277 N.C. App.—No. 4 Pages 586-661

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 10, 2021

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 1 JUNE 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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ARSON

Elements—dwelling house of another—co-conspirator—The State presented sufficient evidence for the jury to convict defendant of second-degree arson and conspiracy to commit second-degree arson where the "dwelling house of another" element was satisfied by evidence that defendant's mother lived in the rental home when the fire occurred. Even though the mother allegedly conspired with defendant to burn down the home, there was no evidence that she knew when or how the fire would be set, and thus there was a risk that she could have been in the home when it was burned. **State v. Lance, 627.**

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Workers' compensation—motion to compel medical treatment—reasonableness of motion—In a workers' compensation matter involving an employee with both work- and non-work-related injuries, there was sufficient evidence to show that defendants' motion to compel medical treatment pursuant to N.C.G.S. § 97-25(f)—seeking to have plaintiff undergo a functional capacity evaluation (FCE) after her treating physician could no longer explain why plaintiff continued to have issues

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

August 9 and 23

September 6 and 20

October 4 and 18

November 1, 15, and 29

December 13

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

CRAVEN COUNTY ON BEHALF OF JESSICA L. WOOTEN, PLAINTIFF
v.
ADEL HAGEB, DEFENDANT

No. COA20-442

Filed 1 June 2021

1. Child Custody and Support—child support—calculation of parent's income—sufficiency of findings—conclusory

In a child support case, where the trial court's conclusory findings of fact were insufficient to support appellate review of its calculation of the father's gross monthly income from self-employment, the case was remanded for further findings of fact.

2. Child Custody and Support—child support—credit for child living in home—sufficiency of findings

In a child support case, where the trial court failed to articulate its rationale for declining to give the father credit for a child living in his home, the case was remanded for further findings of fact to allow for appellate review.

Appeal by defendant from order entered 2 December 2019 by Judge Peter Mack, Jr., in Craven County District Court. Heard in the Court of Appeals 24 March 2021.

No brief filed on behalf of plaintiff-appellee.

McIlveen Family Law Firm, by Ashley Stucker, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Adel Hageb ("Father") appeals from an order requiring him to pay child support to Plaintiff Jessica L. Wooten ("Mother") for the support of their two minor children, A.H. and N.H.[1] After careful review, we remand to the trial court for the entry of additional findings of fact.

Background

¶ 2 Father and Mother were involved in a romantic relationship, but never married. On 23 February 2016, two months after A.H. was born,

1. Initials are used to protect the identities of the juveniles.

the Craven County Child Support Enforcement Agency ("CSEA") filed a complaint on Mother's behalf, as her designated representative under N.C. Gen. Stat. § 110-129(5) (2019), seeking child support from Father. Father filed his answer on 28 March 2016, in which he moved the court to order a paternity test. The resulting paternity test showed "a probability of 99.99% that [Father was] the biological father" of A.H. On 29 July 2016, the parties entered into a consent order obligating Father, *inter alia*, to provide health insurance coverage for A.H. and to pay Mother $1,000.00 per month in child support.

¶ 3 On 23 April 2018, eight months after N.H. was born, CSEA filed a complaint on Mother's behalf seeking child support for N.H., to which Father responded with his answer generally denying Mother's allegations. On 7 January 2019, based on "testimony and genetic test results showing 99.99% [probability that Father was] the father" of N.H., the trial court entered a child support transmittal order consolidating the two child support cases, obligating Father to provide health insurance coverage for N.H. as well as A.H., and ordering Father to contribute the sum of $2,554.00 per month to the support of N.H. and A.H., pending a final hearing.[2]

¶ 4 On 9 September 2019, the issue of permanent child support came on for hearing in Craven County District Court before the Honorable Peter Mack, Jr. At the hearing, Father testified that he has seven biological children, five of whom were then younger than 18, A.H. and N.H. included. Of his three other minor children, Father testified that two live with him, and the third lives with the child's mother in Yemen.

¶ 5 On 2 December 2019, the trial court entered its order obligating Father to contribute $2,605.22 per month toward the support of A.H. and N.H. In support of its child support determination, the trial court made the following findings of fact:

> 6. [Father] is presently under a Temporary Order of the Court dated 01/07/2019 requiring [Father] to pay the sum of $2,554.00 per MONTH for the support of his children; [N.H. and A.H.]
>
> 7. [Father] is self-employed and has a gross income of $19,454.39 per month.
>
> 8. [Mother] is self-employed and has [a] gross income of $1,800.00 per month.

2. The record on appeal does not contain a temporary child support order dated 7 January 2019; only the child support transmittal order is included in the record.

Handwritten next to finding of fact #7, the trial court added: "The Court reviewed tax returns provided by [Father]. Income from [Father]'s business for gaming and lottery was not included."

¶ 6 Following the court's ninth and final typed finding of fact, two additional findings were handwritten:

> 10. [Father] was given credit for one biological child in his home as his name was listed as the father on the birth certificate. The other birth certificate provided did not have [Father]'s name listed as the child's father.
>
> 11. [Father] shows significant personal expenses as business expense[s] on his tax returns.

The trial court did not attach a Child Support Guidelines Worksheet to the order.

¶ 7 Father timely filed his notice of appeal on 20 December 2019.

Discussion

¶ 8 On appeal, Father argues that the trial court erred by failing to make sufficient findings of fact concerning its calculation of his gross monthly income; by improperly calculating his gross monthly income; and by failing to give him credit for one of his biological children who resided in his home. In that the trial court's findings of fact are insufficient to support appellate review, we are precluded from addressing the merits of these arguments.

I. Standard of Review

¶ 9 "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Jonna v. Yaramada*, ___ N.C. App. ___, ___, 848 S.E.2d 33, 41 (2020) (citation omitted). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985) (citation omitted).

¶ 10 However, determinations of gross income in a child support order are conclusions of law reviewed de novo, rather than findings of fact. *Lawrence v. Tise*, 107 N.C. App. 140, 145 n.1, 419 S.E.2d 176, 179 n.1 (1992). If the trial court labels a conclusion of law as a finding of fact, this Court still conducts de novo review. *Thomas v. Burgett*, 265 N.C. App. 364, 367, 852 S.E.2d 353, 356 (2019).

II. Findings of Fact

¶ 11 **[1]** Father argues that the trial court erred by failing to make findings of fact sufficient to support its calculation of his gross monthly income from self-employment. We agree.

¶ 12 "The calculation of child support is governed by North Carolina Child Support Guidelines established by the Conference of Chief District Court Judges." N.C. Child Support Servs., N.C. Dep't of Health & Human Servs., https://ncchildsupport.com/ecoa/cseGuideLines.htm (last visited May 12, 2021). "Failure to follow the [G]uidelines constitutes reversible error." *Rose v. Rose*, 108 N.C. App. 90, 93, 422 S.E.2d 446, 447 (1992).

¶ 13 The Guidelines define "gross income" as "a parent's actual gross income from any source, including but not limited to income from employment or self-employment . . . [or] ownership or operation of a business, partnership, or corporation[.]" N.C. Child Support Guidelines, at 3 (2019). The actual gross income derived from self-employment is calculated by subtracting the "ordinary and necessary expenses required for self-employment or business operation" from the gross receipts. *Id.*

¶ 14 When a trial court enters a child support order, it must "make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Johnston Cty. ex rel. Bugge v. Bugge*, 218 N.C. App. 438, 440, 722 S.E.2d 512, 514 (2012) (citation omitted). "Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence." *Plott*, 313 N.C. at 69, 326 S.E.2d at 867.

> In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. It is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it[.]

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (citation omitted). It is not for this Court to determine de novo "the weight and credibility to be given to evidence disclosed by the record on appeal." *Id.* at 712–13, 268 S.E.2d at 189.

¶ 15 Here, the trial court's findings of fact in its child support order are not sufficient to allow us to effectively review its calculation of Father's gross monthly self-employment income. The trial court's order includes two findings of fact that simply state the calculated gross monthly

incomes for each of the parents. The trial court also made one finding that states that the court "reviewed tax returns provided by" Father and that "[i]ncome from [Father]'s business for gaming and lottery was not included[,]" and another finding that Father "shows significant personal expenses as business expense[s] on his tax returns." These findings are more conclusory than explanatory; they offer us no basis for review of the trial court's application of the law to the evidence presented.

¶ 16 For example, Father argues that the trial court erred by failing to exercise its discretion in ruling on the deductibility of his straight-line depreciation as an ordinary and necessary business expense required for the operation of his business. This Court has repeatedly concluded that "under the Child Support Guidelines accelerated depreciation [is] not allowed as a deduction from a parent's business income." *Holland v. Holland*, 169 N.C. App. 564, 570, 610 S.E.2d 231, 236 (2005). However, we have also concluded that the trial court has "the discretion to deduct from a parent's monthly gross income the amount of straight[-]line depreciation allowed by the Internal Revenue Code." *Id.* at 570–71, 610 S.E.2d at 236 (citation omitted). Upon review of the trial court's order in this case, "we are unable to ascertain how the trial court treated depreciation. . . . Thus, the findings in this regard are not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing Father's gross income, and remand is necessary." *Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181.

¶ 17 On remand, the trial court should compute Father's income in accordance with the Child Support Guidelines, and record its calculations in findings of fact consistent with this Court's rulings in *Holland* and *Lawrence*. *See Holland*, 169 N.C. App. at 571, 610 S.E.2d at 236. The findings of fact should address which, if any, of Father's ordinary and necessary expenses the trial court considered in calculating Father's gross income for child support purposes, as well as how it calculated his gross income based upon its consideration of the evidence presented. We note that "[t]he trial judge has the authority to believe all, any, or none" of the evidence and testimony presented when sitting as the finder of fact. *Sharp v. Sharp*, 116 N.C. App. 513, 530, 449 S.E.2d 39, 48, *disc. review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994). However, the trial court must specifically articulate the rationale for its findings and conclusions. *See Coble*, 300 N.C. at 714, 268 S.E.2d at 190.

III. Credit for Biological Child

¶ 18 **[2]** Father also argues that the trial court erred, in calculating his child support obligation, by failing to credit him for his biological child who

lives in his home. In its child support order, the trial court stated that Father "was given credit for one biological child in his home as his name was listed as the father on the birth certificate. The other birth certificate provided did not have [Father]'s name listed as the child's father."

¶ 19 The Child Support Guidelines provide that "[a] parent's financial responsibility . . . for his or her natural or adopted children who currently reside with the parent (other than children for whom child support is being determined in the pending action) is deducted from the parent's gross income." N.C. Child Support Guidelines, at 4. We note that evidence other than a parent's name on a child's birth certificate can be sufficient to establish parentage; for instance, this Court has vacated and remanded a child support order where the father "presented evidence that he has one daughter from his present marriage and that she lives in his household," concluding that "the trial court erred when it failed to take this into account in determining [the f]ather's gross income." *Kennedy v. Kennedy*, 107 N.C. App. 695, 702, 421 S.E.2d 795, 799 (1992).

¶ 20 In the instant case, it is apparent that the trial court took some of Father's evidence into account when it determined that he would receive credit for one child living in his home but not the other. At trial, Father testified that he is the biological father of the child for whom the trial court declined to give him credit. Of course, the trial court was free not to believe this testimony. *See Sharp*, 116 N.C. App. at 530, 449 S.E.2d at 48. However, the trial court did not articulate its rationale for declining to give Father credit for the second child living in his home. Accordingly, on remand, the trial court shall state in its findings of fact why it did not credit Father for one of the children residing in Father's home. If the trial court did not find Father's testimony to be credible, it should state so in its order. The trial court must articulate its rationale with sufficient specificity to facilitate effective appellate review. *Coble*, 300 N.C. at 714, 268 S.E.2d at 190.

Conclusion

¶ 21 For the foregoing reasons, we remand the child support order to the trial court for the entry of further findings of fact. "[O]n remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Holland*, 169 N.C. App. at 572, 610 S.E.2d at 237 (citation omitted).

REMANDED.

Judges DILLON and COLLINS concur.

IN RE K.M.

[277 N.C. App. 592, 2021-NCCOA-232]

IN THE MATTER OF K.M.

No. COA20-879

Filed 1 June 2021

1. Child Visitation—permanency planning order—suspension of in-person visits—closure of supervised visitation facility—temporary limitations

In a permanency planning matter, the trial court did not abuse its discretion by first granting respondent-mother supervised visitation with her two-year-old son, but then suspending in-person visitation—since the designated supervised visitation center was temporarily closed due to the COVID-19 pandemic—and instead granting virtual visitation by video. The unchallenged findings of fact established that respondent-mother's past violent behavior rendered it unsafe to allow visitation with untrained supervisors such as family members, and those findings supported the court's conclusion that the son's best interests would not be served by alternative forms of visitation.

2. Child Visitation—permanency planning—supervised visitation—assignment of cost—lack of findings

The trial court's permanency planning order was partially vacated where it did not include any findings assigning the cost of supervised visitation to the child's guardians despite the trial court making that pronouncement in court.

Appeal by respondent-mother from order entered 20 August 2020 by Judge Fred Wilkins in Alamance County District Court. Heard in the Court of Appeals 27 April 2021.

Jamie L. Hamlett for petitioner-appellee Alamance County Department of Social Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

J. Thomas Diepenbrock for respondent-appellant mother.

ZACHARY, Judge.

IN RE K.M.

[277 N.C. App. 592, 2021-NCCOA-232]

¶ 1 Respondent-Mother appeals from the trial court's order awarding her supervised visitation with her son "Kenneth,"[1] but temporarily suspending in-person visitation due to the closure of the supervised visitation facilities during the COVID-19 pandemic. After careful review, we affirm the trial court's order in part, vacate the order in part, and remand.

Background

¶ 2 Kenneth was born to Respondent-Parents in February 2018. The day after Kenneth was born, the Alamance County Department of Social Services ("DSS") received a report that both Kenneth and Respondent-Mother had tested positive for marijuana. On 25 September 2018, DSS received a report concerning domestic violence between Respondent-Parents and the maternal grandmother; Respondent-Mother was arrested for allegedly assaulting her mother in Kenneth's presence. On 8 October 2018, DSS received another report, this time regarding substance abuse, improper supervision, improper care, and domestic violence. Respondent-Parents and the maternal grandmother allegedly consumed marijuana while Kenneth was present in the home, and when a social worker and law enforcement officers visited the home to investigate, Respondent-Mother locked herself in a bedroom with Kenneth and threatened to kill herself. When law enforcement officers intervened, Respondent-Mother "engaged in a physical altercation with them." Respondent-Mother was involuntarily committed, and Kenneth was placed in a kinship placement with a maternal relative.

¶ 3 On 12 October 2018, DSS filed a juvenile petition alleging that Kenneth was a neglected and dependent juvenile. That same day, the trial court entered an order placing Kenneth in nonsecure custody with DSS. DSS, in turn, placed Kenneth with a foster family ("the guardians"), rather than continuing the kinship placement, because the maternal relative stated that she could no longer care for Kenneth. Following a Child and Family Team meeting on 8 November 2018, Respondent-Parents agreed to case plans. And on 12 December 2018, Respondent-Parents stipulated to certain facts for the purposes of adjudication in this matter, including that "it would place [Kenneth] at a substantial risk of physical harm if returned to [Respondent-Parents] due to their ongoing mental health, substance abuse, domestic violence, lack of ability to provide basic needs and other issues of concern."

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1. Consistent with the parties' stipulation and the record on appeal, a pseudonym is used to protect the identity of the juvenile in accordance with N.C. R. App. P. 42(b).

¶ 4 On 30 December 2018, Respondent-Mother was arrested and charged with the misdemeanor simple assault of Respondent-Father. While incarcerated, she was charged with felony possession of a controlled substance on jail premises. She remained incarcerated until 24 January 2019.

¶ 5 On 6 January 2019, the trial court entered an order adjudicating Kenneth to be a neglected and dependent juvenile, and awarding custody of Kenneth to DSS. The trial court also set conditions for Kenneth's reunification with Respondent-Parents, and awarded Respondent-Parents supervised visitation.

¶ 6 Respondent-Father was arrested on 18 March 2019 for a variety of drug possession charges, contributing to the delinquency of a minor, and a probation violation. Respondent-Father was also charged with second-degree sexual exploitation of a minor and contributing to the delinquency of a minor, allegations concerning his 17-year-old girlfriend who lived with him. He was incarcerated until 22 June 2019, when he was released on post-release supervision and subject to house-arrest.

¶ 7 Following an initial permanency planning hearing on 9 April 2019, the trial court endorsed reunification with Respondent-Parents as a primary plan for Kenneth with adoption as a secondary plan, but maintained Kenneth's placement with DSS and continued Respondent-Parents' conditions for reunification.

¶ 8 On 15 May 2019, Respondent-Mother was arrested for a probation violation. On 18 July 2019, she was arrested for shoplifting and concealment of goods. Despite this, she consistently attended her supervised visits with Kenneth when she was not incarcerated.

¶ 9 On 6 August 2019, after Respondent-Mother failed to confirm that she would attend a visitation with the social worker, the social worker informed Respondent-Mother that the visitation would be canceled. Respondent-Mother texted the social worker an apology, but when she called the social worker, Respondent-Mother "began screaming obscenities at [the social worker,] calling her names such as stupid, fat, and bitch." The social worker ended the call as Respondent-Mother "continued to use profanity and was beyond reasoning with as she was screaming childlike into the phone." Respondent-Mother called back and after the social worker restated the confirmation process for supervised visitation, Respondent-Mother "again began shouting and screaming profanity, calling [the social worker] a f***ing idiot and a f***ing bitch."

