reverse defendant's convictions for DWI and felony death by vehicle due to insufficient evidence of impairment. Defendant's trial was otherwise free of prejudicial error.

REVERSED IN PART; NO ERROR IN PART.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
LUIS GUILLERMO NEIRA, DEFENDANT

No. COA19-653

Filed 3 March 2020

Motor Vehicles—speeding to elude arrest—eligibility for expunction—offenses involving impaired driving

The trial court erred as a matter of law in determining that defendant's conviction for speeding to elude arrest was ineligible for expunction as an "offense involving impaired driving" under N.C.G.S. § 15A-145.5(a)(8a). Even though defendant committed the offense while drunk and was simultaneously convicted of driving while impaired, the offense itself does not meet the controlling statutory definition of an "offense involving impaired driving."

Appeal by Defendant from order entered 13 June 2019 by Judge Vinston Rozier in Wake County Superior Court. Heard in the Court of Appeals 21 January 2020.

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

Anton M. Lebedev for the Defendant.

BROOK, Judge.

Luis Guillermo Neira ("Defendant") appeals from an order denying his petition for the expunction of his conviction over ten years ago of felonious speeding to elude arrest. Because we hold that the trial court erred in determining that Defendant was ineligible for an expunction, we reverse and remand.

I. Background

Defendant was charged 9 January 2007 by arrest warrant with felony speeding to elude arrest and by criminal citation with speeding and driving while impaired ("DWI") in Wake County District Court. Defendant's arrest warrant charged that Defendant

> operate[d] a motor vehicle on a higway [sic] while fleeing or attempting to elude [a law enforcement officer] who was in lawful perforance [sic] of his duties by

(1) speeding in excess of 15 mph over the speed limit[]

(2) reckless driving

(3) gross impairment of an impairing substance[.]

Defendant was indicted 6 March 2007 in Wake County District Court for felonious speeding to elude and DWI; the charges stemmed from the same events of 9 January 2007. Defendant was convicted by a jury on 12 September 2007 of felonious speeding to elude arrest and of DWI. The trial court found, as a mitigating factor, that "Defendant was significantly impaired by alcohol" when he committed the offense. The trial court sentenced Defendant to four to five months in the custody of the North Carolina Department of Corrections for the charge of speeding to elude. The trial court also sentenced Defendant to 120 days on the charge of impaired driving. It suspended that sentence upon Defendant's successful completion of 24 months' supervised probation.

Defendant filed a petition for expunction of the speeding to elude charge in Wake County Superior Court on 1 November 2018. As part of his petition, Defendant submitted affidavits of support from members of the community asserting that he has good character and a good reputation in the community. The State opposed expunction because the charge for "fleeing to elude [was filed under] the same file number as DWI. This is an offense 'involving impaired driving.' " The trial court denied Defendant's petition for expunction, finding he was ineligible for an expunction because the offense "involve[d] impaired driving per [N.C. Gen. Stat. §]15A-156.6(a)(8a)[.]"

II. Jurisdiction

Defendants who have been denied the expunction of a conviction have no appeal as of right. *See* N.C. Gen. Stat. § 15A-1444 (2019). However, Defendant filed a petition for writ of certiorari on 14 June 2019, which this Court allowed on 3 July 2019.

III. Analysis

Defendant contends that the lower court erroneously determined Defendant was ineligible for an expunction and, as a result, erroneously denied his expunction petition. We agree.

A. Standard of Review

Whether to grant an expunction is a discretionary determination. North Carolina General Statutes § 15A-145.5(c) provides that a person convicted of a nonviolent misdemeanor or nonviolent felony, but who

has no other misdemeanor or felony convictions other than traffic violations, may petition for expunction of that person's criminal record. N.C. Gen. Stat. § 15A-145.5(c) (2019). If the trial court finds the petitioner eligible for expunction, "it *may* order that such person be restored . . . to the status the person occupied before such arrest or indictment or information." *Id.* (emphasis added). Given its discretionary nature, the review of a denial of an expunction will generally be reviewed solely for an abuse of discretion. *See Little v. Penn Ventilator Co.*, 317 N.C. 206, 217-18, 345 S.E.2d 204, 211-12 (1986) ("may" indicates discretion).

