270 N.C. App.—No. 4 Pages 640-822

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 26, 2021

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ADMINISTRATIVE OFFICE OF THE COURTS

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McKinley Wooten

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

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

COURT OF APPEALS

CASES REPORTED

FILED 7 APRIL 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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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.

KAREN BAUMAN, Plaintiff
v.
PASQUOTANK COUNTY ABC BOARD, Defendant

No. COA19-613

Filed 7 April 2020

Adverse Possession—color of title—seven-year period—running against trust beneficiary where it ran against trustee

Where plaintiff filed a quiet title action against defendant over a tract of land held in trust for plaintiff's father, which defendant purchased from the trustee, the trial court properly entered judgment on the pleadings in defendant's favor on grounds that defendant adversely possessed the tract under color of title. Because the trustee sold the tract in her individual capacity rather than as trustee (where in fact, through a series of conveyances, she owned all land in the trust except for that tract), defendant's possession of the tract was adverse to the trust. Thus, the trial court properly applied the general rule that the seven-year period for adverse possession under color of title runs against the trust's beneficiaries whenever it runs against the trustee.

Appeal by Plaintiff from order entered 1 March 2019 by Judge Marvin K. Blount in Pasquotank County Superior Court. Heard in the Court of Appeals 4 February 2020.

Gregory E. Wills for Plaintiff-Appellant.

Roberson Haworth & Reese, PLLC, by Alan B. Powell, Christopher C. Finan, and Andrew D. Irby, for Defendant-Appellee.

INMAN, Judge.

Plaintiff Karen Bauman ("Plaintiff") appeals from an order granting judgment on the pleadings in favor of Defendant Pasquotank County ABC Board (the "Board"). After careful review, we affirm the trial court's order.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following:

Plaintiff's grandmother, Margaret Fletcher, owned considerable acreage in and around Elizabeth City, North Carolina. Ms. Fletcher

passed away in 1990, and her will provided that her real property holdings be placed in a testamentary trust for the benefit of her son—Plaintiff's father—Charles Fletcher. The will provided that the trust remainder would pass to Plaintiff at her father's death. The will named as trustee Emma Norris ("Emma"), who was not a family member at the time of Ms. Fletcher's death, and delegated to Emma full and sole discretion to sell the corpus for the benefit of Mr. Fletcher and to terminate the trust at any time.

The trustee-beneficiary relationship between Emma and Mr. Fletcher eventually took on a more romantic character and, in 1997, the two were married. On the day the marriage license was issued, Emma, in her capacity as trustee, conveyed the majority of the real property in the trust to Mr. Fletcher individually by general warranty deed. Nine days later, Emma arranged for Mr. Fletcher to execute a deed conveying that same property to her in her individual capacity.

The deeds did not transfer the entirety of the trust's real estate holdings because they failed to describe a .66 acre tract in Elizabeth City (the "Disputed Tract"). Thus, while the vast majority of the trust's corpus now belonged to Emma individually, the Disputed Tract remained within the trust.

Emma executed a deed purporting to transfer the Disputed Tract to the Board in exchange for $165,000 in March of 2000. The deed lists the grantor as Emma "and husband, [Mr.] Fletcher[,]" and both signed the deed individually without reference to the trust. Emma deposited the proceeds from the sale in a personal account under her name only. The Board built and operated an ABC store on the property.

In 2015, Mr. Fletcher and Plaintiff filed suit against Emma for undue influence, fraud, and breach of fiduciary duty in connection with her transfers of the real property out of the trust. Emma and Mr. Fletcher died while the suit was pending, and their respective estates were substituted in as parties. Those claims were ultimately resolved by summary judgment entered in favor of Plaintiff and her father's estate. In 2017, Plaintiff and the new trustee learned that the Disputed Tract had never been conveyed out of the trust and, on 8 January 2018, Plaintiff filed a quiet title action against the Board.

The Board responded to Plaintiff's complaint by asserting counterclaims for adverse possession under color of title and reformation, among others. The Board then moved for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure, while Plaintiff moved for partial summary judgment on all pertinent claims

discussed above. Both motions came on for hearing before the trial court on 20 December 2018.

The trial court requested that counsel first argue the Board's motion for judgment on the pleadings. Following those arguments, the trial court took the matter under advisement and concluded the hearing without proceeding to argument on Plaintiff's motion for summary judgment. And, although it had received evidentiary exhibits pertinent to Plaintiff's motion, the trial court announced that it would not consider those exhibits in deciding the Board's motion. The trial court ultimately entered judgment on the pleadings in favor of the Board. Plaintiff now appeals.

II. ANALYSIS

A. Standard of Review

Judgment on the pleadings is appropriate "where the pleadings fail to reveal any material issue of fact with only questions of law remaining." *Fisher v. Town of Nags Head*, 220 N.C. App. 478, 480, 725 S.E.2d 99, 102 (2012). Granting judgment on the pleadings "is not favored by law and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant." *Carpenter v. Carpenter*, 189 N.C. App. 755, 762, 659 S.E.2d 762, 767 (2008). "This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

B. Adverse Possession Against Trust Beneficiaries

Plaintiff concedes on appeal that the Board "has possessed the land in dispute under a claim of right for 17 years before her lawsuit was filed and that the . . . deed to the [Board] adequately described the property." She thus limits her argument to the "sole contention . . . that th[e] shortened period of adverse possession . . . [of] seven years under 'color of title' cannot be applied [to] the facts presented in this record." More specifically, Plaintiff asserts that the seven-year term for adverse possession under color of title cannot run against the beneficiaries of a trust when the trustee is responsible for creating color of title in the adverse possessor. She relies on our Supreme Court's decisions in *King v. Rhew*, 108 N.C. 696, 13 S.E. 174 (1891), *Deans v. Gay*, 132 N.C. 227, 43 S.E. 643 (1903), and *Cherry v. Power Co.*, 142 N.C. 404, 55 S.E. 287 (1906).

King, like this case, involved the purported transfer of real property held in a testamentary trust. 108 N.C. at 697, 13 S.E. at 174. There, the beneficiary of the trust and her husband—but not the trustee—executed a deed transferring the real property to a third party, and the purported grantee took possession of the land. *Id.* at 698, 13 S.E. at 174. When the beneficiary died, and more than seven years after the grantee took possession, several heirs with contingent remainder interests in the trust sued to recover the real property. *Id.* The Supreme Court held that the seven-year period for adverse possession under color of title had run against the heirs because the trustee of the trust could have brought a legal challenge as the true owner of the property against the grantee on behalf of the trust's beneficiaries. *Id.* at 699, 13 S.E. at 175. In other words, the Supreme Court followed the default rule that if the seven-year period for adverse possession under color of title has run against the trustee, then it has also run against the trust's beneficiaries. *Id.*[1] The Supreme Court, in applying the rule, distinguished a decision from Tennessee, *Parker v. Hall*, 39 Tenn. 641 (1859), that reached a different result under a different set of facts:

> [*Parker*] only decides that the [beneficiaries] are not barred where the trustee estops himself from suing by selling the property, and thus "uniting with the purchaser in a breach of the trust." The wrong, says the court, is to the [beneficiaries] and not to the trustee, and he "could not sue or represent them." It has never been insisted that the bar is effective against the [beneficiaries] except in cases where the trustee could have sued, as in this case, and failed to do so.

King, 108 N.C. at 704, 13 S.E. at 176-77.

The Supreme Court again addressed this general rule in *Deans*, when a testator's will established a testamentary trust for the benefit of her daughter and grandchildren and naming her daughter as trustee. 132 N.C. at 228, 43 S.E. at 644. Per the trust documents, the real property was to be held in the trust "for the benefit of [the daughter] and her children forever." *Id.* The daughter and her husband executed a mortgage deed encumbering the land held by the trust to a third party, who

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1. *King* was not the first decision from our Supreme Court adopting this rule. *See, e.g.*, *Clayton v. Cagle*, 97 N.C. 300, 303, 1 S.E. 523, 525 (1887) ("The interests of the [beneficiaries] are, as to strangers to the deed, under the protection of the trustee, and share the fate that befalls the legal estate by his inaction or indifference." (citations omitted)).

then conveyed that mortgage interest to the defendant. *Id.* The defendant later foreclosed on the property and ultimately purchased it. *Id.* 25 years later, the daughter and her children filed suit against the defendant seeking his removal. *Id.*

In resolving the case, the Supreme Court distinguished *King* and declined to apply the general rule on adverse possession found therein. *Id.* at 231, 43 S.E. at 645. The Supreme Court held that although a mortgage interest was validly conveyed by the trustee, that mortgage interest did not include a power of sale. *Id.* at 232, 43 S.E. at 645. And, seizing on the fact that the daughter had executed the mortgage deed as trustee, the Court held that the defendant's possession could not satisfy an adverse possession claim because the defendant took "possession under, and not adverse to the trustee." *Id.* at 231, 43 S.E. at 645. The Court continued:

> There is no ouster of the trustee; she puts him in. He takes the legal title subject to the trust, the declaration of which is in his chain of title, and therefore his possession cannot become adverse to the [beneficiaries]. In this respect the case is distinguished from the case of *King v. Rhew*[.]

Id.

The final case cited by Plaintiff, *Cherry*, involved a tract of real property held in trust for a woman with her husband acting as trustee. 142 N.C. at 408, 55 S.E. at 288. The wife possessed "an equitable estate for the joint life of her husband and herself and a contingent remainder in fee dependent upon her surviving him, with remainder over to her children dependent upon her predeceasing her husband." *Id.* at 409, 55 S.E. at 288. The trust document provided that the wife could transfer her interest only upon the consent of the trustee, but in any event could not "dispose of a larger estate than that vested in her." *Id.* The husband and wife ultimately conveyed the real property in the trust to a third party in 1868, with the husband executing the deed in his capacity as trustee. *Id.* at 407, 55 S.E. at 288. The property was eventually conveyed to the defendant, who continued possession of the property. *Id.* The wife died in 1885, and the husband died in 1903. *Id.* Their children eventually brought suit in 1906 to recover the property from the defendant. *Id.*

The Supreme Court first addressed what was transferred by the deed, and held that the husband had executed the conveyance in his capacity as trustee; however, it construed the deed as only conveying the wife's interest in the property, *i.e.*, "an equitable estate for the joint life of her husband and herself and a contingent remainder in fee dependent

upon her surviving him[.]" *Id.* at 409, 55 S.E. at 288. Thus, the defendant possessed the property under that equitable interest until her death and, because the trustee had agreed to the transfer of the equitable interest, there was no *adverse* possession during that time such that the rule utilized in *King* did not apply. *Id.* at 410, 55 S.E. at 289. Instead, the Supreme Court held that the period of adverse possession began when the wife predeceased her husband, as the wife's interest under the trust extinguished upon her death and the property should have devolved in fee simple to the children at that time. *Id.* In other words, because the trustee conveyed less than a fee simple interest in the property to the defendant and that conveyance was made under the terms of the trust, the defendant's possession was not adverse until the trust was extinguished and complete title passed to the children. *Id.*

In sum, the above cases stand for the following propositions: (1) if a trustee may sue to eject an adverse possessor, the time for adverse possession under color of title runs against the trust beneficiaries, *King*, 108 N.C. at 699, 13 S.E. at 175; and (2) if the trust possesses rights short of a fee simple interest in real estate and the trustee, acting in that capacity, transfers those rights to a third party, the term of adverse possession does not begin to run until the trust is extinguished and fee simple passes to the beneficiaries. *Deans*, 132 N.C. at 231, 43 S.E. at 645; *Cherry*, 142 N.C. at 410, 55 S.E. at 289.

C. Plaintiff's Appeal

The facts of this case do not lend themselves to a neat application of *King*, *Deans*, and *Cherry* based on the close reading discussed above.

Deans and *Cherry* are distinctly inapposite from this case. As demonstrated by the allegations of the complaint and supporting exhibits,[2] Emma did not convey the Disputed Tract to the Board in her capacity as trustee. Nor did she purport to bind the trust in any way. By contrast,

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2. A trial court may consider documents attached to a complaint in ruling on a motion for judgment on the pleadings without converting it into summary judgment because "documents . . . attached to and incorporated within a complaint . . . become part of the complaint." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (citation omitted). We also note that a dispositive motion aimed at the pleadings does not become a summary judgment motion where the parties submit extraneous documents so long as it is clear from the record that those materials were not considered by the trial court in reaching its ruling. *See Estate of Belk by and through Belk v. Boise Cascade Wood Products, L.L.C.*, ___ N.C. App. ___, ___, 824 S.E.2d 180, 182-83 (2019) (noting that a motion to dismiss under Rule 12(b)(6) is not converted to a summary judgment motion if the record shows the trial court limited its consideration to the pleadings).

in *Deans* and *Cherry*, the defendants took title from trustees under the terms of the respective trusts, so that possession during the life of each trust was not adverse. Given the unique and distinguishing facts of this case, we hold that the Board took possession of the Disputed Tract adverse to, instead of under, the trust.

The basis for tolling adverse possession against trust beneficiaries announced in *Parker* and echoed in *King* does not apply to this case. Plaintiff argues that the Board had no adverse possession during the term of the trust because Emma was estopped from suing to eject the Board under the theory of estoppel by deed. *See, e.g.*, *Crawley v. Stearns*, 194 N.C. 15, 16, 138 S.E. 403, 403 (1927) ("[A]s to his grantee the maker of a deed will not be heard to contradict it, or to deny its legal effect . . . , or to say that when the deed was made he had no title. As against his grantee he is estopped to assert any right or title in derogation of this deed."). However, estoppel by deed binds "only . . . parties and privies." *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 182, 158 S.E.2d 7, 15 (1967). Plaintiff offers no explanation of how Emma's conveyance *solely in her individual capacity* worked to estop her from challenging the conveyance *as trustee* on behalf of the trust.[3]

Further, and as pointed out by the Board, *Parker* and *King* discuss tolling the term of adverse possession against beneficiaries when the trustee breaches the trust by impermissibly exercising a power of sale and, in doing so, "unit[es] with the purchaser in a breach of the trust." *King*, 108 N.C. at 704, 13 S.E. 174 at 177 (quoting *Parker*, 39 Tenn. at 646). Here, however, Emma possessed the right as trustee to sell trust property in her sole discretion, and the judgment in the constructive

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3. We note that all trustees are empowered to bring suit "to enforce claims *of the trust*[,]" N.C. Gen. Stat. § 36C-8-811 (2019) (emphasis added), and, in light of the complaint's allegations and Plaintiff's insistence on appeal that Emma's conveyance to the Board was purely an individual act that in no way bound the trust, the facts do not compel the legal conclusion that Emma was legally estopped from asserting the trust's claim to oust the Board in her capacity as trustee. *See Hendricks v. Mendenhall*, 4 N.C. 371 (1816) (holding executors' endorsement of a deed in their capacity as executors of an estate did not estop them from challenging the deed in their individual capacities as heirs); *cf. Brooks v. Arthur*, 626 F.3d 194, 201 (4th Cir. 2010) ("The rule of differing capacities is generally understood to mean that defendants in their official and individual capacities are not in privity with one another for the purposes of res judicata."). *But see Dillingham v. Gardner*, 222 N.C. 79, 80, 21 S.E.2d 898, 899 (1942) (holding a party in his individual capacity was equitably estopped from contesting a judgment against him in his capacity as sole trustee when "the plaintiff himself has acted upon the assumption that the interest of the plaintiff in the former case and the interest of the plaintiff in the instant case were identical.").

fraud case against Emma as trustee did not invalidate the conveyance of the Disputed Tract to the Board.[4] Although the complaint contains a conclusory allegation that Emma and the Board "united in a breach of the . . . trust[,]" the complaint's allegations and supporting documents attached to it do not place this case within that language as used in *Parker* and *King*. *See cf.* Restatement 2d of Trusts, § 327, Comment I (1959) ("If the trustee in breach of trust transfers trust property to a third person . . . who *does not knowingly participate in the breach of trust*, and the trustee is barred by the Statute of Limitations or laches from maintaining a suit against the transferee, the beneficiary is also barred, . . . even though the beneficiary does not know of the breach of trust." (emphasis added)).

Given the above distinctions from *King*, *Deans*, and *Cherry*¸ and in light of the particular facts of this case, we hold that the trial court properly granted judgment on the pleadings in favor of the Board. The complaint and its attachments do not demonstrate facts falling within the exception to the general rule that adverse possession under color of title will run against the trust's beneficiaries. In adopting that rule, our Supreme Court believed it "so plain that it was deemed unnecessary to cite authorities, and the Court was content to leave the question on the manifest reason of the thing." *Carswell v. Creswell*, 217 N.C. 40, 46, 7 S.E.2d 58, 61 (1940) (citation and quotation marks omitted). In discussing the equity of its application, our Supreme Court declared:

> If by reason of neglect on the part of the trustees, [beneficiaries] lost the trust fund, their remedy is against the trustees, and if they are irresponsible, it is the misfortune of the [beneficiaries], growing out of the want of forethought on the part of the maker of the trust, under whom they claim.

Id. (citations and quotation marks omitted). In the face of these prevailing principles, the unique facts here do not plainly situate Plaintiff's claim inside the claimed exception to this rule.

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4. The summary judgment order in that case discusses fraud only in the context of Emma's transfers of real estate from the trust to her husband and from her husband to herself. That judgment concerned and voided only those two deeds, and Appellant acknowledges in her brief that "the pleadings and affidavits contained [in that case file] show that the issue of title ownership of the .66 acres in dispute in this case, was never litigated in that case."

III. CONCLUSION

For the foregoing reasons, and in light of the particular facts of this case, we affirm the trial court's order granting judgment on the pleadings in favor of the Board. Because we hold the entry of judgment on the pleadings was proper and it appears from the record that the trial court did not consider evidence outside the pleadings, we do not address Plaintiff's contention that the Board's motion was converted to one for summary judgment.

AFFIRMED.

Judges BRYANT and DILLON concur.

THELMA BONNER BOOTH, Widow and Administratrix of the ESTATE OF HENRY HUNTER BOOTH, JR., Deceased Employee, Plaintiff

v.

HACKNEY ACQUISITION COMPANY, f/k/a HACKNEY & SONS, INC., f/k/a HACKNEY & SONS (EAST), f/k/a J.A. HACKNEY & SONS, Employer, NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION on behalf of AMERICAN MUTUAL LIABILITY INSURANCE, Carrier, and on behalf of THE HOME INSURANCE COMPANY, Carrier, Defendants

No. COA19-602

Filed 7 April 2020

Workers' Compensation—North Carolina Insurance Guaranty Association Act—bar date and statute of repose—claims arising from latent occupational diseases

The Industrial Commission properly dismissed plaintiff's workers' compensation claims against the North Carolina Insurance Guaranty Association (reviewing claims on behalf of an insolvent, liquidated insurer) where those claims were barred under the statutory bar date and five-year statute of repose under the North Carolina Insurance Guaranty Association Act. On appeal, while acknowledging that the Act fails to accommodate claims (such as plaintiff's) arising from occupational diseases that do not manifest until after the bar date or statute of repose expire, the Court of Appeals held that—even under a liberal interpretation—the Act's plain language expressly barred plaintiff's claims and any attempt to ignore the Act's plain meaning would constitute improper judicial legislation.

Appeal by Plaintiff from Opinion and Award entered 30 April 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 December 2019.

Wallace & Graham, by Edward L. Pauley, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake, for defendant-appellee North Carolina Insurance Guaranty Association.

HAMPSON, Judge.

Factual and Procedural Background

Thelma Bonner Booth (Plaintiff) appeals from an Opinion and Award on Remand of the Full Commission of the North Carolina Industrial Commission (Commission) dismissing her claim against Hackney Acquisition Company, f/k/a Hackney & Sons, Inc., f/k/a Hackney & Sons (East), f/k/a J.A. Hackney & Sons, and the North Carolina Insurance Guaranty Association (NCIGA) on behalf of both American Mutual Liability Insurance and the Home Insurance Company (Defendants). Specifically, the Commission granted NCIGA's Motion to Dismiss on behalf of Home Insurance Company on the basis Plaintiff's claim was barred by the North Carolina Insurance Guaranty Association Act's (Guaranty Act) bar date provision and/or statute of repose.[1] N.C. Gen. Stat. §§ 58-48-35(a)(1), -100(a) (2019). The Record reflects the following relevant facts:

Henry Hunter Booth Jr. (Decedent) was employed as a welder by Hackney Acquisition Company (Hackney) from 1967 through 1989. Hackney held workers' compensation insurance through the Home Insurance Company, covering Decedent as an employee from 1988-1990. On 13 June 2003, a New Hampshire court declared Home Insurance Company insolvent in an Order for Liquidation. The New Hampshire court further ordered all claims against the company be filed by 13 June 2004.

1. Plaintiff's claim against NCIGA for coverage provided by the now-allegedly insolvent American Mutual Liability Insurance is not before this Court on appeal. Plaintiff makes no argument as to coverage by NCIGA for claims related to American Mutual Liability Insurance. Indeed, the Record is devoid of any indication of the status of this aspect of Plaintiff's claim. It is Plaintiff's contention, agreed to by NCIGA, the Commission's Opinion and Award is a final adjudication of all of Plaintiff's claims. Thus, it appears—certainly for purposes of this appeal—Plaintiff has abandoned any claim against NCIGA related to coverage provided by American Mutual Liability Insurance.

In June 2008, Decedent was diagnosed with lung cancer, from which he died on 27 April 2009. On 1 December 2009, Plaintiff filed a Form 18 "Notice of Accident to Employer and Claim of Employee, Representative, or Dependent" on behalf of Decedent for worker's compensation benefits with the Commission. Plaintiff's Form 18 was supported by a written opinion letter from Dr. Arthur L. Frank opining to a reasonable degree of medical certainty Decedent's lung cancer was caused by "his exposures to welding fumes in combination with his habit of cigarette smoking."

On 17 June 2013, NCIGA, on behalf of now-insolvent Home Insurance Company, filed a Form 61 "Denial of Workers' Compensation Claims." On 20 October 2015, NCIGA filed a Motion to Dismiss Plaintiff's claims, arguing claims related to Home Insurance Company were barred under the Guaranty Act's bar date provision—N.C. Gen. Stat. § 58-48-35(a)(1)—and the five-year statute of repose—N.C. Gen. Stat. § 58-48-100(a).

A Deputy Commissioner denied NCIGA's Motion on 2 December 2015. On 5 January 2016, NCIGA appealed to the Full Commission. Before the Full Commission, Plaintiff argued that interpreting the Guaranty Act's bar date and statute of repose to deny otherwise valid claims before they existed was a "violation of constitutional due process" under the North Carolina and United States Constitutions. On 7 December 2016, the Full Commission certified to this Court the questions of the constitutionality of the bar date provision and statute of repose under the North Carolina and United States Constitutions.

On 7 November 2017, this Court, in *Booth v. Hackney Acquisition Co.*, held both of these provisions of the Guaranty Act were constitutional under the State and Federal Constitutions and remanded the matter to the Full Commission for further proceedings. *See* 256 N.C. App. 181, 189, 807 S.E.2d 658, 664 (2017), *disc. rev. denied*, 370 N.C. 696, 811 S.E.2d 594 (2018).

On remand from the Court of Appeals, the Full Commission issued its Opinion and Award on 30 April 2019 granting the NCIGA's Motion to Dismiss, concluding Plaintiff's claim was barred by both the Guaranty Act's bar date and the statute of repose. Plaintiff timely appealed from this Opinion and Award.

Issue

The sole issue on appeal is whether this Court may interpret the Guaranty Act to include Plaintiff's claim even though the plain language of the bar date provision and statute of repose exclude coverage.

Analysis

Plaintiff contends strict application of the Guaranty Act's bar date provision and separately the statute of repose "def[y] the nature and purpose[ ]" of the Guaranty Act and the North Carolina Workers' Compensation Act because it bars claims, such as Decedent's, that arise due to occupational diseases discovered after the bar date and statute of repose, respectively, rendering recovery under the Guaranty Act impossible. Accordingly, Plaintiff raises an argument of statutory construction, which we review de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) ("Issues of statutory construction are questions of law, reviewed de novo on appeal.").

I. The North Carolina Insurance Guaranty Association

NCIGA is a "nonprofit, unincorporated legal entity" created by the General Assembly in the 1971 Guaranty Act to "provide a mechanism for the payment of *covered claims* under certain insurance policies . . . to avoid financial loss to claimants or policyholders because of the insolvency of an insurer . . . ." N.C. Gen. Stat. §§ 58-48-25, -5 (2019) (emphasis added); *An Act to Provide for the Establishment of the North Carolina Insurance Guaranty Association*, 1971 N.C. Sess. Law 670 (N.C. 1971). The Guaranty Act's coverage expanded in 1993 to include workers' compensation claims made against insolvent insurers. *See* 1991 N.C. Sess. Law 802, §§ 1, 13 (N.C. 1991). "Under the Guaranty Act, when an insurer becomes insolvent and is liquidated by the insurance regulator of this or another state, NCIGA becomes 'obligated' to pay for 'covered claims' on behalf of the insolvent insurer in accordance [S]ection 58-48-35." *N.C. Ins. Guar. Ass'n v. Board of Tr. of Guilford Technical Cmty. College*, 364 N.C. 102, 104, 691 S.E.2d 694, 696 (2010).

Here, for NCIGA to incur liability for Plaintiff's claim against the insolvent Home Insurance Company, the claim must be a "covered claim." *See* N.C. Gen. Stat. § 58-48-35(a)(1). A "covered claim" is

> an unpaid claim . . . in excess of fifty dollars ($50.00) and [that] arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event[.]

Id. § 58-48-20(4). A covered claim does "not include any claim filed with [NCIGA] after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer." *Id.* § 58-48-35(a)(1)(b).

Separately, the Guaranty Act's statute of repose provides an otherwise covered claim "not instituted against the insured of an insolvent insurer or [NCIGA], within five years after the date of entry of the order by a court of competent jurisdiction determining the insurer to be insolvent, shall thenceforth be barred forever as a claim against [NCIGA]." *Id.* § 58-48-100(a).

Here, NCIGA contends Plaintiff's claim is barred by the bar date in Section 58-48-35(a)(1), as both parties agree the bar date is 13 June 2004 and Plaintiff did not file her claim until 1 December 2009. Additionally, NCIGA contends even if Plaintiff's claim constitutes a covered claim notwithstanding the bar date, Plaintiff's claim is barred by the five-year statute of repose. Specifically, in order to meet the statute of repose, Plaintiff (or Decedent) would have had to file a claim within five years of the date the New Hampshire court declared Home Insurance Company to be insolvent. *Id.* § 58-48-100(a). Specifically, in this case, this would have required Plaintiff or Decedent to have filed a claim by or before 13 June 2008.

Plaintiff concedes strict application of the bar date and statute of repose would operate to bar her claims. However, Plaintiff argues this result is untenable because Decedent was not diagnosed with Lung Cancer until 23 June 2008 and did not pass away until 2009, rendering Plaintiff's ability to comply with the 13 June 2004 bar date an impossibility. Additionally, Plaintiff contends the five-year statute of repose date (13 June 2008) would also render it impossible for Plaintiff to pursue her claim for death benefits because Decedent did not pass away until 2009. Plaintiff, therefore, requests this Court to construe the bar date provision and statute of repose liberally, arguing this interpretation would be in line with the way our Courts interpret workers' compensation statutes. *See Chaisson v. Simpson*, 195 N.C. App. 463, 469, 673 S.E.2d 149, 155 (2009) (citation and quotation marks omitted) ("Our Supreme Court has repeatedly held that our Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents[.]").

Acknowledging, the Guaranty Act is not part of the statutory workers' compensation regime found in Chapter 97 of our General Statutes, and indeed covers a broader scope of claims involving insolvent insurance carriers, for purposes of argument we assume Plaintiff's position is the correct framework for our analysis. However, even applying the liberal rules of construction articulated by the North Carolina Supreme Court in interpreting workers' compensation statutes, we cannot reach

Plaintiff's desired result. Our Supreme Court has stated three primary guiding principles for interpreting our workers' compensation statutes.

> First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of judicial legislation. Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid ingrafting upon a law something that has been omitted, which it believes ought to have been embraced.

Ketchie v. Fieldcrest Cannon, Inc., 243 N.C. App. 324, 326-27, 777 S.E.2d 129, 131 (2015) (quotation marks omitted) (citing *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008)).

Plaintiff argues for a sweeping interpretation of the Guaranty Act, contending "the General Assembly decided to protect all employees and employers against insolvencies when it created the NCIGA." However, NCIGA is not the legal successor to the insolvent insurer. Rather, NCIGA's only obligation is to pay claims falling within the statutory definition of "covered claims." *See City of Greensboro v. Reserve Insurance Co.*, 70 N.C. App. 651, 664, 321 S.E.2d 232, 240 (1984) ("[A] guaranty association is not the legal successor of the insolvent insurer; rather, it is obligated to pay claims only to the extent of covered claims[.]"). Indeed, the plain language of the Guaranty Act expressly limits coverage only to "covered claims." N.C. Gen. Stat. § 58-48-5. Likewise, the five-year statute of repose is couched in equally clear language barring any claims not settled or instituted within five years of the date the insurer is judicially determined insolvent:

> Notwithstanding any other provision of law, a covered claim with respect to which settlement is not effected with the Association, or suit is not instituted against the insured of an insolvent insurer or the Association, within five years after the date of entry of the order by a court of competent jurisdiction determining the insurer to be

> insolvent, shall thenceforth be barred forever as a claim against the Association.

Id. § 58-48-100(a).

Thus, in order to reach the result for which Plaintiff advocates, this Court would be required to ignore the clearly expressed language of the bar date provision and statute of repose. N.C. Gen. Stat. §§ 58-48-35(a)(1)(b), -100(a). This we may not do even applying a liberal construction of the statute.

Plaintiff additionally argues, given the remedial purpose of the Guaranty Act, the General Assembly could not have intended to eliminate an entire class of claimants—those who suffer from a subsequently diagnosed latent occupational disease—from the scope of the Guaranty Act's coverage. Plaintiff reasons in enacting the bar date and statute of repose, the "General Assembly did not consider occupational disease claims where the insolvency can occur years before the diagnosis of the occupational disease." However, "it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation[.]" *Shaw*, 362 N.C. at 463, 665 S.E.2d at 453.

The statute of repose was added to the Guaranty Act in 1985. 1985 N.C. Sess. Law 613, § 9 (N.C. 1985). Four years later, in 1989, the bar date was added. *An Act to Amend the Postassessment Insurance Guaranty Association Act*, 1989 N.C. Sess. 206, § 3 (N.C. 1989). Then, the Guaranty Act was expanded to include coverage for covered workers' compensation claims beginning in 1993. *An Act Concerning the Workers' Compensation Security Funds*, 1991 N.C. Sess. Law 802, § 1 (N.C. 1991). Notably, in expanding the scope of coverage of the Guaranty Act, the General Assembly did not amend the bar date or statute of repose or make any accommodation for their application to workers' compensation claims (whether by injury or occupational disease). Under principles of statutory construction, we must presume the General Assembly was aware of the prior statutes establishing the bar date and statute of repose and elected not to make any alterations. *See Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (citation omitted) ("In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.").

Furthermore, by 1991, the Legislature was aware of the history of latent occupational diseases. *See Wilder v. Amatex Corp.*, 314 N.C. 550, 558, 336 S.E.2d 66, 71 (1985) (majority) ("Both the Court and the

legislature have long been cognizant of the difference between diseases on the one hand and other kinds of injury on the other from the standpoint of identifying legally relevant time periods. This is demonstrated by examination of some of the workers' compensation statutes and this Court's decisions interpreting them."); *Id.* at 563, 336 S.E.2d at 74 (Meyer, J., dissenting) ("I cannot concur in Part II of the majority opinion which concludes that our legislature did not intend that occupational disease cases . . . should be covered by the statute of repose . . . . With regard to legislative intent, the majority seems to ascribe to the members of the General Assembly an unawareness of developments in the legal arena in the early 1970s, when that statute was enacted, that I find naive. At that point in time, delayed manifestation injuries, together with the time-delayed product injuries, constituted a giant wave that was breaking upon the courts.").

Nevertheless, Plaintiff points to instances in which our Courts have avoided strict application of statutes time-barring workers' compensation claims—including for example applying equitable principles of estoppel[2]—and, indeed, points to *Wilder* in particular as a judicially created exception to a statute of repose. *Wilder*, 314 N.C. at 562, 336 S.E.2d at 73. In *Wilder*, our Supreme Court held a now-repealed workers' compensation statute of repose in question did not apply to occupational disease claims. *Id.* However, in *Wilder*, the Court specifically concluded "the legislature intended the statute to have no application to claims arising from disease." *Id.* The Court, looking at the bill's legislative history, identified a "deliberate omission of reference to disease as this statute made its way through the legislative process[.]" *Id.* Indeed, the Court tracked the language of the statute through the legislative process and noted "[a]s finally enacted the statute omitted all references to claims arising out of disease." *Id.*

Here, the Guaranty Act's bar date and statute of repose do not distinguish between types of claims. To the contrary, the triggering dates for purposes of both are established not by the occurrence of injury or disease but are tied solely to the insolvency of the insurance carrier. Without evidence of legislative intent otherwise, the case *sub judice* is not analogous to *Wilder*, and accordingly, "the judiciary should avoid ingrafting upon a law something that has been omitted which it believes ought to have been embraced." *Shaw*, 362 N.C. at 463, 665 S.E.2d at 453 (citations and quotation marks omitted).

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2. There is no argument in this case NCIGA should be estopped from asserting either the bar date or statute of repose.

Here, we agree with Plaintiff the statutory regime of the Guaranty Act as it currently exists fails to provide accommodation for latent occupational disease claims that may not manifest until expiration of the bar date and/or the statute of repose. However, Plaintiff's requested "remedy lies with the Legislature and not with the Court, whose business it is to administer and expound the law, not to make it." *Hawkins v. County of Randolph*, 5 N.C. 118, 121 (1806). Even attempting to construe the Guaranty Act liberally, as Plaintiff requests, "our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of 'judicial legislation.' " *Shaw*, 362 N.C. at 463, 665 S.E.2d at 453 (citation and quotation marks omitted). We are constrained by the plain language of the Guaranty Act and "should avoid ingrafting upon a law something that has been omitted[.] *Id.* Therefore, we decline to adopt Plaintiff's proffered reading of the Guaranty Act. The Commission, thus, correctly determined Plaintiff's claim against NCIGA arising from the insolvency of Home Insurance Company is barred under either the statutory bar date and/or the statute of repose.

Conclusion

Accordingly, for the foregoing reasons, the Order of the Full Commission is affirmed.

AFFIRMED.

Judges BRYANT and COLLINS concur.

CURLEE v. JOHNSON

[270 N.C. App. 657 (2020)]

RICKY CURLEE, A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM
KARINA BECERRA, INDIVIDUALLY, PLAINTIFF
v.
JOHN C. JOHNSON, III, STACEY TALADO AND RAYMOND CRAVEN, DEFENDANTS

No. COA19-701

Filed 7 April 2020

Animals—dog attack—negligence—landlord—prior knowledge of dangerous nature—summary judgment

In a negligence action asserted against a landlord whose tenants' dog attacked a child, the trial court properly granted summary judgment for the landlord where there was no admissible evidence showing the existence of a genuine issue of material fact that the landlord had prior knowledge of the dog's propensity for viciousness. Although a discovery request raised the question of whether the landlord was informed of a prior incident in which a different child was nicked by the dog, requiring medical attention, the tenants' unsworn answer in the affirmative and non-response, respectively, were not binding on the landlord, and the discovery responses were refuted by the tenants at deposition who specifically denied ever informing the landlord of the earlier incident.

Judge BROOK dissenting.

Appeal by plaintiffs from order entered 10 April 2019 by Judge Stephan R. Futrell in Johnston County Superior Court. Heard in the Court of Appeals 5 February 2020.

Law Office of Michael D. Maurer, P.A., by Michael D. Maurer, and Burton Law Firm, PLLC, by Jason M. Burton, for plaintiff-appellants.

Simpson Law, PLLC, by George Simpson, for defendant-appellee John C. Johnson.

TYSON, Judge.

Ricky Curlee and his mother, Karina Becerra, ("Plaintiffs") appeal from an order entered granting summary judgment in favor of John C. Johnson, III. We affirm.

I. Background

In 2000, Johnson leased a single-family residential property located at 132 Gower Circle ("the Property") in Garner to Raymond Craven and Stacie Talado. Following the expiration of the initial one-year lease term, Craven and Talado remained Johnson's tenants on a month-to-month basis. At the time of trial, Craven and Talado continued to maintain their tenancy at the Property with their minor children. Johnson collects the rental payment at the end of the driveway at the Property or at the Wal-Mart store where Talado acquires cashier's checks to pay the rent.

A. Johnny

Craven and Talado owned a dog they had named "Johnny." Johnny was given to them as a puppy by a friend. Craven believed Johnny's sire was a black lab and his dam was "like a collie-looking kind of dog."

B. 13 October 2014 Incident

Talado and Craven's children were playing with a neighbor's minor child, P.K. who is wholly unrelated to Plaintiffs, on 13 October 2014, when an incident occurred. P.K.'s mother had told her son not to play rough with Johnny, but she continued to allow P.K. and his sister to go over to and visit Craven and Talado's home with Johnny being present.

Talado described the incident: "[P.K.] was just playing with the dog, kind of wrestling with him, and [Johnny] nicked the top of his head." The "nick" occurred when P.K raised his head up while wrestling with Johnny. Talado described the "nick" as "about the size of my pinkie nail."

Chad Massengill, Johnston County's Animal Services ("JCAS") Director, affirmed the hospital did not document the incident in a report and the "nick" was minor. When investigating the October 2014 incident, Director Massengill classified Johnny's breed as a "Retriever, Labrador/Terrier, American Pit Bull." Director Massengill based this classification upon his visual identification.

Johnny was quarantined for ten days following the 13 October 2014 incident. JCAS determined Johnny did not satisfy the statutory definition of either a dangerous dog or even a potentially dangerous dog. No preventative measures of the Johnston County Ordinances relating to keeping animals were required of Talado and Craven. Johnny was returned to Talado and Craven following the expiration of the ten-day quarantine.

Director Massengill advised Talado and Craven of voluntary steps they could take to minimize the risks of keeping Johnny, including placing "Beware of Dog" signs on the property and keeping Johnny on a

leash anytime children were around. Nothing in the record shows JCAS notified Johnson of this 2014 incident, as the owner of the property.

C. 17 March 2015 Incident

Over six months later, seven-year-old Curlee visited the Property to play with Craven and Talado's children. Curlee lived on Gower Circle with his parents, Becerra and Ricky Curlee, Sr. During his visit, Talado and Craven had restrained Johnny with a leash on the Property.

Curlee walked within the radius of the leash restraining Johnny while walking home. While inside the radius, Curlee pointed a toy gun at Johnny's head. Johnny bit Curlee on his cheek and tore the tissue off. Plaintiff's complaint alleges Curlee suffered severe and permanent facial disfigurement and psychological injuries as a result of the incident. JCAS responded to the incident, took possession of Johnny, and followed Craven and Talado's instructions to euthanize the dog.

D. Procedural History

Plaintiffs initially sued Johnson only, and alleged negligence and strict liability on 5 July 2016. Following discovery, Johnson filed a Rule 56 motion for summary judgment under North Carolina Rules of Civil Procedure. Before this motion was heard, Plaintiffs voluntarily dismissed their complaint.

Ten days before the third anniversary of the incident, Plaintiffs re-filed their claims against Johnson and added Craven and Talado as co-defendants on 6 March 2018. Craven and Talado proceeded *pro se* and did not file answers to the complaint. Plaintiffs moved for and were granted an entry of default on 17 July 2018 solely against Craven and Talado.

Johnson denied liability, timely filed, and served his answer. Following discovery, Johnson filed his motion for summary judgment, which was granted by the trial court. Plaintiffs timely filed a notice of appeal.

II. Jurisdiction

Plaintiffs concede their appeal is interlocutory, but assert without immediate appeal their substantial rights will be impacted. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019). "Entry of judgment for fewer than all the defendants is not a final judgment and may not be appealed in the absence of certification pursuant to Rule 54(b) unless the entry of summary judgment affects a substantial right." *Camp v. Leonard*, 133 N.C. App. 554, 557, 515 S.E.2d 909, 912 (1999) (citations omitted).

> Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries.

Id. (citations and internal quotation marks omitted).

This Court has held a substantial right is affected when "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't of Transportation v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995) (citations omitted). Here, the same factual issues apply to all claims against the property owner and the tenants. Two trials may bring about inconsistent verdicts relating to Plaintiff's damages. We conclude Plaintiffs assert a substantial right to have the liability of all defendants be determined in one proceeding. *Id.*

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019). We address the merits of Plaintiff's interlocutory appeal.

III. Issue

Plaintiffs argue the trial court erred in granting summary judgment for Johnson.

IV. Summary Judgment

A. Standard of Review

"Summary judgment is appropriate 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 [a] party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation and internal quotation marks omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

On Defendant's motion for summary judgment in a negligence action:

> 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.*

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004) (emphasis supplied).

B. Analysis

This Court recently stated: "Summary judgment is seldom appropriate in a negligence action. A trial court should only grant such a motion where the plaintiff's forecast of evidence fails to support an essential element of the claim." *Hamby v. Thurman Timber Company, LLC*, __ N.C. App. __, __, 818 S.E.2d 318, 323 (2018) (citation omitted). However, this "forecast of evidence" must still demonstrate "specific facts, as opposed to allegations, showing [Plaintiff] can at least establish a *prima facie* case at trial." *Id.*; *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735.

In order to hold a landlord liable for injuries caused by a tenant's dog to a visitor, "a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party." *Stephens v. Covington*, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014) (citations omitted).

The crux of this case is whether Johnson had prior knowledge Johnny posed a danger. Specifically, within this context, "posed a danger" is not a generalized or amorphous standard, but ties directly back to our common-law standard for liability in dog-attack cases: "that the landlord had knowledge of the dogs' previous attacks and dangerous propensities." *Id.*

This standard is consistent with the common-law standard applicable to the owner or keeper of the animal requiring prior knowledge of the animal's vicious propensity as an essential element in dog-bite cases to establish liability. "[T]he gravamen of the cause of action is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness." *Holcomb v. Colonial Assoc., L.L.C.*, 358 N.C. 501, 511, 597 S.E.2d 710, 717 (2004) (alterations, citations, and quotation marks omitted).