¶ 10 Respondent-Mother was arrested again on 13 August 2019, for a variety of drug possession charges, and missed her next supervised visitation due to her being incarcerated. On 9 September 2019, Respondent-Mother was again arrested, this time for injury to personal property, and remained incarcerated until 13 January 2020.

¶ 11 In the four permanency planning orders filed between June 2019 and February 2020, the trial court repeatedly found that Respondent-Mother was "somewhat actively participating" in her case plan, but noted that she was "not making adequate progress within a reasonable period of time[.]" In the February 2020 order, the trial court found that Respondent-Father was making adequate progress and conditionally allowed him to have unsupervised visitation with Kenneth. However, after Respondent-Father tested positive for marijuana on 28 February 2020, the social worker was no longer able to say that his home was free of drugs, and Respondent-Father was reverted to supervised visitation only.

¶ 12 On 16 March 2020, the Chief Justice of the Supreme Court of North Carolina issued an order directing that the majority of district court cases, including this case, be continued for 30 days due to the emerging public health threat posed by the COVID-19 pandemic. The order was then extended to 1 June 2020, and hearings in this case were continued.

¶ 13 On 20 March 2020, the North Carolina Department of Health and Human Services directed the State's Child Protective Services units to "make all efforts to cease face-to-face visitation for foster children . . . and [to] transition to electronic means." Respondent-Parents agreed to suspend in-person visitation and engage in electronic visitation in the event that the county or state facilities went into lockdown due to the pandemic. Before the first scheduled visitation, Guilford County issued a stay-at-home order. Respondent-Parents began virtual visits with Kenneth on 28 March 2020. In-person visitation with Kenneth resumed on 21 May 2020 for Respondent-Mother and on 2 June 2020 for Respondent-Father.

¶ 14 The matter came on for hearing before the Honorable Fred Wilkins in Alamance County District Court on 22 and 23 July 2020. In an order entered 20 August 2020, the trial court ordered, *inter alia*, that Respondent-Mother exercise her visitation with Kenneth at a supervised visitation facility, but temporarily suspended that in-person visitation due to the closure of the supervised visitation facilities as a result of the COVID-19 pandemic:

> 6. That [Respondent-Mother] will have monthly visitation with [Kenneth] through the Family Abuse

> Services supervised visitation program or another supervised visitation program in the Triad that has similar cost structure and reasonable driving distance. The visitation shall be twice a month for two hours. [Respondent-Mother] will contact Family Abuse Services in order to set up an intake meeting or a different supervised visitation program in the Triad if Family Abuse Services remains closed that has similar cost structure and reasonable driving distance. The day and time will be based on the availability of the program. . . .
>
> . . . .
>
> 8. Until the Family Abuse Services supervised visitation center re-opens or another supervised visitation program is found, [Respondent-Mother]'s face-to-face visitation is suspended. [Respondent-Mother] is permitted to have a weekly video contact with [Kenneth] for fifteen to thirty minutes as [Kenneth]'s attention span will allow, supervised by the Guardians.

In the Family Abuse Services supervised visitation program order, the trial court added that Respondent-Mother's "level of supervision shall include eyes and ears on, direct supervision."

¶ 15 Although the trial court stated at the hearing that the guardians would bear the responsibility of paying the costs of supervised visitation, neither the permanency planning order, the guardianship short order, nor the Family Abuse Services supervised visitation program order—all entered on 20 August 2020—specifically addressed the assignment of the cost of the supervised visitation facility. On 18 September 2020, Respondent-Mother timely filed her notice of appeal from the permanency planning order.

Discussion

¶ 16 On appeal, Respondent-Mother argues that the trial court erred by (1) suspending her supervised visitation with Kenneth, and (2) failing to assign the cost of supervised visitation to the guardians. After careful review, we affirm that portion of the trial court's order temporarily suspending the supervised visitation. However, we vacate the portion of the order relating to payment of the supervised visitation facility fee, and remand to the trial court for clarification.

I. Standard of Review

¶ 17 Our review of a permanency planning order is "limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re J.S.*, 250 N.C. App. 370, 372, 792 S.E.2d 861, 863 (2016) (citation omitted). Unchallenged findings of fact are presumed to be supported by competent evidence and are thus binding on appeal. *In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909, *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009).

¶ 18 "We review a dispositional order only for abuse of discretion. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.K.*, 274 N.C. App. 5, 11, 851 S.E.2d 389, 394 (2020) (citation omitted).

II. Suspension of Supervised Visitation

¶ 19 **[1]** Respondent-Mother argues that the trial court erred when it suspended her supervised visitation with Kenneth, because that suspension "effectively eliminate[d] the very visitation the trial court ordered." Respondent-Mother further contends that "[t]he trial court's conclusion that it [wa]s contrary to Kenneth's best interest to have face-to-face visitation [wa]s not supported by the trial court's findings of fact or by competent evidence."

¶ 20 Our Juvenile Code provides:

> An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.

N.C. Gen. Stat. § 7B-905.1(a) (2019). When a trial court places a juvenile in a guardianship, "any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised." *Id.* § 7B-905.1(c).

¶ 21 In the instant case, Respondent-Mother does not challenge any of the trial court's findings of fact. Instead, Respondent-Mother challenges

conclusion of law #19 and the decretal portions of the order that awarded her with, but then temporarily suspended, visitation at a supervised visitation facility. Respondent-Mother argues that "[t]he trial court erred when it suspended [her] visitation with her son, when she had not forfeited her rights to visitation, and when the evidence [did] not support a finding that it was contrary to Kenneth's best interest to have visitation with his mother."

¶ 22 Conclusion of law #19 reads as follows, with the specific portion that Respondent-Mother challenges in italics:

> 19. *That until Family Abuse Services supervised visitation center is operating or another supervised visitation facility in the Triad is operating that has similar cost structure and reasonable driving distance, it is contrary to the best interest of* [*Kenneth*] *to have face-to-face visitation with* [*Respondent-Mother*]. Until the centers re-open, [Respondent-Mother]'s face-to-face visitation is suspended. [Respondent-Mother] is permitted to have a weekly video contact with [Kenneth] for fifteen to thirty minutes as [Kenneth]'s attention span will allow, supervised by the Guardians.

¶ 23 The challenged conclusion of law—that face-to-face visitation with Respondent-Mother was not in Kenneth's best interests so long as no appropriate supervised visitation facility was open and operating during the COVID-19 pandemic—is necessarily understood in the full context of the trial court's order, and builds upon two independent determinations: (1) that only a specific, narrowly defined supervised visitation with Respondent-Mother would be in Kenneth's best interests; and (2) that the COVID-19 pandemic rendered that specific supervised visitation temporarily unavailable.

¶ 24 The trial court explained the first determination in the immediately preceding conclusions of law, which Respondent-Mother does not challenge:

> 17. That due to [Respondent-Mother]'s volatile and uncontrolled temper, inability to comply with the terms and conditions of court orders and other issues as outlined above, *it is contrary to the best interest of* [*Kenneth*], *inconsistent with the health and safety of* [*Kenneth*] *and would present a risk of harm to* [*Kenneth*]:

> *a. To have unsupervised visitation with* [*Kenneth*];
>
> *b. To have visitation supervised by* [*the maternal grandmother*];
>
> *c. To have visitation supervised by the [guardians]; and*
>
> *d. To have visitation supervised by anyone who is not trained in supervision techniques and strategies.*
>
> 18. That [Respondent-Mother] will have visitation supervised by Family Abuse Services supervised visitation center or another supervised visitation program in the Triad that has similar cost structure and reasonable driving distance.

(Emphasis added).

¶ 25 These unchallenged conclusions of law are supported by the trial court's unchallenged finding of fact "[t]hat it would present a risk of harm for the [guardians], maternal grandmother or any untrained person to supervise [Respondent-Mother]'s visitation due to [her] volatile and uncontrolled behaviors and her aversion to individuals who present information/direction contrary to [her] desire." Not only does Respondent-Mother not challenge this finding of fact, but our careful review of the record reveals significant support for the trial court's finding. In light of Respondent-Mother's criminal history and her pattern of abusive behavior and hostility toward her assigned social worker, it is apparent that the trial court plainly considered—and rejected—alternative forms of visitation and specifically concluded that Kenneth's best interests would be best served by limiting Respondent-Mother to visitation at a supervised visitation facility.

¶ 26 The second determination—that the COVID-19 pandemic rendered that narrowly defined supervised visitation temporarily unavailable—is supported by the trial court's unchallenged findings of fact. Among these binding findings of fact are several that address the effect of the COVID-19 pandemic on Respondent-Mother's visitation with Kenneth:

> 76. [Respondent-Mother] participated in her weekly visitation from January 14, 2020 — March 17, 2020. *All parties agreed to temporarily suspend face to face visits due to COVID*[-]*19*. These visits took place

at [DSS] or a mutually agreed upon location such as McDonald's. These visits went well. . . .

. . . .

102. *Due to the* [*COVID*]*-19 Pandemic, in an effort to protect the safety and health of the child in this case, a temporary and limited change to the visitation has been agreed to*. In this case, all parties agree to supervised visits on the weekend by the [guardians] at the same level of supervision. *In the event that all public locations close or the state/county goes into lockdown mode*, [*Respondent-Mother*] *and* [*Respondent-Father*] *agree to suspend their face-to-face contact and engage in electronic means*. These would be arranged by the parties. [Respondent-Parents] have been advised that they should also consult their attorneys in this matter. *Prior to the first supervised face-to-face visit by the* [*guardians*], *Guilford County issued a stay at home order*. [*Respondent-Parents*] *began virtual visits with [Kenneth] on March 28, 2020*.

103. The [guardians] reported that the virtual visits were a challenge. They were a challenge because it was sometimes difficult to get [Kenneth] to get on the phone as he is two and his attention span is not very long. The other challenge that they faced was when [Respondent-Parents] were not ready for the visits. For example, they would call [Respondent-Mother] and she would be asleep and would ask if she could get up and get it together and call them back. There were times that [Respondent-Father] would not answer and would call back an hour or so later. The [guardians] found that driving [Kenneth] around in the car while he spoke with [Respondent-Parents] was the best way to get him to focus on them.

104. The face-to-face visits began again on May 21, 2020 for [Respondent-Mother] and June 2, 2020 for [Respondent-Father]. The visits have gone well.

. . . .

121. Family Abuse Services of Alamance County operates a supervised visitation center *that is not*

> *currently operating and no date for re-opening has been set. . . .*
>
> . . . .
>
> 125. *That due to the pandemic, the visitation center is not currently conducting visitation and has not stated when it will reopen.*

(Emphases added).

¶ 27 These findings of fact not only support the trial court's conclusions, but also provide necessary context. The parties agreed to temporarily suspend face-to-face visitation at the onset of the pandemic. Indeed, these initial suspensions proved to be temporary, in that face-to-face visitation resumed after a few months. The limited and temporary nature of the suspension in the order before us is further reflected in the reasonable limitations that the trial court explicitly placed on the suspension: it would last only until the supervised visitation facility reopened, or until the parties located an open and adequate supervised visitation facility in the area.

¶ 28 With the supervised visitation facility temporarily closed due to the COVID-19 pandemic, the trial court was faced with determining whether it was in Kenneth's best interests either to temporarily suspend Respondent-Mother's supervised visitation, or to award Respondent-Mother an alternative form of visitation that the court had already determined was not in Kenneth's best interests. The trial court chose to grant Respondent-Mother the narrowly defined supervised visitation that would be in Kenneth's best interests, and then to *temporarily* suspend that supervised visitation until such visitation became available and safe.

¶ 29 Respondent-Mother cites *In re T.R.T.*, 225 N.C. App. 567, 572–75, 737 S.E.2d 823, 828–29 (2013), in support of her argument that the trial court's suspension of supervised visitation violated N.C. Gen. Stat. § 50-13.2(e), which provides, *inter alia*: "Electronic communication may not be used as a replacement or substitution for custody or visitation." In *T.R.T.*, this Court reversed and remanded a visitation order that provided the respondent-mother with Skype visitation, which we determined was "not visitation as contemplated by N.C. Gen. Stat. § 7B-905(c)[.]"[2]

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2. Our General Assembly repealed the relevant portion of § 7B-905(c) in 2013 and substantively recodified it as § 7B-905.1(a). 2013 N.C. Sess. Laws 305, 316, ch. 129, §§ 23–24.

225 N.C. App. at 573, 737 S.E.2d at 828. However, unlike the case before us, in *T.R.T.*, "the trial court did not make any specific findings that . . . visitation would be inappropriate under the circumstances." *Id.* at 574, 737 S.E.2d at 829. Here, the trial court *did* make specific findings that visitation would be inappropriate, with the sole exception of supervised visitation at Family Abuse Services, which was temporarily closed due to the COVID-19 pandemic.

¶ 30 Further, the trial court's temporary suspension of supervised visitation in this case does not amount to "a replacement or substitution for . . . visitation." N.C. Gen. Stat. § 50-13.2(e). Rather, the trial court exercised its statutory authority to "specify in the order conditions under which visitation may be suspended." *Id.* § 7B-905.1(a). Indeed, the trial court's order repeatedly describes Respondent-Mother's supervised visitation as "suspended," rather than "replaced" or "substituted" with weekly video contact.

¶ 31 The trial court appropriately provided Respondent-Mother with a contingency, depending on the availability of the specific form of supervised visitation that the court deemed to be in Kenneth's best interests. Having determined that other forms of visitation were not in Kenneth's best interests, and having determined that the sole form of appropriate visitation was temporarily unavailable, the trial court could have properly awarded Respondent-Mother with "no visitation" at all. *Id.* However, in its discretion, the trial court concluded that it was preferable to temporarily award Respondent-Mother weekly video contact for so long as in-person visitation was unavailable due to the pandemic.

¶ 32 The trial court's reasoning is further reflected in the transcript of the hearing. First, the trial court modified DSS's recommended visitation order, with respect to ensuring Respondent-Mother's sobriety:

> THE COURT: The Court's inclined to go along with the recommendations of the department in this matter, but I do think that the visitation schedule needs to be modified a little bit, particularly with respect to [Respondent-Mother].
>
> I don't think that the foster parents in the role of guardians should be put to the task each visit to determine her sobriety or her mental state on this, and from all the evidence that I have heard here over the last two days, it needs someone else that's more acutely attuned to making those types of decisions should do it.

> And I don't think it should be a matter of concern. I think it should be: if she appears under the influence of alcohol or mind-altering drug[s] or if she appears in an agitated state for the visitation, that the visitation is terminated, and I think that should be done by a third party, not by the guardians because, eventually, that is or will come back in court.
>
> . . . .
>
> So the visitation schedule is set by [DSS] on this will be modified on this to not include[ ] the terms "concern" but would be "appear at a visit."
>
> And those visits with respect to [Respondent-Mother]—I can't remember the name of the facility here.
>
> [COUNSEL FOR DSS]: Your Honor, the supervised visitation is done through the Family Abuse Services at the Family Justice Center. Right now, due to COVID[-19], they are not operating or conducting visits, and I don't know when they will start back.
>
> THE COURT: That's that way it needs to be done.

¶ 33 Then, after addressing assessment of the supervised visitation facility fee, Respondent-Mother's counsel objected to the visitation order. As described below, the trial court considered—and rejected—the alternative option of awarding Respondent-Mother supervised visitation at DSS:

> [RESPONDENT-MOTHER'S COUNSEL]: And, Your Honor, I would like to just put my objection on the record.
>
> THE COURT: I understand. I understand.
>
> [RESPONDENT-MOTHER'S COUNSEL]: That, number one, my client [lives] an hour away from Family Abuse Services, but Family Abuse Services has suspended all their supervised visitation. They do not have a plan of when they're going to start it back up, and it has not started back up, so it's not a viable option.
>
> THE COURT: Well, then—then the alternative is to have those visitations occur at DSS and be

> monitored by them, but *I don't want the guardians being placed in the position of having to deal with this lady under those conditions. I think that's—I think that's dangerous to all the parties and the child.*

(Emphasis added).

¶ 34 Respondent-Mother characterizes this exchange as a recognition by the trial court that there existed "an alternative to suspending visitation while FAS was closed[.]" That argument, however, ignores that the trial court clearly considered that option and nevertheless rejected it, determining that having Respondent-Mother's visitation supervised at DSS would not be "in the best interests of [Kenneth] consistent with [his] health and safety[.]" *Id.*

¶ 35 After careful review of the record, and due to the specific circumstances at the time, we cannot say that the trial court's decision was not supported by its findings of fact or conclusions of law, nor can we say that it was "so arbitrary that it could not have been the result of a reasoned decision." *N.K.*, 274 N.C. App. at 11, 851 S.E.2d at 394. The trial court's award and temporary suspension of Respondent-Mother's supervised visitation with Kenneth is affirmed.

III. Costs of Supervised Visitation

¶ 36 **[2]** Respondent-Mother next argues, and DSS and the guardian *ad litem* agree, that the trial court erred when it failed to order that the guardians be responsible for the supervised visitation facility fee, as the court indicated at the conclusion of the hearing.