Here, however, Defendant alleges that the trial court misapplied our statutes in holding that it had no choice but to deny Defendant's expunction petition. Alleged errors in statutory interpretation are errors of law that we review de novo. *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998); *see also State v. Cotton*, 318 N.C. 663, 668, 351 S.E.2d 277, 280 (1987) ("Where the trial court has discretion but erroneously fails to exercise it and rules as a matter of law, the prejudiced party is entitled to have the matter reconsidered."). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted). We therefore review the question of whether the trial court erroneously denied Defendant's expunction petition de novo.

B. Denial of Expunction Petition

Defendant contends that the trial court erred in concluding that the offense that Defendant sought to have removed from his criminal record "involve[d] impaired driving per [N.C. Gen. Stat. §]15A-156.6(a)(8a)" and, as such, was ineligible for expunction.

Under N.C. Gen. Stat. § 15A-145.5(a)(8a), a petitioner is ineligible for an expunction of a conviction for "[a]n offense involving impaired driving as defined in G.S. 20-4.01(24a)." N.C. Gen. Stat. § 15A-145.5(a)(8a) (2019). North Carolina General Statutes § 20-4.01(24a) states:

> Offense Involving Impaired Driving. – Any of the following offenses:
>
> a. Impaired driving under G.S. 20-138.1.
>
> b. Any offense set forth under G.S. 20-141.4 when conviction is based upon impaired driving or a substantially similar offense under previous law.

> c. First or second degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18 when conviction is based upon impaired driving or a substantially similar offense under previous law.
>
> d. An offense committed in another jurisdiction which prohibits substantially similar conduct prohibited by the offenses in this subsection.
>
> e. A repealed or superseded offense substantially similar to impaired driving, including offenses under former G.S. 20-138 or G.S. 20-139.
>
> f. Impaired driving in a commercial motor vehicle under G.S. 20-138.2, except that convictions of impaired driving under G.S. 20-138.1 and G.S. 20-138.2 arising out of the same transaction shall be considered a single conviction of an offense involving impaired driving for any purpose under this Chapter.
>
> g. Habitual impaired driving under G.S. 20-138.5.

N.C. Gen. Stat. § 20-4.01(24a) (2019).

Here, the lower court denied Defendant's petition for expunction, finding Defendant not "eligible for an expunction of the offense[] listed . . . because [the offense] involves impaired driving per 15A-145.5(a)(8a)." As a matter of fact, the felonious fleeing to elude conviction Defendant seeks to have expunged here involved impaired driving; it arose from the same incident resulting in his DWI conviction. But the statutory regime defines expunction eligibility in term of the *offense* in question. Felonious speeding to elude arrest is not an *offense* involving impaired driving per N.C. Gen. Stat. § 20-4.01(24a). And, while it may seem counterintuitive that an offense committed while driving impaired is not an offense "involving impaired driving," the statutory definition controls in this inquiry. *See In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974) (noting that where a statute "contains the definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be."). Therefore, the lower court's determination that Defendant was ineligible for an expunction of his fleeing to elude conviction was an error of law.

The State notes that even "a person with an eligible conviction is not entitled to expungement" because N.C. Gen. Stat. § 15A-145.5(c) grants trial courts the discretion to grant or deny expunctions sought by eligible petitioners. We agree with the State that whether to grant an expunction

is a discretionary matter, and that the trial court could have, in its discretion, denied Defendant's petition after considering, for example, that the sentencing court found Defendant was "significantly impaired by alcohol[.]" However, the trial court did not deny Defendant's petition as an exercise of discretion but rather because it found Defendant was ineligible for expunction; this determination reflects an error of law.

IV. Conclusion

Having concluded that the trial court made an error of law in determining that Defendant was ineligible for expunction of the offense of fleeing to elude arrest, we must reverse the denial of Defendant's petition for expunction and remand to the trial court for it to exercise its discretion in determining whether to grant the petition.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
CHARLES EDGAR PRATT, Defendant

No. COA19-435

Filed 3 March 2020

1. Criminal Law—jury instructions—requested defense—entrapment—predisposition to commit crime

In a prosecution for multiple drug trafficking offenses, defendant was not entitled to a jury instruction on the defense of entrapment where the evidence showed defendant's predisposition to commit the offenses for which he was charged. Although the State's confidential informant encouraged defendant to obtain illegal drugs in order to trade them for home repair work, defendant first learned of the drugs-for-work idea from a third party unaffiliated with the State, and it was defendant who then brought the idea to the attention of the State's informant.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

After defendant was convicted of multiple drug trafficking offenses, the trial court erred by entering a civil judgment against

defendant for attorney fees without affording defendant notice and an opportunity to be heard as required by N.C.G.S. § 7A-455.