Plaintiff argues the trial court erred in granting Johnson's motion for summary judgment, citing *Holcomb*, *supra* and *Stephens*, *supra*.

1. *Holcomb v. Colonial Associates*

In *Holcomb*, our Supreme Court examined "whether a landlord can be held liable for negligence when his tenant's dogs injure a third party." *Holcomb*, 358 N.C. at 503, 597 S.E.2d at 712. The landlord in *Holcomb*, was aware of two prior incidents involving the tenant's Rottweiler breed dogs, yet continued to allow the tenants to keep the dogs on the property. *Id.* at 504, 597 S.E.2d at 712-13.

A lease provision allowed the landlord to have the tenant "remove any pet . . . within forty-eight hours of written notification from the landlord that the pet, in the landlord's sole judgment, creates a nuisance or disturbance or is, in the landlord's opinion, undesirable." *Id.* at 503, S.E.2d at 712. Our Supreme Court stated the landlord with prior knowledge of multiple past attacks could be held liable because the express "lease provision [above] granted [the landlord] sufficient control to remove the danger posed by [the tenant]'s dogs." *Id.* at 508-09, 597 S.E.2d at 715.

2. Stephens v. Covington

In *Stephens v. Covington*, this Court applied rationale from *Holcomb* to a premises liability factual pattern that is analogous to the present case. *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255. The landlord lived in the same neighborhood as the property and knew the tenants owned a Rottweiler dog. *Id.* at 498, 754 S.E.2d at 254. The landlord and the tenants spoke with animal control officers regarding safety measures for keeping a Rottweiler. *Id.*

The tenants created a fenced-in gate and posted "No Trespassing" and "Beware of Dog" signs on the property. *Id.* The incident occurred within the dog's fenced-in pen. *Id.* Even with the multiple signs posted, and the breed of the dog, this Court held the evidence failed to show the defendant knew or should have known the Rottweiler had a dangerous propensity prior to the attack on the plaintiff. *Id.* at 501, 754 S.E.2d at 256. Johnson, unlike the defendant in *Stephens*, was not involved with the placing of the signs nor in arranging safety measures for Johnny.

3. Plaintiffs' Proffer of Forecasted Evidence

Plaintiffs contend direct and circumstantial evidence tends to show Johnson had prior knowledge of Johnny's alleged dangerous propensities. Plaintiff sent requests for admission of their prior knowledge of the dog's propensities to Talado, Craven, and Johnson. Craven failed

to respond to the requests for admission. The items contained in the request for admission sent to Craven are admitted as against him by operation of law. *See* N.C. R. Civ. P. 36(a).

Talado responded *pro se* to Plaintiffs' request for admission, but not under oath or before a notary. Request for admission twelve provides: "Please admit that you informed your landlord, John Johnson III ("landlord"), of the attack, shortly after the attack." Talado responded with a handwritten "yes."

Plaintiffs contend their proffered evidence creates a genuine issue of fact of whether Johnson knew or should have known of this prior 2014 incident. Plaintiffs contend their proffer shows, at a minimum, a disputed issue of fact exists of whether Talado personally informed Johnson of the incident. Additionally, Plaintiffs claim their proffered expert testimony established, even if Johnson had not been informed of the incident, the appearance of the "Beware of the Dog" signs constituted "a flashing red light to the landlord that they've got a potential problem there." Plaintiffs assert this imposed a duty upon Johnson to further investigate and inspect the premises to determine whether the dog posed a danger and take appropriate steps.

Taken in the light most favorable to the Plaintiffs and accepting the proffer as true, Plaintiffs' proffer fails to establish a genuine issue of material fact exists of whether Johnson knew or should have reasonably known of the October 2014 incident.

Plaintiffs' characterization of the prior October 2014 incident as an "attack" is not supported by the evidence in the record. To the contrary, the only evidence in the record is that the October 2014 incident occurred when another child was playing with the dog, and during the course of that play, the child picked his head up hitting the dog's mouth causing a "nick" on the child's head, resulting in a trip to the emergency room and a stitch. That incident does not raise a genuine issue of material fact of a "dog bite" to charge Johnson with prior notice.

Plaintiffs point to the JCAS case report that indicates it was for a "bite/exposure investigation" and the deposition testimony of Director Massengill, who had no independent recollection of the October 2014 incident, that the incident involved a "minor bite" because of the lack of any documentation concerning its severity.

From this, Plaintiffs contend a genuine issue of material fact exists of whether the prior incident should be classified as a dog-bite and/or attack sufficient to survive summary judgment. That characterization

conflicts with the first-hand evidence of the October 2014 incident, and Plaintiffs offer no evidence to the contrary. JCAS investigated the incident and determined the dog was not dangerous or potentially dangerous.

To reach the conclusion advocated by Plaintiffs—that the October 2014 incident was "an attack" such that knowledge of it would have put Johnson on notice of the dog's dangerous propensity—would require speculation or conjecture that the October 2014 incident was not as described in the uncontradicted evidence. Such speculation or conjecture is insufficient as a matter of law to withstand summary judgment. *See Estate of Tipton v. Delta Sigma Phi*, ___ N.C. App. ___, ___ 826 S.E.2d 226, 233, *disc. rev. denied*, 372 N.C. 703, 831 S.E.2d 76 (2019) ("[I]t is well established that 'a plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, summary judgment is proper.' " (*citing Hamby*, ___ N.C. App. at ___, 818 S.E.2d at 323 (internal citation and internal quotation marks omitted)). Plaintiffs failed to forecast evidence that Johnson knew or should have known the dog posed a danger prior to the March 2015 incident.

Plaintiffs assert Talado's *pro se* unsworn answer to an ambiguous question of an "attack" imputes Johnson's prior knowledge of the 13 October 2014 incident. This admittingly "ambiguous" interrogatory where Talado entered a hand written "yes" does not differentiate between the 13 October 2014 or the 17 March 2015 incidents. This notion is contrary to law.

A co-defendant's nonresponses or admissions are not binding upon another co-defendant, even at the summary judgment stage. *Barclays American v. Haywood*, 65 N.C. App. 387, 389, 308 S.E.2d 921, 923 (1983) ("Facts admitted by one defendant are not binding on a co-defendant."). The language of *Barclays* applies not only to purported admissions of liability, but also to facts. *Id.* "Admissions in the answer of one defendant are not competent evidence against a [co-defendant]." *Cambridge Homes of N.C. Ltd. P'ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 418, 670 S.E.2d 290, 299 (2008). During Talado and Craven's sworn depositions, both specifically denied informing Johnson of the earlier 13 October 2014 incident involving P.K.

Consistent with *Draughon*, this Court properly held: "If the moving party makes out a *prima facie* case that would entitle him to a directed verdict at trial, summary judgment will be granted unless the opposing party presents some competent evidence *that would be admissible at trial* and that shows that there is a genuine issue as to a material fact."

Insurance Co. v. Bank, 36 N.C. App. 18, 26, 244 S.E.2d 264, 268-69 (1978) (emphasis supplied) (citations omitted).

Under our precedents, a *pro se* and unsworn answer by a co-defendant to an ambiguous question in discovery, refuted at the sworn deposition, is not "competent evidence . . . [to show] . . . a genuine issue as to a material fact" of Johnson's prior knowledge. *Id.* The dissenting opinion purports to bolster the unsworn answer, as creating a factual issue, but fails to address its competency and admissibility under N.C. Gen. Stat. § 1A-1, Rule 56. "[M]aterial offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment." *Strickland v. Doe*, 156 N.C. App. 292, 295, 577 S.E.2d 124, 128 (2003) (citations omitted).

Additionally, the dissenting opinion improperly places the burden on the Defendants. *See Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735 ("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" (citation omitted)). Once Johnson showed Plaintiffs cannot introduce evidence of an essential element of their claim, Johnson's prior knowledge, the burden shifts to Plaintiffs to make a forecast of *prima facie* evidence, which shifts and relieves Defendant of any burden of production. *Id.*

Plaintiffs have not presented a genuine issue of material fact admissible at trial to satisfy the first prong of *Stephens* to prove "the landlord had knowledge that a tenant's dog posed a danger." *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255. A review of the admissible evidence presented at the motion hearing and before this Court points merely to Johnson's knowledge that his tenants owned a dog, while they were staying on the Property. A refuted, unsworn, *pro se* and inadmissible statement does not create a genuine issue of material fact. Plaintiffs' argument is overruled.

The cases of *Barclays* and *Volkman* provide no support for one defendant's inadmissible assertion against another defendant to create any genuine issue of material fact. *Barclays*, 65 N.C. App. at 389, 308 S.E.2d at 923; *Volkman v. DP Associates*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980). This assertion not only misinterprets the controlling bright line principle articulated in *Barclays*, but also ignores the posture of *Volkman*. *Barclays* holds "[f]acts admitted by one defendant are not binding on a co-defendant." *Barclays*, 65 N.C. App. at 389, 308 S.E.2d at 923.

The facts in *Volkman* involved interrogatories sent to a plaintiff by a defendant and the defendant's subsequent answers being used to support a defendant's motion for summary judgment. *Volkman*, 48 N.C. App. at 155-56, 268 S.E.2d at 266. Alternative theories for establishing a partnership, overlooked by the trial court in the summary judgment award, provided a justification to reverse and remand that case on appeal. *Id.* at 157, 268 S.E.2d at 267.

The instant case involves unsworn and *pro se* answers by co-defendants triggering the rule from *Barclays*. Ignoring or overlooking this distinction and disregarding the legitimate use and admissibility of discovery, does not create genuine issues of material fact, nor compel a contrary result.

The bright-line rule from *Draughon*, *Barclays*, and *Insurance Co.* shows the correctness of the trial court's judgment. No case is cited to support the admission of this unsworn and refuted answer into evidence or to allow this Court to deviate from *Barclays* and these precedents to reverse and remand.

Plaintiffs have not satisfied the first prong of *Stephens*. Plaintiffs' "forecast of evidence fails to support an essential element of the claim." *Hamby*, __ N.C. App. at __, 88 S.E.2d at 323. Summary judgment is proper. We do not need to address the remaining prong of *Stephens* or Plaintiffs' arguments of alleged "willful or wanton" conduct to award punitive damages.

V. Conclusion

Plaintiffs' "forecast of evidence" does not establish a genuine issue of material fact exists of their alleged negligence claims against Johnson or present a *prima facie* case. *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. The trial court's summary judgment order is affirmed. *It is so ordered.*

AFFIRMED.

Judge HAMPSON concurs.

Judge BROOK dissents with separate opinion.

BROOK, Judge, dissenting.

I respectfully dissent.

The question raised on this appeal is not whether Plaintiffs proved that Defendant John Johnson ("Johnson") knew that Stacie Talada ("Talada") and Raymond Craven's ("Craven") dog posed a danger; Plaintiffs will bear that burden at trial. The question is whether, viewing the facts in the light most favorable to Plaintiffs, Johnson carried his burden of showing there was no genuine issue of material fact as to whether he knew the dog posed a danger. I would hold he has not and, as such, would reverse the trial court's entry of summary judgment for Johnson.

I. Governing Law

A party moving for summary judgment has a hill to climb. First, summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019); *see also Volkman v. DP Associates*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980) (noting summary judgment improper where "[t]he answers to the [written discovery] indicate that there is at least a question as to" a disputed material fact). In evaluating such a motion, the evidence must be "viewed in the light most favorable to the non-moving party"—here, Plaintiffs. *Hardin v. KCS Int'l., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009). Indeed, "[e]ven the slightest doubt should be resolved in favor of the nonmovant." *Volkman*, 48 N.C. App. at 157, 268 S.E.2d at 267.[1]

Beyond these generally applicable rules, the hill becomes steeper in circumstances such as these. "Summary judgment is seldom appropriate in a negligence action." *Hamby v. Thurman Timber Co., LLC*, ___ N.C. App. ___, ___, 818 S.E.2d 318, 323 (2018) (internal marks and citation omitted). Additionally, "[s]ummary judgment is rarely proper when

1. The majority opinion notes that if the moving party shows entitlement to summary judgment, it "will be granted unless the opposing party presents some competent evidence that would be admissible at trial and that shows that there is a genuine issue as to a material fact." *Old S. Life Ins. Co. v. Bank of N.C., N.A.*, 36 N.C. App. 18, 26, 244 S.E.2d 264, 268-69 (1978). The next sentence in *Old* is equally pertinent here, however: "In addition, as is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged by means of a timely objection." *Id.*

a state of mind such as intent or knowledge is at issue." *Valdese Gen. Hosp., Inc. v. Burns*, 79 N.C. App. 163, 165, 339 S.E.2d 23, 25 (1986).

As articulated by the majority opinion, to succeed in a suit against a landlord for injuries caused by a tenant's dog to a third party, "a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party." *Stephens v. Covington*, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014). Again, Plaintiffs need not have proved each of these elements at this summary judgment stage—instead, Johnson must establish that they have not forecast evidence sufficient to create a genuine issue of material fact with regard to each element of the claim. Addressing each element pursuant to the applicable de novo standard of review, I would hold that Johnson has not met his burden of establishing there is no genuine issue of material fact.

II. Application

A. Knowledge of Dog's Dangerousness

Plaintiffs have not only alleged but presented evidence, through requests for admission and deposition testimony, that places Johnson's knowledge in dispute. I briefly review this evidence below.

Plaintiffs submitted requests for admissions to Talada and Craven. In response to these requests, Talada made certain handwritten admissions as follows:

> 9. Please admit that you owned a pit bull mix named Johnny which you kept on the property you leased . . .
>
> RESPONSE: never owned a pit bull
>
> 10. Please admit that this pit bull attacked ("the attack") and injured a child ("the child") on or about October 13, 2014 on the property.
>
> RESPONSE: never owned a pit bull
>
> 11. Please admit that the child bitten on your property required medical treatment following the attack.
>
> RESPONSE: yes
>
> 12. Please admit that you informed your landlord, John Johnson III ("landlord"), of the attack, shortly after the attack.

RESPONSE: yes

(Emphasis added.) Craven did not respond; he is therefore deemed to have admitted each request by operation of law. *See* N.C. Gen. Stat. § 1A-1, Rule 36(a) (2019) ("The matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection[.]"). Talada and Craven, in short, both admitted that they informed Johnson of the 13 October 2014 incident shortly after it occurred.

In addition to these admissions, Talada testified that Johnson would come to her house once a month to collect rent. Johnny would be in the yard during some of these visits. Both Craven and Talada testified at their depositions that they posted at least four "Beware of Dog" signs around their property after the October incident. Chad Massengill, Director of Johnston County Animal Services, testified at his deposition that such signs can be helpful in informing the public that a dog could be potentially dangerous. Plaintiffs' expert witness, Certified Property Manager Daryl Greenberg, testified that the appearance of such signs "is a flashing red light to the landlord that they've got a potential problem there . . . and that they have a duty to inspect and take additional steps under the area of safety." Johnson also admitted that he saw the signs and that he did not ask why they were posted when they had not been posted previously.

Considered as a whole and in the light most favorable to Plaintiffs, this evidence places Johnson's knowledge of the danger the dog posed at issue and meets the low bar of establishing a genuine issue of material fact. The narrative is easy enough to discern: Talada and Craven told Johnson about the 13 October 2014 incident involving Johnny biting another child, requiring that child to receive medical care; they further put up "Beware of Dog" signs on the property in response to this incident, a "flashing red light to the landlord that [he had] a potential problem"; Johnson saw these signs; and, in response to these developments, Johnson did nothing. Taken in the light most favorable to Plaintiffs, these facts are cleanly distinguishable from instances where our Court has found no genuine issue of material fact in this context and, as such, are sufficient to survive a motion for summary judgment. *See Stephens*, 232 N.C. App. at 501, 754 S.E.2d at 256 ("Defendant [landlord] could not have known that Rocky [the dog] was dangerous[.]").

The majority's response is to shade both the facts and law in favor of Defendant, which is inappropriate here given that he moved for summary judgment. I discuss three instances of such shading below.

First, the majority resolves ambiguities pertaining to the 13 October 2014 incident in favor of Defendant. Talada in her deposition testimony stated that the October incident between her dog and another child resulted in the child receiving "one or two stitches" from emergency medical personnel. Furthermore, the hospital reported the incident as a "minor bite" to Johnston County Animal Services. In contrast, the majority opinion characterizes the record as follows: "the only evidence . . . is that the October 2014 incident occurred when another child was playing with the dog, and during the course of that play, the child picked his head up hitting the dog's mouth causing a 'nick' on the child's head, resulting in a trip to the emergency room and a stitch." *Curlee*, *supra* at ___. This interpretation of the record evidence resolves ambiguities in a manner helpful to Defendant. But, at this point in the proceeding, our mandate is clear: to view the record evidence in the light most favorable to the Plaintiffs as they seek to establish notice of dangerousness.[2]

Second, the majority interprets ostensibly ambiguous requests for admission in a manner disadvantageous to Plaintiffs.

As an initial matter, the majority is incorrect that Plaintiffs' requests for admission do not distinguish between the 13 October 2014 and the 17 March 2015 incidents. In fact, the requests for admission are not ambiguous in the least. The requests at issue, as noted above, proceed as follows:

> 10. Please admit that this pit bull attacked (***"the attack"***) and injured a child ("the child") ***on or about October 13, 2014*** on the property.
>
> RESPONSE: never owned a pit bull
>
> 11. Please admit that the child bitten on your property required medical treatment following ***the attack***.
>
> RESPONSE: yes
>
> 12. Please admit that you informed your landlord, John Johnson III ("landlord"), of ***the attack***, shortly after the attack.

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2. The majority opinion further notes Johnston County Animal Services "determined Johnny did not satisfy the statutory definition of either a dangerous dog or even a potentially dangerous dog." *Curlee*, *supra* at ___. Left unsaid is that these statutory definitions did not factor into the inquiry in *Holcomb* or *Stephens* and that the definitions are quite exclusive, including only dogs who have killed or inflicted severe injury without provocation, "[i]nflicted a bite on a person that resulted in broken bones or disfiguring lacerations[,]" and the like. N.C. Gen. Stat. § 67-4.1 (2019).

RESPONSE: yes

(Emphasis added.) The requests plainly utilize the parenthetical to define the 13 October 2014 incident as "the attack" and then refer back to that incident using that same language in the requests for admission that immediately follow. Even without guidance from the parenthetical, the most straightforward reading of the above is that requests 11 and 12 are referring to the event introduced in request 10. This straightforward interpretation is reinforced when reviewing the requests for admission as a whole. The 17 March 2015 "attack" is the only other "attack" referenced therein, and it is not introduced until request 17. And, when it is referenced, it is defined parenthetically as the "second attack[.]" Hence, it is clear that the "attack" referenced in requests 11 and 12 is that of 13 October 2014.

But even accepting request 12 as ambiguous does not support the grant of summary judgment. At this stage in the proceedings, "[e]ven the slightest doubt should be resolved in favor of the nonmovant." *Volkman*, 48 N.C. App. at 157, 268 S.E.2d at 267; *see also Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 164, 336 S.E.2d 699, 700 (1985) ("If different material conclusions can be drawn from the evidence, then summary judgment should be denied."). Accordingly, the affirmative responses from Talada and Craven to request 12 here must be interpreted as evidence that Johnson knew of the 13 October 2014 incident shortly after it occurred.

Finally, Johnson and the majority opinion also suggest that the admissions from Talada and Craven cannot raise a genuine issue of material fact. But the rules are clear: summary judgment is only appropriate where "pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

The majority opinion cites *Cambridge Homes of N.C. Ltd. P'ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 670 S.E.2d 290 (2008), and *Barclays American Financial, Inc. v. Haywood*, 65 N.C. App. 387, 308 S.E.2d 921 (1983), as dooming Plaintiffs' appeal; however, a brief review indicates this is not so.[3] Both cases are cited, at bottom, for the proposition that "[f]acts admitted by one defendant are not binding on a

3. In addition to the below reason that these cases do not stand for the proposition asserted, *Cambridg*e is inapposite here as it deals with a far different circumstance: whether to reverse the denial of a motion to dismiss for lack of personal jurisdiction. 194 N.C. App. at 419, 670 S.E.2d at 299.

co-defendant." *Cambridge*, 194 N.C. App. at 418, 670 S.E.2d at 299 (quoting *Barclays*, 65 N.C. App. at 389, 308 S.E.2d at 923). *Barclays* illustrates this central point well. There, the trial court granted plaintiff summary judgment against one defendant based on another defendant's admission via failure to respond to requests for admission. *Barclays*, 65 N.C. App. at 389, 308 S.E.2d at 923. While this admission made summary judgment proper against the defendant who failed to respond, our court reversed the entry of summary judgment against the other defendant the plaintiff sought to bind. *Id.*

But just because one defendant's admission is not all powerful with the effect of resolving all issues as to another defendant does not mean it is inert. As in *Barclays* and *Volkman*, in the current controversy, "[t]he answers to the [written discovery] indicate[d] that there [wa]s at least a question as to" the key issue. 48 N.C. App. at 157, 268 S.E.2d at 267. And, here, as there, summary judgment is thus inappropriate.[4]

B. Control Over Dog's Presence on the Property

I turn briefly to the second element Plaintiffs must ultimately prove: "that [Johnson] had control over the dangerous dog's presence on the property[.]" *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255.

Our Supreme Court in *Holcomb v. Colonial Assocs.*, 358 N.C. 501, 597 S.E.2d 710 (2004), articulated the relevant inquiry as whether the landlord had "sufficient control to remove the danger posed by" a tenant's dog. *Id.* at 508-09, 597 S.E.2d at 715. The *Holcomb* Court found that the tenants' lease clearly granted the landlord the right to remove any pet undesirable to the landlord. *Id.* at 508-09, 597 S.E.2d at 715. The Supreme Court cited several cases from other jurisdictions for the proposition that a written lease provision does not provide the only manner by which a landlord can exercise control over a tenant's dog. *Id.* (*Uccello v. Laudenslayer*, 44 Cal. App.3d 504, 514, 118 Cal. Rptr. 741, 747 (1975) (holding the landowner had control via the power "to order his tenant to cease harboring the dog under pain of having the tenancy terminated");

4. The majority also argues these admissions were not properly considered at summary judgment because they were unsworn, an argument not made by Johnson at the trial court or before our Court. This argument has been waived because it was not raised below and, as such, is not properly before us. *See Thelen v. Thelen*, 53 N.C. App. 684, 689, 281 S.E.2d 737, 740 (1981). Further, assuming arguendo that the majority opinion is correct as to admissibility, "as is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged by means of a timely objection." *Old S. Life Ins. Co.*, 36 N.C. App. at 26, 244 S.E.2d at 269.

Shields v. Wagman, 350 Md. 666, 684, 714 A.2d 881, 889-90 (1998) (holding the landowner could exercise control over his tenant's dog by refusing to renew a month-to-month lease agreement)).

Here, Johnson's deposition testimony indicated the following regarding the control he retains over his tenants' dogs:

> [JOHNSON]: My policy is if, it can't be a nuisance to any of the tenants or property owners, it can't destroy my property of course and be, you know, dangerous to anybody else in the area. What I do is if someone, if I get a phone call, generally it's from an adjoining one or someone close by saying hey, I have got a problem with so and so and so and so, this is the problem. I go to that tenant and I say okay, I have been notified there is a problem, this is what they have said. Let's just use an example of a nuisance, a dog, barking dog. ***If they can't stop the dog from barking, they're going to have to move or get rid of the dog and I have had many people move***.
>
> Q: Because of a barking dog?
>
> [JOHNSON]: Because they can't figure it out. You figure it out. If you don't figure it out, I'll figure it out.
>
> Q: So, you have the power to kick them out of there if they don't stick to your policy even with a barking dog?
>
> [JOHNSON]: If that dog is a nuisance to other tenants and property owners, sure. Sure.

(Emphasis added.) He further testified that he has before exercised control over tenants' dogs by evicting tenants over an issue with an animal and that he has required tenants to get rid of dogs.

Accordingly, Johnson has not met his burden of establishing that no genuine issue of material fact exists regarding his control over Talada and Craven's dog.

III. Conclusion

Were I a juror and defense counsel made the majority's arguments, I might well be persuaded. But we are not there yet. At this stage in the proceedings, the majority opinion steps beyond our limited role in a fashion at odds with our precedent's teaching that "[s]ummary judgment is an extremely drastic remedy that should be awarded only where the truth is quite clear." *Volkman*, 48 N.C. App. at 157, 268 S.E.2d at 267.

Taking the facts in the light most favorable to Plaintiffs, as is our duty here, there is no such clarity as to the matter at issue: whether Johnson knew the dog posed a danger. I respectfully dissent and would reverse the entry of summary judgment.

WANDA GRAHAM AND GEORGE L. GRAHAM, PLAINTIFFS
v.
STEPHANIE JONES, DEFENDANT

No. COA19-511

Filed 7 April 2020

1. Appeal and Error—appellate jurisdiction—custody action—permanent versus temporary custody order

An order granting a mother full physical and legal custody of her minor child while granting visitation to the child's grandparents was immediately appealable as a final order—even though the order resulted from a temporary custody hearing—because it permanently adjudicated the parties' custody rights (thus, it was not entered "without prejudice to either party"), did not state a reconvening time, and determined all issues in the custody action. At any rate, interlocutory jurisdiction would have also been appropriate because the order implicated a substantial right: the mother's constitutionally protected interest in the custody, care, and control of her child.

2. Child Custody and Support—custody action—between mother and grandparents—"best interests of the child" analysis—improper

In a custody dispute between a mother and her minor child's grandparents, where the mother's natural and legal right to custody as the child's only living parent remained intact when the grandparents filed the action, and where the trial court determined that the mother was a fit parent and had not acted inconsistently with her constitutionally protected status as a parent, the trial court erred in applying the "best interests of the child" standard to award the grandparents visitation with the child after awarding full custody to the mother. In doing so, the trial court violated the Due Process Clause of the Fourteenth Amendment of the Constitution, which protects parents' fundamental right to make decisions regarding their children's association with third parties.

GRAHAM v. JONES

[270 N.C. App. 674 (2020)]

Appeal by Defendant from order entered 16 November 2018 by Judge Larry D. Brown, Jr., in Alamance County District Court. Heard in the Court of Appeals 4 December 2019.

Fairman Family Law, by Kelly Fairman, for Plaintiffs-Appellees.

North Carolina Central University School of Law Clinical Legal Education Program, by Nakia C. Davis, Esq., for Defendant- Appellant.

COLLINS, Judge.

Defendant appeals a custody order granting her full physical and legal custody, care, and control of her minor child but granting the minor child's grandparents visitation. Defendant argues that the trial court erred by proceeding with a best interest of the child analysis after granting Defendant full physical and legal custody, care, and control of the child and, based on this analysis, erred by granting Plaintiffs visitation with the child. For the reasons stated below, we reverse the trial court's order and dismiss the custody action.

I. Factual Background

Wanda Graham and George L. Graham ("Plaintiffs") are the paternal grandparents[1] of Abby.[2] Abby was born on 8 February 2018 to Plaintiffs' son, Christopher Tice Butler, Jr. ("Christopher"), and Stephanie Jones ("Defendant"). Christopher, Defendant, and Abby lived with Plaintiffs in Snow Camp, North Carolina from the date of Abby's birth until July 2018. In July and August 2018, Christopher, Defendant, and Abby lived together in a rental apartment in North Carolina with Defendant's two other minor children.

By Domestic Violence Protective Order ("DVPO") entered 13 August 2018, Defendant was found to have attempted to cause Christopher bodily injury on 6 August 2018 by slapping him while he was holding Abby. The DVPO prohibited Defendant from having contact with Christopher, granted Christopher temporary custody of Abby, and granted Defendant visitation with Abby for one hour per week. The DVPO was to expire by its terms on 13 August 2019. Christopher and Abby moved back into

1. George L. Graham is Abby's paternal step-grandfather.

2. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 3.1(b).

the Plaintiffs' home. Defendant moved to Texas and did not exercise her visitation with Abby.

On 30 September 2018, Christopher passed away in an automobile accident. Abby remained in Plaintiffs' home. On 2 October 2018, Plaintiffs filed a complaint pursuant to N.C. Gen. Stat. § 50-13.1(a) seeking "full legal custody of the minor child" and "primary physical custody of the minor child on an emergency, temporary, and permanent basis." Plaintiffs alleged, inter alia, "Defendant stated she will be in the jurisdiction on Thursday, October 4, 2018, to retrieve the child and remove her from the jurisdiction"; "Defendant abandoned the minor child and moved to Floresville, TX in August 2018 with no notice and has had minimal contact with Plaintiff[s] regarding the welfare of the minor child"; "Defendant suffers from severe depression and bi-polar disorder, for which she does not take her prescribed medication"; "Defendant also cuts herself as a side effect of her mental disorders"; "Defendant has been hospitalized in the psychiatric unit at Alamance Regional Medical Center due to her mental disorders"; and "Defendant has acted inconsistently with her constitutionally-protected status and custody should be granted to the Plaintiffs." On 3 October 2018, the trial court entered an Ex Parte Order granting Plaintiffs custody of Abby, prohibiting Defendant from removing Abby from Plaintiffs' custody, and setting a temporary custody hearing for 24 October 2018. On 15 October 2018, Defendant filed an answer to the complaint.

On 24 October 2018, the parties appeared for the temporary custody hearing in Alamance County District Court. After the hearing, the trial court took the matter under advisement. On 26 October 2018, the trial court gave an oral ruling from the bench. The oral ruling was reduced to writing and entered on 16 November 2018 ("Custody Order"). In the Custody Order, the trial court made sixty-three findings of fact and, based upon those findings, concluded, inter alia:

> 6. That the court is not considering the best interest of the minor child standard at this posture of the case.
>
> 7. Defendant is not an unfit parent.
>
> 8. Defendant has not abandoned her daughter.
>
> 9. That the minor child has not been neglected by Defendant.
>
> 10. That Defendant has not acted in a manner inconsistent with her constitutionally protected right as a parent.

11. That Defendant is a fit and proper person to have full physical and legal custody of the minor child.

12. That it is in the best interest of the minor child to place full physical and legal custody with Defendant, Stephanie Jones.

13. That Plaintiffs are fit and proper person[s] to have reasonable visitation with the minor child.

14. That the Court has the authority to grant Plaintiffs reasonable visitation.

15. That it is in the best interest of the minor child to have reasonable visitation with Plaintiffs, Wanda Graham and George Graham.

The trial court thus ordered that Defendant have "full physical, legal, custody care and control" of Abby, but that Plaintiffs should have visitation with Abby, who was approximately nine months old at the time, as follows: (a) On the third weekend of every month Plaintiffs have unsupervised visitation from Friday at 6 a.m. to Monday at 6 a.m. The parties shall exchange the child at a neutral location half–way between Plaintiffs' home in North Carolina and Defendant's home, which was in Texas at that time; (b) Plaintiffs are permitted to video chat with Abby four times per week, every Monday, Thursday, Friday, and Sunday, from 6:00 p.m. to 7:00 p.m.; and (c) Plaintiffs have unsupervised visitation with Abby for a period of two uninterrupted weeks during the summer. "The weeks shall be defined as 6:00[]a.m. on Monday to 6:00[]a.m. on Monday (14 days)."

On 13 December 2018, Defendant filed notice of appeal.

II. Discussion

Defendant argues on appeal that the Custody Order is immediately appealable as it is a permanent order. In the alternative, Defendant argues that the Custody Order is immediately appealable as it affects a substantial right. Defendant further argues that the trial court erred by proceeding with a best interest analysis after granting Defendant full physical and legal custody, care, and control of Abby, and erred by granting Plaintiffs visitation with Abby.

A. Immediate Appellate Review

[1] We first determine whether this appeal is properly before us. Defendant argues that the Custody Order is immediately appealable

because it (1) is a permanent custody order and (2) affects a substantial right.

1. Permanent Custody Order

A party is generally not entitled to appeal from a temporary custody order while a permanent custody order is immediately appealable. *Brown v. Swarn*, 257 N.C. App. 418, 422-23, 810 S.E.2d 237, 240 (2018) (citation omitted). "[A] temporary or interlocutory custody order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree." *Smith v. Barbour*, 195 N.C. App. 244, 250, 671 S.E.2d 578, 583 (2009) (internal quotation marks and citation omitted). "[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Id.* at 249, 671 S.E.2d at 582 (citation omitted).

A "temporary custody order[] establish[es] a party's right to custody of a child pending the resolution of a claim for permanent custody—that is, pending the issuance of a permanent custody order." *Regan v. Smith*, 131 N.C. App. 851, 852–53, 509 S.E.2d 452, 454 (1998) (citations omitted). In contrast, "[a] permanent custody order establishes a party's present right to custody of a child and that party's right to retain custody indefinitely. . . ." *Id.* "Generally, a child custody order is temporary if . . . '(1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings [is] reasonably brief[,] or (3) the order does not determine all the issues.' " *Kanellos v. Kanellos*, 251 N.C. App. 149, 153, 795 S.E.2d 225, 229 (2016) (quoting *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003)). If the order "does not meet any of these criteria, it is permanent." *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011) (citation omitted). "Further, it is the satisfaction of these criteria, or lack thereof, and not any designation by a district court of an order as temporary or permanent which controls." *Kanellos*, 251 N.C. App. at 153, 795 S.E.2d at 229 (citations omitted).

a. Prejudice

"An order is without prejudice if it is entered without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." *Marsh v. Marsh*, 816 S.E.2d 529, 532 (N.C. Ct. App. 2018) (quotation marks, brackets, and citation omitted). The Custody Order before us "granted full physical, legal, custody care and control" of Abby to Defendant, with visitation to Plaintiffs. Unlike the Ex Parte Order entered in this case which expressly stated, "This is a temporary order and not prejudicial to either party[,]"the Custody Order does not

contain express language indicating that it was entered without prejudice to either party. *See*, *i.e.*, *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (holding the custody order was entered "without prejudice" because it contained express language stating as such). Moreover, it is not clear from the plain language of the Custody Order that it was entered without the loss of rights, or otherwise prejudicial to the legal rights of either party. *See Marsh*, 816 S.E.2d at 532 ("Even though the trial court did not include express language in the order stating it was entered 'without prejudice,' it is clear from the plain language of the order that it was entered without the loss of rights, or otherwise prejudicial to the legal rights of either party."). To the contrary, the plain language of the Custody Order indicates it was permanently adjudicating the parties' rights with respect to Abby's custody.

b. Reconvening Time

The Custody Order does not state a reconvening time. *Kanellos*, 251 N.C. App. at 153, 795 S.E.2d at 229. Moreover, no language in the Custody Order indicates that any further reconvening time is contemplated. The Custody Order grants "full physical, legal, custody care and control" of Abby to Defendant and sets forth a visitation schedule for Plaintiffs for the indefinite future. Furthermore, the Custody Order encompasses future conduct, including "[t]hat the parties may mutually agree to additional visitation[,]" and that Defendant shall continue her mental health treatment and prescription medications.

c. Determination of Issues

As the trial court found in the Custody Order, "the question in this matter is a question of whether the parent [Defendant] is unfit or acted in a manner that is inconsistent with her constitutionally protected right as a parent." The trial court made extensive findings of fact, addressing, inter alia, Defendant's mental health, drug addiction, ability to provide financial support for Abby, the nature of Abby's relationship with Plaintiffs, and whether Defendant was a fit and proper parent who had acted consistently with her constitutionally protected right as a parent.

Based upon these findings, the trial court concluded, inter alia:

> 7. Defendant is not an unfit parent.
>
> 8. Defendant has not abandoned her daughter.
>
> 9. That the minor child has not been neglected by Defendant.

> 10. That Defendant has not acted in a manner inconsistent with her constitutionally protected right as a parent.
>
> 11. That Defendant is a fit and proper person to have full physical and legal custody of the minor child.
>
> 12. That it is in the best interest of the minor child to place full physical and legal custody with Defendant, Stephanie Jones.

The trial court accordingly ordered that Defendant "be granted full physical, legal, custody care and control" of Abby. Thus, the Custody Order "determine[d] all the issues." *Kanellos*, 251 N.C. App. at 149, 795 S.E.2d at 229.

Plaintiffs argue that the Custody Order is temporary because, as in *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (2012), it fails to determine a holiday visitation schedule for Abby. In *Sood*, the trial court's custody order granted joint legal custody of the minor child to both biological parents and specified a custodial schedule for the upcoming Christmas holiday and spring break, but did not resolve the holiday custodial schedule for the indefinite future. *Id*. at 809, 732 S.E.2d at 606. Based in part on the lack of a future holiday custodial schedule, this Court concluded the order was temporary.

In the present case, the Custody Order concluded that Defendant, Abby's biological mother, "has not acted in a manner inconsistent with her constitutionally protected right as a parent" and granted Defendant "full physical, legal, custody care and control" of Abby. Thus, unlike the order in *Sood*, the Custody Order here granted Defendant full custody of Abby at all times, resolving the holiday custodial schedule for the indefinite future. The visitation schedule set forth in the Custody Order comprised the complete grant of visitation to Plaintiffs, Abby's grandparents, for the indefinite future.

Plaintiffs further argue that the Custody Order is temporary because it failed to analyze whether Plaintiffs had standing to bring this custody action. "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). Here, the trial court specifically concluded, "That this Court has subject matter jurisdiction to hear this

matter." This conclusion necessarily encompasses the trial court's conclusion that Plaintiffs had standing to bring this custody action.[3]

We acknowledge that the Custody Order was issued as a result of a temporary custody hearing, and that the trial court decreed in the Ex Parte Order that a temporary order would be entered as a result of the temporary hearing. However, "[a] trial court's label of a custody order as 'temporary' is not dispositive[,]" *Sood*, 222 N.C. App. at 809, 732 S.E.2d at 606 (citation omitted), and precedent dictates that an order that does not meet any of the *Kanellos* criteria is permanent. *Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734. As the Custody Order was not entered without prejudice to the parties, does not set a reconvening time for a subsequent hearing, and determines all of the issues before the trial court, the Custody Order is a final order. Defendant's appeal is therefore properly before this Court. N.C. Gen. Stat. § 7A-27(b)(2) (2019).

2. Substantial Right

In addition to the Custody Order being permanent, the Custody Order affects a substantial right and is thus immediately appealable.

> An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits.

High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 204 N.C. App. 55, 61, 693 S.E.2d 361, 366 (2010) (citation omitted). In the present case, the Custody Order was not certified by the trial court pursuant to Rule 54(b). However, citing *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), and *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), Defendant asserts that the trial court's order awarding visitation rights to Plaintiffs implicated Defendant's constitutionally protected interest in the custody, care, and control of Abby.

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3. Had the trial court concluded that Plaintiffs lacked standing to bring this custody action, the trial court would have been required to dismiss the action. *See Chavez v. Wadlington*, 821 S.E.2d 289, 291 (N.C. Ct. App. 2018) (affirming the trial court's order dismissing plaintiff's complaint for lack of subject matter jurisdiction where plaintiff lacked standing as an "other person" pursuant to N.C. Gen. Stat. § 50-13.1(a) to seek custody of the minor children at issue).

In *Petersen*, our Supreme Court explicitly recognized "the strength of the right of natural parents as against others[.]" *Petersen*, 337 N.C. at 403, 445 S.E.2d at 904. *Petersen* also adopted precedent of this Court holding that "parents' paramount right to custody includes the right to control their children's associations[.]" *Id.* at 403, 445 S.E.2d at 904-05 (*quoting Acker v. Barnes*, 33 N.C. App. 750, 752, 236 S.E.2d 715, 716 (1977) ("So long as parents retain lawful custody of their minor children, they retain the prerogative to determine with whom their children shall associate.")). Our Supreme Court reiterated these principles in *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003), in which it

> [n]ote[d] that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. This parental liberty interest is perhaps the oldest of the fundamental liberty interests the United States Supreme Court has recognized. This interest includes the right of parents to establish a home and to direct the upbringing and education of their children. Indeed, the protection of the family unit is guaranteed not only by the Due Process Clause, but also by the Equal Protection Clause of the Fourteenth Amendment and possibly by the Ninth Amendment. . . . The protected liberty interest . . . is based on a presumption that [parents] will act in the best interest of the child.

Id. at 144-45, 579 S.E.2d at 266 (internal quotation marks and citations omitted); *see also Troxel v. Granville*, 530 U.S. 57 (2000).

In *In re Adoption of Shuler*, 162 N.C. App. 328, 590 S.E.2d 458 (2004), the biological father of a minor child appealed the trial court's denial of his motion to dismiss a third-party petition to adopt the child. This Court held that, although the father's appeal was interlocutory, the trial court's order affected a substantial right because it "eliminate[d] the [father's] fundamental right . . . , as a parent, to make decisions concerning the care, custody, and control of [the child][.]" *Id.* at 330, 590 S.E.2d at 460 (internal quotation marks and citation omitted).

In the present case, we similarly conclude that the trial court's order directing Defendant to allow Plaintiffs access to and visitation with Abby affected Defendant's fundamental right to make decisions concerning the care, custody, and control of her child, including the child's association with third parties. Notwithstanding statutory provisions that permit grandparents to seek visitation rights in limited circumstances, this Court has explicitly held that "[a] grandparent is a third party to the

parent-child relationship. Accordingly, the grandparent's rights to the care, custody[,] and control of the child are not constitutionally protected while the parent's rights are protected." *Eakett v. Eakett*, 157 N.C. App. 550, 554, 579 S.E.2d 486, 489 (2003). In this case, Defendant "enjoys a constitutional right to the care, custody, and control of [her] child that [sprung] upon the death of [Christopher,] the custodial parent[,] to the exclusion of and superior to any interest held by a grandparent." *Rivera v. Matthews*, 824 S.E.2d 164, 169 (N.C. Ct. App. 2019). The trial court's order granting visitation to Plaintiffs therefore affected a substantial right, and Defendant's appeal is properly before us.

B. Custody

[2] Defendant next argues that the trial court erred by engaging in a best interest analysis after granting Defendant full physical and legal custody, care, and control of Abby and by granting Plaintiffs visitation with Abby.