¶ 37 In the trial court's written order, the court determined that it could not "find that [Respondent-Mother] has the ability to pay the fees associated with the center[,]" and that the guardians "have the ability to pay the fees associated with supervised visitation." However, although the trial court clearly indicated at the hearing that the guardians would bear the costs of the supervised visitation facility, the court failed to assign the costs in the order that it ultimately entered.

¶ 38 We have vacated and remanded permanency planning orders when "the trial court made no findings as to the costs associated with supervised visitation, who would bear the responsibility of paying such costs, or [the r]espondent's ability to pay the costs." *In re J.T.S.*, 268 N.C. App. 61, 74, 834 S.E.2d 637, 646 (2019); *accord In re Y.I.*, 262 N.C. App. 575, 582, 822 S.E.2d 501, 505–06 (2018).

¶ 39 Here, the trial court erred by failing to assign responsibility for the costs of supervised visitation in its order. Accordingly, "we vacate this portion of the order and remand to the trial court for clear instructions" with regard to the assessment of the supervised visitation costs. *J.T.S.*, 268 N.C. App. at 75, 834 S.E.2d at 647.

Conclusion

¶ 40 For the foregoing reasons, the trial court did not abuse its discretion in awarding, then temporarily suspending, Respondent-Mother's visitation at a supervised visitation facility that was temporarily closed due to the COVID-19 pandemic. However, the order is vacated and remanded for the entry of an order assigning responsibility for the costs of the supervised visitation.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Chief Judge STROUD and Judge TYSON concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
LANIER LAW GROUP, P.A., AND LISA LANIER, DEFENDANTS

No. COA19-926

Filed 1 June 2021

Insurance—duty to defend—policy exclusions—willful conduct—comparison of allegations and policy

Where a personal injury law firm was sued for violating federal law by knowingly using protected personal information for advertisements, the law firm's insurance company had no duty to defend the law firm because injury arising out of the willful violation of a penal statute was excluded from the applicable policy's coverage. Because the complaint in the federal lawsuit alleged that the injury was based upon the law firm's "knowing" conduct, and because "knowing" and "willful" mean essentially the same thing, the policy's exclusion for "willful" conduct was triggered.

Appeal by defendants from order entered 28 June 2019 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 28 April 2021.

Goldberg Segalla LLP, by David L. Brown and Martha P. Brown, for plaintiff-appellee.

Pinto Coates Kyre & Bowers, PLLC, by Richard L. Pinto and Matthew J. Millisor, for defendants-appellants.

TYSON, Judge.

¶ 1 Lanier Law Group, P.A. (LLG) and Lisa Lanier ("Lanier") ("collectively Defendants") appeal from an order entered granting summary judgment to North Carolina Farm Bureau Insurance Company, Inc. ("Plaintiff"). We affirm.

I. Background

¶ 2 LLG is a North Carolina-chartered professional association law firm, which specializes in representing plaintiffs in personal injury actions. Lanier is President/CEO of LLG and she practices law in North Carolina. Plaintiff is a mutual insurance company organized and existing under the laws of North Carolina.

¶ 3 LLG seeks clients by sending marketing materials to individuals who have been involved in automobile accidents. LLG obtains the names and addresses of the potential clients from the North Carolina Division of Motor Vehicles form DMV-349 accident reports.

¶ 4 LLG purchased three primary business policies and an excess policy from Plaintiff. Lanier individually purchased three homeowners' policies and a personal umbrella policy from Plaintiff.

¶ 5 LLG, Lanier, and other personal injury lawyers, who also utilize the direct mailing solicitations from DMV-349 accident reports, were named in a class action filed on 27 May 2016 in the United States District Court for the Middle District of North Carolina captioned *Garey v. James S. Farrin*, Case No. 1:16-cv-00542-LCB-JLW.

¶ 6 The plaintiffs in *Garey* alleged the defendants, including Defendants herein, obtained and used their "protected personal information" in connection with advertisements for legal services without the consent of the plaintiffs in violation of the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq*. ("DPPA").

¶ 7 Allegations in the *Garey* complaint assert:

> 140. Defendants *knowingly* obtained and used one or more Plaintiff's protected personal information from a motor vehicle record as described above.

> 141. Each Defendant *knowingly* obtained, disclosed and used one or more Plaintiff's protected personal information from a motor vehicle record for the purpose of marketing that Defendant's legal services.
>
> . . . .
>
> 143. When each Defendant sent its above-described mailing containing the words "This is an advertisement for legal services" to one or more Plaintiffs, Defendants *knowingly* disclosed and used said Plaintiff's personal information from a motor vehicle record.
>
> 144. Defendants *knowingly* obtained, disclosed and used Plaintiffs' personal information from a motor vehicle record for the purpose of marketing legal services.
>
> 145. Advertising for legal services for the solicitations of new potential clients is not a permissible purpose for obtaining motor vehicle records under the DPPA. *Maracich v. Spears*, 133 S. Ct. 2191 (2013).
>
> 146. Defendants *knowingly* obtained, disclosed and used Plaintiffs' personal information from a motor vehicle record in violation of the DPPA. (emphasis supplied).

¶ 8 Upon cross motions for summary judgment in the underlying case, the United States District Court Judge denied the plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment. *Garey v. Farrin*, __ F. Supp.3d __, 2021 WL 231281 (M.D.N.C. 2021).

¶ 9 The *Garey* order and opinion states the plaintiffs were involved in vehicle accidents wherein "local police officers or North Carolina State Highway Patrol troopers investigated and recorded their findings on a standard DMV-349 form that was then provided to the North Carolina Division of Motor Vehicles ("DMV")." *Id.* at __, 2021 WL 231281, at *1. The information was gathered from the individual's driver's license. *Id.*

¶ 10 The defendants in *Garey* gathered the information from DMV -349s themselves or they "purchased accident report data aggregated by a third party." *Id.* Nowhere in plaintiff's pleadings or arguments in *Garey* did they allege the DMV-349 reports are "motor vehicle records," but "the information included in the report may be traced back to such records and thus fall under the ambit of the DPPA." *Id.*

¶ 11 "There are no allegations that the accident reports are motor vehicle records under the DPPA nor that the information was obtained from a search of a DMV database." *Id.* at __, 2021 WL 231281, at *8 (internal quotation marks omitted). The plaintiff in *Garey* did not assert and the District Court Judge did not find any case "where a defendant was adjudged liable as a matter of law for a DPPA violation after obtaining, disclosing, or using personal information that was not gathered directly from a state DMV." *Id.* (internal quotation marks omitted).

¶ 12 Lanier and LLG tendered the defense of the *Garey* litigation to Plaintiff under the policies listed above. Plaintiff agreed to defend Defendants under a reservation of rights to later deny indemnity coverage and to withdraw from providing for the defense. During oral argument, Plaintiff's counsel stated Plaintiff would not be seeking a recoupment of costs and fees extended during Defendant's defense of the *Garey* suit.

¶ 13 Plaintiff commenced this action by filing a declaratory judgment complaint on 2 December 2016 to determine its obligations under the above policies to the *Garey* suit. On cross-motions for summary judgment, the trial court entered a summary judgment order for Plaintiff on 28 June 2019 finding the *Garey* suit did not trigger Plaintiff's duty to defend under any of the tendered policies. Defendants timely appealed.

II. Jurisdiction

¶ 14 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issue

¶ 15 Defendants argue the trial court erred by granting summary judgment for Plaintiff and assert, at minimum, there is a duty to defend under the LLG excess policy.

IV. Plaintiff's Summary Judgment Motion

A. Standard of Review

¶ 16 North Carolina Rule of Civil Procedure 56(c) entitles a movant to obtain summary judgment upon demonstrating "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show there is "no genuine issue as to any material fact" and the movant is "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

¶ 17 A genuine issue of material fact is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty*

Mut. Ins. Co. v. Pennington, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). "An issue is material if the facts alleged would . . . affect the result of the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

¶ 18 "The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). "This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation and internal quotation marks omitted).

¶ 19 "The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted). When the court reviews the evidence at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted).

¶ 20 "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when 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.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). The meaning of the terms and provisions used in an insurance policy are a question of law. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

B. Rules of Construction of Insurance Policies

¶ 21 Our Supreme Court stated an insurance policy is a contract, "[a]s with all contracts, the object of construing an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 9, 692 S.E.2d 605, 612 (2010) (citation and internal quotation marks omitted); *see Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978) ("[T]he goal of [insurance policy] construction is to arrive at the intent of the parties when the policy was issued.").

¶ 22 "[T]he most fundamental rule [in interpreting insurance policies] is that the language of the policy controls." *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994).

¶ 23 Any ambiguities in the insurance policy are "strictly construed against the insurer and in favor of the insured." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 73 (1986).

¶ 24 Our Supreme Court stated our courts are to "construe[] liberally insurance policy revisions that extend coverage so as to provide coverage, whenever possible by reasonable construction," and "strictly construe against an insurance company those provisions excluding coverage under an insurance policy." *Harleysville Mut. Ins. Co.*, 364 N.C. at 9-10, 692 S.E.2d at 612 (citation and internal quotation marks omitted); *see State Capital Ins. Co.*, 318 N.C. at 542-43, 350 S.E.2d at 71 (1986) ("Exclusionary clauses are interpreted narrowly while coverage clauses are interpreted broadly to provide the greatest possible protection to the insured.").

¶ 25 If the insurance policy specifically defines a term, that definition governs its application. *York Indus. Ctr., Inc. v. Mich. Mut. Liab. Co.*, 271 N.C. 158, 162, 155 S.E.2d 501, 505 (1967) ("Since the word . . . is defined in the amended policy, it must be given that meaning, regardless of whether a broader or narrower meaning is customarily given to the term, the parties being free, apart from statutory limitations, to make their contract for themselves and to give words therein the meaning they see fit."). This Court stated, "all parts of an insurance policy are to be construed harmoniously so as to give effect to each of the policy's provisions." *Nationwide Mut. Ins. Co.*, 115 N.C. App. at 198, 444 S.E.2d at 667.

C. Duty to Defend

¶ 26 A policyholder claiming coverage under an enforceable insurance policy triggers two independent duties the carrier owes to the insured: the duty to defend and the duty to indemnify. *See Harleysville Mut. Ins. Co.*, 364 N.C. at 6-7, 692 S.E.2d at 610-11. Our Court has held: "the insured has the burden of bringing itself within the insuring language of the policy." *Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 283, 708 S.E.2d 138, 147 (2011) (citation and alteration omitted).

¶ 27 If the insured party meets this burden, the burden shifts to the insurer to "prove that a policy exclusion excepts the particular injury from coverage." *Id.* (citation omitted). If the insurer meets this burden, the burden shifts back to the insured to "prov[e] that an exception to the exclusion exists and applies to restore coverage." *Home Indem. Co.*

v. Hoechst Celanese Corp., 128 N.C. App. 189, 202, 494 S.E.2d 774, 783 (1998) (citation omitted).

¶ 28 Our Supreme Court examined the interplay between a duty to defend and a duty to indemnify in *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986) holding:

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial. *When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable.* Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Id. (emphasis supplied). An insurer is excused from its duty to defend when "the facts are not even arguably covered by the policy." *Id.* at 692, 340 S.E.2d at 378.

¶ 29 Our Supreme Court further explained the duty of an insurer to defend in *Waste Management* holding: "Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage." *Id.* at 691, 340 S.E.2d at 377 (citation omitted).

¶ 30 Later in *Harleysville Mut. Ins. Co.*, our Supreme Court articulated a "comparison test" by reading the policies at issue and the complaint "side by side" to determine whether an insurer has a duty to defend. *Harleysville Mut. Ins. Co.*, 364 N.C. at 6, 692 S.E.2d at 610. A court performs this test by taking "the facts as alleged in the complaint . . . are true and compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend." *Id.* at 7, 692 S.E.2d at 611.

¶ 31 This Court extended the "comparison test" from just allegations in the pleadings and the policy in *Waste Management and Harleysville Mut. Ins. Co.* to include "facts learned from the insured and facts discov-

erable by reasonable investigation may also be considered." *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 638, 386 S.E.2d 762, 764 (1990).

¶ 32 Defendants tendered claims under four separate types of policies to Plaintiff: business primary policies, business excess policy, personal homeowners' policies, and a personal umbrella policy. The parties agreed at oral arguments that the only policy where coverage is at issue is under the LLG business excess policy. We limit our review to that policy.

D. Willful Violation of a Criminal Statute

¶ 33 The excess policy contains an exclusion for injuries arising out of the willful violation of a penal statute:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> a. "Personal injury" or "advertising injury";
>
> . . .
>
> (4) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured.

¶ 34 Plaintiff asserts that there is no duty to defend because the complaint alleges as the basis of liability, "Defendants knowingly obtained, disclosed and used Plaintiffs' personal information from a motor vehicle record in violation of the DPPA." Plaintiff contends a knowing violation of the DPPA is a criminal act and, the alleged injury arising out of a willful violation of a penal statute, triggers the policy exclusion. We agree.

¶ 35 Federal code, 18 U.S.C. § 2721, proscribes the knowing disclosure of personal information and highly restricted personal information. 18 U.S.C. § 2725(3) defines "personal information" as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3).

¶ 36 18 U.S.C. § 2725(4) defines "highly restricted personal information" as an individual's photograph or image, social security number, medical or disability information[.]" 18 U.S.C. § 2725(4). 18 U.S.C. § 2723 crimi-

nalizes knowing violations. The code also creates a civil cause of action for knowing violations in 18 U.S.C. § 2724. Thus, a knowing violation of the DPPA, which gives rise to a civil cause of action, is also a violation of the penal criminal provision.

¶ 37 The dispositive issue is whether the plaintiff's allegations of "knowingly" violating the DPPA in *Garey* has the same meaning as "willfully" doing so. Neither the insurance policy nor the DPPA define "knowingly" or "willfully."

¶ 38 "Knowingly" is defined as "1. having knowledge or understanding 2. shrewd; clever 3. implying shrewd understanding or possession of a secret or inside information 4. deliberate; intentional." Webster's New World College Dictionary 806 (5th ed. 2014). "Willful" is defined in part as "1. said or done deliberately or intentionally." Webster's New World College Dictionary 1656 (5th ed. 2014).

¶ 39 The terms "knowingly" and "willfully" are both defined as deliberate or deliberately. The standard dictionary and ordinary meanings of both words are equivalent. Our General Assembly, our Supreme Court, and this Court have used both terms in tandem and interchangeably in both the criminal and civil contexts. *See Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981); *State v. Tennant*, 141 N.C. App. 524, 529, 540 S.E.2d 807, 810 (2000).

¶ 40 We conclude that the words "willful" and "knowing" carry essentially the same or equivalent meanings. An allegation of a "knowing" violation of the DPPA is an allegation of a "willful" violation of the DPPA. The injury alleged in the underlying complaint, which is based upon Defendants having "knowingly obtained, disclosed and used Plaintiffs' personal information from a motor vehicle record in violation of the DPPA," is injury arising out of the "willful" violation of a penal statute and that violation is excluded from coverage under the plain terms of the policy.

V. Conclusion

¶ 41 Viewed in the light most favorable to Defendants and giving them the benefit of any disputed inferences, the trial court properly entered summary judgment for Plaintiff. Applying the "comparison test" of the Garey complaint's allegations to the terms of Defendants' policy with Plaintiff, the policy excludes coverage for the facts as alleged or for "facts discoverable by reasonable investigation." *Harleysville Mut. Ins. Co.*, 364 N.C. at 6, 692 S.E.2d at 610-11 (citation omitted); *Duke Univ.*,

96 N.C. App. at 638, 386 S.E.2d at 764. Defendants' claims for coverage under the LLG excess business policy do not invoke Plaintiff's duty to defend. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges DEITZ and ARROWOOD concur.

HERMENA RICHARDSON, EMPLOYEE, PLAINTIFF
v.
GOODYEAR TIRE & RUBBER COMPANY, EMPLOYER,
LIBERTY MUTUAL INSURANCE GROUP, CARRIER, DEFENDANTS

No. COA20-745

Filed 1 June 2021

Attorney Fees—workers' compensation—motion to compel medical treatment—reasonableness of motion

In a workers' compensation matter involving an employee with both work- and non-work-related injuries, there was sufficient evidence to show that defendants' motion to compel medical treatment pursuant to N.C.G.S. § 97-25(f)—seeking to have plaintiff undergo a functional capacity evaluation (FCE) after her treating physician could no longer explain why plaintiff continued to have issues with her shoulder even after extensive treatment—was reasonable, even though the motion was denied on the basis that the FCE did not constitute medical compensation or medical treatment under the statute. Therefore, the Commission did not abuse its discretion by denying plaintiff an award of attorney fees.

Appeal by plaintiff from opinion and award entered 18 August 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 May 2021.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, David P. Stewart, and Jay A. Gervasi, Jr., for plaintiff-appellant.

Young Moore and Henderson, P.A., by Jefferson P. Whisenant, for defendant-appellee.

TYSON, Judge.

¶ 1 Hermena Richardson ("Plaintiff") appeals from an Opinion and Award by the North Carolina Industrial Commission ("Commission") granting the Goodyear Tire & Rubber Company and Liberty Mutual Insurance Company's ("Defendants") motion to add additional evidence, affirming the deputy commissioner's Opinion and Award, and denying the award of attorney's fees. We affirm.

I. Background

¶ 2 Plaintiff sustained compensable injuries in the course and scope of her employment to her bilateral shoulders on 21 October 2013. Plaintiff reached maximum medical improvement ("MMI") for her right shoulder injury and was given permanent restrictions in December 2014.

