247 N.C. App.—No. 1 Pages 1-248

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 16, 2018

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
DONNA S. STROUD
ROBERT N. HUNTER, JR.
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
WENDY M. ENOCHS[1]
PHIL BERGER, JR.[2]
HUNTER MURPHY[3]
JOHN S. ARROWOOD[4]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[5]
J. DOUGLAS McCULLOUGH[6]

[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2017 [4]Appointed 24 April 2017
[5]Retired 31 December 2016 [6]Retired 24 April 2017

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

COURT OF APPEALS

CASES REPORTED

FILED 19 APRIL 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

children's private school tuition was irrelevant to their present ability to pay in a child support action where the father was ordered to continue paying private school tuition for his children. The trial court's findings, binding on appeal, were specific enough to support the conclusion that plaintiff was capable of paying his children's tuition. **Smith v. Smith, 135.**

Child Custody and Support—prospective support award—findings—no mention of defendant's inheritance—remanded—A prospective child support award was remanded where the trial court's findings lacked any mention of defendant's inheritance. Without specific findings of fact addressing this inheritance, the Court of Appeals could not determine whether the trial court gave due regard to the factors enumerated in N.C.G.S. § 50-13.4(c). **Smith v. Smith, 135.**

Child Custody and Support—retroactive—findings—An order for retroactive child support was remanded for recalculation where there was an inconsistency in the trial court's findings. **Smith v. Smith, 135.**

Child Custody and Support—retroactive child support—change of custodial arrangement—corresponding findings of fact—The trial court did not err in a child support case in its award of retroactive child support where plaintiff argued that a change in the custodial arrangement meant that some of defendant's evidence about expenditures did not reflect amounts spent after that time, but defendant testified repeatedly to the static nature of the shared and individual expenses of her children and that she had taken into account any increase or decrease that may have occurred. The trial court made corresponding findings of fact. **Smith v. Smith, 135.**

Child Custody and Support—retroactive child support—partial payment—basis—The trial court erred in a child support action by ordering defendant to pay 25 percent of the children's school tuition without making findings explaining its basis for the 25 percent figure. **Smith v. Smith, 135.**

Child Custody and Support—retroactive private school tuition—UTMA accounts—The trial court did not err in a child support action by ordering plaintiff to pay retroactive private school tuition to defendant where at least some of the money was paid by defendant from the children's Uniform Transfers to Minors Act (UTMA) accounts. The trial court ordered that defendant reimburse the UTMA accounts upon receipt of the child support award from plaintiff. **Smith v. Smith, 135.**

Child Custody and Support—retroactive support—inconsistent testimony—other supporting evidence—The trial court did not err when ordering retroactive child support where plaintiff argued that defendant's testimony had been inconsistent and skewed, but the inconsistency went to credibility, and evidence before the trial court otherwise established the subject of the evidence. **Smith v. Smith, 135.**

Child Custody and Support—shared custody—evidence and findings—Challenged findings in a child support and custody case were supported by competent evidence, and the findings supported the conclusion that an equally shared custodial arrangement was in the best interest of the children. **Smith v. Smith, 135.**

Child Custody and Support—shared parenting—child psychologist—testimony relevant—A child psychologist's testimony in a child custody and support case on shared parenting arrangements was relevant to the custodial arrangement in the case, and the trial court did not abuse its discretion in admitting the testimony. **Smith v. Smith, 135.**

CEO, the trial court erred by rejecting an expert witness's calculation of GEI's loss of value caused by defendant's actions. The trial court's finding that the expert "simply chose a convenient number to base his loss of value calculation on" was unsupported by the evidence. The expert chose one of three third-party offers to purchase GEI ($6,000,000) because it was the lowest offer during the relevant time period and also occurred on the date closest to defendant's actions that gave rise to the lawsuit. **Seraph Garrison, LLC v. Garrison, 115.**

Corporations—President and CEO—failure to pay taxes or make 401(k) contributions—breach of fiduciary duties—Where the President and CEO (defendant) of a corporation (GEI) had stopped paying state and federal payroll taxes and stopped making 401(k) contributions for several years, the trial court erred in a derivative action brought on behalf of GEI by concluding that these actions by defendant did not constitute a breach of his fiduciary duties. Defendant deliberately neglected two of his primary corporate responsibilities in violation of state and federal laws—a failure to act with due care and good faith—and he knowingly engaged in conduct that injured GEI—a breach of the duty of loyalty. **Seraph Garrison, LLC v. Garrison, 115.**

Corporations—President and CEO—fraud and breach of fiduciary duty—punitive damages claim—In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, where the trial court erroneously concluded that GEI was not injured by defendant's fraud and breach of fiduciary duty in misrepresenting a contract he negotiated with another company and therefore was not entitled to compensatory damages, the Court of Appeals ordered the court to consider the issue of punitive damages on remand. **Seraph Garrison, LLC v. Garrison, 115.**

Corporations—President and CEO—misrepresentation of contract to board of directors—affirmative duty to disclose material facts—no requirement to prove reliance element of actual fraud—In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, where defendant misrepresented the terms of a licensing contract he negotiated with another company (Ecolab) to GEI's board of directors, the trial court erred in its conclusion that plaintiff had failed to establish the board's reasonable reliance on defendant's misrepresentations and therefore could not be awarded damages on its fraud claim. As a corporate officer reporting to the board, defendant had an affirmative fiduciary duty to disclose all material facts related to the Ecolab contract negotiations. Because defendant breached this duty, plaintiff was not required to prove the reliance element of actual fraud. **Seraph Garrison, LLC v. Garrison, 115.**

Corporations—President and CEO—repaying self for loan rather than paying back taxes—constructive trust or unjust enrichment—Where the President and CEO (defendant) of a corporation had stopped paying state and federal payroll taxes and stopped making 401(k) contributions for several years—yet he continued to pay himself and also repaid himself for a loan using funds from an initial payment on a contract with another company—the trial court erred by refusing to grant plaintiff's claim under either a constructive trust or unjust enrichment theory based on the loan repayment. Defendant breached his fiduciary duty by directing the repayment to himself rather than making mandatory payments to the federal and state governments. As to whether plaintiff was entitled to recover defendant's salary and benefits, the issue was remanded to the trial court for consideration of whether plaintiff was entitled to recover any compensatory damages. **Seraph Garrison, LLC v. Garrison, 115.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JOSEPH W. BARNETTE, EMPLOYEE, PLAINTIFF
v.
LOWE'S HOME CENTERS, INC., EMPLOYER, SELF-INSURED (SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., ADMINISTRATOR), DEFENDANT

No. COA15-938

Filed 19 April 2016

1. Workers' Compensation—findings of fact—sufficiency

The Industrial Commission did not err in a workers' compensation case by making its findings of fact 4, 6, and 7. Each of the challenged factual findings were supported by competent evidence in the record.

2. Workers' Compensation—injury by accident—fortuitous event—interruption of work routine—unusual task

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff employee failed to establish that he sustained an injury by accident. Plaintiff employee showed that his injury resulted from a fortuitous event, an interruption of his work routine, or an unusual task. The matter was remanded for further proceedings to determine the benefits that plaintiff was entitled as a result of his compensable injury.

Appeal by Plaintiff from opinion and award entered 15 April 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 January 2016.

Wallace and Graham, PA., by Whitney V. Wallace, for Plaintiff.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, for Defendant.

STEPHENS, Judge.

In this appeal by an injured employee from an opinion and award of the North Carolina Industrial Commission denying compensation, we apply our well established standard of review and hold that, while certain of the findings of fact challenged by the employee are supported by competent evidence, the Commission's legal conclusion that the employee failed to show that his injury "resulted from a fortuitous event, an interruption of his work routine, or an unusual task" and, thus, failed to establish that he sustained an injury by accident is *not* supported by the findings of fact. Accordingly, we reverse and remand.

Factual and Procedural Background

Plaintiff Joseph W. Barnette began working as a delivery driver for Defendant Lowe's Home Centers, Inc. ("Lowe's") in 2004. At the time he began his employment with Lowe's, Barnette had pre-existing back problems that had required medical treatment from about 2000 or 2001 forward. On 8 August 2012, Barnette was working with another Lowe's employee, Ron Alcorn, to deliver a refrigerator to a home on Bald Head Island. Like many homes on the island, this home had a so-called "reverse" floor plan with the kitchen on an upper floor. Barnette testified that the delivery was difficult, requiring him and Alcorn to carry a large refrigerator up a narrow twisting flight of stairs. At the top of the stairs, Barnette and Alcorn discovered that the refrigerator would not fit through the final turn of the stairwell and, thus, they had to take the refrigerator immediately back down the stairs. Barnette alleged that, near the bottom of the stairs, he lost all feeling in his right hand and forearm. Barnette shifted the weight of the refrigerator to his other hand and continued carrying the appliance down the stairs. The evidence was conflicting about whether Barnette mentioned his arm and hand symptoms to Alcorn at that moment. Feeling returned to Barnette's hand in about 20 to 30 minutes. Alcorn drove Barnette back to the local Lowe's. Barnette testified that he reported to the manager on duty that he had hurt his hand, but could not remember whether he mentioned "all the details . . . ."

On 15 January 2013, Barnette filed a Form 18 asserting that he had "injured his right arm/elbow/hand when performing [an] unusually difficult delivery of a refrigerator up and down a narrow set of stairs"

on 8 August 2012. On 19 March 2013, Lowe's filed a Form 61 Denial of Workers' Compensation Claim and Amended Denials of Workers' Compensation Claim on 20 June and 7 November 2013. Barnette filed a Form 33 Request that Claim be Assigned for Hearing on 5 April 2013 and an amended Form 18 on 5 November 2013. On 7 January 2014, a hearing was held before the deputy commissioner, who filed an opinion and award on 4 August 2014 denying Barnette benefits for failure to show he sustained an injury by accident. Barnette appealed to the Full Commission ("the Commission"), and, on 15 April 2015, the Commission affirmed the deputy commissioner's opinion and award with modifications, still denying Barnette compensation. From the Commission's opinion and award, Barnette appeals.

Discussion

Barnette argues that the Commission erred in (1) making findings of fact 4, 6, and 7, and (2) finding and concluding that Barnette's injuries were not the result of an accident. We reverse and remand.

I. Standard of Review

On appeal, we review an opinion and award in a workers' compensation case to determine "whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citation omitted). Thus, our "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and internal quotation marks omitted), *rehr'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). "[T]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony . . . ." *Harrell v. J.P. Stevens & Co., Inc.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (citation omitted), *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to support contrary findings. *Pittman v. Int'l Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (citation omitted), *affirmed per curiam*, 351 N.C. 42, 519 S.E.2d 524 (1999). "The Commission's findings of fact may be set aside on appeal only when there is a *complete* lack of competent evidence to support them." *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (citation omitted; emphasis added). Findings of fact unchallenged by the appellant are presumed to be supported by competent evidence on appeal. *Cooper v. BHT Enters.*, 195 N.C. App.

363, 364-65, 672 S.E.2d 748, 751 (2009) (citation omitted). Where conclusions of law are not supported by the findings, we must reverse those portions of the opinion and award, remanding to the Commission for entry of conclusions of law that are supported. *See, e.g., Goodrich v. R.L. Dresser, Inc.*, 161 N.C. App. 394, 403, 588 S.E.2d 511, 517 (2003).

II. Findings of fact 4, 6, & 7

[1] Barnette first argues that no competent evidence supports the Commission's findings of fact 4, 6, and 7. We are not persuaded.

Specifically, Barnette challenges the following portions of these findings of fact as not supported by competent evidence:

> 4. [Barnette] could not recall whether he immediately reported his injury to Mr. Alcorn. . . .
>
> . . . .
>
> 6. Mr. Alcorn recalled . . . no specific injury, pain, or symptoms reported by [Barnette] at that time. Mr. Alcorn testified that this was not the first time he witnessed [Barnette's] weakness, which he attributed to [Barnette's] age.
>
> 7. Defendant's Assistant Manager, Krystal Webb, . . . did not recall [Barnette] reporting how the numbness started
> . . . .

On appeal, Barnette cites various portions of the testimony before the Commission that appear to contradict the findings of fact made by the Commission or which would support different findings of fact. However,

> it is [not] the role of this Court to comb through the testimony and view it in the light most favorable to the [appellant], when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence.

Alexander v. Wal-Mart Stores, Inc., 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting), *reversed per curiam for the reasons stated in the dissenting opinion*, 359 N.C. 403, 610 S.E.2d 374 (2005). Having engaged in our proper review, we conclude that each of the factual findings challenged by Barnette is supported by competent evidence in the record.

For example, in contending that no competent evidence supports the above-quoted portion of finding of fact 4, Barnette draws our attention to his testimony that he told Alcorn that he needed to see a doctor when his hand went numb as the two men carried the refrigerator to the bottom of the stairs. However, our review of the record reveals that, on direct examination, Barnette also testified that, when he suddenly lost all feeling in his right hand and forearm, "it scare[d] me a little bit. It scare[d] me a lot. And so I—I can't recall whether I tell [Alcorn] something's going on at that juncture or not." Likewise, on cross-examination, Barnette reiterated that, "while I was lifting [the refrigerator] and as I sat it down, . . . I had to let go. I had nothing left. And I cannot remember whether I communicated that with [Alcorn] or not, at the time." This testimony supports the Commission's factual finding that Barnette "could not recall whether he immediately reported his injury to Mr. Alcorn. . . ."

Similarly, the part of finding of fact 6 stating that Alcorn "recalled . . . no specific injury, pain, or symptoms reported by [Barnette] at that time" is supported by Alcorn's response when asked whether he immediately realized Barnette was having symptoms as a result of his alleged injury. Alcorn testified that he knew Barnette was "having trouble holding that weight and taking it down one step at a time. So, he had said he's having difficulty doing it," but did not describe any symptoms until he and Alcorn "got back on the barge [to return to the mainland from Bald Head Island]." In addition, when asked whether Barnette had ever exhibited any physical difficulty in performing his job, Alcorn replied, "Just a weakness at times. I mean, it's—it's a hard job. . . . He's an old man. I'm sorry." That evidence supports the finding that "Mr. Alcorn testified that this was not the first time he witnessed [Barnette's] weakness, which he attributed to [Barnette's] age."

Finding of fact 7, that "Krystal Webb, . . . did not recall [Barnette] reporting how the numbness started[,]" is supported by Webb's response to the question, "Did [Barnette] report to you how the pain started or the numbness started?":

> I don't recall. It was on the job, per se, I assumed that it could have been a job related injury. But that was not discussed between us. It was just the fact that he needed to go to this appointment the next day. So, I—I don't really recall it being on the job injury. That—that wasn't discussed.

We thus overrule Barnette's challenge to findings of fact 4, 6, and 7. We address his challenge to a portion of denominated finding of fact 25, along with the Commission's closely related conclusion of law 4, in section III of this opinion.

III. Denominated finding of fact 25 and conclusion of law 4

[2] Barnette argues that a portion of denominated finding of fact 25—that he "failed to show that his right arm condition resulted from a fortuitous event, an interruption of his work routine, or an unusual task. . . . [r]ather, [than while he was] performing his usual, strenuous job in its usual way"—and related conclusion of law 4—that, as a result, Barnette "failed to prove that his injury resulted from an 'accident' "—are not supported by the Commission's other findings of fact. We agree.

As an initial matter, we note that the part of denominated finding of fact 25 to which Barnette objects is actually a legal, rather than a factual, determination. "[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and internal quotation marks omitted). Whether Barnette's "right arm condition resulted from a fortuitous event, an interruption of his work routine, or an unusual task" was a determination requiring "the application of legal principles"—to wit, the definition of "accident" as developed in our State's worker's compensation jurisprudence—and, thus, it is a conclusion of law. *See id.* Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review. *See, e.g.*, *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) ("[C]lassification of an item within [an] order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review."). Accordingly, we must consider whether the challenged portion of denominated finding of fact 25 and conclusion of law 4 are supported by the Commission's other findings of fact. *See Oliver*, 143 N.C. App. at 170, 544 S.E.2d at 608 (citation omitted).

Under the Worker's Compensation Act ("the Act"), an employee

> is entitled to compensation for an injury only if (1) it is caused by an accident, and (2) the accident arises out of and in the course of employment. . . .
>
> [The Act] defines injury to mean only injury by accident arising out of and in the course of the employment. Our Supreme Court has defined the term accident as used in the . . . Act as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury; the elements of an accident are the

> interruption of the routine of work and *the introduction thereby of unusual conditions likely to result in unexpected consequences*.

Shay v. Rowan Salisbury Sch., 205 N.C. App. 620, 624, 696 S.E.2d 763, 766 (citations, internal quotation marks, and some brackets omitted; emphasis added), *appeal dismissed*, 364 N.C. 435, 702 S.E.2d 216 (2010). "[U]nusualness and unexpectedness are [the] essence" of an accident under the Act. *Smith v. Cabarrus Creamery Co.*, 217 N.C. 468, 472, 8 S.E.2d 231, 233 (1940). "If an employee is injured while carrying on his *usual tasks in the usual way* the injury does not arise by accident. An accidental cause will be inferred, however, when an interruption of the work routine and the *introduction thereby of unusual conditions likely to result in unexpected consequences occurs*." *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986) (citations omitted; emphasis added).

This rule applies even where the usual tasks of an employee's work are physically awkward, strenuous, or demanding. For example, in *Porter v. Shelby Knit, Inc.*, the injured employee was a knitter whose usual work "duties included doffing, a task which entailed pulling rods from rolls of cloth." 46 N.C. App. 22, 23, 264 S.E.2d 360, 361 (1980) (internal quotation marks omitted). Because the evidence showed "that, on the occasion of [the] plaintiff's injury[,] withdrawal of the rod was *unusually difficult* because the roll of cloth was extra tight, ... [and, as a result,] the effort which [the] plaintiff exerted was *unusual*[,]" this Court affirmed the Commission's conclusion that her injury was the result of an accident. *Id.* at 27, 264 S.E.2d at 363 (emphasis added). The Court reasoned that unusual conditions, to wit, the extra tightness of the roll requiring unusual effort and exertion, constituted an "interrupti[on of] what was [the] plaintiff's normal work routine. . . ." *Id.*

Likewise, in *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, the injured employee was a labor and delivery nurse whose patients frequently received epidural blocks that left them in need of the nurse's help to raise their legs during childbirth. 135 N.C. App. 112, 113, 519 S.E.2d 61, 62 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 124 (2000). This Court reversed the Commission's conclusion that the nurse's injury was not the result of an accident, noting that, when injured, she had been performing her usual strenuous duties of helping a patient who had received an epidural lift her legs, but that unusual conditions had interrupted her normal work routine. *Id.* at 116, 519 S.E.2d at 63-64. Specifically, "the undisputed evidence [was] that [the p]laintiff had never in her eleven years of work with [the employer] assisted a patient in

child delivery where she was required, without any assistance from the patient, to lift the leg(s) of the patient, especially a patient weighing 263 pounds." *Id.* at 115-16, 519 S.E.2d at 63.

In a case involving an even more physically demanding normal work routine, this Court concluded that a compensable injury by accident occurred where a professional football player, "engaging in his *normal work duty* of blocking an offensive lineman, . . . was injured because he was forced by another player into *utilizing an unusual and awkward blocking or work technique that was not normally used* in [the player's] normal work routine." *Renfro v. Richardson Sports, Ltd. Partners*, 172 N.C. App. 176, 183, 616 S.E.2d 317, 324 (2005) (emphasis added), *disc. review denied*, 360 N.C. 535, 633 S.E.2d 821 (2006). In that case, the Commission's critical findings of fact were:

> 9. At practice on August 7, 2001, [the] plaintiff was playing defense at a linebacker position. During a particular play, [the] plaintiff became engaged by a block from an offensive lineman.
>
> 10. At the point when the offensive player engaged [the] plaintiff with the block, the impact caused [the] plaintiff's left hand and wrist to be moved down and around, forcing it into what [the] plaintiff described as an awkward position.
>
> 11. It was unexpected and unusual for the offensive player to block [the] plaintiff with an impact that caused his left hand and wrist into an awkward position. At the time of injury, [the] plaintiff was engaged in an activity within the scope of his employment contract and was taking reasonable measures to protect himself from injury, given the nature of the game. [The p]laintiff was required to do what he was doing at the time of injury and had no choice but to perform his job as best he could, notwithstanding the risk of injury.

Id. at 181-82, 616 S.E.2d at 323. This Court held that these findings of fact supported the Commission's conclusion that, "[a]lthough an injury sustained while playing football may not be an unusual occurrence, such injury [under the circumstances present here] is not a probable, intended consequence of the employment and constituted an unlooked for and untoward event that was not expected or designed by [the] plaintiff." *Id.* at 182, 616 S.E.2d at 324.

Regarding the work activity Barnette was engaged in when he sustained his injury, the Commission found as fact:

> 1. At the time of hearing before the Deputy Commissioner, [Barnette] was 59 years old. He has a high school diploma. [Barnette] worked as a delivery driver for Defendant-Employer from November 2004, through August 2012. [Barnette] estimated his deliveries consisted of approximately 80% to 85% appliances and that he often delivered with co-worker, Ron Alcorn.
>
> 2. On August 8, 2012, [Barnette] testified that he and Mr. Alcorn delivered a side-by-side refrigerator to a home on Bald Head Island ("BHI") after making four or five other deliveries. After removing the doors of the refrigerator, [Barnette] and Mr. Alcorn lifted the refrigerator up a winding staircase leading to the second-story kitchen of the home. [Barnette] testified that *he and Mr. Alcorn were unable to make the final turn into the kitchen and decided to head back down the stairs, when his right hand went completely numb, roughly three-fourths of the way down the stairs.* [Barnette] testified that he immediately experienced numbness, but no pain, and that he used his left arm to help Mr. Alcorn finish the descent.
>
> 3. It was not uncommon for [Barnette] to deliver large appliances upstairs at homes like the one in question at BHI, which have "reverse" floor plans, with the kitchen on a second or third level. He described the homes on BHI as "tight" and with narrow staircases. Regarding the home in question, [Barnette] testified that *the staircase was not a standard staircase and was unusually tight.*
>
> . . . .
>
> 5. Ron Alcorn testified at the hearing before the Deputy Commissioner that he and [Barnette] worked together four to five times per week before [Barnette's] workplace injury and that about 75% of the time, an old refrigerator will have to be removed from the home to make room for the new one. Mr. Alcorn recalled the day of the incident, stating that *he and* [*Barnette*] *only made it two-thirds of the way up the staircase with the new refrigerator when they decided it was not going to fit and that they should*

> *return downstairs. Mr. Alcorn testified that the staircase involved in this claim was narrow, that most of the staircases at the homes at BHI were "32-36" inches wide, but this staircase was "29-30" inches wide.*

(Emphasis added). These findings of fact indicate that, like the professional football player in *Renfro*, Barnette's usual work routine and normal work duties were physically strenuous, and that those duties often included the delivery of large appliances, like refrigerators, to homes on BHI with reverse floor plans and narrow staircases and the removal of customers' old refrigerators back down the staircases. However, the above-quoted findings of fact also plainly establish "the introduction . . . of unusual conditions likely to result in unexpected consequences[,]" *see Gunter*, 317 N.C. at 673, 346 S.E.2d at 397 (citations omitted), during the delivery when Barnette sustained his injury.

Specifically, the uncontradicted evidence and findings of fact 2, 3, and 5 establish that, at the home where Barnette was injured, "the staircase was not a standard staircase and was *unusually* tight" such that, instead of carrying the new refrigerator up the stairs, setting it down, and then later carrying an old refrigerator down the stairs, Barnette and Alcorn "only made it two-thirds of the way up the staircase with the new refrigerator when they decided it was not going to fit and that they should return downstairs." Thus, the "unusual condition[]" of the narrow, non-standard staircase "result[ed] in [the] unexpected consequence[]" of Barnette having to hold and carry the refrigerator two-thirds of the way up the staircase and then back down again without a break or the opportunity to reposition his hold on the appliance to better accommodate the descent. *See id.* Simply put, Barnette, while "engaging in his normal work duty of [delivering a refrigerator to a second-floor kitchen by means of a staircase], . . . was injured because he was forced by [the unusual narrowness of the staircase] into utilizing an unusual and awkward . . . work technique that was not normally used in his normal work routine[,]" to wit, having to carry the new refrigerator back down the unusually narrow staircase without a break or pause. *See Renfro*, 172 N.C. App. at 183, 616 S.E.2d at 324.

Plainly then, the portion of denominated finding of fact 25 stating that Barnette "failed to show that his right arm condition resulted from a fortuitous event, an interruption of his work routine, or an unusual task. . . . [r]ather, [than while he was] performing his usual, strenuous job in its usual way" is not supported by the Commission's findings of fact 2, 3, and 5. Further, because those findings of fact establish that Barnette

did not sustain his injury while "carrying on his *usual tasks in the usual way*[,]" but rather as a result of "an interruption of the work routine and the *introduction thereby of unusual conditions*[,]" an accidental cause must be inferred. *See Gunter*, 317 N.C. at 673, 346 S.E.2d at 397 (citations omitted). Accordingly, conclusion of law 4—that Barnette "failed to prove his injury resulted from an 'accident' "—is not supported by the Commission's findings of fact.

Conclusion

The Commission's challenged findings of fact 4, 6, and 7 are supported by competent evidence, *see Oliver*, 143 N.C. App. at 170, 544 S.E.2d at 608, but are not pertinent to the issue of whether Barnette's injury is compensable. Regarding compensability, unchallenged finding of fact 24 and conclusion of law 3 establish that Barnette's injury was caused by the refrigerator-moving incident during his work, thus satisfying the requirement that the injury arise out of and in the course of employment. *See Shay*, 205 N.C. App. at 624, 696 S.E.2d at 766. However, the challenged part of denominated finding of fact 25 and conclusion of law 4—that Barnette's injury was part of his normal work routine and not the result of an accident—are not supported by the Commission's other findings of fact. *See Gunter*, 317 N.C. at 675, 346 S.E.2d at 398. Accordingly, the Commission's opinion and award must be reversed and the matter remanded for further proceedings to determine the benefits to which Barnette is entitled as a result of his compensable injury by accident and the entry of an appropriate amended opinion and award.

REVERSED AND REMANDED.

Judges HUNTER, JR., and INMAN concur.

BERENS v. BERENS

[247 N.C. App. 12 (2016)]

MICHAEL M. BERENS, PLAINTIFF
v.
MELISSA C. BERENS, DEFENDANT

No. COA15-230

Filed 19 April 2016

1. Parties—aggrieved party—no motion to intervene

The trial court did not err by denying Adams' petition to appeal its decision as an aggrieved party. Although Adams filed various pleadings in response to plaintiff's subpoenas in the trial court and was represented by counsel during the hearing, she did not take any action to intervene or otherwise become a party in the underlying action. Rule 3 affords no avenue of appeal to either entities or persons who are nonparties to a civil action.

2. Appeal and Error—interlocutory orders and appeals—discovery—privilege—immunity—substantial right

Orders compelling discovery where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity affects a substantial right and is thus immediately appealable.

3. Agency—participation in meeting with attorney and party to litigation—attorney-client privilege—work product

The trial court erred by concluding that the attorney-client privilege did not apply. A party to litigation who engages a friend as an agent to participate in meetings with an attorney does not waive the protections of attorney-client communications and attorney work product for information arising from the meeting with the attorney and any work product created with the assistance of or shared with the agent as a result of those meetings. The case was remanded to the trial court to determine whether the attorney-client privilege applied to the requested communications, using the five-factor *Murvin* test and considering petitioner Adams as defendant's agent.

Appeal by Defendant from order entered 18 November 2014 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 23 September 2015.

Horack Talley Pharr & Lowndes, P.A., by Christopher T. Hood and Gena G. Morris, for Plaintiff-Appellee.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell, and Tom Bush Law Group, by Tom J. Bush, for Defendant-Appellant.

Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell, for Brook Adams

INMAN, Judge.

This appeal presents the question of whether a party to litigation who engages her friend as an agent to participate in meetings with her attorney waives the protections of attorney-client communications and attorney work product for information arising from the meeting with her attorney and any work product created with the assistance of or shared with the agent as a result of those meetings. Based on our caselaw and the record here, the answer in this case is no.

Defendant-Appellant Melissa Berens ("Defendant") appeals the interlocutory order denying her request for a protective order and her motion to quash Plaintiff-Appellee Michael Berens's ("Plaintiff's") subpoena *duces tecum* to Brooke Adams Healy ("Ms. Adams") compelling production of all documents relating to Ms. Adams's communications with Defendant; her communications with the Tom Bush Law Group ("the law firm"), the firm representing Defendant in her divorce; and her communications with any third party regarding "one or more members of the Berens family" and the legal proceedings that are the subject of the underlying divorce case. On appeal, Defendant argues that Plaintiff's subpoena to Ms. Adams seeks information protected by the attorney-client privilege and by the work product doctrine because Ms. Adams was Defendant's agent. Consequently, according to Defendant, Ms. Adams's presence during Defendant's meetings with her attorney did not waive the privileges nor did her involvement in the preparation of materials for litigation defeat the privileges. Defendant also contends that the subpoena exceeds the scope of Rule 45 of the North Carolina Rules of Civil Procedure.

After careful review, we reverse the trial court's order and remand for proceedings consistent with this opinion.

Factual and Procedural Background

Plaintiff and Defendant were married on 23 September 1989 and separated on 20 July 2012. Six children were born of the marriage. On 4 June 2014, the trial court entered a temporary parenting arrangement order in an effort to best address each child's needs. In it, the court

noted that there were several allegations that Plaintiff had engaged in physical confrontations with his children, including one incident in which Plaintiff grabbed one child and pushed him up against the wall. The court found that all the children have complained about "Plaintiff/Father acting weird or creepy," citing several instances of Plaintiff's inappropriate attempts at jokes or inappropriate behavior when he does not "get his way." The court also stated that when "[Plaintiff] does not get his way, he acts inappropriately, gets up and has 'mini explosions.' "

The trial court held that it was in the children's best interest that Plaintiff have temporary supervised parenting only with the two youngest children and no contact with the four oldest children. The court calendared the permanent child custody trial to begin on 1 December 2014.

Prior to the trial, on 9 September 2014, Plaintiff's counsel issued a subpoena *duces tecum* to Ms. Adams. Ms. Adams, an attorney who is now on inactive status with the North Carolina State Bar, is a friend of Defendant's and asserted in an affidavit that she had been "acting as a consultant/agent on behalf of [Defendant] and the Tom Bush Law Group, and acting in a supporting role for [Plaintiff]." Ms. Adams stated that her friendship with Defendant began prior to the current proceedings. As part of her role as a consultant and agent of Defendant, Ms. Adams stated that she had

> attended meetings with [Defendant] and her attorneys and [has] had access to various documents and tangible things, including. . . emails and documents from and to [Defendant], her attorneys and/or other consultants/experts; correspondence and documents form and to [Defendant], her attorneys and/or other consultants/experts; notes of meetings between [Defendant] and her attorneys; drafts of Court pleadings; potential Court exhibits and documents; case law; statutes; settlements offers during mediation; and, [sic] strategy planning documents.

Attached to her affidavit was a copy of the "Confidentiality Agreements and Acknowledgement of Receipt of Privileged Information" (the "confidentiality agreement") that Ms. Adams entered into with Defendant, identifying Ms. Adams as Defendant's agent, emphasizing that the privileged information she received would be used "solely for the purpose[] of settling or litigating" the divorce proceedings, and affirming the expectation that Ms. Adams's presence and involvement were "necessary for the protection of [Defendant's] interest" and the expectation that all communications would be "protected by the attorney-client privilege."

The confidentiality agreement further provided:

> Client's Agent will limit her communications concerning the Client's litigation and dispute with her husband to Client and Client's attorneys and they [sic] will have no communication with anyone, including, but not limited to Wife's experts, accountants, consultants or attorneys, or other advisors and consultants unless Client's attorneys are present.

Based on her assertion that she was Defendant's agent, Ms. Adams's counsel argued before the trial court that all documents and tangible things sought by Plaintiff's subpoena were protected by the attorney-client privilege and by work product immunity because Ms. Adams's presence in a "support role, to be a consultant, a representative" did not destroy the privilege or immunity. Plaintiff's counsel disagreed, arguing that Ms. Adams was engaged in the "unauthorized practice of law" and that the law firm had "assisted" her in that role.

The trial court denied Defendant's and Ms. Adams's motions on 16 November 2014, finding, in pertinent part, that:

> 19. Defendant/Mother's Motions and Ms. Adams'[s] Motions collectively assert that Ms. Adams has been functioning as a consultant and agent of Defendant/Mother and of the Tom Bush Law Group in this litigation. Ms. Adams states that she has attended meetings with Defendant/Mother and her attorneys, reviewed pleadings, emails, documents, case law, statutes etc.
>
> . . .
>
> 21. Ms. Adams is not an employee of the Tom Bush Law Group, nor has she been retained by the Tom Bush Law Group in this litigation.
>
> 22. In truth, Ms. Adams is a good friend of Defendant/Mother and Ms. Adams is helping Defendant/Mother out in this litigation.
>
> 23. The Agreement executed by Ms. Adams and Defendant/Mother holds no weight in this litigation.
>
> 24. This Court cannot find that any attorney-client privilege or work product immunity exists with respect to the relationship between Ms. Adams and Defendant/Mother and the Tom Bush Law Group.

> 25. There is no "good friend" exception to the attorney-client privilege or work product immunity warranting entry of an order quashing the Subpoena or protective order relieving Ms. Adams of her obligation to the comply with the Subpoena.
>
> 26. One could, argue that Ms. Adams is practicing law if she wishes to utilize either the attorney-client privilege or work product immunity. The Court will not focus on this argument or consider it since Ms. Adams is simply viewed as a good friend of Defendant/Mother.

The trial court concluded in pertinent part that:

> 2. The Agreement executed by Ms. Adams and Defendant/Mother holds no weight in this litigation.
>
> . . .
>
> 4. No exception to the attorney-client privilege or work product immunity exists warranting entry of an order quashing the Subpoena or a protective order relieving Ms. Adams of her obligation to the comply with the Subpoena.[1]
>
> 5. Defendant/Mother's Motions and Ms. Adams' Motions should be denied and Ms. Adams should fully comply with Plaintiff/Father's Subpoena.

Defendant and Ms. Adams timely appealed.

Ms. Adams's Appeal

[1] Ms. Adams argues that she constitutes an "aggrieved party" and has a statutory right to appeal the trial court's order pursuant to N.C. Gen. Stat. § 1-271 (2013) and Rule 3 of the North Carolina Rules of Appellate Procedure. In an abundance of caution, however, Ms. Adams filed a petition for *writ of certiorari* seeking appellate review of the order.

Rule 3 provides that "[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal. . . ." N.C. R. App. P. 3(a)(2014). Our Supreme Court has interpreted Rule 3 to mean that it "afford[s] no avenue of appeal to either entities or persons who are nonparties to a

1. The trial court's conclusion that "[n]o exception to the attorney-client privilege or work product immunity exists" in this case appears to be a non-sequitur because the court ultimately held that neither the privilege nor the immunity applied.

civil action." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). Although Ms. Adams filed various pleadings in response to Plaintiff's subpoenas in the trial court and was represented by counsel during the hearing, it does not appear from the record that she took any action to intervene or otherwise become a party in the underlying action. *See id.* While Ms. Adams is correct that she will be affected by the trial court's order compelling documents and other tangible things, she is not an "aggrieved party" entitled to appeal the order.

The *Bailey* court addressed a similar request by a nonparty and concluded that because the party had no right to appeal as a nonparty, "no such right could be lost by a failure to take timely action." *Id.* at 157, 540 S.E.2d at 322. While Rule 21 provides that a *writ of certiorari* may be issued to permit review of a trial court's order if, among other reasons, there is no right of appeal from an interlocutory order, N.C.R. App. P. 21(a)(1) (2014), *Bailey* compels a conclusion that this avenue of appeal is not available for those who did not fall within the parameters of Rule 3 allowing the party to appeal in the first place. Accordingly, we deny Ms. Adams's petition.

Defendant-Appellant's Appeal

[2] Orders compelling discovery generally are not immediately appealable. *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). However, orders compelling discovery "where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable." *Hammond v. Saini*, 229 N.C. App. 359, 362, 748 S.E.2d 585, 588 (2013) *aff'd*, 367 N.C. 607, 766 S.E.2d 590 (2014)(citation omitted).

Standard of Review

A trial court's order compelling the production of documents that a party claims are protected by the attorney-client privilege or the work product doctrine is generally subject to review for an abuse of discretion. *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006). "To demonstrate such abuse, the trial court's ruling must be shown to be manifestly unsupported by reason or not the product of a 'reasoned decision.' " *Id.* at 410, 628 S.E.2d at 461 (citation omitted) (internal quotation marks omitted). However, a trial court's "discretionary ruling made under a misapprehension of the law . . . may constitute an abuse of discretion." *Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App 390, 393, 663 S.E.2d 337, 339 (2008) (order for new trial reversed

because "the order reveals that the trial court misapprehended the law and improperly shifted plaintiff's burden of proof to defendant"). *See also State v. Tuck*, 191 N.C. App. 768, 773, 664 S.E.2d 27, 30 (2008) (trial court abused its discretion in evidentiary ruling because it misapprehended the applicable discovery statute and failed to consider criteria necessary to its analysis).

Analysis

[3] Plaintiff argues that Ms. Adams was not functioning in the capacity of an agent but was "merely Defendant-Appellant's friend" and that the presence of a friend during attorney-client communications and giving her access to work product defeats the claim of privilege under our state's established caselaw.