Appeal by Defendant from judgments entered 2 May 2018 and 4 May 2018 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 22 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for Defendant-Appellant.

COLLINS, Judge.

Defendant Charles Edgar Pratt appeals from: (1) the 2 May 2018 criminal judgment entered upon his convictions for (a) trafficking in opium by transport, (b) trafficking in opium by possession, and (c) possession with intent to sell and/or deliver methadone; and (2) the 4 May 2018 civil judgment ordering that Defendant pay attorney's fees in connection with his defense. Defendant contends that the trial court erred by: (1) entering the criminal judgment after denying Defendant's request that the trial court instruct the jury on the affirmative defense of entrapment; and (2) entering the civil judgment without giving Defendant notice and an opportunity to be heard on the attorney's fees. We affirm in part and vacate and remand in part.

I. Background

Defendant was arrested on 7 August 2015 by the Onslow County Sheriff's Office on suspicion of drug trafficking. On 14 February 2017, Defendant was indicted by an Onslow County grand jury on the following charges: (1) trafficking in more than four but less than 14 grams of opium by manufacturing, in violation of N.C. Gen. Stat. § 90-95(h)(4); (2) trafficking in more than four but less than 14 grams of opium by transport, in violation of N.C. Gen. Stat. § 90-95(h)(4); (3) trafficking in more than four but less than 14 grams of opium by possession, in violation of N.C. Gen. Stat. § 90-95(h)(4); and (4) possession with intent to sell and deliver methadone, in violation of N.C. Gen. Stat. § 90-95(a)(1). Defendant pled not guilty on all counts, and gave notice that he would seek to assert the affirmative defense of entrapment.

The matter came on for trial on 30 April 2018. At the close of State's evidence, Defendant moved to dismiss the trafficking by manufacturing

count, which the State joined and the trial court allowed. At the charge conference, Defendant requested that the jury be instructed on entrapment, and the State objected. The trial court denied Defendant's request, stating that Defendant "failed to show that he was not otherwise willing to" commit the crimes with which he was charged.

On 2 May 2018, Defendant was convicted on the trafficking by transport, trafficking by possession, and possession with intent to sell and/or[1] deliver counts. The trial court entered judgment upon the convictions the same day, and sentenced Defendant to 70 to 93 months' imprisonment. The trial court also imposed court costs and fines of $51,072.50 and stated that Defendant would be required to reimburse the State for the costs of his defense "in an amount to be determined[,]" which the trial court ordered Defendant's trial counsel to calculate and submit an application for the next day. Defendant gave notice of appeal in open court.

Defendant's trial counsel filed a fee application with the trial court later that day, and on 4 May 2018, the trial court entered a civil judgment against Defendant for $3,300 of attorney's fees.

II. Appellate Jurisdiction

Defendant's oral notice of appeal in open court was sufficient to invoke this Court's jurisdiction to review the criminal judgment entered against him. N.C. Gen. Stat. § 7A-27(b)(1) (2018); N.C. R. App. P. 4(a)(1).

Defendant did not file a written notice of appeal from the civil judgment against him. However, Defendant has filed a petition for a writ of certiorari with this Court asking that we review the civil judgment, and we exercise our authority under North Carolina Rule of Appellate Procedure 21 to grant Defendant's petition and review that judgment as well.[2]

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1. Although Defendant was indicted for "possess[ion] with the intent to sell *and* deliver" methadone, and was thereafter convicted of "POSSESSION WITH INTENT TO SELL *AND/OR* DELIVER METHADONE" (emphases added), this Court has said that such convictions are proper. *See State v. Mercer*, 89 N.C. App. 714, 715-16, 367 S.E.2d 9, 10-11 (1988) ("It is proper for a jury to return a verdict of possession with intent to sell *or* deliver under [N.C. Gen. Stat. §] 90-95(a)(1). Such a verdict is no less proper when the indictment charges possession with intent to sell *and* deliver since the conjunctive 'and' is acceptable to specify the exact bases for the charge." (citations omitted)).