¶ 3 Plaintiff presented for a second evaluation by Dr. Brian Szura, who also found Plaintiff was at MMI for the right shoulder and assigned a 10% disability rating on 13 August 2015. The parties agreed Plaintiff was not disabled under the North Carolina Workers' Compensation Act. Plaintiff was already out of work for an unrelated knee condition, followed by her unrelated back condition. Dr. Christopher Barnes opined Plaintiff had reached MMI for her bilateral shoulder injury in January 2016.

¶ 4 On 10 August 2016, the Commission entered the Consent Order memorializing the parties' agreement. According to the Consent Order:

> Employee has . . . sustained no additional disability as a result of her compensable bilateral shoulder injury. Employee will not be entitled to indemnity benefits in the future *unless and until she is taken out of work totally for her bilateral shoulder condition by her authorized treating physician* or unless defendants are unable to accommodate bilateral shoulder work restrictions assigned by her authorized treating physician, in which case, Defendants have agreed to immediately reinstate temporary total disability benefits. (emphasis supplied).

¶ 5 The parties designated Dr. Peter Dalldorf as Plaintiff's authorized treating physician.

¶ 6 Two weeks after approval of the Consent Order, Dr. Dalldorf excused Plaintiff from work for two months on 29 August 2016 due to her left shoulder. Defendants re-instated temporary total disability compensation at the maximum compensation rate for 2013. This compensation continued to be paid at the time this appeal was filed.

¶ 7 Dr. Dalldorf opined Plaintiff had reached MMI for the left shoulder and assigned a 20% disability rating to the left arm and permanent work restrictions on 5 April 2017. Dr. Dalldorf noted the need to perform an isolated upper extremity functional capacity evaluation ("FCE") to determine Plaintiff's permanent restrictions. Plaintiff was unable to undergo the evaluation due to her unrelated back restrictions.

¶ 8 Plaintiff regularly visited Dr. Dalldorf to address her compensable shoulder injuries and attempted new treatments from October 2017 until October 2019. Defendants scheduled an independent medical examination with Dr. Marshall Kuremsky in November 2019. On 13 January 2020, Defendants asked Dr. Dalldorf to prescribe and order the previously indicated FCE for Plaintiff. Dr. Dalldorf responded he would not order an FCE. Plaintiff refused to participate in the FCE.

II. Procedural History

¶ 9 Defendants filed a motion to compel medical treatment before the Commission on 28 February 2020. They sought an order for Plaintiff to participate in an FCE pursuant to N.C. Gen. Stat. § 97-25 and 11 N.C. Admin. Code 23A.0609 of the Workers' Compensation Rules. Defendants argued, pursuant to N.C. Gen. Stat. § 97-25, they direct Plaintiff's medical treatment, and medical compensation is defined "as may reasonably be required to effect a cure or give relief and . . . will tend to lessen the period of disability" in accordance with N.C. Gen. Sta. § 97-2(19) (2019).

¶ 10 Special Deputy Commissioner Kimberly Fennell denied Defendants' motion. Defendants filed a motion to reconsider their motion to compel medical treatment. Defendants again cited "medical compensation" as the basis pursuant to N.C. Gen. Stat. § 97-25. Special Deputy Commissioner Fennell agreed to hear the motion and again denied Defendants' motion to compel medical treatment on 7 April 2020. Special Deputy Commissioner Fennell recommended the issue be raised before the Commission by requesting an appeal.

¶ 11 Defendant filed a Form 33: Request the Claim be Assigned for Hearing on 9 April 2020 in response to the special deputy commissioner's 7 April order. Defendants requested the scope of the hearing be limited to the legal issues raised in Defendants' motion to compel medical treatment. The parties submitted a pre-trial agreement and stipulations.

¶ 12 Issues before Deputy Commissioner Lori Gaines included: (1) whether an FCE qualifies as medical compensation as defined in N.C. Gen. Stat. §§ 97-2(19) and 97-25; (2) whether the FCE was wholly unnecessary; and (3) whether Defendants should pay attorney fees pursuant to N.C. Gen. Stat. §§ 97-25(f)(5) and 97-88.1.

¶ 13 Deputy Commissioner Gaines gave "great weight" to Dr. Dalldorf's revised opinion that an FCE was unsuitable. The commissioner found "Defendants acted unreasonably in waiting three years post MMI to request [an FCE]." Deputy Commissioner Gaines concluded: "[b]ased on the preponderance of evidence . . . [the FCE] at issue is not medical compensation because it does not effect a cure, provide relief or lessen the period of disability." The Opinion and Award was entered 10 June 2020 pursuant to N.C. Gen. Stat. § 97-25(f). The deputy commissioner awarded Plaintiff attorney's fees, "[a]s sanctions for Defendants' unreasonable engagement in stubborn, unfounded litigiousness of this claim."

¶ 14 Defendants filed a motion to reconsider the award of attorney's fees on 19 June 2020. Deputy Commissioner Gaines denied Defendants' motion to reconsider and ordered Defendants to pay Plaintiffs' attorney's fees pursuant to N.C. Gen. Stat. §§ 97-25(f)(5) and 97-88.1 in the amount of $11,075.00 for 44.3 hours worked defending Plaintiff's claims since February 2020. Defendants filed notice of appeal to the Full Commission along with a motion to admit additional evidence to present proof of Plaintiff's ongoing medical treatments.

¶ 15 The issues before the Full Commission included: (1) whether Defendant's motion to compel Plaintiff's FCE should be approved, and (2) whether Plaintiff is entitled to an award of attorney's fees pursuant to N.C. Gen. Stat. §§ 97-25(f)(5), 97-88.1.

¶ 16 The Commission found *inter alia*: (1) Defendants were made aware of Plaintiff reaching MMI for her left shoulder in March 2017; (2) Plaintiff received shoulder injections from October 2017 until August 2019; (3) Plaintiff indicated pain was no longer an issue on 10 August 2018; (4) Dr. Dalldorf ordered a diagnostic MRI for Plaintiff's right shoulder on 30 September 2019; (5) Dr. Dalldorf administered to Plaintiff additional injections and reviewed the MRI and noted he was "not really sure why [Plaintiff] is experiencing as much difficulty with her right shoulder as she is" on 14 October 2019; (6) Defendants scheduled an independent medical examination ("IME") two days later for 6 November 2019; and, (7) Dr. Kuremsky recommended the FCE at issue on 6 November 2019, which Dr. Dalldorf opined was not appropriate because it would not give the physician any information regarding Plaintiff's ability to return to work given the other injuries.

¶ 17 The Commission concluded, "[the FCE] in dispute in this matter is not reasonably necessary to effect a cure, provide relief, or lessen the period of disability as a result of Plaintiff's compensable injuries." The Commission further concluded "Defendants have not acted unreasonably by initiating the underlying medical motion pursuant to N.C. Gen.

Stat. § 97-25(f)" and denied an award of attorney's fees for Plaintiff. Plaintiff appeals.

III. Jurisdiction

¶ 18 An appeal lies with this Court from the Industrial Commission pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 97-86 (2019).

IV. Issue

¶ 19 Whether the Commission's findings of fact and conclusions of law are insufficient to support the decision not to award attorney's fees to Plaintiff when the Commission determined Defendants brought this action as an expedited medical motion pursuant to N.C. Gen. Stat. § 97-25(f), and the FCE at issue was determined not to constitute medical compensation under the act.

V. Standard of Review

¶ 20 Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. "This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted).

¶ 21 "The decision whether to award or deny attorney's fees rests within the sound discretion of the Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason." *Bell v. Goodyear Tire & Rubber Co.*, 252 N.C. App. 268, 279, 798 S.E.2d 143, 151 (2017) (citation omitted). This Court reviews the Commission's conclusions of law *de novo*. *Id.* at 272, 798 S.E.2d at 147.

VI. Analysis

A. N.C. Gen. Stat. §§ 97-2(19) and 97-25(f)

¶ 22 The Workers' Compensation Act provides "a party may file a motion as set forth in this subsection regarding a request for medical compensation or a dispute involving medical issues." N.C. Gen. Stat. § 97-25(f). Defendants defended the request for a compelled FCE as medical compensation before Special Deputy Commissioner Fennell, Deputy Commissioner Gaines, and the Full Commission. On appeal, Defendants argue their medical motion is permissible under the statute as a "dispute involving medical issues" pursuant to N.C. Gen. Stat. § 97-25.

¶ 23 Defendants argued before the Commission a "dispute involving medical issues" is permitted by N.C. Gen. Stat. § 97-25(f). Defendants' asserted argument the FCE was a "dispute involving medical issues" is not properly before this Court. *See Setzer v. Boise Cascade Corp.*, 123 N.C. App. 441, 445, 473 S.E.2d 431, 433 (1996) (holding "we do not reach the substantive merits of defendants' arguments on appeal [because he did] not properly preserve for this Court's consideration under Rule 10. N.C.R. App. P. 10(b)(1)").

¶ 24 Whether the IME for the isolated upper extremity FCE would qualify as medical compensation under the statute is a question of law. Defendants did not cross-appeal the Commission's finding the FCE at issue is not medical compensation. This issue is not before this Court. We express no opinion on the merits, if any, of this issue.

B. Reasonableness of Defendants' Motion

¶ 25 N.C. Gen. Stat. § 97-25(f) provides guidance for the imposition of attorney's fees when a party acts unreasonably in filing a medical motion when a party: (1) is requesting medical compensation; or (2) there is a dispute involving medical issues. N.C. Gen. Stat. §§ 97-25(f) (2019).

¶ 26 Defendants argue the Commission correctly concluded they did not act unreasonably in filing the underlying expedited medical motion because they presented medical evidence that the FCE was reasonably required to determine Plaintiff's work restrictions as of 28 February 2020.

¶ 27 Plaintiff argues the FCE at issue does not constitute medical compensation or medical treatment and is not a proper subject of the truncated medical motion procedure set forth in N.C. Gen. Stat. § 97-25(f). Plaintiff asserts Defendants failed to request proper medical compensation under the statute.

¶ 28 Defendants clearly have the statutory right to direct Plaintiff's necessary medical treatment. N.C. Gen. Stat. § 97-25(c) (2019) ("the Industrial Commission may order necessary treatment"). Plaintiff had several concurrent injuries and conditions, some work related and some not. The parties stipulated in their Consent Order the bilateral shoulder injury was compensable, and as long as the treating physician excused Plaintiff from work for the shoulder injuries, Defendant would pay the medical costs related thereto.

¶ 29 Plaintiff's shoulder treatments were ongoing from October 2017 to October 2019. Defendants requested the FCE two days after Dr. Dalldorf had reviewed Plaintiff's MRI results. He could not determine why Plaintiff had continued to experience difficulties after treatments

for the work-related shoulder injury. Defendants assert it was imperative to ensure Plaintiff's bilateral shoulder injuries prevented her from work as support for their requested FCE. The MMI had been ordered and completed for both shoulders. Plaintiff had undergone injections, therapy, medications and claimed her pain was not an issue.

¶ 30 Defendants scheduled an IME two days after Dr. Dalldorf had reviewed Plaintiff's MRI for 6 November 2019. Dr. Kuremsky recommended the FCE at issue on 6 November 2019, which Dr. Dalldorf opined was not appropriate, even though he had agreed he could not substantiate Plaintiff's complaint related to her shoulders. The Commission properly found Defendants reasonably acted within their statutory rights after treatments and claims of lack of pain to determine the status of Plaintiff's compensable shoulder injury, which "will tend to lessen the period of disability," particularly if Dr. Dalldorf's FCE reservations were based upon or due to Plaintiff's non-employment related medical conditions. N.C. Gen. Stat. § 97-2(19).

C. Award of Attorney's Fees

¶ 31 Plaintiff contends Defendants' motion should retroactively be held not to be a request for medical compensation, and the Commission must award attorney's fees under N.C. Gen. Stat. § 97-25(f)(5) as a matter of law. We disagree and affirm the Commission's Opinion and Award on this issue.

¶ 32 This notion would require any unsuccessful medical motion, from any party, to result in an automatic award of attorney's fees as a matter of law, without the Commission exercising its discretion. "[S]uch liberality should not . . . 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.' " *Deese v. Lawn and Tree Expert Co.*, 306 N.C. 275, 277, 293 S.E.2d 140, 143 (1982) (citations omitted).

¶ 33 An award of attorney's fees is only permissible under N.C. Gen. Stat. § 97-25(f)(5) when "the Commission determines that any party has acted unreasonably by initiating or objecting to a motion filed pursuant to this section." N.C. Gen. Stat § 97-25(f)(5). Plaintiff has failed to show the Commission abused its discretion, or that its findings are "manifestly unsupported by reason." *Bell*, 252 N.C. App. at 279, 798 S.E.2d at 151.

¶ 34 Defendants' initial motion to compel the FCE was asserted as medical compensation under N.C. Gen. Stat. § 97-2(19). Presuming without

deciding, the Commission properly concluded Defendants had misapplied the statute, the Commission also concluded Defendants' actions do not warrant imposition of Plaintiff's attorney's fees. That conclusion is not "manifestly unsupported by reason" under these facts. *Bell*, 252 N.C. App. at 279, 798 S.E.2d at 151.

¶ 35 Plaintiff was and is receiving ongoing disability compensation from Defendants. On 14 October 2019, Plaintiff's authorized treating physician, Dr. Dalldorf, could no longer explain her right shoulder complaints. Defendants sought a second opinion through an IME. Defendants inquired if Dr. Kuremsky would recommend an FCE to determine Plaintiff's work restrictions for her compensable bilateral shoulder injuries. Dr. Kuremsky noted "it would not be unreasonable to have an [FCE] . . . in order to have a specific set of restrictions or limitations . . . that would help in assigning any permanent restrictions" for Plaintiff.

¶ 36 An employee is only entitled to disability compensation if the employee is unable "because of injury to earn the wages which the employee was receiving at the time of injury." N.C. Gen. Stat. § 97-2(9). The parties' August 2016 Consent Order agreed Plaintiff would only be entitled to disability compensation if "she is taken out of work totally for her bilateral shoulder condition by her authorized treating physician or unless defendants are unable to accommodate bilateral shoulder work restrictions."

¶ 37 The motion to compel the FCE could determine Plaintiff's work restrictions and ability and her continued entitlement to disability compensation for that injury. The Commission concluded Defendant's motion was not "manifestly unsupported by reason" under these facts. *Bell*, 252 N.C. App. at 279, 798 S.E.2d at 151. If Plaintiff's unrelated medical conditions limits or prevents her from undergoing an FCE, that fact does not render Defendant's motion and assertions unreasonable.

¶ 38 Plaintiff argues the Commission failed to make appropriate findings of fact to support its conclusion of law that Defendants were not unreasonable in bringing this non-medical issue as a medical motion under the truncated expedited medical motion procedure under N.C. Gen. Stat. §§ 97-78(f)(2) and 97-25(f).

¶ 39 The Commission in its discretion properly concluded an award of attorney's fees was not allowed pursuant to N.C. Gen. Stat. § 97-25(f). Plaintiff is not entitled to attorney's fees. That portion of the Commission's Opinion and Award is affirmed.

D. N.C. Gen. Stat. § 97-88.1

¶ 40 Plaintiff abandoned her appeal regarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 (2019). An award of attorney's fees under this statute is not before us.

E. Frivolous Appeal

¶ 41 This Court has consistently held Rule 34 sanctions may be warranted, *inter alia*, if the appeal is not well grounded in fact, warranted by existing law, or taken for an improper purpose. *MacMillan v. MacMillan*, 239 N.C. App. 573, 771 S.E.2d 633 (2015).

¶ 42 Defendant argues Plaintiff has brought a frivolous appeal. Plaintiff's case was presented before Special Deputy Commissioner Fennell who denied and re-denied Defendants' motion to compel the FCE. Deputy Commissioner Gaines found the FCE was not medical compensation and determined the unreasonableness of the motion compelled Plaintiff's attorney's fees. The Commission agreed Defendants did not act unreasonably in attempting to confirm the degree and limits of Plaintiff's shoulder restrictions.

¶ 43 Plaintiff's argument was affirmed repeatedly before the Commission at three different levels. It can hardly be said that Plaintiff's appeal is not well grounded or taken for improper purpose before this Court. Defendants' assertion has no merit and is dismissed.

VII. Conclusion

¶ 44 The Commission found the FCE at issue was not medical compensation, Defendants did not cross-appeal that conclusion. We express no opinion on the merits, if any, of that issue. The Full Commission properly concluded Defendants' motion to compel the FCE was not unreasonable and, as such, did not abuse its discretion in concluding Plaintiff is not entitled to an award of attorney's fees.

¶ 45 Finally, Plaintiff's appeal is based on the statutory requirements is well grounded and is not frivolous. The Opinion and Award of the Commission is affirmed. *It is so ordered.*

AFFIRMED.

Judges HAMPSON and WOOD concur.

STATE v. GIBSON

[277 N.C. App. 623, 2021-NCCOA-235]

STATE OF NORTH CAROLINA
v.
DUSTIN CLAYBURN GIBSON

No. COA20-575

Filed 1 June 2021

Burglary and Unlawful Breaking or Entering—motor vehicle—containing any goods of value—sufficiency of evidence

Defendant's conviction for felony breaking or entering a motor vehicle was reversed where there was no evidence that the vehicle contained "goods, wares, freight, or other thing of value," an essential element required by N.C.G.S. § 14-56.