Defendant argues that Ms. Adams's presence during and access to attorney-client communications and work product as a "friend, agent, and trusted confidant" did not destroy the attorney-client privilege or work product doctrine because Ms. Adams was acting as Defendant's agent.[2] In support of this argument, Defendant cites the written confidentiality agreement providing that Ms. Adams was acting as her "agent and personal advisor to specifically assist her in this litigation" and that Ms. Adams's presence and involvement in attorney-client communications "is necessary for the protection of [Defendant's] interest."

Defendant does not contend, and did not contend before the trial court, that she and Ms. Adams had an attorney-client relationship. Rather, she contends that because Ms. Adams was her agent for purposes of this litigation, the privileges and protections arising from her

---

2. Defendant also urges this Court to adopt an approach used in other jurisdictions which considers, on a case-by-case basis, the intention and understanding of the client as to whether the communications would remain confidential. Defendant specifically cites the analysis adopted by the Rhode Island Supreme Court in *Rosati v. Kuzman*, 660 A.2d 263, 266 (R.I. 1995) (holding that "the mere presence of a third party per se does not constitute a waiver thereof. Given the nature of the attorney-client privilege, the relevant inquiry focuses on whether the client reasonably understood the conference to be confidential notwithstanding the presence of third parties." (emphasis removed) (citation removed) (internal quotation marks removed)), and by courts in Maryland. *See Newman v. State*, 384 Md. 285, 307, 863 A.2d 321, 334–35 (2004) (concluding that the attorney-client privilege was not defeated by the presence of a third party confidant because: (1) the record indicated the client's "clear understanding that the communications made in the presence of [the third party] would remain confidential"; (2) the attorney "exerted his control over [the third party's] presence"; and (3) in all times during the "extremely contentious" divorce and custody proceedings, the third party "acted as a source of support for [the client]" by attending court proceedings with the client, participating in investigations, and communicating directly with the attorney).

attorney-client relationship with the law firm within the context of the confidentiality agreement remained intact despite the sharing of attorney communications and work product with Ms. Adams.

In concluding that "[t]he [confidentiality agreement] executed by Ms. Adams and Defendant/Mother holds no weight in this litigation,"[3] the trial court misapprehended the law of agency. In failing to address the confidentiality agreement and other evidence of the agency relationship between Defendant and Ms. Adams, the trial court misapprehended the law regarding the extension of the attorney-client privilege and the attorney work product doctrine to communications with a client's agent within the context of the litigation and confidentiality agreement.

I. Attorney-Client Privilege

"It is a well-established rule in this jurisdiction that when the relationship of attorney and client exists, all confidential communications made by the latter to his attorney on the faith of such relationship are privileged and may not be disclosed." *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). Our Supreme Court has outlined a five-factor test, *i.e.*, the *Murvin* test, to determine whether the attorney-client privilege attaches to a particular communication:

> A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege. . . . Communications between attorney and client generally are not privileged when made in the presence of a third person who is not an agent of either party.

Id. at 531, 284 S.E.2d at 294 (citation omitted).

---

3. The trial court included this statement in both its findings of fact and conclusions of law. Because it involves the application of legal principles, it is a conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675–76 (1997) (although trial court made identical findings of fact and conclusions of law that juvenile was neglected, that a government agency had made reasonable efforts to prevent her removal from her parent's home, and that it was in the juvenile's best interest to remain in county custody, "[t]hese determinations…are more properly designated conclusions of law and we treat them as such for purposes of this appeal"). Plaintiff did not dispute the authenticity of the confidentiality agreement or present any evidence to dispute Defendant's or Ms. Adams's stated understanding and intention in executing the confidentiality agreement.

> The burden is always on the party asserting the privilege to demonstrate each of its essential elements. This burden may not be met by mere conclusory or ipse dixit assertions, or by a blanket refusal to testify. Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item.

In re Miller, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003) (citations omitted) (internal quotation marks omitted).

The parties do not dispute that an attorney-client relationship existed between the law firm and Defendant. Rather, they dispute whether Ms. Adams's presence during meetings of the law firm and Defendant destroyed the privileged nature of those meetings and related documents.

Defendant contends that all the communications Ms. Adams witnessed between the law firm and Defendant met all five factors of the *Murvin* test because Ms. Adams was an agent of Defendant. As explained below, we agree.

Defendant points to Ms. Adams's affidavit attesting her role as an agent and the confidentiality agreement she and Defendant signed memorializing their mutual understanding and expectation that Ms. Adams was acting as Defendant's agent and that Ms. Adams's access to Defendant's privileged information was protected by the attorney-client privilege.

Generally, communications between an attorney and client are not privileged if made in the presence of a third party because those communications are not confidential and because that person's presence constitutes a waiver. *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 536, 645 S.E.2d 117, 122 (2007); *Harris v. Harris*, 50 N.C. App. 305, 316, 274 S.E.2d 489, 495 (1981). However, the privilege still applies if the third party is an agent "of either party." *Murvin*, 304 N.C. at 531, 284 S.E.2d at 294. As explained by our Supreme Court,

> [i]n limiting the application of the privilege by holding that attorney-client communications which relate solely to a third party are not privileged, we note that this rationale would not apply in a situation where the person communicating with the attorney was acting as an agent of some third-party principal when the communication was made. In that instance, the information would remain privileged

> because the third-party principal would actually be the client who is communicating with the attorney through the agent. Because the communication would relate to the third-party principal's interests, it would therefore be within the scope of matter about which the attorney was professionally consulted and thus would be privileged.

Miller, 357 N.C. at 340–41, 584 S.E.2d at 789–90 (internal citation omitted).

If Ms. Adams was Defendant's agent when she witnessed the communications between Defendant and the law firm, the communications would remain privileged should they satisfy the other *Murvin* factors.

Agency is defined as "the relationship that arises from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Green v. Freeman*, 233 N.C. App. 109, 112, 756 S.E.2d 368, 372 (2014). "There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 435, 617 S.E.2d 664, 669 (2005) (citation omitted) (internal quotation marks omitted).

The trial court dismissed without explanation Defendant's and Ms. Adams's claims that Ms. Adams was, at all times, acting as an agent of and consultant for Defendant. The trial court simply characterized Ms. Adams as "a good friend of Defendant/Mother" and concluded that the Agreement executed by Ms. Adams held "no weight in this litigation." In addition, based upon Finding of Fact 21, that "Ms. Adams is not an employee of the Tom Bush Law Group, nor has she been retained by the Tom Bush Law Group in this litigation," the trial court apparently considered that only a paid consultant or employee of the law firm could assist in the litigation without destroying the privilege. This misapprehension may have been why the trial court summarily disregarded Ms. Adams's affidavit and other evidence supporting Defendant's and Ms. Adams's contentions that, in addition to being Defendant's "good friend," Ms. Adams was also Defendant's agent and consultant in the contentious divorce and child custody proceedings, especially in light of the serious allegations noted in the temporary parenting order. Ms. Adams and Defendant memorialized their relationship in the confidentiality agreement, referring to Ms. Adams as "Client's Agent," *i.e.*, Defendant's agent, and noting that Ms. Adams's role was to "serve as [Defendant's] agent and personal advisor[] to assist [Defendant] in her

dispute and/or litigation." In addition, the information protected by this agreement is limited to direct communications between Defendant and the law firm and the law firm's work product, which may be developed with Ms. Adams's assistance under the confidentiality agreement. The trial court did not address whether or why this evidence did not manifest consent by Defendant and Ms. Adams regarding Ms. Adams's role.

We hold that an agency relationship existed between Ms. Adams and Defendant for the purposes agreed upon between them. This holding is based not merely on Defendant's allegations and assertions, *see generally In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787, but on additional evidence derived from a source other than Defendant. The additional evidence includes the affidavit by Ms. Adams establishing that her role during the communications was as Defendant's agent and consultant—the type of evidence specifically noted by the *In re Miller* court as probative of an agency relationship—as well as the written agreement memorializing the agency relationship between Ms. Adams and Defendant. The agreement provided express authority by Defendant for Ms. Adams to act as her agent and evidences Defendant's control over Ms. Adams, both necessary showings to establish an agency relationship. *See Phelps-Dickson Builders*, 172 N.C. App. at 435, 617 S.E.2d at 669. The trial court failed to conduct the essential analysis as to whether the affidavit, confidentiality agreement, and other evidence established an agency relationship. We are aware of no caselaw, nor has Plaintiff cited any authority, that being a client's "good friend" and being a client's agent are mutually exclusive. Nor does our caselaw prohibit a non-practicing attorney from acting as an agent for purposes of assisting another person in communications with legal counsel. Our holding would be the same if Ms. Adams had been a friend trained as an accountant, a psychologist, or an appraiser who agreed to assist with the litigation without charge. Consequently, we must reverse the trial court's order concluding that the attorney-client privilege does not apply in this case.[4]

II. Work Product Doctrine

> In order to successfully assert protection based on the work product doctrine, the party asserting the protection . . . bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or

4. Although Defendant's appellate counsel urges this Court to adopt a new rule requiring the trial court to consider the client's expectations regarding confidentiality, it is not necessary given the evidence establishing an agency relationship.

> for another party or its representatives which may include an attorney, consultant or *agent*.

Isom, 177 N.C. App. at 412–13, 628 S.E.2d at 463 (emphasis added) (citation omitted) (internal quotation marks and editing marks omitted). The doctrine is not without limits:

> The work-product doctrine shields from discovery all materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent. This includes documents prepared after a party secures an attorney and documents prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected by the work-product doctrine. The test is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

In re Ernst & Young, LLP, 191 N.C. App. 668, 678, 663 S.E.2d 921, 928 (2008) (citations omitted) (internal quotation marks omitted).

We are persuaded that, given the record evidence, many of the documents requested by Plaintiff may constitute privileged work product not subject to discovery. Accordingly, the trial court's order concluding that the work product protection necessarily does not apply to the documents is reversed.

III. Remand

Although we reverse the trial court's conclusion that neither the attorney-client privilege nor the work product doctrine has any application in this case, the ultimate determination of which documents are shielded from discovery requires further inquiry regarding the nature of each document requested. This determination must be made by the trial court from evidence including an *in camera* review of the documents.

Plaintiff's subpoenas requested all documents relating to all of Ms. Adams's communications with Defendant, all documents relating to her communications with the law firm, and all documents relating to her communications with any third party regarding the ongoing legal proceedings during a specified time period. While we have held that the record evidence established an agency relationship between Ms. Adams and Defendant, it is unclear whether all the requested materials fall

within the scope of the attorney-client privilege by satisfying the five-factor *Murvin* test. For example, communications between Ms. Adams and third parties outside the law firm may not fall within the protection of the attorney-client privilege. Therefore, we must remand for the trial court to determine whether the attorney-client privilege applies to the requested communications, using the five-factor *Murvin* test and considering Ms. Adams as Defendant's agent. Unless the trial court can make this determination from other evidence such as a privilege log, it must conduct an *in camera* review of the documents. *See Raymond v. N.C. Police Benevolent Ass'n., Inc.*, 365 N.C. 94, 101, 721 S.E.2d 923, 928 (2011) (ordering the trial court to conduct an *in camera* review on remand to determine whether the communications were protected by the attorney-client privilege under *Murvin*).

We also are unable to determine based on the limited record whether the documents requested, or any of them, are subject to the work product doctrine. This determination is necessary only for documents which Defendant asserts are work product and which the trial court concludes are not protected by the attorney-client privilege. *See Isom*, 177 N.C. App. at 412–13, 628 S.E.2d at 463. We remand for the trial court to review the documents *in camera* and determine whether the work product protection applies, taking into account that Ms. Adams was acting as Defendant's agent. *See Ernst & Young, LLP*, 191 N.C. App. at 677–78, 663 S.E.2d at 928 (2008) (remanding for an *in camera* review to determine whether the documents requested were created in anticipation of litigation and satisfy the work product doctrine). A document created by Ms. Adams within the context of the confidentiality agreement for the law firm and for the purposes of the litigation would be protected, as would any documents created by the law firm which would normally be protected even if they were shared with Ms. Adams.

Given our reversal of the trial court's order, it is not necessary to address Defendant's alternative argument that Plaintiff's subpoena to Ms. Adams exceeded the scope of Rule 45 of the North Carolina Rules of Civil Procedure.

Conclusion

Based on the foregoing reasons, we reverse the trial court's order denying Defendant's motion to quash and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and STROUD concur.

DANCY v. DANCY

[247 N.C. App. 25 (2016)]

KELLY RENEE DANCY, N/K/A KELLY RENEE LAUGHTER, PLAINTIFF
v.
ANTHONY SHANE DANCY, DEFENDANT

No. COA15-1049

Filed 19 April 2016

Child Custody and Support—increased visitation with father—best interests of child

Where plaintiff-mother appealed the order of the trial court granting defendant-father increased visitation with their daughter, the trial court correctly used the best interest of the child analysis, and substantial evidence supported the trial court's findings, which supported its conclusion that the daughter's best interests and welfare were best served with a permanent custodial arrangement that included substantial visitation with her father.

Appeal by Plaintiff from order entered 2 July 2015 by Judge Hal G. Harrison in Madison County District Court. Heard in the Court of Appeals 11 February 2016.

Emily Sutton Dezio for Plaintiff-Appellant.

No brief filed by Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Kelly Renee Dancy, now known as Kelly Renee Laughter ("Plaintiff"), appeals from a district court order granting Anthony Shane Dancy ("Defendant") increased visitation with their daughter. We affirm the trial court.

I. Factual and Procedural History

The parties were married in Marshall, North Carolina on 28 June 2003 and lived together as husband and wife until 30 May 2006, at which time they separated and Defendant moved to California. They had one daughter who was born on 2 September 2004.

On 30 May 2006, the parties executed a separation agreement that stated the following:

> 11. Joint Custody.
>
> The parties shall share the joint legal care, custody, and control of the minor child of the parties. The Wife shall have the physical custody of said minor child, subject to Husband's rights of reasonable visitation. The parties shall make every reasonable effort to foster feelings of affection between themselves and the child recognizing that frequent and continuing association and communication of both parties with a child is in the furtherance of the best interests and welfare of the child. . . .
>
> 13. Child Support Monetary Amount.
>
> a. The Husband shall pay to Wife, as and for the support of the minor child of the parties, the sum of $265.00 per month . . . . Obligations to make the payments as set forth in this section for the support of a child shall cease when the child dies, reaches the age of 18, enters in to marriage, becomes emancipated, or ceases to be in the physical custody of custodial parent. If, however, a child reaches the age of 18, is unmarried and resides with custodial parent [and] is a full-time high school student, said support obligation shall continue as to said child, until the child marries, no longer resides with custodial parent, no longer is a full-time high school student, completes the 12th grade [or] attains age 20, whichever shall first occur. . . .
>
> c. Modification. The parties further acknowledge that the child support required by this Agreement is only subject to modification by a court of competent jurisdiction upon a showing of substantial change of circumstances.

In addition to settling child custody and support, the parties settled their property division in the agreement as well. The parties signed the agreement and filed it in Madison County, North Carolina on 9 May 2007.

Plaintiff and Defendant obtained an absolute divorce on 15 August 2007, and the district court incorporated their settlement agreement into the divorce judgment. On 12 July 2011, Plaintiff filed a "motion for immediate, temporary and modification of permanent custody" and received an *ex parte* order granting her immediate custody. At the return hearing

on 18 July 2011, the parties entered into a consent order that increased Defendant's visitation time with the child and recited the following:

> [T]his temporary agreement reached by and between the Parties is fair, just and reasonable and in the minor child's best interest and should be adopted by the Court. . . . Primary physical placement of the minor child shall remain with the Plaintiff in this matter, subject to visitation with the Defendant as is set out herein. . . . The parties agree to hold open the hearing on temporary custody set for July 20, 2011 in Yancey County, while they meet to attempt further settlement negotiations on all outstanding issues.

At the custody hearing on 8 September 2011, the trial court accepted the consent order and issued an order entitled, "Order: Temporary and Permanent Custody." The trial court filed the order 14 September 2011 and found the consent order provisions were in the best interests of the child and awarded primary physical custody to Plaintiff. Pursuant to the consent order, the trial court awarded Defendant greater visitation during his military leave from 20 July 2011 to 24 July 2011, and visitation on Sundays thereafter using cell phones, Skype, and other correspondence. The order contemplated future visitation as follows:

> Provided the Defendant maintains regular Sunday contact with the minor child, then during the Summer of 2012, the Defendant shall exercise an uninterrupted period of visitation with the child, not to exceed two weeks, and which shall begin with two consecutive daytime visits from 10:00 a.m. until 6:00 p.m. Said two-week visitation shall be exercised within the state of North Carolina and the Defendant shall provide the Plaintiff with two months' advance notice of the visitation dates[.]

Three years later, on 24 September 2014, Defendant filed a verified motion for permanent custody. Defendant alleged the following:

> 6. That since the entry of [the 14 September 2011 order], the parties have continued Defendant's visitation with the minor child as provided in said Order, through [S]ummer 2012.
>
> 7. That since [S]ummer 2012, the parties have continued Defendant's visitation with the minor child on an ad hoc basis, to wit:

a. For [S]ummer 2013, Defendant was unable to travel to North Carolina and Plaintiff refused to allow the minor child to travel to California; and

b. For [S]ummer 2014, the minor child traveled to California with her older half-sibling, who is not a party to this action but is also a resident of the State of North Carolina, and was also accompanied by Defendant on both legs of the trip to and from California, for a period of approximately 15 days.

8. That Defendant's visits with the minor child have gone very well and that Defendant and the minor child desire to expand their visitations.

9. That the custody order currently in effect does not provide for visitation between Defendant and the minor child beyond [S]ummer 2012.

10. That the September 14, 2011 Custody Order is a temporary custody order in that said order did not determine all of the issues pertaining to child custody.

In his motion, Defendant sought to modify the child custody agreement to afford him "substantial visitation" with his daughter, to account for the geographic distance between the parties. The matter was set for the June 2015 calendar in Madison County District Court.

On 18 June 2015, the parties presented evidence and arguments to the trial court. The trial court entered a written order 2 July 2015 entitled, "Final and Permanent Child Custody Order." The order recited the following findings of fact and conclusions of law:

Findings of Fact

1. Defendant's Motion seeks to modify an existing temporary order and to establish a permanent child custodial arrangement. . . .

6. A temporary custody order was entered on September 14, 2011, which only provided a visitation arrangement through the summer of 2012. Thereafter the order did not set a custodial arrangement for the indefinite future.

7. By mutual agreement of the parties, Defendant did exercise a period of visitation with the minor child, in California, during summer 2014. That visit went very well,

and the minor child was accompanied by her older half-sister [].

8. For the summer 2014 visit, Defendant flew to North Carolina to pick up the parties' minor child and to accompany her to California for the two-week visit, then flew back with the minor child to return her to North Carolina at the conclusion of the visit.

9. Both parties have a close, loving relationship with the minor child. . . .

11. Since the summer 2014 visit, and until the present visit for this Court hearing, Defendant's contact with the child has been limited to telephone calls and text messages.

12. Plaintiff is married and works as a house cleaner. Plaintiff and her current husband are very fit and suitable to share custody of the minor child.

13. Defendant is a retired U.S. Marine, is remarried, and self-employed as an electrical contractor. Defendant is very fit and suitable to share custody of the minor child.

14. It is in the best interests and welfare of the parties' minor child that she have a permanent custodial arrangement with the Defendant father.

15. It is in the best interests and welfare of the parties' minor child that the parties share joint legal care, custody, and control of the minor child.

Conclusions of Law

1. That this Court has jurisdiction over the persons of Plaintiff, Defendant, and the parties' minor child.

2. That it is in the best interests and welfare of the parties' minor child that she have a permanent custodial arrangement with the Defendant father.

3. That it is in the best interests and welfare of the parties' minor child that the parties share joint legal care, custody, and control of the minor child.

The trial court awarded primary physical custody to Plaintiff, ordered greater visitation to Defendant on holidays and school breaks, and specified the terms of visitation.

Thereafter, Plaintiff timely filed her notice of appeal on 2 July 2015. She filed her Appellant brief and settled the record. Defendant has not participated in this appeal at all.

II. Standard of Review

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254.

"Whether a district court has utilized the proper custody modification standard is a question of law we review *de novo*." *Peters v. Pennington*, 210 N.C. App. 1, 707 S.E.2d 724 (2011) (citations omitted). "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006).

III. Analysis

Plaintiff contends the trial court committed error when it (1) found the 14 September 2011 order was a temporary order, and (2) failed to apply the correct burden of proof. We disagree.

Trial courts may issue child custody orders that are "temporary" or "permanent." *Woodring v. Woodring*, 227 N.C. App. 638, 642, 745 S.E.2d 13, 17 (2013). "The term 'permanent' is somewhat of a misnomer, because 'after an initial custody determination, the trial court retains jurisdiction of the issue of custody until the death of one of the parties or the emancipation of the youngest child.' " *Id.* (citations omitted).

A party seeking modification of a permanent child custody order bears the burden of showing "a substantial change in circumstances has occurred, which affects the child's welfare." *Karger v. Wood*, 174 N.C. App. 703, 705, 622 S.E.2d 197, 200 (2005) (citation omitted). Conversely, "if a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change in circumstances." *Senner v. Senner*, 161 N.C. App. 78, 80–81, 587 S.E.2d 675, 677 (2003) (quoting *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002)); *see also Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18.

"A trial court's designation of an order as 'temporary' or 'permanent' is neither dispositive nor binding on an appellate court." *Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18 (citation omitted). A child custody order is temporary if (1) it is entered into without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval time between the two hearings was reasonably brief; or (3) the order does not determine all of the issues. *Id.* (citing *Peters*, 210 N.C. App. at 13–14, 707 S.E.2d at 734); *see also Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. If a child custody order does not meet any of these criteria, it is permanent. *Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734.

First, the 14 September 2011 custody order does not state it is entered into with prejudice towards either party. However, we need not resolve this issue using only this prong.

Second, the 14 September 2011 order does not state a specific reconvening time and date. This Court has held that a temporary order can be converted into a "final order" when "neither party sets the matter for a hearing within a reasonable time." *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (citing *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000) (holding that one year between hearings is too long in a case with no unresolved issues); *LaValley*, 151 N.C. App. at 293, n. 6, 564 S.E.2d at 915, n.6 (holding twenty-three months is an unreasonable time between hearings)). However, the passage of time alone will not convert a temporary order into a permanent order. *See Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. In *Senner*, this Court held that a twenty-month passage of time was not unreasonable when the parties negotiated, albeit unsuccessfully, whether the child would move to Texas, and whether they would share joint custody on an alternating two-week basis. *Id.* In light of these ongoing negotiations, this Court held the plaintiff failed to show the defendant's twenty-month delay in filing a motion to modify was unreasonable. *Id. Senner* is similar to the case *sub judice*, in that the 14 September 2011 order never allowed the child to visit Defendant in California, yet the parties agreed to let her travel to California in Summer 2014. Because the parties continued to agree beyond the trial court's 14 September 2011 order, we hold the order was not converted into a permanent order.

Third, the 14 September 2011 order does not resolve all of the issues. The order does state in its preamble that the parties "hav[e] reached an agreement on all pending custody issues and tendered this Consent Order to the Court." However, this Court has held that an order is temporary and does not resolve all issues when it fails to address a party's right

to "ongoing visitation." *See Woodring*, 227 N.C. App. at 644, 745 S.E.2d at 18 (the temporary 2010 order at issue "provided father with only three specific instances of visitation in 2010" and "did not address father's ongoing visitation[.]"); *see also Smith v. Barbour*, 195 N.C. App. 244, 671 S.E.2d 578 (2009). Here, the 14 September 2011 order only allowed Defendant to visit his daughter in person during his four-day military leave in July 2011, and again for two weeks during Summer 2012, provided that he maintain regular Sunday contact with his daughter and travel to North Carolina during Summer 2012. Under this arrangement, Defendant was only able to visit his daughter in person up to her eighth birthday, leaving his ongoing visitation rights to be effectuated via Skype and phone calls and texts. The 14 September 2011 order did not resolve all of the issues in this case. Accordingly, we hold the order is temporary and the trial court correctly proceeded to a best interests of the child analysis without burdening Defendant to show a substantial change in circumstances.

After *de novo* review of the record, we hold the trial court utilized the proper custody modification standard—the best interests of the child analysis. The trial court's findings of fact supporting the custody modification are supported by substantial evidence presented by the parties. The findings of fact support the conclusion of law that the daughter's best interests and welfare are best served with a permanent custodial arrangement that includes substantial visitation with her father, Defendant.

IV. Conclusion

For the foregoing reasons we affirm the trial court.

AFFIRMED.

Judges STEPHENS and INMAN concur.

ALBERT S. DAUGHTRIDGE, JR. AND MARY MARGRET HOLLOMAN DAUGHTRIDGE, PLAINTIFFS
v.
THE NORTH CAROLINA ZOOLOGICAL SOCIETY, INC., DEFENDANT

No. COA15-1151

Filed 19 April 2016

1. Appeal and Error—parties—different cases

Plaintiffs could not seek review of an order in another, similar case where they were not parties in that case.

2. Jurisdiction—summary judgment—prior ruling by another judge

One judge could not quiet title in favor of defendant as a matter of law where another judge had previously denied defendant's motion for summary judgment on the same issue.

3. Appeal and Error—cross-appeal—notice untimely—appellant's brief required

A motion to dismiss defendant's cross-appeal was granted where the notice of cross appeal was untimely. Moreover, although defendant filed a petition for writ of certiorari, defendant did not file an appellant's brief and instead included its argument in its cross issues in its appellee brief, precluding full response by plaintiff. It is well established that a cross-appeal will not be considered when the cross-appellant fails to file an appellant's brief.

4. Appeal and Error—interlocutory orders and appeals—alternative basis for appeal

Defendant's purported cross-appeal and petition for writ of certiorari seeking review of an interlocutory order was denied where defendant made no attempt to show that the order affected a substantial right. Any arguments concerning an alternative basis for upholding a prior order did not relate to the order from which plaintiff appealed.

Appeal by plaintiffs and cross-appeal by defendant from order entered 11 December 2014 and judgment entered 29 June 2015 by Judges Alma L. Hinton and Marvin K. Blount, III, respectively, in Halifax County Superior Court. Heard in the Court of Appeals 10 March 2016.

Boxley, Bolton, Garber & Haywood, by Ronald H. Garber, for plaintiffs.

Charles S. Rountree, III, for defendant.

GEER, Judge.

Plaintiffs Albert S. Daughtridge, Jr. and Mary Margret Holloman Daughtridge appeal from a judgment quieting title in favor of defendant, the North Carolina Zoological Society, Inc. Plaintiffs contend the trial court erroneously overruled a previous order by a different superior court judge who had denied defendant's motion for summary judgment on the same issue. We agree with plaintiffs and find the procedural circumstances identical to those of *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 374 S.E.2d 160 (1988). Accordingly, we vacate the judgment and remand to the trial court for trial on the issues presented in plaintiffs' complaint.

Facts

On 13 September 2010, defendant recorded a general warranty deed in the Halifax County Public Registry to a 25-acre tract of land which was granted in fee simple by John B. Shields. Included in the deed was a reference to a map of the 25-acre tract prepared by a surveyor on 10 August 2010. After discovering this deed in 2013, plaintiffs recorded 14 non-warranty deeds describing property by metes and bounds that also claimed title to land described by the survey referenced in defendant's deed. Plaintiffs then filed a declaratory judgment action and a notice of lis pendens in Halifax County Superior Court against defendant on 3 July 2013 for the purpose of quieting title to this disputed real property. Defendant filed an answer and its own counterclaim to quiet title on 17 September 2013.

The real property in dispute is located between the town of Scotland Neck and the Roanoke River, abutting the southern boundary of White's Mill Pond. All parties seem to agree that plaintiffs' property is bounded on the east and northeast by the Kehukee Swamp Run, a water course that runs south through White's Mill Pond and then in a southeasterly direction. The issue at the heart of this case is which party has proper record title to an approximately five-acre tract of land determined by a description of the course of the Kehukee Swamp Run in each parties' respective chains of title.

In conducting discovery, the parties produced substantial documentation regarding their respective chains of title dating as far back as 1799,

as well as documentation regarding the exact location and course of the Kehukee Swamp Run. On 13 August 2014, defendant filed a motion for summary judgment, which came on for hearing on 3 November 2014 before Judge Alma L. Hinton. After reviewing detailed evidence regarding each parties' respective claims to chain of title to the disputed real property, Judge Hinton determined that summary judgment was not appropriate. Judge Hinton, therefore, entered an order on 11 December 2014 denying defendant's motion for summary judgment, and trial was calendared for 13 April 2015.

Subsequent to the denial of defendant's motion for summary judgment, plaintiffs deposed defendant's surveyor and defendant's closing attorney. Plaintiffs also filed with the court an affidavit from an expert witness expressing an opinion on the exact course of the Kehukee Swamp Run. On 15 April 2015, after conducting a pre-trial hearing spanning three days, Judge Marvin K. Blount, III took the case under advisement "to determine whether or not the case needs to be decided . . . by a jury or whether [there] are questions of law that will be decided by the judge." After hearing further arguments on 21 May 2015, Judge Blount directed defendant's counsel to prepare a judgment quieting title in favor of defendant as a matter of law. Judge Blount entered that judgment on 29 June 2015, and plaintiffs timely appealed the judgment to this Court.[1]

I

[2] Plaintiffs argue that Judge Blount was precluded from quieting title in favor of defendant as a matter of law on 29 June 2015 because Judge Hinton had previously denied defendant's motion for summary judgment on the very same issue on 11 December 2014. We agree.

---

1. **[1]** There is also a dispute regarding whether defendant owns the property to the east of the Kehukee Swamp Run that is the subject of separate litigation between defendant and Virgil Leggett in Halifax County Superior Court, file no. 14 CVS 1027. Hearings in 14 CVS 1027 were calendared in Halifax County Superior Court for the same date as the hearings in this action between the parties to this appeal. The trial court ultimately entered partial summary judgment in favor of the North Carolina Zoological Society in 14 CVS 1027. Plaintiffs in this case and Mr. Leggett have filed a petition for writ of certiorari in this appeal in 13 CVS 624, seeking review of the summary judgment order entered in 14 CVS 1027. Because plaintiffs were not parties in 14 CVS 1027, they may not seek review of the order entered in that case. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("A careful reading of Rule 3 [of the Rules of Appellate Procedure] reveals that its various subsections afford no avenue of appeal to either entities or persons who are nonparties to a civil action."). Moreover, Mr. Leggett may not seek review in this appeal of an order entered in an entirely different proceeding. We, therefore, have denied plaintiffs' and Mr. Leggett's petition for writ of certiorari.

Plaintiffs cite generally to *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972), for the well-established rules that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." It is well established that "[o]ne superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order." *First Fin. Ins. Co. v. Commercial Coverage, Inc.*, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002).

"In the granting or denial of a motion for summary judgment, the court is ruling as a matter of law, and is not exercising its discretion." *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 633, 272 S.E.2d 374, 376 (1980). Because a denial of a motion for summary judgment is not discretionary, "[t]he aggrieved party may not seek relief by identical motion before another superior court judge." *Id.* at 634, 272 S.E.2d at 376. Furthermore, "one trial judge 'may not reconsider and grant a motion for summary judgment previously denied by another judge.' " *Iverson*, 92 N.C. App. at 164, 374 S.E.2d at 163 (quoting *Smithwick v. Crutchfield*, 87 N.C. App. 374, 377, 361 S.E.2d 111, 113 (1987)).

Defendant attempts to circumvent these established rules by labeling Judge Blount's judgment a "directed verdict." Defendant cites to *Clinton v. Wake Cnty. Bd. of Educ.*, 108 N.C. App. 616, 621, 424 S.E.2d 691, 694 (1993), for the proposition that "a pretrial order denying summary judgment has no effect on a later order granting or denying a directed verdict on the same issue or issues." In *Clinton*, "[a]ll motions for summary judgment were denied . . . and the case proceeded to trial . . . ." *Id.* at 620, 424 S.E.2d at 693. The plaintiff in *Clinton* presented his evidence at trial before a jury and then the trial court directed a verdict in favor of the defendant. *Id.*

Clinton has no relevance to the case before us. Here, Judge Blount did not grant a directed verdict during trial following the presentation of evidence. *See Buckner v. TigerSwan, Inc.*, ___ N.C. App. ___, ___, 781 S.E.2d 494, 498 (2015) (" '[I]t is well settled that a motion for a directed verdict only is proper in a jury trial.' " (quoting *Dean v. Hill*, 171 N.C. App. 479, 482, 615 S.E.2d 699, 701 (2005))). Instead, he conducted *a pre-trial hearing* to determine whether there were genuine issues of fact appropriate for a jury trial or if the case could be decided as a matter

of law. Whether labeled as such or not, Judge Blount purported to grant summary judgment to defendant.

The procedural circumstances in this case are identical to those in *Iverson*. In *Iverson*, after one superior court judge had denied defendant's motion for summary judgment, a subsequent superior court judge "conducted, at a pretrial conference, a hearing in the absence of the jury to determine whether a material issue of fact existed. This was the issue which had previously been presented to and decided by [the original judge presiding over defendant's summary judgment motion]." 92 N.C. App. at 164, 374 S.E.2d at 163. This Court held that the procedure used by the subsequent presiding judge, "while not labeled a hearing on summary judgment, was exactly that." *Id.* at 165, 374 S.E.2d at 163. Because the subsequent judgment overruled the original denial of summary judgment, this Court vacated the subsequent judgment and remanded the case back to the superior court for trial on the issues presented in the plaintiff's complaint. *Id.*

Because this case is materially indistinguishable from *Iverson*, we hold that Judge Blount's entry of judgment in defendant's favor prior to trial had the effect of overruling Judge Hinton's earlier denial of defendant's motion for summary judgment. We, therefore, must vacate Judge Blount's judgment and remand to the trial court for trial on the parties' actions to quiet title to the disputed real property. *Id. See also Cail v. Cerwin*, 185 N.C. App. 176, 184, 648 S.E.2d 510, 516 (2007) (holding that "only when the legal issues differ between the first motion for summary judgment and a subsequent motion may a trial court hear and rule on the subsequent motion").

II

[3] Defendant filed a notice of cross-appeal from Judge Hinton's order denying defendant's motion for summary judgment that was untimely under Rule 3(b)(3) of the Rules of Appellate Procedure. Because of the untimeliness of the notice, defendant has also filed a petition for writ of certiorari seeking review of that same order. Defendant, however, failed to file an appellant's brief and instead simply included its argument on its cross issues in its appellee brief.

Because defendant's notice of cross-appeal was untimely, we have granted plaintiffs' motion to dismiss defendant's cross-appeal. Further, by failing to file an appellant's brief in support of the cross-appeal that is the subject of the petition for writ of certiorari, defendant precluded plaintiffs from being able to fully respond with an appellees' brief. It is

well established that this Court will not consider a cross-appeal when the cross-appellant has failed to file an appellant's brief. *See*, *e.g.*, *Alberti v. Manufactured Homes*, *Inc.*, 329 N.C. 727, 739, 407 S.E.2d 819, 826 (1991) ("Plaintiffs gave proper notice of appeal on these issues but did not file an appellant's brief within the time allowed under Rule 13 of the North Carolina Rules of Appellate Procedure. Rather, they attempted to argue the issues in their appellee's brief. The Court of Appeals, therefore, correctly held that plaintiffs had failed to preserve any of these questions for its review, and we affirm this decision."); *Countrywide Home Loans*, *Inc. v. Reed*, 220 N.C. App. 504, 508, 725 S.E.2d 667, 670 (2012) ("Because Plaintiff did not file a cross-appellant's brief in this case, we grant Defendants' motion to dismiss Plaintiff's cross-appeal[.]").

[4] Moreover, defendant's purported cross-appeal and petition for writ of certiorari seek review of an interlocutory order. In *Cail*, 185 N.C. App. at 185-86, 648 S.E.2d at 516-17, once this Court concluded that a superior court judge improperly granted summary judgment after a prior judge had denied a motion for summary judgment, the Court declined to address the defendant's arguments that the initial denial of summary judgment should be reversed. The Court noted that because the order denying summary judgment was an interlocutory order, it could only be reviewed upon a showing that it affected a substantial right. *Id.* at 185, 648 S.E.2d at 517. Because the defendant had failed to make the necessary showing, the Court dismissed the defendant's cross-appeal. *Id.* at 186, 648 S.E.2d at 517.

Likewise, in this case, defendant has made no attempt to show that Judge Hinton's order affects a substantial right. Because of defendant's failure to file an appellant's brief and because defendant has failed to show why an appeal of Judge Hinton's order is now necessary, we exercise our discretion to deny its petition for writ of certiorari.

It appears, however, that defendant may also be contending in its appellee brief that its arguments regarding Judge Hinton's order denying summary judgment constitute an alternative basis for upholding Judge Blount's order entering judgment in defendant's favor. Rule 28(c) of the Rules of Appellate Procedure allow an appellee, "[w]ithout taking an appeal," to "present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."

Plaintiff has, however, appealed from Judge Blount's 29 June 2015 judgment, while defendant is challenging a separate order: Judge Hinton's

11 December 2014 order. In *Belmont Land & Inv. Co. v. Standard Fire Ins. Co.*, 102 N.C. App. 745, 751, 403 S.E.2d 924, 927 (1991), this Court specifically held that when the plaintiff appealed from an order granting summary judgment on one of its claims, defendants could not seek review of an earlier order denying their motion for summary judgment on the grounds that the earlier order deprived them of an alternative basis in law for supporting the summary judgment challenged on appeal. The Court stated simply: "The error assigned by defendants does not relate to the order . . . from which appeal has been taken." *Id.*

Because defendant's arguments do not relate to the order that plaintiffs appealed, defendant cannot rely on Rules 10(c) and 28(c) as a basis for review of Judge Hinton's order. Accordingly, we hold that defendant's arguments are not properly before us, and we decline to address them. *See also Birmingham v. H&H Home Consultants & Designs, Inc.*, 189 N.C. App. 435, 444, 658 S.E.2d 513, 519 (2008) (declining to consider cross-assignment of error under the predecessor rule to Rule 10(c) because it did "not address the order entered by the trial court from which plaintiff appeals").