Four statutes address grandparent custody and visitation in North Carolina. Under N.C. Gen. Stat. § 50-13.1(a),

> Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. . . . Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

N.C. Gen. Stat. § 50-13.1(a) (2019). While "[i]n certain contexts 'custody' and 'visitation' are synonymous[,] . . . it is clear that in the context of grandparents' rights to visitation, the two words do not mean the same thing." *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995). Thus, "[a]lthough this broad statute describes general standing to seek custody or visitation, our Supreme Court has applied canons of statutory construction to determine the statute only grants grandparents standing for custody, not visitation." *Wellons v. White*, 229 N.C. App. 164, 174, 748 S.E.2d 709, 717 (2013) (citing *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750) (other citation omitted). A grandparent initiating a proceeding for custody under N.C. Gen. Stat. § 50-13.1(a) must allege that the parent is unfit or has acted in a manner inconsistent with her parental status. *See Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 489 (citations omitted); *Yurek v. Shaffer*, 198 N.C. App. 67, 75, 678 S.E.2d 738, 744 (2009).

The following three statutes ("grandparent visitation statutes") "provide grandparents with the right to seek 'visitation' only in certain clearly

specified situations[,]" *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 749-50: (1) N.C. Gen. Stat. § 50-13.2(b1) allows grandparents to be granted visitation as part of an ongoing custody dispute, although it does not allow grandparents to initiate an independent action for visitation. *See Moore v. Moore*, 89 N.C. App. 351, 353, 365 S.E.2d 662, 663 (1988); (2) N.C. Gen. Stat. § 50-13.2A permits a biological grandparent to request visitation with the grandchild if the grandchild is adopted by a stepparent or relative of the child, provided the child and grandparent have a substantial relationship; and (3) N.C. Gen. Stat. § 50-13.5(j) allows grandparents to seek visitation by intervening in an existing custody case and alleging facts sufficient to support a showing of a substantial change of circumstances affecting the welfare of the child since the original order was entered and that modification is in the best interest of the child. "Th[ese] situations do not include that of initiating suit against parents whose family is intact and where no custody proceeding is ongoing." *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750. Thus, under the grandparent visitation statutes, "a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative." *Id.* at 634, 461 S.E.2d at 749.

"[W]here one parent is deceased, the surviving parent has a natural and legal right to custody and control of the minor children." *McDuffie v. Mitchell*, 155 N.C. App. 587, 589, 573 S.E.2d 606, 607-08 (2002) (citation omitted). "That maxim was no less true when the sole surviving parent was the non-custodial parent of the children[.]" *Rivera*, 824 S.E.2d at 168-69.

Here, when Plaintiffs filed their complaint, there was no ongoing custody proceeding as Defendant had a natural and legal right to custody and control of Abby upon Christopher's death, *see McDuffie*, 155 N.C. App. at 589, 573 S.E.2d at 607-08, and Abby had not been adopted by a stepparent or relative. Thus, Plaintiffs lacked standing to bring a claim for visitation under any of the grandparent visitation statutes. However, as Plaintiffs stress in their brief, whether there was an ongoing custody proceeding or whether Abby "was living in an intact family when this action was filed" are "irrelevant" considerations as Plaintiffs were not seeking visitation under any of the grandparent visitation statutes, but instead brought their action for custody under N.C. Gen. Stat. § 50-13.1(a).

In their complaint, Plaintiffs alleged that Defendant was unfit and had acted inconsistently with her parental status. Plaintiffs thus had standing to bring this custody action pursuant to N.C. Gen. Stat. § 50-13.1(a). *See Eakett* at 553, 579 S.E.2d at 489; *Rodriguez v. Rodriguez*,

211 N.C. App. 267, 274, 710 S.E.2d 235, 240 (2011). Nevertheless, even when grandparents have standing to bring a custody action, to gain custody they must still overcome a parent's "constitutionally-protected paramount right . . . to custody, care, and control of [the child.]" *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905. "While the best interest of the child standard would apply in custody disputes between two parents, in a dispute between parents and grandparents there must first be a finding that the parent is unfit." *Sharp v. Sharp*, 124 N.C. App. 357, 361, 477 S.E.2d 258, 260 (1996) (citation omitted).

"If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause." *Price*, 346 N.C. at 79, 484 S.E.2d at 534. Accordingly, only after the trial court has determined that the parent has acted in a manner inconsistent with his or her protected status may the trial court apply the best interest of the child test to determine custody. *Seyboth v. Seyboth*, 147 N.C. App. 63, 67, 554 S.E.2d 378, 381 (2001). If, however, the grandparent is not able to show that the parent has lost his or her protected status, the custody claim against the parent must be dismissed. *See Owenby*, 357 N.C. at 148, 579 S.E.2d at 268 (reinstating the trial court's order dismissing grandparent's custody action where grandparent "failed to carry her burden of demonstrating that defendant forfeited his protected status").

In this case, based upon its extensive findings of fact, the trial court concluded, in relevant part:

> 7. Defendant is not an unfit parent.
>
> 8. Defendant has not abandoned her daughter.
>
> 9. That the minor child has not been neglected by Defendant.
>
> 10. That Defendant has not acted in a manner inconsistent with her constitutionally protected right as a parent.
>
> 11. That Defendant is a fit and proper person to have full physical and legal custody of the minor child.

Although the trial court initially concluded, "6. That the court is not considering the best interest of the minor child standard at this posture of the case[,]" the trial court's following conclusions plainly indicate otherwise:

> 12. That it is in the best interest of the minor child to place full physical and legal custody with Defendant, Stephanie Jones.
>
> 13. That Plaintiffs are fit and proper person[s] to have reasonable visitation with the minor child.
>
> 14. That the Court has the authority to grant Plaintiffs reasonable visitation.
>
> 15. That it is in the best interest of the minor child to have reasonable visitation with Plaintiffs, Wanda Graham and George Graham.

As Defendant remained entitled to constitutional protection of her parental status upon Christopher's death, *Rivera*, 824 S.E.2d at 168-69, and the trial court found that Defendant was not an unfit parent and had not acted inconsistently with her constitutionally-protected status as a parent, the trial court's application of the "best interest of the child" standard before concluding that Plaintiff was entitled to full legal and physical custody of Abby "offend[s] the Due Process Clause." *Price*, 346 N.C. at 79, 484 S.E.2d at 534. Moreover, as the trial court found that Defendant was not an unfit parent and had not acted inconsistently with her constitutionally protected status as a parent, the trial court's "inquiry into [Plaintiffs'] fitness for purposes of custody was irrelevant[,]" *Petersen*, 337 N.C. at 404, 445 S.E.2d at 905; the trial court erred in concluding that it had the authority to grant Plaintiffs visitation; and the trial court's application of the "best interest of the child" standard to grant Plaintiffs visitation again "offend[s] the Due Process Clause." *Id.*

As the trial court found that Defendant was not an unfit parent and had not acted inconsistently with her constitutionally protected status as a parent, there was no basis for the trial court to grant visitation to the Plaintiffs. *See Rodriguez*, 211 N.C. App. at 279, 710 S.E.2d at 244 (in a custody action brought by grandparents pursuant to N.C. Gen. Stat. § 50-13.1, "there was no basis for the trial court to grant visitation to the [grandparents]" where "defendant did not act inconsistently with her status as a parent, and the trial court did not make a finding that defendant was unfit").

III. Conclusion

For the reasons articulated above, we reverse the Custody Order and remand the case to the trial court with instructions to dismiss Plaintiffs' action and dissolve the Ex Parte Order and the Custody Order. *See Owenby*, 357 N.C. at 148, 579 S.E.2d at 268 (reinstating trial court's

order dismissing plaintiff's custody action and dissolving all orders previously entered).

REVERSED AND REMANDED.

Judges BRYANT and HAMPSON concur.

LAI YING TAM HARDY, PLAINTIFF
v.
MICHAEL FRANKLIN HARDY, DEFENDANT

No. COA19-441

Filed 7 April 2020

Appeal and Error—appeal from order denying contempt—Appellate Rules violations—substantial—subject to dismissal

Plaintiff's appeal from an order denying her motion for contempt (alleging defendant willfully failed to pay child support) was dismissed for a substantial violation of the Rules of Appellate Procedure where plaintiff failed to state a basis for appellate review. Since plaintiff's motion referenced both civil and criminal contempt and it was unclear which one formed the basis for the trial court's denial, plaintiff's failure to establish any ground for appellate jurisdiction impeded review.

Appeal by Plaintiff from Order entered 21 December 2018 by Judge Aretha V. Blake in Mecklenburg County District Court. Heard in the Court of Appeals 29 October 2019.

Moen Legal Counsel, by Lynna P. Moen, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

HAMPSON, Judge.

Lai Ying Tam Hardy (Plaintiff) appeals from an Order on Contempt concluding Michael Franklin Hardy (Defendant) was in criminal contempt for failure to pay spousal support but not in contempt for failure to pay child support. We dismiss this appeal because Plaintiff fails to establish this Court has jurisdiction, thus precluding appellate review.

Factual and Procedural Background

Plaintiff and Defendant were granted a Judgment of Dissolution in California on 2 November 2007 (California Order). As part of the California Order, Defendant was required, starting in November 2007, to pay Plaintiff $750.00 per month in spousal support for three years and $1,065.00 per month in child support. Until approximately 2015, Plaintiff never sought, and Defendant never paid, any payments under the terms of the California Order.

On 5 November 2015, Plaintiff filed a petition for registration of the California Order in Mecklenburg County District Court. On 15 February 2018, Plaintiff filed a notice of registration of the California Order for enforcement purposes only in Mecklenburg County District Court. Thereafter, Plaintiff filed a Motion for Contempt with the Mecklenburg County District Court on 23 February 2018. In her Motion for Contempt, Plaintiff alleged "[Defendant] has willfully failed and refused to abide" by the California Order through his failure to pay either child or spousal support. Therefore, Plaintiff requested the trial court issue an "Order requiring [Defendant] to appear and show cause, if any he has, why he should not be held in contempt and punished for civil and/or criminal contempt." Plaintiff further prayed "[Defendant] be found in civil or criminal contempt for failure to comply with the [California Order]."

On 28 February 2018, the trial court entered an Order to Show Cause and Appear stating "it further appearing to the Court that there is probable cause to believe that contempt exists on the part of Defendant" and ordering Defendant "to appear and show cause, if any there be, why he should not be adjudged in willful contempt of Court." Prior to a hearing on this Order, the trial court entered a Consent Order for Permanent Child Custody and Visitation (Consent Order) on 12 April 2018, which provided in relevant part—"The entry of this Consent Order resolves issues of child custody, child support, and attorney's fees, currently existing between [Plaintiff] and [Defendant] herein regarding the best interests, parenting time and general welfare of the parties' minor child."

On 12 October 2018, Plaintiff filed an Amended Notice of Hearing notifying Defendant "that the pending claim of Motion for Contempt and Motion to Establish Child Support Arrearage Schedule in the above-referenced matter is now set for trial for the 19th day of November, 2018[.]" On 16 October 2018, the trial court issued an Amended Order to Show Cause and Appear, which is identical to the 28 February 2018 Order to Show Cause and Appear except for changing the appearance date to 19 November 2018.

On 19 November 2018, Plaintiff and Defendant, both represented by counsel, appeared before the trial court for a contempt hearing. At no point during the hearing did either party or the trial court clarify whether the proceeding was for criminal or civil contempt. On 21 December 2018, the trial court entered its Order on Contempt. The Order begins by noting the 19 November 2018 hearing came on for hearing "upon Plaintiff's Motion for Contempt" but does not mention its own Amended Order to Show Cause and Appear. The Order on Contempt found the "Consent Order was entered that resolved the issues of permanent child custody and child support, but did not address spousal support"; "[Plaintiff's] basis for contempt upon the issues of child support and attorney's fees was negated by the Consent Order . . . , which resolved issues of child support then existing between the parties, including then-pending Motion for Contempt"; and "[Defendant] has failed to pay spousal support per the stipulations of the California Order [and Defendant] is in willful violation of the [California Order]."

Based on these Findings, the trial court concluded "there is no basis for a finding of contempt against [Defendant] regarding the issue of child support" and that "[Defendant] is in criminal [contempt] for failing to comply with the [California] Order on spousal support." Accordingly, the Decretal Section of the Order on Contempt stated in relevant part:

> 1. [Plaintiff's] motion for contempt regarding child support is denied.
>
> 2. [Plaintiff's] motion for contempt regarding spousal support is granted.
>
> 3. [Defendant] is in criminal contempt for failure to pay spousal support.
>
> 4. [Defendant] is sentenced to fifteen (15) days incarceration. The foregoing sentence is suspended and [Defendant] shall be on unsupervised probation for six months under the following terms and conditions:
>
>   a. [Defendant] shall pay to [Plaintiff] $168.75 per month beginning January 15, 2019.
>
> 5. Each party shall bear their own costs for this action. [Plaintiff's] claim for attorney's fees is denied as attorney's fees are not recoverable upon a finding of criminal contempt.

On 18 February 2019, Plaintiff filed Notice of Appeal to this Court from the Order on Contempt.

Failure to Establish Grounds for Appellate Jurisdiction

"It is well established that the appellant bears the burden of showing to this Court that the appeal is proper." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). "Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Id.* (citation omitted).

Here, Plaintiff's statement of grounds for appellate review states: "This appeal is from a final judgment of a district court in a civil action; thus appeal lies of right directly to this Court. N.C. Gen. Stat. § 7A-27(c) (2012)." Plaintiff cites a repealed version of Section 7A-27, which is now found at Section 7A-27(b)(2). S*ee* 2013 N.C. Sess. Law 411, § 1 (N.C. 2013); *see also* N.C. Gen. Stat. § 7A-27(b)(2) (2019). More significantly though, Plaintiff fails to acknowledge Chapter 5A of our General Statutes governs both civil and criminal contempt proceedings, including specifically the right to appeal. Moreover, Plaintiff fails to articulate any basis for appealing from an order *denying* her contempt motion and, in particular, fails to distinguish whether the trial court's denial was grounded in civil or criminal contempt.

The distinction between civil and criminal contempt is important.

> At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.
>
> A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. *The importance in distinguishing between criminal and civil contempt lies in the difference in procedure, punishment, and right of review.*

O'Briant v. O'Briant, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (emphasis added) (citations omitted); *see also Hancock v. Hancock*, 122 N.C. App. 518, 522, 471 S.E.2d 415, 418 (1996) (explaining "the character of the relief is dispositive of the distinction between criminal and civil contempt, and where the relief is imprisonment, but the contemnor may avoid or terminate imprisonment by performing an act required by the court, then the contempt is civil in nature" (citation omitted)).

Willful noncompliance with a court order may constitute either criminal or civil contempt. *See* N.C. Gen. Stat. §§ 5A-11(a)(3); -21(a) (2019). The process for instituting either a civil or criminal contempt proceeding is set by statute. *See id.* §§ 5A-14, -15; -23 (2019) (summary proceeding for criminal, plenary proceeding for criminal, and civil, respectively). Pursuant to Section 5A-15, a judicial official may institute plenary criminal contempt proceedings[1] "by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court." *Id.* § 5A-15(a). Whereas, civil contempt proceedings may be initiated:

> (1) by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt; (2) by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt; or (3) by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt.

Cumberland Cty. v. Manning, ___ N.C. App. ___, ___, 822 S.E.2d 305, 308 (2018) (citations and quotation marks omitted).

In civil contempt, "[a]n alleged contemnor has the burden of proof under the first two methods used to initiate a show cause proceeding." *Cumberland Cty. ex rel. Lee v. Lee*, ___ N.C. App. ___, ___, 828 S.E.2d 548, 551 (citation omitted), *disc. rev. denied*, 372 N.C. 708, 830 S.E.2d 836 (2019). "However, if an aggrieved party initiates a show cause proceeding instead of a judicial official, the burden of proof is on the aggrieved party instead, because there has not been a judicial finding of probable cause." *Id.* (citation and quotation marks omitted). On the other hand, in a show-cause proceeding for *criminal* contempt, the contemnor does

1. A trial court may also institute summary criminal contempt proceedings for *direct* criminal contempt under Section 5A-14. *See id.* § 5A-14(a).

not have the burden of proof; rather, the "trial court must find facts supporting . . . contempt, and the facts must be established beyond a reasonable doubt." *State v. Phillips*, 230 N.C. App. 382, 385, 750 S.E.2d 43, 45 (2013) (alterations, citation, and quotation marks omitted).

Importantly, the appeal process differs markedly between civil and criminal contempt orders entered in district court. Section 5A-17(a) provides—"A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, *except appeal from a finding of contempt by a judicial officer inferior to a superior court judge is by hearing de novo before a superior court judge*." N.C. Gen. Stat. § 5A-17(a) (2019) (emphasis added). Whereas, Section 5A-24 provides—"A person found in civil contempt may appeal in the manner provided for appeals in civil actions." *Id.* § 5A-24 (2019). Further, as a general principle, "[o]ur statutes make no provision for appeal when a person is found not in contempt." *Patterson v. Phillips*, 56 N.C. App. 454, 454, 289 S.E.2d 48, 49 (1982). Thus, there is no individual right to appeal a trial court's decision not to hold an alleged contemnor in criminal contempt. *See id.* at 456, 289 S.E.2d at 50 ("The government, the courts and the people have an interest in the prosecution of criminal contempt charges; however, the plaintiff individually has no substantial right to the relief requested."). In the civil contempt context, however, our Court has recognized a right to appeal the dismissal of a civil contempt charge so long as "the order affects a substantial right claimed by the appellant." *Equipment Co. v. Weant*, 30 N.C. App. 191, 194, 226 S.E.2d 688, 690 (1976) (citation omitted).

Here, it is not entirely clear Plaintiff has *any* right to appeal the Order on Contempt.[2] Although the trial court expressly found Defendant

2. Neither the process employed by the parties and the trial court nor the trial court's Order on Contempt is a model of clarity. For instance, Plaintiff in her Motion for Contempt requested the trial court issue a show-cause order ordering Defendant to show cause "why he should not be held in contempt and punished for civil and/or criminal contempt." The trial court's Order to Show Cause and Appear states only "it further appearing to the Court that there is probable cause to believe that contempt exists on the part of Defendant[.]" At the contempt hearing, neither the trial court nor the parties clarified whether the proceeding was for civil contempt, criminal contempt, or both. When rendering its ruling on criminal contempt for failure to pay spousal support, the trial court based its ruling in part on Defendant's "failure to meet his burden that he was not in willful noncompliance" with the California Order; however, Defendant does not bear the burden in criminal contempt proceedings. *See Phillips*, 230 N.C. App. at 385, 750 S.E.2d at 45 (citation omitted). Indeed, the trial court failed to provide Defendant with the protections afforded an alleged contemnor in criminal contempt, including the right against self-incrimination. *See Bishop v. Bishop*, 90 N.C. App. 499, 505-06, 369 S.E.2d 106, 109-10 (1988) (citation omitted). Although the trial court expressly found Defendant in *criminal* contempt for failing to pay spousal support in its Order on Contempt, the trial court failed to designate whether its finding of no contempt regarding child support was based on civil or criminal contempt.

in criminal contempt for failure to pay spousal support, the Order on Contempt only states Plaintiff's "motion for contempt regarding child support is denied." Plaintiff cites no specific authority allowing for appellate review of this Order. If this conclusion by the trial court relates to *criminal* contempt, then Plaintiff has no right to appeal the Order. *See Patterson*, 56 N.C. App. at 454-56, 289 S.E.2d at 49-50 (citations omitted). Further, even assuming the trial court's conclusion Defendant was not in contempt regarding child support relates to *civil* contempt, Plaintiff's brief still fails to articulate why or how this appeal is proper. As discussed *supra*, the right to appeal the dismissal of a civil contempt charge only exists if "the order affects a substantial right claimed by the appellant." *Weant*, 30 N.C. App. at 194, 226 S.E.2d at 690 (citation omitted). Plaintiff, however, makes no argument a substantial right of Plaintiff's will be affected absent review by this Court of the Order on Contempt. Although such an argument could potentially be made, "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Plaintiff's failure to present any adequate basis upon which we can determine whether this Court has jurisdiction to review her appeal precludes our ability to substantively review this case and constitutes a failure to meet her burden to establish this Court's jurisdiction. *See Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338 (citation omitted).

Indeed, Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure specifically requires an appellant's brief to include a statement of the grounds for appellate review, which "*shall include citation of the statute or statutes permitting appellate review*." N.C.R. App. P. 28(b)(4) (emphasis added). It is unclear whether the trial court's denial of contempt was grounded in civil or criminal contempt, and Plaintiff fails to establish any ground, statutory or otherwise, for appealing the portion of the trial court's Order denying contempt. This constitutes a substantial violation of the appellate rules, impairing our review. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366-67 (2008) (citations omitted). Therefore, we must dismiss this appeal.

Conclusion

Accordingly, for the foregoing reasons, we dismiss Plaintiff's appeal.

APPEAL DISMISSED.

Judges INMAN and BERGER concur.

JAMES C. McGUINE, Employee Plaintiff
v.
NATIONAL COPIER LOGISTICS, LLC, Employer, and TRAVELERS INSURANCE COMPANY OF ILLINOIS, Carrier and/or NCL TRANSPORTATION, LLC, Employer, NON-INSURED, Defendants

AND

THE NORTH CAROLINA INDUSTRIAL COMMISSION
v.
NCL TRANSPORTATION, LLC, Non-Insured Employer, and THOMAS E. PRINCE, Individually, Defendants

No. COA19-735

Filed 7 April 2020

Workers' Compensation—liability for claim—proof of employer-employee relationship—joint employment doctrine—lent employee doctrine

Where a truck driver (plaintiff) brought a workers' compensation claim against a North Carolina shipping company and an Ohio company that handled the shipping company's payroll, the Industrial Commission erred by concluding that only the Ohio company was plaintiff's employer at the time of plaintiff's work-related injury and that, therefore, the shipping company was not liable for the workers' compensation claim. Plaintiff sufficiently established an employer-employee relationship between himself and the shipping company under both the joint employment doctrine and the lent employee doctrine, where he showed that they had an implied employment contract (the shipping company hired, trained, and supervised plaintiff while indirectly paying him through the Ohio company), the shipping company controlled the details of plaintiff's work, and plaintiff performed the same work for both companies.

Judge TYSON dissenting.

Appeal by Plaintiff from opinion and award entered 25 April 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 February 2020.

Jay Gervasi, P.A., by Jay Gervasi, and Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and David P. Stewart, for the Plaintiff.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Neil P. Andrews, for the Defendant.

BROOK, Judge.

James C. McGuine ("Plaintiff") appeals from an opinion and award entered 25 April 2019 by the North Carolina Industrial Commission ("Commission" or "Full Commission") in which the Commission concluded as a matter of law that Defendant NCL Transportation, LLC ("NCL"), and not National Copier Logistics, LLC ("National Copier"), was Plaintiff's employer at the time of his injury. Plaintiff contends that the Commission erred by concluding that Plaintiff was employed solely by NCL, not by National Copier or jointly employed by both. For the reasons discussed below, we reverse and remand.

I. Background

A. Facts

Defendant Thomas E. Prince ("Prince") started shipping contractor National Copier on 17 January 2007. National Copier contracted with equipment dealers to move office equipment to and from clients.

Prince then established NCL in Ohio in January of 2007 and was its sole manager and member. According to Prince and National Copier Accounting Manager Susan German ("German"), the footprint and purpose of NCL was limited. No employees worked at the NCL location in Ohio; Prince testified that "it was a hub where drivers would pick up equipment, put equipment in, take equipment out[.]" German testified that the "hub" was essentially a warehouse. Both Prince and German testified NCL handled payroll for National Copier truck drivers. German testified further that the "sole purpose for NCL Transportation" was to be the company "that the [truck] drivers are basically paid out of . . . as well as getting the Workman's Compensation in Ohio." Prince testified along the same lines, stating that he formed NCL for two reasons: to limit National Copier's liability and to decrease National Copier's workers' compensation insurance costs.

Sometime in the summer of 2013—before the first hearing on this matter—NCL ceased operations. At that time, Prince cancelled NCL's payroll account and began to pay the truck drivers through National Copier's account; nothing else changed regarding National Copier's day-to-day operations or the truck drivers' day-to-day work.

Plaintiff, a commercial truck driver from Greensboro, North Carolina, applied to work with National Copier in Charlotte in December 2012. The application for employment that National Copier provided him listed "National Copier Logistics" as the prospective employer. German oversaw Plaintiff's application process, interview, and hiring. Plaintiff was hired as a truck driver on 11 December 2012. German provided him with a company credit card that listed National Copier's name to use to fuel the truck. The truck Plaintiff drove bore National Copier's name and displayed National Copier's US Department of Transportation ("DOT") number.[1] Throughout Plaintiff's employment, instructions regarding his routes and deliveries came directly from Prince or from Jake,[2] National Copier's dispatcher, who was "not considered part of" NCL, and who "made the routes [and] kind of oversaw what the drivers did day to day." Plaintiff testified that he considered himself to be an employee of National Copier because he spoke only with Prince, German, and Jake, he was hired in Charlotte, and he never met anyone who identified themselves as being part of NCL. Plaintiff's W-2, pay statements, and employment verification form I-9, however, listed his employer as NCL.

On 15 February 2013, Plaintiff was injured when several sheets of plywood fell from a truck, striking Plaintiff on the head, back, neck, and left shoulder. Plaintiff was diagnosed with left shoulder acromioclavicular strain and a possible rotator cuff tear consistent with the mechanism of injury.

B. Procedural History

Plaintiff reported his injury to German, who provided him with the workers' compensation form necessary to bring a claim against NCL in Ohio. The Ohio Workers' Compensation Bureau first denied Plaintiff's claim, but, following Plaintiff's appeal, it allowed Plaintiff's claim against NCL, concluding that Prince and NCL employed Plaintiff. At the time of the first hearing on this matter, Plaintiff's Ohio claim was under appeal from his initial denial.

Plaintiff's North Carolina workers' compensation case first went before Deputy Commissioner Myra L. Griffin in Charlotte on 19 February 2014. Deputy Commissioner Griffin entered an order on 25 February 2014 noting that "a substantial conflict of interest between Defendant-Carrier, Travelers Insurance Company of Illinois and Defendant, National Copier Logistics, LLC" could exist.

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1. NCL did have a US DOT number, but the number was never used.

2. Jake's last name is absent from the record.

The Commission then set the matter for a de novo hearing before Deputy Commissioner Adrian Phillips. The parties stipulated to the prior hearing transcript and presented additional testimony. Deputy Commissioner Phillips entered an opinion and award on 9 June 2015 and then entered an amended opinion and award on 22 June 2015. Deputy Commissioner Phillips concluded as a matter of law that Plaintiff suffered a compensable injury on 15 February 2014. She concluded that both National Copier and NCL employed Plaintiff at the time he sustained his injury and ordered both Defendants to pay all costs for Plaintiff's medical treatment. Defendant National Copier noticed appeal to the Full Commission on 25 June 2015.

The Full Commission heard the matter on 30 November 2015, reviewing the prior opinion and award based upon the records of the proceedings before Deputy Commissioners Griffin and Phillips and considering the briefs and arguments of the parties. The Commission issued an interlocutory opinion and award on 23 January 2017. The Commission made the following conclusions of law:

> 1. Under the Workers' Compensation Act, "[t]he term 'employee' means every person engaged in an employment under an appointment or contract of hire or apprenticeship, express or implied, oral or written . . ." N.C. Gen. Stat. § 97-2(2). Plaintiff bears the burden of proving that an employer-employee relationship existed at the time an injury by accident occurred. *Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 689, 696 S.E.2d 379, 382 (2005).
>
> . . .
>
> 4. In the instant matter, Plaintiff has failed to prove by a preponderance of the evidence that he was an employee of National Copier. Plaintiff failed to prove that he entered into an express or implied contract of hire with National Copier, that he was performing the work of National Copier, that National Copier had the right to control the details of his work, that he was under the simultaneous control of and simultaneously performing services for both NCL and National Copier, or that the services for each employer were closely related to that of the other. *Collins* 459, 204 S.E. 2d at 876, *Anderson* at 636, 351 S.E.2d at 110. Accordingly, the Full Commission concludes that Plaintiff was an employee of NCL at the time of the injury by accident that is the subject of this claim. N.C. Gen. Stat. § 97-2(2).

. . .

> 7. In the instant case, the preponderance of the evidence of record shows that Plaintiff's contract of employment with NCL was made in North Carolina, that North Carolina was NCL's principal place of business, and that North Carolina was Plaintiff's principal place of employment. *Id.* As such, the Full Commission concludes as a matter of law that the Industrial Commission has jurisdiction over Plaintiff's claim. *Id.*
>
> . . .
>
> 9. On 15 February 2013, Plaintiff sustained a compensable injury by accident to his left shoulder arising out of and in the course of his employment with Defendant-Employer NCL. N.C. Gen. Stat. § 97-2(6).
>
> . . .
>
> 22. The Full Commission is unable to determine from the evidence of record whether Defendant-Employer NCL was insured under the *North Carolina Workers' Compensation Act* as of 15 February 2013. As such, there is good ground to reopen the record in this matter to receive further evidence regarding Defendant-Employer NCL's Ohio workers' compensation insurance policy for the coverage period including 15 February 2013.

(Alterations in original.) The Commission awarded Plaintiff "payment of any remaining past medical expenses and all future medical expenses incurred or to be incurred as a result of Plaintiff's compensable left shoulder condition" and remanded the matter to the Chief Deputy Commissioner to determine whether NCL was insured under the North Carolina Workers' Compensation Act on the date of Plaintiff's injury.

Plaintiff appealed the opinion and award on 30 January 2017. This Court granted Defendant-Appellee National Copier and Travelers' motion to dismiss Plaintiff's appeal as interlocutory on 28 September 2017.

Deputy Commissioner Phillips then issued a discovery order consistent with the Full Commission's directives on remand on 11 June 2018. The parties jointly submitted additional evidence pursuant to the discovery order. The Full Commission then entered a final opinion and award on 25 April 2019, incorporating by reference the findings

and conclusions of the 23 January 2017 opinion and award. The Full Commission made the following additional findings:

> 7. As of 15 February 2013, Ohio's workers' compensation law did not have any provisions granting the Bureau the authority to contract with an insurer licensed in other states to provide coverage to eligible Ohio employers. Thus, the coverage NCL obtained through the Bureau did not extend to provide coverage for claims filed in other jurisdictions.
>
> . . .
>
> 10. As of 15 February 2013, National Copier had a worker's compensation policy providing coverage in North Carolina through Travelers Insurance Company of Illinois. The policy did not cover employees of NCL.
>
> 11. In July or August 2013, Mr. Prince made the decision to transfer the payroll of truck drivers employed by NCL to National Copier's payroll, re-classified the truck drivers as employees of National Copier, and obtained a North Carolina workers' compensation policy to cover the truck drivers. The truck drivers remained so covered as of the 19 February 2014 evidentiary hearing.
>
> 12. By July or August 2013, NCL was no longer in operation.
>
> . . .
>
> 14. The Full Commission finds that on 15 February 2013 NCL did not have workers' compensation insurance as required by N.C. Gen. Stat. § 97-93.

In addition to the incorporated conclusions of law from the 23 January 2017 opinion and award, the Full Commission concluded that "Defendant-Employer NCL Transportation, LLC was uninsured for workers' compensation purposes on 15 February 2013."

Plaintiff appealed on 6 May 2019.

II. Jurisdiction

The Commission's 25 April 2019 opinion and award, incorporating in its entirety its previous 23 January 2017 opinion and award, is now a final judgment, and jurisdiction is proper with this Court pursuant to N.C. Gen. Stat. § 7A-27(b).

III. Analysis

Plaintiff contends that the Full Commission committed reversible error by concluding that Plaintiff was employed solely by NCL. Plaintiff contends that National Copier was in fact Plaintiff's joint employer. In the alternative, Plaintiff argues that the Commission erred in concluding that National Copier is not liable as a primary contractor pursuant to N.C. Gen. Stat. § 97-19. We hold that Plaintiff was employed both by NCL and National Copier and that both are therefore liable for Plaintiff's workers' compensation; we therefore need not reach Plaintiff's second argument.

A. Standard of Review

"The question of whether [an employer–employee] relationship existed at the time of the claimant's injury is jurisdictional," *Hicks v. Guilford Cty.*, 267 N.C. 364, 365, 148 S.E.2d 240, 242 (1966), and is reviewed by our Court de novo, *Whicker v. Compass Grp. USA, Inc.*, 246 N.C. App. 791, 795, 784 S.E.2d 564, 568 (2016). Further, the Commission's "findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (internal marks and citation omitted). In making findings of jurisdictional facts, this Court must "assess the credibility of the witnesses" and weigh the evidence, "using the same tests as would be employed by any fact-finder in a judicial or quasi-judicial proceeding." *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, 205 N.C. App. 712, 715, 698 S.E.2d 91, 94 (2010).[3]

B. Employer–Employee Relationship

An employee can, under some circumstances, operate as an employee of two employers at the same time, in which case both employers can be liable for workers' compensation. *See Leggette v. McCotter, Inc.*, 265 N.C. 617, 625, 144 S.E.2d 849, 855 (1965). "Plaintiff may rely upon two doctrines to prove [he] is an employee of two different employers at the same time: the joint employment doctrine and the lent employee doctrine." *Whicker*, 246 N.C. App. at 797, 784 S.E.2d at 569. "Joint employment occurs when a single employee, under contract

3. Despite agreement between the parties that we must apply this standard of review for such jurisdictional questions, the dissent applies the standard of review for non-jurisdictional questions without explaining its basis for doing so.

with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other." *Id.* (internal marks and citation omitted). The quite similar lent employee doctrine can be summarized as follows:

> When a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation only if
>
> (a) the employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.

Id. (internal marks and citation omitted).

We thus structure our analysis around whether Plaintiff has established the requisite contract, control, and work overlap to show he was employed by National Copier and NCL such that both employers are liable for his workers' compensation claim.

i. Employment Contract

As noted above, both joint employment and lent employee "doctrines require an employment contract to exist between" the plaintiff and the defendant. *Id.* at 798, 784 S.E.2d at 569. Employment contracts can be express or implied; implied contracts can be "inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Id.*, 784 S.E.2d at 570 (internal marks and citation omitted).

Absent an express contract (which the parties agree did not exist here between Plaintiff and National Copier), we determine whether an implied contract existed by considering who "hired, paid, trained, and supervised" the plaintiff. *Id.* at 799, 784 S.E.2d at 570. *Henderson v. Manpower of Guilford Cty., Inc.*, 70 N.C. App. 408, 319 S.E.2d 690 (1984), illustrates how this inquiry operates. In *Henderson*, Manpower of Guilford County, Inc., a company supplying temporary workers to employers, placed the plaintiff with Benner & Fields, a construction company, for whom he cut trees and cleared land. 70 N.C. App. at 409, 319 S.E.2d at 691. As part of that arrangement, Benner & Fields paid Manpower $6.25 per hour that the plaintiff worked, $4 per hour of which Manpower then passed along to the plaintiff. *Id.* After the

plaintiff was injured when a tree felled by another employee struck him, the Industrial Commission concluded that he was an employee solely of Manpower. *Id.* at 409-10, 319 S.E.2d at 691. This Court reversed, concluding that, "[a]lthough no express contract existed between plaintiff and Benner & Fields, an implied contract manifestly did, since they accepted plaintiff's work and were obligated to pay Manpower for it, and Manpower was obligated in turn to pay plaintiff[.]" *Id.* at 414, 319 S.E.2d at 694.

Here, the record evinces an implied contract between Plaintiff and National Copier. First, the evidence shows that National Copier hired Plaintiff. *See Whicker*, 246 N.C. at 799, 784 S.E.2d at 570. Plaintiff traveled to National Copier's office in Charlotte to apply for work, National Copier Accounting Manager German informed Plaintiff he would be working for National Copier, and the preprinted application listed National Copier as the prospective employer. German testified that she had "no role" at NCL; she is an employee only of National Copier, and she hired and fired drivers at Prince's direction. Second, the evidence shows that National Copier trained and supervised Plaintiff. *See id.* Jake, National Copier's dispatcher, gave the drivers route directions, and Prince testified that National Copier controlled where the drivers went on their routes. German testified that Jake—who was not "considered part of [] NCL"—"made the routes [and] kind of oversaw what the drivers did day to day."

The Industrial Commission based its conclusion that Plaintiff was employed solely by NCL on the facts that Plaintiff's W-2 tax form, pay statements, employment verification form I-9, and payroll authorization for automatic deposit list NCL as the employer. This evidence tends to suggest that NCL, not National Copier, paid Plaintiff, a fact relevant to the implied contract inquiry. *See id.* (considering who "hired, paid, trained, and supervised" in determining whether an implied employment contract existed). But even these facts favorable to Defendant are far more nuanced than is reflected in the Full Commission's opinion and award. German explained at the first hearing how the companies interacted regarding paying the truck drivers:

> [GERMAN]: [A]ll that we were running out of NCL Transportation was the payroll . . . It was not created for any other purpose but to employ[] drivers to work for National Copier Logistics. . . . really all that was run out of that, NCL Transportation, financially was payroll. And because that was a subcontractor expense to National Copier Logistics, ***National Copier Logistics would***

fund the payroll to the NCL Transportation bank account as an expense and then the payroll run (sic) through NCL Transportation's bank account.

(Emphasis added.) In short, National Copier paid NCL, which, in turn, paid the truck drivers for the work they completed for the benefit of National Copier. The payor name on a paystub and the like is not determinative; our Court has found an implied contract in such instances between the worker and the company paying the company nominally paying the employee. *See Henderson*, 70 N.C. App. at 414, 319 S.E.2d at 694 (finding an implied contract between the plaintiff and Benner & Fields where Benner & Fields "accepted plaintiff's work and were obligated to pay Manpower for it, and Manpower was obligated in turn to pay plaintiff[.]"). Because the evidence tends to show that National Copier hired, trained, supervised, and functionally paid Plaintiff, we conclude that an implied contract existed between Plaintiff and National Copier.

ii. Control

A finding of joint employment also requires that a plaintiff be "under the simultaneous control of both" employers. *Whicker*, 246 N.C. App. at 797, 784 S.E.2d at 569 (citation omitted). Similarly, special employment requires that "the special employer ha[ve] the right to control the details of the work." *Id.* (citation omitted).

Henderson again articulates the factors we consider in assessing whether the requisite control exists to support finding an employment relationship. Concluding that Benner & Fields had sufficient control over the plaintiff's work, our Court focused on the facts that Benner & Fields supplied all of the "materials or tools" for the plaintiff's work; supervised temporary employees "one hundred percent"; retained discretion to terminate any temporary employees; assigned duties to temporary employees; and controlled "the manner and method in which [temporary employees] carried out [their] duties." 70 N.C. App. at 410-11, 319 S.E.2d at 692. Manpower, on the other hand, had no control over the "tree cutting work and those that did it." *Id.* at 413, 319 S.E.2d at 693. These facts led our Court to conclude that "Benner & Fields had the right to and did control the details of that work." *Id.* at 414, 319 S.E.2d at 694.

Applying this framework to the case at hand, we conclude that National Copier controlled the details of Plaintiff's work. National Copier supplied Plaintiff's "materials [and] tools" in that the truck Plaintiff drove bore National Copier's name, logo, and US DOT number. Plaintiff delivered equipment for National Copier's customers. Only

Jake, the dispatcher, assigned duties to truck drivers; Jake was solely an employee of National Copier. German hired and terminated drivers for National Copier at Prince's direction. German testified that the "sole purpose for NCL Transportation" was to pay drivers out of NCL, "as well as getting the Workman's Compensation in Ohio." Indeed, when Prince moved six truck drivers from NCL's payroll to National Copier's, nothing changed about those drivers' work; their duties, instructions, materials, and continued employment all continued to flow from National Copier. Upon an examination of the record, we must conclude that National Copier controlled the details of Plaintiff's work.

iii. Work Overlap

The third factor necessary to find either joint or special employment is whether the work the employee does at the relevant time is essentially the same for both employers. *Whicker*, 246 N.C. App. at 797, 784 S.E.2d at 569. The plaintiff's injury in *Henderson*, for example, involved the work of Benner & Fields, namely "[c]utting trees and clearing land," supporting the conclusion that there was an employment relationship between plaintiff and Benner & Fields. 70 N.C. App. at 412, 319 S.E.2d at 693.

Here, Plaintiff's work responsibilities were driving trucks labeled "National Copier Logistics" to deliver equipment for customers and contractees of National Copier. Plaintiff never performed work for NCL that was not also the work of National Copier; as noted above, NCL merely was a payroll service for National Copier's truck drivers. We conclude that Plaintiff has met this factor because there was no clean partition between the work of National Copier and NCL and, as such, he "was doing [National Copier's] work when injured[.]" *Id.* at 414, 319 S.E.2d at 694.

* * * * *

In short, Plaintiff has established an implied contract between National Copier and himself and, further, that National Copier controlled his work, which, at bottom, was that of National Copier's.[4]

4. The dissent contends Plaintiff's claim is barred by the doctrine of judicial estoppel. Specifically, the dissent states "Plaintiff first asserted his sole employment was with NCL when he applied for Ohio workers' compensation benefits." *McGuine, infra* at 707 (Tyson, J., dissenting). This assertion is belied by the evidence. Put simply, Plaintiff's seeking recovery as an employee of NCL in Ohio is not "clearly inconsistent" with his argument before our Court that he was a joint employee of NCL and National Copier. *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 29, 591 S.E.2d 870, 888 (2004). This is another argument the Defendants have not made.

IV. Conclusion

Thorough consideration of the facts, law, and the parties' arguments therefrom makes plain Plaintiff was jointly employed by NCL and National Copier. We therefore do not reach Plaintiff's argument in the alternative that National Copier and NCL had a contractor–subcontractor relationship because we conclude they were joint employers.

The award of the Industrial Commission is reversed and the matter remanded for the entry of an award in favor of the appellant in accord with this opinion.

REVERSED AND REMANDED.

Judge HAMPSON concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion misapplies the standard of appellate review and reweighs the evidence to substitute and imply its preferred, but wholly unsupported, outcome to reverse the Commission's opinion and award. I respectfully dissent.

I. Background

Thomas Prince contracted with equipment dealers and sellers to transport their office equipment to buyers. He chartered and formed National Copier Logistics, LLC ("Defendant") as a North Carolina Limited Liability Company with the North Carolina Secretary of State's Office in 2007.

Four years later, Prince formed NCL Transportation, LLC ("NCL") as an Ohio Limited Liability Company and chartered under the laws of the State of Ohio to employ truck drivers. NCL complied with all state and federal governmental regulations as a separate entity and obtained Ohio workers' compensation insurance coverage for all of NCL's employees.

James C. McGuine ("Plaintiff") was hired by NCL on or around 11 December 2012. Plaintiff's tax withholding forms, Form I-9, and pay stubs identified and designated NCL as his employer. Plaintiff represented NCL as his employer on authorization forms for direct deposit of his NCL salary into his bank account. Plaintiff never asserted or filed anything claiming Defendant was his employer from his employment date with NCL until this action was commenced.