Appeal by Defendant from judgments entered 20 February 2020 by Judge Stanley Allen in Rockingham County Superior Court. Heard in the Court of Appeals 28 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Dorian Woolaston, for the State-Appellee.

Mary McCullers Reece for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from judgments entered upon jury verdicts of guilty of various offences, including felony breaking or entering a motor vehicle, and a guilty plea to attaining habitual breaking and/or entering status. Defendant contends that the trial court erred by denying his motion to dismiss the charge of felony breaking or entering a motor vehicle because there was insufficient evidence to sustain a conviction.

I. Procedural Background

¶ 2 On 17 February 2020, a jury found Defendant guilty of various offenses, including felony breaking or entering a motor vehicle. Defendant pled guilty to attaining habitual breaking and/or entering status, while reserving his right to appeal the underlying convictions. The trial court found one mitigating factor and sentenced Defendant to consecutive prison terms of 26 to 44 months and 8 to 19 months, followed by 5 to 15 months of supervised probation. Defendant gave oral notice of appeal in open court.

II. Discussion

¶ 3 Defendant's sole argument on appeal is that the trial court erred by denying his motion to dismiss the charge of felony breaking or entering a motor vehicle because the State failed to present sufficient evidence that the motor vehicle contained any "goods, wares, freight, or anything of value[,]" an essential element of the charge. We agree.

A. Standard of Review

¶ 4 We review de novo a trial court's denial of a motion to dismiss a criminal charge for insufficient evidence. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (citation omitted). "In reviewing a motion to dismiss based on the sufficiency of the evidence, the scope of the court's review is to determine whether there is substantial evidence of each element of the charged offense." *State v. Marshall*, 246 N.C. App. 149, 157, 784 S.E.2d 503, 508 (2016) (quotation marks and citation omitted). "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) (quotation marks and citation omitted).

¶ 5 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). If "the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *Winkler*, 368 N.C. at 575, 780 S.E.2d at 826 (quotation marks and citation omitted). "This is true even though the suspicion so aroused by the evidence is strong." *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967) (citation omitted).

B. Analysis

¶ 6 N.C. Gen. Stat. § 14-56 provides, in pertinent part: "If any person with intent to commit any felony or larceny therein, breaks or enters any . . . motor vehicle . . . containing any goods, wares, freight, or other thing of value . . . that person is guilty of a Class I felony." N.C. Gen. Stat. § 14-56(a) (2020). Items of trivial value satisfy the element of "goods, wares, freight, or other thing of value." *See State v. McClaughlin*, 321 N.C. 267, 270, 362 S.E.2d 280, 282 (1987) (citing *State v. Goodman*, 71 N.C. App. 343, 349-50, 322 S.E. 2d 408, 413 (1984) (registration card, hubcap key); *State v. Quick*, 20 N.C. App. 589, 590-91, 202 S.E.2d 299, 300-01 (1974) (papers, cigarettes, shoe bag)). Where there is no evidence that the victim's vehicle contained a thing of even trivial value, a conviction

for felony breaking or entering a motor vehicle must be reversed. *State v. McDowell*, 217 N.C. App. 634, 636, 720 S.E.2d 423, 424-25 (2011) (quotation marks and citation omitted) (testimony that nothing appeared to be missing from the vehicle and that defendant did not have time to take anything out of the truck "at best" only gave rise to a suspicion or conjecture that the truck contained things of value and was not sufficient to survive a motion to dismiss).

¶ 7 In this case, Defendant was charged with felony breaking or entering a pickup truck that was parked overnight at a business. The business owner, Jonathan Coleman, testified that the truck was an employee's personal vehicle that had been parked at the business overnight. Coleman testified that the "car window was busted open" and there was "[s]ome stuff scattered around in it." Deputy Zachary Fulp testified that the vehicle's window had been "busted out and went through." Detective Angela Webster assisted the investigation and took photographs of the crime scene. She testified that she "noticed a white Chevrolet truck that had the windows busted out of it."

¶ 8 The record is devoid of any evidence that the truck contained an item of even trivial value, and there was no evidence that anything had been taken from inside the truck.[1] While the testimony that there was "[s]ome stuff scattered around" the vehicle is evidence that things may have been in the vehicle – broken glass, for example – such testimony is not evidence that those things were even of a trivial value. The testimony, at best, merely gives rise to a suspicion that the truck contained items of value and is not sufficient evidence to survive a motion to dismiss. *See McDowell*, 217 N.C. App. at 634, 720 S.E.2d at 423.

¶ 9 The State argues that since evidence was presented that the vehicle was used by an employee on a regular basis, it can be reasonably inferred that the vehicle contained "items of value."

¶ 10 Although evidence that a vehicle is owned by a dealership is "strong circumstantial evidence that the car was in fact empty of all goods or wares of even the most trivial value[,]" *State v. Jackson*, 162 N.C. App. 695, 699, 592 S.E.2d 575, 578 (2004), evidence that a vehicle is owned

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1. The State also introduced and published photographs depicting the broken window of the motor vehicle, but they were not included in the record on appeal. The State was served with Defendant's proposed Record on Appeal and failed to object or propose an alternative record on appeal, so Defendant's "proposed record on appeal thereupon constitutes the record on appeal." N.C. R. App. P. 11(a). Our review is limited to "the record on appeal, the transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9[.]" N.C. R. App. P. 9(a).

and used by an individual is sufficient only to raise a suspicion or conjecture that the vehicle contained items of value and is not sufficient evidence that the vehicle contained items of value to survive a motion to dismiss. *State v. McLaughlin*, 321 N.C. 267, 271, 362 S.E.2d 280, 282 (1987) (reversing defendant's conviction for breaking and entering a motor vehicle for insufficient evidence despite evidence that the vehicle was owned by victim and parked outside her home). Accordingly, the State's argument lacks merit.

¶ 11 At trial, Defendant moved to dismiss all the charges, specifically including the charge of felony breaking or entering a motor vehicle. When asked by the trial court to respond to the motion, the State argued as follows:

> Your Honor, Mr. Coleman was able to pull out testimony that the vehicle was on his property. The vehicle was intact. No broken windows. There's photographic evidence that the window was broken and something happened, I mean, it's broken into.
>
> Reviewing of the video, you can see that suddenly the lights on the vehicle are coming on. There's an individual walking around the vehicle. Mr. Coleman was able to identify the owner of the vehicle as one of the employees.
>
> Your Honor, I believe there's sufficient evidence to meet all of the elements that a breaking occurred: a window was broken of a vehicle, we know who the property owner is, and it was on the property of Mr. Coleman. You can see the pictures in the video, it happened.

¶ 12 At that point, the trial court announced, "All right. I'll deny your motions in all of the charges at this point." The State did not even address the element of "goods, wares, freight, or other thing of value," much less argue that the evidence presented was sufficient to support that element.

¶ 13 A careful review of the record shows that the State presented insufficient evidence that the truck contained "goods, wares, freight, or other thing of value," an essential element of felony breaking or entering a motor vehicle. Defendant's conviction of that charge is reversed.

III. Conclusion

¶ 14 As there was insufficient evidence that the motor vehicle contained "goods, wares, freight, or other thing of value[,]" we reverse Defendant's conviction for felony breaking or entering a motor vehicle. Because the trial court consolidated Defendant's conviction for felony breaking or entering a motor vehicle with his conviction for injury to real property, we remand for resentencing as to the injury to real property conviction. *See State v. Fuller*, 196 N.C. App. 412, 426, 674 S.E.2d 824, 833 (2009).

REVERSED AND REMANDED.

Judges DIETZ and JACKSON concur.

STATE OF NORTH CAROLINA
v.
SHERRY LEE LANCE

No. COA20-273

Filed 1 June 2021

1. Arson—elements—dwelling house of another—co-conspirator

The State presented sufficient evidence for the jury to convict defendant of second-degree arson and conspiracy to commit second-degree arson where the "dwelling house of another" element was satisfied by evidence that defendant's mother lived in the rental home when the fire occurred. Even though the mother allegedly conspired with defendant to burn down the home, there was no evidence that she knew when or how the fire would be set, and thus there was a risk that she could have been in the home when it was burned.

2. Evidence—expert testimony—reliability test—detailed findings not required

In an arson prosecution, the trial court properly conducted the Evidence Rule 702 reliability analysis before exercising its discretion to admit the expert testimony of a fire investigator, where the court heard extensive voir dire testimony that covered all three prongs of the reliability test and announced that it had considered the three-prong test; it was not required to make detailed findings addressing each prong. Further, contrary to defendant's argument

that the expert used an admittedly unscientific "negative corpus" approach, the expert expressly stated that he did not rely on that approach.

3. Fraud—insurance fraud—jury instructions—specification of particular false statement

In an arson prosecution, the trial court did not commit plain error in its insurance fraud jury instructions when it failed to specify the particular false statement or misrepresentation alleged in the indictment. There was no variance between the indictment, the proof at trial, and the jury instructions.

4. Damages and Remedies—restitution—arson—sufficiency of evidence

The trial court erred in an arson prosecution by ordering defendant to pay a $40,000 restitution award to the homeowner without any testimony or documentary evidence to support the award amount.

Appeal by defendant from judgment entered 7 November 2019 by Judge Athena Fox Brooks in Henderson County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas J. Felling, for the State.

Warren D. Hynson for defendant.

DIETZ, Judge.

¶ 1 Defendant Sherry Lee Lance appeals her convictions for second degree arson, conspiracy to commit second degree arson, and insurance fraud, all stemming from allegations that Lance conspired with her mother to burn down the home they shared and collect insurance proceeds.

¶ 2 Lance's central argument is that the State could not prove an essential element of the arson charges—that Lance burned the dwelling house of another—because the only other inhabitant of the home was her mother, who allegedly conspired with her to burn the home.

¶ 3 As explained below, we reject this argument. The State's evidence showed that Lance's mother still lived in the home when the fire occurred, and there was no evidence that Lance's mother knew when or

how the fire would be set. Thus, the State's evidence was sufficient to send the case to the jury.

¶ 4 Lance also argues that the trial court erred by admitting the testimony of the State's fire investigation expert and committed plain error in the jury instruction concerning insurance fraud. We likewise reject these arguments and hold that the trial court properly considered the appropriate reliability factors before admitting the expert testimony and did not commit plain error in its jury instructions.

¶ 5 Finally, Lance alleges—and the State concedes—that there was insufficient evidence to support the trial court's award of restitution. We vacate the restitution order and remand that matter for further proceedings.

Facts and Procedural History

¶ 6 In September 2016, a house in Fletcher was destroyed by a fire. At the time of the fire, Defendant Sherry Lance and her mother Jonnie Turner lived in the house. They had leased it from the owner for about two years.

¶ 7 After the fire, Fletcher Police Sergeant Ronald Diaz, the town fire chief, the fire marshal, and an SBI agent went to the property to investigate. The SBI agent brought a canine trained to identify accelerants or incendiaries, but the canine did not alert to any.

¶ 8 There was a large hole in the kitchen floor area that the investigators believed was the origin point of the fire. Sergeant Diaz observed that there was an unusually low number of personal belongings in the home and "not what you would expect in a home that was just lost to a fire." Based on that observation, Sergeant Diaz contacted the National Insurance Crime Bureau to see if Lance had renter's insurance on her personal property in the home. Sergeant Diaz learned that Lance had obtained a renter's insurance policy in May 2016, about four months prior to the fire, and had filed a claim for items lost in the fire.

¶ 9 On 15 September 2016, Casey Silvers, a fire investigator hired by the insurance company to investigate the cause of the fire, went to the property to investigate along with a claims adjuster. The claims adjuster also met with Lance to take her recorded statement about the fire. In her recorded statement, Lance explained that she told the landlord about some electrical problems in the home but he would not fix them. Lance explained that she thought the fire was electrical. When asked where she was and what she did on the day of the fire, Lance stated that she had gone "dumpster diving" with her mother, taking their two dogs with

them. Lance submitted a "loss inventory list" to the adjuster, listing the items of personal property that she claimed were lost in the fire.

¶ 10 Several months later, Sergeant Diaz discovered that Turner had rented a storage unit in Fletcher the day before the fire. After obtaining a search warrant, Sergeant Diaz searched the unit and found a large number of personal belongings and household items, as well as personal financial and legal documents belonging to Lance. Various items that Sergeant Diaz found in the storage unit matched items listed on the loss inventory form Lance submitted to her insurance company. Sergeant Diaz obtained video footage from the storage facility, which showed Lance and Turner accessing the storage unit the day before the fire, moving items into the unit, and later moving items out of the unit after the fire.

¶ 11 The State charged Lance with second degree arson, conspiracy to commit second degree arson, and insurance fraud. The case went to trial.

¶ 12 At trial, the homeowner, the insurance adjuster, and Sergeant Diaz testified to the events described above. Along with Sergeant Diaz's testimony, the State presented the video footage from the storage facility and photographs of the items found inside the storage unit.

¶ 13 The State also offered the testimony of Casey Silvers as an expert in the field of fire and arson investigation. Lance objected on the ground that Silvers's expert testimony was not reliable under Rule 702. Both parties conducted voir dire questioning of Silvers. The trial court then ruled that Silvers's testimony was admissible "under the three prong reliability test" of Rule 702 and that it would allow Silvers to testify to his conclusion that the results of his investigation excluded possible causes of the fire "with the exception of an incendiary causation."

¶ 14 The State also presented evidence that Lance made incriminating statements to family members following the fire. Lance's stepdaughter testified that, in 2018, Lance made statements to her indicating that Lance was "in trouble for burning [her] house down." Lance's father testified that Lance came to live with him in 2017 and admitted that she set fire to her home in North Carolina, telling him that she set the fire to collect renter's insurance.

¶ 15 At the close of the evidence, Lance moved to dismiss the arson charges, arguing that the State failed to present sufficient evidence to show that the house was "the dwelling of another person" as required for arson because the only inhabitants of the house at the time of the fire were Lance and her alleged co-conspirator in the arson plan, and thus,

"this is a case where there was no risk to anybody else." The trial court denied the motion.

¶ 16 On 7 November 2019, the jury convicted Lance of all three charges. The trial court consolidated the charges and sentenced Lance to a term of 10 to 21 months in prison. The court also ordered Lance to pay $40,000 in restitution to the homeowner. Lance appealed.

Analysis

I. Denial of motion to dismiss

¶ 17 **[1]** Lance first argues that the trial court erred in denying her motion to dismiss the arson and conspiracy to commit arson charges because the State failed to present sufficient evidence that the house in question was inhabited by "another person," an essential element of those arson charges. Lance asserts that the only other inhabitant of the house, her mother Jonnie Turner, was her alleged co-conspirator in the arson plan. Thus, she argues, the house was not the dwelling of "another" because "neither co-conspirator would have been endangered by the hazards of a burning they allegedly planned together."

¶ 18 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The trial court must deny a motion to dismiss if the State presented "substantial evidence" of each essential element of the offense charged. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 19 Arson "is the wilful and malicious burning of the dwelling house of another person." *State v. White*, 288 N.C. 44, 50, 215 S.E.2d 557, 561 (1975). The essential elements of second-degree arson are: "(1) the wilful and malicious burning (2) of the dwelling (i.e., inhabited) house of another; (3) which is unoccupied at the time of the burning." *State v. Scott*, 150 N.C. App. 442, 453, 564 S.E.2d 285, 293 (2002). Our Supreme Court has held that the "arson requirement that the dwelling burned be that of 'another' is satisfied by a showing that some other person or persons, together with the defendant, were joint occupants of the

same dwelling unit." *State v. Shaw*, 305 N.C. 327, 338, 289 S.E.2d 325, 331 (1982).

¶ 20 The central issue in this case is whether Lance's mother, Jonnie Turner, qualifies as "another" person under the elements described above. The parties acknowledge that our appellate courts have never directly addressed whether an alleged co-conspirator in a plan to commit arson can be considered another person for purposes of establishing the required elements of arson. We hold that under the facts of this case, there was sufficient evidence that the home was the dwelling of another.

¶ 21 First, the elements of this offense and our existing precedent do not provide any exception for co-conspirators, nor do they require that the other person living in the home be unaware or uninvolved in the plan to burn the home. For example, in *Shaw*, our Supreme Court held that the "requirement that the dwelling burned be that of 'another' is satisfied by a showing that some other person or persons, together with the defendant, were joint occupants of the same dwelling unit" without offering any exceptions for categories of persons who would not qualify as "another." 305 N.C. at 338, 289 S.E.2d at 331. Similarly, in *State v. Eubanks*, this Court emphasized that a house "is the dwelling house 'of another' if someone other than the defendant lives there." 83 N.C. App. 338, 339, 349 S.E.2d 884, 885 (1986). Again, the holding required only that "someone other than the defendant lives there." *Id.*

¶ 22 To be sure, these earlier cases involved homes that the defendant occupied together with others who were not involved in the arson plan. *See Shaw*, 305 N.C. at 328–29, 289 S.E.2d at 326–27; *Eubanks*, 83 N.C. App. at 339–40, 349 S.E.2d at 885. But we find nothing in these holdings that *required* those third parties to be innocent or uninvolved in the arson. *Shaw*, 305 N.C. at 337, 289 S.E.2d at 331; *Eubanks*, 83 N.C. App. at 339, 349 S.E.2d at 885. To the contrary, in *Eubanks*, the defendant warned the other inhabitant of the home to get out, take his belongings, and find another place to live in advance of the fire. 83 N.C. App. at 339–40, 349 S.E.2d at 885. Nevertheless, this Court found sufficient evidence of the essential elements of arson. *Id.* As these prior cases establish, the critical inquiry in determining whether a house "is the dwelling house 'of another' " is simply whether "someone other than the defendant lives there." *Id.* at 339, 349 S.E.2d at 885.