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF
v.
ADAMS OUTDOOR ADVERTISING OF CHARLOTTE LIMITED PARTNERSHIP, DEFENDANT

No. COA15-589

Filed 19 April 2016

1. Eminent Domain—subject matter jurisdiction—Section 108 hearing

The trial court's erroneous application of the Outdoor Advertising Control Act in Article 11 did not affect subject matter jurisdiction to conduct a Section 108 hearing in a condemnation case.

2. Evidence—findings of fact—conclusions of law—sufficiency—billboard—outdoor advertising

The trial court erred in a condemnation case by finding and concluding that (1) defendant's billboard was a permanent leasehold

improvement and not personal property; (2) defendant's alleged loss of business and outdoor advertising income were compensable property interests in an Article 9 proceeding; (3) the Department of Transportation permit granted to defendant under the Outdoor Advertising Control Act was a compensable property interest; and (4) the option to renew contained in defendant's lease was a compensable real property interest.

3. Eminent Domain—calculation of compensation—bonus value method

The trial court erred by holding that the "bonus value" method of calculating compensation interest was improper and excluding evidence of the "bonus value" method from the trier of fact under Rules 401 and 403, and allowing consideration of income attributable to a billboard and outdoor advertising. The trial court's classification of the billboard as a permanent leasehold improvement was erroneous, which error resulted in improper measure of compensation.

Appeal by plaintiff from order entered 27 August 2014 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 December 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Dahr Joseph Tanoury and Assistant Attorney General Kenneth A. Sack, for the Department of Transportation.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for defendant-appellee.

BRYANT, Judge.

Where the trial court did not lack subject matter jurisdiction, we affirm. However, where the trial court's findings and conclusions regarding the compensable property interests taken are unsupported by the evidence and contrary to law, we reverse.

On 6 December 2011, the North Carolina Department of Transportation ("plaintiff-DOT") filed a civil action in Mecklenburg County Superior Court and an acknowledgment of taking pursuant to a resolution of plaintiff-DOT authorizing the appropriation of defendant's property for the construction of a highway project. When the parties could not agree on the purchase price of the leasehold interest to

be appropriated, the trial court held a Section 108[1] hearing and made findings of fact and conclusions of law. The trial court's findings of fact included those set forth below.

In 1981, a billboard ("the billboard") was originally constructed on a lot (the "CHS Lot") located at the corner of Independence Boulevard and Sharon Amity Road in Charlotte, North Carolina. It was legally erected pursuant to permits issued by the City of Charlotte and plaintiff-DOT. It was constructed pursuant to a lease agreement between Craig T. Brown, Jr., then-owner of the CHS Lot, and National Advertising Company ("National"), predecessor in interest to defendant Adams Outdoor Advertising of Charlotte Limited Partnership ("defendant"). The billboard had two back-to-back V-type sign face displays of approximately 14' x 48' each or 672 square feet of advertising space per face.

About ten years later, on 15 August 1991, a new lease agreement was entered into by National and C.H.S. Corporation, then-owner of the land. The new lease had an original term of six years and thereafter was to run on a year-to-year basis. In October 2001, defendant acquired the billboard from National and all property rights pertaining thereto. At that time, defendant inherited the 1991 lease which was operating on a year-to-year basis.

On 26 September 2006, defendant entered into a lease agreement (the "2006 lease") with C.H.S. Corporation to secure the CHS Lot for the purpose of operating, maintaining, repairing, modifying, and reconstructing the billboard. The original term of the 2006 lease commenced on 1 August 2007 and ran for a ten-year period with one automatic ten-year extension. Therefore, except for the discretion specifically reserved to defendant to cancel upon the happening of certain events,[2] the 2006

---

1. The purpose of a Section 108 hearing is to "eliminate from the jury trial any question as to what land [DOT] is condemning and any question as to its title." *N.C. State Hwy. Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967). During a Section 108 hearing, "the judge . . . shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken." N.C. Gen. Stat. § 136-108 (2015).

2. The cancellation provision reads as follows:

> **CANCELLATION:** If, in Lessee's sole opinion: a) the view of the advertising copy on any Structure becomes obstructed; b) the Property cannot be safely used for the erection, maintenance or operation of any Structure for any reason; c) the value of any Structure is substantially diminished, in the sole judgment of the Lessee, for any reason; d) the

lease would not terminate until 1 August 2027. The 2006 lease was recorded in the Mecklenburg County Register of Deeds Office in Book 22206 at Pages 740–44 and permitted defendant to use the CHS Lot for outdoor advertising purposes only.

In the 2006 lease, defendant agreed to pay substantially more rent to the landlord C.H.S. Corporation than what was found in the 1991 lease due to the high value of the unique location of the CHS Lot and the need to secure defendant's investment for a long term. Additionally, the lease contained the following language regarding defendant's right to remove its billboards:

> All Structures erected by or for the Lessee [defendant] or its predecessors-in-interest . . . shall at all times be and remain the property of [defendant] and the above-ground portions of the Structures may be removed by [defendant,] . . . notwithstanding that such Structures are intended by Lessor and [defendant] to be permanently affixed to the Property.

Prior to plaintiff-DOT's taking on 6 December 2011, defendant owned and operated the billboard and each year would pay the DOT to renew its State permit for the billboard.

Although the billboard was legally erected and maintained, it was not, as of 6 December 2011, in conformity with then existing height regulations adopted by plaintiff-DOT for outdoor advertising adjacent to interstates or federal aid primary highways. The sign was approximately sixty-five feet in height, and DOT regulations, adopted in 1990, set height limitations at fifty feet. However, because it was legally existing at the time it was erected, the billboard was grandfathered as a nonconforming sign that could be maintained under an exception to applicable state statute and DOT regulations. *See* Charlotte, N.C., Code § 13.112(1)(c).

> Lessee is unable to obtain, maintain or continue to enforce any necessary permit for the erection, use or maintenance of any Structure as originally erected; or, e) *the use of any Structure, as originally erected, is prevented by law or by exercise of any governmental power*; then Lessee may, at its option, either: (i) reduce and abate rent in proportion to the impact or loss that such occurrence has upon the value of Lessee's Structure for so long as such occurrence continues; or, (ii) cancel this Lease and receive a refund of any prepaid rent, prorated as of the date of cancellation.

(emphasis added).

Also, as of 6 December 2011, the CHS Lot was zoned B-2 by the City of Charlotte, and several years earlier, the City of Charlotte enacted zoning regulations banning new billboard locations within its jurisdiction, including along Independence Boulevard. The immediate neighborhood near the CHS Lot consisted of many commercial properties with a large concentration of retail shopping centers and automobile dealerships. Approximately 85,000 vehicles travel Independence Boulevard on a daily basis and it is one of the main thoroughfares linking the Charlotte downtown with areas to the east, including Union County, which is one of the fastest growing counties in the State.

However, because of the nonconforming nature of the billboard and the restrictive regulatory climate, relocation of the billboard in the City of Charlotte was not possible. Additionally, because plaintiff-DOT acquired the entire CHS Lot for highway widening purposes, neither the billboard, nor any substantial part thereof, could be moved anywhere else on the same site. As of 6 December 2011, the date of the taking, defendant had at least sixteen years remaining (until August 2027) on the lease to use the CHS Lot and maintain the billboard for outdoor advertising purposes.

The Complaint and Declaration of taking condemned defendant's right to use the CHS Lot for outdoor advertising and to operate and maintain on said land a sign for that purpose. Plaintiff-DOT had become the fee owner of the CHS Lot, having acquired title voluntarily from the former owner, C.H.S. Corporation, on 6 December 2011. On or about 13 December 2012, defendant filed an Answer praying for the appointment of commissioners to appraise any damage to the land as a result of the taking pursuant to Article 9, N.C. Gen. Stat. § 136-109.

Both parties filed motions for a "Section 108 hearing," pursuant to N.C. Gen. Stat. § 136-108, to hear all matters raised by the pleadings, except the issue of damages. On 23–25 June 2014, a Section 108 hearing was held pursuant to the motions before the Honorable Lisa C. Bell, Special Superior Court Judge presiding, in Mecklenburg County Superior Court. The trial court entered an order on 27 August 2014 finding, *inter alia*, that plaintiff-DOT took various property interests of defendant and that defendant was entitled to compensation pursuant to the Outdoor Advertising Control Act ("OACA"), for the value of defendant's outdoor advertising. On 24 September 2014, plaintiff-DOT gave Notice of Appeal from the order.

On appeal, plaintiff-DOT argues that (I) the trial court lacked subject matter jurisdiction and erred by applying Article 11, the OACA, to a condemnation proceeding; (II) the trial court's findings and conclusions are unsupported by the evidence and contrary to law; and (III) the trial court erred by adopting the wrong measure of compensation and damages.

I

[1] Plaintiff-DOT first argues that the trial court lacked subject matter jurisdiction and erred by applying the incorrect article to a condemnation proceeding. Specifically, plaintiff-DOT argues that the trial court erred by applying the Outdoor Advertising Control Act, codified within Article 11 of North Carolina General Statutes Chapter 136, rather than Article 9 (titled "Condemnation"), Chapter 136 of the North Carolina General Statutes. Instead, plaintiff-DOT argues the trial court should have applied Article 9 *exclusively* because plaintiff-DOT filed this action under Article 9 for the sole purpose of acquiring rights of way for the construction of highway improvements to E. Independence Boulevard and did not file the action under Article 11 to condemn a nonconforming billboard that violated the OACA. In other words, plaintiff-DOT contends that because the pleadings, consisting of plaintiff-DOT's complaint and defendant's answer, did not expressly raise the issue of N.C. Gen. Stat. § 136-131, the trial court lacked subject matter jurisdiction to decide the issue.[3] We agree with plaintiff-DOT to the extent the trial court erred in applying Article 11; however, we disagree that the trial court lacked subject matter jurisdiction to conduct a Section 108 Hearing.

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (citations and quotation marks omitted). "A court has jurisdiction over the subject matter if it has the power to hear and determine cases of the general class to which the action in question belongs." *Dep't of Transp. v. Tilley*,

---

3. Plaintiff-DOT contends that its prayer for relief asking that just compensation be determined according to the provisions and procedures of Article 9 went unchallenged. However, the prayer for relief is not an "averment" for which a responsive pleading is required. *See* N.C. Gen. Stat. § 1A-1, Rule 8(d) (2015); *Bolton v. Crone*, 162 N.C. App. 171, 174, 589 S.E.2d 915, 916 (2004) ("Rule 8(d) applies to only material or relevant averments." (citation and quotation marks omitted)); Black's Law Dictionary (10th ed. 2014) (defining an "averment" as "[a] positive declaration or affirmation of fact; esp., an assertion or allegation in a pleading . . . .").

136 N.C. App. 370, 373, 524 S.E.2d 83, 86 (2000) (quoting *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 324, 244 S.E.2d 164, 165 (1978)). In *Tilley*, this Court, citing N.C. Gen. Stat. § 136-103(a) of Article 9, stated that "[o]ur legislature has expressly conferred jurisdiction over condemnation matters on our superior courts." *Id.*

Article 9 procedures begin with the application of N.C. Gen. Stat. § 136-103 and the filing of a complaint and declaration of taking. N.C.G.S. § 136-103 (2015). Pursuant to N.C.G.S. § 136-103, both plaintiff-DOT's complaint and declaration of taking are to provide "[a] statement of the authority under which and the public use for which said land is taken." *Id.* § 136-103(c)(1). N.C. Gen. Stat. § 136-103 further dictates that the complaint and declaration describe the "entire tract or tracts affected" and the "estate or interest in said land." *Id.* §§ 136-103(c)(2), (3). Once a complaint and declaration of taking is filed, "[a]ny person whose property has been taken by" DOT may file an answer to the complaint "*only* praying for a determination of just compensation." N.C. Gen. Stat. § 136-106(a) (emphasis added).

A Section 108 hearing is conducted by the trial court which "shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, *if controverted*, questions of necessary and proper parties, title to the land, interest taken, and area taken." N.C. Gen. Stat. § 136-108 (2015) (emphasis added).

Here, in both plaintiff-DOT's complaint and declaration of taking, plaintiff-DOT described "the authority vested in the plaintiff under the provisions of Chapter 136 of the General Statutes." Plaintiff-DOT followed the mandate of N.C.G.S. § 136-103 by describing defendant's lease "for the purpose of erecting and maintaining one Billboard Advertising Structure" permitted by plaintiff-DOT. In filing its answer, defendant followed N.C.G.S. § 136-103(a), admitting some allegations and denying others, including plaintiff-DOT's allegation regarding the "tract or tracts affected" or the "interest in said land." N.C.G.S. §§ 136-103(c)(2), (3).

"In reality, [plaintiff-DOT] [is] contesting the propriety of the *pleadings*, not the propriety of the court's *jurisdiction*." *Tilley*, 136 N.C. App. at 373, 524 S.E.2d 83, 86 (2000) (emphasis added). In *Tilley*, the defendants argued that because the plaintiff's declaration of taking did not correctly list the entire tract affected, the trial court did not have subject matter jurisdiction over the property to be taken. *Id.* This Court rejected that argument, finding it to be "contrived and without merit." *Id.*

Here, plaintiff-DOT employs a similar tactic by arguing that the trial court lacked subject matter jurisdiction because defendant's answer

discussed Article 11 and plaintiff-DOT did not file an action under that article. While we agree the trial court erred in applying Article 11, we disagree with plaintiff-DOT's contention that failing to apply Article 9 *exclusively* affected the jurisdiction of the court. All that is necessary to invoke the trial court's jurisdiction to conduct a Section 108 hearing is that the "interest in said land" be in dispute, *see* N.C.G.S. § 136-108; *City of Winston-Salem v. Slate*, 185 N.C. App. 33, 41, 647 S.E.2d 643, 649 (2007).

Here, defendant denied plaintiff-DOT's allegation regarding what precisely was defendant's "interest in said land"—the CHS Lot—upon which defendant had a leasehold interest and a billboard. Therefore, the trial court's erroneous application of Article 11 did not affect subject matter jurisdiction to conduct a Section 108 hearing. Accordingly, plaintiff-DOT's argument regarding jurisdiction is overruled.

II

[2] Plaintiff-DOT next argues that the trial court's findings of fact and conclusions of law regarding the compensable property interests taken are unsupported by the evidence and contrary to law. Specifically, plaintiff-DOT contends the trial court erred in finding and concluding that (1) defendant's billboard was a permanent leasehold improvement and not personal property; (2) defendant's alleged loss of business and outdoor advertising income are compensable property interests in an Article 9 proceeding; (3) the DOT permit granted to defendant under the OACA is a compensable property interest; and (4) the option to renew contained in defendant's lease is a compensable real property interest. We agree.

"The standard of review on appeal from a judgment entered after a non-jury trial[4] is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Dep't of Transp. v. Webster*, 230 N.C. App. 468, 477, 751 S.E.2d 220, 226 (2013) (quoting *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002)). "[U]nchallenged findings of fact are presumed correct and are binding on appeal[,]" but the trial court's conclusions of law are reviewed *de novo*. *Id.* (citations and quotation marks omitted).

---

4. We acknowledge that the case before us is an appeal from an interlocutory order and not an appeal of an order following a "non-jury trial." However, the standard of review for a trial judge's findings of fact and conclusions of law remain the same in our review of an interlocutory order. *See Webster*, 230 N.C. App. at 477, 751 S.E.2d at 226 (applying above stated standard of review in appeal of interlocutory order).

By exercise of its eminent domain powers, plaintiff-DOT took defendant's property interests related to the CHS Lot. "The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty." *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960). Just compensation limits eminent domain power and is guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution. U.S. Const. amend. XIV; N.C. Const. art. I, § 19; *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 274 N.C. 362, 372, 163 S.E.2d 363, 370 (1968).

In a compensation action, a property owner is entitled to " 'the full and perfect equivalent of the property taken.' . . . 'In awarding just compensation for the property taken,' the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Lea Co. v. Dep't of Transp.*, 317 N.C. 254, 260, 345 S.E.2d 355, 358 (1986) (internal citations omitted). It is well-settled that "a leasehold is a property right, . . . [and] [a]ny diminution of that right by the sovereign in the exercise of its power of eminent domain entitles lessee to compensation." *Horton v. Redev. Comm'n of High Point*, 264 N.C. 1, 8–9, 140 S.E.2d 728, 734 (1965) (citations omitted). Furthermore, the power of eminent domain, being contrary to common law property rights, must be exercised strictly in accord with enabling statutes, and any ambiguities pertaining to such power are construed in favor of the property owner. *Proctor v. State Hwy. & Pub. Works Comm'n*, 230 N.C. 687, 692, 55 S.E.2d 479, 482–83 (1949).

(1) Classification of Billboard

Plaintiff-DOT's first assignment of error regards the proper classification of defendant's billboard. Plaintiff-DOT argues the trial court erred in Findings of Fact Nos. 21, 27, 32, 33, 40, 41, 45, and Conclusions of Law Nos. 8, 10–13, by holding that defendant's billboard was a permanent leasehold improvement and not personal property. We agree.

"[W]hether property attached to land is removable personal property or part of the realty is determined by examining external indicia of the lessee's 'reasonably apparent' intent when it annexed its property to the land." *Nat'l Adver. Co. v. N.C. Dep't of Transp.*, 124 N.C. App. 620, 626, 478 S.E.2d 248, 250–51 (1996) (citing *Little v. Nat'l Serv. Indus., Inc.*, 79 N.C. App. 688, 693, 340 S.E.2d 510, 513 (1986)). This classification is important because the law does not authorize a court to award compensation for personal property, such as a billboard sign. N.C. Gen. Stat. § 136-19(a) (2015) (stating NCDOT is authorized to condemn only land,

materials, and timber for rights of way, not personal property); *Lyerly v. State Hwy. Comm'n*, 264 N.C. 649, 650, 142 S.E.2d 658, 658 (1965) ("No allowance can be made for personal property, as distinguished from fixtures, located on the condemned premises[.]" (citation omitted)). "Items of personal property which are attached to the leasehold for business purposes are trade fixtures . . . and they remain the personal property of the tenant." *Taha v. Thompson*, 120 N.C. App. 697, 703, 463 S.E.2d 553, 557 (1995) (internal citations omitted) (citing *Stephens v. Carter*, 246 N.C. 318, 321, 98 S.E.2d 311, 313 (1957)).

In *National Advertising Co.*, this Court found that the billboard at issue was "removable personal property and not part of the realty." 124 N.C. App. at 625, 478 S.E.2d at 250. In "examining the external indicia of the lessee's 'reasonably apparent' intent," this Court found the following in support of its conclusion that the billboard was personal property: (1) the landowners signed a disclaimer of any ownership in the sign; (2) the sign was listed as personal property for tax purposes; and (3) in response to plaintiff-DOT's First Request for Admissions, the sign was noted to be a "trade" fixture, which by law is removable personal property. *Id.* at 626, 478 S.E.2d at 251.

In the instant case, "examining the external indicia of the lessee's (defendant's) reasonably apparent intent," the external indicia show that the billboard and structure were personal property and the trial court's ruling (Conclusion of Law No. 10) to the contrary is not supported by the facts.

First, defendant, not plaintiff-DOT, physically removed the billboard and structure from the CHS Lot by carefully dismantling them and reinstalling major components thereof at another billboard location along Independence Boulevard, as permitted by the lease agreement. The lease between defendant and C.H.S. Corporation specifically stated that

> [a]ll Structures erected by or for the Lessee [defendant]. . . *shall at all times be and remain the property of [defendant]* and the above-ground portions of the Structures may be removed by the [defendant,] . . . *notwithstanding that such structures are intended by Lessor and [defendant] to be permanently affixed to the Property.*

(emphasis added). The clear intent of the parties as evidenced by the lease agreement was for the billboard to remain defendant's property and be removed at the expiration of the lease, absent the imposition of a cancellation provision in the lease. *See supra* note 2.

Second, for tax purposes, defendant's billboard structures are classified as "Business Personal Property" and the company pays property taxes to Mecklenburg County in accordance with that classification. Patricia Peterson, plaintiff-DOT's tax witness, testified that the North Carolina Department of Revenue treats a billboard as personal property even if the land is owned in fee by the billboard company. Significantly, defendant previously admitted in a different case that its billboards are personal property and subject to personal property tax assessments. *Adams Outdoor Adver., Ltd. v. City of Madison*, 294 Wis. 2d 441, 450, 458, 717 N.W.2d 803, 807–08, 811–12 (2006) (acknowledging personal property classification of billboard in tax assessment dispute).

Third, defendant's vice president for real estate admitted in a sworn affidavit and other documents that the billboard was personal property and agreed to accept relocation money for it. At the hearing, plaintiff-DOT's counsel argued that this evidence was not offered to dispute the validity of the relocation or eminent domain claim or reveal the settlement of a claim, as defendant argued, but rather it was offered and admitted to show defendant's inconsistent position regarding the classification of the billboard as personal property. *See Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc.*, 134 N.C. App. 468, 472, 518 S.E.2d 28, 31 (1999) (noting statement made by agent of party opponent regarding settlement of a claim in a different matter was admissible against party opponent under N.C.G.S. § 1A-1, Rule 801(d)).

Accordingly, the trial court erred in finding and concluding that the billboard and its structure were not movable personal property as this conclusion is not supported by evidence and is contrary to law.

(2) Loss of Income

Plaintiff-DOT next argues that defendant's alleged loss of business and outdoor advertising income are not compensable property interests in an Article 9 proceeding. Specifically, plaintiff-DOT contends that the trial court erred by stating plaintiff-DOT took defendant's "right to receive rental income" generated by the billboard sign and the jury should be allowed to consider that lost income. Furthermore, plaintiff-DOT argues that the lost advertising "rental income" attributable to the billboard is more accurately termed lost "business income." We agree.

In highway eminent domain proceedings, "[t]he longstanding rule in North Carolina is that evidence of lost business profits is inadmissible in condemnation actions" because the alleged losses are too speculative in nature, cannot be calculated with certainty, and are reliant on too many contingencies. *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1,

7, 637 S.E.2d 885, 891 (2006) (citing *Pemberton v. City of Greensboro*, 208 N.C. 466, 470–72, 181 S.E. 258, 260–61 (1935)). However, "[e]vidence of the *rental revenues* from land may be admitted and considered in determining the fair market value of the land at the time of the taking." *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 121, 123–24, 330 S.E.2d 618, 619–20 (1985) (emphasis added) (citations omitted); *see City of Charlotte v. Hurlahe*, 178 N.C. App. 144, 149–51, 631 S.E.2d 28, 31–32 (2006) (holding rental income from airport parking lot admissible to show market value where rent directly attributable to the land and comparable sales unavailable).

(3) DOT Permit

Plaintiff-DOT also argues that the DOT permit granted to defendant under the OACA is not a compensable property interest. Specifically, plaintiff-DOT argues that it was error for the trial court to hold that the value of the OACA permit should be considered by the finder of fact. We agree.

Once land has been deemed condemned and taken for the use of the DOT, "the right to just compensation therefor shall vest in the person owning said property *or any compensable interest therein* at the time of the filing of the complaint and the declaration of taking . . . ." N.C. Gen. Stat. § 136-104 (2015) (emphasis added). Generally, termination of a government-issued permit is not a compensable taking of a property interest. *See Haymore v. N.C. State Hwy. Comm'n*, 14 N.C. App. 691, 696, 189 S.E.2d 611, 615 (1972) (noting that the granting of a driveway permit application is a regulatory action that does not vest an irrevocable property right in the owner).

Plaintiff-DOT's evidence, based on Roscoe Shiplett ("Shiplett"), a Charlotte appraiser's forty-three years of experience, was that the permit's worth should not be included in the value of the leasehold because it is not part of the real estate and "goes to the overall business enterprise." Shiplett also testified that he has never seen another appraiser assign a specific value to a billboard permit when valuing a leasehold interest. We have found nothing in our jurisprudence that has held contrary to the statement made by Shiplett. Thus, the trial court erred in holding that the value of the OACA permit should be considered by the finder of fact in determining just compensation.

(4) Option to Renew

Plaintiff-DOT next argues that the option to renew contained in defendant's lease is also not a compensable property interest. Specifically,

plaintiff-DOT contends that the court's ruling that defendant's expectation of renewal "in perpetuity" of defendant's lease was a compensable property interest that should be considered by the finder of fact is not supported by the evidence and is contrary to law. Plaintiff-DOT argues that defendant is not entitled to compensation for any purported expectation of renewal of its leasehold interests beyond the terms of the lease. We agree.

While plaintiff-DOT's argument is supported primarily by North Carolina case law noting that "perpetual leases" are disfavored and "will not be enforced absent language in the lease agreement which expressly or by clear implication indicates that this was the intent of the parties," *Lattimore v. Fisher's Food Shoppe, Inc.*, 313 N.C. 467, 470, 329 S.E.2d 346, 348 (1985), the enforcement of a "perpetual lease" is not at issue here. Rather, the issue is whether the expectation of a lease renewal is a proper consideration in establishing just compensation. *See Almota Farmers Elevator & Warehouse Co. v. U.S.*, 409 U.S. 470, 473–74, 35 L. Ed. 2d 1, 8 (1973) (noting that the expectation of renewal is a proper consideration in establishing just compensation, especially when tenant fixtures (grain elevators) have a substantially long useful life). Further, it is well established that when determining just compensation, "the trial court should admit any relevant evidence that will assist the jury in calculating the fair market value of the property and the diminution in value caused by the condemnation." *M.M. Fowler*, 361 N.C. at 6, 637 S.E.2d at 890 (citing *Abernathy v. S. & W. Ry. Co.*, 150 N.C. 97, 108–09, 63 S.E. 180, 185 (1908)).

Here, at the time of the taking, defendant's lease for its billboard had been tied to the CHS Lot for approximately thirty years. When defendant acquired the billboard and all property rights pertaining thereto, defendant inherited an existing lease with CHS, which operated on a year-to-year basis. Around 26 September 2006, defendant negotiated and entered into a lease agreement with CHS to secure, long term, the site for the billboard. The original term of the lease commenced on 1 August 2007 and ran for a ten-year period with one automatic ten-year extension. Except for some limited circumstances reserved to defendant, neither CHS nor defendant could terminate the lease until 1 August 2027. After 1 August 2027, the lease would automatically renew for successive ten year periods unless either CHS or defendant gave ninety days' notice to terminate prior to the deadline. As of 6 December 2011— the date of the taking in this case—defendant had at least sixteen years to use the CHS Lot and maintain the billboard for outdoor advertising purposes.

In its Finding of Fact No. 42, which plaintiff-DOT does not challenge, the trial court found the following:

> 42. A willing, knowledgeable buyer in the market for a billboard location and a willing seller of such property in setting a price would factor in the strength of the rights arising from a lease as improved with a sign structure and the status of compliance with State and local laws, in this case being the protections afforded to the sign owner from being legally permitted and the benefits accruing from the nonconforming nature of the property.

However, because there is no North Carolina case law specifically allowing the expectation of renewal of a lease to be considered in valuing property (here, a billboard), and because the instant case does not provide facts to support such an extension of the law, the trial court erred in finding and concluding that defendant's expectation of renewal "in perpetuity" of its leasehold interest was a compensable property interest.

As we reverse the trial court's findings and conclusions that various components of defendant's leasehold interest were compensable due to the trial court's ultimate conclusion that the billboard was a "permanent leasehold improvement," we note defendant's reliance and the trial court's acceptance of numerous cases from other states which have analyzed these components as being favorable to defendant's position. *See*, *e.g.*, *The Lamar Corp. v. State Hwy. Comm'n*, 684 So.2d 601, 604 (Miss. 1996) (holding highway billboard located on property condemned for highway expansion was "structure," entitling owner to compensation in eminent domain proceedings, regardless of whether billboard was personal or real property); *State of Okla. ex rel. Dep't of Transp. v. Lamar Adver. of Okla., Inc.*, 335 P.3d 771, 775–76 (Okla. 2014) (holding that where billboards are part of a taking in a condemnation proceeding, such trade fixtures, like billboards, are "generally treated as real property"); *The Lamar Corp. v. City of Richmond*, 402 S.E.2d 31, 34 (Va. 1991) (holding government's condemnation of real estate includes billboards as a matter of law); *Dep't of Transp. v. Drury Displays, Inc.*, 764 N.E.2d 166, 172 (Ill. App. Ct. 2002) ("Billboard owners have a right to just compensation for any condemned sign.").

However, we also note that such authority is not controlling. And thus, we agree with plaintiff-DOT that the trial court erred in finding and concluding that the billboard is a "permanent leasehold improvement" and that lost profits, a DOT permit, and the option to renew are compensable property interests.

III

[3] In plaintiff-DOT's final argument, it contends that the trial court erred by adopting the wrong measure of compensation and damages. Specifically, plaintiff-DOT argues that the trial court erred by holding that the "bonus value" method of calculating compensation interest was improper and excluding evidence of the "bonus value" method from the trier of fact pursuant to Rules 401 and 403 of the North Carolina Rules of Evidence, and allowing consideration of income attributable to the billboard and the outdoor advertising. We agree.

Section 108 of Chapter 136, titled "Determination of issues other than damages," states as follows: "[T]he judge . . . shall . . . hear and determine any and all issues raised by the pleadings other than the issue of *damages*, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken." N.C.G.S. § 136–108 (emphasis added).

"One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land [plaintiff-DOT] is condemning and any question as to title." *City of Wilson v. Batten Family, L.L.C.*, 226 N.C. App. 434, 438, 740 S.E.2d 487, 490 (2015) (quoting *N.C. Stat. Hwy. Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967)). Accordingly, "[a]n order entered pursuant to N.C. Gen. Stat. § 136-108 is an interlocutory order because '[t]he trial court d[oes] not completely resolve the entire case,' but instead 'determine[s] all relevant issues other than damages *in anticipation of a jury trial on the issue of just compensation*.' " *Dep't of Transp. v. BB & R, LLC*, ___ N.C. App. ___, ___, 775 S.E.2d 8, 11 (2015) (emphasis added) (quoting *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 708–09 (1999)).

The property interest determined at the Section 108 hearing was the "leasehold interest in the land on which the billboard stood." Defendant's position was that the billboard was a permanent improvement, not personal property, and therefore part of the property interest condemned by DOT and subject to just compensation. However, we have determined that the trial court's classification of the billboard as a permanent leasehold improvement was erroneous, which error resulted in improper measure of compensation. Therefore, because the trial court's ruling on what measure of damages would be included or excluded at a jury trial on damages was based on an erroneous premise, we must also reverse the trial court's order addressing the measure of damages.

In accordance with the forgoing, the trial court's judgment is

REVERSED.

Judges GEER and McCULLOUGH concur.

EPIC GAMES, INC., PLAINTIFF
v.
TIMOTHY F. MURPHY-JOHNSON, DEFENDANT

No. COA15-454

Filed 19 April 2016

1. Appeal and Error—interlocutory orders

An order permanently staying five claims but permitting a claim for breach of contract was interlocutory but was allowed to proceed where a substantial right existed which could be lost absent immediate appellate review.

2. Arbitration and Mediation—state or federal law—no determination by court—determined by arbitrator

An arbitration case was not reversed where the trial court made no determination as to whether state or federal arbitration law governed. Under either law, the plain language of the arbitration clause, properly interpreted, delegates the threshold issue of substantive arbitrability to the arbitrator—not to the trial court.

3. Arbitration and Mediation—substantive arbitrability—delegated to arbitrator

The trial court erred by enjoining certain disputes from proceeding to arbitration where, according to the plain language of the arbitration clause, the threshold issue of substantive arbitrability was delegated to an arbitrator. Both the plain language of the arbitration clause and its incorporation of the AAA rules demonstrate that the parties agreed the arbitrator should decide issues of substantive arbitrability.

Appeal by defendant from order entered 18 July 2014 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 October 2015.

Hunton & Williams, LLP, by R. Dennis Fairbanks, Douglas W. Kenyon, Ryan G. Rich, and Michael R. Shebelskie, for plaintiff-appellee.

David E. Shives, PLLC, by David E. Shives, and McGowan, Hood & Felder, LLC, by Chad A. McGowan, William A. McKinnon, and Jordan C. Calloway, for defendant-appellant.

CALABRIA, Judge.

Timothy F. Murphy-Johnson ("Johnson") appeals from an order granting Epic Games, Inc.'s ("Epic Games") application for judicial relief to enjoin arbitration in part. We reverse.

I. Background

Defendant, Johnson, is a computer programmer. While attending college in the United Kingdom, he founded a software company, Artificial Studios, and created Reality Engine, a successful computer software program that served as a platform for game developers to construct video games. In March 2005, Timothy Sweeney, the founder and largest shareholder of Epic Games, along with Michael Capps, the company's president, negotiated with then-twenty-one-year-old Johnson to purchase Reality Engine and recruited him to move from London to North Carolina to work for Epic Games. On 10 May 2005, Johnson executed seven contracts that purported to sell Artificial Studios and Reality Engine and its related intellectual property to Epic Games, in exchange for employment with Epic Games, company stock options, and cash.

The seven contracts can be divided into two groups. First, Epic Games bought Reality Engine from Artificial Studios and then licensed it back to Artificial Studios. Those agreements were labeled "Reality Engine Acquisition Agreement" and "Reality Engine Limited License Agreement." Second, Epic Games hired Johnson and executed five related contracts. Those agreements were labeled "Stock Option Agreement," "Residual Rights Acquisition Agreement," "Non-Competition Agreement," "Confidentiality Obligations and Intellectual Property Rights Agreement," and "Employment Agreement."

The Employment Agreement contained the following arbitration clause:

> Any disputes between Employee and Epic in any way concerning his employment, this Agreement or this

> Agreement's enforcement, including the applicability of this Paragraph, shall be submitted at the initiative of either party to mandatory arbitration before a single arbitrator and conducted pursuant to the rules of the American Arbitration Association [("AAA")] applicable to the arbitration of employment disputes then in effect, or its successor, provided however, that this Paragraph does not apply to the Confidentiality Obligations and Intellectual Property Rights Agreement referred to in Paragraph 7, and attached as Exhibit A. The decision of the arbitrator may be entered as judgment in any court of the State of North Carolina.

The Employment Agreement also contained a choice-of-law provision: "This Agreement shall be governed by the law of the State of North Carolina[.]"

According to the Stock Option Agreement, Johnson's stock options and bonuses were to vest over a four-year period. For this reason, according to Johnson, he requested that Epic Games draft a strict for-cause termination provision in the Employment Agreement. Johnson wrote Capps:

> My lawyer's been explaining to me that "for cause" termination is not something I should count on as ensuring I will be employed, as so long as the determination of cause rests on Epic you can terminate me and the burden of proof would be on me, which means I'd have to litigate at a cost that would be prohibitive. Therefore while he thinks that's "fair" for purely employment terms, he said it's not very sensible to tie the $75K and stock options related to the deal to employment in this way if I feel this is part of the value for selling my company.
>
> My first question is therefore whether you're prepared to narrow "for cause" to what we initially agreed, namely that I'd have to commit some crime or other malicious act or act of total incompetence, and the burden of proof in "for cause" termination rests on Epic, not me. . . . .

Epic Games' Vice President of Business Development, Jay Wilbur, responded:

> Our goal is to have you join the Epic family. What you read in the employment agreement is that [sic] same for

all Epic employees. I'm willing to consider changes but I need a little something back for it.

I'll give you the narrower "for cause" if you give me the Reality Engine marks, domains, websites, etc. as part of that assignment.

Johnson agreed. The narrowed "for cause" provision read:

b. Termination For Cause. Employer may terminate Employee's employment at any time, with or without notice, for any one or more of the following reasons: (i) willful and continual failure to substantially perform his duties with Employer (other than a failure resulting from the Employee's disability) and such failure continues after written notice to Employee providing a reasonable description of the basis for the determination that Employee has failed to perform his duties, (ii) indictment for a criminal offense other than misdemeanors not required to be disclosed under the federal securities laws, (iii) breach of this Agreement in any material respect and such breach is not susceptible to remedy or cure and has already materially damaged the [sic] Epic, or is susceptible to remedy or cure and no such damage has occurred, is not cured or remedied reasonably promptly after written notice to Employee providing a reasonable description of the breach, (iv) Employee's breach of fiduciary duty to Employer, material unauthorized use or disclosure of Employer's confidential or proprietary information or competition with Employer; (iv) [sic] Employee's intentional conduct or omission which reasonably has or is likely to have the effect of materially harming Employer's business; (v) conduct that the Employer has reasonably determined to be dishonest, fraudulent, unlawful or grossly negligent, and such conduct is not cured or remedied reasonably promptly after written notice to Employee providing a reasonable description of the conduct at issue, any one of which shall be deemed "Cause" for dismissal. The determination of whether an event, act or omission constitutes "Cause" hereunder shall rest in the reasonable exercise of the Employer's discretion. . . .

On 20 March 2006, approximately two months before his first round of stock options and bonuses were scheduled to vest, Epic Games fired

Johnson. When Johnson was "terminated with cause" by Epic Games, he had been employed for less than one year, from 10 May 2005 until 20 March 2006. The termination letter stated, in pertinent part:

> We regret to inform you that your employment with Epic Games is terminated with cause effective March 20, 2006 as a result of your repeated performance problems, conduct issues and attendance concerns, which you have failed to remedy despite verbal and written warnings. Epic has determined that these issues at the very least amount to a material failure to devote your entire professional time, attention, skill and energies to Epic's business and the responsibilities assigned to you by Epic, a willful and continual failure to substantially perform your duties, gross negligence, and intentional conduct that is potentially materially damaging to Epic's business. Any one of these supports a "for cause" termination.