Plaintiff was injured while at work for NCL in Ohio. Plaintiff asserted a claim against NCL as his employer under the Ohio workers' compensation policy. Plaintiff represented himself as an employee of NCL and received workers' compensation benefits due under the Ohio policy.

The action before us commenced when Plaintiff filed the present claim before the Commission and asserted he was not employed solely by NCL. Plaintiff also claimed to be either solely an employee of Defendant or jointly an employee of both NCL and Defendant.

Competent evidence in the record supports the Commission's finding and conclusion that:

> Plaintiff has failed to prove by a preponderance of the evidence that he was an employee of National Copier. Plaintiff failed to prove that he entered into an express or implied contract of hire with National Copier, that he was performing the work of National Copier, that National Copier had the right to control the details of his work, that he was under the simultaneous control of and simultaneously performing services for both NCL and National Copier, or that the services for each employer were closely related to that of the other.

The Commission concluded, "Plaintiff was an employee of NCL at the time of the injury by accident that is the subject of this claim. N.C. Gen. Stat. § 97-2(2)." Plaintiff appealed.

II. Standard of Review

"Plaintiff bears the burden of proving the existence of an employer-employee relationship at the time of the injury by accident." *Whicker v. Compass Grp. USA, Inc.*, 246 N.C. App. 791, 797, 784 S.E.2d 564, 569 (2016) (citation omitted). The Commission's findings and conclusions are presumed to be correct unless Plaintiff carries his burden to prove otherwise. *See id.*

III. Employment Status

Plaintiff argues he was employed solely by Defendant or, alternatively, jointly by Defendant and NCL.

A. Sole Employment

Plaintiff made inconsistent assertions before the Ohio Workers' Compensation Bureau and before the Commission. He is judicially estopped from asserting any claim of sole employment by Defendant.

Our Supreme Court has held three factors inform the decision whether to apply the doctrine of judicial estoppel in a particular case:

> First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position . . . . Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 29, 591 S.E.2d 870, 888-89 (2004) (citations, footnote, and internal quotation marks omitted). As noted above, there is a presumption of correctness of the Commission's order and award that is Plaintiff's burden to overcome. This Court is not bound solely to appellee's arguments and authorities to affirm the order appealed from. *See State v. Hester*, 254 N.C. App. 506, 516, 803 S.E.2d 8, 16 (2017) (citations omitted).

Applying this analysis, Plaintiff first asserted his sole employment was with NCL when he applied for Ohio workers' compensation benefits. This claim is inconsistent with his current claim of being solely employed by Defendant. Secondly, the Ohio Workers' Compensation Bureau and the Commission both concluded Plaintiff was an employee of NCL. Finally, Plaintiff actually received benefits in Ohio for an injury that occurred in Ohio as an employee of NCL, and he now seeks to receive additional benefits from Defendant, which would "impose an unfair detriment" upon Defendant. *See Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 888-89. Plaintiff is judicially estopped from asserting Defendant was his sole employer. *See id.* His argument of sole employment with Defendant is without merit.

B. Joint Employment

Plaintiff also asserts Defendant was his joint employer. As the Commission properly found and concluded, joint employment only exists when a single employee, under contract with two employers, and under the simultaneous control of both, performs services for both employers at the same time, and where the service for each employer is the same as, or is closely related to, that for the other. *Henderson v. Manpower*, 70 N.C. App. 408, 413-14, 319 S.E.2d 690, 693 (1984).

The majority's opinion purports to find Plaintiff's joint employment with Defendant through an implied in fact employment contract

between Plaintiff and Defendant. It does so by disregarding the facts as found by the Commission and re-weighing the evidence to assert and imply its notion of Plaintiff's simultaneous employment by NCL and Defendant. No evidence in the record during the period relevant to the Commission's inquiry supports Plaintiff's burden to show joint employment under any theory of implied contract. *See id.*

1. Employment Contract

The employer-employee relationship is contractual in nature and determined by governing contractual rules. *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934) (citations omitted). An employee's right to demand pay from his employer is "essential to his right to receive compensation under the Workmen's Compensation Act." *Id.* at 210, 173 S.E. at 605 (citations omitted).

"An implied [employment] contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Whicker*, 246 N.C. App. at 798, 784 S.E.2d at 570 (citation omitted). To support a finding of joint employment, Plaintiff must produce evidence of a contract of employment, express or implied, with each employer. *See Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 607, 525 S.E.2d 471, 475 (2000).

The majority's opinion correctly notes the parties stipulated that no express contract of employment existed between Plaintiff and Defendant. The only basis for finding joint employment under these facts would be an implied in fact contract between the parties.

The Commission based its conclusion that Plaintiff was employed solely by NCL on the objective facts that Plaintiff's signed tax withholding forms, pay statements, employment verification form I-9, and payroll authorization for automatic deposit all list NCL as the employer, and he was solely paid by NCL. The majority opinion's analysis of whether an implied contract existed between Plaintiff and Defendant is based on who "hired, paid, trained, and supervised" Plaintiff. *Whicker*, 246 N.C. App. at 799, 784 S.E.2d at 570.

This undisputed evidence shows NCL, not Defendant, employed, paid, and supervised Plaintiff'. *See id.* (considering who "hired, paid, trained, and supervised" in determining whether an implied employment contract existed). Plaintiff stipulated and submitted that he was NCL's employee in Ohio to secure Ohio Workers' Compensation benefits from an injury that occurred in Ohio, while he was working in that state for an Ohio-chartered and based entity. Plaintiff never asserted any

claim of employment or entitlement to benefits against Defendant until this action.

It is absolutely irrelevant to the Commission's or this Court's analysis or decision that Prince formed either or both Defendant or NCL to reduce liability and costs. These reasons are the normal and legitimate bases to form all corporations, limited liability companies, limited partnerships, or other entities. *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007) (explaining the limited liability of the entity's owners is a "crucial characteristic" of LLCs); *see also* N.C. Gen. Stat. § 57D-2-03 (2019) ("an LLC has the same powers as an individual or a domestic corporation to do all things necessary or convenient to carry out its business").

Neither Prince's, Defendant's, nor NCL's use of these normal and legitimate uses of the corporate form supports the majority opinion's conclusion otherwise. Plaintiff failed to produce any evidence to show or support an implied contract of employment with Defendant. *See Whicker*, 246 N.C. App. at 798, 784 S.E.2d at 570. The Commission's conclusion is properly affirmed.

2. Control

Evidence to support a finding and conclusion of joint employment requires a plaintiff to prove that he or she was under simultaneous control of both employers. *Id.* at 797, 784 S.E.2d at 569. The majority's opinion purports to apply the framework in *Henderson v. Manpower* to conclude Defendant controlled the details of Plaintiff's work. *See Henderson*, 70 N.C. App. at 412-13, 319 S.E.2d at 693. Under these facts, or the lack thereof, the majority's implying a contract to impose liability on Defendant is unsupported and misapplies the analysis in *Henderson*. *See id.*

Manpower's business model in *Henderson* was significantly different from that of Defendant and NCL. Defendant and NCL were formed and chartered in different states and were maintained for distinct and admittedly lawful purposes. Defendant and its employees provided office equipment transportation and delivery services. NCL employees were truck drivers. It is wholly irrelevant to the proper disposition of this appeal whether the principal shareholder or member of Defendant also wholly owned NCL, or whether NCL was a purported subsidiary of Defendant.

NCL's drivers' use of Defendant's trucks or fuel cards does not give Defendant control over NCL's drivers. Defendant's dispatcher schedules

all of its deliveries, whether to NCL or others. These facts, even if true, are wholly immaterial to this analysis.

In *Henderson*, "the work that injured [the employee], was entirely the work of [the employer], who not only controlled the details of that work, but had the right to discharge plaintiff from *that* work at will." *Henderson* at 412, 319 S.E.2d at 693 (emphasis in original). In this case, Defendant's purported control over Plaintiff did not approach the level of control in *Henderson*. Plaintiff was injured while working in his capacity as a driver for NCL. Defendant did not have the authority to fire Plaintiff. Because of the separate and distinct business functions of NCL and Defendant, the majority's opinion errs in misapplying *Henderson*'s framework to the facts of this case.

As the Commission properly found and concluded, Plaintiff failed to show by a preponderance of the evidence that Defendant exercised any control over the details of Plaintiff's express and admitted employment by NCL or that Plaintiff was jointly employed by Defendant. The Commission's opinion and award are properly affirmed.

3. Work Overlap

The final factor required for Plaintiff to prove joint employment exists is to show the work the employee does is the same for both employers. *Whicker*, 246 N.C. App. at 797-98, 784 S.E.2d at 569. Again, the majority's opinion cites *Henderson* to illustrate its implication of Plaintiff's joint employment with both Defendant and NCL.

The example cited in the majority's opinion does not show Plaintiff carried his burden to prove an overlap in responsibilities between NCL and Defendant as was shown between Manpower and the employer in *Henderson*. Their example goes more to the control the employer in that case had over that plaintiff.

This Court's analysis in *Whicker* is consistent with the present facts. This Court reasoned the type of services offered between purported joint employers were distinct in *Whicker*, and therefore no work overlap existed. *Id.* at 800, 784 S.E.2d at 571.

Here, the undisputed evidence shows Defendant provides trucks, fuel, and schedules delivery endpoints. NCL provides the drivers. NCL does not assert responsibility of providing trucks, fuel, or when, where, or which products are picked up or delivered. Alternatively, Defendant did not carry the responsibility of employing, training, paying, insuring, or ensuring regulatory compliance of NCL's commercial truck drivers.

While both companies did business together and provided related or even integrated services within the same industry, Plaintiff's driving services were provided solely for NCL, an admitted separate and distinct company that hired truck drivers. No evidence supports Plaintiff carrying his burden before the Commission to prove or imply any employment, joint or otherwise, by Defendant. The Commission's order and award is properly affirmed.

IV. N.C. Gen. Stat. § 97-19

The majority's opinion reverses the Commission on Plaintiff's first issue, due to its prohibited fact finding and substituted conclusion on appellate review to imply joint employment between Plaintiff and Defendant. The majority's opinion fails to address the second issue: whether Defendant and NCL had a contractor-subcontractor relationship. The Commission held Defendant was not a statutory employer under N.C. Gen. Stat. § 97-19. A contractor-subcontractor relationship did not exist between Defendant and NCL. N.C. Gen. Stat. § 97-19 does not apply.

"Any principal contractor . . . who shall sublet any contract for the performance of any work" shall not be held liable to any employee of such subcontractor if the subcontractor has a workers' compensation policy in compliance with N.C. Gen. Stat. § 97-93 in effect on the date of the injury. N.C. Gen. Stat. § 97-19 (2019).

Prior precedents hold N.C. Gen. Stat. § 97-19 "cannot apply unless there is first a contract for the performance of work which is then sublet." *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 310, 392 S.E.2d 758, 760 (1990). N.C. Gen. Stat. § 97-19 does not apply to a relationship between a principal and independent contractor. *Id.* Plaintiff failed to prove Defendant was a contractor in the case at bar.

No evidence in the record shows NCL received portions of the contract price agreed upon by Defendant and its clients. NCL was a separate company and Defendant used NCL's employees' services to assist them in the performance of their contracts. N.C. Gen. Stat. § 97-19 is not triggered. Additionally, NCL had purchased and maintained a valid Ohio workers' compensation policy in place during all times of Plaintiff's employment in Ohio and at the time of Plaintiff's injury in Ohio.

The Ohio Workers' Compensation Bureau concluded Plaintiff had asserted a compensable claim and NCL was liable for Plaintiff's injuries. The stated legislative purpose of N.C. Gen. Stat. § 97-19 is to protect workers from "financially irresponsible sub-contractors who do

not carry workmen's compensation insurance." *Cook*, 99 N.C. App. at 310, 392 S.E.2d at 759 (citations omitted). That text and purpose is not at issue here. NCL maintained workers' compensation coverage for its employees, as Defendant did for its employees.

The Commission's conclusion is supported by its findings of fact, which are based upon competent evidence in the whole record. *See Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). For these reasons, I vote to affirm the Commission's opinion and award.

V. Conclusion

Plaintiff has produced no evidence to carry his burden or to show any bad faith or fraud to disregard NCL's Ohio-chartered entity or to pierce its corporate veil as an alter ego or disregarded entity to Defendant. NCL observed all required corporate formalities and filings to maintain its separate legal existence. NCL also met all responsibilities to its employees to provide agreed-upon employment and required workers' compensation benefits, of which Plaintiff availed himself.

Prince, Defendant, and NCL complied with all laws in both Ohio and North Carolina. They are entitled to the protections and benefits of lawfully arranging their business transaction in both North Carolina and Ohio under these facts, as the Commission properly found upon the uncontested facts before it. *Hamby*, 361 N.C. at 636, 652 S.E.2d at 235. NCL alone "hired, paid, trained, and supervised" Plaintiff. *Whicker*, 246 N.C. App. at 799, 784 S.E.2d at 570.

Plaintiff has failed to produce evidence or carry his burden to show entitlement to any compensation due from Defendant in North Carolina. Having admitted he was NCL's employee in Ohio to apply for and receive benefits from an accident in Ohio, Plaintiff is judicially estopped from asserting he was solely Defendant's employee in North Carolina. *Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 889. Plaintiff has not produced any evidence to show or imply joint employment under any implied contract with Defendant. *See Henderson*, 70 N.C. App. at 413-14, 319 S.E.2d at 693.

Finally, no evidence of a contractor-subcontractor relationship is shown to have existed, nor is there evidence that either Defendant or NCL failed to maintain workers' compensation coverage for their respective employees. I vote to affirm the Commission's conclusion that N.C. Gen. Stat. § 97-19 does not apply.

The Commission's opinion and award is properly affirmed. I respectfully dissent.

JERRY McSWAIN, Employee, Plaintiff
v.
INDUSTRIAL COMMERCIAL SALES & SERVICE, LLC, Employer,
AIG/CHARTIS CLAIMS, INC., Carrier, Defendants

No. COA19-740

Filed 7 April 2020

1. Workers' Compensation—compensable injury—traveling employee—personal errand—not arising out of employment

An employee's injury sustained after slipping and falling in a hotel lobby while on an out-of-state work trip was not compensable by the employer because there was no indication the employee's personal errand to retrieve his laundry was in furtherance of the employer's business, whether directly or indirectly.

2. Workers' Compensation—evidence—exclusion of medical records—prejudice analysis

Where the Industrial Commission properly concluded a traveling employee's fall in a hotel lobby did not involve a compensable injury, the exclusion of the employee's medical records by the Full Commission, even if an abuse of discretion, was not prejudicial.

3. Appeal and Error—mootness—cross-appeal—alternate theories in a workers' compensation case

Where the Court of Appeals upheld the Industrial Commission's determination that a traveling employee's injury from falling in a hotel lobby was not compensable, the issues raised in the employer's cross-appeal involving alternate theories of noncompensability were moot.

Appeal by Plaintiff from Order & Award entered 27 February 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 February 2020.

McSwain Law Firm, LLC, by Gayla S.L. McSwain, pro hac vice, and The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr., for Plaintiff-Appellant.

McAngus, Goudelock & Courie, PLLC, by Derek R. Wagner, for Defendants-Appellees.

DILLON, Judge.

Plaintiff Jerry McSwain appeals from an Order and Award entered by the Full Commission denying him workers' compensation payment after he fell while traveling for work for his employer, Defendants Industrial Commission Sales & Services, LLC and AIG/Chartis Claims, Inc. (altogether "Defendant").

I. Background

Plaintiff was employed by Defendant. Plaintiff claims he is due workers' compensation for injuries he sustained when he slipped and fell in the hotel he was staying at while out of town working on a project for his employer. Plaintiff fell as he walked through the lobby of the hotel to retrieve his laundry from the hotel laundry room. The facts, more particularly, are as follows:

On 12 November 2013, Plaintiff was part of a work crew who flew to California to work on a project for Defendant. The crew was scheduled to complete the job on 19 November and return on 20 November. However, they finished the project a day early, on 18 November. But changing the crew's return flights from 20 November to 19 November would have cost Defendant $2,400.00. Therefore, Defendant told the crew to keep their original schedule, giving the employees a free day in California.

During this free day, on 19 November, Plaintiff started a load of laundry in the hotel. While waiting for his laundry to finish, Plaintiff visited with other coworkers on the hotel patio consuming alcohol. When Plaintiff later walked back inside to retrieve his laundry, he slipped and fell on a wet spot in the hotel lobby.

Plaintiff filed a claim for workers' compensation for the injuries he allegedly sustained in the fall. His claim was denied by both a deputy commissioner and by the Full Commission. Plaintiff timely appealed.[1]

II. Analysis

The Full Commission denied coverage essentially because "Plaintiff has failed to prove a causal relationship between walking through the hotel to check on his laundry and his employment."

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1. We note that there have been many motions filed with our Court from both parties. Plaintiff's Petition for Writ of Certiorari and Amended Petition for Writ of Certiorari are both denied, as they wish to admit for our consideration evidence that was not considered by the deputy commissioner or the Full Commission. Defendant's motions are dismissed as moot. *See infra*.

Plaintiff argues that the Full Commission (1) failed to conclude that his fall did not arise out of his employment and (2) abused its discretion by refusing to consider certain medical evidence.

Defendant cross-appeals, contending that there were other grounds upon which the Commission could have also based its denial, which it failed to do.

For the reasons stated below, we conclude that the Full Commission's determination that Plaintiff's fall was not compensable was supported by the findings; that any error by the Commission in failing to consider other medical evidence that Plaintiff sought to offer was harmless; and that Defendant's arguments on cross-appeal are, therefore, moot.

A. Standard of Review

The standard of review for opinions and awards from the North Carolina Industrial Commission is "limited to [a] review[] [of] whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Intern. Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

B. Compensability of Plaintiff's Fall

[1] To qualify for benefits under the Workers' Compensation Act (the "Act"), an injury which occurs by accident must occur in the course of employment *and* arise out of employment. *See* N.C. Gen. Stat. § 97-2(6) (2019). As explained below, an employee is deemed to be "in the course of" his employment when he is on the job, that is, doing something which directly or indirectly benefits his employer. And an injury which occurs in the course of employment is deemed to "arise out of" his employment if his employment exposed him to an increased risk of injury.

Our Supreme Court has stated that traveling employees – that is, employees whose job requires them to stay overnight away from home – are considered acting "in the course of" their employment "during the trip, *except when a distinct departure on a personal errand is shown*." *Brewer v. Powers Trucking*, 256 N.C. 175, 178, 123 S.E.2d 608, 610 (1962) (emphasis added) (internal quotation marks and citations omitted). While a traveling employee on a business trip is generally deemed acting "in the course" of employment during the entire trip, the employee must still establish that the injury "arose out of" employment. *Bartlett v. Duke U.*, 284 N.C. 230, 235-36, 200 S.E.2d 193, 196 (1973) (no coverage where, even conceding that the traveling employee died in the course of his employment, he had not established that his death arose out of his employment).

Whether an injury sustained by a traveling employee "arises out of" his employment depends on the facts. *See Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996) ("The determination of whether an accident arises out of . . . employment is a mixed question of law and fact[.]"). Our Supreme Court has instructed that an injury arises out of employment when the injury "is a natural and probable consequence or incident of the employment and a natural result of one of its risks[.]" *Perry v. American Bakeries Co.*, 262 N.C. 272, 274, 136 S.E.2d 643, 645 (1964). And "[t]he causative danger . . . must be incidental to the character of the business and not independent of the [employment relationship]. *Bartlett*, 284 N.C. at 233, 200 S.E.2d at 195. However, for an injury to be covered, the risk "need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment[.]" *Id.* at 233, 200 S.E.2d at 195.

Here, the Commission determined that the injury sustained by Plaintiff, working as a traveling employee, was non-compensable.

The line between compensability and non-compensability is nuanced, but is sufficiently defined to resolve this case, as illustrated by the cases below.

Our Court has stated that when an off-duty, traveling employee is injured while traveling to a restaurant from the hotel to eat a meal, that injury generally is compensable. *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 42, 167 S.E.2d 790, 793 (1969). This is because the risk was from traveling to eat, a risk that arose from being away from home. *Id.*

However, our Supreme Court has held that injury to an off-duty, traveling employee who chokes on food while eating that restaurant meal is generally not compensable. *Bartlett*, 284 N.C. at 234-35, 200 S.E.2d at 195-96. This is because eating at a restaurant away from home did not increase the risk that the employee would choke on his meal. *Id.* at 234-35, 200 S.E.2d at 195-96.

Our Court has held that injuries sustained by an off-duty, traveling employee who was robbed while getting ice from the hotel ice machine *to make lunch* for the next day generally is compensable. *Ramsey v. N.C. Indus.*, 178 N.C. App. 25, 630 S.E.2d 681 (2006). This is because the hotel created an "increased risk" of robbery that the employee would not have faced had he been in his own kitchen preparing his lunch for the next day. *Id.* at 38-39, 630 S.E.2d at 690 (identifying the issue of "whether the risk of assault at the motel was a hazard of the journey [that is,] a risk peculiar to traveling").

However, our Supreme Court has held that injuries sustained by an off-duty, traveling employee in a traffic accident while returning to the hotel from purchasing soft drinks and beer (but not a meal) is not compensable. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E.2d 218 (1962). This is because the trip, unlike traveling to get a meal, was deemed a personal errand that did not "directly or indirectly [further] his master's business." *Id.* at 198, 128 S.E.2d at 221.

And our Supreme Court has held that an injury sustained by a traveling employee while using the hotel's pool is generally not compensable. *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964). The Court reasoned that

> [t]he fact that plaintiff was required to be temporarily in a distant city with expenses paid by his employer is not a controlling factor [but rather] whether his use of the pool was an authorized activity calculated to further, directly or indirectly, his employer's business [or whether] the accident resulted from the risk involved in the employment.

Id. at 274, 136 S.E.2d at 646.

Plaintiff points to some cases which are instructive. For example, Plaintiff cites *Martin*, *supra*, in which we held that an off-duty, traveling employee who goes on a personal errand to sightsee but then was injured when he began walking to a restaurant to eat a meal was covered, concluding that he "had abandoned this personal sight-seeing mission" and was back within the scope of his employment when he went to get a meal. *Martin*, 5 N.C. App. at 43, 167 S.E.2d at 794.

Plaintiff also points to a case in which our Court held that an off-duty, traveling employee is injured within the confines of the employer's road project and while returning to his sleeping quarters is covered, even though he was traveling back from a softball game involving the employees. *See Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 281 S.E.2d 718 (1981) (employee injured while traveling from a meal back to the hotel, but detouring to set up a softball game).

And Plaintiff cites to a case in which we held that an off-duty, traveling employee who is injured while returning to his hotel from an evening meal is still covered, even though he stayed at the restaurant past his meal to drink alcohol and watch a ballgame (where there was no allegation that the injury was due to intoxication). *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 529-30, 477 S.E.2d 678, 680 (1996).

Though not a case involving a traveling employee, we note our Supreme Court's decision in which that Court held that a night watchman who is injured while washing his own car while on the job on his employer's worksite was not covered. *Bell v. Dewey Bros., Inc.*, 236 N.C. 280, 283, 72 S.E.2d 680, 682 (1952). The Court reasoned that the employee "was engaged in an act in no way connected with the work he was employed to perform, and there appears no causal relationship between his employment as a watchman and the injury he sustained." *Id.* at 283, 72 S.E.2d at 682.

Here, the Commission found that Plaintiff was injured while retrieving his laundry that he was washing. Based on the findings made by the Commission and based on our jurisprudence, we must affirm the Commission's determination.

The fact that Plaintiff fell on the hotel premises does not, in and of itself, necessitate reversal. Indeed, our Supreme Court held that the employee in *Perry*, *supra*, who was injured in the hotel's swimming pool was not covered, as his swimming was not "calculated to further, directly or indirectly, the employer's business." *Perry*, 262 N.C. at 274, 136 S.E.2d at 645.

As illustrated above, a traveling employee while going to and from a restaurant to eat or to his hotel room to sleep is generally covered, because an employee has to eat meals and sleep in order to function for his employer on the trip. *See Martin*, 5 N.C. App. at 42, 167 S.E.2d at 793 (stating that traveling employees are covered where the injury "has its origin in a risk created by the necessity of sleeping and eating away from home").

Unlike eating and sleeping, washing laundry is not always necessary for an off duty, traveling employee. For this reason, Plaintiff's claim here is distinguishable from *Ramsey*, in which the claimant had to prepare and pack his lunch for the following workday, and similar cases. Unlike the claimant in *Ramsey*, Plaintiff was not injured while attending to personal needs that *had to be met* (e.g., eating a meal) before his traveling duties for his employer were completed. The Commission made no finding to suggest that the act by Plaintiff of doing his laundry was necessary to further, directly or indirectly, the business of his employer. There was no finding, much less evidence to support a finding, that Plaintiff had run out of clean clothes to necessitate a need to laundry to provide clean clothes during the remainder of the business trip. Accordingly, we conclude that the findings made by the Commission are more in line with those in *Perry*, where the employee was swimming in the hotel

pool, and *Bell*, where the night watchman was injured on the worksite while washing his own car. In each of those cases, our Supreme Court held that there was no coverage because there was no showing that the employee was engaged in an act calculated to further, directly or indirectly, his employer's business.

C. New Evidence

[2] Plaintiff claims that the Full Commission abused its discretion when it excluded certain medical records concerning his injuries and treatment, evidence that he did not offer in the hearing before the deputy commissioner.

Whether the Commission considers new evidence is a matter within its sound discretion. *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 577-78, 139 S.E.2d 857, 862-63 (1965).

The statute governing new evidence to be heard by the Full Commission states: "the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representative, and if proper, amend the award[.]" N.C. Gen. Stat. § 97-85. However, it has been held that "the duty to receive further evidence, in addition to reviewing the award, applies only if good ground therefor be shown." *Tindall v. American Furniture Co.*, 216 N.C. 306, 311, 4 S.E.2d 894, 897 (1939).

The Commission found that Plaintiff made no effort to have these documents admitted to the record before the Deputy Commissioner and that "Plaintiff did not produce any reason for not producing the evidence while the matter was before the Deputy Commissioner."

Assuming there was an abuse of discretion, we see no prejudice in the exclusion of the medical records, based on our determination that the accident which caused Plaintiff's injuries is not covered under the Act.

D. Defendant's Cross-Appeal

[3] Defendant argues that the Commission erred by not ruling on whether Plaintiff's claim was barred on an alternate theory, namely due to his intoxication causing the fall. "No compensation shall be payable if the injury or death to the employee was proximately caused by: (1) His intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee." N.C. Gen. Stat. § 97-12.

Defendants also argue that the Commission erred as a matter of fact and law in failing to find that Plaintiff did not carry his burden of proving a causal link between his fall and his injury.

Based on our conclusion that Plaintiff's fall did not occur within the scope of his employment, these additional issues raised by Defendant are moot. Defendant's cross-appeal is, therefore, dismissed.

III. Conclusion

The Commission did not err by concluding that Plaintiff's injuries are not compensable under the Act. The Commission did not abuse its discretion in excluding evidence that was not admitted or introduced in the hearing with the Deputy Commissioner. We dismiss Defendant's cross-appeal as moot.

AFFIRMED.

Judges BRYANT and INMAN concur.

MOLLY SCHWARZ, PLAINTIFF
v.
ST. JUDE MEDICAL, INC., ST. JUDE MEDICAL, S.C., INC., DUKE UNIVERSITY, DUKE UNIVERSITY HEALTH SYSTEM, INC., ERIC DELISSIO AND TED COLE, DEFENDANTS

No. COA19-395

Filed 7 April 2020

1. Civil Procedure—motion hearing—Rule 56—mandatory notice period

In an employment dispute, plaintiff-employee was given adequate notice of defendant-employer's motion for summary judgment where defendant complied with the Rules of Civil Procedure (Rules 5 and 56(c)) by serving plaintiff with the motion by fax ten days in advance of the hearing.

2. Civil Procedure—motion hearing—continuance—Rule 56(f)—trial court's discretion

The trial court did not abuse its discretion by denying plaintiff-employee's motion for a continuance of a summary judgment hearing in an employment dispute after considering arguments from both parties where its discretionary decision was well-reasoned and non-arbitrary.

3. Employer and Employee—wrongful discharge—retaliation—public policy considerations—summary judgment

In an employment dispute in which plaintiff-employee claimed she was wrongfully discharged in violation of public policy as retaliation for reporting to her employer that one of her coworkers committed adultery, the trial court properly granted summary judgment for defendant-employer because plaintiff failed to show not only that adultery was criminal conduct by statute, but also that reporting a consensual and private affair to her employer contravened public policy.

4. Employer and Employee—wrongful discharge—sex and age discrimination—legitimate reason for dismissal—summary judgment

In an employment dispute in which plaintiff-employee (a clinical specialist for a medical device company) claimed she was wrongfully discharged due to sex and age discrimination based on being replaced by a younger male employee, the trial court properly granted summary judgment for defendant-employer where the record established a legitimate and nondiscriminatory reason for plaintiff's discharge—numerous and consistent complaints about her job performance from doctors and patients—and where plaintiff failed to offer any evidence that this reason was merely a pretext for firing her due to sex or age.

5. Libel and Slander—per se libel—employee performance—healthcare field—patient care—qualified privilege

In an employment dispute in which plaintiff-employee (a clinical specialist for a medical device company) asserted her coworkers committed libel per se by forwarding an email that contained a patient complaint about her to upper management, the trial court properly granted summary judgment for defendant-coworkers based on qualified privilege because the internal reporting of a healthcare worker's performance related to patient care is protected from libel claims.

6. Wrongful Interference—employment contract—legitimate business interest—evidentiary support

In an employment dispute in which plaintiff-employee (a clinical specialist for a medical device company) asserted claims of tortious interference with her employment contract after she was fired, plaintiff's claims failed as a matter of law against (1) two coworkers who, by reporting and investigating patient complaints about

plaintiff's care, were engaged in legitimate business interests of the company and (2) a university health system that requested it no longer wanted to work with plaintiff based on complaints of her performance because there was no evidence that it sought to have plaintiff fired after she reported an affair by one of its doctors.

Appeal by plaintiff from orders entered 10 January 2019 by Judge Karen Eady-Williams and 17 January 2019 by Judge R. Kent Harrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2019.

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

Parker Poe Adams & Bernstein LLP, by Keith M. Weddington, and Seyfarth Shaw LLP, by Nancy E. Rafuse and J. Stanton Hill, for defendants-appellees St. Jude Medical, Inc., St. Jude Medical S.C., Inc., Eric Delissio, and Ted Cole.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Robert A. Sar and Andrew C. Avram, for defendants-appellees Duke University and Duke University Health System.

DIETZ, Judge.

Plaintiff Molly Schwarz worked for St. Jude Medical, a medical device company. In her position, Schwarz visited doctor's offices and hospitals and interacted with physicians and patients.

Over several years, St. Jude received multiple complaints from doctors and patients about Schwarz's unprofessional or inappropriate behavior. Ultimately, St. Jude fired Schwarz.

Schwarz then sued St. Jude, one of her co-workers, her direct supervisor, and Duke University Health System, one of St. Jude's larger customers in the region. She asserted claims for retaliatory discharge, sex and age discrimination, libel, and tortious interference with her employment contract.

The trial court granted summary judgment for Defendants and against Schwarz on all claims. On appeal, Schwarz asserts a series of procedural arguments about the timing of one of the two summary judgment hearings and argues that her claims should have been sent for trial. We disagree.

As explained below, the trial court was well within its sound discretion to conduct the summary judgment hearing when it did, rather than continue it, and Schwarz's evidence was insufficient to create a genuine issue of material fact on any of her claims. Accordingly, the trial court properly entered judgment in Defendants' favor as a matter of law.

Facts and Procedural History

In 2012, Defendant St. Jude Medical, a medical device company, hired Plaintiff Molly Schwarz to work as a Clinical Specialist. As part of her duties, Schwarz had to conduct "patient checks" in doctor's offices and hospitals to assess and assist with the adjustment of implanted medical devices. Schwarz also had to field calls and answer questions about the devices and provide information at conferences within a defined territory. During this period, Schwarz worked with Defendant Ted Cole, the Territory Manager for St. Jude in the Raleigh area. Both Schwarz and Cole were supervised by Defendant Eric Delissio, St. Jude's Regional Sales Director.

Beginning in 2014, St. Jude received several complaints from physicians and patients about Schwarz, including some complaints so serious that physicians prohibited St. Jude from sending Schwarz to work with them. For example, in June 2014, a physician banned Schwarz from working with him because Schwarz gave the doctor an expired medical device to implant. Schwarz received a written warning from Delissio for this incident. Later, in September 2014, St. Jude received a complaint from another hospital that Schwarz was "like a bull in a China shop" and agitated a patient when servicing the patient's medical device. Then, in January 2015, a physician in Schwarz's assigned territory prohibited Schwarz from coming to his office unless absolutely necessary because he claimed Schwarz had challenged his medical judgment in front of a patient.

In February 2015, St. Jude's human resources department suggested to Schwarz's supervisors that she be placed on a performance improvement plan based upon her "pattern of behavior that needed to be addressed with [Schwarz] from a customer standpoint." One week later, Schwarz's supervisors received a verbal complaint from a patient who alleged that Schwarz was unprofessional, lacked compassion, and appeared to lack knowledge of how St. Jude's medical devices functioned. The patient refused future care from Schwarz.

Finally, in late February 2015, another patient complained that Schwarz exposed the patient to unnecessary radiation, was argumentative, refused to listen, and "kept referring to the [x-ray] films backwards."

Cole received a copy of the email containing these claims and he forwarded the email to Delissio, who in turn forwarded it to high-level managers at St. Jude.

After considering other, less drastic disciplinary measures, St. Jude ultimately decided to terminate Schwarz's employment based on the pattern of behavior revealed by the repeated physician and patient complaints. In March 2015, St. Jude notified Schwarz that her employment was terminated. Schwarz then filed this lawsuit, asserting claims for wrongful termination, defamation, and tortious interference with contract.

Schwarz does not dispute the existence of the long series of physician and patient complaints against her. But she insists that these complaints were used as a pretext to fire her.

She contends that the real reason she was fired was because she informed her supervisors that a physician at Duke University Health System, with whom St. Jude worked, was engaged in an extra-marital affair with one of Schwarz's co-workers at St. Jude. Schwarz asserted claims for wrongful discharge based on public policy, sex discrimination, and age discrimination against St. Jude; libel claims against Cole and Delissio, the co-workers who forwarded certain patient complaints to superiors within the company; and tortious interference claims against Cole and Delissio, as well as against Duke University and Duke University Health System, the employer of the physician who allegedly had an extra-marital affair with Schwarz's co-worker.

After full discovery, Defendants moved for summary judgment. The trial court entered summary judgment for Defendants and against Schwarz on all claims. Schwarz timely appealed.

Analysis

I. Notice of the St. Jude summary judgment hearing

[1] Schwarz first argues that the trial court improperly ruled on the St. Jude defendants' summary judgment motion because Schwarz did not receive adequate notice of the hearing on that motion.[1] We reject this argument.

Under Rule 56(c), the party seeking summary judgment must serve the motion on the adverse party "at least 10 days before the time fixed for the hearing." N.C. R. Civ. P. 56(c). "Although Rule 56 makes no direct

1. We refer to the St. Jude Medical companies and the two St. Jude employees, Cole and Delissio, collectively as "St. Jude."

reference to notice of hearing, this Court has held that such notice also must be given at least ten (10) days prior to the hearing." *Wilson v. Wilson*, 191 N.C. App. 789, 791, 666 S.E.2d 653, 654 (2008). "Failure to comply with this mandatory 10 day notice requirement will ordinarily result in reversal of summary judgment obtained by the party violating the rule." *Zimmerman's Dep't Store, Inc. v. Shipper's Freight Lines, Inc.*, 67 N.C. App. 556, 557–58, 313 S.E.2d 252, 253 (1984).

Here, St. Jude complied with this 10-day notice rule. St. Jude served the motion by fax on 27 December 2018, ten days before the 7 January 2019 hearing on the motion. This service by fax is permitted by Rule 5 of the Rules of Civil Procedure. N.C. R. Civ. P. 5(b)(1)(a). Thus, St. Jude notified Schwarz of the summary judgment hearing at least ten days in advance.

But Schwarz argues that she was entitled to *thirteen* days advance notice, not ten. This is so, she reasons, because St. Jude also served its notice by mail. Under the "mail rule" for service contained in Rule 6(e), Schwarz argues, "three days shall be added to the prescribed period" of notice, thus meaning she was entitled to a 13-day notice period rather than a 10-day one. *See* N.C. R. Civ. P. 6(e); *see also Planters Nat'l Bank and Tr. Co. v. Rush*, 17 N.C. App. 564, 566, 195 S.E.2d 96, 97 (1973).

We reject this argument. The purpose of the 10-day mandatory notice requirement in Rule 56(c) is to ensure that the non-moving party is aware of the upcoming hearing at least ten days in advance. That occurred here because St. Jude faxed the notice ten days before the hearing in conformity with the procedural requirements of both Rule 5 and Rule 56(c).

II. Motion for continuance

[2] Next, Schwarz contends that the trial court erred by denying her motion to continue the 7 January 2019 summary judgment hearing. Again, we reject this argument.

"Rule 56(f) allows the trial court to deny a motion for summary judgment or order a continuance to permit additional discovery, if the party opposing the motion cannot present facts essential to justify his opposition." *Fla. Nat'l Bank v. Satterfield*, 90 N.C. App. 105, 109, 367 S.E.2d 358, 361 (1988). "The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice." *Bowers v. Olf*, 122 N.C. App. 421, 426, 470 S.E.2d 346, 350 (1996). The decision of whether to grant a request for a continuance under Rule 56(f) is left to the sound discretion of the

trial court. *Fla. Nat'l Bank*, 90 N.C. App. at 109, 367 S.E.2d at 361. This Court cannot override that determination unless the trial court abused its discretion through a ruling "so arbitrary that it could not have been the result of a reasoned decision." *Manning v. Anagnost*, 225 N.C. App. 576, 579, 739 S.E.2d 859, 861 (2013).

Here, Schwarz argues that the trial court should have granted a continuance because her attorneys "were on vacation during the Christmas holidays," giving them little time to prepare for the hearing. She also contends that St. Jude's motion relied on witnesses that St. Jude failed to disclose during the discovery period. Thus, she contends, the interests of justice required the trial court to continue the hearing to provide Schwarz and her counsel with additional time to prepare.

The trial court's analysis of this question is a paradigmatic example of a discretionary decision to which this Court must defer. Schwarz argued the continuance was necessary in the interests of justice. St. Jude disagreed. Both sides offered reasonable arguments for their positions. The trial court considered the parties' arguments and elected, in its discretion, to proceed with the hearing. Although the trial court properly could have granted a continuance, the court's decision not to do so was a reasoned, non-arbitrary one and thus was well within the trial court's sound discretion. *Fla. Nat'l Bank*, 90 N.C. App. at 109, 367 S.E.2d at 361.

III. Wrongful discharge – retaliation

[3] Schwarz next argues that the trial court erred by granting summary judgment in favor of St. Jude on her wrongful discharge claim based on unlawful retaliation. Schwarz contends that her termination was retaliation for her report of adultery by a co-worker and that this retaliation violates North Carolina public policy. We reject this argument.

Schwarz was an at-will employee. "Although at-will employment may be terminated for no reason, or for an arbitrary or irrational reason," the employer cannot terminate an employee for a "reason or purpose that contravenes public policy." *Imes v. City of Asheville*, 163 N.C. App. 668, 670, 594 S.E.2d 397, 398 (2004). Put another way, employers generally are free to "retaliate" against their at-will employees by firing them for conduct of which they disapprove. But they cannot fire an at-will employee for a reason that contravenes North Carolina public policy.

"Public policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 670, 594 S.E.2d at 399. Public policy is violated "when an employee is fired in contravention

of express policy declarations contained in the North Carolina General Statutes." *Id.*

Here, Schwarz contends that she engaged in conduct protected by North Carolina public policy because she "reported adultery" by one of her co-workers. Adultery, Schwarz contends, is an illegal act and a report of this illegal activity to the employer is a protected act under North Carolina public policy.

There are several flaws in this argument. First, it is far from clear that adultery is a criminal act in North Carolina. To be sure, there is an aging statute titled "Fornication and Adultery" which provides that "[i]f any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-184. But this Court has examined this statute and observed that "the State has chosen not to use it, at least in modern times." *Malecek v. Williams*, 255 N.C. App. 300, 305 n.2, 804 S.E.2d 592, 597 n.2 (2017). Indeed, in 2006, a trial court declared Section 14-184 facially unconstitutional. The court entered a permanent injunction providing that the State was "hereby permanently enjoined from enforcing N.C.G.S. § 14-184 in any manner." *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Aug. 25, 2006) (unpublished). The State did not appeal that permanent injunction and it appears to be in effect today. Thus, Schwarz has not identified any currently applicable statutory basis for asserting that adultery is a criminal act.

In any event, we find no support in either the General Statutes or our case law for the principle that reporting to one's *employer* the private sexual activity of a co-worker is protected by any "express policy declarations contained in the North Carolina General Statutes." *Imes*, 163 N.C. App. at 670, 594 S.E.2d at 399. The alleged consensual affair between Schwarz's co-worker and a married physician is simply not conduct so "injurious to the public or against the public good" that reporting it to Schwarz's employer could be considered a part of the core public policy of our State. *Id.* The trial court therefore properly concluded that Schwarz's wrongful discharge claim based on public policy grounds failed as a matter of law.

IV. Wrongful discharge - sex and age discrimination

[4] Schwarz next argues that St. Jude committed sex and age discrimination by firing her and hiring a male employee who was 39 years old. This wrongful discharge argument, like Schwarz's previous one, is fatally flawed.

North Carolina has adopted the legal standard for sex and age discrimination that was developed through federal employment discrimination doctrine. *Johnson v. Crossroads Ford, Inc.*, 230 N.C. App. 103, 111, 749 S.E.2d 102, 108 (2013). Under this standard, the claimant must first establish a prima facie case of disparate treatment by showing that: (1) she is a member of a protected class; (2) she was qualified for her job and her performance was satisfactory; (3) she suffered an adverse employment action; and (4) other similarly situated employees who are not members of the protected class did not suffer the same adverse employment action. *Head v. Adams Farm Living, Inc.*, 242 N.C. App. 546, 555, 775 S.E.2d 904, 910 (2015).