¶ 23 Lance cites to this Court's opinion in *State v. Ward*, where we held that the facts "precluded defendant's conviction of common law arson" based on facts showing the other inhabitant's "consent to, if not active participation in, a scheme with defendant to burn the [home]." 93 N.C.

App. 682, 686, 379 S.E.2d 251, 254 (1989). But our reasoning in that case was that the other inhabitant, with knowledge of the arson plan, "had permanently abandoned the [home] at the time of the burning" and was "living elsewhere at the time of the burning." *Id.* We held that "[u]nder these particular facts, there was no danger to anyone who 'might' have been in the [home] at the time it burned" because no one other than the defendant was currently living there. *Id.* at 686, 379 S.E.2d at 253.

¶ 24 In this case, by contrast, Lance's mother lived in the home at the time it was burned. Thus, unlike *Ward*, in this case there was a risk that Turner could have been in the home at the time it was burned, even assuming Turner participated in the plan to set the fire.

¶ 25 Moreover, an exception to this arson requirement for people who are aware of, or participate in, the plan to burn the dwelling is not consistent with the general purpose of criminalizing arson. When examining the scope of a criminal law, we consider "the public policy of the State as declared in judicial opinions and legislative acts, the public interest, and the purpose." *State v. Wagoner*, 199 N.C. App. 321, 324, 683 S.E.2d 391, 395 (2009), *aff'd*, 364 N.C. 422, 700 S.E.2d 222 (2010). In explaining its holding in *Shaw*, the Supreme Court noted that "the main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned." 305 N.C. at 337, 289 S.E.2d at 331. In other words, the "gravamen of the offense of common law arson is the danger that results to persons who are or might be in the dwelling." *White*, 288 N.C. at 50, 215 S.E.2d at 561. Knowledge of, or participation in, a plan to commit arson does not remove the danger that the other person could be injured or killed when the burning occurs. Indeed, in this case, there is no evidence that Turner knew when the fire would be set, how it would be set, where in the house it would be set, or how much of the house would be destroyed. The evidence is solely that Turner assisted with other aspects of the conspiracy, such as leasing the storage unit the day before the fire and moving various items from the house into that unit. The State's evidence established that Turner was a person living in that dwelling who could have been in the home at the time it was burned, and that is all that is required to satisfy this element of the arson offenses in this case. Accordingly, we hold that the trial court did not err by denying Lance's motion to dismiss.

II. Admission of fire investigator's expert testimony

¶ 26 **[2]** Lance next argues that the trial court erred in admitting Casey Silvers's expert testimony because the court failed to conduct a proper

reliability analysis under Rule 702 of the Rules of Evidence and because Silvers's testimony was based on an unreliable method.

¶ 27 A trial court's ruling to admit expert testimony under Rule 702 "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). A trial court "may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* "Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, but instead to decide whether the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 899, 787 S.E.2d at 15 (citation omitted).

¶ 28 Lance first asserts that the trial court "failed to conduct a proper analysis under Rule 702" because, despite "purporting to apply the three-part reliability test" in Rule 702, "the trial court's ruling shows that it only considered the first prong, but not the second or third." Thus, Lance argues, the trial court "failed to properly perform—and abdicated—its gatekeeping function, manifesting an abuse of discretion."

¶ 29 Under Rule 702, expert testimony must meet a three-pronged reliability test: (1) the testimony must be based upon sufficient facts or data; (2) the testimony must be the product of reliable principles and methods; and (3) the witness must have applied the principles and methods reliably to the facts of the case. N.C. R. Evid. 702(a)(1)–(3); *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. "The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability . . . it enjoys when it decides whether that expert's relevant testimony is reliable." *Id.* "Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3)." *Id.* at 892, 787 S.E.2d at 10.

¶ 30 Here, the trial court heard extensive *voir dire* testimony from Silvers. Silvers testified that he works as a senior fire investigator with a fire investigation firm, where he conducts origin and cause investigations for fires, using the scientific method to determine causation. Silvers stated that he has education and training in the field for more than 15 years and that he has completed various courses in fire investigation, expert testimony, and evidence collection through the National

Fire Academy. He attends yearly seminars and classes on investigations and is regularly tested on his knowledge. He testified that he is a certified fire investigator, teaches classes in arson detection, and has investigated over 800 fires. Silvers went on to describe his process of using the scientific method to investigate a fire by gathering data, analyzing the data, forming hypotheses on possible fire causes, attempting to disprove the hypotheses, and then attempting to confirm any remaining hypotheses. He testified that this method is recommended by the National Fire Protection Association's guidelines.

¶ 31 During questioning from Lance, Silvers testified that he is familiar with the term "negative corpus," which is a method that uses the elimination of accidental causes to conclude that a fire was caused by human agency, and that the negative corpus approach is not consistent with the scientific method. But Silvers clarified that he did not conclude that the fire in this case had an incendiary or human cause, only that he could not rule out the hypothesis of an incendiary cause based on the information gathered in his investigation. Silvers explained that his observations of the fire patterns and other evidence from the fire were indicative of an incendiary fire, which is why he could not exclude that hypothesis. Silvers testified that, even with negative test results for ignitable liquids, an incendiary cause could not be ruled out because there are incendiary sources that would not give a positive result.

¶ 32 Following this testimony, the trial court ruled that, "under the three prong reliability test," it would allow Silvers to testify about his conclusion that he had excluded other causes of the fire "with the exception of an incendiary causation" and that "he can say he excluded other things." The court noted, "I want it very clear that he just basically couldn't exclude that by his scientific means, not that means that's what happened."

¶ 33 In light of the trial record, the trial court's stated reasoning, and the court's express pronouncement that it considered the three reliability factors in Rule 702, we hold that the trial court's ruling was within the court's sound discretion. *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11. Silvers's extensive *voir dire* testimony covered all three prongs of the Rule 702 reliability test, describing in detail the facts and data he collected in conducting his investigation, the principles and methods he applied in accordance with his training and the guidelines for his profession, and the way he applied those principles and methods to the facts of this case to reach his conclusion that he could not exclude an incendiary cause. *See* N.C. R. Evid. 702(a)(1)–(3); *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. The trial court was not required to make detailed findings addressing each prong of Rule 702. The court's statement that

it considered the three-prong analysis is sufficient to show that the trial court understood the applicable standard and exercised its discretion in choosing to admit the testimony under that standard. *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9; *State v. Gray*, 259 N.C. App. 351, 355, 815 S.E.2d 736, 739–40 (2018). Accordingly, we reject Lance's claim that the trial court failed to engage in the appropriate Rule 702 analysis.

¶ 34 Lance also contends that the expert testimony should have been excluded because Silvers used a method, known as the negative corpus approach, that is unscientific and *per se* unreliable. Lance points to portions of the National Fire Protection Association's guidelines cautioning that "determining the ignition source for a fire, by eliminating all ignition sources found, known, or believed to have been present in the area of origin, and then claiming such methodology is proof of an ignition source for which there is no supporting evidence of its existence, is referred to by some investigators as *negative corpus*." NFPA 921, ¶ 19.6.5 (2014 ed.). The guidelines explain that the negative corpus process "is not consistent with the scientific method, is inappropriate, and should not be used." *Id.*

¶ 35 But Silvers testified that he understood the negative corpus approach and its flaws and that he did not rely on negative corpus in reaching his conclusion about the cause of the fire in this case. Silvers testified that he applied the scientific method and process of elimination to rule out various hypotheses on the cause of the fire, in accordance with his profession's guidelines.

¶ 36 Again, the trial court was within its sound discretion to conclude that this testimony was admissible under Rule 702. "Rule 702 does not mandate particular procedural requirements, and its gatekeeping obligation was not intended to serve as a replacement for the adversary system." *Gray*, 259 N.C. App. at 355, 815 S.E.2d at 739–40 (citation omitted). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof continue as the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 355, 815 S.E.2d at 740. Here, there were appropriate means to challenge Silvers's testimony through contrary evidence and cross-examination—for example, by underscoring that Silvers's analysis did not establish causation.

¶ 37 Finally, even assuming the admission of this expert testimony was error—and we are not persuaded that it was—the error was harmless. This court may not order a new trial based on an evidentiary error unless the error was prejudicial, meaning "there is a reasonable possibility

that, had the error in question not been committed, a different result would have been reached at trial." *State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017). Here, the State's evidence showed that Lance purchased an insurance policy shortly before the fire, that there was an unusually low number of personal belongings in the home at the time of the fire, and that Lance had moved many of her personal belongings from the house into a storage unit the day before the fire. Lance also admitted to two family members that she set the fire. In light of this evidence, Lance failed to show a reasonable possibility that, had the expert testimony been excluded, the jury would have reached a different verdict. Id. Accordingly, we find no error in the trial court's admission of the challenged expert testimony.

III. Challenge to jury instructions on insurance fraud

¶ 38 **[3]** Lance next contends that the trial court committed plain error in the jury instructions concerning insurance fraud. Lance argues that the court failed to specify the particular false statement or misrepresentation alleged in the indictment.

¶ 39 Lance concedes that she did not object to the instructions at trial and thus we review this issue solely for plain error. "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). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

¶ 40 A defendant "must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Locklear*, 259 N.C. App. 374, 380, 816 S.E.2d 197, 202 (2018). With respect to the insurance fraud claim, this principle means that the trial court should "instruct the jury on the misrepresentation as alleged in the indictment." *Id.* at 383, 816 S.E.2d at 204. But a "jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury." *Id.*

¶ 41 Here, there is no variance between the allegations in the indictment and the State's evidence at trial. The indictment alleged that Lance provided a false "written and oral statement" to her insurer in which she "claimed that her personal property was destroyed by an accidental

fire." The jury instruction required the jury to determine if Lance's statements about the insurance policy "contained false or misleading information concerning a fact or matter material to the claim," but it did not identify the particular statement alleged in the indictment.

¶ 42 The State's evidence showed that, following the fire, Lance met with an insurance adjuster to provide a recorded statement for her renter's insurance claim in which she told the adjuster she thought the fire was "electrical" and provided an inventory of personal property she claimed was destroyed in the fire. The State contended that these statements were false and that Lance set the fire.

¶ 43 The State did not present any evidence of other false statements Lance made to her insurer aside from those regarding the cause of the fire and the property that was destroyed. Lance asserts that there was evidence of "more than one statement by Ms. Lance the jury could interpret as false or misleading," but all of these statements concerned the alleged destruction of her property through a fire that Lance claims she did not cause. Viewed in context, these statements all fell within the scope of the specific misrepresentation alleged in the indictment that her property was destroyed by an accidental fire. Accordingly, we reject this argument and find no plain error in the trial court's instructions to the jury.

IV. Restitution award

¶ 44 **[4]** Finally, Lance argues that the trial court erred in ordering her to pay $40,000 in restitution without a sufficient evidentiary basis of testimony or documentary evidence to support the amount of restitution ordered. The State concedes error on this issue and we agree.

¶ 45 This Court reviews *de novo* the issue of whether a trial court's restitution order was supported by evidence at trial or sentencing. *State v. Hardy*, 242 N.C. App. 146, 159, 774 S.E.2d 410, 419 (2015). The amount of restitution set by the trial court must be supported by *evidence* at trial. *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). A "restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *Id.* Likewise, an "unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004).

¶ 46 Here, the State informed the trial court that the owner of the house did "not wish to be here for sentencing," but that the State requested $40,000 in restitution. The State presented the trial court with a restitu-

tion worksheet requesting that amount, which the trial court then ordered. The State did not present any testimony or documents to support the requested $40,000 amount except for the worksheet. *See Moore*, 365 N.C. at 285, 715 S.E.2d at 849. We agree with the parties that the restitution award is not supported by sufficient evidence and therefore vacate and remand that portion of Lance's sentence for further proceedings.

Conclusion

¶ 47 For the reasons discussed above, we find no error in the trial court's judgment, but we vacate the trial court's award of restitution and remand for further proceedings on that issue.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges CARPENTER and WOOD concur.

STATE OF NORTH CAROLINA
v.
SHAWN MARTEZ McKOY

No. COA20-452

Filed 1 June 2021

1. Evidence—lay witness identification—surveillance footage—larceny—plain error analysis

In a prosecution for felony larceny, where the State introduced surveillance footage of a man stealing a trailer and where four lay witnesses identified that man as defendant, the trial court erred in admitting three of those identifications into evidence where only one witness was familiar with defendant based on previous dealings with him. However, the court's error did not amount to plain error because it did not have a probable impact on the jury's verdict where other evidence—including the one properly admitted identification, the surveillance footage (which was properly admitted for illustrative purposes), and still images from the footage—indicated defendant's guilt.

2. Larceny—felony larceny—elements—identity of perpetrator—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a felony larceny charge for insufficiency of the evidence, where—

rather than presenting evidence showing only that defendant had an opportunity to steal someone else's trailer—the State presented substantial evidence of each essential element of the crime and of defendant's identity as the perpetrator, including surveillance footage of a man hitching the trailer to his truck and driving away, witness testimony identifying defendant as the man in the footage, and still images placing defendant at the scene of the theft.

3. Damages and Remedies—restitution—felony larceny conviction—defendant's ability to pay

After a jury convicted defendant of felony larceny, the trial court did not abuse its discretion in ordering defendant to pay restitution, pursuant to N.C.G.S. § 15A-1340.36(a), where it properly considered defendant's ability to pay before doing so. The amount of restitution ordered and the terms of its payment reflected the court's reasonable consideration of defendant's financial circumstances, including that he was in prison for another crime (and, therefore, unable to earn a living), had two children to support upon his release, owned zero assets, and planned to go back to trade school once he left jail.

Appeal by Defendant from judgment and order entered 22 May 2019 by Judge Cy A. Grant, Sr., in Franklin County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers and Assistant Attorney General Eric R. Hunt, for the State-Appellee.

The Green Firm, PLLC, by Bonnie Keith Green, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant, Shawn Martez McKoy, appeals a judgment entered upon his conviction of felony larceny and an order for restitution. Defendant argues that the trial court: (1) plainly erred by permitting the State's four witnesses to offer lay opinions identifying an individual depicted in surveillance footage as Defendant; (2) erred by denying Defendant's motion to dismiss for insufficient evidence; and, (3) erred by failing to consider Defendant's ability to pay before ordering restitution. The trial court did not err in admitting one witness' identification of Defendant and did not plainly err in admitting identifications by the other witnesses. Because there was substantial evidence of each element of felony larceny and

Defendant's identity as the perpetrator, the trial court did not err in denying Defendant's motion to dismiss. The trial court did not fail to consider Defendant's ability to pay prior to ordering restitution, and therefore did not abuse its discretion.

I. Procedural History

¶ 2 On 20 February 2017, Defendant was indicted on two counts of felony larceny. Defendant was tried before a jury in Franklin County Superior Court on 21 and 22 May 2019. At the close of the State's evidence, Defendant moved to dismiss both charges for insufficient evidence. The trial court denied Defendant's motion. Defendant did not present any evidence and renewed his motion to dismiss, which the trial court again denied. The jury returned a verdict of guilty on the first count of felony larceny and not guilty on the second count. The trial court sentenced Defendant to 11 to 23 months in prison and ordered Defendant to pay $3,200 in restitution. Defendant gave timely notice of appeal in open court.

II. Factual Background

¶ 3 In August 2016, William Mitchell owned and operated a catering company in Louisburg, North Carolina, adjacent to a Sheetz gas station. Mitchell owned a trailer containing various catering equipment used for his business and stored the trailer on the business's property adjacent to the Sheetz. Mitchell testified that he purchased the trailer near the end of 2014 for "[s]omewhere in the vicinity of $3500."

¶ 4 Mitchell last saw the trailer around 1 August 2016. In the last week of August 2016, he drove past the property and saw that the trailer was gone. He contacted the Louisburg Police Department and Detective Clifford Stephens met with Mitchell at the property.

¶ 5 Stephens examined the lot where the trailer was kept and found no physical evidence other than tire drag marks over a curb. He then requested that Cindy Jackson, a manager at the Sheetz, permit him to access the surveillance footage recorded by the store's multiple cameras. Jackson allowed Stephens to review the footage, and Mitchell joined him. Stephens determined that the trailer was removed on the night of 25 August 2016 and asked Jackson to provide him with recordings taken from multiple cameras during a specific 15-minute time frame ("Sheetz Footage"). Jackson requested the Sheetz Footage from the Sheetz security office, which delivered a DVD containing it to Jackson. Jackson then provided the DVD to Stephens.

¶ 6 Both Mitchell and Stephens took still images of an individual depicted in the Sheetz Footage to show to their contacts. Stephens sent an image to Troy Wheeless, an agent with the North Carolina Department of Motor Vehicles license and theft bureau. Wheeless identified Defendant as the individual in the image. Mitchell also compared a picture of Defendant from a DMV website or other government database with the still that he took from the Sheetz Footage and concluded that Defendant was the individual in the Sheetz Footage.