On 7 March 2014, Johnson filed a demand for arbitration with the AAA alleging breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. Specifically, Johnson alleged that Epic Games breached the Employment Agreement by wrongfully terminating him; breached the covenant of good faith and fair dealing under the Employment Agreement and the related agreements by depriving him of the benefit of the sale of Artificial Studios and Reality Engine; and breached fiduciary duties owed to him under the Employment Agreement, Stock Option Agreement, and related agreements. Johnson sought the following pertinent forms of relief:

> 1. [A] declaration that Epic Games, Inc. willfully breached [the] Employment Agreement;
>
> 2. . . . [D]amages for [Epic Games'] breach of at least $11,300,000, representing the value of stock, bonus, and other payments due [Johnson] under the Employment Agreement, or, in the alternative, that [Johnson] be awarded 1,966 shares of undiluted stock in Epic Games, Inc. and $4,300,000 in other payments due;
>
> 3. . . . [A]ny copyright or other intellectual property assignment from [Johnson] or Artificial Studios to Epic be declared null and void;
>
> 4. . . . [L]ost profits of Artificial Studios;

> 5. . . . [P]unitive damages for conduct that reflects fraud, deceit, or malicious behavior[.]

On 24 March 2014, Epic Games filed a motion, as an application for judicial relief, to enjoin arbitration in part in Wake County Superior Court, alleging that Epic Games never consented to arbitrate certain claims asserted by Johnson. Epic Games also alleged that Johnson did not object for eight years to the termination of his employment. Johnson denied this allegation in his answer and counterclaim.

On 18 April 2014, Johnson removed the case to the United States District Court for the Eastern District of North Carolina. On 2 May 2014, after hearing Epic Games' application to enjoin arbitration in part, the Honorable G. Bryan Collins, Jr. of Wake County Superior Court entered an order in favor of Epic Games. (This order was later stricken due to lack of jurisdiction.) On 9 July 2014, the federal court remanded the case to Wake County Superior Court.

On 18 July 2014, the trial court held a *de novo* hearing on Epic Games' application for judicial relief and to enjoin arbitration in part. Subsequently, the trial court granted Epic Games' application for judicial relief and entered a written order enjoining arbitration of the following claims:

> 4.1 The third cause of action for breach of fiduciary duty alleged in his arbitration demand.
>
> 4.2 The claim for stock or its monetary value under the parties' former Stock Option Agreement.
>
> 4.3 The request for a declaration that any copyright or other intellectual property assignment [Johnson] gave to Epic be declared null and void.
>
> 4.4 The request for a declaration that any copyright or other intellectual property assignment Artificial Studios, Inc. gave to Epic be declared null and void.
>
> 4.5 The claim for lost profits of Artificial Studios.

According to the trial court's order, Johnson could "proceed to arbitrate the issue whether Epic [Games] breached the Employment Agreement by discharging him[.]" However, the court permanently enjoined Johnson from arbitrating the matters identified in paragraphs 4.1 to 4.5. Johnson appeals.

II. Jurisdiction

[1] The order on appeal permanently stays arbitration of five claims but permits Johnson's claim of breach of contract to proceed. Although this order is interlocutory,

> [a]ppellate review of an interlocutory order is permitted under N.C.G.S. § 7A–27(d)(1) when the order affects a substantial right, and review is permitted under N.C.G.S. § 1–277(a) of any order involving a matter of law or legal inference which affects a substantial right. It is well established that the right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable.

In re W.W. Jarvis & Sons, 194 N.C. App. 799, 802, 671 S.E.2d 534, 536 (2009) (citations, quotation marks, brackets, and ellipses omitted). Because the order enjoins certain claims from proceeding to arbitration, a substantial right exists which may be lost absent immediate appellate review. *Id.* Therefore, this Court has jurisdiction.

III. Analysis

A. Governing Law

[2] As an initial matter, it is unclear whether the arbitration clause is governed by North Carolina's Revised Uniform Arbitration Act ("RUAA"), the Federal Arbitration Act ("FAA"), or some other law. Determining whether the FAA applies "is critical because the FAA preempts conflicting state law[.]" *Sillins v. Ness*, 164 N.C. App. 755, 757–58, 596 S.E.2d 874, 876 (2004). In this case, although the trial court's order referenced provisions of the RUAA as conferring upon it the authority to permanently enjoin certain claims asserted by Johnson, the court below made no determination as to whether state or federal arbitration law governs. "[T]he trial court should have addressed the issue of choice of law before addressing any other legal issue." *Bailey v. Ford Motor Co.*, __ N.C. App. __, __, 780 S.E.2d 920, 924 (2015) (citation omitted), *disc. review denied*, __ N.C. __, __ S.E.2d __ (2016). This is because

> " '[w]hether a contract evidence[s] a transaction involving commerce within the meaning of the [FAA] is a question of fact' for the trial court[,]" *King v. Bryant*, 225 N.C. App. 340, 344, 737 S.E.2d 802, 806 (2013) (citation omitted), and this Court "cannot make that determination in the first instance on appeal[.]" *Cornelius v. Lipscomb*, 224 N.C. App. 14, 18, 734 S.E.2d 870, 872 (2012).

T.M.C.S., Inc. v. Marco Contractors, Inc., __ N.C. App. __, __, 780 S.E.2d 588, 592 (2015).

Our appellate courts have remanded cases for the trial court to make the initial determination of whether the FAA governs an arbitration agreement, when that determination was critical to the disposition of the case. *See Eddings v. S. Orthopedic & Musculoskeletal Assocs., P.A.*, 147 N.C. App. 375, 385, 555 S.E.2d 649, 656 (2001) (Greene, J., dissenting) (reasoning that remand was required for trial court to determine initially whether FAA or RUAA governed arbitration clause, because the majority determined initially that FAA applied and resolution of governing law was dispositive to the case), *rev'd per curiam for reasons stated in the dissent*, 356 N.C. 285, 286, 569 S.E.2d at 645, 645 (2002); *see also Sillins v. Ness*, 164 N.C. App. 755, 759, 596 S.E.2d 874, 877 (2004) (reversing and remanding order denying motion to compel arbitration "[b]ecause the question whether the FAA or the UAA governs this arbitration agreement determines whether the trial court properly denied the motion to compel arbitration").

In the instant case, however, whether federal or state arbitration law governs has no bearing on our disposition of the case. Both the FAA and the RUAA dictate that arbitration is strictly a matter of contract. *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (noting "[t]he thrust of the federal law is that arbitration is strictly a matter of contract[.]") (citation, quotation marks, and brackets omitted); *see also Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003) ("[W]hether a dispute is subject to arbitration is a matter of contract law."), *aff'd per curiam*, 358 N.C. 146, 593 S.E.2d 583 (2004). Under either law, the plain language of the arbitration clause, properly interpreted, delegates the threshold issue of substantive arbitrability to the arbitrator—not to the trial court. Therefore, we decline to reverse and remand the trial court's ruling on the basis that it did not expressly find whether the FAA applies. *See Sloan Fin. Grp.*, 159 N.C. App. at 479, 583 S.E.2d at 330 (declining to reverse and remand trial court's order in light of party's argument that trial court failed to apply the FAA, when the analysis was virtually identical and the same conclusion would be reached under either federal or state law).

B. Standard of Review

"[W]hether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court." *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 226, 721 S.E.2d 256, 260 (2012) (citation omitted). Issues relating to the interpretation of terms in

an arbitration clause are matters of law, which this Court reviews *de novo*. *See*, *e.g.*, *Bailey*, __ N.C. App. at __, 780 S.E.2d at 924 (citation omitted).

C. Arbitrability

[3] Johnson contends that the trial court erred by enjoining certain disputes from proceeding to arbitration, because according to the plain language of the arbitration clause, the threshold issue of substantive arbitrability was delegated to an arbitrator. We agree.

"[O]nly those disputes which the parties agreed to submit to arbitration may be so resolved." *Rodgers Builders*, *Inc. v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 731 (1985). "To determine if a particular dispute is subject to arbitration, this Court must examine the language of the agreement, including the arbitration clause in particular, and determine if the dispute falls within its scope." *Fontana v. S.E. Anesthesiology Consultants*, *P.A.*, 221 N.C. App. 582, 589, 729 S.E.2d 80, 86 (2012) (citation omitted). Because arbitration is a matter of contract, contract principles govern the interpretation of an arbitration clause. *See*, *e.g.*, *Harbour Point Homeowners' Ass'n*, *Inc. v. DJF Enters.*, *Inc.*, 201 N.C. App. 720, 725, 688 S.E.2d 47, 51, *disc. review denied*, 364 N.C. 239, 698 S.E.2d 397 (2010).

"When the language of the arbitration clause is 'clear and unambiguous,' we may apply the plain meaning rule to interpret its scope." *Fontana*, 221 N.C. App. at 588–89, 729 S.E.2d at 86. If the language is ambiguous, "[o]ur strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992); *see also Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.") (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 74 L. Ed. 2d 765, 785 (1983)). Furthermore, "[p]ursuant to well settled contract law principles, the language of the arbitration clause should be strictly construed against the drafter of the clause." *Harbour Point*, 201 N.C. App. at 725, 688 S.E.2d at 51.

In this case, Epic Games drafted the arbitration clause, which provided in pertinent part:

> Any disputes between Employee and Epic in any way concerning his employment, this Agreement or this

> Agreement's enforcement, including the applicability of this Paragraph, shall be submitted at the initiative of either party to mandatory arbitration before a single arbitrator and conducted pursuant to the rules of the [AAA] applicable to the arbitration of employment disputes then in effect, or its successor, provided however that this Paragraph does not apply to the Confidentiality Obligations and Intellectual Property Rights Agreement referred to in Paragraph 7, and attached as Exhibit A.

The plain language of the arbitration clause is clear and unambiguous. It provides for mandatory arbitration of "*[a]ny disputes* between [Johnson] and Epic [Games] *in any way concerning* his employment, this Agreement or this Agreement's enforcement[.]" These broad phrases indicate the drafter, Epic Games, intended for an extensive range of issues relating to Johnson's employment or the Employment Agreement to fall within the arbitration clause's scope. Moreover, this expansive clause expressly covers disputes "in any way concerning . . . the applicability of this Paragraph[.]" Indeed, the "dispute[] between [Johnson] and Epic [Games]" on appeal is whether particular claims asserted fall within the scope of the arbitration clause, implicating a matter "concerning" the arbitration clause's "applicability." The language Epic Games employed in drafting the clause makes it clear that any disputes regarding whether the arbitration clause applied to a particular claim should be submitted to arbitration and decided by the arbitrator.

Furthermore, the arbitration clause incorporates the rules of the AAA. Under AAA Employment Rule 6(a), "[t]he arbitrator *shall* have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement." (emphases added). Although our state appellate courts have never addressed or decided this issue when interpreting an arbitration clause subject to the RUAA, this Court recently adopted the majority rule among the federal courts of appeal when interpreting an arbitration clause subject to the FAA. In *Bailey*, this Court held that under the FAA, an arbitration clause which incorporated an arbital body's rules, when those rules explicitly delegate the threshold issue of arbitrability to an arbitrator, constitutes "clear and unmistakable" evidence—a more exacting standard than currently exists when interpreting arbitration clauses subject to the RUAA—that the parties agreed to arbitrate issues of substantive arbitrability. *Bailey*, __ N.C. App. at __, 780 S.E.2d at 927. Therefore, both the plain language of the arbitration clause and its incorporation of the AAA rules demonstrate that the parties agreed

the arbitrator should decide issues of substantive arbitrability. Even if this broad clause, by itself, does not resolve the issue of whether the parties agreed to arbitrate arbitrability, the requirement for arbitration to be conducted pursuant to the AAA rules does.

As a secondary matter, we note that although the "Confidentiality Obligations and Intellectual Property Rights Agreement" was excluded from the arbitration clause's scope, Epic Games concedes in its brief that this agreement merely "prescrib[es] Johnson's confidentiality obligations and his assignment to Epic of intellectual property created *while employed*." (emphasis added). Neither party asserts that Johnson's claims fall within the scope of this agreement. Therefore, that agreement is of no consequence to our analysis or disposition of the case.

IV. Conclusion

Based on its plain language and incorporation of the AAA rules, the arbitration clause drafted by Epic Games, properly interpreted, contained a valid agreement to delegate issues of substantive arbitrability to the arbitrator. Therefore, the trial court was without authority to issue an injunction and determine the scope of arbitrable issues. The trial court's order must be reversed.

REVERSED.

Judges BRYANT and ZACHARY concur.

PETER JERARD FARRELL, Petitioner
v.
United States Army Brigadier General, Retired, KELLY J. THOMAS, Commissioner of NC Division of Motor Vehicles, in his official capacity, Respondent

No. COA15-257

Filed 19 April 2016

1. Motor Vehicles—impaired driving—probable cause

The superior court erred in an impaired driving prosecution where it reversed the Department of Motor Vehicles' conclusion that an officer had reasonable grounds to believe that petitioner was driving while impaired. The findings about petitioner at the scene of the stop were sufficient to establish probable cause.

2. Evidence—State's dismissal of criminal DWI charge—not an admission—license revocation

The State's dismissal of an impaired driving charge and a handwritten entry by the prosecuting attorney that the dismissal was because all of the evidence would be suppressed was not a judicial admission that barred the Department of Motor Vehicles from pursuing a driver's license revocation under the implied consent laws.

Judge DILLON concurring by separate opinion.

Judge HUNTER, JR. dissenting by separate opinion.

Appeal by respondent from order entered 31 December 2014 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 10 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for respondent-appellant.

The Farrell Law Group, P.C., by Richard W. Farrell, for petitioner-appellee.

DIETZ, Judge.

In 2013, a Raleigh police officer pulled over a car driven by Petitioner Peter Farrell. When the officer approached Farrell, he noticed that Farrell's eyes were glassy and bloodshot and that his speech was slightly slurred. The officer returned to his patrol car to wait for backup. When he returned to question Farrell further, the officer noticed a strong odor of mouthwash that wasn't there before, and a nearly empty bottle of mouthwash on the floorboard. The officer asked Farrell if he had just used mouthwash, and Farrell lied and said he had not. As the officer continued to question Farrell, he admitted that he had used mouthwash.

Farrell ultimately refused the officer's request to take a breath test after being informed of his implied consent rights and the consequences of refusing to comply. Law enforcement then obtained a blood sample from Farrell, which revealed that Farrell's blood alcohol level was .18.

Because Farrell refused to submit to a breath test upon request, the Division of Motor Vehicles revoked Farrell's driving privileges as required by our State's implied consent laws. Farrell challenged his license revocation and the DMV upheld it following a hearing. Farrell

appealed the DMV's order to the Wake County Superior Court. There, the court reversed on the ground that the DMV's findings did not support its conclusion that the officer had reasonable grounds to believe Farrell was driving while impaired.

We reverse. As explained in more detail below, the DMV's findings readily support its conclusion. Those findings establish that the arresting officer observed Farrell with glassy, bloodshot eyes and slightly slurred speech; that, while the officer had returned to his patrol car, Farrell used enough mouthwash to create a strong odor detectable by the officer from outside the car; and that Farrell lied to the officer about using the mouthwash. From these facts, a reasonable officer could conclude that Farrell was impaired and had attempted to conceal the alcohol on his breath by using mouthwash and then lying about having done so. Thus, the DMV did not err in concluding that, based on its uncontested findings of fact, the arresting officer had reasonable grounds to believe Farrell was driving while impaired. Accordingly, we reverse the superior court's order.

Facts and Procedural History

Around 1:30 a.m. on 6 September 2013, Raleigh police received a call about a car driving dangerously at a shopping center. Officer David Maucher traveled to the scene and witnesses described the car as a silver four-door Audi sedan.

As Officer Maucher searched the area in his patrol car, he spotted a silver Audi matching the witnesses' descriptions. Officer Maucher ran a check on the plate and discovered that the car had an expired registration and was past its State-required inspection date. Based on this information, Officer Maucher pulled the car over.

Officer Maucher approached the car and found Farrell in the driver's seat, sitting on top of his seat belt, with glassy, bloodshot eyes and "slightly" slurred speech. Farrell admitted that he had consumed multiple beers earlier in the night.

Officer Maucher returned to his patrol car and requested backup. After other officers arrived, Officer Maucher returned to Farrell's car. As he approached the driver's side window, he smelled a strong odor of mouthwash that was not present the first time he approached the vehicle. Officer Maucher also noticed a nearly empty mouthwash bottle on the floorboard. Officer Maucher asked Farrell if he had just used mouthwash and Farrell said he had not. When Officer Maucher told Farrell that he did not believe him, Farrell relented and said he used "a little" mouthwash.

Officer Maucher then asked Farrell to step out of the vehicle to perform field sobriety tests. Farrell refused to perform the sobriety tests, but indicated that he would take a breath test. Officer Maucher then placed Farrell under arrest for driving while impaired based on the officer's conclusion that Farrell was "under the influence of an impairing substance" and "appreciably impaired by alcohol."

At 2:29 a.m. in the Wake County Detention Center, Officer Maucher, a certified chemical analyst, informed Farrell of his implied consent rights, both orally and in writing in accordance with N.C. Gen. Stat. § 20-16.2(a), and explained to Farrell how to submit a sample of his breath for chemical analysis. After speaking with his brother by phone, Farrell told Officer Maucher that he would not take the breath test. Officer Maucher officially marked Farrell's refusal of chemical analysis at 3:04 a.m. Following this refusal, police obtained a blood sample from Farrell. That test revealed that Farrell had a blood alcohol concentration of .18.

The State charged Farrell with driving while impaired but later dismissed the criminal charges because the prosecutor believed that all evidence resulting from Farrell's stop and arrest would be suppressed under the exclusionary rule.

On 10 October 2013, Farrell received an official notice of license suspension from the DMV, effective 20 October 2013, based on his willful refusal to submit to chemical analysis under N.C. Gen. Stat. § 20-16.2. Upon receiving this notice, Farrell requested a hearing before the DMV.

On 19 February 2014, the DMV found adequate evidence to sustain the revocation of Farrell's driving privileges. Farrell appealed the administrative hearing results to the Wake County Superior Court. On 21 December 2014, the Superior Court reversed the DMV's decision on the basis that the findings of fact did not support the conclusion that Officer Maucher had reasonable grounds to believe Farrell was driving while impaired. The DMV timely appealed.

Analysis

[1] The DMV argues that the superior court erred in reversing its decision. We agree.

In an appeal from a DMV hearing to the superior court under N.C. Gen. Stat. § 20-16.2(e), the superior court acts as an "appellate court." *Johnson v. Robertson*, 227 N.C. App. 281, 286, 742 S.E.2d 603, 607 (2013). It is not a trier of fact. *Id.* By statute, the superior court's review "shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of

law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e).

Here, the superior court held there was "sufficient evidence in the record to support the Findings of Fact" but that "Conclusion of Law of [sic] #2 . . . is not supported by the Findings of Fact." In Conclusion of Law #2, the DMV concluded that "Officer Maucher had reasonable grounds to believe that [Farrell] had committed an implied consent offense." For the reasons explained below, we hold that Conclusion of Law #2 is supported by the DMV's findings.

In a license revocation proceeding, "the term 'reasonable grounds' is treated the same as 'probable cause.' " *Hartman v. Robertson*, 208 N.C. App. 692, 695, 703 S.E.2d 811, 814 (2010). "[P]robable cause exists if the facts and circumstances at that moment and within the arresting officer's knowledge and of which the officer had reasonably trustworthy information are such that a prudent man would believe that the [suspect] had committed or was committing a crime." *Id.*

Thus, in reviewing the DMV's conclusion, we must ask whether the findings of fact establish that Officer Maucher had probable cause to believe Farrell was driving while impaired.[1] As explained below, the findings readily support that conclusion.

The DMV found that, when Officer Maucher approached the car, Farrell's "eyes were glassy and bloodshot and his speech was slightly slurred." The officer returned to his patrol car and when he approached Farrell a second time, he "smelt [sic] a significant strong odor of mouthwash coming from" Farrell. Officer Maucher did not smell this odor when he first approached Farrell's car. Officer Maucher asked Farrell "if he had just washed his mouth out with the mouthwash." Farrell lied and said he had not, then changed his story and admitted he had used "just a little bit" of mouthwash.

These findings are sufficient to establish probable cause. Farrell's glassy, bloodshot eyes and slurred speech alone created a strong suspicion that Farrell might be impaired. Then, Farrell acted in an unusual and suspicious manner by using so much mouthwash while the officer had returned to his patrol car that, when the officer returned, there was "a significant strong odor of mouthwash" detectable from outside Farrell's

1. Farrell does not contend that any particular findings by the DMV are unsupported by the record, nor does he challenge the superior court's holding that there was "sufficient evidence in the record" to support all findings.

car. Finally, and perhaps most significantly for the officer's determination of probable cause, Farrell lied to the officer and said he had not used any mouthwash and then, under further questioning, admitted that he had.

From this conduct, the officer had probable cause to believe that Farrell was impaired and sought to hide any odor of alcohol on his breath by using mouthwash and attempting to conceal that he had done so. *See United States v. Wilson*, 699 F.3d 235, 246 (2d Cir. 2012) (finding probable cause to search car for contraband where defendant "lied about having crossed the border at a non-designated border crossing point, and had then admitted to lying," and also admitted to having "scored a little" marijuana while in Canada); *People v. McCowen*, 159 A.D.2d 210, 213 (N.Y. App. Div. 1990) ("Defendant's untruthful answers to officers upon being questioned as to whether he had any gold chains on him provided the predicate for reasonable suspicion to ripen into probable cause."). Accordingly, the DMV properly concluded that Officer Maucher had reasonable grounds (i.e., probable cause) to believe Farrell was driving while impaired.

[2] Farrell next argues that the State's dismissal of his DWI charge is a "judicial admission" that bars the DMV from pursuing a driver's license revocation under the implied consent laws. The record before the DMV did not disclose *why* the State dismissed the DWI charge. On appeal, Farrell submitted a dismissal document from the criminal case in which a handwritten entry, apparently made by the prosecuting attorney, indicates that the State dismissed the DWI charge because all evidence would be "suppressed due to a pre-arrest request violation."

Ordinarily, we do not consider material not submitted to the trial court, and we cannot tell, from the record before us, whether Farrell raised this issue at the DMV hearing despite not producing the dismissal document. In any event, even assuming Farrell properly raised and preserved this issue below, it is meritless. First, as the concurrence observes, no court in this State has ever held that the decision of an assistant district attorney not to pursue criminal charges, made in the exercise of prosecutorial discretion, is binding on other state agencies that can pursue civil remedies for the same underlying conduct. Second, whatever evidence the prosecutor believed would be suppressed in the criminal case would not have been suppressed at the DMV hearing. It is well-settled that, unlike in a criminal proceeding, the exclusionary rule does not apply in a civil license revocation proceeding like this one. *See Combs v. Robertson*, __ N.C. App. __, 767 S.E.2d 925, 928, *appeal dismissed*, *review denied*, __ N.C. __, 776 S.E.2d 194 (2015); *Hartman*,

208 N.C. App. at 695, 703 S.E.2d at 814; *Quick v. N.C. Div. of Motor Vehicles*, 125 N.C. App. 123, 127, 479 S.E.2d 226, 228 (1997).

The dissent contends that the U.S. Supreme Court's recent decision in *Grady v. North Carolina*, 575 U.S. ___ (2015) (per curiam), which held that "the Fourth Amendment's protection extends beyond the sphere of criminal investigations," means that we should revisit our holding from *Combs*, *Hartman*, and *Quick*. This confuses the Fourth Amendment's *protection* (against unreasonable searches) with a court-created *remedy* (the exclusionary rule). The Fourth Amendment itself "says nothing about suppressing evidence" and the U.S. Supreme Court has been clear that the exclusionary rule is a "judicially created remedy" and not a requirement of the Fourth Amendment. *See Davis v. United States*, 564 U.S. 229 (2011); *see also Stone v. Powell*, 428 U.S. 465, 494 at n.37 (1976) (holding that "the exclusionary rule is a judicially created remedy rather than a personal constitutional right"). Thus, although *Grady* held that the Fourth Amendment itself applies in the civil context, it does not follow that the exclusionary rule also must apply there. Indeed, *Grady* dealt solely with whether imposing satellite-based monitoring on sex offenders in a civil proceeding amounted to a search under the Fourth Amendment; the decision does not even mention the exclusionary rule.

We agree with our dissenting colleague that there are strong policy reasons for applying the exclusionary rule in civil license revocation cases. Indeed, the majority in this case also was in the majority in *Combs*, which pointed out that there was a significant split in our sister states on this issue, making it suitable for review by our Supreme Court. *Combs*, __ N.C. App. at __, 767 S.E.2d at 929, *appeal dismissed*, *review denied*, __ N.C. __, 776 S.E.2d 194 (2015). Our Supreme Court nevertheless dismissed the *Combs* appeal on the ground that it did not present a substantial constitutional question, and denied discretionary review, leaving our precedent from *Combs*, *Hartman*, and *Quick* intact. *Id.*

We remain bound by that precedent until an intervening decision of our Supreme Court or the U.S. Supreme Court overrules it and—for the reasons explained above—*Grady* does not. Accordingly, we are constrained to reject Farrell's argument.

Conclusion

For the reasons discussed above, we reverse the superior court.

REVERSED.

Judge DILLON concurs by separate opinion.

Judge HUNTER, JR. dissents by separate opinion.

DILLON, Judge, concurring.

I agree with the majority's conclusion that the Commissioner's findings are sufficient to establish that the officer had reasonable grounds (i.e. probable cause) to believe Mr. Farrell was driving while impaired.

I agree with the majority's conclusion that the State's dismissal of Mr. Farrell's DWI charge does not bar the DMV from suspending Mr. Farrell's license, notwithstanding the written notation on the DWI dismissal form which suggests that the prosecutor believed that the State's evidence would be "suppressed due to a pre-arrest request violation." The majority reasons that even if Mr. Ferrell's Fourth Amendment rights were violated, the exclusionary rule would not apply since the rule is not part of the Fourth Amendment but rather is a judicial remedy that does not apply to a DMV hearing. The dissent argues that the exclusionary rule should apply, notwithstanding our case law to the contrary, in light of the recent United States Supreme Court holding in *Grady v. North Carolina*, 575 U.S. ___ (2015) (per curiam).

I write separately because I do not believe we need to reach the issue of whether the exclusionary rule still applies in a DMV hearing, in light of *Grady*. Specifically, I do not believe the DMV is estopped from making a reasonable grounds (probable cause) determination because of the decision (or reasoning) of an assistant district attorney not to pursue the DWI charge.

HUNTER, JR., Robert N., Judge, Dissenting.

The Fourth Amendment protects the "right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV. Our State Constitution protects these same rights by prohibiting general warrants, which "are dangerous to liberty" N.C. Const. art. I, section 20. To protect these rights, both courts created the exclusionary rule, making "all evidence seized in violation of the Constitution . . . inadmissible in a State court as a matter of constitutional law." *State v. Cherry*, 298 N.C. 86, 92, 257 S.E.2d 551, 556–57 (1979).

Historically, the exclusionary rule has not been applied in civil proceedings. *Quick v. North Carolina Div. or Motor Vehicles*, 125 N.C. App. 123, 127, 479 S.E.2d 226, 228 n. 3 (1997) (citing *United States v. Janis*, 428 U.S. 433, 459–60 (1976)). Our Supreme Court "has long viewed

drivers' license revocations as civil, not criminal, in nature." *State v. Oliver*, 343 N.C. 202, 207–08, 470 S.E.2d 16, 20 (1996) (citations omitted). Consequently, our Court has held that "evidence in a license revocation hearing . . . is not subject to the exclusionary rule." *Hartman v. Robertson*, 208 N.C. App. 692, 698, 703 S.E.2d 811, 816 (2010) (citing *Quick*, 125 N.C. App. at 127 n. 3, 479 S.E.2d at 228–29).

Prior to *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368 (2015), our Court noted this impasse, stating, "unless our Supreme Court holds otherwise the Fourth Amendment's exclusionary rule does not apply in civil proceedings such as driver's license revocation hearings . . . ." *Combs v. Robertson*, ___ N.C. App. ___, ___, 767 S.E.2d 925 (Feb. 3, 2015) (No. COA14–709). Without the benefit of *Grady*, our Court has been obligated to affirm license revocation decisions that are based upon a record of unconstitutional evidence. *See Hartman*, 208 N.C. App. at 697, 703 S.E.2d at 815 ("Petitioner's second argument is that, because the traffic stop was illegal, the evidence gathered subsequent to the stop should have been suppressed. We disagree."); *Combs*, ___ N.C. App. at ___, 767 S.E.2d at 926–27 ("[P]olice violated Petitioner['s] Fourth Amendment rights by stopping her without reasonable suspicion. . . . Without the exclusionary rule, we must . . . affirm DMV's revocation of [Petitioner's] driver's license.")

This precedent was best critiqued by the United States Supreme Court in *Grady*, in the context of civil satellite based monitoring. At the State level, our Court "placed decisive weight on the fact that the State's monitoring program is civil in nature." *Grady*, 575 U.S. ___, 135 S. Ct. at 1371 (citation omitted). We affirmed the order imposing Grady's satellite based monitoring, and our Supreme Court "summarily dismissed [his] appeal and denied his petition for discretionary review." *Id.* at ___, 135 S. Ct. at 1370 (citation omitted). On appeal, the United States Supreme Court granted *certiorari* and published a *per curiam* opinion. The Court reasoned, "the Fourth Amendment's protection extends beyond the sphere of criminal investigations." *Id.* at ___, 135 S. Ct. at 1371 (citing *Ontario v. Quon*, 560 U.S. 746, 755 (2010); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967)). The *Grady* Court held the monitoring program "is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Grady*, 575 U.S. at ___, 135 S. Ct. at 1371. The Court vacated and remanded the case, directing "North Carolina courts [to] examine whether the States' monitoring program is reasonable—when properly viewed as a [Fourth Amendment] search . . . ." *Id.*

Other states have resolved this issue in their highest courts, protecting Fourth Amendment rights by applying the exclusionary rule to license revocation proceedings. *See Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552, 556 (Minn. 1985); *Pooler v. Motor Vehicles Div.*, 306 Or. 47, 755 P.2d 701 (1988); *Vermont v. Lussier*, 171 Vt. 19, 757 A.2d 1017 (2000); *State v. Nickerson*, 170 Vt. 654, 756 A.2d 1240 (2000). With the hindsight of *Grady*, our Supreme Court is now ripe to consider whether the exclusionary rule should apply in civil license revocation proceedings, to allow the trial court to determine whether a police search was "reasonable" and if any evidence obtained should be suppressed.

I would hold the majority's view of the standard of review is erroneously applied in this case and others arising from the revocation of driver's licenses. As the majority states, "the Superior Court review" shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license. N.C. Gen. Stat. § 20.162(e) (2015).

Here, I concur that Appellant has not produced record evidence that the procurement of his breathalyzer was the result of an illegal search. Under the procedures used to revoke his license, he could not do so because a hearing officer is not a judicial officer with the jurisdictional mandate to enforce an illegal search. Assuming *arguendo* that the search was illegal, then in that event, I would hold in favor of remanding to the Superior Court to make findings on the constitutional issue on whether the Commissioner committed an error of law in revoking the license. Otherwise, unconstitutionally procured evidence could be used to support a governmental action to revoke a license. The use of the writ of *certiorari* to make findings of fact to reach legal issues not within the jurisdictional mandate of a body they are reviewing is not novel but a traditional use of the writ. *See Wilson Realty Co. v. City and County Planning Bd. for City of Winston-Salem and Forsyth County*, 243 N.C. 648, 655–56, 92 S.E.2d 82, 87 (1956) ("Certiorari, as an independent remedy, is designed to review and examine into proceedings of lower tribunals and to ascertain their validity and correct errors therein. The writ issues to review proceedings of inferior boards and tribunals which are judicial or quasi[-]judicial in nature.") (citation omitted).

GUILFORD COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT UNIT, EX REL
DEANA J. ST. PETER, PLAINTIFF
v.
SCOTT L. LYON, DEFENDANT

No. COA15-332

Filed 19 April 2016

1. Appeal and Error—interlocutory order—appeal from final order

Plaintiff's arguments were considered on appeal in a child support enforcement case where she appealed within 30 days of the final order (in November) and specifically appealed from the final order and an earlier, interlocutory order from June. While her arguments focused on the June order, she argued that the November order was based on the June order.

2. Child Custody and Support—motion to modify—changed circumstances converted sua sponte into fraud—insufficient notice

The trial court abused its discretion in a child support enforcement action by using a a sua sponte motion to convert defendant's motion to modify child support due to changed circumstances into a Rule 60 motion for modification based on fraud. Plaintiff was entirely without notice that the issue of fraud would be addressed at the hearing.

3. Child Custody and Support—defendant's motion for modification

In a child support enforcement action reversed on other grounds, the trial court was ordered to base its ruling only on defendant's motion for modification.

Appeal by intervenor from orders entered 24 June 2014 by Judge Angela Bullard Fox and 6 November 2014 by Judge Wendy Enochs in District Court, Guilford County. Heard in the Court of Appeals 23 September 2015.

Wyatt Early Harris Wheeler, LLP, by Lee C. Hawley, for intervenor-appellant.

Walker & Bullard, P.A., by Daniel S. Bullard, for defendant-appellee.

STROUD, Judge.

The trial court *sua sponte* raised and granted a motion under Rule 60 of the North Carolina Rules of Civil Procedure which vacated a prior permanent child support order and set temporary child support; the trial court subsequently entered a new order setting permanent child support. Intervenor Deana St. Peter appeals both orders. Because defendant's motion to modify child support gave intervenor no notice of any allegations of fraud or duress in entry of the prior permanent child support order and intervenor did not consent but instead specifically objected to consideration of these issues, the trial court erred by *sua sponte* amending the defendant's motion under North Carolina General Statute § 50-13.7(a) and vacating the December 2013 order under Rule 60(b). We therefore vacate the trial court's June 2014 order based upon the *sua sponte* Rule 60 motion, vacate the trial court's subsequent November 2014 child support order based upon the erroneous June 2014 order, and remand for further proceedings consistent with this opinion.

I. Background

In March of 2001 intervenor Deana St. Peter and defendant Scott Lynn were married; the couple had one child born in July of 2005, and in October of 2012 they were divorced.[1] On 15 January 2013, plaintiff Guilford County Child Support Enforcement Agency on behalf of Deana St. Peter, filed a complaint against defendant for failure "to pay support or adequate support" and requested that the trial court establish defendant's child support obligation. Defendant failed to answer, and in April of 2013, plaintiff requested and the assistant clerk of superior court entered an entry of default.

In August of 2013, the trial court entered a temporary child support order which also determined that defendant owed $2,808.00 in arrears. A hearing to establish permanent child support was held on 9 October 2013; the order from this hearing was signed on 4 November 2013 and filed on 17 December 2013 ("December 2013 order"). The December 2013 order deviated from the child support guidelines and required defendant to pay $325.00 per month, "of which $268.25 is to apply toward the current child support obligation and of which $56.75 is to apply toward the arrears" amount of $2,555.47. In the findings of fact, the trial court noted:

1. These background facts were alleged in the complaint in this case.

> 3. The custody issue was settled by Court Order, effective 10/01/2013. The Plaintiff has the child residing with her 225 nights per year, and the Defendant has the child residing with him 140 nights per year.
>
> . . . .
>
> 6. The Defendant addresses the Court and requests a deviation from the North Carolina Child Support Guidelines. The Defendant tells the Court that he wishes to pay the sum of $325.00 per month, of which $268.25 should apply toward the current child support, and of which $56.75 should apply toward the arrears. The Defendant added the daycare expense to the medical insurance premium that the Plaintiff pays and divided that number by two to get the $325.00 that he wishes to pay.[2]

The December 2013 order was not appealed. On 16 January 2014, defendant filed a motion to modify the December 2013 child support order stating that "[a]t the time of current support order I agreed to pay more than the guidelines. I can no longer afford this amount and request that it be reduced to the guideline amount."

In June of 2014, after a hearing regarding defendant's motion to modify child support, the trial court found as fact:

> 3. The Plaintiff told Defendant prior to the October hearing that if Defendant did not ask the Court for a deviation and agree to this amount, that Plaintiff would not allow Defendant to see their son.
>
> 4. Fearing that Plaintiff would indeed keep their son from him, Defendant asked the Court during the October 9, 2013 hearing to deviate from the N.C. Child Support Guideline Amount of $51.00 per month (substantially lower than the $268.25 he was fraudulently coerced into paying). No findings were made regarding the ability of Defendant to pay or the needs of the child justifying deviation of the ordered amount. . . .

---

2. Based on the transcript of the hearing defendant explained to the trial court how he determined the amount and requested "a court order" be entered according to the parties' prior "verbal agreement" to the deviation.

> 5. Defendant's fear that he would be kept from his son was reasonable considering the past conduct of the Plaintiff toward the Defendant.
>
> . . . .
>
> 10. Plaintiff has custody of the parties' child . . . for 225 nights per year. Defendant has custody of the parties' child for 140 nights per year.

The trial court further found "[t]he Court herein, *sua sponte*, after considering the substance of Defendant's pleadings and testimony, allows amendment of Defendant's pleadings to conform to the evidence per N.C. R. Civ. P. 15(b) and will consider such as a Motion for Relief and a Motion to set a temporary child support payment." Ultimately, the trial court granted its own *sua sponte* motion for relief from judgment and temporarily modified child support to $69.00 "toward the current child support" and $56.75 "toward the arrears" with permanent child support to be set at a later date.

In September of 2014, Deana St. Peter filed a motion to intervene. In November of 2014, after a hearing on Ms. St. Peter's motion to intervene and permanent child support, the trial court allowed the motion to intervene and ordered defendant to pay $92.00 per month as permanent child support. Intervenor appeals both the June and November 2014 orders.