2. The State filed a motion to dismiss Defendant's appeal from the civil judgment based upon Defendant's failure to timely file written notice appeal therefrom. Because we grant Defendant's petition for a writ of certiorari and will review the civil judgment, we deny the State's motion to dismiss.

III. Discussion

Defendant contends that the trial court erred by (1) denying Defendant's request for an entrapment instruction and (2) entering the civil judgment without giving Defendant an opportunity to be heard on the attorney's fees. We address each argument in turn.

A. Criminal Judgment/Entrapment Instruction

[1] Our Supreme Court has said:

> Whether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law.
>
> The defense of entrapment consists of two elements:
>
> > (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime[; and]
> >
> > (2) [that] the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.
>
> In the absence of evidence tending to show *both* inducement by government agents *and* that the intention to commit the crime originated not in the mind of the defendant, but with the law enforcement officers, the question of entrapment has not been sufficiently raised to permit its submission to the jury.

State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 749-50 (1978) (internal quotation marks and citations omitted).

While the burden is on the defendant to "first present credible evidence tending to support a defense of entrapment before a trial court may submit the question to a jury[,]" *State v. Thompson*, 141 N.C. App. 698, 706, 543 S.E.2d 160, 165 (2001), where "the State's own evidence raises an inference of entrapment . . . the submission of the defense is obviously proper[.]" *State v. Neville*, 302 N.C. 623, 626, 276 S.E.2d 373, 375 (1981). "If defendant's evidence creates an issue of fact as to

entrapment, then the jury *must* be instructed on the defense of entrapment." *State v. Branham*, 153 N.C. App. 91, 100, 569 S.E.2d 24, 29 (2002) (emphasis added). "Whether the evidence, taken in the light most favorable to the defendant, is sufficient to require the trial court to instruct on a defense of entrapment is an issue of law that is determined by an appellate court de novo." *State v. Ott*, 236 N.C. App. 648, 651, 763 S.E.2d 530, 532 (2014).

When viewed in the light most favorable to Defendant, the record contains credible evidence tending to show that Defendant was persuaded by Jason Ford, a confidential informant working with the Onslow County Sheriff's Office, to commit the crimes for which Defendant was tried and convicted. The State conceded at the charge conference that Ford acted as a confidential informant for the State and, as discussed more fully below, Defendant testified that Ford encouraged Defendant to obtain methadone and exchange it for assistance with repairing the roof of Defendant's house. Accordingly, we conclude that Defendant met his burden of showing the first element of entrapment, i.e., "acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime[.]" *Walker*, 295 N.C. at 513, 246 S.E2d at 749-50.

However, our Supreme Court has made clear that a showing of such persuasion is insufficient standing alone to entitle a defendant to an entrapment instruction:

> The defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime *and when the origin of the criminal intent lies with the law enforcement agencies. We note that this is a two step test and a showing of trickery, fraud or deception by law enforcement officers alone will not support a claim of entrapment. The defendant must show that the trickery, fraud or deception was practiced upon one who entertained no prior criminal intent.*

State v. Hageman, 307 N.C. 1, 28, 296 S.E.2d 433, 449 (1982) (emphasis added) (internal quotation marks and citations omitted). Put another way, "[t]he defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials." *Thompson*, 141 N.C. App. at 706, 543 S.E.2d at 165. "Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where

the police merely afford the defendant an opportunity to commit the crime." *Hageman*, 307 N.C.at 31, 296 S.E.2d at 450.

Defendant's own testimony establishes that: (1) the criminal opportunity—that Defendant would obtain methadone and exchange it for assistance repairing the roof of his house—originated with a third party who is not alleged to have been working for or affiliated with the State; (2) Defendant told Ford about the opportunity; and (3) Ford thereafter encouraged Defendant to take advantage of the opportunity and offered to help facilitate.