Once the claimant meets this standard, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *North Carolina Dep't of Correction v. Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 82 (1983). Then, the burden shifts back to the employee to show that the proffered reason for the adverse employment action was merely a pretext for discrimination. *Id.*

Here, even assuming Schwarz's evidence satisfied her initial burden to show a prima facie case of sex and age discrimination, her claim fails because the record contains evidence of a legitimate, nondiscriminatory reason for Schwarz's termination—repeated, consistent complaints from physicians and patients about Schwarz's inappropriate or unprofessional conduct. Indeed, even a core part of Schwarz's retaliatory discharge claim—that she revealed an extra-marital affair between a co-worker and a customer—demonstrates that St. Jude's reason for terminating Schwarz concerned her conduct toward the patients and physicians on whom St. Jude depends for its business.

In response, Schwarz did not offer any evidence that these reasons for her termination were merely a pretext and that St. Jude's real reason for her termination was her sex or age. *Hodge v. North Carolina Dep't of Transp.*, 246 N.C. App. 455, 474, 784 S.E.2d 594, 607 (2016); *Head*, 242 N.C. App. at 561, 775 S.E.2d at 914. Without that evidence, Schwarz cannot survive a motion for summary judgment. Accordingly, the trial court properly entered judgment on this claim as a matter of law.

V. Libel claim

[5] Schwarz next argues that the trial court improperly entered summary judgment on her libel claim. Schwarz contends that Defendants Ted Cole and Eric Delissio committed libel *per se* by forwarding an email up the chain of command at St. Jude. The email alleged that Schwarz mistreated a patient by misreading an x-ray and exposing a patient to unnecessary radiation. We reject Schwarz's argument.

"[L]ibel *per se* is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium, or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, 408–09 (1984).

Although this claim can arise in a workplace setting, there are special rules for libel and defamation claims that occur within a healthcare institution. Healthcare professionals generally have a qualified privilege to report to management any employee work performance issues that implicate patient care. *Troxler v. Carter Mandala Ctr., Inc.*, 89 N.C. App. 268, 272, 365 S.E.2d 665, 668 (1988). This privilege exists because the "health care industry plays a vital and important role in our society" and encouraging employees to share concerns about healthcare services ensures the "quality and trustworthiness of the care which the medical community provides." *Id.*

Here, even taking all the evidence in the light most favorable to Schwarz, her libel allegations fall squarely within the qualified privilege for healthcare professionals. Cole and Delissio received an email indicating that Schwarz provided improper care to a patient. Cole forwarded the email to Delissio, his supervisor, and Delissio forwarded it to higher-ranking employees at St. Jude. Neither defendant sent the email to anyone outside this chain of command within St. Jude. This sort of internal reporting of an allegation of improper patient care is protected from libel claims by the qualified privilege applicable in the healthcare field. Accordingly, the trial court properly entered summary judgment on Schwarz's libel claims.

VI. Tortious interference

[6] Finally, Schwarz argues that Defendants Cole, Delissio, and Duke University Health System tortiously interfered with her employment contract by inducing St. Jude to terminate her employment. Again, this argument is meritless.

To establish a claim for tortious interference with contract, there must be "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to

plaintiff." *Brodkin v. Novant Health, Inc.*, __ N.C. App. __, __, 824 S.E.2d 868, 874 (2019).

We begin with Schwarz's claim against Cole and Delissio, her two co-employees at St. Jude. When a tortious interference claim based on an employment contract is brought against the plaintiff's co-employees, "the plaintiff must show that the alleged interference was unrelated to a 'legitimate business interest' of the employee." *Id.*

Here, unrebutted evidence in the record indicates that the alleged interference—that is, these two employees' involvement in St. Jude's decision to terminate Schwarz—was related to their legitimate business interests. Cole was one of Schwarz's co-workers and interacted with the same clients and patients as Schwarz. Delissio is the mutual supervisor for both Cole and Schwarz.

Cole reported to Delissio that a number of clients and patient had complaints and other concerns about Schwarz's work. Delissio then investigated those concerns and ultimately provided disciplinary recommendations to St. Jude that included possible termination.

Reporting and investigating repeated complaints by patients and healthcare professionals about a co-employee's work performance is a legitimate business interest. *Id.* Accordingly, the trial court properly concluded that undisputed evidence in the record defeated Schwarz's tortious interference claim against her two co-employees at St. Jude as a matter of law.

Schwarz next contends that Duke University Health System tortiously induced St. Jude to fire Schwarz because she reported a sexual relationship between a co-worker and a Duke employee. But this claim fails because, even taking all evidence in the light most favorable to Schwarz, she has not forecast any evidence that Duke sought her termination from St. Jude. *Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 745, 641 S.E.2d 695, 697 (2007).

Duke was, in effect, a customer of St. Jude. One of Duke's physicians refused to work with Schwarz. At most, Duke requested that St. Jude not send Schwarz to work with them, and to use other St. Jude employees instead. There is no evidence that Duke "intentionally induced" St. Jude to terminate its employment contract with Schwarz. *Brodkin*, __ N.C. App. at __, 824 S.E.2d at 874. Indeed, there is no evidence that Duke had any interest at all in whether Schwarz remained employed at St. Jude. Even taking all inferences in Schwarz's favor, Duke, at most, requested not to work with Schwarz anymore. There is no evidence that this would

have forced St. Jude to end its employment contract with Schwarz, nor any evidence that Duke believed this to be true. This, in turn, means Schwarz failed to forecast any evidence that "the defendant intentionally induce[d] the third person not to perform the contract." *Id.* Accordingly, the trial court properly determined that Schwarz's tortious interference claim failed as a matter of law.

Conclusion

For the reasons stated above, we affirm the trial court's orders granting summary judgment in favor of Defendants.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
DONALD EUGENE BLANKENSHIP

No. COA19-678

Filed 7 April 2020

1. Satellite-Based Monitoring—period of years—basis—multiple victims—position of trust

After being convicted of five counts of taking indecent liberties with a child, defendant did not have to be assessed as high risk by the Department of Corrections (DOC) before the trial court could impose satellite-based monitoring. The court's imposition of a ten-year period upon defendant's release from prison was adequately supported by defendant's stipulation to the factual basis for his guilty plea, the DOC's determination that defendant was of average risk, and findings that defendant abused multiple children of different ages, both male and female, and that he took advantage of a position of trust by using as a pretext the provision of a safe environment in order to commit his assaults.

2. Appeal and Error—preservation of issues—satellite-based monitoring—reasonableness

In a prosecution for five counts of taking indecent liberties with a child, defendant failed to preserve for appellate review any

challenge to the reasonableness of the imposition of satellite-based monitoring (for a period of ten years upon his release from incarceration) where he raised no objections or constitutional arguments before the trial court.

3. Constitutional Law—effective assistance of counsel—satellite-based monitoring—civil proceeding

Defendant's claim that his counsel provided ineffective assistance of counsel (IAC) for failing to raise a constitutional challenge at his satellite-based monitoring (SBM) hearing was dismissed because IAC claims do not apply to civil proceedings such as a hearing on SBM eligibility.

Appeal by defendant from judgments entered 6 December 2017 by Judge Julia Lynn Gullett in Catawba County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Yvonne B. Ricci, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

TYSON, Judge.

Donald Eugene Blankenship ("Defendant") appeals from judgments entered upon his guilty plea to five counts of indecent liberties with minor children. We affirm the trial court's order imposing ten years of satellite-based monitoring ("SBM").

We dismiss Defendant's unpreserved constitutional challenge to the reasonableness of the trial court's order on SBM. We also dismiss Defendant's ineffective assistance of counsel ("IAC") claim.

I. Background

Federal law enforcement officers located in Joplin, Missouri were investigating David Lee Perkins for filming and distributing child pornography. Perkins distributed child pornography to Defendant and corresponded via email with him concerning the minor victim depicted in the pornography. The Federal Bureau of Investigation executed a search warrant on Defendant at home and confiscated his computer. During Defendant's interview, he admitted to receiving, having, and sharing child pornography on his computer and to fondling several victims.

Defendant was indicted for five counts of taking indecent liberties with children on 1 May 2017. He pleaded guilty to those charges on 6 December 2017. The State presented a factual basis for Defendant's plea, asserting three of the sexual assault victims, both male and female children, were between the ages of six to fourteen years old. The State also identified two additional minor victims and child pornography crimes, for which Defendant was not indicted.

T.S. was six or seven years old between 1 July 2010 and 31 August 2010. T.S.' parents were friends with Defendant, and they had left T.S. alone with him on several occasions. Defendant fondled and assaulted T.S. two times by touching T.S.' penis and buttocks and had T.S. touch Defendant's penis.

V.G. was fourteen years old between 1 June 2012 and 30 June 2012. V.G. was friends with Defendant's daughter and had stayed overnight at Defendant's house. While V.G. was staying at Defendant's house, he tried to touch "her breasts and her vaginal area."

The third victim, M.B., was eleven years old between 1 June 2012 and 30 September 2012. M.B. was also friends with Defendant's daughter and visited Defendant's house. On "numerous occasions" at Defendant's house he tried to touch M.B.'s breasts and vagina. Once M.B. had to "put[] a pillow over her [body] trying to protect herself" from Defendant's assaults.

As a part of Defendant's plea agreement on the five indecent liberties charges, the State agreed not to proceed on any charges related to the child pornography Defendant possessed or concerning assaults on the two other unindicted victims.

The State requested to be heard on the imposition of SBM. Prosecutors argued and the trial court found Defendant had committed sexually violent offenses under N.C. Gen. Stat. § 14-208.65. The State used the factual basis for the plea and the findings of the STATIC-99R, an actuarial assessment instrument, as the basis for requesting the imposition of SBM on Defendant for ten years. The STATIC-99R concluded Defendant had one point from the individual risk factors, and the Department of Corrections characterized his risk as "Average Risk."

On 6 December 2017, Judge Gullett sentenced Defendant to an active term of five consecutive sentences of 16 to 29 months. Defendant was ordered to register as a sex-offender for thirty years, and to be subject to SBM for a period of ten years following his release from incarceration. On 5 December 2018, Judge Nathaniel J. Poovey entered an

amended judgment *nunc pro tunc* modifying Defendant's sentence to five consecutive active terms of 16 to 20 months each.

Defendant petitioned for writ of certiorari. This Court allowed Defendant's petition "for the purpose of granting defendant a belated appeal from the 'Judicial Findings and Order for Sex Offenders' and criminal judgments" dated 6 December 2017. This Court's order also expressly limited the scope of Defendant's appeal from the criminal judgments "to those issues the defendant could have raised on direct appeal pursuant to N.C. Gen. Stat. [§] 15A-1444 (2017)."

II. Jurisdiction

A defendant entering a guilty plea has no statutory right to appeal the trial court's judgment. *See* N.C. Gen. Stat. § 15A-1444(e) (2019). This Court discretionarily reviews Defendant's "Judicial Findings and Order for Sex Offenders" and criminal judgments under the terms of the writ of certiorari granted on 12 February 2019 pursuant to N.C. Gen. Stat. § 15A-1444(g).

III. Issues

Defendant argues the trial court erred by requiring him to enroll in SBM when the Department of Corrections ("DOC") characterized his risk at the lowest level of the "Average Risk" category on the STATIC-99R form. Defendant also asserts the State had failed to establish his enrollment in SBM constituted a reasonable search under the Fourth Amendment as required by *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). Defendant further argues he received ineffective assistance of counsel upon his trial counsel's failure to argue the constitutionality of the SBM program being applied to him.

IV. SBM Determination

A. Standard of Review

> [W]e review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found. We [then] review the trial court's order to ensure that the determination that defendant requires the highest possible level of supervision and monitoring reflects a correct application of law to the facts found.

State v. Kilby, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citations, quotation marks and brackets in original omitted).

B. Analysis

[1] Defendant argues the trial court erred by requiring him to enroll in the SBM program for a period of ten years. Defendant contends the trial court's four additional findings, the DOC's "Average Risk" assessment, and the basis for the plea do not adequately support the legal conclusion requiring Defendant to enroll in SBM for ten years.

An offender may be required to enroll in SBM without a finding of a high risk by the DOC. *See State v. Morrow*, 200 N.C. App. 123, 132, 683 S.E.2d 754, 761 (2009) (declining "to adopt . . . construction of the statute that would require a DOC rating of high risk as a necessary requisite to SBM").

"[A] trial court's determination that the defendant requires the highest possible level of supervision may be adequately supported where the trial court makes additional findings regarding the need for the highest possible level of supervision and where there is competent record evidence to support those additional findings." *State v. Green*, 211 N.C. App. 599, 601, 710 S.E.2d 292, 294 (2011) (internal quotation marks omitted). In *Green*, this Court held a "trial court may properly consider evidence of the factual context of a defendant's conviction when making additional findings as to the level of supervision required of a defendant convicted of an offense involving the physical, mental, or sexual abuse of a minor." *Id.* at 603, 710 S.E.2d at 295.

Before we consider whether the trial court properly concluded Defendant requires the highest possible level of supervision, we must first determine whether the challenged additional findings are supported by competent evidence. The trial court made the following additional findings of fact: (1) Defendant "sexually assaulted multiple child victims;" (2) Defendant "sexually assaulted both male and female child victims;" (3) "the children ranged in ages from 6 to 14;" and, (4) Defendant "took advantage of a position of trust to sexually assault his victims."

"The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (citation omitted). Prior to the start of the SBM hearing, the trial court engaged in a plea colloquy with Defendant, in which Defendant stipulated to the State's factual basis for the plea.

In offering the factual basis to support the plea, the State provided the details of Defendant's assault on three minor victims between the ages of six to fourteen years old. The victims were both male and female.

Defendant's victims were either guests in his home to visit his daughter or T.S., a six-year-old male child, whose parents had asked Defendant to care for and protect him. The unobjected to evidence, that Defendant admitted as a part of his plea bargain, provides competent evidence to support the trial court's additional findings. Defendant's pretext of providing childcare for T.S. to accommodate T.S.' parents and affording a purported safe place for female minors to visit his daughter and then committing these assaults is especially egregious.

As we have concluded the trial court's additional findings of fact one, two, three, and four are supported by competent evidence, we must next determine whether these findings, along with the "Average Risk" STATIC-99R assessment, support the trial court's determination that Defendant "requires the highest possible level of supervision and monitoring." This Court's review of the trial court's determination is to ensure it "reflect[s] a correct application of law to the facts found." *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432.

Relating to additional finding one, that Defendant "sexually assaulted multiple child victims," Defendant argues this finding of fact merely shows the way or manner of how he committed the offense and did not support its conclusion that Defendant posed a high risk of re-offending. Defendant argues this issue is governed by *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011). Defendant asserts the "evidence offered very little in the way of predicative statements concerning [the] [d]efendant's likelihood of recidivism." *Id.* at 382, 712 S.E.2d at 193.

The holding in *Pell* is inapposite to the present facts. In *Pell*, the defendant was sentenced to register as a sex offender, in part, on the trial court's finding that he was a "danger to the community." *Id.* at 377, 712 S.E.2d at 190. The Court recognized that the "legislative intent reveals that 'danger to the community' only refers to those defendants who pose a risk of engaging in sex offenses following their release from incarceration." *Id.* at 381, 712 S.E.2d at 192. This Court held the State's expert witness' testimony that defendant was at a low risk of offending and the victim's impact statements addressing the impact defendant's actions had on their lives, were insufficient evidence to support a conclusion that the defendant "represented a 'danger to the community.' " *Id.* at 381-82, 712 S.E.2d at 193.

Unlike in *Pell*, the trial court here found Defendant had "sexually assaulted multiple child victims." This finding does not merely relate to the manner of the commission of the offenses. It shows Defendant's multiple actions on multiple minor victims at multiple times rather than

a single or isolated incident. The court's additional finding corresponds to and is exactly a "predictive statement concerning Defendant's likelihood of recidivism." *Id.* at 382, 712 S.E.2d at 193.

As previously discussed, the trial court may consider the context under which the crimes occurred, revealed in the factual basis for Defendant's guilty plea, when making additional findings "as to the level of supervision required of a defendant convicted of an offense involving the physical, mental, or sexual abuse of a minor." *Green*, 211 N.C. App. at 603, 710 S.E.2d at 295. Defendant stipulated to the factual basis for his plea. Defendant's crimes of sexually abusing multiple minor victims, on multiple occasions within the pretext of providing a safe environment to gain access to them supports the imposition of SBM.

Turning to additional finding two, Defendant "sexually assaulted both male and female child victims." Defendant argues this additional finding is contained in the STATIC-99R assessment and cannot also be considered as an additional finding. In support of this assertion, Defendant cites *State v. Thomas*, wherein this Court overturned an order of SBM because "additional findings cannot be based upon factors explicitly considered in the STATIC-99 assessment." *State v. Thomas*, 225 N.C. App. 631, 634, 741 S.E.2d 384, 387 (2013).

The STATIC-99 assessment in *Thomas* included a prior conviction. *Id.* at 632, 741 S.E.2d at 386. This prior conviction was also listed as an "additional finding." *Id.* However, the finding number two in the present case is distinct from *Thomas*. The entire factor was not "explicitly considered" in Defendant's STATIC-99R. The challenged finding before us incorporates both male and female victims in Defendant's home, while only the male victims were included in the STATIC-99R's assessment. In *Thomas*, both the trial court's "additional findings" were overruled by this Court leaving no additional findings to support the SBM order. *Id.* at 635, 741 S.E.2d at 387-88. Here, additional factors to support the order of SBM are not duplicative and remain.

Defendant argues additional finding three, "[t]he children range in ages from 6 to 14" does not support a conclusion that Defendant required the highest possible level of supervision and monitoring. Again, Defendant cites *Green*, where neither of the victims were "able to advocate" for themselves. *Green*, 211 N.C. App. at 601, 710 S.E.2d at 294. However, the statement in *Green* has been read more expansively than being limited to victims so young they cannot speak. The finding goes to the general ability of the victims to advocate and report incidents and abuses. A child, who can speak, may also not have the will, courage, or

maturity to report what has happened to them. *See State v. Smith*, 240 N.C. App. 73, 76, 769 S.E.2d 838, 841 (2015) (upholding the SBM in part based upon the fact victims were very young females).

Defendant argues additional finding four, "[t]he defendant took advantage of a position of trust to sexually assault his victims" does not support the conclusion that he posed a high risk of re-offending. Defendant cites *State v. Blakeman*, wherein this Court overruled a determination to impose SBM because insufficient evidence supported the sentencing factor that the defendant was in a position of trust over the assault victim. *State v. Blakeman*, 202 N.C. App. 259, 272, 688 S.E.2d 525, 533 (2010).

In *Blakeman*, no evidence showed the victim's "mother had arranged for [the defendant] to care for [the victim] on a regular basis, or that [the defendant] had any role in [the victim's] life other than being her friend's stepfather." *Id.* at 270, 688 S.E.2d at 532.

Here, some of Defendant's minor victims were placed in Defendant's care to be watched and kept safe under the direction of the minor's parents, or were children visiting Defendant's daughter in his home. T.S. is distinguishable from the victim in *Blakeman*. The parents of T.S. had left the six-year-old child with Defendant to care for and monitor the child when he took advantage of a position of trust to assault T.S. Defendant's arguments are overruled.

V. Reasonableness of Ten Year SBM

[2] Defendant argues the State failed to establish his enrollment in SBM constituted a reasonable search under the Fourth Amendment as required by *Grady*, 372 N.C. 509, 831 S.E.2d 542. "[T]he State shall bear the burden of proving that the SBM program is reasonable." *State v. Blue*, 246 N.C. App. 259, 264, 783 S.E.2d 524, 527 (2016).

The transcript of Defendant's SBM hearing shows:

> [The State]: Your Honor, that would be the general presentation of the State for the factual basis and the findings that the State would like the Court to find regarding the Static-99 and the additional findings, and in particular the State would like the Court to, of course, based on the findings that it's required to regarding on the 615 Form is that this is a . . . sexually violent offense under GS 14-208.65. I don't think there's any objection to that.
>
> . . . .

> Number 2, the [D]efendant has not been classified as a sexually violent predator.
>
> Number 3, the [D]efendant is not a recidivist.
>
> Number 4, this conviction is not for an aggravated offense. But we do believe that under 5B, this did involve the physical, mental or sexual abuse of a minor.
>
> I think [Defendant's counsel] will probably stipulate to that.
>
> . . . .
>
> And our recommendation to the Court is based on what you heard and the nature and what the systematic desire for child pornography, to exploit children, that this [D]efendant should be subjected to [SBM] for ten years after he is let out of incarceration.

Defendant's counsel raised no objections or constitutional challenge in response to the State's showing and argument. Defendant further raised no objections or constitutional challenge at any point during this hearing. Defendant's counsel filed no motion, objection, or asserted any argument the SBM imposed upon Defendant was an unreasonable search.

This case mirrors *State v. Bishop*, wherein the defendant was convicted of taking indecent liberties with a child and the trial court sentenced him to SBM for a term of thirty years. *State v. Bishop*, 255 N.C. App. 767, 768, 805 S.E.2d 367, 368 (2017). The defendant did not raise any constitutional issue before the trial court, cannot raise it for the first time on appeal, and has waived this argument on appeal. *Id.* at 770, 805 S.E.2d at 370. The writ that brought this case before us for review is expressly limited "to those issues the defendant could have raised on direct appeal pursuant to N.C. Gen. Stat. 15A-1444 (2017)."

The defendant in *Bishop* requested the Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to hear his arguments and review his constitutional challenge. *Id.* This Court held the defendant was "no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step." *Id.*

Here, in the exercise of our discretion, we decline to invoke Rule 2 to issue a further writ of certiorari to review Defendant's unasserted

and unpreserved argument on appeal. Defendant's unpreserved constitutional argument challenging his enrollment in SBM is dismissed. *See State v. Spinks*, 256 N.C. App. 596, 611, 808 S.E.2d 350, 360 (2017).

VI. Ineffective Assistance of Counsel

[3] Defendant argues his counsel's failure to argue the constitutionality of the SBM program before the trial court consisted ineffective assistance of counsel. Our Court has held "hearings on SBM eligibility are civil proceedings." *State v. Miller*, 209 N.C. App. 466, 469, 706 S.E.2d 260, 262 (2011). This Court also held: "IAC claims are not available in civil appeals such as that form an SBM eligibility hearing." *Id.* An order for enrollment in SBM is a civil penalty. *See State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010). Defendant's argument is dismissed.

VII. Conclusion

Defendant's argument that the trial court had no factual basis for requiring the highest level of monitoring based upon the DOC's finding of "Average Risk" is without merit. The conclusion that he requires the highest possible level of supervision is supported by the factual basis for his plea, the State's decision not to pursue further charges, the risks identified by the STATIC-99R, and the four additional findings of fact. The trial court properly found and determined SBM could be lawfully imposed upon Defendant.

Defendant failed to assert at trial and has waived direct appellate review of any Fourth Amendment challenge to the order requiring him to enroll in the SBM program for ten years. His argument is dismissed. We also dismiss Defendant's IAC claim on this civil issue.

We affirm the judgments entered upon Defendant's guilty plea. Defendant's unpreserved constitutional and his IAC claims are dismissed. *It is so ordered.*

AFFIRMED IN PART, DISMISSED IN PART.

Chief Judge McGEE and Judge YOUNG concur.

STATE OF NORTH CAROLINA
v.
MARQUES RAMAN BROWN

No. COA19-403

Filed 7 April 2020

Homicide—second-degree murder—jury instructions—self-defense—sufficiency of evidence

In a trial for the murder of an off-duty police officer, defendant was not entitled to have the jury instructed on self-defense and on the lesser-included offense of voluntary manslaughter based on imperfect self-defense where the evidence was insufficient to support a reasonable belief that deadly force was necessary to protect defendant from death or great bodily harm. Although defendant testified that he saw a man approach him who looked at him "real mean" and he saw a gun, the evidence also showed that the time from when the officer stepped out of his car to when he was shot and killed was only seven seconds, during which the officer did not say anything to defendant, did not point a gun at defendant, and had no physical interaction with defendant.

Appeal by defendant from judgments entered 5 March 2018 by Judge Robert F. Floyd in Robeson County Superior Court. Heard in the Court of Appeals 3 December 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant.

DIETZ, Judge.

Defendant Marques Brown shot and killed an off-duty police officer who was approaching Brown's car to arrest him on several active warrants. At the time, Brown was on edge because there had been several attempts on his own life by individuals who believed Brown had murdered a man named "Fat Boy."

In the several seconds after the officer pulled up in his car and got out, wearing ordinary civilian clothes, Brown glimpsed a handgun on the officer, although Brown admitted that the officer never pointed the weapon at Brown or motioned as if he intended to use it. Brown then

grabbed his own gun, pointed it out his car window, and killed the officer. Brown later explained that he feared for his life because "any time I ever seen somebody coming at me with a gun, it was shot."

Brown appeals his conviction for second degree murder on the ground that the trial court wrongly refused his request for instructions related to self-defense. We reject this argument. Viewing the evidence in the light most favorable to Brown, and considering the mind of a person of ordinary firmness, it was not reasonable for Brown to believe that it was necessary to shoot and kill the approaching officer to avoid serious bodily injury or death. Accordingly, the trial court properly declined to instruct the jury on these self-defense issues and we find no error in the trial court's judgments.

Facts and Procedural History

On the morning of 17 July 2012, Officer Jeremiah Goodson was off duty and running errands with his wife when he stopped at a gas station. At the gas station, Officer Goodson told his wife that he saw someone inside the store who had active warrants and that he needed to drop her off somewhere safe. Goodson took his wife to a nearby strip mall.

Officer Goodson then contacted his supervisor, Lieutenant Monteiro, to report that he located a subject with active warrants, Defendant Marques Brown. Goodson described Brown's clothing and vehicle and reported that Brown was with a woman and a small child. Lieutenant Monteiro immediately instructed an on-duty officer, Officer Hayes, to respond to the gas station to assist in serving the warrants and making the arrest. Monteiro told Goodson to remain on the line and to keep sight of Brown in case he changed locations.

Officer Goodson reported that Brown's car moved to a nearby gas station parking lot. Officer Hayes testified that when he arrived at the parking lot, he blocked Brown's car with his patrol vehicle, while Goodson simultaneously pulled his personal vehicle beside Brown's car. Hayes saw Goodson step out of his car and take a single step towards the store before being struck by multiple gunshots. A cashier working at the gas station witnessed the incident and testified that she saw Goodson exit his car in the parking lot, that Goodson was "looking in the store like he's looking for somebody," and then "his shirt starts to change colors and he hits the ground." A customer at the gas station testified that he heard multiple shots and saw a hand holding a gun out the window of Brown's vehicle.

Immediately after the shooting occurred, Officer Hayes drew his weapon and approached Brown's vehicle where Brown was sitting in the

passenger seat. The front and back passenger windows were partially rolled down. Hayes opened the door of Brown's vehicle and ordered Brown to get out. Hayes saw a gun lying in the front passenger seat. The gun had a ten-round capacity with six bullets remaining.

Captain Johnny Coleman arrived on the scene after learning that an officer was down and observed Goodson lying face down between his vehicle and Brown's vehicle. Goodson was dressed in plain clothes and his head was facing towards the store. When they rolled Goodson over, there was a gun lying underneath him.

Brown told the officers that he was not aware the man he shot was a police officer. He explained that Officer Goodson "had a gun in his hand," although he also asserted, conflictingly, that he "didn't see the gun." When asked about the gun, Brown also told the officers that Goodson didn't "raise it and point it at me or nothing."

On 3 August 2012, Brown was indicted for first degree murder of Officer Goodson, possession of a firearm by a felon, and possession with intent to sell or deliver marijuana. The case went to trial on 19 February 2018.

At trial, Dr. Richard Johnson testified that he performed the autopsy on Officer Goodson and found four gunshot wounds: two in the chest, one in the left side of the face, and one in the back of the head. Goodson's cause of death was one of the gunshot wounds to the chest that was fired from close range and hit the heart.

The State presented surveillance footage of the gas station parking lot while a detective described what was shown in the video. At 11:00:00, Goodson's car comes into view and approaches the passenger side of Brown's vehicle while Hayes's marked patrol car approaches the rear of Brown's vehicle. At 11:00:03, Goodson's car comes to a stop and the driver's side of Goodson's car begins to open. At 11:00:05, Goodson starts to step out of his car. At 11:00:06, Goodson is out of his car and standing, and the door of his car starts to close. At 11:00:07, Goodson's head starts to drop, he starts to fall forward, and then is down on the ground. At the same time, the patrol car door opens and Hayes rushes out.

The entire incident, from Goodson's approach in his car to his collapse to the ground, took approximately seven seconds. Goodson was out of his car for only two seconds. The State also presented dashcam footage of the shooting from Hayes's patrol car showing the same timeline of events.

Brown testified that he had a difficult childhood due to his mother's drug addiction and witnessing multiple violent incidents as a child.

He also explained that there were attempts on his own life by people who believed that Brown was involved in the murder of a man named "Fat Boy."

Brown testified that when he saw Goodson's car pull up beside him, he grabbed his gun and took the safety off while the car was still pulling up. Then he saw a man "looking at me like real mean, like with hate . . . sliding out the car . . . like with a gun." Brown then shot at Goodson through the back passenger window because Brown believed he had a clearer shot through that rolled down window. Brown only recalled firing three shots.

Brown testified that his actions were "like a reflex." He explained that he saw a "glimpse of a gun" as Goodson got out of his car but conceded that Goodson never pointed a gun at him or motioned as if he intended to fire a gun. Brown fired his own gun because, having seen a glimpse of a gun on Goodson, he believed Goodson intended to kill him. Brown explained that "any time I ever seen somebody coming at me with a gun, it was shot. And this is close contact . . . it was too intense."

Brown presented expert testimony from Dr. George Corvin that Brown has a "mild intellectual disability" with an IQ of 69 and that Brown suffers from PTSD, which "impaired" his ability to "perceive what is going on" and "to react to stress appropriately." Dr. Corvin testified that, in his opinion, Brown shot Goodson because he believed Goodson "was going to kill him, was going to shoot him, or at least try to."

During the charge conference, Brown requested instructions on self-defense and on the lesser-included offense of voluntary manslaughter based on imperfect self-defense. The trial court denied Brown's requests, explaining "it doesn't rise to self-defense, because there's no threat of deadly force been presented against him of this defendant at all. The evidence would show now the defendant jumped the gun, and speculated, and he could have speculated that anybody getting out of the car. He made his mind up, he testified when the car drove up quickly . . . . [A]s soon as the victim, Officer Goodson, cleared the vehicle, within three seconds he was dead on the ground, or he was on the ground. Never saw a gun drawn on him, assumed there was a gun drawn on him."

On 5 March 2018, the jury convicted Brown of second degree murder, possession of a firearm by a felon, and possession with intent to sell or deliver marijuana. The trial court sentenced Brown to 258 to 322 months in prison for second degree murder and a consolidated sentence of 21 to 35 months in prison on the remaining charges. Brown appealed.

Analysis

Brown argues that the trial court erred by denying his request for a jury instruction on self-defense. He contends that the evidence, taken in the light most favorable to him, required the trial court to include that instruction. Brown also argues that the trial court erred by denying his request for an instruction on the lesser-included offense of voluntary manslaughter based on imperfect self-defense. We reject these arguments.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). For this reason, "where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986). In other words, when the evidence, viewed in the light most favorable to the defendant, discloses facts that are "legally sufficient" to warrant an instruction on self-defense, the trial court must give that instruction to the jury. *State v. Everett*, 163 N.C. App. 95, 100, 592 S.E.2d 582, 586 (2004).

Competent evidence of self-defense is evidence that it "was necessary or reasonably appeared to be necessary" for the defendant "to kill his adversary in order to protect himself from death or great bodily harm." *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). "[B]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable?" *Id.* Importantly, our Supreme Court has held that a defendant's belief is reasonable only if "the circumstances as they appeared to him at the time were sufficient to create such a belief *in the mind of a person of ordinary firmness*." *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572 (1981) (emphasis added).

Brown argues that, applying this precedent, the trial court should have given a self-defense instruction because there was competent evidence that Officer Goodson "came toward him with his gun drawn." This, Brown contends, led him to believe that he was "about to be killed by a man he did not recognize."

The trial evidence does not support Brown's argument. Brown's testimony—viewed in the light most favorable to him—was that Officer Goodson pulled his car beside Brown's and that Brown saw "a glimpse of a gun" when Goodson "slid out the car." Brown also testified that

Officer Goodson "didn't say nothing" but was "looking at me like real mean, like with hate." Brown further testified that the gun he glimpsed "wasn't pointed at me." Still, Brown believed that Officer Goodson was attempting to kill him because "any time I ever seen somebody coming at me with a gun, it was shot."

Brown's trial testimony was corroborated by his statement to investigators following his arrest, which was admitted at trial. In that statement, Brown conflictingly asserted both that he saw a gun and that he "didn't see the gun." Regardless, when discussing Officer Goodson's gun, Brown explained that Goodson did not "raise it and point it at me or nothing."

Brown also presented expert testimony from Dr. Corvin, who explained that Brown "either saw the gun, or saw him getting the gun, or in one way, shape, form or fashion came to the conclusion that the individual getting out of the car was getting a gun or had a gun in his hand, was looking at him mean, had approached him in an unusually aggressive manner by speeding up and jumping out of the car." Thus, Dr. Corvin explained, Brown's "perception of the events quickly sort of with combined influences of post traumatic stress and his limited intellect is what he saw in his mind. . . . He interpreted that what was occurring was dangerous to him. He then impulsively says he took the gun."

The trial court properly concluded that this evidence was insufficient to create a *reasonable* belief that it was necessary for Brown to use deadly force to protect himself from death or great bodily harm. Specifically, whatever Brown may have *believed*—because he was on edge from an earlier attempt on his life, or because he was suffering from some form of post-traumatic stress, or for any other idiosyncratic reason—the evidence demonstrated that "in the mind of a person of ordinary firmness" there was no basis to use deadly force. *Norris*, 303 N.C. at 530, 279 S.E.2d at 572.

Uncontradicted witness testimony and video evidence presented at trial showed that Officer Goodson did not say anything to Brown, did not point a gun at Brown, and did not have any physical interaction with Brown. The entire incident lasted only seven seconds. During the first three seconds, Goodson pulled his car into the parking spot next to Brown's car and opened the car door. In the next two seconds, Goodson got out of his car and stood up. Then, less than two seconds later, Brown pointed a gun out his car window and shot and killed Officer Goodson.

Critically important, even Brown's own testimony acknowledges that Officer Goodson—at most—had a gun visible either on his body or in his hand. But the uncontroverted evidence, including Brown's own

testimony, is that Officer Goodson was not pointing the gun at Brown or taking any action that indicated he was attempting to shoot Brown. The evidence, even in the light most favorable to Brown, is that a car pulled up quickly near Brown's own car, that an unknown man stepped out of the car in possession of a handgun, and that the man looked at Brown in a manner that was "real mean" or full of "hate."

The trial court properly concluded that these facts are insufficient to permit a self-defense instruction. In the mind of a person of ordinary firmness, this evidence would not permit the use of deadly force on a complete stranger getting out of a nearby car. Accordingly, the trial court properly declined to give the requested instruction on self-defense. *See id.*; *Bush*, 307 N.C. at 160–61, 297 S.E.2d at 569.

Brown also argues that the trial court erred in denying his request for an instruction on the lesser-included offense of voluntary manslaughter on the basis that the jury could have found Brown used excessive force in imperfect self-defense. *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). Because, as explained above, the trial court properly concluded that there was insufficient evidence to support either perfect or imperfect self-defense as a matter of law, the trial court properly declined this request for an instruction as well. *State v. Owens*, 65 N.C. App. 107, 109, 308 S.E.2d 494, 497 (1983); *State v. Norman*, 324 N.C. 253, 260, 378 S.E.2d 8, 12 (1989). Accordingly, we find no error in the trial court's decisions to reject Brown's request for instructions on self-defense and the lesser-included offense of voluntary manslaughter.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
FABIOLA ROSALES CHAVEZ

No. COA19-400

Filed 7 April 2020

1. Appeal and Error—preservation of issues—conspiracy to commit murder—no motion to dismiss

Where defendant failed to move to dismiss a charge of conspiracy to commit first-degree murder at the close of the State's evidence, she failed to preserve for appellate review her argument that the trial court should have dismissed that charge. The Court of Appeals declined to exercise its discretion to invoke Appellate Rule 2 in the absence of exceptional circumstances.

2. Constitutional Law—effective assistance of counsel—failure to move for dismissal—substantial evidence

Defendant's attorney was not ineffective for failing to move to dismiss a charge of conspiracy to commit first-degree murder because the transcript showed that substantial evidence was presented from which a jury could find that defendant conspired with others to attempt to kill the victim through a simultaneous, coordinated attack, and as a result, defendant could not demonstrate he was prejudiced by the failure.

3. Appeal and Error—standard of review—challenge to jury instructions—no objection—plain error

Defendant's argument that the trial court erred by instructing the jury on conspiracy to commit first-degree murder without limiting the jury's consideration to the lone co-conspirator named in the indictment was reviewed for plain error where defendant failed to lodge any objection to the instructions as given. Although defendant consented to the conspiracy instruction, she did not request it and therefore did not invite any error with regard to it.

4. Conspiracy—jury instructions—inconsistent with indictment—one named co-conspirator in indictment—evidence of two co-conspirators at trial

The trial court committed plain error by instructing the jury it could convict defendant of conspiracy to commit first-degree murder if it found that defendant conspired with "at least one other person" where the indictment listed only one co-conspirator by name,

while the State presented evidence of two co-conspirators at trial. The instruction as given was prejudicial because it allowed the jury to convict defendant on a theory not legally available to the State and denied defendant's constitutional right to be properly informed of the accusations against him. Defendant's conspiracy conviction was vacated and the matter remanded for a new trial on that charge.

5. Evidence—hearsay—testimonial—plain error analysis

At defendant's trial for conspiracy to commit first-degree murder, no plain error occurred from the admission of testimony from a law enforcement officer who stated that she did not receive any conflicting information between three witnesses she interviewed with regard to defendant's participation in attacking the victim, because the officer did not relate any of the witnesses' statements and her testimony was not used to prove the truth of any matter asserted, including the identity of the defendant. Assuming any error, substantial evidence of defendant's guilt negated any prejudicial effect.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 29 November 2018 by Judge Joseph N. Crosswhite in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Asher Spiller, for the State-Appellee.

Marilyn G. Ozer for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgments entered upon jury verdicts of guilty of attempted first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argues that the trial court: (1) erred by denying Defendant's motions to dismiss the conspiracy charge; (2) committed plain error in the delivery of jury instructions; and (3) plainly erred by admitting hearsay evidence that violated Defendant's right to confrontation. As the trial court incorrectly instructed the jury on the law of conspiracy to commit first-degree murder, we discern plain error and award a new trial on the conspiracy conviction. However, as to the issues concerning the denial of Defendant's motions to dismiss and the admission of hearsay evidence, we discern no error.

I. Procedural and Factual Background

On 3 October 2016, Defendant Fabiola Rosales Chavez was indicted on two counts of attempted first-degree murder, one count of conspiracy to commit first degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of first-degree burglary. The conspiracy indictment stated, "[t]he jurors for the State upon their oath present that on or about the 21st day of September, 2016, in Mecklenburg County, Fabiola Rosales Chavez did unlawfully, willfully, and feloniously conspire with Carlos Roberto Manzanares to commit the felony of First Degree Murder[.]" Orders for Defendant's arrest were issued on 6 October 2016.

On 26 November 2018, the State dismissed one count of attempted first-degree murder, one count of assault with a deadly weapon with intent to kill inflicting serious injury, and the single count of first-degree burglary. That same day, Defendant's case came on for trial.

The evidence at trial tended to show: On 21 September 2016, Defendant, along with Carlos Manzanares ("Carlos") and a second, unidentified male, entered the home of Roberto Hugo Martinez ("Roberto"). Defendant and the two men were armed with a machete and a hammer. Roberto was asleep in bed with his girlfriend, Maria Navarro ("Maria"), and Maria's 16-month-old infant. Roberto and Maria were awakened when the bedroom lights flashed on, and Maria observed Defendant and the two men enter the room. Maria testified that she heard Defendant say, "nobody laughs at me. Nobody makes fun of me, and I'm here to kill you." Maria witnessed Defendant throw the machete at Roberto, and then watched Carlos and the unidentified male strike and kick Roberto repeatedly. One of the men took the machete and hit Roberto in the head with it. After Roberto fell to the ground, "[t]hey hit him. They kicked him. They hit him in the head with the machete and with the hammer."

Carlos and the unidentified male beat Roberto until he was unconscious, and then Carlos told Maria to flee because, "[i]f you stay here [Defendant] will kill you." Maria grabbed her baby, ran from the apartment, and began knocking on doors in search of help. Maria also called 911 and reported that someone was trying to kill her. Defendant and Carlos pursued Maria outside and caught up to her in a parking lot, where Defendant told Carlos to kill Maria because she had called the police. Carlos refused Defendant's directive to kill Maria, and Defendant fled the parking lot. Carlos remained in the parking lot with Maria until law enforcement arrived.

On 29 November 2018, the jury found Defendant guilty on all charges. The trial court sentenced Defendant to 132-171 months' imprisonment for the attempted first-degree murder conviction; 132-171 months' imprisonment for the conspiracy to commit first-degree murder conviction, to be served consecutively to the first sentence; and 72-99 months' imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury conviction, to be served consecutively to the second sentence. From entry of judgment, Defendant gave proper notice of appeal.

II. Discussion

Defendant argues on appeal that the trial court (1) erred by denying Defendant's motion to dismiss the conspiracy charge; (2) plainly erred by instructing the jury, and accepting its verdict of guilty, on the offense of conspiracy to commit first-degree murder; and (3) plainly erred by admitting hearsay evidence that violated Defendant's right to confrontation.

1. Motion to Dismiss Conspiracy Charge

[1] Defendant first argues that the trial court erred by denying her motion to dismiss for insufficient evidence the charge of conspiracy to commit first-degree murder.

It is apparent from the record that Defendant did not move to dismiss the conspiracy charge at the close of all evidence but, instead, explicitly stated "that [the conspiracy] count should be allowed to go forward" because "conspiracy is very easy for the State to prove[.]" Because Defendant failed to move to dismiss the conspiracy to commit first-degree murder charge, Defendant has failed to preserve this argument for our review. N.C. R. App. P. 10(a)(3) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion [and] . . . obtain a ruling upon the party's request, objection, or motion.").