II. Basis for Appeal

[1] Defendant contends that

> appellant's appeal should be dismissed because she failed to appeal Judge Fox's [June 2014] Rule 60 order within thirty days, thereafter failed to request a deviation from the child support guidelines prior to obtaining the permanent child support order filed November 6, 2014, and by making no reference to such permanent order in her statement of proposed issues in the record on appeal, or in the substantive argument in her brief.

(Original in all caps.) (Quotation marks omitted.) But the June 2014 order was clearly a temporary and thus interlocutory order. *See Banner v. Hatcher*, 124 N.C. App. 439, 441, 477 S.E.2d 249, 251 (1996) ("As we have recognized, an order providing for temporary child support is interlocutory and not an immediately appealable final order.") Intervenor's notice of appeal was filed within thirty days of the final November 2014 order setting permanent support and specifically appealed from both the June and November 2014 orders. Defendant further seems to argue that

because intervenor allegedly did not request deviation from the Child Support Guidelines at the hearing for the permanent order, she cannot make that argument here. Yet intervenor does not actually make this argument on appeal; intervenor's arguments are all focused on the errors in the June 2014 interlocutory order and do not ask this Court to address whether a deviation from the child support guidelines is appropriate. Finally, it is of no concern that intervenor did not make any substantive argument regarding the November 2014 order. Intervenor argues that the November 2014 order was entered in error because it was based upon the erroneous June 2014 interlocutory order and thus focuses her arguments on that prior order; this is entirely logical and permissible, and therefore we will consider plaintiff's arguments on appeal.

III. June 2014 Order

[2] Intervenor first contends that "the trial court abused its discretion in utilizing N.C. R. Civ. P. 15(b) to *sua sponte* amend defendant's motion to modify child support to be treated as a motion for relief under N.C. R. Civ. P. 60(b)." (Original in all caps.) Intervenor argues that she was prejudiced by the trial court's spontaneous motion as she had no notice that relief from judgment would be sought, particularly on the grounds of fraud. We agree.

North Carolina Rule of Civil Procedure 15(b) provides that

> [w]hen issues not raised by the pleadings are tried by the express or implied *consent of the parties*, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.*

N. C. Gen. Stat. § 1A-1, Rule 15(b) (2013) (emphasis added).

In *Jackson v. Jackson*, this Court vacated portions of a trial court's order which amended the pleadings pursuant to North Carolina Rule of Civil Procedure 15(b):

> The Rules of Civil Procedure provide for and encourage liberal amendments to conform pleadings and evidence after entry of judgment under Rules 15(b), 59 and 60. *Discretion in allowing amendment of pleadings is vested in the trial judge and his ruling will not be disturbed on appeal absent a showing of prejudice to the opposing party. However, notwithstanding such discretion and despite the broad remedial purposes of these provisions, Rule 15(b) and Rule 59 do not permit judgment by ambush.*
>
> Our Supreme Court has held that an amendment under Rule 15(b) is appropriate only where sufficient evidence has been presented at trial *without objection* to raise an issue not originally pleaded and where the parties understood, or reasonably should have understood, that the introduction of such evidence was directed to an issue not embraced by the pleadings. Under Rule 59, where a trial court opens an order, makes additional findings of fact and conclusions of law, and enters an amended order, the reasoning must be the same.
>
> Here, the record indicates that the trial court held a hearing on 19 December 2006 to address plaintiff's third and fourth motions for order to show cause and order of contempt and defendant's motion to dismiss, motion for a more definite statement, and motion for sanctions and attorney's fees with respect to plaintiff's fourth motion for order to show cause and order of contempt. The record gives no indication either party understood or reasonably should have understood the evidence presented or the arguments made to be grounds for the modification of custody made by the trial court when it entered its Contempt Order. Furthermore, pursuant to subsequent motions to modify, the trial court entered an Amended Order amending its Contempt Order, but did not elect to take any new evidence.
>
> Despite re-captioning the Contempt Order "Order Modifying Custody Order and for Contempt, and for

> the Appointment of a Parenting Coordinator" the trial court effectively denied both parties an opportunity to submit evidence or present arguments regarding custody modification.

192 N.C. App. 455, 462-64, 665 S.E.2d 545, 550-51 (2008) (citations, quotation marks, ellipses, and brackets omitted).

In this case, there were substantial differences between the motion defendant filed and noticed for hearing and the motion the trial court ruled upon s*ua sponte*. *See generally* N.C. Gen. Stat. §§ 1A-1, Rule 60(b)(3); 50-13.7(a) (2013). North Carolina General Statute § 50-13.7 allows a child support order to be modified based upon "a showing of changed circumstances[;]" this type of motion calls for evidence "of changed circumstances by either party or anyone interested" which would justify modification of the child support obligation. N.C. Gen. Stat. § 50-13.7(a). North Carolina Rule of Civil Procedure Rule 60 provides that a party may be entirely relieved from a judgment upon a showing of "[f]raud . . ., misrepresentation, or other misconduct of an adverse party;" this type of motion would call for evidence of fraud or misconduct of a party which caused the order to be entered. N.C. Gen. Stat. § 1A-1, Rule 60(b)(3). Thus, North Carolina General Statute § 50-13.7 and North Carolina Rule of Civil Procedure Rule 60 require vastly different evidentiary showings and provide for different forms of relief. *See generally* N.C. Gen. Stat. §§ 1A-1, Rule 60; 50-13.7. The difference between the two statutes is much more than, as the trial court stated, "semantics" or "split[ting] hairs." *See generally* N.C. Gen. Stat. §§ 1A-1, Rule 60; 50-13.7.

Under Rule 15(b), the defendant's evidence regarding "fraud" or "coercion" was "objected to at the trial on the ground that it is not within the issues raised by the pleadings[;]" so the trial court could allow the pleadings to be amended and "shall do so freely" *if* (1) "the presentation of the merits of the action will be served thereby[,] and [(2)] the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." N.C. Gen. Stat. § 1A-1, Rule 15(b). In addition, even if the trial court believes that the evidence will serve "the merits of the action[,]" the trial court may consider granting "a continuance to enable the objecting party to meet such evidence." *Id.* Here, the trial court found that intervenor was not prejudiced because "the child support order is temporary and Plaintiff has the representation of a knowledgeable and prepared attorney. Further, Plaintiff is aware of her own actions to fraudulently coerce Defendant to pay more child support than he owes under the Guidelines and more than he can afford to pay."

First, "the child support order is temporary" is an ambiguous finding of fact. Presumably, the trial court was referring to the order which it was actually entering which vacated the December 2013 order and set temporary child support with another hearing to establish a permanent obligation. However, the fact remains that the existing permanent order was being set aside, without prior notice to intervenor of any motion to do so, to allow entry of a new temporary order followed by a new permanent child support order, without any showing of a change in circumstances. The trial court's action was prejudicial to intervenor, particularly since the trial court did not allow a continuance which would at least permit intervenor the opportunity to prepare for a hearing on a Rule 60 motion.

Defendant filed a motion to modify child support based *only* upon a change in his financial circumstances, and thus, as intervenor's attorney explained, intervenor came to the hearing prepared to present evidence regarding a lack of change in financial circumstances. Since the trial court *sua sponte* changed defendant's motion to modify into a Rule 60 motion, plaintiff was entirely without notice that the issue of alleged fraud would be addressed at the hearing. Based upon defendant's motion, plaintiff could expect that the trial court would be considering only the financial circumstances of the parties and the burden would be upon defendant to show how his circumstances had changed since entry of the prior order. See generally N.C. Gen. Stat. § 50-13.7. But despite intervenor's attorney's objections, including objections to the lack of prior notice of any allegations of fraud in entry of the prior order and the resulting prejudice, the trial court chose to set aside the entire prior child support judgment. The trial court's *sua sponte* action placed intervenor in an entirely different procedural posture with substantively different issues to defend than were raised by the motion to modify child support.

We conclude that by *sua sponte* raising and granting a Rule 60 motion on defendant's behalf, the trial court abused its discretion and created a "judgment by ambush." *Jackson*, 192 N.C. App. at 462, 665 S.E.2d at 550. Therefore, we vacate and remand the trial court's June 2014 order. Since the later order was based entirely upon the June 2014 order, we also vacate the November 2014 order setting permanent child support. Because we are vacating the June 2014 order and remanding for entry of a new order addressing defendant's motion to modify child support, we need not address intervenor's other issues on appeal, but we will address some issues that may arise on remand to provide guidance to the trial court.[3]

3. This opinion has no effect upon other subsequent orders issued by the trial court regarding other issues such as child custody and domestic violence.

[3] In the June 2014 order, the trial court failed to make any findings of fact regarding any change in circumstances from the time of the October 2013 hearing on the permanent child support order until the date of the March 2014 hearing on the motion to modify. On remand, the trial court should consider defendant's motion to modify as it was filed, based upon his allegations and the evidence of both parties regarding the alleged change in circumstances presented at the hearing on 5 March 2014, and should make findings of facts and conclusions of law based upon those allegations and that evidence. In addition, for guidance on remand, we note that the trial court's findings of fact could not in any event properly support a conclusion of law that plaintiff committed "fraud upon the defendant[4]:

> While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injury party.
>
> A subsisting or ascertainable facts, as distinguished from a matter of opinion or representation relating to future prospects, must be misrepresented.

Ragsdale v. Kennedy, 286 N.C. 130, 138-39, 209 S.E.2d 494, 500 (1974) (citations omitted).

The "representation" found by the trial court was plaintiff's alleged statements that she would not allow defendant to see their son in the future unless he agreed to the child support deviation from the guidelines. *Id.* Based upon the trial court's findings, this "representation" was not "false[,]" nor was it a representation of past or existing fact; rather, it was a representation of plaintiff's belief or intention regarding her future actions. *Id.* If she were to follow through on her statements and not allow defendant to see their son in violation of the custody order, her

4. The trial court made no actual conclusions of law about fraud or coercion beyond any which may be mixed with the findings of fact but simply granted "Defendant's amended pleadings of Motion for Relief and Motion to Set Temporary Current Child Support and Arrearage Payment[.]"

action would be potentially punishable by contempt, but her statement of intent was not fraudulent.[5] *See id.*

Since the trial court made no substantive conclusions of law, we cannot discern if the order was based in the alternative upon the trial court's determination that in the December 2013 order "[n]o findings were made regarding the ability of Defendant to pay or the needs of the child justifying deviation of the ordered amount[,]" and thus deviation from the child support guidelines was in error. The December 2013 order was not appealed by either party. Even assuming *arguendo* that the December 2013 order should have included additional findings of fact supporting deviation, one district court judge cannot overrule another. *See generally Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) ("The well[-]established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.") On remand, the trial court must consider the December 2013 order as a valid and enforceable order and base its ruling *only* upon defendant's motion for modification.[6]

IV. Conclusion

For the foregoing reasons, we vacate the June and November 2014 orders and remand for entry of an order consistent with this opinion addressing defendant's motion for modification of child support based upon the hearing held on 5 March 2014.

VACATED and REMANDED.

Judges CALABRIA and INMAN concur.

---

5. Intervenor did not admit to the statements defendant claimed she had made, and we are basing this discussion only upon the trial court's findings of fact.

6. Of course, both intervenor and defendant remain free to file any new or additional motions they wish, and we express no opinion on any potential future proceedings beyond the remand of the orders on appeal.

IN RE K.C.

[247 N.C. App. 84 (2016)]

IN THE MATTER OF K.C., A MINOR CHILD

No. COA15-960

Filed 19 April 2016

Termination of Parental Rights—neglect—abandonment—sufficiency of findings

The trial court erred by terminating respondent mother's parental rights on the grounds of neglect by abandonment. Respondent paid her court-ordered child support since petitioner gained sole custody of the minor child. Although respondent did not consistently attend all of her scheduled visitations, she still visited. The pertinent time period of lack of contact was not voluntary and therefore could not support a finding that respondent intended to abandon.

Appeal by respondent from judgment entered 22 May 2015 by Judge Donna Forga in Clay County District Court. Heard in the Court of Appeals 4 April 2016.

James L. Blomeley, Jr. for petitioner-appellee father.

Assistant Appellate Defender J. Lee Gilliam for respondent-appellant mother.

DAVIS, Judge.

T.S. ("Respondent") appeals from the trial court's order terminating her parental rights to her minor child, "Karl."[1] After careful review, we reverse.

Factual Background

At the time Karl was born in 2007, Respondent was married to his biological father, G.C. ("Petitioner"). They subsequently divorced, and pursuant to a Virginia court order the parties had joint custody of Karl for alternating two-week periods. In February 2009, Karl was placed in the sole custody of Petitioner after Respondent failed to return Karl in accordance with the Virginia custody order. While Karl was in Petitioner's custody, Respondent paid Petitioner $1 per month in court-ordered child

1. A pseudonym is used throughout this opinion to protect the identity of the minor child and for ease of reading. N.C.R. App. P. 3.1(b).

support. In January 2010, after Petitioner and Karl had moved to North Carolina, the Clay County District Court modified the custody order by awarding Respondent visitation that was to be supervised until she successfully completed six consecutive monthly visits with Karl. It took Respondent a year and a half to complete six consecutive visits and fulfill this condition. Between March 2012 and October 2013, Respondent had nine visits with Karl.

On 14 March 2014, Petitioner filed a petition to terminate Respondent's parental rights to Karl on the ground of abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). On 10 April 2014, Respondent contacted Petitioner to seek a visit with Karl. Petitioner denied this request because Karl's therapist had determined that his visits with Respondent should be suspended indefinitely.[2] On 30 May 2014, Petitioner filed an amended petition that included the additional ground of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

On 4 May 2015, the trial court conducted a hearing on the amended petition. The trial court entered an order on 22 May 2015 terminating Respondent's parental rights based on the ground of neglect under N.C. Gen. Stat. § 7B-1111(a)(1). Respondent filed a timely notice of appeal.

Analysis

On appeal, Respondent argues that the trial court erred by terminating her parental rights because its findings were insufficient to support its conclusion that she neglected Karl pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). We agree.

Our review on appeal is limited to a determination of whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether its findings of fact support its conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 42 (2004). Under N.C. Gen Stat. § 7B-1111(a)(1), "[t]he trial court may terminate the parental rights to a child upon a finding that the parent has neglected the child." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003).

Included in the statutory definition of a "neglected juvenile" is a "juvenile . . . who has been abandoned . . . ." N.C. Gen. Stat. § 7B-101(15) (2015). *See Humphrey*, 156 N.C. App. at 540-41, 577 S.E.2d at 427 (holding

2. A prior consent judgment entered into by the parties authorized Karl's therapist "to cease [Respondent's] visits for a period of time, or to modify them based upon the therapeutic needs of the child."

parental rights may be terminated under N.C. Gen. Stat. § 7B-1111(a)(1) for neglect due to abandonment of the juvenile). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009) (citation and quotation marks omitted). Abandonment has also been defined as

> wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

Humphrey, 156 N.C. App. at 540, 577 S.E.2d at 427 (citation omitted).

We have also held that "[w]illfulness is more than an intention to do a thing; there must also be purpose and deliberation." *S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51 (citation and quotation marks omitted). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *Id.* (citation and quotation marks omitted).

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). Thus, in order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings reflecting the fact that the parent has acted in a way that "manifests a willful determination to forego all parental duties and relinquish all parental claims to the child" as of the time of the termination hearing. *S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51.

Here, the trial court made the following findings in support of its conclusion that Respondent had neglected Karl by abandonment:

> e. While the case was under the jurisdiction of the Virginia courts, the initial determination of custody gave the parties joint custody of [Karl], with each party having [Karl] for one half of the time, alternating every two weeks. In February of 2009, [Petitioner] filed [a] motion in the cause after [Respondent] failed to return the child to him, and the Court placed the sole custody of the child with [Petitioner].

f. Thereafter, jurisdiction was assumed by the State of North Carolina. In an order entered in January, 2010, the Court modified the Respondent's visitation so that it would be supervised until the Respondent successfully completed six consecutive monthly visits with the child. The Respondent was very inconsistent in her visits, and it was not until a year and a half later that she was able to complete six consecutive monthly visits.

g. The Respondent's last visit with the child was on October 13, 2013. During the period from March 2012 through October 2013, the Respondent had nine visits with the child. The last time that she requested a visit was on April 10, 2014, five days after being served with the Petition in this case. In response to that request, the Petitioner declined her request on the grounds that the child's therapist determined that visits should be suspended indefinitely pursuant to the consent order in Cherokee County file number 09 CVD 181. The Respondent has had no contact with the child in any fashion since October of 2013.

. . . .

i. Since that time, the child has not asked for contact with the Respondent, although he would talk to her briefly if she called. Respondent has had only three phone conversations with the child since 2012, and none at all since October of 2013. In addition, the Respondent has not sent her son any cards or letters, nor has she sent him gifts at any time. In April 2014 when the Respondent called the Petitioner to ask for a visit she did not ask to speak to the child.

j. The Respondent pays $1.00 each month in child support for the child. She receives disability payments from the federal government, but does not apparently receive any additional payments intended to benefit the child.

Respondent does not dispute these findings. Nevertheless, we conclude that the trial court's findings do not support its conclusion that Respondent neglected Karl by abandonment.

The trial court's findings demonstrate that Respondent had paid her court-ordered child support since Petitioner gained sole custody of Karl. Although Respondent did not consistently attend all of her scheduled

visitations with Karl, she still visited with him nine times between March 2012 and October 2013, and she spoke with him on the phone three times after 2012. She also requested in April 2014 to visit with Karl, but this request was denied based on the decision of Karl's therapist. These actions are not consistent with abandonment as defined under North Carolina law.

Furthermore, the fact that Respondent did not visit Karl between 10 April 2014 and the 4 May 2015 hearing cannot be taken as evidence of abandonment. The trial court's findings indicate that Respondent was denied visitation during that period because "the Petitioner declined her request on the grounds that the child's therapist determined that visits should be suspended indefinitely . . . ." Thus, this lack of contact was not voluntary and therefore cannot support a finding that Respondent intended to abandon Karl. *See In re T.C.B.*, 166 N.C. App. 482, 486-87, 602 S.E.2d 17, 20 (2004) (holding that trial court's conclusion of abandonment was not supported by its findings regarding lack of visits given that respondent's attorney instructed him not to have any contact with child and subsequent protection plan disallowed visitation).

In *Bost v. Van Nortwick*, 117 N.C. App. 1, 449 S.E.2d 911 (1994), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995), this Court held that the trial court erred in determining that the respondent willfully abandoned his minor children when he visited them during Christmas, attended three of their soccer games, and told their mother he wanted to set up child support payments. *Id.* at 18-19, 449 S.E.2d at 921. This Court concluded that the respondent's actions did not "evince a settled purpose to forego all parental duties and relinquish all parental claims to the children." *Id.* at 19, 449 S.E.2d at 921. Similarly, in the present case, in addition to paying child support, Respondent visited Karl nine times from March 2012 through October 2013 and asked for further visitation in April 2014 but was denied.

The facts here are distinguishable from cases where this Court has upheld terminations of parental rights on abandonment grounds. *See, e.g.*, *In re C.J.H.*, __ N.C. App. __, __, 772 S.E.2d 82, 92 (2015) (affirming finding of abandonment because even though respondent made "last-minute child support payments and requests for visitation," during the relevant period "respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile"); *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986) (holding that evidence of one $500 payment by respondent — without

any other activity during the relevant time period — was sufficient to support jury's determination that father willfully abandoned child).

In sum, the evidence does not support a conclusion that Respondent abandoned Karl. Therefore, the trial court erred in concluding that Respondent's parental rights to Karl should be terminated based on the ground of neglect by abandonment under N.C. Gen. Stat. § 7B-1111(a)(1).

Conclusion

For the reasons stated above, the trial court's 22 May 2015 order is reversed.

REVERSED.

Judges HUNTER, JR. and ZACHARY concur.

IN THE MATTER OF M.S.

No. COA15-1162

Filed 19 April 2016

1. Jurisdiction—standing—parent—stepfather—no record evidence became parent through adoption or otherwise qualified

A stepfather did not have standing to appeal in an abused and neglected juvenile case. N.C.G.S. § 7B-1002(4), which permits a "parent" to appeal from an order of adjudication and disposition, does not authorize an appeal by a stepparent in the absence of record evidence that the stepparent has become the child's parent through adoption or is otherwise qualified under the statute.

2. Child Abuse, Dependency, and Neglect—abuse—neglect—indecent liberties—improper care—environment injurious to welfare

The trial court did not err by concluding that a minor child was an abused and neglected juvenile. Ample evidence supported the findings of fact which established that the stepfather committed indecent liberties upon the minor child and that she was an abused juvenile. The trial court's findings also established that the child did not receive proper care from respondent mother and her stepfather, and that she resided in an environment injurious to her welfare.

Appeal by respondent-mother and the minor's stepfather from adjudication and disposition order entered 1 May 2015 by Judge Addie H. Rawls in Harnett County District Court. Heard in the Court of Appeals 4 April 2016.

Duncan B. McCormick for petitioner-appellee Harnett County Department of Social Services.

Marie H. Mobley for guardian ad litem.

Richard Croutharmel for respondent-mother, appellant.

David A. Perez for respondent-stepfather, appellant.

ZACHARY, Judge.

Following the adjudication of the minor child, Mary,[1] as an abused and neglected juvenile, an appeal was taken to this Court by Mary's mother (respondent), and by J.C., who is married to Mary's mother and is referred to in court documents as her "stepfather." On appeal, respondent's counsel has filed a "no-merit" brief pursuant to N.C.R. App. P. Rule 3.1(d) (2014), and J.C. has offered arguments regarding the merits of the trial court's adjudication and disposition orders. We conclude that there is no basis for reversal of the trial court's order, and that the record fails to establish that J.C. has standing to appeal from the trial court's order. Accordingly, we affirm the trial court's order and dismiss J.C.'s appeal.

I. Background

On 22 July 2014, the Harnett County Department of Social Services ("DSS") filed a juvenile petition alleging that Mary was an abused and neglected juvenile and obtained nonsecure custody of Mary. The petition alleged that Mary was born in the Philippines in 2000, that her father was deceased, and that J.C., who was identified as Mary's "step-father," had sexually abused Mary over a period of years.

Two hearings were conducted on the petition in December 2014 and March 2015. Mary, who was fourteen at the time of the hearings, testified that J.C. had sexually molested her on numerous occasions when she was between nine and thirteen years old. Mary provided specific details

1. To protect the child's privacy, we refer to her by the pseudonym Mary in this opinion.

of J.C.'s abuse, which had included inappropriate touching of Mary's private parts, J.C. touching Mary with his penis, and at least one attempt by J.C. to undress Mary. Mary had reported the incidents to respondent, who refused to believe her or to allow her to participate in professional services such as a child medical examination or therapy. Mary's older sister, who was nineteen years old at the time of the hearing, testified that J.C. had also molested her when she was eleven or twelve years old.

On 1 May 2015, the trial court entered an order containing more than sixty findings of fact describing Mary's home situation and J.C.'s sexual abuse of Mary. The trial court found that Mary did not receive proper care and supervision in the home of respondent and J.C. and that she resided in an environment injurious to her health. The court also found that respondent had not provided adequate protection and a safe environment for her daughter and that Mary resided in a home where another juvenile had been subjected to abuse or neglect by J.C. Based upon these findings of fact, the court adjudicated Mary to be an abused and neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(1) and (15) (2014).

In its dispositional order, the trial court ordered that Mary's custody would remain with DSS and that there would be no visitation between Mary and either her mother or J.C. Respondent and J.C. each noted an appeal to this Court from the trial court's adjudication and dispositional orders.

II. Standard of Review

"The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2015).

> When this Court reviews an order in a juvenile abuse, neglect or dependency proceeding, we determine whether the trial court made proper findings of fact and conclusions of law in its adjudication and disposition orders. In so doing, we consider whether clear and convincing evidence in the record supports the findings and whether the findings support the trial court's conclusions. If there is evidence to support the trial court's findings of fact, they are deemed conclusive even though there may be evidence to support contrary findings. We consider matters of statutory interpretation *de novo*.

In re W.V., 204 N.C. App. 290, 293, 693 S.E.2d 383, 386 (2010) (citing *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007), *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000), *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984), and *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001)).

III. Appeal by J.C.

[1] We first address the issue of J.C.'s standing to appeal from the trial court's orders. "Although [J.C.'s] brief does not address the issue of standing, we are compelled to address this issue." *In re T.B.*, 200 N.C. App. 739, 742, 685 S.E.2d 529, 532 (2009). "Standing is jurisdictional in nature and '[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.' " *In re T.M.*, 182 N.C. App. 566, 570, 643 S.E.2d 471, 474 (quoting *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004)), *aff'd per curiam*, 361 N.C. 683, 651 S.E.2d 884 (2007). "As the party invoking jurisdiction, [J.C. has] the burden of proving the elements of standing." *Neuse River Found., Inc., v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation omitted), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

N.C. Gen. Stat. § 7B-1001(a) (2014) provides in relevant part that an "appeal of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals. . . . [T]he following juvenile matters may be appealed: . . . (3) Any initial order of disposition and the adjudication order upon which it is based." Under N.C. Gen. Stat. § 7B-1002 (2014), appeal from an initial order of adjudication and disposition may be taken only by:

> (1) A juvenile acting through the juvenile's guardian *ad litem* previously appointed under G.S. 7B-601.
>
> (2) A juvenile for whom no guardian *ad litem* has been appointed under G.S. 7B-601. . . .
>
> (3) A county department of social services.
>
> (4) A parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.
>
> (5) Any party that sought but failed to obtain termination of parental rights.

In the present case, J.C. clearly is not the juvenile, a court-appointed guardian *ad litem*, a county department of social services, or a party

who sought unsuccessfully for termination of parental rights. Therefore, the only ground on which J.C. might assert a right to appeal from the trial court's order of adjudication and disposition would be pursuant to N.C. Gen. Stat. § 7B-1002(4), as Mary's "parent" or "custodian as defined in G.S. 7B-101." Upon review of the relevant statutes and the record, we conclude that the record fails to contain any evidence that J.C. is either Mary's parent or her legal custodian.

N.C. Gen. Stat. § 7B-101 (2014) defines the following terms as follows:

. . .

> (3) Caretaker. -- Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, [or] an adult relative entrusted with the juvenile's care[.] . . . (emphasis added).

. . .

> (8) Custodian. -- The person or agency that has been awarded legal custody of a juvenile by a court.

The record contains nothing to suggest that J.C. was awarded legal custody of Mary by a court and, as a result, he cannot assert a basis to appeal as her "custodian" pursuant to N.C. Gen. Stat. § 7B-101(8). Moreover, N.C. Gen. Stat. § 7B-101(3) expressly defines "caretaker" to include a stepparent, such as J.C. On the record before us, we conclude that J.C. had the status of "caretaker" of Mary.

In reaching this conclusion, we have necessarily made a distinction between "parent" and "stepparent," a distinction that we conclude is in accord with N.C. Gen. Stat. § 7B-101 and N.C. Gen. Stat. § 7B-1002. We note that N.C. Gen. Stat. § 7B-101(8) defines "caretaker" as a person "other than a parent, guardian, or custodian" who is responsible for the health and welfare of a juvenile, and specifies that this term includes "a stepparent." Thus, N.C. Gen. Stat. § 7B-101 distinguishes between a parent and a stepparent. In addition, in N.C. Gen. Stat. § Chapter 48, which governs adoption procedures, N.C. Gen. Stat. § 48-1-101(18) (2014) defines "stepparent" as "an individual who is the spouse of a parent of a child, but who is not a legal parent of the child." (emphasis added).

We conclude that J.C. is not a proper party for appeal pursuant to N.C. Gen. Stat. § 7B-1002 and that he is a 'caretaker' under N.C. Gen. Stat. § 7B-101(3). We hold that N.C. Gen. Stat. § 7B-1002(4), which permits a "parent" to appeal from an order of adjudication and disposition, does not authorize an appeal by a stepparent in the absence of record evidence that the stepparent has become the child's parent through adoption or is otherwise qualified under the statute. "Due to insufficient information in the record to determine whether [J.C.] has standing to pursue this appeal, we dismiss the appeal." *T.B.*, 200 N.C. App. at 740, 685 S.E.2d at 530.

IV. Appeal by Respondent

[2] Counsel for respondent has filed a "no merit" brief pursuant to N.C.R. App. P. 3.1(d) (2014). In compliance with the provisions of that rule, counsel states that after thoroughly and conscientiously reviewing the record on appeal and consulting with other experienced appellate attorneys he is unable to identify any issues with sufficient merit upon which to base an argument for relief on appeal. He asks this Court to review the record for possible meritorious issues that may have been overlooked by counsel. He also identifies possible arguments that he considered and explains why he rejected them. He attached to the brief the letter he mailed to respondent, advising her of his inability to find possible meritorious issues and of her right to file her own written arguments directly with this Court. Counsel also informed respondent of the procedures to follow if she elected to file her own arguments and provided her with the necessary documents for that purpose.

Respondent has not filed her own written arguments. After reviewing the record on appeal, we are unable to find anything to support an argument for meaningful relief on appeal. We find ample evidence to support the findings of fact, which establish that J.C. committed indecent liberties upon Mary, and, accordingly, that Mary is an abused juvenile. The trial court's findings also establish that Mary did not receive proper care from respondent and J.C. and that she resided in an environment injurious to her welfare. The court's findings of fact thus support its conclusion of law that Mary is an abused and neglected juvenile.

We affirm the adjudication and disposition order.

AFFIRMED IN PART, DISMISSED IN PART.

Judges HUNTER, JR., and DAVIS concur.

McLENNAN v. JOSEY

[247 N.C. App. 95 (2016)]

ALEX D. McLENNAN, JR., DOROTHY N. McLENNAN, AND RUFUS T. CARR, JR., PLAINTIFFS
v.
C. K. JOSEY, JR., DEBORAH G. JOSEY, JOSEY PROPERTIES, LLC, THOMAS D. TEMPLE, IV, CRYSTAL TEMPLE, BETTY JO TEMPLE, AND JOSEPH LANIER RIDDICK, III, DEFENDANTS

No. COA 15-533

Filed 19 April 2016

1. Real Estate—surveyor's duty—senior documents—no justiciable issue

The counterclaim lacked a justiciable issue pursuant to N.C.G.S. § 6-21.5 in a boundary line dispute. Although defendants argued that they were fee simple owners of the property in good faith, defendants' map of the property was based on their own survey. Surveyors have a duty to check the county records, and in this case a routine title search should have discovered senior documents.

2. Attorneys—fees—frivousless litigation

It was within the trial court's discretion to award attorney fees for frivolous litigation where a counterclaim lacked a justiciable issue.

3. Attorneys—fees—appeal—award for additional case

Any attorney fees awarded under N.C.G.S. § 6-21.5 connected with an appeal were awarded erroneously. The portion of the award for another case was remanded because the record did not contain the final result in the case. The statute allowed an award of a reasonable attorney fee to the prevailing party.

4. Costs—litigation expenses—insufficient explanation—remanded

In a boundary dispute, an order awarding as costs an amount for "reasonable and necessary litigation expenses" without explanation of what the total included was remanded for additional findings.

5. Appeal and Error—frivolous appeal—sanctions denied—appeal well grounded in existing law

A motion for sanctions for a frivolous appeal was denied where the appeal was well grounded in existing law.

Appeal by Defendants from order entered 15 December 2014 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 21 October 2015.

Charles S. Rountree, III, for Plaintiff-Appellees.

Etheridge, Hamlett & Murray, LLP, by Ernie K. Murray, for Defendant-Appellants.

HUNTER, JR., Robert N., Judge.

Defendants appeal an order awarding Plaintiffs attorneys fees, costs, and litigation expenses on the grounds that their claims presented justiciable issues contemplated by N.C. Gen. Stat. § 6-21.5. Defendants request we reverse the trial court. In addition, the Plaintiffs have requested that this Court award fees for filing a frivolous appeal. For the following reasons, we affirm in part, reverse in part, and remand the case to the trial court to take further action consistent with this opinion.

I. Factual and Procedural Background

Our Court previously reviewed the legal merits of this boundary line dispute in *McLennan v. Josey*, __ N.C. App. __, 758 S.E.2d 888 (2014). In the first appeal, after *de novo* review this Court affirmed the trial court's summary judgment holding Plaintiffs had established superior record title to the *res* in question and Defendants' parol evidence to the contrary was inadmissible. *Id.* at __, 758 S.E.2d at 891–892. Because Defendants' evidence did not meet their burden of proof to show their ownership was superior, we held no genuine issue of material fact existed as to the location of the boundary line between Plaintiffs' and Defendants' property. *Id.* at __, 758 S.E.2d at 892.

On 24 July 2013, during the pendency of the first appeal, Plaintiffs filed a Motion to Tax Costs, Including Reasonable Attorney's Fees and Expenses in trial court. In support of their motion, Plaintiffs attached a list of legal services rendered and associated legal fees dating back from 17 May 2010, totaling $112,740.00. Plaintiffs also attached a list of disbursements, including court costs totaling $3,458.38, and fees associated with expert witnesses totaling $24,708.86. Additionally, Plaintiffs attached affidavits attesting to the reasonableness of the fees.

Following our decision in the first appeal, Plaintiffs filed a Supplement to their Motion to Tax Costs on 17 October 2014. In support of their motion, Plaintiffs attached invoices related to the appeal totaling

$55,660.00 in attorneys fees and $1,130.18 for out of pocket expenses and court costs.

On 15 December 2014, the trial court entered an order taxing costs and reasonable attorneys fees to Defendants. The trial court concluded:

> A. Plaintiffs are entitled as a matter of law to recover the costs incurred in this action in the sum of $3,716.25.
>
> B. The court has the authority to award reasonable attorneys fees and out of pocket expenses to Plaintiffs in this case pursuant to N.C. Gen. Stat. § 6-21.5 (2014).
>
> C. The court concludes as a matter of law that plaintiffs' reasonable attorneys fees and litigation expenses incurred as a result of the complete absence of a justiciable issue of either law or fact raised by Defendants in any pleading total $215,828.12.

Defendants filed a written notice of appeal on 13 January 2015, contesting the order awarding costs and attorneys fees. On 14 August 2015, Plaintiffs filed a motion seeking sanctions against Defendants for pursuing a frivolous appeal. Defendants filed a reply brief 19 August 2015. The Clerk of the North Carolina Court of Appeals referred Plaintiffs' motion to this panel on 31 August 2015.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of a superior court pursuant to N.C. Gen. Stat. § 7A-27.

III. Standard of Review

Our decision requires we apply differing standards of review to the questions arising from the lower court's award. We decide these issues consecutively.

First, we must determine whether or not the Plaintiffs presented a justiciable issue in their pleadings. Our case law has held that "[i]n reviewing an order granting a motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5, '[t]he presence or absence of justiciable issues in the pleadings is . . . a question of law that this Court reviews *de novo*.' " *Wayne St. Mobile Home Park, LLC v. N. Brunswick Sanitary Dist.*, 213 N.C. App. 554, 561, 713 S.E.2d 748, 753 (2011) (citing *Free Spirit Aviation v. Rutherford Airport*, 206 N.C. App. 192, 197, 696 S.E.2d 559, 563 (2010)).

Second, "[t]he [trial court's] decision to award or deny attorney's fees under [s]ection 6-21.5 is a matter left to the sound discretion of the trial court." *Persis Nova Constr., Inc. v. Edwards*, 195 N.C. App. 55, 67, 671 S.E.2d 23, 30 (2009). "An abuse of discretion occurs when a decision is 'either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.' " *Exgelhof ex rel. Red Hat, Inc. v. Szulik*, 193 N.C. App. 612, 668 S.E.2d 367 (2008) (citing *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 248, 563 S.E.2d 269, 280 (2002)).

Next, we examine the award of costs and expenses to the prevailing party. "Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law . . . ." *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011). We therefore review the trial court's interpretation *de novo*. However, the "reasonableness and necessity" of costs is reviewed for abuse of discretion. *Id.* at 26, 707 S.E.2d at 741.

IV. Analysis

A. Attorneys Fees

[1] In North Carolina, parties to litigation are generally responsible for their own attorneys fees unless a statute provides otherwise. *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1973). Statutes awarding attorneys fees to prevailing parties are "in derogation of the common law" and therefore must be strictly construed. *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 256, 400 S.E.2d 435, 437 (1991).

N.C. Gen. Stat. § 6-21.5 states, ". . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C. Gen. Stat. § 6-21.5 (2015). Fees related to an appeal to this Court or to the North Carolina Supreme Court are not recoverable under N.C. Gen. Stat. § 6-21.5. *See Hill v. Hill*, 173 N.C. App. 309, 318, 622 S.E.2d 503, 509 (2005). The purpose behind N.C. Gen. Stat. § 6-21.5 is to "discourage frivolous legal action." *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990).

A justiciable issue is one that is "real and present, as opposed to imagined or fanciful." *Sunamerica*, 328 N.C. at 257, 400 S.E.2d at 437 (citations omitted). "In order to find a complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions

for summary judgment or to dismiss." *K & K Development Corp. v. Columbia Banking Fed. Savings & Loan*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989) (citations omitted). "Under this deferential review of the pleadings, a plaintiff must either: (1) 'reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue'; or (2) be found to have 'persisted in litigating the case after the point where [he] should reasonably have become aware that pleading [he] filed no longer contained a justiciable issue.' " *Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 655, 689 S.E.2d 889, 895 (2010) (citing *Brooks v. Giesey*, 334 N.C. 303, 309, 432 S.E.2d 339, 342 (1993)); *see also Sunamerica*, 328 N.C. 254 at 258, 400 S.E.2d at 438. A trial court must make one or both of these findings to support its award of section 6-21.5 attorneys fees. *See Sunamerica*, 328 N.C. 254 at 260, 400 S.E.2d at 439 ("[A trial court] shall make findings of fact and conclusions of law to support its award of attorneys' fees.").