At trial, Defendant testified as follows:

> Q. Go back to where it all started, and tell the Court about that.
>
> A. Month earlier, I had an opportunity -- well, messed up opportunity -- but **I had an opportunity through a buddy of my nephew's to do some work for some methadones**.
>
> Q. And when you say "to do some work for some methadones," are you saying that you were going to do work for methadones, or someone else was?
>
> A. Someone else was.
>
> Q. Okay. And what was the work?
>
> A. Frame my roof in, and do my roof.

Soon thereafter, during a colloquy with the trial court, Defendant said that "Mr. Ford is my buddy, or was my friend[,]" and not merely a "buddy of [Defendant's] nephew's." And regarding Ford's involvement in the drugs-for-work "opportunity[,]" Defendant testified as follows:

> Q. Okay. Was Mr. Pratt -- or, sorry -- was Mr. Ford aware of this?
>
> A. He should have been. He -- he did -- yes, he was.
>
> Q. All right. Did you and Mr. Ford ever have conversations about getting the roof done if you paid the methodones [sic] --
>
> A. Yeah.
>
> Q. -- or words to that effect?
>
> A. **He offered to help me, five methadones, telling me that it would be a good deal. He'd have his -- some of his -- he'd ask some of his friends to get some methadones**

> **and everything, and he'd help me get the amount that I needed so I could do that roof**.

Defendant's own testimony therefore indicates that it was an unidentified third party—a "buddy of [Defendant's] nephew's[,]" rather than Ford, who Defendant testified was his own friend—who proposed the drugs-for-work "opportunity" that was the genesis of the drug deal that ultimately led to Defendant's convictions, and that Ford merely "offered to help" facilitate the "opportunity" and opined that it was "a good deal[.]"

Our Supreme Court has made clear that a law-enforcement officer or agent does not entrap a defendant by offering to help facilitate a criminal scheme that the defendant already has in place. *See Hageman*, 307 N.C. at 29-30, 296 S.E.2d at 449 ("It is well settled that the defense of entrapment is not available to a defendant who has a predisposition to commit the crime independent of governmental inducement and influence. The fact that governmental officials merely afford opportunities or facilities for the commission of the offense is, standing alone, not enough to give rise to the defense of entrapment."). Indeed, the Court has stated that the second element of entrapment is concerned with whether "the crime is the product of the creative activity of the law enforcement authorities." *Walker*, 295 N.C. at 513, 246 S.E.2d at 750; *see also Hageman*, 307 N.C. at 28, 296 S.E.2d at 449 (entrapment defense only available "when the origin of the criminal intent lies with the law enforcement agencies"). As the criminal scheme in this case originated between Defendant and a third party, and the State's agent merely offered to assist in seeing that scheme realized, the crime was not the product of the creative activity of law enforcement.

Defendant urges in his brief on appeal that "it was Jason Ford's idea for [Defendant] to use methadone to pay for his roof being repaired[,]" because Ford "offered to help [Defendant] fix his roof in exchange for 'five methadones.' " But Defendant's position both lacks evidentiary support and contradicts his position below. First, Defendant's testimony that Ford "offered to help" him to take advantage of the "opportunity" to have his nephew's friend fix his roof negates the idea that Ford came up with the criminal scheme; plainly, one offers to "help" with a task that has already been conceived. And second, Defendant's characterization impermissibly contradicts his trial counsel's arguments at the charge conference that the drugs-for-work "opportunity" did not originate with Ford, who "heard this idea from someone else."[3] *See Weil v. Herring*,

3. At the charge conference, Defendant's trial counsel argued that Ford "heard that idea and also encouraged [Defendant] to do it," which in Defendant's trial counsel's

207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount").

Accordingly, the record demonstrates that Ford "merely afford[ed] the defendant an opportunity to commit the crime[s,]" which Defendant was predisposed to commit. *Hageman*, 307 N.C. at 31, 296 S.E.2d at 450. Our conclusion that Defendant was predisposed to commit the trafficking and possession offenses is buttressed by Defendant's testimony that he (1) sold Ford methadone one month prior to his arrest in this case and (2) set up the drug deal that led to his arrest entirely independently of Ford or any other agent of the State.