In the alternative, Defendant requests that we invoke Rule 2 and determine whether there was sufficient evidence to support the conspiracy charge. An appellate court may address an unpreserved argument "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2. However, "the authority to invoke Rule 2 is discretionary, and this discretion should only be exercised in exceptional circumstances in which a fundamental purpose of the appellate rules is at stake." *State v. Pender*, 243 N.C. App. 142, 149, 776 S.E.2d 352, 358 (2015) (internal quotation marks, citations, and

ellipsis omitted). This case does not involve exceptional circumstances, and we, in our discretion, decline to invoke Rule 2.

[2] Also in the alternative, Defendant argues that her trial counsel rendered ineffective assistance of counsel ("IAC") by failing to move to dismiss the charge of conspiracy to commit first-degree murder.

Claims of IAC generally should be considered through motions for appropriate relief. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, we may decide the merits of this claim because the trial transcript reveals that no further investigation is required. *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) ("IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ."). "On direct appeal, [this Court] . . . limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." *Id*. at 166, 557 S.E.2d at 524-25 (quotation marks and citation omitted).

To prevail on a claim for IAC, a defendant must satisfy a two-part test:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

State v. Banks, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

An attorney's failure to move to dismiss a charge is not ineffective assistance of counsel when the evidence is sufficient to defeat the motion. *State v. Gayton-Barbosa*, 197 N.C. App. 129, 141, 676 S.E.2d 586, 594 (2009). "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

A conspiracy is an "agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993) (citations omitted). An agreement must be shown to prove a conspiracy, but the agreement may be an implied agreement "generally inferred from . . . the surrounding facts and circumstances, rather than established by direct proof." *State v. Fleming*, 247 N.C. App. 812, 819, 786 S.E.2d 760, 766 (2016) (citing *State v. Whiteside*, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933)). Direct proof of a conspiracy is "not essential, as such is rarely obtainable." *State v. Winkler*, 368 N.C. 572, 576, 780 S.E.2d 824, 827 (2015) (citation omitted). Thus, circumstantial evidence is permitted to find a conspiracy. *Id.*

Moreover, our Courts have determined that a simultaneous attack on a victim or attacking a victim in a coordinated manner is sufficient to present the charge of conspiracy to the jury. *See State v. Lamb*, 342 N.C. 151, 156, 463 S.E.2d 189, 191 (1995) (determining "substantial evidence from which the jury could find the robbery was carried out pursuant to a common plan" to support the finding of guilty of conspiracy where the defendant and two other men drove to a victim's home, robbed and shot the victim, and there was no other evidence of discussion or planning of the crime between the men); *see also State v. Reid*, 175 N.C. App. 613, 622-23, 625 S.E.2d 575, 584 (2006) (finding substantial evidence of conspiracy where the defendant and two other men dragged the victim from his home, shot the victim in the back, and left the home together after finding no money or drugs in the victim's home).

Here, there was substantial evidence of a conspiracy between Defendant and Carlos to commit murder of Roberto. Maria testified that Defendant and two other men, one of whom was Carlos, came into Roberto's bedroom and attacked them. Maria testified that Defendant and the two men were armed with a machete and a hammer, that "the other two men came in and started hitting [Roberto], kicking him[,]" and that "[o]ne of them took [the machete] from [Defendant] to hit Roberto in the head with it." "[The guys] hit him. They kicked him. They hit him in the head with the machete and with the hammer." Maria then positively identified a photo of Carlos, explaining that "[h]e's one of the guys who attacked Roberto."

Maria further testified,

> [Defendant] grabbed me by the hair and she was pulling me up. . . . [A]nd she said, I'm going to kill you. And that's when [Carlos] interfered and [Carlos] said, no you're not

> going to -- you -- I'm -- you're not going to do that because you told me here, we were here for something different, and I'm not going to mess with a mother and a child.

This testimonial evidence supports that Defendant and Carlos entered into an agreement to commit murder of Roberto. *Whiteside*, 204 N.C. at 712-13, 169 S.E. at 712. Maria's testimony also shows a simultaneous, coordinated attack on Roberto and Maria, which provides circumstantial evidence of an agreement to commit murder between Defendant and Carlos. *Lamb*, 342 N.C. at 155-56, 463 S.E.2d at 191. Taken together, these facts and circumstances are substantial evidence showing an agreement to commit murder between Defendant and Carlos. *Whiteside*, 204 N.C. at 712-13, 169 S.E. at 712; *Gibbs*, 335 N.C. at 47, 436 S.E.2d at 347.

As there was substantial evidence to support the conspiracy charge, Defendant was not prejudiced by his attorney's failure to make a motion to dismiss the charge of conspiracy to commit first-degree murder. *Gayton-Barbosa*, 197 N.C. App. at 141, 676 S.E.2d at 594. Because Defendant has shown "no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," Defendant's argument is without merit. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

2. Jury Instruction

Defendant next argues that the trial court erred in its instruction to the jury on the charge of conspiracy to commit first-degree murder. Defendant specifically argues that the trial court plainly erred by instructing the jury, and accepting its verdict of guilty, on the offense of conspiracy to commit first-degree murder when only one co-conspirator was named in the conspiracy indictment, the State presented evidence of two co-conspirators, and the jury instruction failed to limit the jury's consideration to the co-conspirator named in the indictment.

Standard of Review

[3] The parties dispute the appropriate standard of review. Defendant argues that, due to her failure to object to the jury instructions when presented at trial, the proper standard of review on appeal is plain error. The State argues that because Defendant did not object to the jury instructions and instead "indicat[ed] to the Court that [s]he was satisfied with the instructions[,]" Defendant invited the error and cannot complain about the instructions on appeal.

The same argument the State makes here has been soundly rejected by both of our appellate courts. In *State v. Harding*, 258 N.C. App. 306,

813 S.E.2d 254 (2018), "[t]he State argue[d] that defendant [wa]s precluded from plain error review in part under the invited-error doctrine because he failed to object, actively participated in crafting the challenged instruction, and affirmed it was 'fine.' " *Id.* at 311, 813 S.E.2d at 259. Concluding that defendant's argument was reviewable for plain error, this Court stated,

> Even where the "trial court gave [a] defendant numerous opportunities to object to the jury instructions outside the presence of the jury, and each time [the] defendant indicated his satisfaction with the trial court's instructions," our Supreme Court has not found the defendant invited his alleged instructional error but applied plain error review.

Id. (*citing State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (alterations in original).

Similarly, in *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000), our North Carolina Supreme Court explained that defendant

> had ample opportunity to object to the instruction outside the presence of the jury. After excusing the jury to the deliberation room, the trial court asked, "Prior to sending back the verdict sheets does the State wish to point out any errors or omissions from the charge?" The trial court then asked the same of defendant, and defendant responded with respect to other issues but did not object to the instruction in question. . . . As defendant failed to preserve this issue by objecting during trial, we will review the record to determine if the instruction constituted plain error.

Id. (*citing State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990); *State v. Morgan*, 315 N.C. 626, 644, 340 S.E.2d 84, 95 (1986)).

Here, Defendant stated, "And Your Honor, I believe under conspiracy there's mere presence. I want that to be read as well." Defendant explained that the instruction on mere presence "should be under conspiracy. If you read the conspiracy charge, there's a set that says that, however mere presence at the crime scene, even with knowledge of the crime – I have it. I'll bring it after lunch." The Court gave both parties a final list of the instructions, which included acting in concert and conspiracy. The trial court gave copies of the instructions to the State and Defendant, and instructed both parties "to look at it, make sure you're satisfied with it . . . . Make sure you're okay with that." The trial court

again instructed both parties "to look through those charges and make sure you're satisfied, okay?"

As in *Harding* and *Hardy*, Defendant had the opportunity to object to the jury instructions outside the presence of the jury but failed to do so. Thus, as in *Harding* and *Hardy*, we review the record to determine if the instruction constituted plain error.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

Moreover, Defendant's request that the trial court give the "mere presence" footnote from N.C.P.I.—202.10,[1] the Acting in Concert jury instruction, did not constitute invited error which waived any right to appellate review of the conspiracy to commit first-degree murder jury instruction, including plain error review.

In *State v. Wilkinson*, 344 N.C. 198, 474 S.E.2d 375 (1996), "defendant requested that the trial court instruct the jury on depravity of mind, and the trial court did so in conjunction with the pattern jury instruction for the (e)(9) 'especially heinous, atrocious or cruel' aggravating circumstance." *Id.* at 212, 474 S.E.2d at 382 (citation omitted). Defendant "submitted a proposed instruction in writing which referred

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1. This footnote states as follows: "7. This paragraph should be given only where there is support in the evidence for a finding that defendant was present at the scene of the crime. *S. v. Beach*, 283 N.C. 261, 267-268 (1973), states that there is an exception to the rule that mere presence does not make one an accessory: " ' " . . .when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of the law this was aiding and abetting." ' " *See S. v. Walden*, 306 N.C. 466 (1982)."

to 'a circumstance which makes a murder *unusually* heinous, atrocious, or cruel.' " *Id.* at 213, 474 S.E.2d at 383. "The trial court substituted the word 'especially' for 'unusually' to ensure that the 'heinous, atrocious, or cruel' aggravating circumstance was labeled as provided in [N.C. Gen. Stat.] § 15A-2000(e)(9)." *Id.* "Defendant stated that he had no objection to this change." *Id.*

On appeal, however, defendant argued that the trial court's modification of his proposed instruction was an erroneous statement of the law. *Id.* Our Supreme Court explained that while Defendant's failure to challenge the instruction at trial would generally require him to show plain error on appeal, "this Court has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests." *Id.* "A criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *Id.* (quoting *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991) (other citations omitted)).

The Supreme Court concluded, "[h]ere, defendant requested an instruction on depravity and agreed to the substitution of the word 'especially' for the word 'unusually.' Since [defendant] asked for the exact instruction that he now contends was prejudicial, any error was invited error. Therefore, this assignment is without merit and is overruled." *Id.* at 214, 474 S.E.2d at 383 (quoting *McPhail*, 329 N.C. at 644, 406 S.E.2d at 596-97) (internal quotation marks omitted); *see also State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998) (explaining that the defendant "will not be heard to complain on appeal" when the defendant requested a specific jury instruction, "did not object when given the opportunity either at the charge conference or after the charge had been given[,]" and, in fact, "affirmatively approved the instructions during the charge conference") (citing *Wilkinson*, 344 N.C. at 213, 474 S.E.2d at 396).

The present case is materially distinguishable from *Wilkinson* and *White* and compels the opposite result. Here, Defendant requested, and received, a "mere presence" instruction as part of the acting in concert instruction, which was given with the jury instruction on first-degree murder. Defendant does not challenge the "mere presence" instruction, or the first-degree murder instruction for that matter, but instead challenges the conspiracy to commit murder instruction, which was given according to the pattern instruction. As Defendant did not request the conspiracy instruction, but merely consented to it, Defendant did not invite error like the defendant in *Wilkinson*, and is entitled to plain error review like the defendants in *Harding* and *Hardy*.

Analysis

[4] The North Carolina Constitution provides that "[i]n all criminal prosecutions, every person charged with crime has the right to be informed of the accusation" against him. N.C. Const. Art. I, sec. 23. In *State v. Mickey*, 207 N.C. 608, 178 S.E. 220 (1935), our Supreme Court held that the trial court's jury instruction on conspiracy violated the defendant's constitutional right to be informed of the accusation against him, that the instruction "virtually put[] the defendant upon trial for an additional offense to that named in the bill," and ordered a new trial. *Id.* at 609, 178 S.E. at 221. In *Mickey*, the defendant was indicted for conspiracy to commit murder, and the indictment included two named coconspirators, Griffin and Murphy. In its charge, the trial court instructed the jury that it could find the defendant guilty if it found that he "agree[d] together with Griffin or Murphy, or both of them, or others to do an unlawful thing . . . ." *Id.* Our Supreme Court held that the instruction was error because the bill of indictment "nowhere contains the words 'others' or 'another,' or any other word or phrase indicating a charge against the defendant of conspiring with any other person or persons than Murphy and Griffin." *Id.*

Similarly, in *State v. Minter*, 111 N.C. App. 40, 432 S.E.2d 146 (1993), this Court determined that the trial court "erred in instructing the jury that they could find the defendant guilty of conspiracy without limiting the conspiracy to one with the co-conspirator [] named in the indictment . . . ." *Id.* at 42, 432 S.E.2d at 148. In *Minter*, the defendant was indicted for conspiracy and the indictment named his co conspirator, Branch. At trial, the evidence tended to show that the defendant may have conspired with multiple people, not just Branch, to commit an unlawful act. The trial court instructed the jury that it could find the defendant guilty if it found that the defendant "agreed with at least *one other person* . . . to commit the offense and that the defendant and at least *one other person* intended" to carry out the agreement. *Id.* (brackets omitted). On appeal, this Court determined that the charge violated Art. I, sec. 23 of the state Constitution because it "put the defendant on trial for an offense additional to that named in the bill of indictment" and ordered a new trial. *Id.* at 43, 432 S.E.2d at 148; *see also State v. Turner*, 98 N.C. App. 442, 448, 391 S.E.2d 524, 527 (1990) (explaining that while the State's evidence of conspiracy supported "the trial court's instruction . . . the indictment does not[,]" and, as a result, "award[ing] defendant a new trial on the conspiracy charge.").

Recently, this Court in *State v. Pringle*, 204 N.C. App. 562, 694 S.E.2d 505 (2010) explained,

> "[i]t is well established that where an indictment charging a defendant with conspiracy names specific individuals with whom the defendant is alleged to have conspired and the evidence at trial shows the defendant may have conspired with persons other than those named in the indictment, it is error for the trial court to instruct the jury that it may find the defendant guilty of conspiracy based upon an agreement with persons not named in the indictment."

Id. at 566, 694 S.E.2d at 507 (citing to *Mickey*, 207 N.C. at 610-11, 178 S.E. at 221-22, and *Minter*, 111 N.C. App. at 42-43, 432 S.E.2d at 148).

However, a trial court does not err when it fails to name in the jury instruction the specific individuals named in an indictment, *if* the indictment, evidence, and instructions are in accord. *Id.* at 566-67, 694 S.E.2d at 508. In *Pringle*, the defendant was indicted on the charge of conspiracy to commit robbery with "Jimon Dollard and another unidentified male . . . ." *Id.* at 567, 694 S.E.2d at 508. During the jury charge, the trial court instructed the jury that it could find the defendant guilty if it found that the defendant agreed "with at least one other person to commit robbery . . . ." *Id.* at 565, 694 S.E.2d at 507. The evidence at trial tended to show that the defendant conspired with Dollard and one other man, and this Court explained that "during jury instructions the trial court need not specifically name the individuals with whom defendant was alleged to have conspired so long as the instruction comports with the material allegations in the indictment and the evidence presented at trial." *Id.* at 566, 694 S.E.2d at 508. *Pringle* reaffirmed *Mickey* and *Minter*, explaining that in those cases the evidence at trial tended to show that the defendant may have conspired with other individuals not named in the indictment; thus, the indictment, evidence, and jury instruction were not "in accord" and the trial courts in *Mickey* and *Minter* erred in delivering the jury instructions. *Pringle*, 204 N.C. App. at 566-67, 694 S.E.2d at 508.

Here, as in *Minter*, Defendant was indicted for conspiracy to commit first degree murder with a single named co-conspirator—Carlos Manzanares. At trial, however, the State provided evidence that Defendant conspired with two people: Carlos and another unidentified male.

The State first introduced Officer Terry Weaver with the Charlotte Mecklenburg Police Department, who testified that he had been dispatched to the scene and was the first officer to interact with Maria. Upon his arrival, Weaver spoke with Maria and had Maria draft a written statement. Maria told Weaver that "she was in the apartment with her child, . . . and the next thing you know, a Hispanic female came

upstairs, along with two other Hispanic males. One was carrying a machete. Another was carrying a hammer, and they then began to assault [Roberto]." Weaver then read Maria's written statement to the jury, which said, "[Defendant] came in the room saying, all right mother f[***]er I'm going to f[**]k you up. . . . [T]hen the other two guys came in and started . . . hitting [Roberto] . . . ."

The State next called Maria to testify and asked her to explain who came into the bedroom on the night of the assault; Maria said "[Defendant] with two other men." When asked whether the men had anything with them, Maria replied "a hammer. . . . [Defendant] had a machete." Maria explained that "[Defendant] threw the machete at [Roberto] . . . and he tried to defend himself, and that's when the other two men came in and started hitting him, kicking him[,]" and that "one of them took [the machete] from [Defendant] to hit Roberto in the head with it." "[The guys] hit him. They kicked him. They hit him in the head with the machete and with the hammer." Maria then testified that one of the two men—"the one that we don't know anything about,"—ran away from the apartment with the machete. When asked whether she ever again saw the two men who came with Defendant to the apartment, Maria answered "No, I haven't seen them again." Maria then positively identified a photo of Carlos, explaining that "[h]e's one of the guys who attacked Roberto." The State asked Maria whether Carlos was "the guy who stayed? Or is this the guy who left with the machete?" Maria replied that Carlos was "[t]he one that stayed."

Additionally, Maria's handwritten statement, made on the night of the attack, along with witness testimony and a recording of Maria's 911 phone call, is substantial evidence that Defendant conspired with two men on the night of the attack.

Because the indictment specifically named only Carlos as Defendant's co-conspirator, but the evidence presented at trial supported a finding that Defendant conspired with Carlos and another unidentified male, the trial court erred when it instructed the jury as follows:

> The defendant has been charged with conspiracy to commit murder. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First; that the defendant *and at least one other person* entered into an agreement. Second; that the agreement was to commit murder. Murder is the unlawful killing of another with malice. And third; that the defendant *and at least one other person* intended that

> the agreement be carried out at the time it was made. The State is not required to prove that the murder was committed. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant conspired with another to commit murder, and that the defendant *and at least one other person* intended at that time that the murder be committed, it would be your duty to return a verdict of guilty. If you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(emphasis added). This instruction was not "in accord," with both the indictment and evidence presented at trial, and thus the trial court's instruction was error. *Pringle*, 204 N.C. App. at 566-67, 694 S.E.2d at 508.

Moreover, the trial court's error was prejudicial. Because the trial court's instruction put Defendant "on trial for an offense additional to that named in the bill of indictment[,]" it violated Defendant's right to be informed of the accusation against her and permitted the jury to convict her upon a theory unsupported by the indictment. *Id.* at 567, 694 S.E.2d at 508; N.C. Const. Art. I, sec. 23; *see also Minter*, 111 N.C. App. at 42-43, 432 S.E.2d at 148. This type of error has long been held to be plain error by our Supreme Court, which explained that "it would be difficult to say that permitting a jury to convict a defendant on a theory not legally available to the state because it is not charged in the indictment or not supported by the evidence is not plain error even under the stringent test required to invoke that doctrine." *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986); *see id.* at 537-38, 346 S.E.2d at 420 (explaining that "[a]lthough the state's evidence supported [the trial court's] instruction, the indictment does not. It is a well established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." (citations omitted)); *see also Turner*, 98 N.C. App. at 448, 391 S.E.2d at 527 ("[W]e believe that the State's evidence does support the trial court's instruction; however, the indictment does not. Consequently we must award defendant a new trial on the conspiracy charge.").

Because the trial court's instructional error permitted the jury to convict Defendant on a theory not legally available to the State, the erroneous instruction was grave error which amounted to a denial of Defendant's fundamental right to be informed of the accusations against him, N.C. Const. Art. I, sec. 23, and thus the trial court plainly erred its jury instruction on the charge of conspiracy to commit first-degree murder. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Moreover, we have examined

the charge as a whole to determine whether the error was cured, and cannot conclude that it was. *Minter*, 111 N.C. App. at 43, 432 S.E.2d at 148; *Mickey*, 207 N.C. at 609, 178 S.E. at 221. Accordingly, we order a new trial on the conspiracy to commit first degree murder charge.

3. Testimonial Evidence

[5] We next address Defendant's contention that the trial court plainly erred by admitting hearsay evidence that violated Defendant's right to confrontation.

Defendant acknowledges her failure to object at trial to the admission of Sergeant Allison Rooks' testimony and, pursuant to N.C. R. App. P. 10(a)(4), specifically argues on appeal that the trial court's admission of Rooks' testimony constitutes plain error. "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2018). "The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citations omitted). However, "admission of nonhearsay raises no Confrontation Clause concerns." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (internal quotation marks and citations omitted).

Defendant challenges the following exchange between the State and Rooks:

> [State]: You interviewed, you said, Maria Navarro, Luis Martinez and Carlos Manzanares, and Fabiola Chavez. In your interview of Ms. Navarro and Mr. Martinez and Mr. Manzanares, was -- did you receive any conflicting information from those three individuals?
>
> [Rooks]: No. As far as who the other defendant was? No.

Defendant argues that Rooks' response was a testimonial statement which was used as an "obvious substitute for live testimony" of a codefendant, and its admission violated Defendant's right to confront her witnesses and ask any clarifying questions. Defendant further argues that Rooks' response to the State's question was "in effect that Martinez

and Manzanares told [Rooks] that it was Fabiola Chavez who entered the bedroom with Manzanares and the other man." We find no merit in Defendant's claims.

Rooks' response contained no statements from Maria, Carlos, or Luis Martinez, and certainly no statements that were used to prove the truth of the matter asserted—the identity of the other defendant. Rooks' response that there was no conflict between the three witnesses could mean that all three witnesses said the same thing; however, it could also mean that they said nothing at all about the identity of the other defendant. As Rooks' testimony did not contain a statement used to prove the truth of the matter asserted, the testimony was not hearsay and its admission "raises no Confrontation Clause concerns." *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473 (internal quotation marks and citations omitted).

Even assuming arguendo that Rooks' response was hearsay and improperly admitted at trial, the error did not have a probable impact on the jury's finding of guilt. Aside from Rooks' testimony, there was sufficient evidence of Defendant's guilt: Maria testified for the State and provided an eyewitness account of who attacked her on the night of the offense, and she identified both Defendant and Carlos as two of the perpetrators. Maria's handwritten statement, made on the night of the attack, explicitly named Defendant as one of the perpetrators. Additionally, Officer Weaver testified that Maria told him on the night of the attack that Defendant was one of the people who assaulted her and Roberto and attempted to assault her baby.

Rooks' response was made in passing, and there was no emphasis or follow up questions by the State. *See State v. Stroud*, 252 N.C. App. 200, 215, 797 S.E.2d 34, 45 (2017) (the "passing nature of the[] statements" and "the lack of emphasis or detailed discussion of the[] comments by the prosecutor" supported the conclusion that the admission of the testimony was not plain error). Therefore, because Rooks' testimony was not hearsay, the trial court did not err by allowing it into evidence. Even assuming arguendo that the trial court erred in allowing the testimony into evidence, Defendant can show no prejudice as there was other, sufficient evidence of her guilt. However, as we determine that the trial court did not err, it did not plainly err, and Defendant's argument to the contrary is overruled. *See State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986).

III. Conclusion

As there was sufficient evidence to support the charge of conspiracy to commit first-degree murder, Defendant has failed to show that her

attorney's failure to move to dismiss prejudiced Defendant. Moreover, as Rooks' testimony was not hearsay, the trial court did not err in allowing the testimony into evidence. However, because the trial court plainly erred in the delivery of jury instructions on the conspiracy to commit first-degree murder charge, we vacate the judgment entered upon the verdict of guilty of conspiracy to commit first-degree murder and order a new trial on that charge.

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

Judge BROOK concurs.

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

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

Sufficient evidence supports the jury's conviction of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant has failed to show his attorney's failure to move to dismiss was prejudicial, or that he received ineffective assistance of counsel.

Sergeant Rooks' testimony was not hearsay. The trial court did not err by allowing the testimony into evidence. There is no error in the jury's verdicts or the judgments entered thereon for the attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury charges. I fully concur with the majority's opinion in those conclusions of no error.

The transcript and record show Defendant's trial counsel actively engaged in the pre-trial jury charge conference and requested an instruction on mere presence for the conspiracy charge, which the trial court included in the final jury's instructions. Defendant's counsel reviewed and affirmatively acknowledged the applicability of the trial court's proposed instructions. After the instructions were given, Defendant's counsel affirmatively accepted the instructions as given. There is no basis for this Court to invoke plain error to review any purported prejudice in the unobjected-to and affirmatively accepted jury instructions.

Even were plain error review available to Defendant, as the majority's opinion asserts, Defendant failed to and cannot show any prejudice

to be awarded a new trial under any standard of appellate review. Overwhelming evidence of Defendant's guilt overcomes any prejudice under either preserved error or plain error review. The majority's opinion fails to require Defendant to demonstrate any prejudice in light of the overwhelming evidence of her guilt and awards a new trial on the conspiracy to commit first-degree murder charge despite this failure.

Presuming error or even plain error, Defendant also cannot demonstrate prejudice in the instruction on conspiracy to commit first-degree murder to set aside the jury's verdict, reverse the judgment entered thereon, and be awarded a new trial. I concur in part to sustain Defendant's other convictions and respectfully dissent in part from awarding Defendant a new trial on the conspiracy indictment.

I. Background

Defendant's counsel and the trial court engaged in the following exchange during the charge conference:

> [Defendant's counsel]: And Your Honor, I believe under *conspiracy* there's mere presence. I want that to be read as well.
>
> The Court: Do you have the number for that [Pattern Jury Instruction]?
>
> [Defendant's counsel]: No. It should be under conspiracy. If you read the *conspiracy* charge, there's a set that says that, however mere presence at the crime scene, even with knowledge of the crime- - I have it. I'll bring it after lunch. [Emphasis supplied].

The record is silent on whether Defendant's counsel provided the trial court with the promised draft of jury instructions on mere presence in relation to the conspiracy charge. Following the morning charge conference, the trial court again met with trial counsel and read aloud the final proposed list, by the number of the proposed pattern jury instructions, he intended to give.

Defendant's counsel voiced no concerns after being asked by the trial judge if any other proposed instructions needed to be included or altered. Once the jury had left the courtroom following their charge, the following exchange took place:

> The Court: Okay for the record, any comments, concern, corrections from either side for the charges?

[Defendant's Counsel]: No, Your Honor.

[The State]: No, Your Honor.

Defendant failed to object to the instruction when given to the jury to preserve any issue for appeal. Defendant now seeks to invalidate the jury instruction on and his conviction for conspiracy to commit first-degree murder. His counsel was actively involved at the charge conferences, failed to object then or when instruction was given to the jury, and failed to correct or object when given another opportunity. Defendant's counsel expressly consented to the jury instructions as given.

II. Invited Error

"[A] defendant who invites error has waived his right to all appellate review concerning the invited error, *including plain error review*." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (emphasis supplied). North Carolina's statutes provide: "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2019).

Here, Defendant's counsel participated in, made recommendations, and proposed changes to the conspiracy to commit first-degree murder jury instruction during the charge conference. Defendant's counsel never made additional requests nor voiced any objection regarding the jury instructions proposed after he was specifically asked. Defendant's counsel also failed to object when the instructions were given. Defendant was provided the further opportunity to object or correct the instructions and expressly agreed to the instruction as given.

Defendant's failure to object during the charge conference or when the instructions were given to the jury along with express agreement to those given constitutes invited error and waives any right to appellate review concerning the invited error, "*including plain error review*." *Barber*, 147 N.C. App. at 74, 554 S.E.2d at 416 (emphasis supplied). Defendant's counsel's requests and active participation in the formulation of the final instruction during the charge conference forecloses appellate review. *Id.*

Our Supreme Court in *State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998), examined a defendant's counsel's involvement in jury instructions in a death penalty case. The Court held:

> Here, defense counsel did not submit any proposed instructions in writing. Counsel also did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel

> affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Id. (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 396 (1996)).

The majority's opinion cites this Court's opinion in *State v. Harding*, 258 N.C. App. 306, 813 S.E.2d 254 (2018), as contrary to this holding. Presuming a conflict exists between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court's opinion. *Mahoney v. Ronnie's Road Servic*e, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997). Defendant invited any asserted error and waived plain review. *See White*, 349 N.C. at 570, 508 S.E.2d at 275.

III. Plain Error Analysis

Even if the notion that appellate or plain error review is not foreclosed due to Defendant's invited errors and is either available or proper, Defendant does not and cannot show "that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict" and was so prejudicial to be awarded a new trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Defendant failed to meet her burden of showing her asserted error should be reviewed for plain error. Even presuming plain error review, she cannot demonstrate any prejudice, in light of overwhelming evidence of her guilt. The majority's opinion of *per se* error ignores the overwhelming and uncontroverted evidence of Defendant's guilt and omits any analysis or conclusion of prejudice or evidence of her guilt to award a new trial.

Their opinion asserts, *ipse dixit*, the un-objected to and unpreserved plain error had a probable impact on the jury's finding of guilt, and *de facto* holds the trial court plainly erred, which *per se* compels an award of a new trial. This assertion is unprecedented and elevates an unchallenged and unpreserved plain error remedy without an analysis of the overwhelming evidence of Defendant's guilt or prejudice above appellate review of preserved constitutional errors.

Even during appellate review of preserved constitutional errors employing harmless error review, no error is so *per se* prejudicial to compel a new trial without further analysis of whether the error was harmless beyond a reasonable doubt or prejudicial. *See State v. Malachi*,

371 N.C. 719, 738, 821 S.E.2d 407, 421 (2018); *State v. Veney*, __ N.C. App. __, __, 817 S.E.2d 114, 118, *disc. review denied*, 371 N.C. 787, 821 S.E.2d 169 (2018).

We all agree the trial court properly instructed the jury on the elements of attempted first-degree murder. The jury properly convicted Defendant of that offense, which we also agree was without error. The only additional element necessary to convict Defendant of conspiracy to commit first-degree murder was that she entered into an agreement to do so with a co-conspirator. *State v. Crowe*, 188 N.C. App. 765, 771, 656 S.E.2d 688, 693 (2008).

The majority's opinion agrees that: "This testimonial evidence supports that Defendant and Carlos entered into an agreement to commit murder of Roberto." The majority's opinion later correctly states: "[T]here was substantial evidence of a conspiracy between Defendant and Carlos to commit murder of Roberto."

The evidence against Defendant is overwhelming to overcome any asserted prejudice under unpreserved plain error review or even harmless error review. *See State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) ("an error in jury instructions is prejudicial and requires a new trial *only if* there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises" (emphasis supplied) (citations and quotation marks omitted).

The record contains explicit and unchallenged testimony, which the majority's opinion acknowledges, of the conspiracy between Defendant and Carlos Manzanares and of their coordinated attack to commit the first-degree murder of Roberto. *See State v. Lamb*, 342 N.C. 151, 463 S.E.2d 189 (1995). Defendant demonstrated no prejudice in her conspiracy conviction.

A. *State v. Tucker*

The majority's opinion does not complete a prejudice analysis, holding "[t]his type of error has long been held to be plain error by our Supreme Court." In support of this assertion, the majority's opinion cites *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986). Even if their assertion of error is presumed, our Supreme Court in *Tucker* conducted a prejudice analysis of the probable impact of the "plain error" upon the jury's verdict, holding: "In light of the highly conflicting evidence in the instant kidnapping case on the unlawful removal and restraint issues, we think the instructional error might have . . . tilted the

scales and caused the jury to reach its verdict convicting the defendant." *Id.* (quotations omitted).

Unlike in *Tucker*, the uncontroverted evidence of Defendant's guilt is more than enough to overcome any asserted prejudice, even under the notion that the purported error was not invited and plain error review is available and proper. *See id. Tucker* does not support awarding Defendant a new trial on the conspiracy charge.

B. *State v. Pringle*

The majority's opinion cites *State v. Pringle* and states the "instruction was not 'in accord,' with both the indictment and evidence presented at trial, and thus the trial court's instruction was error." *State v. Pringle*, 204 N.C. App. 562, 566-67, 694 S.E.2d 505, 508 (2010). In *Pringle*, the indictment alleged the defendant had "conspired with 'Jimon Dollard and another unidentified male' and the trial court instructed the jury that it could find defendant guilty of conspiracy if the jury found defendant conspired with 'at least one other person.' " *Pringle*, 204 N.C. App. at 567, 694 S.E.2d at 508.

The evidence at trial in *Pringle* tended to show the "defendant and two other men entered into a conspiracy to commit robbery with a dangerous weapon. One of the other men was specifically identified by the testifying officers as 'Jimon Dollard,' the second suspect arrested by officers after they pursued the three men seen robbing the gas station. The third man evaded capture and was never identified." *Id.*

The ultimate conclusion this Court reached in *Pringle* was that the defendant had not demonstrated any reversible prejudice and there was no error in the trial court's instruction or the jury's conviction. *Id.* "[The] instruction was in accord with the material allegations in the indictment and the evidence presented at trial. Consequently, we find no error, much less plain error, in the trial court's instruction." *Id. Pringle* does not support awarding Defendant a new trial on the conspiracy charge.

C. *State v. Lawrence*

The proper legal conclusion in this case, presuming plain error review is available and proper, mirrors the analysis our Supreme Court conducted in *State v. Lawrence*:

> In light of the *overwhelming and uncontroverted evidence*, defendant cannot show that, absent the error, the jury probably would have returned a different verdict. Thus, he *cannot show the prejudicial effect necessary to establish*

> *that the error was a fundamental error*. In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 519, 723 S.E.2d at 335 (emphasis supplied).

Defendant's conspiracy conviction under *any* legitimate analysis is properly left undisturbed. In the cases of *Lawrence*, *Tucker*, and *Pringle*, our Supreme Court and this Court conducted analyses of the probable impact of the asserted error on the jury's verdict, and the other "overwhelming and uncontroverted evidence" of guilt, a prejudice analysis that is *wholly omitted* by the majority's opinion. *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335; *see also Tucker*, 317 N.C. at 540, 346 S.E.2d at 422, *Pringle*, 204 N.C. App. at 567, 694 S.E.2d at 508.

The properly admitted and unchallenged evidence against Defendant is "overwhelming and uncontroverted" to overcome any asserted and unpreserved prejudice under plain error, or even harmless error review. *Lawrence*, 365 N.C. at 519. The majority's opinion errs by disregarding long established and binding Supreme Court precedents as well as this Court's procedures to reach its conclusion, without any analysis weighing the considerable evidence of Defendant's guilt against any probable impact of plain error on the jury's verdict. The majority's opinion cites no precedent to award a new trial in the absence of prejudice. The only rational and legitimate conclusion from this absence of authority is none exists.

IV. Conclusion

Defendant received a fair trial, free from prejudicial errors she preserved and argued on all convictions. I concur with the majority's opinion to find no error in Defendant's attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury convictions.

Defendant is not entitled to a new trial on conspiracy to commit first-degree murder. Any purported error was invited and waived. *White*, 349 N.C. at 570, 508 S.E.2d at 275. Even if Defendant did not invite the error, Defendant wholly failed and cannot carry her burden to show any prejudice under the standard of review of plain error to warrant a new trial.

"[O]verwhelming and uncontroverted evidence" of Defendant's guilt exists in the record to overcome any asserted prejudice. *Lawrence*, 365 N.C. at 519. Defendant failed to show plain error in the

jury's verdict of conspiracy to commit first-degree murder or in the judgment entered thereon.

Presuming plain error analysis is appropriate here, there is no showing by Defendant or analysis by the majority of prejudice to award a new trial. The evidence of her guilt is overwhelming. *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335; *see also Tucker*, 317 N.C. at 540, 346 S.E.2d at 422, *Pringle*, 204 N.C. App. at 567, 694 S.E.2d at 508. There is no error in the jury's verdicts and the judgment entered thereon. I respectfully dissent from awarding a new trial to Defendant for conspiracy to commit first-degree murder under plain error review.

STATE OF NORTH CAROLINA
v.
LARRY LEE DUDLEY

No. COA19-542

Filed 7 April 2020

Jurisdiction—notice of appeal to superior court—in-person notice requirement—applicability

Where defendant properly appealed his conviction for misdemeanor stalking to the superior court by filing written notice of appeal in accordance with N.C.G.S. § 15A-1431(b) and (c), the trial court improperly dismissed defendant's appeal for lack of jurisdiction based on subsection (d), which requires in-person notice of appeal when a defendant is in "compliance with the judgment." The statute's plain language and context indicate that this requirement only applies to defendants who voluntarily comply with a judgment; thus, it did not apply to defendant, even though he had served his full sentence at the time judgment was rendered, because the State had forced him to preemptively serve his sentence in pretrial confinement.

Appeal by defendant from orders entered 16 December 2016 by Judge Susan Bray and 2 August 2018 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 3 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant.

DIETZ, Judge.

Larry Lee Dudley was convicted of misdemeanor stalking in district court and sentenced to time served. He filed a written notice of appeal within ten days of entry of judgment, as required by the general statute governing criminal appeals from district court to superior court.

The State moved to dismiss Dudley's appeal based on a more specific statutory provision requiring "in person" notice of appeal when the defendant seeks to appeal but already is in "compliance with the judgment." The State argued that this provision applied because Dudley was sentenced to time served and thus already was in compliance with the judgment as soon as it was entered. The trial court agreed and granted the State's motion to dismiss.

We reverse. The statute's plain language, its context, and other accompanying indications of intent all show that this special, in-person filing requirement applies only when the defendant *voluntarily* complies with the judgment. Here, by contrast, the State forced Dudley to preemptively serve his sixty-day sentence by jailing him while he awaited trial. That was not Dudley's choice. Accordingly, we hold that Dudley was not in "compliance with the judgment" as that phrase is used in the statute and he therefore properly appealed the judgment by filing a timely written notice of appeal. We reverse the trial court's dismissal of Dudley's appeal and remand this matter to the trial court.

Facts and Procedural History

In 2015, Defendant Larry Lee Dudley was charged with felony stalking and the lesser-included offense of misdemeanor stalking. Dudley was held in pre-trial confinement pending his trial.

In 2016, the district court convicted Dudley of misdemeanor stalking and sentenced him to 60 days in prison. But the court credited Dudley for the time served in pre-trial confinement, which was substantially more than 60 days. As a result, Dudley was immediately released following entry of judgment.

Nine days later, Dudley filed a *pro se* written notice of appeal with the clerk of the superior court. The State then moved to dismiss the appeal pursuant to N.C. Gen. Stat. § 15A-1431(d), arguing that Dudley failed to comply with the statute's jurisdictional notice requirements.

The trial court dismissed Dudley's appeal for lack of jurisdiction and later denied his petition for a writ of certiorari. This Court granted Dudley's petition for a writ of certiorari and ordered appointment of counsel to represent Dudley in this appeal.

Analysis

The sole issue in this appeal is whether Dudley complied with the jurisdictional requirements to appeal his district court conviction to superior court. The parties acknowledge that this issue presents a novel question of statutory interpretation.

We review this statutory interpretation question *de novo*. *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011). "Our task in statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rieger*, __ N.C. App. __, __, 833 S.E.2d 699, 700–01 (2019). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Id.* at __, 833 S.E.2d at 701.

The statute in question is N.C. Gen. Stat. § 15A-1431, which creates the jurisdictional rules for an appeal from district court to superior court in criminal cases. The statute provides that a "defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law." N.C. Gen. Stat. § 15A-1431(b). A defendant seeking to appeal may give notice of appeal within 10 days of entry of judgment either "orally in open court or in writing to the clerk." N.C. Gen. Stat. § 15A-1431(b), (c). There is no dispute that Dudley gave written notice of appeal to the clerk of superior court in writing within 10 days of entry of the challenged judgment.

But the State points to a separate provision of the statute requiring "in person" notice of appeal in situations where, at the time of the notice of appeal, the defendant already was in "compliance with the judgment":

> (d) A defendant convicted by a magistrate or district court judge is not barred from appeal because of compliance with the judgment, but notice of appeal after compliance must be given by the defendant in person to the magistrate or judge who heard the case or, if he is not available, notice must be given:
>
> (1) Before a magistrate in the county, in the case of appeals from the magistrate; or

(2) During an open session of district court in the district court district as defined in G.S. 7A-133, in the case of appeals from district court.

N.C. Gen. Stat. § 15A-1431(d).

The State argues that, at the time Dudley filed his written notice of appeal, he was in "compliance with the judgment" because he was sentenced to time served, which, in the State's view, meant he had fully complied with his sentence. Dudley, by contrast, argues that the word "compliance" requires some element of "assent" and, because the State forced him to be confined until trial, he did not assent to that time served.

We agree with Dudley that, in the context of this statute, the word "compliance" carries with it a connotation of voluntariness. We begin, as we must, with the statute's plain language. "When examining the plain language of a statute, undefined words in a statute must be given their common and ordinary meaning." *Rieger*, __ N.C. App. at __, 833 S.E.2d at 701. Dictionaries define "compliance" as "giving in to a request, wish, or demand; acquiescence." *Webster's New World College Dictionary* 304 (5th ed. 2014). Thus, in its most natural usage, the term "compliance" carries with it a notion that the defendant somehow *chose* to be in compliance.

This interpretation is confirmed by the Criminal Code Commission's official commentary discussing the drafting of this provision. The commentary states that the statute "deals with a problem which has recurred with some frequency. That problem has been presented by the defendant, not represented by counsel, who pays his fine and then wishes to appeal. When he secures counsel, he finds that he has lost his right to appeal by complying with the sentence." N.C. Gen. Stat. § 15A-1431(d), Criminal Code Commission Commentary. This commentary further confirms that the drafters of this provision viewed the term "compliance" as requiring some voluntary step by the defendant. It thus would not apply to a defendant who was forced by the State to comply with a judgment without the freedom to decline.

Here, Dudley's purported "compliance" with his criminal sentence was not his choice. He was involuntarily detained in pre-trial confinement while awaiting trial and was later credited with time served as part of his criminal judgment. As a result, although Dudley had fully served his sentence at the time judgment was rendered, he was not in "compliance with the judgment" under the plain meaning of Section 15A-1431(d). Dudley therefore properly gave notice of appeal by doing so in writing within ten days of the entry of judgment. N.C. Gen. Stat.

§ 15A-1431(c). We reverse the trial court's order dismissing Dudley's appeal and remand for his appeal to be heard by the trial court.