The granting or denial of a motion for summary judgment is "not in itself a sufficient reason for the court to award attorney's fees." N.C. Gen. Stat. § 6-21.5 (2015). However, granting a Rule 12(b)(6) motion or entering summary judgment may be evidence that a pleading lacks a justiciable issue. *Sunamerica*, 328 N.C. 254 at 259, 400 S.E.2d at 439. Moreover, "action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of 6-21.5." *Id.* at 259, 400 S.E.2d at 439.

Defendants argue that they presented a justiciable issue in their counterclaim, contending they were the fee simple owners of the property at issue and that they did so in good faith. Additionally, Defendants point out the award of attorneys fees includes $55,660.00 for "responding to Defendants' appeal" as well as attorneys fees for another case between the parties, 11-CVS-973. Defendants contend the fees related to the appeal and case number 11-CVS-973 were erroneously awarded. We address each of Defendants' arguments in turn.

To review whether attorneys fees are proper, we first determine whether the pleadings contained a justiciable issue. The trial court made the following findings related to whether the pleadings contained a justiciable issue:

> 2. Defendants knew at the time they recorded the map in 2009 that the deed descriptions in the deeds by which Defendants acquired their property excluded the more than two hundred acres belonging to Plaintiffs.

> 3. Defendants' deeds stated that their titles were subject to a 1909 deed by Defendants' predecessors in title to Wilts Veneer Company that described by metes and bounds the location of the boundary between their property and Plaintiffs' adjoining property in a different location than that shown on the 2009 map Defendants recorded.
>
> 4. Before Plaintiffs filed the Complaint in this case in 2010 Defendants had a copy of the recorded 1918 boundary survey of Plaintiffs' property showing the more than two hundred acres was owned by Plaintiffs' predecessor in title.
>
> 5. The Complaint filed by Plaintiffs in the summer of 2010 includes references to recorded maps and deeds describing the boundary on the ground between their property and Defendants' property.

Thus, the trial court's order contains the necessary findings to support its award of attorneys fees. We note that the Defendants did not challenge these factual findings on appeal as unsupported by competent evidence. It is unlikely that such a challenge could be made, since the matters establishing a title are contained in the county register of deeds vaults. Questions of title are questions of law and where the law is settled in regard to titles, the law of this case is that the Defendants submitted no admissible evidence to meet their burden. This result was foreseeable from the title records and routine application of settled law. We agree with the trial court that the counterclaim contained no justiciable issue at the time it was filed.

Defendants relied on a map recorded in 2010 and subsequent deeds to determine the location of Gaynor's Gut, the boundary between Plaintiffs' and Defendants' land. As this Court reasoned in the previous appeal:

> [D]efendants present no evidence by way of deeds in their chain of title to establish their superior claim to the disputed land. Moreover, defendants' recorded map in 2010 and subsequent deeds using the map's boundary description to convey the disputed land are junior to the 1909 and 1918 documents that describe the run of Gaynor's Gut. Thus, the descriptions found in the 1909 and 1918 documents control.

McLennan v. Josey, __ N.C. App. __, __, 758 S.E.2d 888, 892 (2014). Moreover, as the trial court pointed out in finding number 3, Defendants' deeds made reference to the 1909 deed, alerting Defendants to the

existence of the deed prior to filing their counterclaim. Plaintiffs' Complaint also referenced the 1909 deed as well as a 1918 map, informing Defendants of their existence prior to filing their counterclaim.

Defendants' 2010 map is based on a survey obtained by Defendants. Surveyors have a duty to always check the county records in which the land is located. Walter G. Robillard & Lane J. Bouman, *Clark on Surveying and Boundaries* 119 (7th Ed. 1997). Thus, in a routine title search, the senior documents should have been discovered by a surveyor or attorney prior to the drafting of the 2010 survey. As a rule of surveying "no following surveyor may establish new corners or lines or correct erroneous surveys of the earlier surveyors," the run of Gaynor's Gut in the senior deeds and maps controls. *Id.* at 23 (emphasis removed from original). Therefore, after our *de novo* review of the pleadings, we hold the pleadings lacked a justiciable issue.

[2] Since the trial court properly held the pleadings lacked a justiciable issue pursuant to N.C. Gen. Stat. § 6-21.5, it is within the trial court's discretion whether to award attorneys fees. *See Persis Nova Constr.*, 195 N.C. App. at 67, 671 S.E.2d at 30. Although the order does not explicitly state why the court exercised its discretion we hold that it was in furtherance of the policy of the statute to discourage frivolous litigation. As the prevailing party, Plaintiffs are entitled to attorneys fees at the discretion of the trial court. The court had authority pursuant to N.C. Gen. Stat. § 6-21.5 to award Plaintiffs attorneys fees, and made the required findings to support such an award. Therefore, we hold the trial court did not abuse its discretion in awarding attorneys fees under N.C. Gen. Stat. § 6-21.5 to Plaintiffs.

[3] Finally, we review the trial court's award of attorneys fees to determine whether they were authorized under the statute. Within the award of attorneys fees, the trial court awarded $55,898.18 for "responding to Defendants' appeal." Defendants argue attorneys fees may not be awarded under N.C. Gen. Stat. § 6-21.5 for appeals to this Court. *See Hill*, 173 N.C. App. at 318, 622 S.E.2d at 509. We agree. Because attorneys fees related to an appeal are not recoverable under N.C. Gen. Stat. § 6-21.5, we hold any fees connected with the appeal were awarded in error.

Defendants also claim a portion of the awarded attorneys fees are related to another case between the parties, case number 11-CVS-973. Defendants specifically point to entries on the attorneys fees invoices for drafting a complaint in August 2011. Plaintiffs filed the Complaint in the case appealed to this Court on 27 August 2010, approximately one year earlier than the invoice entry in question.

In its order taxing costs and reasonable attorneys fees, the trial court specifically allowed attorneys fees for both cases by finding:

> 22. The legal services in preparing pleadings in 2011 to add additional claims for relief by amendment to the pleadings in this case or by the filing of a companion law suit, being strategic in nature and designed to litigate all issues raised by Defendants' actions at the same time, were related to the prosecution of this civil action and the attorney's fees and litigation expenses incurred are properly recoverable in this action.

However, the motion to consolidate the cases was denied. Further, no final judgment or order from case 11-CVS-973 was appealed to this Court.

N.C. Gen. Stat. § 6-21.5 allows a court to award "a reasonable attorney's fee *to the prevailing party*." N.C. Gen. Stat. § 6-21.5 (2015) (emphasis added). The record on appeal does not contain the final result of the other case nor is that case before this Court. Should Plaintiffs be successful in the other case and should that case also lack a justiciable issue, then Plaintiffs may pursue attorneys fees separately for that case. Unfortunately, based on the record, we cannot distinguish between fees charged for the case on appeal and fees charged for 11-CVS-973. Therefore, we remand this issue to the trial court to limit the fees applicable to this case.

B. Costs and Litigation Expenses

[4] Defendants contend N.C. Gen. Stat. § 6-21.5 only allows an award of attorneys fees, not costs. However, costs are allowed as of course in actions "for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial." N.C. Gen. Stat. § 6-18 (2015). Even so, Defendants contend that "numerous items the trial court ordered to be paid have been held not to be recoverable."

N.C. Gen. Stat. § 7A-305(d) provides a "complete and exclusive . . . limit on the trial court's discretion to tax costs." The statute allows for the "reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings." N.C. Gen. Stat. §7A-305(d)(11) (2015). In light of the North Carolina Supreme Court's recent decision in *Lassiter ex rel Baize v. North Carolina Baptist Hospitals, Inc.*, expert witness fees are taxable as costs even though the expert was not compelled by subpoena.

Lassiter ex rel Baize v. North Carolina Baptist Hospitals, Inc., 368 N.C. 367, 378–379, 778 S.E.2d 68, 75–76 (2015).

The trial court order includes "$26,283.49 in reasonable and necessary litigation expenses" without explanation of what the total includes. Defendants contend this contains expert fees in the amount of $24,708.86, including preparation time for trial. Plaintiffs acknowledge the use of experts in the case, but do not specify whether expert fees were included in the costs or litigation expenses awarded by the trial court order. Thus, we remand this issue to the trial court to make additional findings of fact regarding costs and litigation expenses consistent with this opinion and the Supreme Court opinion.

C. Motion for Sanctions

[5] Plaintiffs contend Defendants are currently pursuing a frivolous appeal before this Court. As such, Plaintiffs seek sanctions against Defendants under N.C. R. App. P. 34 to reimburse Plaintiffs for attorneys fees and costs incurred during this appeal. Pursuant to Rule 34, this Court may impose sanctions against an appellant where "the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *ACC Const., Inc. v. SunTrust Mortg., Inc.* __ N.C. App. __, __, 769 S.E.2d 200, 213–214 (2015).

Here, the appeal was well grounded in existing law. In fact, Defendants succeeded in arguing a portion of the attorney's fees were granted in error. Moreover, Defendants pointed to potential problems in the award of costs and litigation expenses. Thus, we deny Plaintiffs' motion for sanctions.

V. Conclusion

For the foregoing reasons, we affirm in part, reverse in part, and remand the award of attorneys fees pursuant to N.C. Gen. Stat. § 6-21.5. We also remand the award of costs for further findings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges GEER and DILLION concur.

SOUTHEAST CAISSONS, LLC, PLAINTIFF
v.
CHOATE CONSTRUCTION COMPANY, CHOATE CONSTRUCTION GROUP, LLC, FALCON ENGINEERING, INC., BBH DESIGN, P.A., AND KIMLEY-HORN AND ASSOCIATES, INC., DEFENDANTS

No. COA15-1284

Filed 19 April 2016

Contracts—construction—no execution of proposed contract—no meeting of minds—venue selection clause

Where a subcontractor performed work for a contractor even though the written subcontract was never signed by either party, the Court of Appeals affirmed the trial court's order denying the contractor's motion for change of venue. The trial court correctly determined that there was no meeting of the minds on the proposed subcontract and that the parties did not intend to be bound by its terms, including its venue selection clause. The Court of Appeals rejected the contractor's argument that the trial court's order was fatally overbroad.

Appeal by defendants from order entered 11 August 2015 by Judge William Z. Wood in Forsyth County Superior Court. Heard in the Court of Appeals 31 March 2016.

Randolph M. James P.C., by Randolph M. James, for plaintiff-appellee.

Johnston, Allison & Hord, P.A., by Robert L. Burchette, Michael J. Hoefling, and David V. Brennan, for Choate Construction Company and Choate Construction Group, LLC, defendants-appellants.

TYSON, Judge.

Defendants Choate Construction Company and Choate Construction Group, LLC (collectively, "Choate") appeal from order denying Choate's motion to dismiss, or alternatively, for change of venue pursuant to Rule 12(b)(3). We affirm.

I. Factual Background

On 28 July 2011, the trustees of Wake Technical Community College entered into a prime contract with Choate for the construction of

the Northern Wake Campus Parking Deck, located in Raleigh, Wake County, North Carolina. The parking deck construction (hereinafter, "the project") was a public project, and subject to a comprehensive set of statutes and regulations regarding the procurement of services and materials and the performance of the project. The project was overseen by the North Carolina Department of Administration and the State Construction Office.

Choate solicited bids for drilled shafts and concrete piers for the project. Southeast Caissons, LLC ("SEC") submitted two bid proposals to Choate. Brian Kinlaw ("Mr. Kinlaw") served as Choate's project manager for the construction of the parking deck. After SEC submitted its second bid proposal, Mr. Kinlaw corresponded via a series of emails with Keisha West ("Ms. West"), a managing member of SEC, regarding the terms of the proposed subcontract with SEC for the drilling of shafts and the installation of concrete caissons and piers to support the weight and structure of the project.

On 6 October 2011, Mr. Kinlaw emailed Ms. West an electronic copy of Choate's proposed subcontract and informed her she would also receive two hard copies by mail. The subcontract offered a lump sum payment of $438,000.00 to SEC for its work on the project, subject to contingencies, and incorporated the terms of the prime contract between Choate and Wake Technical Community College. The subcontract also contained a clause in Article X, Section 3(b) entitled "Additional Dispute Resolution Provisions." This clause stated: "Venue for any arbitration, settlement meetings or any subsequent litigation whatsoever shall be in the city of Contractor's office as shown on page 1 of the Subcontract." Choate's office was shown on page 1 of the subcontract as being located in Raleigh, Wake County, North Carolina.

Mr. Kinlaw subsequently requested that Ms. West sign and return the proposed subcontract. He explained that Choate required a signed subcontract before it would allow SEC to begin work on the project. Ms. West informed Mr. Kinlaw that SEC "had some small changes to the subcontract but generally found the subcontract agreeable." Ms. West emailed the changes to Mr. Kinlaw and he discussed the changes with his superiors.

On 24 October 2011, Choate and SEC held a "pre-drill" meeting onsite, where the parties reached an oral agreement on where "rock payment would begin in a drilled shaft." On 26 October, Ms. West emailed Mr. Kinlaw SEC's "Proposed Addendum" to the subcontract. The "Proposed Addendum" stated "[SEC] hereby accepts the terms of the attached

Subcontract, *subject to and conditioned upon* [Choate's] acceptance of the terms set forth in this Addendum[.]" (emphasis supplied).

On 27 October, Mr. Kinlaw and Ms. West engaged in a two-hour-long telephone call, during which they discussed the subcontract and the "Proposed Addendum." Following this telephone call, Mr. Kinlaw and Ms. West continued to exchange emails and telephone calls, in which they sought to reach an agreement on and finalize the terms contained in the subcontract and "Proposed Addendum." The correspondences included an email from Mr. Kinlaw on 2 November, in which he indicated the parties "got closer" to reaching a final agreement on the additional issues and he "hope[d] to have this resolved with [Ms. West] ASAP." Ms. West replied with an email on 7 November which read: "I just wanted to touch base with you to check the status of the Subcontract Agreement. I would like to get this contract nailed out [sic] today prior to drilling, if possible." SEC began drilling the first shaft that same day, while the amended subcontract and "Proposed Addendum" remained unsigned by both SEC and Choate.

Despite SEC beginning to drill on-site on 7 November 2011 without a signed written subcontract, Choate and SEC, through Mr. Kinlaw and Ms. West, continued to discuss the terms of the subcontract. On 15 November, Mr. Kinlaw sent an email to Ms. West, which read: "I tried calling yesterday and today . . . to speak further about the Subcontract. . . . Sending this just in case it's not reaching you." Mr. Kinlaw sent another email to Ms. West on 18 November seeking to discuss "further definition and clarification" of certain terms in the proposed subcontract.

The parties continued discussing the terms of the proposed subcontract into December 2011. In an email dated 19 December 2011, Mr. Kinlaw wrote to Ms. West:

> Further to my email below from 12/1/11 following the collaborative effort by both of our offices to reach concurrence on Contract terms, no further response has been received from Southeast Caissons — namely, a signed and executed copy of the Subcontract. In making another attempt, attached you will find a revision to the Subcontract that includes all modifications agreed-upon as clarified and documented previously.

In her supplemental affidavit, Ms. West stated she "could not sign the proposed subcontract because we were not in agreement."

Mr. Kinlaw sent a follow-up email to Ms. West on 30 December, in which he stated he wanted to "discuss several urgent paperwork

issues[.]" Mr. Kinlaw also reminded Ms. West he had re-sent the proposed subcontract document for her to execute and return to Choate.

Mr. Kinlaw emailed to SEC another modified proposed subcontract on 12 January 2012. He stated in the email: "I am re-sending the subcontract to you that includes all modifications agreed-upon as clarified and documented previously and has been cleaned up to remove the handwritten notes on Exhibits B and C. Please execute and return this document immediately." Ms. West averred in her supplemental affidavit that Mr. Kinlaw considered this a "finalized subcontract," but it contained "modifications which were not acceptable to [SEC]." Ms. West did not respond to Mr. Kinlaw's correspondence, and SEC continued to perform work on the construction project. SEC drilled the last shaft on the project on 27 January 2012. The proposed "finalized subcontract," as modified and sent by Mr. Kinlaw on 12 January 2012, remained unexecuted by both parties.

On 23 February 2012, Ms. West mailed Mr. Kinlaw a letter to notify him SEC's work had been completed and to request payment from Choate. Acknowledging she had not signed the proffered subcontract as yet, Ms. West stated: "We understand Choate has maintained that a contract must be signed prior to any payment to [SEC], but it is undeniable that no matter what our disagreement might be on the amount due to [SEC] there is some amount due." In his response letter to Ms. West, Mr. Kinlaw informed her Choate would be unable to pay SEC until someone from SEC submitted a payment application to Choate.

SEC filed a complaint on 23 February 2015 against Choate, Falcon Engineering, Inc. ("Falcon"), BBH Design, P.A. ("BBH"), and Kimley-Horn and Associates, Inc. ("Kimley-Horn") in Forsyth County. Defendants Falcon, BBH, and Kimley-Horn are not parties to this appeal, and the allegations asserted in SEC's complaint pertaining to these defendants are not addressed. SEC's complaint against Choate alleged claims for: (1) breach of contract; (2) *quantum meruit*; (3) fraud in the inducement; (4) unfair and deceptive trade practices; and (5) punitive damages.

Choate responded and filed an answer, motion to dismiss, counterclaims, and crossclaims. Choate asserted four separate bases for the trial court to grant its motion to dismiss: (1) motion to dismiss for breach of a condition precedent to maintain a claim/or waiver of the right to maintain a claim and for failure to state a claim for relief, *i.e.* compliance with the condition precedent; (2) motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6); (3) motion to dismiss or alternatively for change of venue; and (4) motion to dismiss for failure to establish that "rock" was encountered beyond bearing elevation.

Choate's motion for change of venue was based upon the language contained in Article X, Section 3(b) of the unsigned subcontract, which provided: "Venue for any arbitration, settlement meetings or any subsequent litigation whatsoever shall be in the city of Contractor's office as shown on page 1 of the Subcontract."

SEC voluntarily dismissed without prejudice its claims against defendants BBH and Kimley-Horn on 30 July 2015. Choate's motion to dismiss or alternatively for change of venue was heard in Forsyth County Superior Court on 27 July 2015. Both Mr. Kinlaw and Ms. West submitted affidavits, which were filed in anticipation of this hearing.

The trial court entered a written order denying Choate's motion for change of venue on 11 August 2015. The trial court's order stated, in part:

> IT APPEARS to the Court from Brian Kinlaw's affidavit filed by movants and the Affidavit of Keisha West and Supplemental Affidavit of Keisha West filed by plaintiff Southeast Caissons, LLC (SEC), a managing member of SEC, that the Subcontract attached to defendants [sic] Choate's Answer as Exhibit A was never executed by SEC or Choate . . . and is therefore not binding on the plaintiff, and in particular the venue selection clause of Article X of the unexecuted Subcontract; and,
>
> IT FURTHER appears to the Court . . . that [SEC] is a Forsyth County, Kernersville, North Carolina Corporation and venue is proper in Forsyth County . . . as the plaintiff maintains its principal office in Forsyth County and maintains a place of business in Forsyth County[.]

Choate gave timely notice of appeal to this Court.

II. Issues

Defendant Choate argues the trial court erred by: (1) entering an order, which was fatally overbroad; and (2) denying Choate's motion for change of venue pursuant to Rule 12(b)(3).

III. Standard of Review

"[Q]uestion[s] of venue . . . [rest] within the sound discretion of the trial judge, and [are] not subject to review except for manifest abuse of such discretion." *Farmers Coop. Exch., Inc. v. Trull*, 255 N.C. 202, 204, 120 S.E.2d 438, 439 (1961) (citations omitted). Under an abuse of discretion standard, this Court reviews the trial court "to determine whether

a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Printing Servs. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 74, 637 S.E.2d 230, 232 (2006) (citation omitted), *aff'd per curiam*, 361 N.C. 347, 643 S.E.2d 586 (2007).

IV. Analysis

A. Jurisdiction

Defendant Choate's appeal is interlocutory. An order or judgment is interlocutory if it does not settle all the pending issues and "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80 (citation omitted), *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). The trial court's order denying Choate's motion for change of venue is interlocutory, because it does not dispose of all issues of the case and is not a final disposition for any party.

An interlocutory order is generally not immediately appealable. An exception to this rule exists if the appellant shows the order affects a substantial right, which will be lost if the case is not reviewed prior to the issuance of a final judgment. N.C. Gen. Stat. §§ 1-277(a) (2015), 7A-27(b)(1) (2015); *Guilford Cnty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 529, 473 S.E.2d 640, 641 (1996).

This Court has held "where the issue pertains to applying a forum selection clause, our case law establishes that [a party] may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right." *Hickox v. R&G Grp. Int'l, Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003) (citation omitted); *see also Parson v. Oasis Legal Fin., LLC*, 214 N.C. App. 125, 128, 715 S.E.2d 240, 242 (2011) (citation omitted); *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566 n.1, 566 S.E.2d 160, 161 n.1 (2002); *L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 288, 502 S.E.2d 415, 417 (1998) (citation omitted). The trial court's denial of Choate's motion for change of venue affects a substantial right, and we proceed to the merits of Choate's claims.

B. Order Denying Choate's Motion for Change of Venue

Choate argues the trial court erred by entering an order denying Choate's motion for change of venue because: (1) the trial court's order was fatally overbroad; and (2) the order was based upon a misapprehension of law.

1. Venue Selection Clauses

"Generally in North Carolina, when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive." *Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 644, 574 S.E.2d 31, 34-35 (2002) (citation and internal quotation marks omitted) (noting mandatory venue selection clauses have contained words such as "exclusive," "sole," or "only" to indicate that the contracting parties intended to make jurisdiction exclusive).

Here, the venue selection clause stated: "Venue for any arbitration, settlement meetings or any subsequent litigation whatsoever shall be in the city of Contractor's office as shown on page 1 of the Subcontract." The clause at bar does not contain any words to indicate a mandatory venue selection clause. The clause is clearly non-mandatory. *Id.* The trial court correctly determined venue was proper in Forsyth County, where SEC "maintains its principal office[.]"

2. Choate and SEC Subcontract

The well-settled elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms. *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) ("The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds."). "Generally, a party seeking to enforce a contract has the burden of proving the essential elements of a valid contract[.]" *Orthodontic Ctrs. of Am., Inc. v. Hanachi*, 151 N.C. App. 133, 135, 564 S.E.2d 573, 575 (2002) (citation omitted).

The parties agreed at oral argument this contract is not subject to the statute of frauds. Although only those contracts subject to the statute of frauds are required to be in writing and signed by the party to be charged, *see* N.C. Gen. Stat. § 22-2 (2015), this Court held the *absence* of a signed, written instrument is evidence of the parties' intentions not to be bound by the proposed contract. *Zinn v. Walker*, 87 N.C. App. 325, 332, 261 S.E.2d 314, 318 (1987) (citations omitted), *disc. review denied*, 321 N.C. 747, 366 S.E.2d 871 (1988).

"If mutual assent is purportedly manifested in a written instrument but a question arises as to whether there was a genuine meeting of the minds, the court must first examine the written instrument to ascertain the parties' true intentions." John N. Hutson, Jr. & Scott A. Miskimon,

NORTH CAROLINA CONTRACT LAW § 2-4, at 61, § 2-7-1, at 68 (2001) ("Failing to memorialize an oral contract does not invalidate the agreement but instead merely affects the mode of proving the terms of the contract.").

Choate argues the trial court was only authorized to make a limited determination on whether the venue selection clause was enforceable when ruling on its motion for change of venue. Choate contends the trial court's order exceeded the scope of this authority, and is fatally overbroad, because the order is "not limited to whether the parties agreed to select a venue for adjudication of [p]roject-related disputes." Choate also asserts the trial court abused its discretion by basing its order on a "misapprehension of law." We disagree.

The trial court's order denied Choate's motion for change of venue based, in part, on the finding that "the Subcontract . . . was never executed by SEC or Choate . . . and is therefore not binding on the plaintiff, and in particular the venue selection clause of Article X of the unexecuted Subcontract[.]" Choate argues this "blanket proclamation" effectually "removes the matter of contract formation from the finder of fact, [and] at a minimum it will result in prejudice to [Choate] at trial on the underlying actions." We do not interpret the trial court's language to be as sweeping or draconian as Choate suggests. As explained below, the trial court's order does not resolve the underlying issues alleged in SEC's complaint, nor does it define the terms of the agreement between Choate and SEC.

"The heart of a contract is the intention of the parties, which is ascertained by the subject matter of the contract, the language used, the purpose sought, and the situation of the parties at the time." *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968) (citations omitted). "It is a general rule of contract law that the intent of the parties, where not clear from the contract, may be inferred from their actions." *Branch Banking & Trust Co. v. Kenyon Inv. Corp.*, 76 N.C. App. 1, 9, 332 S.E.2d 186, 192 (1985), *appeal withdrawn*, 316 N.C. 192, 341 S.E.2d 587 (1986). *See Zinn*, 87 N.C. App. at 332, 261 S.E.2d at 318 (citations omitted) ("[T]he parties' intentions[,] which are controlling in contract construction, may be construed from the terms of the writings and the parties' conduct." (citations omitted)).

"One of the most fundamental principles of contract interpretation is that ambiguities are to be construed against the party who prepared the writing." *Chavis v. S. Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986) (citations omitted). Here, Choate prepared the proposed subcontract using its own form. Any ambiguities in the proposed subcontract are to be construed against Choate. *Id.*

Our Supreme Court has long held "[f]or an agreement to constitute a valid contract, the parties' minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (citations and internal quotation marks omitted), *reh'g denied*, 354 N.C. 75, 553 S.E.2d 75 (2001). *See also Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998); *Normile v. Miller*, 313 N.C. 98, 108, 326 S.E.2d 11, 18 (1985); *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921).

"[I]n order that there may be a valid and enforceable contract between parties, there must be a meeting of the minds of the contracting parties upon all essential terms and conditions of the contract." *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co., Inc.*, 175 N.C. App. 483, 490, 623 S.E.2d 793, 798-99 (2006) (citations and quotation marks omitted) (holding defendant company did not agree to jurisdiction in New York when it submitted a counteroffer of the amount owed to plaintiff because there was no acceptance of counteroffer).

Here, the trial court's order merely, and correctly, reflects a quintessential tenet of contract law in North Carolina and elsewhere — contract interpretation is governed by mutual assent and the intent of the parties. *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209, *disc. review denied*, 351 N.C. 186, 541 S.E.2d 709 (1999). The trial court properly concluded the parties did not reach mutual assent on, and did not intend to be bound by, the terms of Choate's proposed subcontract, including the venue selection clause, based on their conduct, including: (1) Mr. Kinlaw continued to modify the terms of the proposed subcontract through January 2012, while SEC's work was underway; (2) Choate, via its representatives, articulated numerous times it required a *signed* subcontract from SEC, yet allowed SEC to begin and complete the work without the proposed agreement being signed; (3) in December 2011, Ms. West refused to sign the proposed subcontract because SEC and Choate had not yet reached a mutual agreement on the final terms of the subcontract; (4) Mr. Kinlaw sent to Ms. West a purported "finalized subcontract," but this document contained additional modifications; (5) at a 1 February 2012 meeting, after the work had been completed and Choate had received the benefits of SEC's work, Mr. Kinlaw informed Ms. West that Choate could not pay any money to SEC "until a contract was agreed to and executed[;]" (6) Ms. West averred in her affidavit "the written subcontract document was never agreed to by the parties [and] there was no meeting of the minds between the parties as to the written subcontract;" and, (7) the proposed subcontract was never signed

by either party, despite numerous ongoing correspondences over many months between Ms. West and Mr. Kinlaw regarding the importance of reaching a final agreement on the terms of the subcontract in order for SEC and Choate to sign the subcontract as a written memorialization of the parties' agreement.

> Although the purpose of a signature is to show assent, assent may be shown where the party who failed to sign the writing accepted its terms and acted upon those terms. . . . However, if under the circumstances the parties are merely negotiating while trying to agree on certain terms and the parties are looking to a writing to embody their agreement, no contract is formed until the writing is executed and . . . the offeree's acceptance is properly communicated to the offeror.

Hutson, Jr. & Miskimon, *supra*, § 2-7-1, at 68-69.

Other jurisdictions have similarly held evidence of the parties' intent to enter into a "final definitive agreement" may be utilized to determine the extent of the parties' agreement. *See Empro Mfg. Co., Inc. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989) (holding "as a matter of law parties who make their pact 'subject to' a later definitive agreement have manifested an objective intent not to be bound"); *Knight v. Sharif*, 875 F.2d 516, 525 (5th Cir. 1989) (holding "[t]he parties' use of the term 'final definitive agreement' also leads to the distinct conclusion that what came before . . . was neither final nor definitive"); *Conley v. Whittlesey*, 888 P.2d 804, 811 (Idaho Ct. App. 1995) (holding "agreement in principle" language did not irrevocably commit parties to settlement where parties agreed to memorialize intentions and mutual assent in a formal written contract).

The trial court's order denying Choate's motion for change of venue does not preclude either SEC or Choate from subsequently showing the parties had a contract implied in fact to the jury at trial on the underlying actions. *Snyder*, 300 N.C. at 217, 266 S.E.2d at 602 ("An implied contract is valid and enforceable as if it were express or written. . . . Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact." (citations omitted)). "A valid contract may be implied in light of the conduct of the parties and under circumstances that make it reasonable to presume the parties intended to contract with each other." Hutson, Jr. & Miskimon, *supra*, § 2-5, at 61-63 (noting "[w]hether a party's conduct is a manifestation of assent is ordinarily a question of fact to be resolved by the trier of fact[]" and "[o]nly rarely do courts rule as a matter of law that the parties' course of conduct created an implied contract[]").

The trial court's order simply concludes Choate's proffered written subcontract was never executed by either party and its terms contained therein are not binding on the parties. Both parties' conduct demonstrates their intent *not* to be bound by the proposed written subcontract. As such, the venue selection clause is unenforceable against SEC. *Walker v. Goodson Farms, Inc.*, 90 N.C. App. 478, 488, 369 S.E.2d 122, 126 (citations omitted) (noting "the parties' intentions control, and their intentions may be discerned from both their writings and actions[]"), *disc. review denied*, 323 N.C. 370, 373 S.E.2d 556 (1988).

The trial court considered the evidence, including the extensive written correspondences between the parties, the unexecuted subcontract, the affidavits of Mr. Kinlaw and Ms. West, and the conduct of the parties in order to determine whether the parties had manifested a mutual assent and intent to be bound by the terms of the unsigned subcontract. The trial court ultimately, and correctly, determined there was no *aggregatio mentium*, or "meeting of the minds," on the proposed agreement, and the parties did not intend to be bound by the terms of the unexecuted subcontract, and its venue selection clause. Choate has failed to carry its burden to show the trial court abused its discretion by denying its motion for change of venue. Choate's argument is overruled. The trial court's order denying Choate's motion for change of venue is affirmed.

V. Conclusion

The trial court's order denying Choate's motion for change of venue is not fatally overbroad. The trial court reviewed the extensive evidence and arguments presented by Choate and SEC to decipher the intent of the parties. The trial court concluded the parties did not intend to be bound by Choate's unsigned proposed subcontract. Even if the clause were applicable, the venue selection clause contained within the unsigned subcontract prepared by Choate is not a mandatory venue selection clause to make Wake County the sole proper venue. The trial court did not abuse its discretion by denying Choate's motion for change of venue.

This interlocutory appeal of a discretionary ruling by the trial court on a non-mandatory venue provision contained within an unexecuted subcontract prepared by Choate is reviewed under an abuse of discretion standard on appeal. The trial court's order is affirmed. This case is remanded for further proceedings on the merits.

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

SERAPH GARRISON, LLC v. GARRISON

[247 N.C. App. 115 (2016)]

SERAPH GARRISON, LLC, DERIVATIVELY ON BEHALF OF GARRISON ENTERPRISES, INC., PLAINTIFF
v.
CAMERON GARRISON, DEFENDANT
v.
GARRISON ENTERPRISES, INC., NOMINAL DEFENDANT

No. COA14-1166

Filed 19 April 2016

1. Corporations—President and CEO—failure to pay taxes or make 401(k) contributions—breach of fiduciary duties

Where the President and CEO (defendant) of a corporation (GEI) had stopped paying state and federal payroll taxes and stopped making 401(k) contributions for several years, the trial court erred in a derivative action brought on behalf of GEI by concluding that these actions by defendant did not constitute a breach of his fiduciary duties. Defendant deliberately neglected two of his primary corporate responsibilities in violation of state and federal laws—a failure to act with due care and good faith—and he knowingly engaged in conduct that injured GEI—a breach of the duty of loyalty.

2. Corporations—President and CEO—misrepresentation of contract to board of directors—affirmative duty to disclose material facts—no requirement to prove reliance element of actual fraud

In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, where defendant misrepresented the terms of a licensing contract he negotiated with another company (Ecolab) to GEI's board of directors, the trial court erred in its conclusion that plaintiff had failed to establish the board's reasonable reliance on defendant's misrepresentations and therefore could not be awarded damages on its fraud claim. As a corporate officer reporting to the board, defendant had an affirmative fiduciary duty to disclose all material facts related to the Ecolab contract negotiations. Because defendant breached this duty, plaintiff was not required to prove the reliance element of actual fraud.

3. Corporations—President and CEO—repaying self for loan rather than paying back taxes—constructive trust or unjust enrichment

Where the President and CEO (defendant) of a corporation had stopped paying state and federal payroll taxes and stopped making

401(k) contributions for several years—yet he continued to pay himself and also repaid himself for a loan using funds from an initial payment on a contract with another company—the trial court erred by refusing to grant plaintiff's claim under either a constructive trust or unjust enrichment theory based on the loan repayment. Defendant breached his fiduciary duty by directing the repayment to himself rather than making mandatory payments to the federal and state governments. As to whether plaintiff was entitled to recover defendant's salary and benefits, the issue was remanded to the trial court for consideration of whether plaintiff was entitled to recover any compensatory damages.

4. Corporations—President and CEO—fraud and breach of fiduciary duty—punitive damages claim

In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, where the trial court erroneously concluded that GEI was not injured by defendant's fraud and breach of fiduciary duty in misrepresenting a contract he negotiated with another company and therefore was not entitled to compensatory damages, the Court of Appeals ordered the court to consider the issue of punitive damages on remand.

5. Corporations—expert testimony—business valuation

In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, the trial court erred by rejecting an expert witness's calculation of GEI's loss of value caused by defendant's actions. The trial court's finding that the expert "simply chose a convenient number to base his loss of value calculation on" was unsupported by the evidence. The expert chose one of three third-party offers to purchase GEI ($6,000,000) because it was the lowest offer during the relevant time period and also occurred on the date closest to defendant's actions that gave rise to the lawsuit.

Appeal by plaintiff from judgment entered 26 June 2014 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 March 2015.

Hamilton Stephens Steele & Martin, PLLC, by Mark R. Kutny and Erik M. Rosenwood, and Bryan Cave LLP, by Nicole J. Wade (admittee pro hac vice), for plaintiff-appellant.

No brief filed for defendant-appellee.

CALABRIA, Judge.

Seraph Garrison, LLC ("plaintiff") appeals from an order and judgment denying its claims, which were brought derivatively and on behalf of Garrison Enterprises, Inc. ("GEI" or "the corporation"), against Cameron Garrison ("defendant"). For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

I. Background

GEI, a North Carolina corporation, was founded by defendant in July 2000. The corporation primarily worked with government entities to supply health inspection software for the input of data for various types of restaurants and government agencies; it also sold software and data related to restaurant inspections, and other types of inspections, to private companies. Defendant was President and CEO of GEI from its founding until the corporation's board of directors (the "Board") terminated his employment in December 2010. During this time period, defendant's father, mother, sister, and three brothers were employed at GEI. In his role as President and CEO, defendant was tasked with ensuring that all required tax payments on behalf of GEO were made to the United States Department of Revenue and the North Carolina Department of Revenue. Defendant was also responsible for making contributions to GEI's 401(k) Plan.

On 20 December 2010, plaintiff, a Georgia limited liability company and shareholder of GEI, sent a demand letter to GEI's Board requesting an investigation regarding, *inter alia*, defendant's "potential breaches of fiduciary duty." Three days later, the Board terminated defendant's employment with GEI but it refused to take further action against him. Responding to the Board's refusal, plaintiff instituted a derivative action on behalf of GEI to recover losses that purportedly resulted from defendant's conduct during his tenure as President and CEO. In its verified complaint, which was filed in Mecklenburg County on 22 July 2011, plaintiff alleged that defendant breached his fiduciary duties to GEI, committed actual fraud against the corporation, and engaged in unfair and deceptive trade practices.

Specifically, plaintiff alleged that for "various periods beginning in 2008 and ending in 2010," defendant stopped remitting payroll taxes to the federal and North Carolina state governments. Plaintiff further alleged that defendant failed to make required contributions to GEI's 401(k) Plan from February 2008 until his termination in December 2010. Finally, plaintiff alleged that defendant deceived the Board by misrepresenting

the terms of a licensing contract he negotiated with Ecolab, a company that sells cleaning supplies to the hospitality, food service, and health care industries. Based on these allegations, plaintiff sought to recover damages based on unjust enrichment and the imposition of resulting and constructive trusts. Plaintiff also sought punitive damages.