Because, in the light most favorable to Defendant, the record demonstrates that (1) neither the drugs-for-work "opportunity" nor the drug deal that Defendant pursued to take advantage thereof originated with Ford or any other agent of the State and (2) Defendant himself brought the criminal opportunity to Ford's attention, we conclude that Defendant has failed to demonstrate that "the origin of the criminal intent lies with the law enforcement agencies" and that he "entertained no prior criminal intent" for purposes of showing the second element of entrapment. *Id*. at 28, 296 S.E.2d at 449 (internal quotation marks, emphasis, and citation omitted). We accordingly conclude that Defendant was not entitled to an entrapment instruction, and that the trial court did not err by denying Defendant's request for the same.

B. Civil Judgment/Opportunity To Be Heard

[2] N.C. Gen. Stat. § 7A-455 allows the trial court to enter a civil judgment against a convicted indigent defendant for attorney's fees and costs. Before a judgment imposing attorney's fees may be entered against him, an indigent criminal defendant must be given notice and an opportunity to be heard thereupon. *State v. Jacobs*, 172 N.C. App. 220, 235-36, 616 S.E.2d 306, 316-17 (2005) (vacating civil judgment for attorney's fees because "there is no indication in the record that defendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed").

Defendant argues that he was not given an opportunity to be heard regarding the attorney's fees contemplated within the civil judgment entered against him, and the State concedes in its brief that, if we grant Defendant's petition for a writ of certiorari and reach the civil judgment

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understanding meant that the trial court "can strike out the first person"—i.e., the person who originated the criminal plan—for purposes of analyzing the second element of entrapment.

as we have, the trial court's failure to provide Defendant with an opportunity to be heard before the civil judgment was entered was error. We agree with the parties that the civil judgment must accordingly be set aside.

IV. Conclusion

Because we conclude that Defendant failed to make the requisite showing to be entitled to an instruction on the affirmative defense of entrapment, we discern no error in the criminal judgment, and affirm it. Because Defendant was not given an opportunity to be heard before the trial court entered the civil judgment against him, we vacate the civil judgment and remand to the trial court for a new hearing on attorney's fees.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

Judges ARROWOOD and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 3 March 2020)

CUEVAS v. DAVIS No. 19-631	Henderson (17CVD1195)	Dismissed
CUNNINGHAM v. PRINCIPLE LONG TERM CARE, INC. No. 18-1275	N.C. Industrial Commission (16-024794)	Vacated and Remanded
EST. OF SEYMOUR v. ORANGE CNTY. BD. OF EDUC. No. 19-334	Orange (18CVS1029)	Reversed
GORDON v. HANCOCK No. 19-712	Durham (16CVS4615)	Reversed and Remanded
IN RE S.T. No. 19-423	Wake (14JA304)	Affirmed
INDUS. HEMP MFG., LLC v. AM. HEMP SEED GENETIC, LLC No. 19-679	Wake (18CVS12556)	Affirmed
STATE v. ESKRIDGE No. 19-431	Cleveland (15CRS912)	No Error
STATE v. GRIFFIN No. 19-657	Beaufort (18CRS371) (18CRS372) (18CRS373) (18CRS374) (18CRS50013) (18CRS50014)	NO ERROR IN PART; DISMISSED IN PART
STATE v. GUARASCIO No. 19-486	Durham (18CRS1925)	Dismissed
STATE v. HODGES No. 19-266	Orange (17CRS52067)	No Error
STATE v. JOYNER No. 19-651	Pitt (77CRS581) (77CRS582) (77CRS726-27) (77CRS7711)	Affirmed
STATE v. LEMUS No. 19-582	Granville (18CRS050036)	Affirmed

STATE v. McKOY No. 18-599	Iredell (13CRS56739)	Dismissed
STATE v. POCKNETT No. 19-744	New Hanover (17CRS56263)	No Error
STATE v. SCOTT No. 19-607	Pitt (17CRS50855)	No Error
STATE v. WESTBROOK No. 19-331	Mecklenburg (15CRS244732-36) (16CRS14126) (17CRS236924)	NO ERROR IN PART; VACATED AND REMANDED IN PART; DISMISSED WITHOUT PREJUDICE IN PART
STATE v. WHITE No. 19-664	Duplin (17CRS51941-42)	NO PREJUDICIAL ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR
STATE v. WILSON No. 19-556	Forsyth (17CRS56929)	No Error
STATE v. YATES No. 19-348	Cabarrus (16CRS54344) (16CRS54463-66)	No error in part; vacated in part and remanded.

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