Conclusion

We reverse the trial court's order and remand this matter to the trial court.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
MARK DOUGLAS DUDLEY, DEFENDANT

No. COA19-780

Filed 7 April 2020

1. Discovery—request for sanctions—criminal case—disclosures by State

In a prosecution for multiple drug offenses, the trial court did not abuse its discretion by declining to sanction the State for a violation of N.C.G.S. § 15A-903 where, even though defendant was not provided with the source of a tip that led to defendant's traffic stop, the prosecutor took steps to obtain the name of the source and, upon being informed that the source was an officer with the local police department, passed that information on to defense counsel, who took no steps to inquire further about the source's identity.

2. Drugs—maintaining a vehicle—keeping or selling drugs—sufficiency of evidence

The State presented sufficient evidence from which the jury could find that defendant maintained a vehicle to keep or sell controlled substances, where a search of defendant's car revealed drug paraphernalia and carefully hidden methamphetamine (in a tire-sealant can with a false bottom), and the amount of drugs was consistent with trafficking, not personal use.

Appeal by Defendant from judgments entered 24 January 2019 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 4 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Stroud, for the State.

Richard Croutharmel for Defendant-Appellant.

COLLINS, Judge.

Defendant Mark Douglas Dudley appeals from the trial court's judgments entered upon his convictions for: (1) trafficking in methamphetamine by transportation; (2) trafficking in methamphetamine by possession; (3) maintaining a vehicle to keep or sell controlled substances; and (4) possession of drug paraphernalia. Defendant contends that the trial court erred by declining to sanction the State for failing to comply with its discovery obligations and by denying Defendant's motion to dismiss the maintaining-a-vehicle charge. We affirm in part and discern no error in part.

I. Background

The evidence presented at Defendant's trial tended to show the following: early in the morning on 1 September 2016, Deputy Brad Belk of the Union County Sheriff's Office received a call from Officer Stephen Goodwin of the Town of Wadesboro Police Department. Goodwin told Belk that he had spotted a black Chevrolet Camaro IROC parked outside of a "known drug house[.]" Belk relayed the make, model, and license-plate number to Officer James Pedersen of the Town of Wingate Police Department, who began looking out for the vehicle.

A black Camaro IROC with a license-plate number matching that relayed by Belk soon passed Pedersen while he was sitting at a gas station with, among others, Deputy Tommy Gallis of the Union County Sheriff's Office, who was in his own vehicle with his canine. Pedersen began to follow the vehicle and ran the license-plate number through a vehicle-registration database, which showed that Defendant was the registered owner of the vehicle. Pedersen also noticed that the vehicle had an obscured inspection sticker and did not have a rear-view mirror, and soon initiated a traffic stop. The vehicle, driven by Defendant, pulled into a gas station.

Pedersen approached the vehicle and asked Defendant for his driver's license and registration. Pedersen noticed that Defendant had open sores on his left arm which, based upon his training and experience, Pedersen believed were consistent with drug use. Gallis had his canine at the vehicle, and the officers asked Defendant to step out of

the vehicle, or to turn off the ignition, in the interest of officer safety. Defendant refused to heed the officers' request, and Gallis reached into the vehicle and removed the keys from the ignition. Gallis then ran the canine around the vehicle, and the canine alerted on the driver's side where Defendant was seated. The officers again asked Defendant to step out of the vehicle, and eventually Defendant did so. Pedersen asked Defendant whether he had anything incriminating on his person, and Defendant stated that he had a pipe for using methamphetamine in his pocket. Pedersen seized the pipe and placed Defendant under arrest.

The officers then searched the vehicle. They found a tire-sealant can with a false bottom that contained a plastic baggie holding a clear crystalline substance. One of the officers conducted a field test of the substance, which tested positive for methamphetamine. The officers then seized the can and the substance, cited Defendant for the trafficking violations, and took Defendant to jail in connection with the suspected drug activity. Analysis by the State Bureau of Investigation determined that the substance was approximately 28.29 grams of methamphetamine.

On 24 April 2017, Defendant was indicted by a Union County grand jury for: (1) trafficking in more than 28 but less than 200 grams of methamphetamine by transportation; (2) trafficking in more than 28 but less than 200 grams of methamphetamine by possession; (3) maintaining a vehicle to keep or sell controlled substances; (4) possession with intent to sell or deliver methamphetamine; and (5) possession of drug paraphernalia. On 19 June 2018, Defendant filed a motion to suppress all evidence seized from his vehicle during the traffic stop, arguing that his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 20 of the North Carolina Constitution had been violated when the officers searched his vehicle. In his motion to suppress, Defendant argued that Pedersen had only cited an "unknown source" of the information he had received from Belk which eventually led to Defendant's arrest, and therefore there were no "objective, specific, or articulable facts" to justify any suspicion that Defendant was in possession of any controlled substance at the time Defendant's car was searched. Defendant's motion to suppress came on for hearing on 28 August 2018. At the motion-to-suppress hearing, Belk testified that Goodwin was the source of his tip to Pedersen, and that Goodwin had told him that the Camaro was parked outside of a known drug house, but Belk admitted that he had not so specified in the report he created for the district attorney's office. Defendant's trial counsel argued that Defendant had not been made aware of Goodwin's identity prior to the hearing, saying that "[a]ll of a sudden we're hearing

about law enforcement officers who may well be credible, names that had never been provided in two years."

The prosecutor stated at the hearing that "there ha[d] been a little bit of difficulty in getting all the information to" Defendant's trial counsel, noting that she had followed up with Belk regarding the source of his information and that Belk had told her it was an officer with the Town of Wadesboro Police Department, but that she had not received a name from Belk and had requested that Belk provide a supplemental report to her. The prosecutor said she had "relayed that information that [she] had"—i.e., that the source was an officer with the Town of Wadesboro Police Department—to Defendant's trial counsel, and Defendant's trial counsel told the trial court that "that was not an issue with the district attorney's office." But the prosecutor argued that the traffic violations provided the bases for the traffic stop, and that the canine was "already present at the time of the stop" and therefore that its sniff of the vehicle, which provided the officers probable cause to search, did not implicate constitutional concerns. The trial court entered an order denying Defendant's motion to suppress on 8 October 2018.

Defendant pled not guilty to all charges on 9 November 2018, and the matter came on for trial on 23 January 2019. At the close of State's evidence on 24 January 2019, Defendant moved to dismiss all of the charges for insufficient evidence. The trial court granted the motion to dismiss the possession-with-intent-to-sell-or-deliver charge, but denied the motions to dismiss the four other charges. The defense rested, and the jury returned guilty verdicts on the remaining charges later that afternoon.

Also that afternoon, the trial court entered judgment upon the convictions, and sentenced Defendant to: (1) 70 to 93 months' imprisonment for each trafficking offense (along with a fine and costs to be imposed as a civil judgment), to run concurrently; and (2) 6 to 17 months' imprisonment for the maintaining-a-vehicle and paraphernalia offenses, to run at the expiration of the earlier sentence, and the trial court suspended that sentence and instead placed Defendant on supervised probation for 24 months at the conclusion of his incarceration for the trafficking offenses. Defendant gave oral notice of appeal in open court.

II. Discussion

A. Discovery Sanction

[1] Defendant first argues that the trial court erred by declining to sanction the State for failing to comply with its discovery obligations.

N.C. Gen. Stat. § 15A-903 generally states that upon motion of a defendant, the State must provide the defendant with, inter alia, the "complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant[,]" including "witness statements, investigating officers' notes . . . or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." N.C. Gen. Stat. § 15A-903(a) (2017). That statute also provides that "[o]ral statements shall be in written or recorded form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness." *Id.* at § 15A-903(a)(1)(C). Pursuant to N.C. Gen. Stat. § 15A-903(b), if discovery is provided by the State voluntarily pursuant to a written request rather than upon the defendant's motion (as contemplated by N.C. Gen. Stat. § 15A-902), such discovery must conform to the same standards as if a motion had been made.[1] Finally, N.C. Gen. Stat. § 15A-907 is an evergreen provision that requires, inter alia, that once it provides discovery to a defendant, the State must thereafter notify the defendant of any new developments in evidence it discovers prior to or during trial.

N.C. Gen. Stat. § 15A-910 sets forth as follows, in relevant part:

> (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may:
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (3a) Declare a mistrial, or

1. The record contains no motion by Defendant seeking discovery, but the exhibits appended to Defendant's motion to suppress indicate either that (1) Defendant made a motion seeking discovery pursuant to N.C. Gen. Stat. § 15A-903 or (2) the State provided discovery voluntarily pursuant to N.C. Gen. Stat. § 15A-902 in this case.

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2017).

Defendant's argument that the trial court erred by declining to apply a discovery sanction against the State focuses upon the uncontested fact that Defendant was not made aware that the source of Belk's tip to Pedersen was Goodwin[2] until the hearing on Defendant's motion to suppress. Defendant argues that this was a failure by the State to comply with its discovery obligations under N.C. Gen. Stat. §§ 15A-902 to -910 (as set forth in relevant part above), and that the trial court erred by concluding that the State had not violated these statutes and declining to apply some sanction against the State as a result.

"Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court." *State v. East*, 345 N.C. 535, 552, 481 S.E.2d 652, 664 (1997). We will reverse for abuse of discretion "only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

The record reflects that: (1) the prosecutor followed up with Belk regarding the source of the tip; (2) Belk told the prosecutor that the source was an officer with the Town of Wadesboro Police Department; (3) the prosecutor requested that Belk provide a supplemental report to her with more information; and (4) the prosecutor told Defendant's trial counsel that the source was an officer with the Town of Wadesboro Police Department. Although it appears that Belk never provided the prosecutor with Goodwin's identity, and accordingly that Defendant was never apprised of Goodwin's identity prior to Belk's testimony that Goodwin was the source on the stand at the motion-to-suppress hearing, the State did provide Defendant with Belk's supplemental report—which Defendant introduced as Exhibit 1/E at the hearing on his motion to suppress—and the record does not reflect that Defendant took any steps to seek to ascertain the identity of the specific officer thereafter.

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2. Although Defendant argues in his brief on appeal that Defendant "learned for the first time at the motion to suppress hearing that the person providing the tip that led to Officer Pedersen's stop of his car was a Wadesboro police officer rather than an 'unknown source[,]'" the transcript from the motion-to-suppress hearing reveals that Defendant's trial counsel there agreed that the prosecutor had made her aware prior to the hearing that the source was an officer with the Town of Wadesboro Police Department, albeit not Goodwin, specifically.

On these facts, we cannot conclude that the trial court abused its discretion in determining that the State had complied with discovery or by declining to apply sanctions against the State for failing to provide him with Goodwin's identity.

B. Maintaining-a-vehicle Charge

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of maintaining a vehicle to keep or sell controlled substances, because the State presented insufficient evidence that Defendant's vehicle was used for storing or selling controlled substances.

This Court reviews a 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). In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citation omitted). In reviewing the trial court's decision on appeal, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

Defendant was convicted of keeping or maintaining a car which is used for the keeping or selling of a controlled substance, in violation of N.C. Gen. Stat. § 90-108(a)(7). That provision states, in pertinent part, that "[i]t shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances] in violation of this Article." N.C. Gen. Stat. § 90-108(a)(7) (2019).

> To prove a defendant guilty under this portion of subsection 90-108(a)(7), the State must prove that the defendant
>
> (1) knowingly
>
> (2) kept or maintained
>
> (3) a vehicle
>
> (4) which was used for the keeping or selling
>
> (5) of controlled substances.

State v. Rogers, 371 N.C. 397, 401, 817 S.E.2d 150, 153 (2018) (internal brackets and citation omitted). "[T]he keeping . . . of" drugs referred to in this subsection means "the storing of drugs." *Id.* at 403, 817 S.E.2d at 155.

"The determination of whether a vehicle . . . is used for keeping or selling controlled substances will depend on the totality of the circumstances." *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994). Circumstances our courts have considered relevant to this determination include: the amount of controlled substances found, the presence of drug paraphernalia, the presence of large amounts of cash, and whether the controlled substances were hidden in the vehicle. *See Rogers*, 371 N.C. at 403, 817 S.E.2d at 155; *State v. Alvarez*, 818 S.E.2d 178, 182 (N.C. Ct. App. 2018), *aff'd per curiam*, 372 N.C. 303, 828 S.E.2d 154 (2019); *State v. Dunston*, 256 N.C. App. 103, 106, 806 S.E.2d 697, 699 (2017); *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 687 (2001). While no factor is dispositive, "[t]he focus of the inquiry is on the use, not the contents, of the vehicle." *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30 (emphasis omitted).

In *Rogers*, the State presented sufficient evidence that defendant used a car to keep illegal drugs where law enforcement officers found two purple plastic baggies containing cocaine in a small space behind the door covering the vehicle's gas cap; a marijuana cigarette and $243 in the vehicle's passenger compartment; and similar purple plastic baggies containing larger amounts of cocaine, a digital scale, and small ziplock bags in defendant's hotel room. *Rogers*, 371 N.C. at 403, 817 S.E.2d at 155. Similarly, in *Dunston*, the State presented sufficient evidence that defendant used a car to keep illegal drugs where officers observed defendant in the car engaging in activities consistent with those commonly used in distributing marijuana, and officers discovered in the car a travel bag containing a 19.29-gram mixture of heroin, codeine, and morphine; plastic baggies; two sets of digital scales; and three cell phones. *Dunston*, 256 N.C. App. at 106, 806 S.E.2d at 699. Likewise, in *Alvarez*, the State presented sufficient evidence that defendant used a car to keep illegal drugs where officers discovered one kilogram of cocaine wrapped in plastic and oil to evade detection by canine units in a false-bottomed compartment on defendant's truck bed floor. *Alvarez*, 818 S.E.2d at 182.

In this case, as in *Rogers* and *Alvarez*, Defendant attempted to hide the methamphetamine. "[A] defendant who wants to store contraband will, all other things equal, want to store it in a hidden place, which is exactly what putting the" methamphetamine in the false-bottomed

tire-sealant can would accomplish. *Rogers*, 371 N.C. at 404, 817 S.E.2d at 155. Moreover, similar to the trafficking amounts of controlled substances found in *Rogers*, *Dunston*, and *Alvarez*, the tire-sealant can contained more than 28 grams of methamphetamine—an amount consistent with trafficking, not personal use. Additionally, as in *Rogers* and *Dunston*, officers also discovered drug paraphernalia in Defendant's possession.

While "merely having drugs in a car . . . is not enough to justify a conviction under subsection 90-108(a)(7)[,]" *Rogers*, 371 N.C. at 406, 817 S.E.2d at 157, viewing the evidence in this case in the light most favorable to the State and drawing all reasonable inferences from that evidence, a reasonable jury could find that Defendant used the Camaro to store the methamphetamine. The trial court thus correctly denied Defendant's motion to dismiss the charge of keeping or maintaining a vehicle which is used for the keeping or selling of controlled substances.

III. Conclusion

The trial court did not abuse its discretion in determining that the State had complied with its discovery obligations or by declining to apply sanctions against the State. The trial court thus did not err by denying Defendant's motion to suppress. As the State presented substantial evidence that Defendant's vehicle was used for the keeping or selling of controlled substances, the trial court correctly denied Defendant's motion to dismiss the charge. The trial court's order denying Defendant's motion to suppress is affirmed, and the trial court did not err by denying Defendant's motion to dismiss.

AFFIRMED IN PART AND NO ERROR IN PART.

Judges STROUD and BERGER concur.

STATE OF NORTH CAROLINA
v.
RAFIEL FOREMAN, DEFENDANT

No. COA19-738

Filed 7 April 2020

1. Constitutional Law—effective assistance of counsel—concession of guilt—knowing and voluntary

In a trial for attempted murder, defense counsel's performance was not constitutionally ineffective for conceding that defendant committed assault with a deadly weapon inflicting serious injury where defendant knowingly and voluntarily consented to this strategy, as indicated by the *Harbison* statement defendant signed and submitted to the trial court and by the court's subsequent questioning of defendant. Further, the concession was not an admission to the murder charge because assault with a deadly weapon inflicting serious injury was not a lesser-included offense of attempted first-degree murder.

2. Constitutional Law—concession of guilt—Harbison inquiry—informed consent

In a trial for attempted murder, defendant knowingly and voluntarily consented to having his counsel concede guilt for assault with a deadly weapon inflicting serious injury, as demonstrated by the *Harbison* statement defendant signed and submitted to the trial court and by the trial court's inquiry into defendant's knowledge of and consent to that strategy and its potential consequences. The admission was not a concession of guilt to the murder charge since that offense required proof of elements beyond those needed to prove assault with a deadly weapon inflicting serious injury.

Appeal by defendant from judgments entered 28 August 2018 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Forrest P. Fallanca, for the State.

Michael E. Casterline, P.A., by Michael E. Casterline, for defendant-appellant.

BERGER, Judge.

On August 28, 2018, Rafiel Foreman ("Defendant") was convicted by a Pitt County jury of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), and felonious breaking and entering. On appeal, Defendant contends he received ineffective assistance of counsel when his trial counsel conceded Defendant's guilt to assault with a deadly weapon inflicting serious injury ("AWDWISI") without his knowing and voluntary consent. Defendant also argues the trial court erred when it failed to inquire into whether Defendant's *Harbison* acknowledgment was knowing and voluntary. Defendant also filed a motion for appropriate relief with this Court pursuant to N.C. Gen. Stat.§ 15A-1418. We find no error, and deny Defendant's motion for appropriate relief.

Factual and Procedural Background

Defendant and Dawn Rook ("Dawn") dated for approximately ten years, from 2007 until December 2017. Throughout the course of their relationship, Defendant never met Dawn's father, Bennet Rook ("Mr. Rook"). Mr. Rook was unaware that his daughter had been dating anyone. In December 2017, Dawn ended the relationship because Defendant was becoming "verbally mean."

On February 13, 2018, Dawn woke to several messages and missed calls from Defendant. Since Dawn had blocked Defendant's phone number, he messaged her over Facebook Messenger. The messages from Defendant included the following statements: "You better get a restraining order because this just got worse. I hope you know you pushed me to do this;" "I hope you know I'm going to physically hurt her, then I'm coming for you. I swear on my life today;" and "[I]t's over for everyone today. I'm glad I'm doing what I'm doing . . . I'm out of my mind, and you just gave me reasons to hurt people. I'm about to walk up to your house right now and talk with your father and hope to start a fistfight." Defendant then sent a photograph of the Rooks' home to Dawn, stating "I'm at your [expletive deleted] house, Dawn. Answer my call or I'm walking up there, I swear."

Dawn and her mother had already left for work by the time Defendant arrived at the Rooks' home. Mr. Rook, who was in his late 60s, was home alone. Around 10:00 a.m., Mr. Rook saw Defendant carrying a package up the sidewalk. Mr. Rook did not recognize Defendant but assumed he was a delivery person. Thinking that his wife or his daughter had ordered something, Mr. Rook met Defendant at the front door. When Mr. Rook opened the door, Defendant asked, "Are you Benny Rook?" Defendant then stabbed Mr. Rook and forced his way inside the home.

Once inside, Defendant hit Mr. Rook with two side-tables, a large glass cake dome, and a wine bottle.

Defendant left the residence. He then called Dawn and told her what he had done. Meanwhile, Mr. Rook grabbed his gun, locked the door, and called his wife for help. Officers found broken glass and blood in the Rooks' home. They also observed stab marks in the linoleum floor and recovered a bent knife. Defendant also left the package with his name and address on the delivery label.

By the time Mr. Rook arrived at the hospital, he had lost approximately 20% of his blood and had sustained "life-threatening" injuries. Mr. Rook had several lacerations to his head and face and an injury to his left forearm where Defendant struck him with a table. While in surgery for his injuries, Mr. Rook suffered from an aspiration event which required the operating team to conduct a bronchoscopy. Mr. Rook spent several days in the hospital recovering.

Defendant was tried in August 2018. Prior to opening statements, Defendant's counsel introduced a "*Harbison* Acknowledgment." This sworn document was signed by Defendant and his trial counsel, and it stated that:

> Pursuant to *State v. Harbison*, 315 N.C. 175 (1985), I, Rafiel Foreman, hereby give my informed consent to my lawyer(s) to tell the jury at my trial that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury. I understand that:
>
> 1. I have a right to plead not guilty and have a jury trial on all of the issues in my case.
>
> 2. I can concede my guilt on some offenses or some lesser offense than what I am charged with if I desire to for whatever reason.
>
> 3. My lawyer has explained to me, and I understand that I do not have to concede my guilt on any charge or lesser offense.
>
> 4. My decision to admit that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury is made freely, voluntarily and understandingly by me after being fully appraised of the consequences of such admission.
>
> 5. I specifically authorize my attorney to admit that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury.

The following colloquy then occurred between the trial court and Defendant regarding the *Harbison* Acknowledgement:

> THE COURT: Mr. Foreman, I'm reading a paper that your attorney handed me. Did he discuss with you his intention to admit and concede that you are guilty of assault with a deadly weapon inflicting serious injury?
>
> [DEFENDANT]: Yes, Your Honor, he did.
>
> THE COURT: Do you understand that you have the right to plead not guilty and be tried by a jury on all issues?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: You understand that if you concede your guilt in this case, that the jury could in fact find you guilty of that offense?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: And you understand that you do not have to concede your guilt on that point?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: And is the decision to admit your guilt to assault with a deadly weapon inflicting serious injury made freely, voluntarily, and understandingly?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: Do you understand the ramifications of that and the consequences of such admission?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: And do you specifically authorize your attorney to admit that you're guilty of assault with a deadly weapon inflicting serious injury?
>
> [DEFENDANT]: Yes, Your Honor.

The trial court then found:

> that the Defendant . . ., under *State v. Harbison*, has been advised of his attorney's intention to admit his guilt to assault with a deadly weapon inflicting serious injury; [t]hat the Defendant has consented to that strategy; [t]hat consent was given freely and voluntarily after

> being advised of his rights; [a]nd that he knowingly, voluntarily, freely, and understandingly has acknowledged and has consented to that strategy on behalf of his counsel.

During opening statements, defense counsel conceded that Defendant was guilty of AWDWISI pursuant to the *Harbison* Acknowledgment. Counsel then argued the evidence would fail to show Defendant intended to kill Mr. Rook. At the close of the State's evidence, Defendant moved to dismiss the charges of AWDWIKISI and attempted murder. Defendant's motion was denied. The defense presented no evidence at trial.

Defense counsel also conceded Defendant's guilt to AWDWISI during closing arguments and argued that Defendant did not intend to kill Mr. Rook. The jury found Defendant guilty of AWDWIKISI, attempted first-degree murder, and felonious breaking and entering.

Defendant timely appeals, alleging he was denied effective assistance of counsel because his concession of guilt to AWDWISI was not knowing or voluntary and that he was not informed his admission of guilt would then support a conviction for attempted first-degree murder. Defendant also alleges the trial court failed to conduct an adequate *Harbison* inquiry to determine if he understood the consequences of his admission of guilt. We disagree.

Standard of Review

"On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). "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) (citation and quotation marks omitted).

Analysis

[1] Ordinarily, to prevail on a claim of ineffective assistance of counsel, the defendant "must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our Supreme Court has held that *per se* ineffective assistance of counsel exists "in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985). "*Harbison* applies when defense counsel concedes defendant's guilt to either the charged offense or a lesser included offense." *State v. Alvarez*, 168 N.C. App. 487, 501,

608 S.E.2d 371, 380 (2005). However, *Harbison* does not apply where defense counsel has conceded an element of a crime charged, while still maintaining the Defendant's innocence. *Wilson*, 236 N.C. App. at 477, 762 S.E.2d at 897.

Defendant argues that his trial counsel's concession of guilt to AWDWISI "effectively admitted to the far more serious charge of attempted first-degree murder."

"For an offense to be a lesser-included offense, all of the essential elements of the lesser crime must also be essential elements included in the greater crime." *State v. Rainey*, 154 N.C. App. 282, 285, 574 S.E.2d 25, 27 (2002) (citation and quotation marks omitted). "The essential elements of assault with a deadly weapon inflicting serious injury are: (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 306 (2003) (citations and quotation marks omitted). The essential elements of attempted first-degree murder are (1) a specific intent to kill another person unlawfully; (2) "an overt act calculated to carry out that intent, going beyond mere preparation;" (3) the existence of malice, premeditation and deliberation accompanying the act; and (4) a failure to complete the intended killing. *State v. Cozart*, 131 N.C. App. 199, 202-03, 505 S.E.2d 906, 909 (1998).

AWDWISI is not a lesser-included offense of attempted first-degree murder. *See Rainey*, 154 N.C. App. at 285, 574 S.E.2d at 27 ("Assault with a deadly weapon requires the State to prove the existence of a deadly weapon; however, attempted murder does not require a deadly weapon. Accordingly, assault with a deadly weapon inflicting serious injury is not a lesser-included offense of attempted first-degree murder."). AWDWISI requires proof of an element not required for attempted first-degree murder: the use of a deadly weapon. *Cozart*, 131 N.C. App. at 204, 505 S.E.2d at 910. In addition, attempted first-degree murder requires proof of elements not required for AWDWISI: an intent to kill, and premeditation and deliberation. Although defense counsel conceded guilt to AWDWISI, the State, in this case, still had to prove the elements of intent to kill, and malice, premeditation and deliberation. Because the State had to prove additional elements for attempted first-degree murder, AWDWISI is not a lesser-included offense and Defendant's concession of guilt to that offense does not support a conviction for attempted first-degree murder.

Furthermore, Defendant's consent to his concession of guilt for AWDWISI was knowing and voluntary. Defendant confirmed that he understood the ramifications of conceding guilt to AWDWISI and that

he had the right to plead not guilty. Defendant's counsel filed the *Harbison* Acknowledgment in which Defendant expressly gave his trial counsel permission to concede guilt to AWDWISI after "being fully appraised of the consequences of such admission." In this case, the facts show that Defendant knew his counsel was going to concede guilt to AWDWISI, and the trial court properly ensured that Defendant was aware of the ramifications of such a concession. In addition, at no point at trial did defense counsel concede guilt to attempted murder. Defendant's argument that his concession to AWDWISI was a concession of guilt for attempted murder is meritless. Therefore, we conclude that Defendant was not denied effective assistance of counsel in violation of *Harbison*. *See State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004).

[2] Defendant next argues that the trial court failed to conduct an adequate *Harbison* inquiry to determine if he understood the consequences of conceding guilt to AWDWISI because the court "focused solely on the implications of being convicted of the lesser assault," not the "*de facto* admission of the elements of attempted first-degree murder." We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Hamilton*, ___ N.C. App. ___, ___, 822 S.E.2d 548, 552 (2018), *rev. dismissed*, ___ N.C. ___, 830 S.E.2d 822 (2019), and *rev. denied*, ___ N.C. ___, 830 S.E.2d 824 (2019).

"[T]he trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *State v. Maready*, 205 N.C. App. 1, 7, 695 S.E.2d 771, 776 (2010). "The facts must show, at a minimum, that defendant *knew* his counsel [was] going to make such a concession." *Matthews*, 358 N.C. at 109, 591 S.E.2d at 540 (emphasis in original).

In *State v. Johnson*, the defendant argued on appeal that the trial court failed to conduct an adequate *Harbison* inquiry as to whether he knowingly and voluntarily consented to conceding guilt. 161 N.C. App. 68, 76, 587 S.E.2d 445, 451 (2003). At trial, the court directly asked the defendant the following:

> THE COURT: [Y]ou have heard what [defense counsel] just said. Have ya'll previously discussed that before he made his opening statements?
>
> THE DEFENDANT: Yes, sir, we did.

> THE COURT: And did he have your permission and authority to make that opening statement to the jury?
>
> THE DEFENDANT: Yes, sir, he did.
>
> THE COURT: You consent to that now?
>
> THE DEFENDANT: Yes, sir.

Id. at 77, 587 S.E.2d at 451 (ellipses omitted). This Court found that the trial court's inquiry was sufficient "to establish that defendant had previously consented to his counsel's concession that he was present and had" committed the crime for which he was conceding guilt. *Id.* at 77-78, 587 S.E.2d at 451.

In the present case, Defendant's concession of guilt to AWDWISI was not a concession of guilt to attempted first-degree murder because, as stated earlier, the State still had to prove the elements of intent to kill and premeditation and deliberation. Moreover, Defendant understood the implications of admitting guilt to AWDWISI as shown by his colloquy with the trial court. The trial court questioned Defendant to determine whether he gave his defense counsel permission to admit guilt. The record demonstrates that Defendant fully understood that trial counsel was going to concede guilt to AWDWISI, and the Defendant expressly consented to the concession. Further, Defendant specifically acknowledged that he understood the consequences of the concession. In addition, the trial court also inquired as to whether Defendant met with defense counsel about the admission of guilt, and whether Defendant understood he could plead not guilty to all issues. Thus, the trial court did not err.

Finally, Defendant filed a motion for appropriate relief with this Court pursuant to N.C. Gen. Stat. § 15A-1418. A defendant's motion for appropriate relief may be determined by this Court if there is sufficient information in the record. N.C. Gen. Stat. § 15A-1418 (2019). "A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief." N.C. Gen. Stat. § 15A-1420(c)(6) (2019). Because the trial court conducted an appropriate *Harbison* inquiry, as set forth above, Defendant cannot show that his "conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." N.C. Gen. Stat. § 15A-1415(b)(3) (2019). Because Defendant cannot show the existence of the asserted ground for relief, i.e., a *Harbison* violation, Defendant's motion for appropriate relief is denied.

Conclusion

For the foregoing reasons, we hold Defendant's consent was knowing and voluntary as he was aware of the consequences and ramifications of such an admission. As Defendant's consent to his attorney's concession of guilt was knowing and voluntary, he was not denied effective assistance of counsel in violation of *Harbison*. Defendant's motion for appropriate relief is denied.

AFFIRMED IN PART, DENIED IN PART.

Judge DIETZ and BROOK concur.

STATE OF NORTH CAROLINA
v.
JOSHUA KOIYAN, DEFENDANT

No. COA19-951

Filed 7 April 2020

Evidence—expert testimony—reliability—Rule 702—latent fingerprint analysis—plain error analysis

At a trial for robbery with a dangerous weapon, the trial court erred by admitting an expert's opinion that defendant's fingerprints matched latent prints found at the crime scene, where the expert described his general method of analyzing fingerprints without explaining how he reliably applied that method to the facts of this case, and therefore his testimony fell short of the three-pronged reliability test under Evidence Rule 702. However, the trial court's error did not amount to plain error where the State presented other overwhelming evidence of defendant's guilt, and therefore defendant could not show that the improper testimony prejudiced him.

Appeal by Defendant from judgment entered 3 May 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Tien Cheng, for State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon a jury verdict of guilty of robbery with a dangerous weapon. Defendant argues that the trial court plainly erred by admitting expert testimony because the testimony did not demonstrate that the expert applied accepted methods and procedures reliably to the facts of the case. We discern no plain error.

I. Background

On 24 October 2016, a grand jury indicted Defendant Joshua Koiyan for robbery with a dangerous weapon, in violation of N.C. Gen. Stat. § 14-87. On 29 April 2019, Defendant's case came on for trial. The evidence at trial tended to show: On 12 October 2016, two employees were working at a Boost Mobile store in Charlotte, North Carolina. The employees were Ana Torres and Guadalupe Morin, both of whom worked the floor of the store as sales representatives. That afternoon, both observed a young man—later identified as Defendant—enter the Boost Mobile store; Defendant wandered the store for approximately 45 minutes and repeatedly asked the employees whether the store sold iPhones. Torres noticed that Defendant seemed nervous and she became suspicious that something was going to happen; in light of her suspicion, Torres took all of the money out of her cash register except for the dollar bills and hid the money. Torres also took pictures of Defendant with her personal cell phone while he spoke with Morin.

Approximately 45 minutes after Defendant entered the store, and after all other customers had exited, Defendant pulled out a silver gun and jumped over the counter. Defendant ordered Morin to open the cash registers, and then told both women to go to the corner while he put the money into a plastic bag. Defendant then took Torres' purse, which contained two of her cell phones, her passport, her jewelry, and her wallet, along with several display phones. Defendant told the women, "I'm not going to hurt you all today because you all are being good," jumped back over the counter, and ran out of the store. Torres followed Defendant out of the store but lost sight of him, and then called 911.

Charlotte Mecklenburg Police Officers Kelly Zagar and David Batson arrived at the store within four to five minutes. Torres provided them with a description of Defendant, explaining that he was: a black male; approximately 5'7" tall; skinny build; wore a black visor, black hoody, and jeans; and looked to be about 20 years old. Zagar secured the crime scene for evidence and called the Charlotte Mecklenburg Crime Scene Search. Keywana Darden, an investigator with the Crime Scene Search

team, collected, documented, and preserved all of the evidence found at the store. The evidence included surveillance footage taken from cameras located inside the Boost Mobile store and photographs of the scene. Darden also dusted areas throughout the store and obtained latent fingerprints from the scene. Torres also gave the officers the photographs she took of Defendant while he was in the store. Those photographs were later obtained by the news media and broadcasted to the public.

On 14 October 2016, two days after the robbery, Defendant was apprehended and arrested by the Charlotte Mecklenburg police. Torres independently viewed Defendant's mugshot online but did not participate in a photographic or in-person lineup.

During the trial, Torres testified for the State and identified Defendant as being the individual who committed the armed robbery of the Boost Mobile store. Prior to trial, Defendant filed a motion to suppress Torres' in-court identification, arguing that Torres could not make an identification of him until just one week before trial. Defendant argued that Torres admitted to viewing his mugshot prior to the trial and thus could not independently identify him as the perpetrator. The trial court denied Defendant's motion to suppress, and Torres identified Defendant at trial in the presence of the jury.

Todd Roberts, a latent fingerprint examiner with the State of North Carolina, testified as an expert witness at trial. Roberts testified to his education, training in the field of latent fingerprint analysis, and his conclusion that the latent fingerprints found at the Boost Mobile store were a match to Defendant's fingerprints.

On 3 May 2019, the jury found Defendant guilty of robbery with a firearm. The trial court sentenced Defendant to 45-66 months' imprisonment. Following judgment, Defendant gave oral notice of appeal.

II. Discussion

Defendant's sole argument on appeal is that the trial court plainly erred by admitting Roberts' expert opinion that Defendant's fingerprints matched the latent fingerprints left at the Boost Mobile store because Roberts' testimony did not demonstrate that he applied accepted methods and procedures reliably to the facts of this case.

Defendant acknowledges his failure to object to Roberts' testimony at trial but specifically argues plain error on appeal. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). In order to show fundamental error,

a defendant must establish prejudice—that the error "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks and citation omitted). Accordingly, we review whether the trial court erred in admitting Roberts' testimony for plain error.

It is the trial court's role to decide preliminary questions concerning the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2019). Rule 702 of the North Carolina Rules of Evidence governs testimony by experts. Pertinent to Defendant's argument, Rule 702 provides as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019). Prongs (a)(1), (2), and (3) together constitute the reliability inquiry discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *State v. McGrady*, 368 N.C. 880, 890, 787 S.E.2d 1, 9 (2016). "The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate[.]" *Id.* (internal quotation marks and internal citations omitted). However, "conclusions and methodology are not entirely distinct from one another[;]" thus, when the "analytical gap between the data and the opinion proffered" is too great, the trial court is not required to admit the expert opinion evidence "that is connected to existing data only by the *ipse dixit* of the expert." *Id.* (internal quotation marks and citation omitted).

In *State v. McPhaul*, 256 N.C. App. 303, 314, 808 S.E.2d 294, 304 (2017), this Court recently examined expert testimony regarding latent fingerprint analysis under the three-prong reliability test set forth in

McGrady. In *McPhaul*, the State's expert witness testified that she had worked as a print examiner for more than nearly a decade; explained that each fingerprint contains distinguishing characteristics called "minutia"; and testified that it was possible to identify the source of a latent print by comparing the print to an individual's "known impressions" and evaluating the "minutia points." *Id*. She further explained that she uses an optic camera to compare the minutia points and examine the print pattern type, and she stated that the procedures she followed were commonly used in the field of fingerprint identification. *Id*. at 315, 808 S.E.2d at 304.

However, when the expert testified to her ultimate conclusions, the expert was "unable to establish that she reliably applied the procedure to the facts of this case[.]" *Id*. The expert concluded that the latent print matched the defendant's fingerprints, and stated that she based that conclusion on her "training and experience." *Id*. The State asked the expert whether her other conclusions were based upon "the same procedure" she described to the jury, and the expert stated that was correct. *Id*. at 316, 808 S.E.2d at 305. This Court determined that the expert's testimony was insufficient and failed to satisfy Rule 702's three-pronged reliability test because the testimony failed to show that the expert "reliably applied that methodology to the facts of the case" and failed to explain "how she arrived at her actual conclusions *in this case*." *Id*. As the expert's testimony "implicitly asked the jury to accept her expert opinion that the prints matched[,]" this Court determined the testimony insufficient and held that the trial court erred by admitting the testimony. *Id*.

We determine that the testimony here is similar to the testimony in *McPhaul* and hold that Roberts' testimony failed to demonstrate how he arrived at his conclusion that Defendant's fingerprints matched the fingerprints left at the Boost Mobile store. On direct examination, Roberts first explained that he was a latent fingerprint examiner, had worked in the field for more than 14 years, and that his primary responsibilities were to "evaluate, compare, and attempt to identify latent [fingerprint] lifts collected by a crime scene investigator . . . to its individual[.]" Roberts has degrees in "correctional and juvenile services and criminal justice," two years of in-house training with the State Crime Lab, and has been trained in "logical latent analysis, advanced palm print comparison techniques, forensic ridgeology, and fingerprint comparisons." At the time of trial in this case, Roberts had testified as an expert witness in latent fingerprint identification more than 75 times in state and federal courts and estimated that he had identified and analyzed "tens of thousands" of fingerprints.

Roberts explained that he examines fingerprints by looking for three levels of detail, with "level 1 being the basic just ridge flow. The level 2 detail is what we use for identification, that is, consists of ending ridges and bifurcations and their spatial relationship to each other. And then the level 3 [] detail is more on the microscopic level, but it's actually the structure of the ridge. It's the pores located within the ridge[.]" Roberts explained that he takes the latent fingerprints, puts it beside an inked fingerprint, magnifies the prints, and examines the likenesses or dissimilarities. Roberts testified that an example of "level 1 detail . . . is a right loop, meaning that the ridge is just coming from the right side of the finger. They loop around the core and then back out the right side." "[L]evel 2 detail . . . , they're located within the print . . . . The ending ridges and the bifurcations is what makes that print unique. There are places that you can see a bifurcation come over to another bifurcation, creating an enclosure." "The level 3 detail . . . includes the pores within the print. . . . [T]hose holes that are in the ridge are pores, they're actually in the top of ridge, and that's what secretes sweat, allows the fingerprint to print. That is the level 3 detail." This testimony sufficiently explained Roberts' qualifications, training, and expertise, and showed that Roberts uses reliable principles and methods.

However, Roberts testified to his conclusions later on direct examination:

> [State]: The latent-print cards that were in State's Exhibit 6, did you compare those to [Defendant's prints] that were State's Exhibit 11?
>
> [Roberts]: Yes, ma'am.
>
> [State]: Did any of those latent prints match [Defendant's] prints?
>
> [Roberts]: They did.
>
> [State]: Which ones?
>
> [Roberts]: 2-4-2, 2-4-3, 2-4-4, and then 2-11-1. All were identified to [Defendant].

Pursuant to Rule 702, this testimony is insufficient as it fails to show that Roberts applied accepted methods and procedures reliably to the facts of this case in order to reach his conclusion that the fingerprints were a match. While Roberts testified earlier that he generally examines prints for "three levels of detail" and looks for "ridges and bifurcations and their spatial relationship" on each print, Roberts failed to provide

any such detail when testifying as to *how* he arrived at his conclusions *in this case*. Moreover, he never explained what—if any—characteristics from the latent fingerprints matched with Defendant's fingerprints. Instead, when asked whether any of the prints matched, Roberts merely stated that they did and provided no further explanation for his conclusions. Like in *McPhaul*, Roberts' testimony had the impermissible effect of "implicitly ask[ing] the jury to accept [his] expert opinion that the prints matched." *McPhaul*, 256 N.C. App at 316, 808 S.E.2d at 305. As Roberts failed to demonstrate that he "applied the principles and methods reliably to the facts of the case," as required by Rule 702(a)(3), we determine that the trial court erred by admitting the testimony.

However, under plain error review, we do not conclude that the trial court plainly erred by admitting the testimony. Defendant cannot show that he was prejudiced as a result of this error because of the otherwise overwhelming evidence that he was the perpetrator of the robbery.

Torres provided two photographs of Defendant, which she took with her cell phone while Defendant was in the Boost Mobile store, and the State entered the photographs into evidence and published them to the jury. Torres also provided testimony that Defendant was the individual who robbed her and the Boost Mobile store. The State entered into evidence the surveillance video footage taken from the store, played the video for the jury, and Torres identified Defendant when he appeared on screen. Torres further identified Defendant by pointing him out in the courtroom as the perpetrator of the robbery, and stated that she was "a hundred percent" certain that Defendant was the person who robbed her. Torres noted that she spent nearly 45 minutes with Defendant while he robbed the Boost Mobile store, and that she would not "forget his face."

Altogether, Torres' testimony and in-court identification of Defendant, along with the photographs of Defendant and surveillance video footage showing Defendant rob the Boost Mobile store, provided sufficient evidence that Defendant was the perpetrator of the robbery. In light of this overwhelming evidence, we are not persuaded by Defendant's argument that the trial court's error was so great as to have had "a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted). As such, we conclude that the trial court's admission of Roberts' expert testimony was not plain error.

NO PLAIN ERROR.

Judges DILLON and BROOK concur.

STATE v. SHULER

[270 N.C. App. 799 (2020)]

STATE OF NORTH CAROLINA
v.
SHANNA CHEYENNE SHULER

No. COA19-967

Filed 7 April 2020

Constitutional Law—right against self-incrimination—evidence of post-arrest, pre-Miranda silence—prior notice of affirmative defense of duress

In a prosecution for drug trafficking and possession, where defendant filed pretrial notice of her intent to assert duress as an affirmative defense (claiming that a friend threatened to harm her if she refused to hide drugs on her person) and where the trial court informed prospective jurors of defendant's affirmative defense before empaneling the jury, the trial court did not violate defendant's constitutional right against self-incrimination by admitting testimony during the State's case in chief highlighting defendant's post-arrest, pre-*Miranda* warnings silence to police regarding the alleged duress. This testimony constituted valid impeachment evidence because—where police had already arrested and removed the friend from the scene—it would have been natural for defendant to have told police about the threat at that time.