Subsequently, the case was designated as a complex business case and assigned to Judge Calvin E. Murphy, Special Superior Court Judge for Complex Business Cases. On 23 November 2011, defendant filed an answer and counterclaims. When the matter came on for trial in June 2014, defendant failed to appear. As a result, Judge Murphy conducted a bench trial, where plaintiff presented testimony from Rahul Saxena ("Saxena"), who became GEI's interim President and CEO upon defendant's termination, and Paul Saltzman ("Saltzman"), who the trial court designated an expert in business valuation, income tax, and accounting. After trial, the court entered an order and judgment that granted plaintiff's claim for breach of fiduciary duty based on defendant's misrepresentations regarding the Ecolab contract. However, all of plaintiff's remaining claims were denied, and no damages were awarded on any claims.[1] Plaintiff appeals.

II. Analysis

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (quotations omitted). "Where such competent evidence exists, this Court is bound by the trial court's findings of fact even if there is also other evidence in the record that would sustain findings to the contrary." *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) (citation omitted). The trial court's conclusions of law, however, are subject to *de novo* review. *Id.* (citation omitted).

B. Plaintiff's Claims For Unfair And Deceptive Trade Practices

As an initial matter we note that the trial court denied plaintiff's unfair and deceptive trade practices claim based on its conclusion that N.C. Gen. Stat. § 75-1.1 did not apply to this case. We agree with this conclusion. *See White v. Thompson*, 864 N.C. 47, 53, 691 S.E.2d 676, 860

1. The trial court also granted plaintiff's motion for a directed verdict on defendant's counterclaims, since he neither prosecuted nor presented evidence upon them.

(2010) (finding section 75-1.1 inapplicable to the internal conduct of a single business). Furthermore, since defendant does not challenge the court's conclusion on appeal, he has abandoned the issue. N.C.R. App. P. 28(b)(6) (2015) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Thus, we affirm the trial court's denial of plaintiff's unfair and deceptive trade practices claim.

C. Plaintiff's Claims For Breach of Fiduciary Duty and Fraud

Before addressing plaintiff's fiduciary duty and fraud claims, we begin by noting some principles that should animate any judicial evaluation of corporate conduct. First, under North Carolina law, corporate officers with discretionary authority must discharge their duties:

> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.

N.C. Gen. Stat. § 55-8-42(a) (2015). Corporate directors are charged with the same standard of conduct. *Id.* § 55-8-30(a)(1)-(3). Although the word "fiduciary" is not used in these provisions, the Official Comment to section 55-8-30 explains "there is no intent to change North Carolina law in this area. The decision not to bring forward the language . . . in former [N.C. Gen. Stat.] § 55-35[—which provided that officers and directors stand in a fiduciary relation 'to the corporation and to its shareholder'—] is not intended to modify in any way the duty of directors recognized under the former law." Consequently, the earlier cases that examine and delineate the duties of directors and officers continue to be effective.

Under these cases, corporate directors and officers act in a fiduciary capacity in the sense that they owe the corporation the duties of loyalty and due care. *Belk v. Belk's Dep't Store, Inc.*, 250 N.C. 99, 103, 108 S.E.2d 131, 135 (1959) (recognizing a director's "duty to honestly exercise[]" his powers "for the benefit of the corporation and all of its shareholders"); *Loy v. Lorm Corp.*, 52 N.C. App. 428, 436, 278 S.E.2d 897, 903 (1981) ("Directors owe a duty of fidelity and due care in the management of a corporation and must exercise their authority solely for the benefit of the corporation and all its shareholders."); *Pierce Concrete, Inc. v. Cannon Realty & Const. Co.*, 77 N.C. App. 411, 413-14, 335 S.E.2d

30, 31 (1985) (declaring that the fiduciary duty corporate officers owe to North Carolina corporations "is a high one").

Subdivision 55-8-42(a)(2) outlines the standard by which an officer's duty of care is measured. Its specific language—in a "like a position" and "under similar circumstances"—acknowledges officers' that responsibilities will vary from corporation to corporation. The same holds true for the corporate decision-making processes that are employed. Even so, subdivision 55-8-42(a)(2) also imposes an affirmative duty on officers: it requires them to assume an active and direct role in the matters that are under their authority. *Anthony v. Jeffress*, 172 N.C. 378, 379, 90 S.E. 414, 415 (1916) (considering it "immaterial whether the [directors] were cognizant of the . . . company['s insolvency] or not [when they declared a dividend]. The law charges them with actual knowledge of its financial condition, and holds them responsible for damages sustained by stockholders and creditors by reason of their negligence, fraud, or deceit."); *F-F Milling Co. v. Sutton*, 9 N.C. App. 181, 184, 175 S.E.2d 746, 748 (1970) (stating that corporate directors in North Carolina may be held personally liable for, *inter alia*, gross neglect of their duties and mismanagement).

Subdivision 55-8-42(a)(3) codifies the requirement that an officer always discharge the responsibilities of the office "with undivided loyalty" to the corporation. *Meiselman v. Meiselman*, 309 N.C. 279, 307, 307 S.E.2d 551, 568 (1983). The corporate law duty of loyalty also imposes an affirmative obligation: a fiduciary must strive to advance the best interests of the corporation. *In re The Walt Disney Co. Derivative Litig.*, 2004 WL 2050138, at *5 n.49 (Del. Ch. Sept. 10, 2004) (stating that the duty of loyalty "has been consistently defined as 'broad and encompassing,' demanding of a director 'the most scrupulous observance.' To that end, a director may not allow his self-interest to jeopardize his unyielding obligations to the corporation and its shareholders") (citation omitted).

Second, while subsection 55-8-42(a) requires an officer to act in good faith, this concept cannot be separated from the duties of loyalty and due care. In other words, the obligation to act in good faith does not create a discrete, independent fiduciary duty. Rather, good faith is better understood as an essential component of the duty of loyalty. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006)[2] ("The failure to act in good faith may result in liability because the requirement to act in good faith 'is a subsidiary element[,]'[i.e., a

2. Although Delaware law is not binding on this Court, we find its well-developed body of corporate case law instructive and persuasive.

condition,] 'of the fundamental duty of loyalty.' "). A leading authority on North Carolina business law has also recognized this obligation as a component of the duty of due care: "The requirement of good faith is listed separately in [subsections 55-8-30(a) and 55-8-42(a),] . . . but it normally operates . . . as a component of the other two traditional duties, requiring conscientious effort in discharging the duty of care and constituting the very core of the duty of loyalty." Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.02, 14-7 (7th ed. 2015); *see also Jeffress*, 172 N.C. at 380, 90 S.E. at 415 ("Good faith *alone* will not excuse [directors] when there is lack of the proper care, attention, and circumspection in the affairs of the corporation[.]") (emphasis added). Thus, the requirement of good faith is subsumed under an officer's duties to the corporation; it is a primary and comprehensive obligation that compels an officer to discharge his responsibilities openly, honestly, conscientiously, and with the utmost devotion to the corporation. *See* Black's Law Dictionary 762 (9th ed. 2009) (defining "good faith" in pertinent part as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, . . . [and] (4) absence of intent to defraud or to seek unconscionable advantage").

Third, context matters: the analysis of an officer's fiduciary conduct must be judged in light of the background in which it occurs and the circumstances under which he serves the corporation. *Robinson* at § 16.07 (noting that officers' "greater familiarity with the affairs of the corporation . . . may subject them to higher scrutiny and expectations" than some directors, and that an officer's good faith and adherence to his duty of loyalty are "defined in terms of the particular individual's position, so that one with a higher level of authority would naturally have greater responsibilities"); *TW Servs., Inc. v. SWT Acquisition Corp.*, Nos. 10427, 10298, 1989 Del. Ch. LEXIS 19, *28 n.14, 1989 WL 20290 (Del. Ch. Mar. 2, 1989). "[N]o matter what our model [of corporate law], it must be flexible enough to recognize that the contours of a duty of loyalty will be affected by the specific factual context in which it is claimed to arise. . . ."). The same holds true for any examination of "good faith," an inquiry that presents a mixed question of law and fact:

> Whether a party has acted in good faith is a question of fact for the trier of fact, but the standard by which the party's conduct is to be measured is one of law. In making the determination as to whether a party's actions constitute a lack of good faith, the circumstances and context in which the party acted must be considered.

Farndale Co., LLC v. Gibellini, 176 N.C. App. 60, 67-68, 628 S.E.2d 15, 19 (2006) (citation omitted).

Fourth, the standard of conduct outlined in section 55-8-42 is subject to review under the business judgment rule. While the application of the business judgment rule in North Carolina has been rather sparse, it is clear that our courts do apply the rule.[3] *See, e.g.*, *Ehrenhaus v. Baker*, 216 N.C. App. 59, 91, 717 S.E.2d 9, 30 (2011); *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 602, 513 S.E.2d 812, 821-22 (1999); *Swenson v. Thibaut*, 39 N.C. App. 77, 107, 250 S.E.2d 279, 298 (1978); *N. Carolina Corp. Comm'n v. Harnett Cty. Trust Co.*, 192 N.C. 246, 134 S.E. 656, 657 (1926). This Court has formulated the rule as follows:

> [The business judgment rule] operates primarily as a rule of evidence or judicial review and creates, first, an initial evidentiary presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business purpose.

ILA Corp., 132 N.C. App. at 602, 513 S.E.2d at 821-22. As a general matter, *post hoc* judicial review of corporate action should not serve as a platform for second-guessing the business decisions of officers and directors. *HAJMM Co. v. House of Raeford Farms*, 94 N.C. App. 1, 10, 379 S.E.2d 868, 873 ("We are also mindful that the business judgment rule protects corporate directors from being judicially second-guessed when they exercise reasonable care and business judgment."), *review on additional issues allowed*, 325 N.C. 271, 382 S.E.2d 439 (1989), and *modified, aff'd. in part, rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). Nevertheless, to receive the benefit of the business judgment rule, an officer or director must discharge his duties in compliance with the requirements of subdivision 55-8-42(a). *See In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009) (holding that absent proof of bad faith, conflict of interest, or

---

3. "The business judgment rule is generally stated, by [our Supreme Court] and others, as being available to officer and directors." *Robinson* at § 16.07 (citing *Alford v. Shaw*, 318 N.C. 289, 299, 349 S.E.2d 41, 47 (1986), *on reh'g*, 320 N.C. 465, 358 S.E.2d 323 (1987) (stating in dicta that the "rule has provided the yardstick against which the duties and decisions of corporate officers and directors are measured")).

disloyalty, officers' and directors' business decisions will not be second-guessed if they are "the product of a rational process," and the officers and directors "availed themselves of all material and reasonably available information" and honestly believed they were acting in the corporation's best interests) (citation and footnote omitted)).

With these principles in mind, we turn to plaintiff's claims for breach of fiduciary duty and fraud.

1. *Payroll Taxes and 401(k) Contributions: Breach of Fiduciary Duty*

[1] Plaintiff contends the trial court erred in concluding that defendant's failure to remit payroll taxes and make 401(k) contributions did not constitute a breach of his fiduciary duties. We agree.

From at least 2008 until the end of 2010, defendant caused GEI to stop paying state and federal payroll taxes. Defendant also stopped making contributions to GEI's 401(k) Plan during this time period. When defendant was terminated in December 2010, GEI owed the federal government approximately $1.6 million in back taxes. The tax delinquency caused several problems for GEI: penalties were incurred, interest accrued, and corporate assets were frozen for a period of time. As a result of the 401(k) contribution delinquency, the North Carolina Department of Labor filed a complaint against GEI and defendant in his individual capacity. According to defendant's deposition, because cash flow was tight at GEI during the period in question, he chose to pay employees and keep the corporation running instead of paying taxes and making contributions.

Based on plaintiff's evidence, the trial court found that there was no proof that defendant's failure to pay payroll taxes and make 401(k) contributions fell below the standard of conduct required by subsection 55-8-42(a). The court also found that defendant neither hid the tax delinquency from the Board nor prevented the Board from intervening to reduce the tax liability. As a result, the court concluded that "given GEI's cash crunch," plaintiff did not present sufficient evidence that defendant's plan of management amounted to a breach of fiduciary duty. Because defendant failed to discharge his duties according to law, the trial court's conclusion was reached in error.

Defendant's failure to make the required payments violated both federal and state law. For example, federal law provides that amounts withheld for payroll taxes and 401(k) plan contributions are held in trust for the government and employees, respectively, and must be used by the employer solely for the purpose of making the required payments to

the government or to the 401(k) plan. *See*, *e.g.*, 26 U.S.C. §§ 7501, 6672; 29 U.S.C. §§ 1103, 1132. The federal Internal Revenue Code ("the Code") specifically requires employers to withhold payroll (i.e., social security and excise) taxes from their employees' wages. An employer's "[p]ayment of . . . [payroll] taxes is 'not excused' merely because 'as a matter of sound business judgment, the money was paid to suppliers . . in order to keep the corporation operating as a going concern—the government cannot be made an unwilling partner in a floundering business.' " *Erwin v. United States*, 591 F.3d 313, 319 (4th Cir. 2010) (internal brackets and citation omitted). To assure an employer's compliance with its obligation to remit payroll taxes, the Code imposes personal liability on officers or agents of the employer who are responsible[4] for the employer's decisions regarding withholding and payment of the taxes and who willfully fail to do so. 26 U.S.C. §§ 6672(a), 6671(b).

Whether a "responsible person" willfully failed to collect, account for, or remit payroll taxes depends primarily on whether the person had "knowledge of nonpayment or reckless disregard of whether the payments were being made." *Erwin*, 591 F.3d at 325. "[W]hen a responsible person learns that withholding taxes have gone unpaid in past quarters for which he was responsible, he has a duty to use all current and future unencumbered funds available to the corporation to pay back those taxes." *Id.* at 326. To that end, the Fourth Circuit has held that a director acted willfully in failing to remit delinquent payroll taxes when she knew that such taxes for numerous quarters remained unpaid and continued to direct corporate payments to herself and other creditors. *Johnson v. United States*, 734 F.3d 352, 364-65 (4th Cir. 2013) (citing 26 U.S.C.A. § 6672).

In the instant case, defendant, a "responsible person," knew that payroll taxes for quarters from 2008 to 2010 remained unpaid during his tenure as a GEI officer—he caused the delinquency himself. However, despite this knowledge, unencumbered corporate funds were used to pay defendant's salary and car allowance. When the Board questioned defendant on the payroll tax issue, he claimed to be working with the IRS but stated that "it was on the bottom of the pile." Defendant continued to skirt the issue when the Board followed up on it. Notably, Saxena testified that although corporate expenses were high, GEI's revenue was

---

4. "The case law interpreting [section] 6672 generally refers to the person required to collect, account for, and remit payroll taxes to the United States as the 'responsible person.' " *Plett v. United States*, 185 F.3d 216, 218-19 (4th Cir. 1999).

sufficient to pay the payroll taxes and make 401(k) contributions. Saxena also testified that there was no legitimate reason for defendant's failure to make the required payments and contributions. All told, defendant's failure to remedy the payroll tax deficiencies was willful as a matter of law. *See id.* at 364-65 ("[D]uring the . . . delinquent tax periods, Mrs. Johnson received well in excess of $500,000 in compensation and benefits from the corporation while the payroll taxes went unpaid.").

This Court has held that failure to comply with the statutory procedures required for a corporate merger "constitutes a breach of a director's fiduciary duty[.]" *Loy*, 52 N.C. App. at 435, 278 S.E.2d at 902-03. One principle emanating from *Loy* is that a director or officer's failure to ensure the corporation is operated according to law amounts to a breach of fiduciary duty. Plaintiff's evidence established defendant's indifference to the payroll tax and 401(k) contribution deficiencies, which presented the corporation with a myriad of legal problems. It is irrelevant that defendant neither hid these liabilities from the Board nor prevented the Board from addressing them—his conduct violated subsection 55-8-42. By deliberately neglecting two of his primary corporate responsibilities, and violating federal and state law in the process, defendant failed to act with due care and in good faith to GEI. And since defendant had actual knowledge of the tax and contribution liabilities, he also breached his duty of loyalty by engaging in conduct that injured the corporation. Given the facts of this case, the business judgment rule cannot protect defendant's failure to remedy problems he both created and ignored. Accordingly, the trial court erred in concluding that defendant did not breach his fiduciary duty to GEI by causing the corporation to become delinquent on its payroll taxes and 401(k) contributions.

2. *Ecolab Contract: Fraud and Breach of Fiduciary Duty*

[2] Plaintiff next argues that the trial court erred in concluding that damages could not be awarded on its fraud claim because plaintiff failed to establish the Board's reasonable reliance on defendant's misrepresentations regarding the Ecolab contract. We agree.

While an officer at GEI, defendant had the sole responsibility for all contract negotiations with third parties. In early 2009, defendant began negotiating a contract with Ecolab to provide data from government agencies that conduct health inspections on restaurants. According to defendant's deposition, he pledged to keep the Board apprised of the negotiations and to submit the contract for Board review before it was executed. To that end, defendant submitted a draft that was reviewed and edited by GEI's corporate counsel and approved by the Board.

On 10 August 2009, defendant circulated to the Board a "final" version of the contract, which purportedly had been executed by GEI and Ecolab on 1 July 2009 (the "July Contract"). GEI undertook its relationship with Ecolab based on the Board's understanding that the July Contract's terms were in effect. However, defendant had actually executed a different version of the Ecolab contract on 1 August 2009 (the "August Contract"). Ecolab paid GEI $1,000,000 as an up-front exclusivity payment ("initial payment") for executing the August Contract. Defendant used a portion of those funds to repay himself for a loan he had previously made to GEI, and to pay his salary, car allowance, and the salaries of other employees. Sometime in late 2010, at a meeting between GEI and Ecolab representatives, Saxena learned of the August Contract's existence. He also learned that the August Contract's terms—which were particularly unfavorable to GEI—governed the parties' relationship and that the July Contract had never been executed by Ecolab.

After having a third-party law firm conduct an investigation, the Board determined that Ecolab's signature on the July Contract was a forgery and that the August Contract was valid. At this point in time, GEI could not repudiate the August Contract. Even more problematic were the material differences between the two contracts: the July Contract required Ecolab to pay up to $2,550,000 in exclusivity fees, while the August Contract provided for only $1,300,000 in such fees; the July Contract permitted GEI to maintain existing contracts with large restaurant chains, but the August Contract required GEI to terminate its preexisting contracts with third parties; the July Contract granted GEI and Ecolab equal rights of termination after ten years, but the August Contract could be terminated only by Ecolab after ten years; the August Contract prohibited GEI from pursuing new contracts unless Ecolab approved, but the July Contract allowed GEI to enter into such contracts under certain conditions. The August Contract also contained provisions that granted Ecolab exclusive rights to GEI's intellectual property, including its software. In Saxena's view, the August Contract effected a sale of GEI to Ecolab for $1,300,000.

Based on this evidence, the trial court found that the August Contract "was financially detrimental to [GEI]." However, the trial court also found that none of the evidence established that defendant was required to seek the Board's approval before entering into contracts on behalf of GEI. Based on this finding, the court concluded that while defendant breached his fiduciary duty by purposefully misleading the Board as to the July Contract, GEI was only damaged by the August Contract's execution. In the court's view, even though the August Contract's terms

might have embodied a "bad business deal," defendant's execution of that contract did not constitute a breach of fiduciary duty. The court reached a similar conclusion on plaintiff's fraud claim:

> [47] As previously noted, the Court is unconvinced that [d]efendant was obligated to seek Board approval before entering into the Ecolab contract. And, even if [d]efendant were [sic] required to seek Board approval, the approval given was for the July 2009 unexecuted contract and not for the August 2009 executed contract. The only step the Board took in reliance on [d]efendant's misrepresentations was to approve the July 2009 contract, which was never executed. Defendant's representations could not have caused the Board to approve the August 2009 contract because, as Saxena testified, the Board was not aware of its existence until months after it had been executed. Therefore, the Court does not conclude that the Board relied on [d]efendant's misrepresentation to [GEI's] detriment such that an award of damages would be proper under [p]laintiff's fraud claim.

After denying plaintiff's fraud claim and granting its breach of fiduciary claim (as to the Ecolab contract), the court refused to award any compensatory damages based on the following rationale: "It was not [d]efendant's misrepresentation [regarding the July Contract] to the Board that caused damage to GEI. Rather, it was his signing of the August . . . Contract that created the problem for the company, but such was not a breach of his fiduciary duty."

By focusing on defendant's affirmative misrepresentation regarding the July Contract, the trial court diminished the legal significance of his concealed execution of the August Contract and engaged in flawed reasoning. Our Supreme Court has recognized that actual fraud "has no all-embracing definition[.]" *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (citations omitted). Even so, a *prima facie* case for fraud consists of the following elements: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the [deceived] party." *Id.* Additionally, the deceived party must have reasonably relied on the allegedly false representations. *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007) (citation omitted).

As noted above, the trial court analyzed only defendant's misrepresentation as to the July Contract; it did not address defendant's concealment of material facts (the August Contract's terms and execution). Consequently, the court found that plaintiff met all the essential elements of fraud but failed to prove reasonable reliance causing detriment.

Although reasonable reliance is generally required, the existence of a confidential or fiduciary relationship creates a duty to fully disclose material facts. *Vail v. Vail*, 233 N.C. 109, 116, 63 S.E.2d 202, 207 (1951). When the duty to disclose is breached, fraud has been committed and the deceived party need not prove reasonable reliance. *Id.* Indeed, in the context of fiduciary relationships, the law excuses a deceived party's failure to exercise reasonable diligence, as the duty to investigate is subordinate to the duty of full disclosure:

> [T]he failure of the defrauded person to use diligence in discovering the fraud may be excused where there exists a relation of trust and confidence between the parties. This is so for the reason that a confidential or fiduciary relation imposes upon the one who is trusted the duty to exercise the utmost of good faith and to disclose all material facts affecting the relation.

Id. (internal quotation marks and citation omitted); *see also Everts v. Parkinson*, 147 N.C. App. 315, 325, 555 S.E.2d 667, 674 (2001) (holding that a plaintiff need not prove reasonable reliance upon proving breach of duty to disclose, as the elements are virtually identical to what is already required to establish the very duty to disclose).

In the instant case, defendant committed two species of fraud: he concealed the August Contract's terms from the Board, and he falsely represented that the July Contract was in effect. The trial court found that defendant misled the Board by "purposefully present[ing] the Board with [the July Contract] when he knew that another, detrimental version had already been executed." Given the fiduciary duties that subsection 55-8-42(a) imposed on defendant, plaintiff had to prove only that the law obligated defendant to disclose the information he concealed. Even a cursory review of the record reveals that defendant's calculated misrepresentation relating to the July Contract allowed him to conceal the negotiation, execution, and existence of the August Contract. It is equally clear that the Board detrimentally incorporated defendant's misrepresentations into its decision-making process: GEI commenced its relationship with Ecolab based on the July Contract, which the Board believed to be valid and binding; and if the August Contract's terms

had been disclosed, it is reasonably certain that the Board would have attempted to repudiate the agreement.[5] Yet the trial court reasoned that defendant's misrepresentations did not induce the Board to enter into the August Contract. This reasoning was flawed. Defendant's act (representing that the July Contract was executed) and omission (concealing the August Contract), which were not taken in good faith, were inextricably linked. It was illogical to conclude that reliance was required in this instance and that such reliance, if required, could only be established by proving the Board relied on information that defendant *deliberately concealed*. As a corporate officer reporting to the Board, defendant had an affirmative, fiduciary duty to disclose all material facts related to the Ecolab contract negotiations. Since he failed to do so, plaintiff was not required to prove the reliance element of actual fraud, *Vail*, 233 N.C. at 116, 63 S.E.2d at 207, and the trial court erred in imposing such a requirement. Accordingly, we reverse the trial court's conclusion that plaintiff failed to establish the elements of actual fraud in relation to the Ecolab contract.

Defendant not only breached his fiduciary duties through misrepresentations and concealment, he also breached them by using the initial payment from Ecolab for his personal benefit. Saltzman acknowledged that when defendant repaid himself for a loan he purportedly made to GEI, he "put himself first in the line of creditors." The record also demonstrates that, had funds from the initial payment flowed through the corporation correctly, other creditors—the federal government, employees, and GEI itself—would have been paid before defendant. Defendant repaid himself at a time when GEI was facing serious legal consequences from the federal and state governments. Those consequences stemmed directly from defendant's failure to remit payroll taxes and make required 401(k) contributions. As such, defendant engaged in a certain form of self-dealing: he used proceeds from a corporate contract to benefit himself and his interests at the expense of GEI. Because the requirement of good faith requires officers to avoid self-dealing, *see Freese v. Smith*, 110 N.C. App. 28, 38, 428 S.E.2d 841, 848 (1993) (noting that defendant-director "was under a statutory mandate to act in good faith and not to engage in any self[-]dealing"), defendant breached his

5. As noted below, we conclude that the reasonable reliance requirement of fraud was obviated in this case due to defendant's concealment of the August Contract. However, GEI also detrimentally relied on defendant's affirmative misreprentation as to the July Contract, which fraudulently induced the Board to forego inquiries which it otherwise would have made. Thus, no matter what analysis is applied, the trial court reached an erroneous conclusion on plaintiff's fraud claim.

duty of loyalty to GEI. *See ILA Corp.*, 132 N.C. App. at 597, 513 S.E.2d at 819 (holding that a director engaged in self-dealing and breached his fiduciary duty by directing proceeds from a purchase of corporate stock to repay a debt to another company that he controlled).

D. Unjust Enrichment, Resulting Trust, and Constructive Trust

[3] Plaintiff argues that the trial court erred by denying its claims for unjust enrichment, resulting trust,[6] and constructive trust.

A constructive trust is an equitable remedy " '. . . imposed by courts . . . to prevent the unjust enrichment of the holder of title to, or of an interest in, property which [was] acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.' " *United Carolina Bank v. Brogan*, 155 N.C. App. 633, 636, 574 S.E.2d 112, 115 (2002) (citations omitted). Failure to establish a fraud claim is not determinative of a constructive trust claim; "[i]t is sufficient that legal title has been obtained in violation, express or implied, of some duty owed to the one who is equitably entitled." *Colwell Elec. Co. v. Kale-Barnwell Realty & Const. Co.*, 267 N.C. 714, 719, 148 S.E.2d 856, 860 (1966) (citation omitted); *see also Roper v. Edwards*, 323 N.C. 461, 465, 373 S.E.2d 423, 425 (1988) (stating that the existence of fraud need not be established if the facts of the case necessitate imposition of a constructive trust).

This Court has defined unjust enrichment as a

> legal term characterizing the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself or herself at the expense of another. . . .

Adams v. Moore, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 (1989) (citation and brackets omitted). Since an unjust enrichment claim involves a restitution-type recovery, a plaintiff need not have actual damages:

---

6. Plaintiff makes no legal argument on its resulting trust claim, and we believe the claim was never actionable in the first place. *See Patterson v. Strickland*, 133 N.C. App. 510, 519, 515 S.E.2d 915, 920 (1999) (explaining that a resulting trust generally arises "when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another") (citation and quotation marks omitted). Accordingly, we will not address this issue. *See* N.C.R. App. P. 28(b)(6).

> The main purpose of the damages award is some rough kind of compensation for the plaintiff's loss. This is not the case with every kind of money award, only with the damages award. In this respect, restitution stands in direct contrast to the damages action. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's part. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . even though plaintiff may have suffered no demonstrable losses.

Booher v. Frue, 86 N.C. App. 390, 393-94, 358 S.E.2d 127, 129 (1987) (alteration, quotation marks, and citations omitted).

Plaintiff's constructive trust and unjust enrichment claims were based on its allegations that defendant paid himself and received benefits—such as a car allowance—during the period that the payroll tax and 401(k) contribution delinquencies occurred. These claims were also based on the allegation that defendant used a portion of the initial payment ($124,451) from the August Contract to repay himself for a loan he made to GEI. The trial court rejected both claims, finding that: (1) defendant did not breach his fiduciary duty by failing to remit payroll taxes or make 401(k) contributions; (2) "by entering into a bad business deal, [d]efendant [did not] forfeit[] his right to earn and be paid a salary and car allowance"; and (3) "even if [d]efendant did repay a loan he made to GEI in accordance with Saltzman's testimony, there is insufficient evidence that he was not entitled to such repayment."

As to the $124,451 loan repayment, the trial court erred by refusing to grant plaintiff's claim under either a constructive trust or unjust enrichment theory. We have already held that defendant breached his fiduciary duty in directing the repayment to himself. In the context of this case, it is irrelevant whether defendant was entitled to repayment—he claimed those funds at a time when his actions (and inactions) caused GEI to incur significant legal and financial liabilities. Specifically, he used discretionary funds from the initial payment to benefit himself instead of making mandatory payments to the federal and state governments.

As to whether plaintiff was entitled to recover all or a portion of defendant's salary and benefits that were taken from the initial payment,

we remand the issue to the trial court for further consideration. The trial court took issue with Saltzman's analysis of losses GEI suffered related to plaintiff's unjust enrichment and constructive trust claims, finding that he "never presented evidence on" those claims. We agree with this finding subject to one exception: Saltzman did discuss the $124,451 loan repayment. As a result, plaintiff cannot recover losses related to defendant's salary and benefits pursuant to its unjust enrichment and constructive trust claims. However, since we have reversed the court on the breach of fiduciary duty and fraud claims, it should consider whether plaintiff may recover any losses related to defendant's salary and benefits (taken from the initial payment) may be recovered as compensatory damages.

E. Damages Issues

1. *Punitive Damages*

[4] Plaintiff next contends that because the trial court erred in denying compensatory damages, the court also erred in failing to consider an award of punitive damages. We agree.

N.C. Gen. Stat. § 1D-15 (2015) provides, in pertinent part, that:

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud[;]
>
> (2) Malice[; or]
>
> (3) Willful or wanton conduct.
>
> (b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

"For the tort of fraud, the aggravating factor may be intrinsic to the tort." *Hudgins v. Wagoner*, 204 N.C. App. 480, 493, 694 S.E.2d 436, 446 (2010); *see also Stone v. Martin*, 85 N.C. App. 410, 418, 355 S.E.2d 255, 260 (1987) ("Since fraud is present in [this] case . . . , additional elements of aggravation are unnecessary.") (citation omitted).

Here, the trial court found that GEI was not "injured by [d]efendant's breach of fiduciary duty by misrepresenting" the Ecolab contract's terms. As this was "the only actionable portion of all [p]laintiff's claims," the trial court concluded that plaintiff was not entitled to compensatory

damages from defendant. Consequently, the court refused to consider the issue of punitive damages.

Since the trial court erroneously concluded that plaintiff failed to prove actual fraud—a potential aggravating factor under section 1D-15—and since compensatory damages may be awarded for defendant's fraud and breach of fiduciary duty claims, the court should consider the issue of punitive damages on remand.

2. *The Trial Court's Rejection of Saltzman's Loss of Value Evaluation*

[5] In its final argument, plaintiff contends that the trial court erroneously rejected Saltzman's calculation of GEI's loss of value that was caused by defendant's actions. Once again, we agree.

At trial, Saltzman explained that his analysis focused on the fair market value of GEI in 2009, when defendant negotiated the Ecolab contract. In assessing GEI's fair market value, Saltzman mainly considered three different third-party offers to purchase GEI: (1) $10,500,000 on 24 November 2009; (2) $7,000,000 on 17 August 2010; and (3) $6,000,000 on 6 November 2009. He also discussed later, additional offers: a $5,000,000 offer from Ecolab in November 2010, and a $2,000,000 offer which was tendered in 2013. Saltzman concluded that the $6,000,000 offer provided the best starting point for calculating GEI's loss of value, explaining that he "took the lowest of the three [offers] that were in that time period" and that "[t]he [$6,000,000] figure was the closest date to the" negotiation of the July and August Contracts. After basing his calculations on the $6,000,000 offer, Saltzman concluded it was reasonably certain GEI had lost $510,531 in value.

However, the trial court rejected Saltzman's use of the $6,000,000 figure:

> Saltzman's use of $6,000,000 in his calculation of loss of value appears to be based on convenience and very little methodology. There were other figures he could have used to represent expression of interest in purchasing GEI that were close to the timing of the Ecolab contract, including one number lower than he selected. Saltzman affirmatively opted not to use an average value. It appears to the Court that Saltzman simply chose a convenient number to base his loss of value calculation on, which the Court finds unpersuasive.

Based on our review of the record, we conclude that these findings were unsupported by the evidence. To begin, the trial court's insinuation

that an average value would have been more appropriate makes little sense. An average of the three 2009 offers would have set Saltzman's starting point at approximately $7,800,000; an average of all five offers would have yielded a $6,100,000 starting point. In addition, the "lower" offer the court discussed—apparently a reference to the $5,000,000 Ecolab offer—was contingent on certain revenue requirements and was, thus, not comparable to the $6,000,000 offer. Finally, the court's finding that defendant "simply chose a convenient number" was unjustified. Saltzman explained his methodology and testified that he took the lowest offer that was close in time to the Ecolab contract's execution. Overall, Saltzman's assessment of GEI's loss of value was calculated with reasonable certainty. *See Iron Steamer, Ltd. v. Trinity Rest., Inc.*, 110 N.C. App. 843, 847, 431 S.E.2d 767, 770 (1993) (recognizing that damages for loss of corporate profits must be ascertained with "reasonable certainty") (citation omitted). Consequently, the trial court erred in rejecting his $510,531 loss of value estimate.

III. Conclusion

Defendant breached his fiduciary duties to GEI by failing to remit payroll taxes and make 401(k) contributions that were required by federal and state law. He also breached his fiduciary duties by appropriating funds from the Ecolab contract initial payment for his personal benefit—the repayment of a loan he made to GEI—to the detriment of the corporation. By concealing the existence of the binding August Contract, defendant committed actual fraud against GEI. Since compensatory damages may be awarded on this claim, the trial court should consider the issue of punitive damages on remand. Furthermore, because we have reversed the trial court on virtually all of plaintiff's claims, the court should consider anew the issue of compensatory damages as they relate to the claims of breach of fiduciary duty and fraud. Plaintiff is entitled to recover the $124,521 loan repayment pursuant to its constructive trust and unjust enrichment claims, and the trial court should reconsider whether the salary and benefits defendant received from his appropriation of the initial payment are subject to plaintiff's compensatory damages claim.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges McCULLOUGH and DIETZ concur.

SMITH v. SMITH

[247 N.C. App. 135 (2016)]

CRAIG STEVEN SMITH, PLAINTIFF
v.
VERA CRANFORD SMITH, DEFENDANT

No. COA15-185

Filed 19 April 2016

1. Appeal and Error—appealability—interlocutory order—temporary child support and custody order—subsequent permanent order

Although plaintiff argued that an interlocutory order concerning temporary child support and custody order was reviewable on appeal because the question was a matter of public interest, the matter did not, in fact, raise any issue of public interest. The temporary child support order and the interlocutory post-trial order were moot because of the subsequent entry of the permanent child support order.

2. Child Custody and Support—high income parent—private school tuition

In a case of first impression, the trial court did not err by concluding that a high income plaintiff should continue to pay his children's private school tuition where the children had been consistently enrolled in private school, the parties' continual desire was to educate their children in private schools, and the parties' income exceeded the level set by the Child Support Guidelines. A trial court can require a higher income parent to pay his children's private school tuition without a specific showing that his children needed the advantages offered by private schooling; a child's reasonable needs are not limited to absolutely necessary items if the parents can afford to pay more to maintain the accustomed standard of living of the child.

3. Child Custody and Support—private school tuition—father capable of paying

Whether the parties had previously used defendant's inheritance to pay their children's private school tuition was irrelevant to their present ability to pay in a child support action where the father was ordered to continue paying private school tuition for his children. The trial court's findings, binding on appeal, were specific enough to support the conclusion that plaintiff was capable of paying his children's tuition.

4. Child Custody and Support—retroactive private school tuition—UTMA accounts

The trial court did not err in a child support action by ordering plaintiff to pay retroactive private school tuition to defendant where at least some of the money was paid by defendant from the children's Uniform Transfers to Minors Act (UTMA) accounts. The trial court ordered that defendant reimburse the UTMA accounts upon receipt of the child support award from plaintiff.

5. Statutes of Limitation and Repose—retroactive child support payments—payments after action filed

The three-year statute of limitations had no application to retroactive child support payments made after plaintiff filed her action in 2009.

6. Child Custody and Support—retroactive—findings

An order for retroactive child support was remanded for recalculation where there was an inconsistency in the trial court's findings.

7. Child Custody and Support—retroactive child support—partial payment—basis

The trial court erred in a child support action by ordering defendant to pay 25 percent of the children's school tuition without making findings explaining its basis for the 25 percent figure.

8. Child Custody and Support—retroactive support—inconsistent testimony—other supporting evidence

The trial court did not err when ordering retroactive child support where plaintiff argued that defendant's testimony had been inconsistent and skewed, but the inconsistency went to credibility, and evidence before the trial court otherwise established the subject of the evidence.

9. Child Custody and Support—retroactive child support—change of custodial arrangement—corresponding findings of fact

The trial court did not err in a child support case in its award of retroactive child support where plaintiff argued that a change in the custodial arrangement meant that some of defendant's evidence about expenditures did not reflect amounts spent after that time, but defendant testified repeatedly to the static nature of the shared and individual expenses of her children and that she had taken into

account any increase or decrease that may have occurred. The trial court made corresponding findings of fact.

10. Child Custody and Support—inconsistent findings—remanded

A child support order was remanded where the trial court's intent, as suggested by one finding, was inconsistent with another finding that was reflected in the conclusion.

11. Child Custody and Support—amount previously paid

The trial court did not err in a child support action by failing to credit to plaintiff an amount previously paid where plaintiff testified that the payment represented the computation of defendant's share of the October distribution of marital assets minus expenses.

12. Child Custody and Support—prospective support award—findings—no mention of defendant's inheritance—remanded

A prospective child support award was remanded where the trial court's findings lacked any mention of defendant's inheritance. Without specific findings of fact addressing this inheritance, the Court of Appeals could not determine whether the trial court gave due regard to the factors enumerated in N.C.G.S. § 50-13.4(c).