¶ 7 Mitchell, Jackson, Stephens, and Wheeless each testified for the State at trial. During direct examination of Stephens, the State played multiple portions of the Sheetz Footage for the jury. Mitchell described the Sheetz Footage as showing, at approximately 9:00 p.m. on 25 August: (1) an extended-cab silver truck pulling in to the Sheetz parking lot and parking in front of the store; (2) an individual getting out of the driver's side of the truck and "hesitat[ing] as he appears to look over at the trailer"; (3) that individual, a "black male, average height, average weight, beard, mustache, close cut hair, a red shirt and khaki pants[,]" walking into the entryway of the Sheetz; (4) the individual walking through a hallway to the store's bathroom; (5) the individual returning to the truck, starting it, and beginning to drive off; (6) the truck leaving the Sheetz parking lot, and exiting the view of the cameras, in the direction of the property where the trailer was stored; and, (7) the truck later returning to the view of the cameras and pulling out with the trailer in tow. The video did not show anyone else getting into or out of the truck while it was on the Sheetz property.

¶ 8 At trial, Mitchell, Jackson, Stephens, and Wheeless each identified the individual depicted in the Sheetz Footage as Defendant. Defendant raised only a general objection to the identification by Jackson and did not object to the identifications by the other three witnesses.

¶ 9 The jury found Defendant guilty of larceny of the trailer, but not guilty of larceny of the catering equipment within the trailer. The trial court entered judgment and ordered restitution. Defendant appeals.

III. Discussion

A. Lay Witness Identifications

¶ 10 **[1]** Defendant argues that the trial court erred by permitting the State's witnesses to give lay opinion testimony identifying Defendant as the individual pictured in the Sheetz Footage.

¶ 11 Defendant acknowledges that he raised only a general objection to the identification by Jackson and did not object to the identifications by

Mitchell, Stephens, and Wheeless. As Defendant concedes, the issue of whether the identifications were properly admitted is not preserved for appellate review. See N.C. R. App. P. 10(a)(1) ("[I]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996) ("A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence.").

¶ 12 Notwithstanding Defendant's failure to properly preserve this issue, because Defendant specifically and distinctly contends that the admission of the identifications amounted to plain error, we will review the trial court's admission of the identifications for plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

¶ 13 "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). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). The plain error rule "is always to be applied cautiously and only in the exceptional case . . . ." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (citation omitted).

¶ 14 "Under the North Carolina Rules of Evidence, the jury is charged with determining what inferences and conclusions are warranted by the evidence." *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009) (citation omitted). "Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). A lay witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2019).

¶ 15 A lay witness may not give an opinion as to the identity of an individual depicted in surveillance images where the witness is "in no better

position than the jury to identify [the defendant] as the person in the surveillance [images] . . . ." *State v. Belk*, 201 N.C. App. 412, 414, 689 S.E.2d 439, 441 (2009). In determining whether a lay witness is sufficiently qualified to give an opinion on the identity of a person depicted in surveillance images, we consider (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's specific familiarity with the defendant's appearance at the time the surveillance was taken, or at a time when the defendant was dressed in a similar manner to the individual in the surveillance; (3) whether the defendant had disguised his appearance at the time of the offense; (4) whether the defendant had altered his appearance before trial; and (5) the clarity of the surveillance images and the completeness with which the individual was depicted. *State v. Hill*, 247 N.C. App. 342, 346, 785 S.E.2d 178, 181-82 (2016); *State v. Collins*, 216 N.C. App. 249, 256, 716 S.E.2d 255, 260 (2011).

¶ 16 At trial, only Wheeless indicated that he had a general familiarity with Defendant. Wheeless testified that he was "familiar with" Defendant, had "previous dealings" with Defendant, and had "been in his personal presence[,]" even though "[p]robably weeks" had passed between the last time Wheeless saw Defendant and the day he identified Defendant in the still image provided by Stephens. Mitchell, Jackson, and Stephens each had no familiarity with Defendant's appearance prior to seeing him in the Sheetz Footage. Mitchell testified that he did not know Defendant, nor did he have any contact with Defendant after the trailer was taken. Stephens testified that he had not seen Defendant in person prior to trial. Jackson offered no testimony indicating that she was familiar with Defendant.

¶ 17 None of the State's witnesses testified to their specific familiarity with Defendant's appearance at the time the trailer was taken, or with his appearance when dressed in a manner similar to the individual depicted in the Sheetz Footage. No evidence was presented that the individual in the Sheetz Footage had used a disguise, or that Defendant had altered his appearance between 25 August 2016 and trial. Finally, there is no indication of any defect in the clarity of the Sheetz Footage, and there are multiple instances in which the footage shows the individual in his entirety as he walks through the view of the store's cameras.

¶ 18 The admissibility of Wheeless's testimony is controlled by this Court's decision in *State v. Collins*. In that case, the defendant argued that the trial court plainly erred by admitting an officer's lay opinion identifying the defendant as the person depicted in a surveillance video. *Collins*, 216 N.C. App. at 254, 716 S.E.2d at 259. The officer testified only

that he "had had dealings" with the defendant. *Id.* at 256, 716 S.E.2d at 261. This Court stated that "[w]e believe 'dealings' mean more than minimal contacts . . . however, we do note defense counsel could have questioned these 'dealings,' if so desired." *Id.* at 257, 716 S.E.2d at 261. Based on the officer's testimony concerning "dealings" with the defendant, this Court concluded that the officer "was familiar with defendant and would be in a better position than the jury to identify defendant in the videotape." *Id.*

¶ 19 Similarly, Wheeless testified that he had "previous dealings" with Defendant. Wheeless also testified that he was "familiar with" Defendant and had "been in his personal presence[.]" Defendant did not question the basis of Wheeless's claimed familiarity or the scope of these "dealings" on cross examination. Accordingly, Wheeless was qualified to give lay opinion testimony identifying the individual in the Sheetz Footage as Defendant. The admission of Wheeless's testimony was not error, let alone plain error.

¶ 20 No evidence, however, supported a conclusion that Mitchell, Jackson, or Stephens were qualified to provide lay opinion testimony identifying Defendant as the individual in the Sheetz Footage. The trial court erred by admitting their identifications of Defendant.

¶ 21 Defendant contends that but for these erroneous identifications, "there was no evidence that [Defendant] committed the crime or was at the Sheetz store, and the jury likely would not have convicted him." We disagree.

¶ 22 Defendant emphasizes that the trial court "instructed the jury that the video and screen shots were admitted only for the purpose of illustrating and explaining the witnesses' testimony." The DVD containing the Sheetz Footage was admitted "generally into evidence" by the trial court. The trial court instructed the jury, however, that "[p]hotographs and a video were introduced into evidence in this case for the purpose [of] illustrating and explaining the testimony of a witness. These photographs and video may not be considered by you for any other purpose." Nonetheless, as discussed above, Wheeless's identification of Defendant was based on his prior familiarity with Defendant and was properly admitted. The jury was permitted to consider the Sheetz Footage as illustrative of Wheeless's identification and assess the accuracy of Wheeless's identification.

¶ 23 Additionally, the State introduced several still images for the jury's consideration. Among these were State's Exhibit 5, "a picture of a gentlemen [sic] at the men's and women's restroom," and State's Exhibit 7, a

known photograph of Defendant in 2014 taken from a DMV or other government database. During examination of both Stephens and Wheeless, State's Exhibit 5 and State's Exhibit 7 were published to the jury simultaneously. The jurors therefore had an opportunity to compare the images and draw their own conclusion as to whether Defendant was the individual in the Sheetz.

¶ 24 Because the admission of Wheeless's identification was not erroneous, the Sheetz Footage illustrated Wheeless's identification and permitted the jury to assess its accuracy, and the jury had the opportunity to draw its own conclusions based on still images admitted into evidence, we cannot conclude that the erroneous admission of identifications by Mitchell, Stephens, and Jackson "had a probable impact on the jury's finding that the [D]efendant was guilty." *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Consequently, Defendant cannot demonstrate prejudice, and the erroneous admission of these identifications did not amount to plain error.

B. Sufficiency of the Evidence

¶ 25 **[2]** Defendant next argues that the trial court erred by denying his motion to dismiss because the evidence was insufficient to support his conviction for felony larceny. We review 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 deciding whether substantial evidence exists[, t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Hill, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

¶ 26 Defendant was convicted of felony larceny of the trailer under N.C. Gen. Stat. § 14-72(a). "The essential elements of larceny are that the defendant '(1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently.' " *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019) (quoting *State v. Reid*, 334 N.C. 551, 558, 434 S.E.2d 193, 198 (1993)). "Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony." N.C. Gen. Stat. § 14-72(a) (2016).

¶ 27 Defendant argues that the evidence admitted at trial "established only that [Defendant] was in the Sheetz store" and that "[t]here was insufficient evidence to support an inference that the individual depicted in the Sheetz surveillance video is the person who stole the trailer." We disagree.

¶ 28 During the State's case in chief, the trial court admitted the Sheetz Footage into evidence, and the State played multiple clips of the footage.[1] Mitchell and Stephens extensively narrated the contents of these clips without objection. As discussed above, each of the State's witnesses identified Defendant as the individual in the Sheetz Footage. Though three of these identifications were erroneously admitted, they are still relevant in assessing a motion to dismiss. *See Hill*, 365 N.C. at 275, 715 S.E.2d at 843, (requiring the court, for purposes of a motion to dismiss for insufficient evidence, to consider "all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State"). Additionally, the trial court admitted State's Exhibit 5, a still image taken from the Sheetz Footage showing the suspect outside of the Sheetz bathroom, and State's Exhibit 7, a known image of Defendant.

¶ 29 The evidence admitted at trial, viewed in the light most favorable to the State, and giving the State the benefit of every reasonable inference, tended to show: Mitchell purchased his catering trailer for approximately $3,500 in 2014. Mitchell parked the trailer on a lot next to a Sheetz gas station in Louisburg, North Carolina. Mitchell last saw the trailer around 1 August 2016. On the night of 25 August 2016, an extended-cab silver truck pulled up to the front of the Sheetz. Defendant exited the truck, walked into the Sheetz, and went into the bathroom. After a few minutes, Defendant returned to the truck. Defendant drove the truck towards the exit of the Sheetz parking lot, braked, and backed up to the

1. The trial court was consequently permitted to consider the Sheetz Footage in ruling on Defendant's motion to dismiss, despite the subsequent inconsistent instruction that the jury was to consider the Sheetz Footage only for illustrative purposes.

adjacent property where Mitchell's trailer was parked. A few minutes later, Defendant drove the truck away with the trailer in tow.

¶ 30 Defendant argues that the evidence cannot support his felony larceny conviction because it shows only that Defendant had the opportunity to take the trailer. It is true "that a conviction cannot be sustained if '[t]he most the State has shown is that defendant had been in an area where he could have committed the crimes charged.' " *Campbell*, 373 N.C. at 221, 835 S.E.2d at 848 (quoting *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976)). But crediting the in-court identifications and giving the State the benefit of every reasonable inference, a rational juror could conclude that Defendant was the sole occupant and driver of the truck and, without Mitchell's consent, hitched Mitchell's trailer—valued at over $1,000—to the truck and drove away with the trailer in tow, intending to deprive Mitchell of it permanently. Accordingly, substantial evidence of each element of felony larceny and Defendant's identity as the perpetrator was presented. The trial court did not err by denying Defendant's motion to dismiss.

C. Restitution Order

¶ 31 **[3]** Defendant argues that the trial court erred in ordering restitution because it failed to consider Defendant's ability to pay. Though Defendant did not object to the award of restitution before the trial court, "a defendant's failure to specifically object to the trial court's entry of an award of restitution does not preclude appellate review." *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777-78 (2010) (citations omitted); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (2019).

¶ 32 "When sentencing a defendant convicted of a criminal offense, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question." N.C. Gen. Stat. § 15A-1340.34(a) (2019).

> In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters.

N.C. Gen. Stat. § 15A-1340.36(a) (2019).

¶ 33 "A trial court's judgment ordering restitution must be supported by evidence adduced at trial or at sentencing." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (quotation marks and citation omitted). "[T]he award does not have to be supported by specific findings of fact or conclusions of law, and the quantum of evidence needed to support the award is not high. Rather, when there is some evidence that the amount awarded is appropriate, it will not be overruled on appeal." *State v. Hillard*, 258 N.C. App. 94, 97, 811 S.E.2d 702, 704 (2018) (citations omitted). "Whether the trial court properly considered a defendant's ability to pay when awarding restitution is reviewed by this Court for abuse of discretion." *Id.* at 98, 811 S.E.2d at 705.

¶ 34 During trial, Mitchell testified that he had paid "[s]omewhere in the vicinity of $3500" for the trailer. The trial court was also informed, prior to ordering restitution, that Defendant was near the end of an active sentence and therefore unable to currently earn, Defendant has two children to support upon his release, and Defendant "plan[s] to go back to school and get a trade once he leaves from custody." Defendant also filed an affidavit of indigency reflecting that he was in custody and had zero assets and zero liabilities as of 22 May 2019.

¶ 35 Given the information presented to the trial court, the amount of restitution ordered, and the terms of its payment, the trial court did not fail to consider Defendant's financial resources as required by section 15A-1340.36(a) and thus, did not abuse its discretion. *See State v. Tate*, 187 N.C. App. 593, 597-98, 653 S.E.2d 892, 896 (2007) (finding sufficient consideration of defendant's financial resources where the trial court was presented with an affidavit of indigency and "was aware of defendant's age, employment situation, and living arrangements"); *State v. Person*, 187 N.C. App. 512, 531, 653 S.E.2d 560, 572 (2007) (The "relatively modest amount of restitution and the terms of its payment are not such as to lead to a 'common sense' conclusion that the trial court did not consider defendant's ability to pay."), *rev'd on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008).

IV. Conclusion

¶ 36 Because Wheeless had general familiarity with Defendant, the trial court did not err in permitting him to identify Defendant as the individual depicted in the Sheetz Footage. Though the trial court erred in permitting the State's other three witnesses to identify Defendant, in light of the other evidence presented, the trial court did not plainly err. The trial

court did not err in denying Defendant's motion to dismiss, and did not abuse its discretion in ordering Defendant to pay restitution.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges TYSON and CARPENTER concur.

ESTATE OF ANTHONY FAZZARI BY RUTH FAZZARI, EXECUTRIX; AND RUTH FAZZARI, PLAINTIFFS

v.

NEW HANOVER REGIONAL MEDICAL CENTER; WILMINGTON HEALTH, PLLC; SEJAL S. PATEL, M.D. AND JOSHUA D. DOBSTAFF, M.D., DEFENDANTS

No. COA20-473

Filed 1 June 2021

Medical Malpractice—pleadings—Rule 9(j)—standard-of-care expert—active clinical practice or instruction—review of all medical records

In a wrongful death case, where defendant doctors knew about decedent's low blood platelet count when he was hospitalized but neither discontinued his Heparin prescription (which can reduce one's platelet count) nor did anything else to mitigate the issue, the trial court properly dismissed plaintiffs' complaint under Civil Procedure Rule 9(j). Plaintiffs could not have reasonably expected their proffered expert to qualify as a standard-of-care expert under Evidence Rule 702(b)(2) where, in the year prior, the expert worked as a medical director of a community blood center, and therefore had not devoted a majority of his time to active clinical practice or the instruction of students in the same or similar health profession as defendants. Further, the expert only reviewed twenty-five percent of decedent's relevant medical records, which did not include records from the five days leading up to decedent's death.

Appeal by plaintiffs from orders entered 7 January 2020 and 13 January 2020 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 28 April 2021.

Chleborowicz Law Firm, PLLC, by Christopher A. Chleborowicz and Elijah A. T. Huston, for plaintiffs-appellants.

Harris, Creech, Ward & Blackerby, P.A., by R. Brittain Blackerby and Terra N. Johnson, for defendant-appellee New Hanover Regional Medical Center.

Walker, Allen, Grice, Ammons, Foy & Klick, LLC, by Jerry A. Allen, Jr., and Louis F. Foy, III, for defendants-appellees Wilmington Health, PLLC, Sejal S. Patel, M.D., and Joshua D. Dobstaff, M.D.

ARROWOOD, Judge.

¶ 1 The Estate of Anthony Fazzari by Ruth Fazzari, Executrix, and Ruth Fazzari (collectively, "plaintiffs") appeal from the trial court's orders granting all defendants'[1] (1) motions to dismiss; (2) motions to exclude plaintiffs' sole testifying and standard-of-care expert witness; and (3) summary judgment motions. For the following reasons, we affirm the trial court's order entered 7 January 2020 granting defendants' motions to dismiss pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure.

I. Background

¶ 2 At all times relevant, Anthony Fazzari ("decedent") was a 77-year-old man with a history of multiple myeloma and myelodysplastic syndrome. Decedent had been periodically admitted to defendant New Hanover Regional Medical Center ("NHRMC") for neutropenic fever and other complications related to multiple myeloma and myelodysplastic syndrome.