Appeal by defendant from judgment entered 31 October 2018 by Judge William H. Coward in Haywood County Superior Court. Heard in the Court of Appeals 17 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

W. Michael Spivey for defendant-appellant.

TYSON, Judge.

Shanna Cheyenne Shuler ("Defendant") appeals from judgment entered upon the jury's verdicts finding her guilty of trafficking in methamphetamine and simple possession of marijuana. We find no error.

I. Background

A. State's Evidence

Maggie Valley Chief of Police Russell Gilliland and Detective Brennan Regner responded to a disturbance call at a motel involving the occupants of a silver Ford Fusion automobile on 2 March 2017. Detective Regner observed the vehicle at a nearby residence, with a man standing outside the vehicle. Both officers approached the man, who identified himself as Joshua Warren and presented a South Carolina driver's license. The officers determined outstanding warrants were pending for Warren's arrest. Warren was arrested, searched, and taken from the scene. The officers found $1,700.00 in cash on Warren when he was searched.

The officers approached Defendant, who had been sitting in the vehicle, and asked her for identification. Defendant produced a valid identification card. The officers learned an arrest warrant was also pending for Defendant. Chief Gilliland informed Defendant of the arrest warrant and asked if she had any contraband on her. Defendant appeared hesitant, then removed a clear bag containing a leafy substance from inside of her bra. Chief Gilliland specifically referenced methamphetamine and asked Defendant again if she had anything else on her person.

Detective Regner explained to Defendant that she could face additional charges if she arrived at the detention facility with other contraband on her. Defendant produced another clear bag, also from inside of her bra, containing a crystal-like substance. The officers seized the evidence and the vehicle, and took Defendant into custody.

The next day, officers searched the vehicle. A digital scale, rolling papers, and a clutch bag with Defendant's name on it were found in the center console. Defendant was charged with felony trafficking in methamphetamine and with misdemeanor possession of marijuana. Prior to trial, Defendant timely filed her notice of intent to offer the defense of duress pursuant to N.C. Gen. Stat. § 15A-905(c)(1).

Detective Regner testified for the State. The State asked her if Defendant had made "any statements about Joshua Warren when she took those substances out of her bra?" Defendant's counsel objected, citing the right to counsel under the Fifth Amendment to the Constitution of the United States. The trial court overruled the objection. Detective Regner answered: "No, ma'am. She made no -- no comment during that one time."

Defendant's counsel moved for the court to excuse the jury. Outside the presence of the jury, Defendant's counsel moved for a mistrial

over the State's question, which had "solicited an answer highlighting [Defendant's] silence at the scene." The trial court acknowledged Defendant's prior objection and conducted a *voir dire* of Detective Regner's testimony to address whether Defendant was under arrest at the time of her alleged silence.

Detective Regner testified during the *voir dire* that Defendant was not in custody when she was approached and asked if she possessed any illegal substances on her. On cross-examination during the *voir dire*, Detective Regner testified she and Chief Gilliland approached Defendant once they had learned of her pending arrest warrant and asked her: "You're under arrest, do you have anything on you?"

The trial court allowed the State to re-ask the question when the jury returned over Defendant's objection.

B. Defendant's Testimony

Defendant testified in her own defense. She admitted she was addicted to methamphetamine. Defendant had known Warren's family. Warren had befriended her on social media on 28 February 2019. She testified Warren asked her if she wanted to accompany him as he rented a car on 2 March 2019. Defendant explained Warren was "known to police" and "just wanted to be in a different car so he could go and do whatever." She testified she agreed to go with Warren because she had been using methamphetamine, had been awake for eight days, and was bored.

Defendant testified Warren drove to a motel in Maggie Valley to meet the person who would rent him another car. She testified the motel owner "had some words" and was cursing with Warren when he stepped out of the car there. Warren and Defendant left the motel. Defendant testified Warren then saw a truck with the people he had intended to meet. Warren told them to meet him at a store across the street from the motel.

Warren drove to the store and met with the people in the truck. Defendant testified she saw Warren pull "a small baggie" out of his pants and hand it into the passenger side window of the truck. She then saw someone from the truck hand money to Warren. She was sitting in the passenger seat of Warren's car at the store when they first saw the police arrive at the motel.

She testified Warren drove away from the store. Warren pulled the car into the driveway of a house she did not know and exited the car. She presumed Warren went to knock on the door of the house, while she remained in the passenger seat. She testified Warren was returning to

the car when the police officers arrived. The officers spoke with Warren and left.

After the officers left, Warren told her he thought he had an active warrant for his arrest "for tying my girlfriend to a tree." She testified Warren then saw the officers returning and cursed. He pulled a bag out of his pants and tossed it into Defendant's lap. She testified Warren stated, "if you don't hide it then you'll be the next one chained to a tree."

Defendant testified she took Warren's threat seriously and put the bag he had given to her into her bra. Defendant did not testify concerning her silence about Warren's threat in response to the officers' questions to her.

Defendant also called Warren as a witness in her defense. Warren plead his Fifth Amendment rights rather than answering most questions Defendant's counsel asked. Warren denied he had ever tied his girlfriend to a tree or had threatened Defendant.

The trial court instructed the jury on the defense of duress. The jury's verdict found Defendant guilty of both charges. The trial court consolidated the charges and sentenced Defendant to an active term of 70 to 93 months in prison and ordered $57,533.00 in fees, fines, and costs entered as a civil judgment. Defendant entered notice of appeal in open court.

II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issue

Defendant argues the trial court erred by admitting into evidence testimony of her silence in response to questions by the police officers. She asserts this admission violates her privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States.

IV. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Veney*, 259 N.C. App. 915, 917, 817 S.E.2d 114, 116 (citation omitted), *disc. review denied*, 371 N.C. 787, 821 S.E.2d 169 (2018). "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) (citation and internal quotation marks omitted).

V. Analysis

Defendant argues the trial court erred in allowing the State to elicit evidence of her silence, specifically her failure to implicate Warren, after he had been removed from the scene, when asked by police if she had any contraband on her.

> [A] criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution. A defendant's decision to remain silent following [her] arrest may not be used to infer [her] guilt, and any comment by the prosecutor on the defendant's exercise of [her] right to silence is unconstitutional.

State v. Ward, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (citations omitted).

This Court has held "a defendant's pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting the defendant's prior silence is inconsistent with [her] present statements at trial." *State v. Booker*, __ N.C. App. __, __, 821 S.E.2d 877, 885 (2018) (citation omitted). "Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008).

A. Silence of Duress

Defendant argues the State elicited her silence during its case in chief, by anticipating and preemptively attacking her defense of duress. Defendant argues this testimony was impermissibly admitted as substantive evidence, rather than permissible impeachment evidence, because she had not yet testified.

The "main purpose of impeachment is to discount the credibility of a witness for the purpose of inducing the jury to give less weight to [her] testimony." *State v. Mendoza*, 206 N.C. App. 391, 397, 698 S.E.2d 170, 175 (2010) (citation omitted). This Court has held the State may not preemptively "point[] out to the jury that [a] defendant chose to remain silent when in [a police officer's] presence rather than provide the explanation proffered at trial." *Id.* at 398, 698 S.E.2d at 176.

In *Mendoza*, the State elicited testimony that the defendant did not act surprised when the arresting officer found cocaine in his car, nor did he offer any explanation as he was being arrested. *Id.* at 396-97, 698 S.E.2d at 174-75. This Court held admission of that testimony as substantive evidence was error. *Id.* at 397, 698 S.E.2d at 175. Further, in *Mendoza*, this Court considered and rejected the State's argument that it may preemptively impeach the defendant before he testified. *Id.*

B. Affirmative Defense

Unlike in *Mendoza*, Defendant in this case filed written notice of her intent to present an affirmative defense of duress. To invoke the affirmative defense of duress, the burden is on Defendant to show her "actions were caused by a reasonable fear that [s]he would suffer immediate death or serious bodily injury if [s]he did not so act." *State v. Cheek*, 351 N.C. 48, 62, 520 S.E.2d 545, 553 (1999) (citation omitted), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

The State argues Defendant's intended invocation of the affirmative defense of duress distinguishes this case from *Mendoza* and aligns this case with other cases allowing impeachment by silence. When the State seeks to impeach a defendant through silence, "[t]he test is whether, under the circumstances at the time of arrest, it would have been natural for defendant to have asserted the same defense asserted at trial." *State v. McGinnis*, 70 N.C. App. 421, 424, 320 S.E.2d 297, 300 (1984) (citing *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980)).

In *McGinnis*, this Court found no error in the admission of the defendant's post-arrest pre-*Miranda* warnings silence, concluding: "it would clearly have been natural for [the] defendant to have told the arresting police officer that the shooting with which [he] was accused was accidental, if [he] believed that to be the case." *Id.* Here, it would have been similarly "natural for" Defendant to have told the arresting officers the contraband she possessed belonged to Warren and he had threatened her to conceal it, if she "believed that to be the case." *Id.*

Warren had been arrested and removed from the scene before the officers asked Defendant if she possessed any contraband on her. The threat Warren assertedly posed to Defendant was greatly mitigated, if not completely eliminated, by his arrest and removal.

The only difference between this case and *McGinnis* is that the State elicited evidence of Defendant's silence asserting Warren's threat in its case in chief. Defendant had appropriately notified the State of her intended defense, pursuant to N.C. Gen. Stat. § 15A-905(c)(1) (2019).

The trial court had informed the prospective jurors of Defendant's affirmative defense of duress prior to the jury being empaneled.

Because the affirmative defense of duress was asserted before Defendant testified, the exclusion of Detective Regner's answer is not governed by *Mendoza*. We find no error in the admission of Detective Regner's testimony of Defendant's silence to challenge her affirmative defense of duress from Warren's threats and her asserted possession of contraband under duress, after his arrest and removal.

VI. Conclusion

The trial court properly overruled Defendant's objection and admitted Detective Regner's testimony of Defendant's silence of Warren's alleged threat. Defendant received a fair trial, free from prejudicial errors she preserved and argued.

We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges BRYANT and ARROWOOD concur.

UNIFUND CCR PARTNERS, PLAINTIFF
v.
KRYSTAL G. LOGGINS, DEFENDANT

No. COA19-957

Filed 7 April 2020

Civil Procedure—action to renew judgment—entered as default judgment—action for sum certain

The trial court properly granted summary judgment to plaintiff in its action to renew a default judgment from a prior lawsuit in which plaintiff, the holder in due course of a credit card agreement between defendant and his bank, sought to recover defendant's unpaid credit card debt. Because plaintiff's complaint and affidavit in the prior lawsuit included specific allegations enabling the assistant clerk of court to determine the exact amount defendant owed, the prior lawsuit was "for a sum certain" in accordance with Civil Procedure Rule 55(b)(1), the clerk had jurisdiction to enter the

default judgment, and the judgment could be renewed because it was not void.

Appeal by Defendant from order entered 17 July 2019 by Judge Lee W. Gavin in Randolph County District Court. Heard in the Court of Appeals 18 March 2020.

Sessoms & Rogers, P.A., by Andrew E. Hoke, for Plaintiff-Appellee.

Law Office of Jonathan R. Miller, PLLC, d/b/a Salem Community Law Office, by Jonathan R. Miller, for Defendant-Appellant.

COLLINS, Judge.

Defendant Krystal G. Loggins appeals from order granting summary judgment to Plaintiff Unifund CCR Partners in its action to renew a judgment of record[1] against Defendant. Defendant argues that the judgment, entered by the assistant clerk of court as a default judgment, cannot be renewed because it was void where Plaintiff's claim was not for a sum certain. We affirm the trial court's order.

I. Factual and Procedural History

The facts are not in dispute. Defendant entered into a written credit agreement with Citibank (South Dakota), N.A., establishing a credit card account that was later sold to Plaintiff. On 2 February 2005, Defendant defaulted under the terms of the credit agreement by failing to make the required payments.

Plaintiff commenced a civil action against Defendant on 27 August 2007 by filing an unverified complaint in Randolph County District Court, alleging in relevant part:

> 6. Pursuant to the terms and provisions of the note or credit agreement, the defendant is lawfully indebted to the plaintiff in the principal sum of $4,776.88 together with interest thereon at the contract rate of 23.99% per annum. Said sum has been outstanding since February 2, 2005.
>
> 7. The written credit agreement between the parties contains provisions for the payment of attorneys fees

1. An independent action to collect on a prior judgement is often colloquially referred to as an action to "renew" a judgment. *See Raccoon Valley Inv. Co. v. Toler*, 32 N.C. App. 461, 462-64, 232 S.E.2d 717, 718 (1977).

> in the event of default. The balance outstanding is currently $7,703.04, comprised of the principal, together with interest to date of $2,926.16. Pursuant to the provisions of [N.C. Gen. Stat.] § 6-21.2, the plaintiff hereby gives notice to the defendant that it intends to enforce those provisions of the credit agreement calling for the payment of attorneys fees. . . .

N.C. Gen. Stat. § 6-21.2 allows for the recovery of reasonable attorneys' fees at a rate of 15% of the outstanding balance owed. Plaintiff attached a copy of the credit card agreement to the complaint. Plaintiff served the complaint and summons on Defendant on 28 August 2007.

After Defendant failed to file an answer or any other pleading or appear in court, Plaintiff filed a motion on 3 October 2007 for entry of default and default judgment, accompanied by an affidavit from Plaintiff's attorney and an affidavit of account from an authorized representative of Plaintiff, stating:

> [Affiant] has read the Complaint which was filed in this action, and the allegations contained therein are true and accurate of his/her own knowledge, except as to those matters and things therein stated upon information and belief, and as to those (s)he believes them to be true. The contents of said Complaint are incorporated herein by this reference, and are hereby verified to be true.
>
> The Defendant entered into a promissory note or written credit agreement with Citibank (South Dakota), N.A.[] The Plaintiff has purchased and is the holder in due course of the account referred to herein. A true and accurate copy of the terms of the promissory note or account agreement between the parties was attached to the Complaint filed herein. The Defendant is in default under the terms thereof for failure to make the required payments. As a result of the Defendant's default, [Plaintiff] has declared the entire outstanding balance due and payable.
>
> . . . . .
>
> [Defendant] is currently indebted to [Plaintiff] in the principal sum of $4,776.88, together with interest thereon at the rate of 23.99% per annum from and after February 2, 2005, the date of the [D]efendant's default, reasonable attorneys fees, and costs.

On 3 October 2007, the assistant clerk of superior court ordered entry of default and default judgment ("2007 default judgment"), pursuant to Rules 55(a) and 55(b) of the North Carolina Rules of Civil Procedure. The assistant clerk of superior court ("clerk") found that the action was "for a sum certain or a sum which can by computation be made certain," and ordered recovery for Plaintiff of the principal sum of $4,776.88 plus 23.99% interest calculated to the date of entry of the judgment; interest accrued at 8% after the date of entry of the judgment until paid; reasonable attorneys' fees in the amount of $1,155.46, an amount equal to 15% of $7,703.04, pursuant to N.C. Gen. Stat. § 6-21.2; and costs associated with the action.

On 15 September 2017, Plaintiff filed an unverified complaint in Randolph County District Court ("2017 action") seeking to renew the 2007 judgment. The complaint alleged that Plaintiff had obtained a judgment against Defendant on 3 October 2007 and that no payments had been received since entry of the judgment. Plaintiff attached the 2007 judgment and an affidavit to the complaint. Defendant filed an answer with counterclaims on or around 19 October 2017. On or around 28 November 2017, Plaintiff filed a motion to dismiss Defendant's counterclaims, which the trial court granted on 12 July 2018. Plaintiff filed a motion for summary judgment on 20 December 2018. On 17 July 2019, the trial court conducted a hearing and entered an order granting summary judgment to Plaintiff.

Defendant filed notice of appeal of the summary-judgment order on 15 August 2019.

II. Discussion

Defendant argues that the trial court erred by granting summary judgment to Plaintiff in the 2017 action, thereby allowing Plaintiff to renew the 2007 judgment. Defendant specifically argues that the clerk lacked jurisdiction to enter the 2007 default judgment because Plaintiff's claim was not for a sum certain and thus, the 2007 judgment was void ab initio.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Likewise, an appeal of an order granting summary judgment is reviewed de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper if the record shows 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." *Id.* (internal quotation marks and citation omitted).

"A challenge to jurisdiction may be made at any time." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citation omitted). "A judgment is void, when there is a want of jurisdiction by the court . . . ." *Id.* (citation omitted). A void judgment "is a nullity [and] [i]t may be attacked collaterally at any time [because] legal rights do not flow from it." *Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964) (citations omitted).

The owner of a judgment may obtain a new judgment to collect any unpaid amount due on a prior judgment by bringing "an independent action on the prior judgment, which . . . must be commenced and prosecuted as in the case of any other civil action brought to recover judgment on a debt." *Raccoon Valley*, 32 N.C. App. at 463, 232 S.E.2d at 718 (internal quotation marks and citation omitted). An independent action seeking to effectively renew a judgment must be brought within ten years of entry of the original judgment, and such renewal action can only be brought once. N.C. Gen. Stat. § 1-47(1) (2017). In an action to renew a judgment, a plaintiff should allege the existence of a prior judgment against the defendant; the fact that full payment on the judgment has not been made; and an accounting of the unpaid balance due and any applicable interest. *Raccoon Valley*, 32 N.C. App. at 463-64, 232 S.E.2d at 718-19.

Here, Defendant does not challenge the process by which the 2017 action to renew a judgment was brought, but instead argues that the underlying default judgment entered by the clerk in 2007 is void and thus cannot be renewed.

The clerk shall enter default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise[.]" N.C. Gen. Stat. § 1A-1, Rule 55(a) (2017). When a defendant fails to answer a complaint and default is entered, the substantive allegations raised by the complaint are deemed admitted for purposes of default judgment. *Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980).

After default has been entered against a defendant, judgment by default may be entered by the clerk "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain[.]" N.C. Gen. Stat. § 1A-1, Rule 55(b)(1) (2017).[2] The

2. For the clerk to enter default judgment, this rule also requires that "the defendant has been defaulted for failure to appear and [] the defendant is not an infant or incompetent person." *Id.* Neither of these requirements is at issue in this case.

amount due must appear in an affidavit. *Id.* A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to compute or determine the sum certain. *Id.* "Absent a certain dollar amount, the default judgment must be entered by a judge who may conduct a hearing to adequately determine damages." *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 622, 610 S.E.2d 469, 471 (2005) (citing N.C. Gen. Stat. § 1A-1, Rule 55(b)(2) (2003)). If the clerk lacked the authority to enter a default judgment because the claim was not for a sum certain, then the judgment is void as a matter of law. *Id.* at 624, 610 S.E.2d at 472.

In *Smith v. Barfield*, 77 N.C. App. 217, 334 S.E.2d 487 (1985), plaintiffs alleged in a verified complaint that defendants had agreed to move a house for $10,700, one half to be paid when the house was loaded for moving; that plaintiffs paid $5,350 under the agreement; and that defendants failed to move the house. These allegations constituted a "sum certain" under Rule 55(b)(1). *Id.* at 218, 334 S.E.2d at 488. Similarly, in *Thompson v. Dillingham*, 183 N.C. 566, 112 S.E. 321 (1922), plaintiff's verified complaint alleged that defendants owed plaintiff $2,000 on the purchase price of an automobile, which defendants had expressly promised to pay. These allegations constituted a "sum certain" sufficient to sustain the clerk's entry of default judgment. *Id.* at 567, 112 S.E. at 322.

In contrast, in *Hecht Realty, Inc. v. Hastings*, 45 N.C. App. 307, 262 S.E.2d 858 (1980), the allegations in plaintiff's complaint were not sufficient to state a claim "for a sum certain or a sum which can by computation be made certain" within Rule 55(b)(1). Plaintiff's complaint alleged a breach of contract by defendant, but nothing in the allegations of the complaint made it possible to compute the amount of damages to which plaintiff was entitled by reason of the breach. Exhibit A, a copy of the exclusive sales agreement, and Exhibit B, a copy of the sales contract, which presumably would have supported the amount of the demand, were not attached to either the original complaint filed with the clerk nor to the complaint sent to defendant. Although plaintiff demanded judgment in the prayer for relief "in the sum of Three Thousand Two Hundred Ten Dollars ($3,210.00), together with interest and the costs of this action[,]" this Court held that "[t]he mere demand for judgment of a specified dollar amount does not suffice to make plaintiff's claim one for 'a sum certain' as contemplated by Rule 55(b)." *Id.* at 309, 262 S.E.2d at 859. *See also Williams v. Moore*, 95 N.C. App. 601, 605, 383 S.E.2d 416, 418 (1989) (no sum certain when damages were mitigated by a sum based on plaintiff's estimate of fair rental value of some unspecified amount of land); *Basnight*, 169 N.C. App. at 624, 610 S.E.2d at 472 (no

sum certain where "the six sentence affidavit which the Clerk reviewed, and the only evidence of an exact amount, stated in one place that the amount owed was $ 55,779.49, and in another $ 51,779.49"); *Grant v. Cox*, 106 N.C. App. 122, 128, 415 S.E.2d 378, 382 (1992) (no sum certain where plaintiffs alleged they were damaged $25,000, the "fair market value" of the timber defendants cut; an affidavit from a consulting forester opining that the timber was worth between $25,000 and $30,000 was not properly before the court; and no other information was before the court showing how plaintiffs computed the fair market value of the trees).

In this case, Plaintiff's 2007 complaint alleged that Defendant was lawfully indebted to Plaintiff for the principal sum of $4,776.88 together with interest at a contract rate of 23.99% per annum, that the unpaid amount had been outstanding since 2 February 2005, and that Plaintiff was entitled to calculable attorneys' fees under N.C. Gen. Stat. § 6-21.2. Plaintiff attached the credit card agreement to the complaint. Plaintiff's affidavit incorporated by reference and verified the allegations in the complaint, which included the following: Plaintiff was the holder in due course of the credit agreement; Defendant was in default under the terms of the agreement; the entire outstanding balance was due under the terms of the agreement; and Defendant was "currently indebted to [Plaintiff] in the principal sum of $4,776.88, together with interest thereon at the rate of 23.99% per annum from and after February 2, 2005, the date of [Defendant's] default, reasonable attorneys fees, and costs." When Defendant failed to answer the complaint and default was entered, the substantive allegations raised by the complaint were deemed admitted for purposes of default judgment, *see Bell*, 299 N.C. at 721, 264 S.E.2d at 105, obviating the need for further evidence to support the allegations.

Unlike the complaint in *Hecht Realty*, which demanded judgment for a specified amount but failed to include allegations making it possible to compute the amount of damages to which plaintiff was entitled, here, Plaintiff's affidavit and complaint verified by affidavit included specific allegations enabling the clerk to identify the amount owed with certainty. *See Basnight*, 169 N.C. App. at 624, 610 S.E.2d at 472. Moreover, unlike in *Williams* and *Grant* wherein plaintiffs based their claims on the fair rental of land and the fair market value of trees, respectively, which are subjective values requiring the use of certain methods to determine such values, here, the amount of the money owed could be specifically determined and averred to. Thus, as in *Smith* and *Thompson*, these allegations constituted a "sum certain" sufficient to sustain the clerk's entry of default judgment.

III. CONCLUSION

As Plaintiff's claim was for a sum certain, the clerk had the authority to enter the 2007 default judgment, and thus the judgment was not void. As the judgment was not void, there is no genuine issue as to any material fact, and Plaintiff is entitled to a judgment as a matter of law in its 2017 action to renew the 2007 default judgment. Accordingly, the trial court's entry of summary judgment is affirmed.

AFFIRMED.

Judges DILLON and BROOK concur.

SHIRLEY VALENTINE, ADMINISTRATOR OF THE ESTATE OF SHANYE JANISE ROBERTS, DECEASED, PLAINTIFF
v.
STEPHANIE SOLOSKO, PA-C; NEXTCARE URGENT CARE; NEXTCARE, INC.; NEXTCARE, INC. D.B.A. NEXTCARE URGENT CARE; MATRIX OCCUPATIONAL HEALTH, INC. AND MATRIX OCCUPATIONAL HEALTH, INC. D.B.A. NEXTCARE URGENT CARE, DEFENDANTS

No. COA19-852

Filed 7 April 2020

Process and Service—dormant summons—retroactive extension of time to serve—excusable neglect—discretion of court

The trial court's retroactive extension of time allowing the administrator of an estate to serve a dormant summons and complaint was a proper exercise of the court's discretionary power under Civil Procedure Rule 6(b) where the court found the failure to timely serve within the time required by Rule 4(c) was due to excusable neglect. The summons was merely dormant and had not been discontinued since an alias or pluries summons was issued within the 90-day period specified by Rule 4(d).

Appeal by Defendants from order entered 18 March 2019 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 4 February 2020.

The Law Office of Thomas E. Barwick, PLLC, by Thomas E. Barwick, for Plaintiff-Appellee.

Lewis Brisbois Bisgaard & Smith, LLP, by Carrie E. Meigs and Justin G. May, for Defendants-Appellants.

COLLINS, Judge.

Defendants appeal from an order granting Plaintiff's motion for an extension of time to serve the summons and complaint and denying Defendants' motions to dismiss and for judgment on the pleadings. Defendants argue that the trial court erred in its application of Rules 4 and 6 of the North Carolina Rules of Civil Procedure. Because a trial court is afforded discretion under Rule 6(b) to retroactively extend the time for service of process of a dormant summons under Rule 4(c) upon a finding of excusable neglect, we discern no legal error by the trial court. Accordingly, we affirm the trial court's order.

I. Procedural History

Plaintiff, Shirley Valentine, the administrator of the estate of her deceased daughter Shanye Janise Roberts, filed a lawsuit in 2015 alleging medical malpractice and wrongful death against Stephanie Solosko, PA-C; NextCare Urgent Care; NextCare, Inc.; NextCare, Inc. D.B.A. NextCare Urgent Care; Matrix Occupational Health, Inc.; and Matrix Occupational Health, Inc. D.B.A. NextCare Urgent Care (collectively "Defendants"). The action arose out of medical care that Defendants provided to the deceased on 10 April 2013. The trial court extended the statute of limitations to 7 August 2015 pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. Plaintiff voluntarily dismissed the lawsuit without prejudice on 24 February 2017.

Plaintiff timely filed a second lawsuit on 23 February 2018 and the Clerk of Court issued summonses ("the original summonses") for all Defendants on that day. Plaintiff served the original summonses on defendant Solosko on 15 May 2018 and the other defendants on 17 May 2018 (eighty-one and eighty-three days, respectively, after the original summonses were issued). Plaintiff filed an affidavit of service of process on 15 June 2018, including the returned registry receipts as exhibits.

Plaintiff sued out alias or pluries summonses[1] for all Defendants on 23 May 2018, eighty-nine days after the original summonses were issued. Plaintiff did not serve these alias or pluries summonses on Defendants.

1. North Carolina Rule of Civil Procedure 4 appears to use the terms "alias or pluries summons" and "alias and pluries summons" interchangeably, as do our courts. Throughout this opinion, we use the term "alias or pluries summons."

On 19 July 2018, Defendants filed an answer and a motion to dismiss on the following grounds: lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, and the action being time-barred by the statute of limitations. Defendants also filed a motion for judgment on the pleadings.

Plaintiff sued out alias or pluries summonses again on 22 August 2018, ninety one days after issuance of the previous alias or pluries summonses. Plaintiff did not serve these alias or pluries summonses. On 28 September 2018, Plaintiff filed a motion to extend time to issue, file, and serve the summonses, the alias or pluries summonses, and the complaint.

After conducting a hearing, the trial court entered an order granting Plaintiff's motion for extension of time for service of the summonses and complaint, and denying Defendants' motions to dismiss and for judgment on the pleadings. Defendants filed notice of appeal.

II. Appellate Jurisdiction

The trial court's order does not dispose of all claims and all defendants, and is thus an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(a) (2019); *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). There is generally no right to immediate appeal of an interlocutory order—although immediate appeal may be permitted if the trial court certifies the order under N.C. Gen. Stat. § 1A-1, Rule 54(b), or if the appellant can show that the order affects a substantial right—because most interlocutory appeals tend to hinder judicial economy by causing unnecessary delay and expense. *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 145-46 (1982).

Here, the trial court could not certify the order pursuant to Rule 54(b) because "there has been no adjudication as to any claim(s) or part(ies) within the meaning of Rule 54(b)." *Howze v. Hughes*, 134 N.C. App. 493, 495, 518 S.E.2d 198, 199 (1999). Moreover, contrary to Defendants' argument that the order affects a substantial right under N.C. Gen. Stat. § 1-277(b), which allows "the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[,]" our courts have routinely held that that section 1-277(b) is limited to rulings on minimum contacts questions, and does not apply to rulings based on procedural issues regarding issuance or service of process, such as the order at issue in this case. *See Berger v. Berger*, 67 N.C. App. 591, 595, 313 S.E.2d 825, 829 (1984). Nonetheless, "because the case *sub judice* is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order,

we will treat the appeal as a petition for a writ of certiorari and consider the order on its merits." *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007) (citations omitted); N.C. R. App. P. 21(a)(1).

III. Discussion

The central question is whether the trial court may, upon a showing of excusable neglect, grant an extension of time under these facts to serve a dormant summons where a second alias or pluries summons was obtained ninety-one days after the previous alias or pluries summons.

Plaintiff argues that *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 367 S.E.2d 655, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988), and its progeny control the outcome here. Conversely, Defendants contend that Plaintiff's failure to timely obtain the second alias or pluries summons effectively discontinued the action, as was the case in *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635 (1992).

Rule 4 governs service of process. *See* N.C. Gen. Stat. § 1A-1, Rule 4 (2019). Upon the filing of a complaint, summons shall be issued within five days. *Id.* at § 1A-1, Rule 4(a). Rule 4(c) requires that a summons be served within sixty days of issuance. *Id.* at § 1A-1, Rule 4(c). A summons not served within sixty days "loses its vitality and becomes *functus officio*, and service obtained thereafter does not confer jurisdiction on the trial court over the defendant. However, although a summons not served within [sixty] days becomes dormant and unserveable, under Rule 4(c) it is not invalidated nor is the action discontinued." *Dozier*, 105 N.C. App. at 75-76, 411 S.E.2d at 636 (citations omitted).

If the summons is not served within sixty days of issuance, Rule 4(d) permits the action to be continued in existence by an endorsement from the clerk or issuance of an alias or pluries summons within ninety days of the issuance of the preceding summons. N.C. Gen. Stat. § 1A-1, Rule 4(d). Any such alias or pluries summons must be served within sixty days of issuance. *See Lemons*, 322 N.C. at 275, 367 S.E.2d at 657.

When there is neither an endorsement nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant who was not served with summons within the time allowed. N.C. Gen. Stat. § 1A-1, Rule 4(e). Thereafter, endorsement may be obtained or alias or pluries summons may issue, but, as to any defendant who was not served with summons within the time specified in Rule 4(d), the action shall be deemed to have commenced on the date of such issuance or endorsement. *Id.*

"Rule 4 . . . must be interpreted in conjunction with Rule 6, which addresses the computation of any time period prescribed by the Rules of Civil Procedure." *Lemons*, 322 N.C. at 275, 367 S.E.2d at 657. Rule 6 provides:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect.

N.C. Gen. Stat. § 1A-1, Rule 6 (2019).

In *Lemons*, our North Carolina Supreme Court concluded that Rule 6 permitted the trial court to grant an extension of time to serve a dormant summons, and thus revive it, where the alias summons was served on the defendant after the time for service of process under Rule 4(c) had expired. *Lemons*, 322 N.C. at 277, 367 S.E.2d at 658. The plaintiff commenced an action against the defendant on 6 February 1986. A summons was also issued that day but was not served. An alias summons was issued on 2 May of that year and was served on 5 June, more than thirty days[2] after its issuance. On 13 October 1986, the plaintiff filed a motion for retroactive extension of time, nunc pro tunc, from 2 June until 6 June to serve the alias summons. Construing Rule 4 in para materia with Rule 6(b), the Court determined that the General Assembly, by adopting Rule 6(b), gave trial courts the authority to extend the time provided in Rule 4(c) to serve a summons upon a finding of excusable neglect, and thus to "breathe new life and effectiveness into [a dormant summons] retroactively after it has become *functus officio*." *Id.* at 274-75, 367 S.E.2d at 657. The Court concluded that Rule 6 permitted an extension of time to serve a dormant summons and thus revive it where the alias summons was served on the defendant after the time for service of process under Rule 4(c) had expired. *Id.* at 277, 367 S.E.2d at 658.

Applying *Lemons* in *Hollowell v. Carlisle*, 115 N.C. App. 364, 444 S.E.2d 681 (1994), this Court concluded that Rule 6 permitted the trial

2. At the time the summons was issued in this case, Rule 4(c) required process to be served within thirty days. At the time the instant action was commenced, the time allowed under Rule 4(c) was sixty days.

court to grant a plaintiff an extension of time to serve a dormant summons where *no* alias or pluries summons was obtained. *Id.* at 368, 444 S.E.2d at 683. The defendant was served with the original summons and complaint sometime between sixty-eight and ninety days after issuance of the summons. Since the defendant "was served with a *dormant* summons within the 90-day limit," this Court held that "the trial court had the authority pursuant to the language of Rule 6(b) to extend the time for service of process under Rule 4(c), 'to permit the act to be done where the failure to do the act was the result of excusable neglect.' " *Id.* *See also Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 761, 606 S.E.2d 407, 410 (2005) ("The instant case is factually identical to *Lemons*. The alias and pluries summons became dormant after sixty days, prior to plaintiffs' effectuating service on 20 November 2002, but before the expiration of the summons on 27 November 2002. The summons was merely dormant at the time of service; it had not expired and the trial court had the discretion to retroactively extend the time for service of the alias and pluries summons.").

By contrast, in *Dozier*, this Court distinguished *Lemons* and concluded that Rule 6(b) does not allow a party to continue an action beyond the ninety-day period specified in Rule 4(e). *Dozier*, 105 N.C. App. at 77-78, 411 S.E.2d at 637-38. In *Dozier*, the plaintiff filed an action on 15 March 1990 alleging personal injuries. A summons was issued on that day but returned unserved twelve days later. Ninety-two days after the issuance of the original summons, an alias or pluries summons was issued; it was returned unserved eleven days later. The defendant accepted service on 20 August 1990 and filed a motion for judgment on the pleadings asserting the three-year statute of limitations. The plaintiff moved pursuant to Rule 6 to extend the period for issuance of the alias or pluries summons.

The Court explained that under *Lemons*, a trial court, pursuant to Rule 6, may in its discretion and upon a finding of excusable neglect extend the time provided in Rule 4(c) to serve a dormant summons and thus revive it. *Id.* *Lemons* did not control, however, because the action before the *Dozier* Court had been *discontinued*. The Court explained:

> Rule 4(e) specifically provides that where there is neither endorsement nor issuance of alias or pluries summons within 90 days after issuance of the last preceding summons, the action is discontinued as to any defendant not served within the time allowed and treated as if it had never been filed. Under Rule 4(e), either an extension can be endorsed by the clerk or an alias or pluries summons

> can be issued after the 90 days has run, but the action is deemed to have commenced, as to such a defendant, on the date of the endorsement or the issuance of the alias or pluries summons. Thus, when plaintiff failed to have this action continued through endorsement or issuance of alias or pluries summons within 90 days, this action was discontinued.

Id. at 78, 411 S.E.2d at 638 (internal quotation marks, emphasis, and citations omitted).

Accordingly, "[w]hile Rule 6 under the *Lemons* case gives the trial court discretion upon a showing of excusable neglect to permit *an act* to be done," the Court found "no authority in the rule or in *Lemons* to overrule the express language of Rule 4(e) as to the effect of failing to have an endorsement or alias or pluries summons issued 'within the time specified in Rule 4(d) . . . .' " *Id.*

Lemons and its progeny control this case, while *Dozier* involves a factual situation which materially differs from that presented here. Unlike the defendant in *Dozier* who was served some five months after the original summons was issued with an alias summons that was issued outside the ninety-day time period prescribed by Rule 4(d), Defendants in this case were served with the original summonses eighty-one and eighty-three days after issuance of the summonses. As in *Hollowell*, Defendants were served with dormant summonses within the ninety-day limit prescribed by Rule 4(d). Under *Lemons*, the trial court had the authority under Rule 6(b) to extend the time provided in Rule 4(c) to serve the summonses upon a finding of excusable neglect, and thus to "breathe new life and effectiveness" into the dormant summonses retroactively after they had become *functus officio*. *Lemons*, 322 N.C. at 274-75, 367 S.E.2d at 657. Accordingly, "the trial court had the authority pursuant to the language of Rule 6(b) to extend the time for service of process under Rule 4(c), 'to permit the act to be done where the failure to do the act was the result of excusable neglect.' " *Hollowell*, 115 N.C. App. at 368, 444 S.E.2d at 683.

As the trial court found that Plaintiff's service of the original summonses outside the sixty-day period prescribed in Rule 4(c) was a result of excusable neglect,[3] and the trial court had the authority to invoke

3. This finding is not challenged and is thus binding upon us. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The trial court's finding that Plaintiff's failure to renew the alias or pluries summons resulted from excusable neglect is not germane to this appeal, as the trial court did not extend the time for suing out the second alias or pluries summons.

its discretion to retroactively extend the time for Plaintiff to serve the summonses and complaint to 23 May 2018 and to explicitly deem service of process timely under Rule 4, the trial court did not err in granting Plaintiff's motion for an extension of time to serve the summonses and complaint.[4] Moreover, as service of process was deemed timely under Rule 4, the trial court obtained personal jurisdiction over Defendants. *See Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998) ("[I]t is well established that a court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily defined methods."). Accordingly, Plaintiff's action was not barred by the statute of limitations. Thus, the trial court did not err by denying Defendants' motions to dismiss and for judgment on the pleadings.

IV. Conclusion

Because the trial court had the authority to exercise discretion under Rule 6(b) to extend the time for Plaintiff to serve dormant summonses under Rule 4(c) upon a finding of excusable neglect, we discern no legal error by the trial court. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges STROUD and BERGER concur.

4. The trial court also found that "Plaintiff's failure to renew her Alias and Pluries Summons prior to the hearing of these Motions were the result of excusable neglect." To the extent the trial court's order granting "Plaintiffs Motion to Extend the Time to Issue[], File and Serve Summonses and Complaint" allowed Plaintiff an extension of time to renew her Alias and Pluries Summons, such extension was erroneous under *Dozier*. *See Dozier*, 105 N.C. App. at 78, 411 S.E.2d at 638 (There is "no authority in the rule or in *Lemons* to overrule the express language of Rule 4(e) as to the effect of failing to have an endorsement or alias or pluries summons issued 'within the time specified in Rule 4(d) . . . .'").

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 APRIL 2020)

BOYD v. TAYLOR No. 19-392	Vance (18CVD945)	Affirmed
COBB v. DAY No. 19-805	New Hanover (16CVS2633)	Affirmed
COLUMBUS CNTY. DEP'T OF SOC. SERVS. v. NORTON No. 18-1198	Columbus (10CVD152)	Vacated
DUNHILL HOLDINGS, LLC v. LINDBERG No. 18-1112	Durham (17CVS3710)	Dismissed
ECO TERRA PRODS., INC. v. DAYSTAR HOLDINGS, LLC No. 19-623	Franklin (18CVS603)	Affirmed
FINN v. FINN No. 19-520	Mecklenburg (15CVD12244)	Affirmed
HOAG v. CNTY. OF PITT No. 19-826	Pitt (18CVS1976)	Affirmed
HUTCHERSON v. CANNON No. 19-199	Guilford (17CVS9271)	Affirmed
IN RE H.A.V. No. 19-353	Mecklenburg (18JA262) (18JA263) (18JA264)	Affirmed
IN RE HARPER No. 19-808	Buncombe (16E1030) (18SP758)	Dismissed
IN RE M.J.D. No. 19-1005	Surry (17JB6)	Remanded
IN RE PURSWANI No. 19-263	Guilford (16E2169)	Affirmed
ISENHOUR v. FRAME No. 19-654	Avery (17CVS129)	Dismissed
LOGUE v. LOGUE No. 19-831	Cumberland (15CVD1837)	Affirmed in part, vacated and remanded in part

MARTIN v. WAKEMED No. 19-213	N.C. Industrial Commission (16-018941)	Affirmed
NICHOLS v. ADMIN. OFF. OF THE COURTS No. 19-1011	N.C. Industrial Commission (TA-27115)	Affirmed
SCIARA v. EDWARDS No. 19-854	Jackson (17CVS301)	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
STATE v. BOONE No. 19-560	Alamance (17CRS52048-49) (18CRS610)	No Plain Error
STATE v. BOYKIN No. 19-806	Sampson (16CRS51643)	No error in part; vacated and remanded in part
STATE v. BROWN No. 19-499	Mecklenburg (16CRS208832-33) (16CRS8400)	No Error
STATE v. BURTON No. 19-246	Dare (15CRS282)	No Error
STATE v. CABRAL No. 19-835	Mecklenburg (16CRS236634)	No Prejudicial Error
STATE v. COTTRELL No. 19-981	Cumberland (15CRS63304) (16CRS53144)	Affirmed
STATE v. COUNCIL No. 19-363	Edgecombe (16CRS52962)	New Trial
STATE v. HENRY No. 19-704	Gaston (13CRS51884)	No Error
STATE v. HOUSE No. 19-702	Cabarrus (17CRS51177)	NO PLAIN ERROR; NO ERROR.
STATE v. LANIER No. 19-658	Johnston (17CRS55493-95)	No Plain Error
STATE v. LAUDERMILT No. 19-703	Durham (18CRS52574)	No Error

STATE v. POTTER No. 19-898	Pamlico (14CRS50013-14) (14CRS50020) (15CRS45)	REVERSED AND REMANDED
STATE v. SPRINKLE-SURRATT No. 19-775	Surry (14CRS53189)	No Error
STATE v. THOMAS No. 19-570	Moore (15CRS53314) (16CRS143)	No Error
STATE v. WILLIAMS No. 19-540	Cleveland (16CRS2285) (16CRS54727) (16CRS54730) (17CRS512)	Dismissed
WIGGINS v. WELLS FARGO BANK, N.A. No. 19-940	Durham (19CVS1905)	Dismissed
YOW v. HENRY No. 19-817	Cabarrus (17CVD643)	Vacated and Remanded

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