¶ 3 On 12 April 2016, NHRMC admitted decedent to the care of defendant Sejal S. Patel, M.D. ("Dr. Patel"), who noted that decedent presented signs of neutropenic fever and had the condition of "pancytopenia: chronic"—too few red blood cells, white blood cells, and platelets. Dr. Patel prescribed decedent 5,000 units of Heparin[2] every eight hours as a deep vein thrombosis ("DVT") prophylactic.[3] Defendant Joshua D. Dobstaff, M.D. ("Dr. Dobstaff"), another provider for decedent at the time, was allegedly aware of decedent's depressed platelet count but

1. We will refer to all named defendants collectively unless otherwise noted.

2. Heparin may reduce one's platelet count.

3. Plaintiffs allege that at the time of decedent's admission, his platelet count was "depressed indicating that Heparin as a DVT prophylaxis was an inappropriate course of treatment, particularly in light of pending chemotherapy which would further depress platelet counts."

did not take any action to mitigate the issue. At all times relevant, Drs. Dobstaff and Patel were employed by defendant Wilmington Health, PLLC, and practicing as hospitalists when they provided inpatient care to decedent at NHRMC.

¶ 4 On the evening of his admission, blood testing indicated that decedent's platelet count was 24 K/uL, far below NHRMC's target level of 50 K/uL. Given decedent's low platelet count, a secure electronic message was sent to David Schultz, M.D. ("Dr. Schultz"), regarding "critical lab value – Platelets 24" and for "review case."[4] Notwithstanding the above, decedent was administered the previously prescribed dose of Heparin later that night. Thereafter, at 5:44 a.m. on 13 April 2016, decedent's platelet count had dropped from 24 K/uL to 18 K/uL. Notwithstanding this decrease, the orders for Heparin were not discontinued. Plaintiffs allege that after reviewing the lab results reflecting the decrease in decedent's platelet count, neither Dr. Dobstaff nor Dr. Patel changed any orders (including the Heparin prescription) and failed to take any other action to restore decedent's platelet count to target level. However, during the afternoon of 13 April 2016, a nurse refrained from administering the scheduled dose of Heparin noting in decedent's medical record that his platelet count was 18 K/uL.

¶ 5 At 3:42 a.m. on 14 April 2016, decedent's blood was again collected, and his platelet count was determined to be 20 K/uL. Shortly thereafter, decedent complained of a headache and requested medication. In light of these events, a NHRMC care provider sent another secured message to Dr. Schultz stating that decedent appeared confused, impulsive, disoriented, and was exhibiting slurred speech. It is unclear whether Dr. Schultz or any other hospitalists responded to or received these messages; plaintiffs allege that NHRMC did not have the correct information on file for these secure electronic messages which prevented the listed physician in the system from receiving the messages as he or she was not on call to receive or respond to the communications.

¶ 6 Later, a physician's assistant was notified about decedent's deteriorating condition. The Heparin order was discontinued approximately two hours later, around noon on 14 April 2016, and platelet therapy was initiated. After the initiation of platelet therapy, decedent began showing signs of stroke with a diagnosis of Acute Brain Hemorrhage or Intracerebral Hemorrhage ("ICH"). A computerized tomography scan was ordered, and the imaging confirmed that decedent was suffering

4. Dr. Schultz is not a defendant in this case. Also, it is unclear whether there was any response to this secure electronic message.

from an ICH. While decedent's platelet count had improved from the platelet therapy and blood transfusions, decedent was not an operative candidate for the ICH pressure. Decedent was then transferred to the Intensive Care Unit ("ICU") where he was treated until 20 April 2016, when decedent eventually succumbed to the ICH.

¶ 7 On 21 September 2017, plaintiffs filed a complaint against all defendants asserting claims for (1) professional negligence/wrongful death, (2) negligent infliction of emotional distress, and (3) loss of consortium. Pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, plaintiffs certified that all of the medical records pertaining to defendants' negligence had been reviewed by a person who was reasonably expected to qualify under Rule 702 of the North Carolina Rules of Evidence.

¶ 8 On 30 May 2018, plaintiffs served responses to NHRMC's interrogatories. Plaintiffs' responses identified Arnold Rubin, M.D. ("Dr. Rubin"), as plaintiffs' Rule 9(j) expert. On 2 July 2019, plaintiffs served their designation of experts; plaintiffs' designation of experts likewise identified Dr. Rubin as plaintiffs' sole Rule 9(j) expert.

¶ 9 Defendants deposed Dr. Rubin on 5 November 2019. Following Dr. Rubin's deposition, defendants Wilmington Health, PLLC, Dr. Patel, and Dr. Dobstaff filed a motion to exclude Dr. Rubin from testifying as a standard-of-care expert pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, Rule 702 of the North Carolina Rules of Evidence, N.C. Gen. Stat. § 90-21.12, and other applicable law. These same defendants contemporaneously filed a motion to dismiss pursuant to "Rule 9, Rule 12, Rule 37, Rule 41 and Rule 56 of the North Carolina Rules of Civil Procedure" on the grounds that plaintiffs "failed to comply with the requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure." NHRMC filed practically identical motions on 25 September 2019. The trial court heard oral argument on all motions on 2 December 2019.

¶ 10 Following the hearing, the trial court took the motions under advisement and subsequently granted all motions by entering the following orders: (1) "Order Granting Motions of All Defendants to Dismiss Pursuant to Rule 9(j)" on 7 January 2020; (2) "Order Granting Motions of All Defendants to Exclude Plaintiff's Standard of Care Expert Witness Dr. Arnold Rubin" on 13 January 2020; and (3) "Order Granting Motions of All Defendants for Summary Judgment" on 13 January 2020. Plaintiffs filed a notice of appeal of all three orders on 28 January 2020.

¶ 11 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

A. Rule 9(j) Certification

¶ 12 Because compliance with Rule 9(j) presents a question of law, this Court reviews whether the trial court properly dismissed a complaint under Rule 9(j) *de novo*. *Est. of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012) (citation omitted).

¶ 13 In a medical malpractice suit, a "plaintiff must show (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998) (citation omitted). "Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony." *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003) (citations omitted).

¶ 14 Rule 702 of the North Carolina Rules of Evidence governs the admission of expert testimony and states that a medical expert witness may qualify to give expert testimony as to the appropriate standard of care only if the person (1) is a licensed health care provider; (2) specializes in the same specialty or similar specialty as the party against whom the testimony is offered; and (3) during the year immediately preceding the date of the occurrence that is the basis for the action, devoted a majority of his time to the active clinical practice of the same health profession in which the party against whom the testimony is offered or the instruction of students in the same health profession in which the party against whom the testimony is offered. N.C. R. Evid. 702(b)(1)-(2). When the requirements of Rule 702 are satisfied, the trial court must then determine whether the expert is "familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources." *Barham v. Hawk*, 165 N.C. App. 708, 712, 600 S.E.2d 1, 4 (2004) (citation and quotation marks omitted) (quoting another source).

¶ 15 Rule 9(j) of the North Carolina Rules of Civil Procedure requires that any complaint alleging medical malpractice by a health care provider that fails to comply with the applicable standard of care shall be dismissed unless:

> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care . . . .

N.C. R. Civ. P. 9(j)(1). Failure to adhere to the strict expert requirements set out in Rule 9(j) necessarily leads to dismissal. *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002). Moreover, it is well settled that "even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008).

¶ 16 In the case at hand, plaintiffs could not have reasonably expected Dr. Rubin to qualify as an expert witness under Rule 702 such that he could proffer testimony that the medical care provided to decedent did not comply with the applicable standard of care. *See* N.C. R. Civ. P. 9(j)(1). Rule 9(j) incorporates by reference Rule 702(b) of the North Carolina Rules of Evidence, which permits a medical expert witness to give expert testimony as to the appropriate standard of care only if the person (1) is a licensed health care provider; (2) specializes in the same specialty or similar specialty as the party against whom the testimony is offered; and (3) during the year immediately preceding the date of the occurrence that is the basis for the action, devoted a majority of his time to the active clinical practice or the instruction of students in the same health profession in which the party against whom the testimony is offered. N.C. R. Civ. P. 9(j)(1); N.C. R. Evid. 702(b)(1)-(2). Per Rule 702(b), the appropriate standard of care to which the expert must reasonably be expected to testify is defined in N.C. Gen. Stat. § 90-21.12, which provides the following:

> [I]n any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession

> with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action; or in the case of a medical malpractice action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12(a) (2019). Thus, plaintiffs must not only reasonably expect the putative expert witness to qualify under Rule 702(b), but they must also reasonably expect the witness to be able to testify as to the applicable standard of care set out in N.C. Gen. Stat. § 90-21.12(a). While the putative expert is not required to have practiced in the same community as defendant, the "witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities." *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672 (citations omitted).

¶ 17 Here, plaintiffs could not have reasonably expected Dr. Rubin to qualify as an expert in this medical malpractice case for at least two reasons. We discuss each issue in turn.

B. Rule 702(b)(2) of the North Carolina Rules of Evidence

¶ 18 First, plaintiffs could not have reasonably believed that during the year immediately preceding the date of the occurrence that is the basis for this action, Dr. Rubin devoted a majority of his professional time to the active clinical practice of the same or similar health profession of Drs. Patel and Dobstaff (Internal and Hospitalist Medicine). Nor could plaintiffs have reasonably believed that from April 2015 to April 2016, Dr. Rubin devoted a majority of his professional time to the instruction of medical students or residents in Internal and Hospitalist Medicine. During his November 2019 deposition, Dr. Rubin confirmed that he retired from active clinical practice in 2013 and became a professor *emeritus* at Rutgers University thereafter. His teaching responsibilities included a monthly lecture to fellows training in hematology and oncology, one yearly lecture to first-year medical students, and "occa-

sional lectures to other students[.]" Notwithstanding the value of these teachings, it is clear that during the year immediately preceding the date of the occurrence that is the basis for this action (*i.e.*, April 2016), Dr. Rubin did not devote a majority of his professional time to the active clinical practice of the same or similar health professions of Drs. Patel and Dobstaff or to the instruction of medical students or residents in the same or similar specialty areas as Drs. Patel and Dobstaff. Indeed, in the year preceding the events giving rise to this action, Dr. Rubin served as the medical director of a community blood center—a non-teaching position. Thus, it is clearly evident that Dr. Rubin did not devote a majority of his professional time to the instruction of *any* students or residents during the year preceding this case. In short, the trial court properly dismissed plaintiffs' complaint pursuant to Rule 9(j) as plaintiffs could not have reasonably expected Dr. Rubin to satisfy the requirement of Rule 702(b)(2) that he devote a majority of his professional time to the active clinical practice or instruction of students or residents in the same or similar health professions as Drs. Patel and Dobstaff. Because Dr. Rubin does not meet the practice-instruction requirement, we need not address the remaining requirements of Rule 702.

C. Review of Medical Records

¶ 19 In addition to plaintiffs' expert's failure to satisfy Rule 702(b)(2), the Rule 9(j) certification is defective in at least one other respect. Rule 9(j) requires certification in the operative pleading that "all medical records pertaining to the alleged negligence . . . have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 . . . ." N.C. R. Civ. P. 9(j)(1). Plaintiffs' putative expert, Dr. Rubin, admittedly reviewed only twenty-five percent of the relevant medical records related to decedent's April 2016 admission at NHRMC. It is undisputed that Dr. Rubin examined only the medical records related to decedent's admission at NHRMC between 12 April 2016 and 14 April 2016. He did not review any medical records for treatment and care between 15 April 2016 and 20 April 2016, the date of decedent's death, although such documents were available to plaintiffs. Therefore, the trial court properly ruled that plaintiffs failed to comply with Rule 9(j). *See Fairfield v. WakeMed*, 261 N.C. App. 569, 574, 821 S.E.2d 277, 281 (2018) ("Allowing a plaintiff's expert witness to selectively review a mere portion of the relevant medical records would run afoul of the General Assembly's clearly expressed mandate that the records be reviewed in their totality. Rule 9(j) simply does not permit a case-by-case approach that is dependent on the discretion of the plaintiff's attorney or her proposed expert witness as to which of the available records falling within the ambit of the Rule are most relevant.").

¶ 20 Moreover, we disagree with plaintiffs' assertion that medical records dated after 14 April 2016 do not "pertain to the alleged negligence." Plaintiffs aver in their September 2017 complaint that after 14 April 2016, decedent's platelet count "improved significantly with the platelet therapy and blood transfusions." Plaintiffs assert that after 14 April 2016, decedent was treated in the ICU with platelet therapy and medications until his death on 20 April 2016. Certainly records reflecting any actions taken by defendants or their agents in the days after the discontinuation of Heparin and the days before decedent's death would be highly relevant and important to an expert's opinion on the matter. Thus, we find that medical records from 14 April 2016 through 20 April 2016 are highly relevant and material to the alleged negligence. Because said records were not reviewed by Dr. Rubin, we affirm the trial court's conclusion that plaintiffs failed to satisfy the substantive pre-filing requirement of Rule 9(j) that Dr. Rubin review all medical records pertaining to the alleged negligence that were reasonably available to plaintiffs.

¶ 21 Because plaintiffs could not have reasonably believed that Dr. Rubin would qualify to testify as an expert under Rule 702 as he had not been actively practicing or teaching in the year prior to his designation, and because Dr. Rubin failed to review all medical records pertaining to the alleged negligence that were available to plaintiffs, and in light of the fact that Dr. Rubin was plaintiffs' sole expert witness, the trial court properly dismissed plaintiffs' complaint pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. *See Smith*, 159 N.C. App. at 197, 582 S.E.2d at 673 (holding that exclusion of sole expert witness rendered plaintiff unable to establish essential element of malpractice claim and thus warranted judgment in favor of defendants).[5]

III. Conclusion

¶ 22 For the foregoing reasons, we affirm the trial court's order entered 7 January 2020 dismissing plaintiffs' complaint for failure to comply with the provisions of Rule 9(j) of the North Carolina Rules of Civil Procedure.

AFFIRMED.

Judges DILLON and WOOD concur.

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5. In light of our holding affirming the Rule 9(j) dismissal, we need not reach plaintiffs' remaining arguments nor review the trial court's additional orders.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 JUNE 2021)

ASCENDUM MACH., INC. v. KALEBICH 2021-NCCOA-238 No. 20-579	Mecklenburg (19CVS9596)	Affirmed
BRADLEY v. CITY OF FAYETTEVILLE 2021-NCCOA-239 No. 20-525	Cumberland (19CVS4382)	Affirmed
CHEEK-TAROUILLY v. STANHISER 2021-NCCOA-240 No. 20-150	Durham (19CVD500121)	Affirmed
FAM. INNOVATIONS, LLC v. CARDINAL INNOVATIONS HEALTHCARE SOLUTIONS 2021-NCCOA-241 No. 20-681	Mecklenburg (19CVS1265)	Affirmed
FRENCH-DAVIS v. THE SHOPS AT CAMERON PLACE, LLC 2021-NCCOA-243 No. 20-664	Lee (18CVS431)	Affirmed
IN RE A.L.P. 2021-NCCOA-244 No. 20-629	Yancey (19JB30)	Reversed and Remanded
IN RE N.B. 2021-NCCOA-245 No. 21-38	McDowell (15JA41) (18JA12) (18JA51)	Vacated and Remanded
IN RE N.C. 2021-NCCOA-246 No. 21-54	Wayne (20JA36)	Affirmed.
IN RE N.L.G. 2021-NCCOA-247 No. 21-56	Alexander (20JB4)	Reversed and Remanded
IN RE W.A. 2021-NCCOA-248 No. 20-808	Cumberland (18JA191)	Affirmed

PISTONE v. HELBERG 2021-NCCOA-249 No. 20-484	Iredell (15CVD2107)	Dismissed
POSTAL v. KAYSER 2021-NCCOA-250 No. 20-623	Buncombe (18CVS5034)	Affirmed
RADCLIFFE v. AVENEL HOMEOWNERS ASS'N, INC. 2021-NCCOA-251 No. 20-123	New Hanover (13CVS1073)	Affirmed
SOLOMON v. CUNDIFF 2021-NCCOA-252 No. 20-489	Rowan (19CVS1529)	Affirmed
STATE v. ALEXANDER 2021-NCCOA-253 No. 20-315	Haywood (19CRS204-205)	No Error
STATE v. DILLARD 2021-NCCOA-254 No. 20-631	Rowan (18CRS50589-91) (18CRS50608) (18CRS50733) (18CRS50740)	Affirmed.
STATE v. FINNEY 2021-NCCOA-255 No. 20-354	Cleveland (18CRS595)	No Error
STATE v. FLOYD 2021-NCCOA-256 No. 20-454	Cumberland (17CRS061578)	No Error.
STATE v. McKOY 2021-NCCOA-257 No. 20-582	Robeson (15CRS51892)	NO ERROR IN PART; VACATED IN PART.
STATE v. MILTON 2021-NCCOA-258 No. 20-414	Forsyth (18CRS55756)	No Error
STATE v. O'NEAL 2021-NCCOA-259 No. 20-375	Pitt (15CRS57830)	No Error
STATE v. PHIFER 2021-NCCOA-260 No. 20-630	Davidson (16CRS55047-48)	Dismissed

STATE v. RAMIREZ 2021-NCCOA-261 No. 20-504	Moore (19CRS458) (19CRS50659)	REVERSED IN PART AND VACATED IN PART.
STATE v. TAYLOR 2021-NCCOA-262 No. 20-509	Wilson (18CRS51704)	AFFIRMED IN PART, DISMISSED IN PART.
STATE v. WILLIAMS 2021-NCCOA-263 No. 20-424	Johnston (19CRS52193-94)	No plain error in part; No error in part.
WILLIAMS v. REARDON 2021-NCCOA-264 No. 20-450	Mecklenburg (18CVS15898)	Affirmed

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