13. Child Custody and Support—support—plaintiff's contribution—religious contribution—loan repayment—no conclusion as to reasonableness

The trial court did not err in a child support case where there was no specific conclusion as to the reasonableness of plaintiff's religious contributions or a loan repayment, but the trial court's ultimate conclusion as to plaintiff's reasonable expenses were supported by its findings of fact.

14. Witnesses—child psychologist—qualified as an expert—child custody and support action

The trial court did not err in a child custody and support action by concluding that a child psychologist was qualified to testify as an expert witness.

15. Child Custody and Support—shared parenting—child psychologist—testimony relevant

A child psychologist's testimony in a child custody and support case on shared parenting arrangements was relevant to the custodial arrangement in the case, and the trial court did not abuse its discretion in admitting the testimony.

16. Child Custody and Support—deviation from temporary order—change of circumstances not required

The trial court was not required to find changed circumstances in a child custody and support action in order to deviate from an earlier temporary order.

17. Child Custody and Support—shared custody—evidence and findings

Challenged findings in a child support and custody case were supported by competent evidence, and the findings supported the conclusion that an equally shared custodial arrangement was in the best interest of the children.

18. Divorce—equitable distribution—inheritance

The trial court erred by making no mention of defendant's inheritance in the final equitable distribution order because the inheritance qualifies as property.

19. Appeal and Error—granting of motions—order not included

The Court of Appeals did not have jurisdiction to address the issues raised by defendant on appeal regarding the granting of plaintiff's motion to amend an equitable distribution order pursuant to N.C.G.S. § 1A-1, Rules 52 and 59. Defendant clearly included the amended judgment and order regarding equitable distribution in her notice of appeal but failed to include the order granting plaintiff's Rule 52 and 59 motions.

20. Divorce—equitable distribution—debt payments—status—stipulations

The trial court did not err in an equitable distribution order by not classifying two debt payments as divisible property. As to the debt incurred for expenses relating to the marital home, the parties' stipulations fully resolved any claims arising from divisible property interests in the marital home, and there was no divisible interest remaining after considering the value of the property and the debt. There was also no divisible property interest in dues or assessments plaintiff may have paid to a country club. Finally, the findings supported the trial court's conclusions of law.

21. Divorce—equitable distribution—accounting partnership—valuation

The trial court did not err in an equitable distribution and child support case in the valuation methodology used for valuing

plaintiff's PricewaterhouseCoopers, LLC partnership interest. The trial court's methodology applied sound techniques and relied upon competent evidence to reasonably approximate the value of plaintiff's partnership interest.

Appeal by plaintiff and cross-appeal by defendant from orders and judgments entered 1 June 2010, 21 February 2011, 10 May 2011, 31 August 2011, 17 June 2013, 22 July 2013, 20 November 2013, 28 January 2014, and 9 July 2014 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 25 August 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, G. Russell Kornegay, III, and John Paul Tsahakis, for plaintiff.

William L. Sitton, Jr., Attorney at Law, by William L. Sitton, Jr.; and Brendle Law Firm, PLLC, by Andrew S. Brendle, for defendant.

GEER, Judge.

Plaintiff Craig Steven Smith appeals from the trial court's equitable distribution judgment, three corresponding qualified domestic relations orders, and a permanent child support and custody order. Plaintiff primarily argues on appeal that the trial court erred by requiring him to pay his children's private school tuition without finding that his children have a reasonable need for private schooling that a public school education cannot provide. Because the parties' combined yearly income exceeds the level at which the presumptive North Carolina Child Support Guidelines ("the Guidelines") apply, we hold that the trial court was not required to make findings mandated by the Guidelines. Instead, we hold that the trial court's conclusion that private school is a reasonable need of the children is fully supported by the court's findings of fact that private school is part of the children's accustomed standard of living, that the parties are capable of paying the tuition, and that the parties have previously agreed that their children would be educated in private school. We therefore affirm the trial court's order that plaintiff pay his children's private school tuition. Because the parties have shown that the trial court failed to make adequate findings of fact with respect to certain aspects of the child support and equitable distribution orders, we reverse those orders and remand for further findings of fact. We find no error with respect to the custody order and affirm it.

Facts

Plaintiff and defendant married on 1 August 1992. They met while employed as certified public accountants at the same company in New Orleans, Louisiana. They later moved to Houston, Texas where plaintiff took a job with PricewaterhouseCoopers ("PwC"). Three children were born to their marriage: Margaret ("Meg") on 13 October 1996; Emilie on 16 January 1999; and Lara on 8 April 2002.

In August 2003, they moved from Houston to Charlotte, North Carolina so that plaintiff could pursue his career as an equity partner with PwC. Within a few years after the move to Charlotte, plaintiff's income as an equity partner substantially increased from approximately $150,000.00 in 2003 to over $500,000.00 by 2007. During the same period, defendant's salary decreased from around $80,000.00 to approximately $38,000.00, as she became the primary caregiver for the children and plaintiff became the primary supporting parent.

Ever since the children began school, plaintiff and defendant shared a mutual desire to educate their children in private schools. When the parties relocated to Charlotte, they enrolled their three children at Providence Day School ("PDS"), where they presently remain enrolled.

The parties separated on 1 June 2007, when defendant left the marital home a few months after plaintiff discovered that defendant was having an extramarital affair and was pregnant from that affair. From the date of separation until February 2009, the parties shared physical custody of the children, with each parent having the children for nearly an equal amount of time. However, beginning in February 2009 and continuing until the trial court entered a temporary custody order in February 2011, defendant unilaterally restricted plaintiff's time with the children to every other weekend.

Also upon separation, plaintiff began objecting to the children's continued enrollment at PDS. He agreed for them to finish the 2007-2008 school year at PDS, but expressed his desire to enroll them at a less expensive private school, even though he never made a significant effort to identify one. Plaintiff did not voluntarily contribute to the PDS tuition after the 2007-2008 school year. Defendant therefore paid the children's tuition for the 2008-2009 and 2009-2010 school years with money from the children's individual Uniform Transfers to Minors Act ("UTMA") accounts in the amounts of $53,810.00 and $49,804.18, respectively, for each school year. She also utilized individual savings accounts to pay the 2009-2010 tuition.

Plaintiff filed for absolute divorce on 8 May 2009, which the trial court granted on 17 September 2009. In his complaint for divorce, plaintiff also sought primary custody of the children and an unequal equitable distribution of the marital property in his favor. Defendant filed an answer and counterclaim on 19 June 2009, seeking continued primary custody, retroactive and prospective child support, and an unequal distribution of the marital property in her favor.

The trial court entered a final equitable distribution pretrial order on 1 June 2010. In this order, the parties stipulated to classifying three of plaintiff's PwC retirement accounts -- a 401(k) plan, a "Keough" plan, and a "RBAP" plan -- as marital property until the date of separation and any post-separation accruals in those accounts as plaintiff's separate property. Also, on 23 December 2010, the parties stipulated in writing that they would equally divide the net equity received from the sale of the marital residence.

On 21 February 2011, the trial court entered a temporary child support order, requiring plaintiff to pay $5,000.00 in child support to defendant on the first of each month beginning 1 August 2010 and all of the children's private school tuition at PDS going forward. Also on 21 February 2011, the trial court entered a temporary custody order essentially maintaining the custody arrangement created by defendant in February 2009. This order provided that plaintiff would have the children for approximately six overnights a month and for four weeks of the children's summer vacation.

On 22 July 2013, the trial court entered its final equitable distribution order in which it ordered an unequal distribution in favor of defendant. The order was based on findings including, but not limited to, the extent of defendant's inheritance, the value of plaintiff's PwC partnership interest as of the date of separation, and the classification and valuation of plaintiff's PwC retirement accounts. With regard to defendant's inheritance, the trial court acknowledged her maternal inheritance of over $916,000.00, which she contributed to the marriage. However, the trial court made no findings relating to defendant's substantial paternal inheritance, aside from three parcels of real property. In relation to plaintiff's PwC partnership valuation, although the court "question[ed] the accuracy and validity of both parties' methods of computing the value," it ultimately concluded that "Defendant/Wife's methodology appears to be the most appropriate of the two."

The trial court further found, despite prior stipulations to the contrary, that the post-separation accruals in plaintiff's three PwC retirement

plans were divisible property. Plaintiff thereafter filed several post-trial motions on 1 August 2013, which the court granted pursuant to Rules 52 and 59 of the Rules of Civil Procedure. As a result, the trial court entered an amended equitable distribution order on 20 November 2013 reclassifying these post-separation accruals as plaintiff's separate property. Then, on 28 January 2014, the trial court entered three qualified domestic relations orders ("QDROs"), distributing defendant's shares of these retirement plans accordingly.

Upon entering a permanent custody order on 9 July 2014, the trial court reversed course from the temporary custody arrangement and granted the parties joint and equal physical custody on a week-on-week-off basis. In addition, the trial court awarded "permanent joint legal care, custody, and control of the minor children" to both the parties. Also on 9 July 2014, the trial court entered a permanent child support order, in which the trial court reduced plaintiff's monthly support contribution from $5,000.00 to $4,000.00 as a result of the changed custody arrangement. It further required plaintiff to pay $95,520.65 in retroactive child support to defendant for the time period from the date of separation through 30 June 2009.

Because of the parties' substantial combined income, the trial court determined that the presumptive requirements of the child support Guidelines were not applicable. With regard to private school tuition, the trial court found that "[i]t continue[d] to be in the best interest of the minor children to be enrolled at [PDS]," and that plaintiff "is well-able and capable of providing substantial support on behalf of the minor children to maintain that standard of living that they have enjoyed prior to the parties' separation . . . ." Based on its findings, the trial court ordered that plaintiff "be solely responsible for every tuition and expense payment due and payable to [PDS]," but required defendant to reimburse plaintiff for 25% of the tuition expenses going forward. Additionally, plaintiff was required to pay $116,409.18 in reimbursements to defendant for tuition for the 2007-2008, 2008-2009, and 2009-2010 school years paid out of her account and the children's accounts.

Plaintiff timely appealed the permanent custody and support orders, as well as the final equitable distribution order and corresponding QDROs to this Court. Shortly thereafter, defendant timely filed a cross-appeal, challenging the custody, support, and equitable distribution orders, as well.

Discussion

As a general matter, where the trial court sits without a jury, "the judge is required to 'find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.' " *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 188-89 (1980) (quoting N.C.R. Civ. P. 52(a)). Thus, " 'the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). The findings of fact are supported by competent evidence "even when the record includes other evidence that might support contrary findings." *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). "The trial court's conclusions of law, however, are reviewed de novo." *Casella v. Alden*, 200 N.C. App. 24, 28, 682 S.E.2d 455, 459 (2009).

I. Appeal from Temporary and Interlocutory Orders

[1] Before addressing the parties' appeals from the final orders in these proceedings, we must address plaintiff's appeals from the trial court's 21 February 2011 temporary child support and custody order and the 31 August 2011 interlocutory order denying plaintiff's post-trial motions. Plaintiff acknowledges the well-observed rule that a temporary interlocutory order made moot by virtue of a subsequent permanent order is not reviewable by this Court. *See, e.g.*, *Metz v. Metz*, 212 N.C. App. 494, 498, 711 S.E.2d 737, 740 (2011) (refusing to challenge temporary support order mooted by subsequent permanent order). In an attempt to circumvent this rule, plaintiff cites to *In re A.N.B.*, 232 N.C. App. 406, 408, 754 S.E.2d 442, 445 (2014) (quoting *Thomas v. N.C. Dep't of Human Res.*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 821 (1996), *aff'd per curiam*, 346 N.C. 268, 485 S.E.2d 295 (1997)), arguing that this Court has a duty to address the issues he raises in these mooted orders because "the 'question involved is a matter of public interest.' "

We do not agree that this matter raises any issue of public interest. Matters of public interest are, for example, matters such as "preventing unwarranted admission of juveniles into [psychiatric] treatment facilities[.]" *Id.* We do not believe that the court-ordered child custody and support arrangements are comparable matters of public interest. Accordingly, the temporary child support order and the interlocutory post-trial order are moot on account of the subsequent entry of the permanent child support order and are not reviewable by this Court.

Plaintiff also seeks review of these orders pursuant to a writ of certiorari under Rule 21(a)(1) of the Rules of Appellate Procedure. However, "it is well-established that where an argument is moot, no appellate review should lie." *In re J.R.W.*, ___ N.C. App. ___, ___, 765 S.E.2d 116, 119 (2014) (declining to suspend the Rules of Appellate Procedure under Rule 2 when arguments moot), *disc. review denied*, 367 N.C. 813, 767 S.E.2d 840 (2015). We, therefore, deny plaintiff's request for certiorari.

II. Child Support

Plaintiff appeals, and defendant cross-appeals, from a number of rulings in the permanent child support order of 9 July 2014. Both parties challenge the trial court's findings of fact and conclusions of law related to the payment of their children's private school tuition, while plaintiff also challenges the findings of fact related to the retroactive and prospective child support awards. Each challenge is addressed in turn below.

A. Private School Tuition

[2] Plaintiff contends that the trial court erroneously ordered him to pay his children's private school tuition at PDS without making findings of fact as to the children's particular needs for private school pursuant to North Carolina's applicable child support statute. That statute reads:

> Payments ordered for the support of a minor child shall be *in such amount as to meet the reasonable needs of the child* for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2015) (emphasis added). The question whether a trial court can require a higher income parent, such as plaintiff, to pay his children's private school tuition without a specific showing that his children need the advantages offered by private schooling is a matter of first impression for this Court. However, we do not agree with plaintiff's contentions that a trial court must find such a specific need prior to ordering a higher income parent to pay this expense as a component of child support.

The trial court made numerous findings in the permanent child support order regarding the parties' respective incomes. The trial court found that as of 2011, plaintiff "was earning at least $522,000/year at PwC," that his "gross income has increased each year since 2004[,]" and

that "[t]here is no reason to assume that [his] gross monthly income will remain at or below $43,000.00 per month for the current fiscal year." The trial court also found that defendant's income in the years from 2007 to 2011 fluctuated from approximately $36,000.00 to $51,000.00. Based on the parties' combined income, the court determined that "[c]hild support in this matter is not subject to the N.C. Child Support Guidelines" and, therefore, that private school tuition was not a "deviation" from the Guidelines or an "extraordinary expense" as set forth in the Guidelines.

The trial court further found that "[p]rior to taking up residence in Charlotte, North Carolina . . . Meg and Emilie were enrolled at Providence Day School" and that the youngest child, Lara, "has remained a full-time student at PDS since August of 2007." The court also found that plaintiff "testified that it was his preference that the Smith children continue attending private school[,]" but that he claimed "there are other private schools in the Charlotte region that charge significantly less tuition than PDS . . . [which] should be preferred[,]" even though he had not "present[ed] [any] evidence regarding accreditation, curricula or tuition and expenses for these specific alternative schools."

Ultimately, the trial court concluded that the parties were capable of paying for their children's private school tuition based on their respective gross incomes. Furthermore, the trial court concluded that the parties must continue to educate their children in private school "[i]n order to maintain the standard of living to which the minor children are accustomed" and to remain consistent "with the stated intent of both parties that the minor children attend private school versus public school[.]"

Normally, "[t]he court shall determine the amount of child support payments by applying the presumptive guidelines . . . ." N.C. Gen. Stat. § 50-13.4(c). However, when "the parents' combined adjusted gross income is more than $25,000 per month ($300,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule." N.C. Child Support Guidelines, 2016 Ann. R. N.C. at 50. "The schedule of basic child support may be of assistance to the court in determining a minimal level of child support." *Id.* But, " '[f]or cases with higher combined monthly adjusted gross income, child support should be determined on a case-by-case basis.' " *Taylor v. Taylor*, 118 N.C. App. 356, 362, 455 S.E.2d 442, 447 (1995) (quoting Guidelines, 1991 Ann. R. N.C.), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996).

Thus, where the parties' income exceeds the level set by the Guidelines, the trial court's support order, on a case-by-case basis,

" 'must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount.' " *Id.* (quoting *Newman v. Newman*, 64 N.C. App. 125, 127, 306 S.E.2d 540, 542 (1983)). The determination of a child's needs is "largely measured by the 'accustomed standard of living of the child.' " *Cohen v. Cohen*, 100 N.C. App. 334, 339, 396 S.E.2d 344, 347 (1990).

Even though the expense of private school has never been specifically addressed in higher income cases, our appellate courts have long recognized that a child's reasonable needs are not limited to absolutely necessary items if the parents can afford to pay more to maintain the accustomed standard of living of the child. *See, e.g.*, *Williams v. Williams*, 261 N.C. 48, 57, 134 S.E.2d 227, 234 (1964) ("In addition to the actual needs of the child, a [parent] has a legal duty to give his [or her] children those advantages which are reasonable considering his [or her] financial condition and his [or her] position in society."); *Loosvelt v. Brown*, ___ N.C. App. ___, ___, 760 S.E.2d 351, 362 (2014) ("In addition to the actual needs of the child, a father has a legal duty to give his children those advantages which are reasonable considering his financial condition and his position in society.").

Despite this well-established law, plaintiff contends that in order for the trial court to award the expense of private school tuition, it must first find that a child's special needs -- for example, a child's health issues or disabilities -- require private school and that public school cannot adequately meet such needs. In making this argument, he cites *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000). This Court in *Biggs* held that *in order to deviate from the Guidelines* and allow for such "extraordinary expenses" as private school tuition, the trial court must make adequate findings relating to the reasonable needs of the child for such extraordinary expenses. *Id.* at 298, 524 S.E.2d at 581. *Biggs* is inapplicable, however, when, as here, the trial court was not bound by the Guidelines because the parents' income exceeds the level governed by the Guidelines.

Plaintiff also relies on case law that predates the establishment of the presumptive Guidelines to support his argument. He claims that *Brandt v. Brandt*, 92 N.C. App. 438, 444, 374 S.E.2d 663, 666 (1988), *aff'd per curiam*, 325 N.C. 429, 383 S.E.2d 656 (1989), is applicable here because it holds that a party fails to show that "private school is a necessary or reasonable expense" when there is "no evidence . . . [that a child] could not excel in public school." He also cites to *Evans v. Craddock*, 61

N.C. App. 438, 443, 300 S.E.2d 908, 912 (1983), and *Falls v. Falls*, 52 N.C. App. 203, 215, 278 S.E.2d 546, 554-55 (1981) for the same proposition.

While we do not find these cases wholly inapplicable simply because they predate the presumptive Guidelines,[1] we also do not find them relevant to this appeal because they do not reflect the parents' accustomed standards or desires in high-income cases. They, therefore, shed little light on the needs of children in higher income families in which "need" is determined based on their "accustomed standard of living," as this Court's decisions in *Loosvelt* and *Williams* require.

In addition, in contrast to this case, in all three cases cited by plaintiff, the parents had not mutually agreed to enroll, and in fact had enrolled, their children in private school before the time of trial. *See Brandt*, 92 N.C. App. at 444, 374 S.E.2d at 666 (indicating one party was not consulted prior to child's enrollment in private school by other party); *Evans*, 61 N.C. App. at 443, 300 S.E.2d at 912 ("On remand, . . . [t]he trial judge should also determine if the defendant agreed to pay the tuition . . . ."); *Falls*, 52 N.C. App. at 215, 278 S.E.2d at 555 (acknowledging children were not attending private school and parents' lack of intent to enroll them in private school). Thus, the mutual intent of both parents to educate their children in private school, together with their children's actual enrollment, is a consideration in determining the "accustomed standard of living" of the parties.

In this high-income case, the trial court properly addressed the reasonable needs of the children as measured by their accustomed standard of living, consistent with *Cohen*, 100 N.C. App. at 339, 396 S.E.2d at 347. The trial court's findings of fact regarding the children's consistent enrollment in private schools and the parties' continual desire to educate their children in private schools adequately support the court's conclusion that private schooling is a reasonable need of the children given their accustomed standard of living.

[3] Plaintiff, however, further argues that even though his children had always been enrolled in private school, the payment of the PDS tuition had resulted in "estate depletion." According to plaintiff, they were only able to afford the tuition by using defendant's maternal inheritance. In effect, he challenges the trial court's determination that he is capable of paying his children's tuition. We disagree.

---

1. "Before the guidelines, the law referred to the needs of the child as the basis of the award; therefore, pre-guidelines cases are instructional." Suzanne Reynolds, 2 *Lee's North Carolina Family Law* § 10.16, at 542 n.132 (5th. ed. 2015).

In support of his argument, plaintiff points to his own testimony that upon moving to Charlotte, his children's tuition was paid for at least in part by defendant's separate money from her maternal inheritance. Specifically, plaintiff testified that the tuition "was funded out of salary and Vera's inheritance." He, therefore, claims that because defendant's inheritance is now depleted, he is incapable of affording the tuition payments.

The trial court, however, based its determination that plaintiff is able to pay the tuition expenses on its finding that beginning with the 2007-2008 school year, plaintiff's salary had increased to over $500,000.00 a year and was no less than $43,000.00 a month. The court found that plaintiff's own financial affidavit from 2011 claimed $11,568.00 in monthly expenses for his three children, an amount that included tuition payments of nearly $5,000.00 a month and $5,000.00 in child support payments owed to defendant each month. The trial court also found that plaintiff's other reasonable monthly expenses included $3,700.00 in personal expenses per month and another $3,700.00 in shared family expenses per month. Finally, the trial court found that from the date of separation through 2011, plaintiff had been able to make contributions to his retirement accounts and charitable contributions in the approximate amount of $10,000.00 per month. However, the court concluded that plaintiff's religious contributions of $4,500.00 per month would not be included in his reasonable expenses.

Thus, even though plaintiff points to his own testimony that paying for his children's tuition created a standard of living commensurate with estate depletion, it is apparent that the trial court gave little weight to that testimony and found, to the contrary, that plaintiff contributed personally to his children's tuition prior to separation and that, given his income and reasonable expenses, he can afford to pay for the tuition. Despite plaintiff's contentions, however, the court's findings are supported by the evidence, including his own testimony. Indeed, despite contending in conclusory fashion that the findings regarding his income and expenses are unsupported by competent evidence, plaintiff fails to make any specific argument to support that contention.[2] We, therefore, consider those findings binding on appeal. In totaling plaintiff's reasonable monthly expenses, including tuition, and comparing them to the

2. Plaintiff specifically challenges the findings that his religious contributions are not reasonable expenses. We address those arguments *infra* as plaintiff's arguments in that regard relate to prospective child support and not to his ability to pay his children's tuition. Thus, he fails to argue effectively here how the trial court's calculations of his income and expenses preclude him from paying his children's tuition.

monthly earnings found by the trial court, we hold that these findings are specific enough to support the conclusion that plaintiff is capable of paying his children's tuition. Whether the parties had previously used defendant's inheritance to pay their children's tuition is, therefore, irrelevant to their present ability to pay.

Accordingly, because the trial court's determinations regarding the reasonable needs of the children to attend private school -- as established by their accustomed standard of living and past actions -- and plaintiff's ability to pay for this tuition are adequately supported by competent findings of fact, we affirm the trial court's order requiring plaintiff to pay his children's private school tuition.

[4] Plaintiff next contends that the order that he pay retroactive private school tuition to defendant is improper because (1) defendant should not recover money she paid to PDS out of her children's UTMA accounts, (2) the award requires reimbursement of funds paid outside the pertinent time period for retroactive support, and (3) the permanent support award fails to account for payments he already made to defendant for tuition payments. We address these arguments in sequence.

The trial court found in the permanent child support order that the parties' three children each have a UTMA account at Merrill Lynch of which defendant is the custodian. The support order also found that defendant paid for her three daughters' 2008-2009 and 2009-2010 PDS tuition primarily out of their individual UTMA accounts, in a total amount of $103,614.18. Concluding that plaintiff was responsible for all the tuition expenses for his children for the 2007-2008, 2008-2009, and 2009-2010 school years, the trial court decreed that plaintiff shall reimburse defendant for the $53,810.00 payment made out of the UTMA accounts for the 2008-2009 school year; that plaintiff shall reimburse defendant for the $49,804.18 payment made out of the UTMA accounts for the 2009-2010 school year; and that defendant thereafter shall reimburse each UTMA account on a *pro rata* basis within 90 days from the entry of the permanent support order.

In calculating retroactive child support awards, the trial court must determine "the amount actually expended by [the dependent spouse] which represent[s] the [supporting spouse's] share of support." *Hicks v. Hicks*, 34 N.C. App. 128, 130, 237 S.E.2d 307, 309 (1977). The dependent spouse "is not entitled to be compensated for support for the children provided by others[.]" *Id.* Notwithstanding this established rule of law, because the trial court ordered that defendant reimburse her children's UTMA accounts upon receipt of the child support award from plaintiff,

we do not agree with plaintiff's first argument that the trial court erred by reimbursing defendant for amounts that she did not pay.

[5] Plaintiff next urges that defendant's claim for retroactive child support improperly included $41,225.18 in tuition payments defendant made on 22 June, 2 November, and 7 December of 2009 because retroactive child support is only recoverable for the amount expended three years prior to the date of filing. He cites to *Napowsa v. Langston*, 95 N.C. App. 14, 21, 381 S.E.2d 882, 886 (1989), arguing that retroactive child support is recoverable by defendant "(1) to the extent she paid [plaintiff's] share of such expenditures, and (2) to the extent the expenditures occurred three years or less before . . . the date she filed her claim for child support." However, the limitation plaintiff is referencing only limits reimbursement to three years prior to the filing of the action. *See* N.C. Gen. Stat. § 1-52(2) (2015). Since defendant filed her claim for retroactive child support on 19 June 2009, the statute of limitation has no application to payments defendant made *after* that date. Indeed, *Napowsa* held that " 'each . . . expenditure by the mother creates in her a new right to reimbursement.' " 95 N.C. App. at 21, 381 S.E.2d at 886 (quoting *Tidwell v. Booker*, 290 N.C. 98, 116, 225 S.E.2d, 816, 827 (1976)).

[6] Lastly, plaintiff argues that Finding of Fact No. 194 in the permanent support order credits him with paying only $5,810.00 in PDS tuition for the 2007-2008 school year. He claims this amount is $3,000.00 too low, as the court determined in Finding of Fact No. 108 that "Plaintiff/Father was credited with one-half (1/2) of payment three (3) (made on November 1, 2007) or $5,810.00 and $3,000.00 of payment four (4) (made on February 1, 2008) from his separate funds." We agree with plaintiff that there is an inconsistency in the trial court's findings, and we, therefore, remand to the trial court for findings of fact resolving this inconsistency and recalculation of the amount owed by plaintiff to defendant in retroactive child support.

[7] Defendant's sole argument with respect to the private school tuition part of the permanent child support order is that the trial court erred in requiring her to reimburse plaintiff for 25% of the PDS tuition. Defendant contends that the trial court failed to make any findings of fact explaining its basis for the 25% figure, which departs from a pro-rata distribution of support requirements based on the parties' respective incomes. We agree.

" 'The ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the [obligor] to meet the needs.' " *Robinson v. Robinson*, 210

N.C. App. 319, 333, 707 S.E.2d 785, 795 (2011) (quoting *Cauble v. Cauble*, 133 N.C. App. 390, 394, 515 S.E.2d 708, 711 (1999)). This objective is fulfilled by making adequate findings regarding the "estates, earnings, conditions, accustomed standard of living . . ., the child care and homemaker contributions of each party, [or] other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c).

In this instance, Finding of Fact No. 121 in the permanent support order set out the parties' respective annual incomes from 2007 to 2011. It is apparent from the trial court's findings that plaintiff's income perennially dwarfed defendant's income, accounting for almost 90% of the parties' combined income. The trial court made no other findings of fact that could support its order that defendant pay 25% of the tuition payment when her income accounts for only 10% of the combined income. While the record contains evidence upon which the trial court might justify its award, we agree with defendant that the trial court's determination of the amount she was required to pay is not supported by adequate findings of fact. We, therefore, reverse the child support award, and remand to the trial court for further findings of fact to support its determination.

B. Retroactive Child Support

[8] Plaintiff also appeals several other aspects of the retroactive child support order apart from the private school tuition. He argues the order (1) lacks adequate factual findings, (2) is marred by internal inconsistencies, and (3) fails to account for payments already made to defendant.

" '[A] party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child, and evidence that such expenditures were reasonably necessary.' " *Loosvelt*, ___ N.C. App. at ___, 760 S.E.2d at 355 (quoting *Robinson*, 210 N.C. App. at 333, 707 S.E.2d at 795). Recoverable expenditures are those " 'actually expended on the child's behalf during the relevant period.' " *Id.* (quoting *Robinson*, 210 N.C. App. at 333, 707 S.E.2d at 795). Affidavits are acceptable means by which a party can establish these expenditures. *Savani v. Savani*, 102 N.C. App. 496, 502, 403 S.E.2d 900, 904 (1991). Any "[e]videntiary issues concerning credibility, contradictions, and discrepancies are for the trial court . . . to resolve and, therefore, the trial court's findings of fact are conclusive . . . if there is competent evidence to support them despite the existence of evidence that might support a contrary finding." *Smallwood v. Smallwood*, 227 N.C. App. 319, 322, 742 S.E.2d 814, 817 (2013).

Here, the permanent child support award directed plaintiff to pay defendant $95,520.65, "representing the difference between the monthly

cash support ordered . . . for the period beginning June 1, 2007 through June, 2009 and the total amount actually paid" during that time period. Plaintiff first argues that the findings of fact regarding this retroactive child support payment are not supported by competent evidence because defendant testified inconsistently as to the numbers sworn to in her financial affidavit and because such numbers were skewed for the relevant time period as a result of the changed custody arrangement. We disagree.

Defendant initially testified in June 2010 that her expense affidavit relevant to retroactive child support for the period of June 2007 to June 2009 was based only on her year-end expenses for 2009, suggesting those expenses were not reflective of actual expenditures during that period. However, defendant adequately explained during the permanent support hearing on 21 December 2011 that the expenses set out in her June 2009 financial affidavit were "the same" as the previous two years' expenses because she "used those two years of expenses to verify . . . the numbers [she] was placing on [her] affidavit." She provided an updated affidavit of financial standing on 8 September 2011 corroborating this testimony. Because this inconsistency cited by plaintiff raises only credibility issues to be resolved by the trial court, and evidence before the court otherwise established her expenditures for the relevant time period, we find that the trial court's findings in this regard were based on competent evidence.

[9] Plaintiff also argues that because the custodial arrangement changed significantly in February 2009, giving defendant increased time with the children, her affidavit based on expenditures made in 2009 does not properly reflect expenditures made from June 2007 until January 2009. However, at the 21 December 2011 hearing, defendant testified repeatedly to the static nature of the shared and individual expenses of her children from the date of separation through 2010 and that she had taken into account any increase or decrease that may have occurred in the two years prior to the filing of her affidavit in June 2009. The trial court made corresponding findings of fact, ultimately concluding that the children's monthly individual and shared expenses totaled $6,285.00. Accordingly, we affirm the trial court's ruling awarding retroactive child support for this period.

[10] As a final matter, plaintiff points out a clerical error in the support order. Finding of Fact No. 183 states that plaintiff "is well able and capable of paying $4,000.00 per month" in retroactive support for the June 2007 to June 2009 time period. However, Finding of Fact No. 193 suggests that the trial court intended this monthly payment to be $5,000.00

for this time period. This intent, which is inconsistent with Finding of Fact No. 183, is reflected in Conclusion of Law No. 14 in the support order, which states that the $4,000.00 per month permanent support payment effective 1 March 2012 "represents a 20% reduction in the amount of child support" plaintiff was paying prior to that date. Accordingly, we remand to the trial court for correction of the clerical error.

[11] Plaintiff's last argument with respect to the retroactive support directive is that the trial court failed to take into account the $43,085.00 payment he made to defendant on 5 October 2007, and therefore its conclusions were not supported by appropriate findings of fact. However, plaintiff testified that the $43,085.00 payment "represented what we computed as her share of the October distribution [of marital assets] minus the expenses we had discussed." Accordingly, we hold the court did not err by failing to credit this amount to plaintiff as a child support payment.

C. Prospective Child Support

[12] Plaintiff contends that the trial court erred in calculating his prospective child support requirement by failing to make sufficient findings of fact regarding (1) defendant's paternal inheritance and (2) defendant's reasonable monthly expenditures. The trial court's award to defendant of prospective child support in the amount of $4,000.00 per month effective 1 March 2012, a reduction from the temporary child support order, was based on plaintiff's "increased custodial time" with the children, defendant's ability to work additional hours, plaintiff's "substantial earned income" and defendant's earned income, the "needs and expenses of the minor children and their accustomed standard of living," and, lastly, "the passive income that Defendant/Mother can realize from her non-retirement assets and accounts[.]"

"[T]he trial court is *required* to make findings of fact with respect to the factors listed in [N.C. Gen. Stat. § 50-13.4(c)]," including findings on "the parents' incomes, *estates*, and present reasonable expenses in order to determine their relative ability to pay." *Sloan v. Sloan*, 87 N.C. App. 392, 394, 360 S.E.2d 816, 818, 819 (1987) (emphasis added). "[T]o determine the relative abilities of the parties to provide support, the court 'must hear evidence and make findings of fact on the parents' income[s], estates (e.g., savings; real estate holdings, including fair market value and equity; stocks; and bonds) and present reasonable expenses.' " *Taylor*, 118 N.C. App. at 362-63, 455 S.E.2d at 447 (quoting *Little v. Little*, 74 N.C. App. 12, 20, 327 S.E.2d 283, 290 (1985)). "At the very least, a trial court must determine what major assets comprise the parties' estates and their approximate value." *Sloan*, 87 N.C. App. at 395, 360 S.E.2d at

819; *see also Sloop v. Friberg*, 70 N.C. App. 690, 695-96, 320 S.E.2d 921, 925 (1984) (holding that finding of fact regarding party's total estate is "required").

Throughout the child support and equitable distribution proceedings, both parties put on evidence of the sizeable inheritance defendant had received from her father after his passing following the date of separation. Defendant testified to being the sole heir of her father's estate, which comprised a 401(k) plan worth in excess of $800,000.00, an IRA worth approximately $60,000.00, a Certificate of Deposit worth approximately $100,000.00, a bank account with Bank Corp. South worth approximately $208,000.00, various other bank accounts worth anywhere from $7,000.00 to $13,000.00, three vehicles, and two parcels of real estate with a tax value in excess of $103,000.00. Although defendant claimed that some of this money is inaccessible or "subject to tax" if she were to withdraw it immediately, she also admitted that she received an initial distribution of $30,000.00 from her father's 401(k), and would continue receiving yearly distributions from this account, as well as "approximately $700.00 a month" from her mother's pension, which passed to her through her father's estate. Despite this evidence, the trial court's findings of fact regarding permanent child support erroneously lack any mention of these assets other than a vague allusion to her "non-retirement assets and accounts" as a partial impetus for reducing the monthly award from $5,000.00 to $4,000.00 in the permanent support order.

Defendant argues that notwithstanding these omissions, the trial court considered these components of her estate in calculating the child support award and that, as a result, plaintiff has failed to show prejudicial error. Defendant also claims that the pre-Guidelines cases plaintiff cites requiring findings on defendant's estate are irrelevant here because post-Guidelines cases suggest that specific findings of one's estate are only required when a party requests a deviation from the Guidelines. We disagree with both contentions.

First, the post-Guidelines cases that defendant cites are not high-income cases, but rather are cases controlled by the Guidelines and, therefore, irrelevant to the issues in this case. Second, defendant's paternal inheritance is both voluminous and convoluted in nature. There are a number of issues regarding her inherited estate -- including monthly distributions and tax implications -- that impact defendant's ability to immediately utilize this estate to pay her children's monthly expenses. Without specific findings of fact addressing this inheritance, we cannot determine whether the trial court gave due regard to the factors

enumerated in N.C. Gen. Stat. § 50-13.4(c). Consequently, we reverse the prospective child support award and remand for findings of fact relating to defendant's paternal inheritance.

[13] Plaintiff next argues that the trial court's determinations regarding the reasonableness of his expenses, particularly his monthly religious contributions and 401(k) loan repayment expenses, were not supported by any finding of fact. We disagree. The trial court detailed in its findings of fact plaintiff's total individual monthly expenditures as of the June 2010 hearings and his personal expenses as of the date of the permanent child support order. In each finding, the trial court determined that plaintiff's monthly religious contributions totaled more than half of his monthly expenditures, and if excluded, would result in plaintiff having personal expenses of only $3,700.00 each month. The trial court also made a finding that of plaintiff's $22,839.33 of itemized monthly deductions, "$955.00 is a loan payment that Plaintiff/Father pays to himself as a result of borrowing against one of his retirement accounts" and that such an amount "should not be itemized as a deduction."

When determining the reasonable needs and expenses of the parties in domestic actions, "absent contrary indications in the record, there is no requirement that a specific conclusion as to the reasonableness of such expenses be made[.]" *Byrd v. Byrd*, 62 N.C. App. 438, 441, 303 S.E.2d 205, 208 (1983). Where there are no contrary indications in the record, "a lack of a specific conclusion as to reasonableness will not necessarily be held for error[.]" *Coble*, 300 N.C. at 714, 268 S.E.2d at 190. Although there was no specific conclusion as to the reasonableness of plaintiff's religious contributions or his $955.00 loan repayment, the trial court's ultimate conclusions as to plaintiff's reasonable expenses were supported by its findings of fact, which were in turn supported by competent evidence. We, therefore, affirm those aspects of the trial court's permanent support order.

III. Custody

A. Admissibility of Dr. Neilsen's Expert Testimony

[14] Defendant first contends that the trial court erred in admitting Dr. Linda Neilsen's expert testimony and corresponding exhibits in the areas of "adolescent psychology, father-daughter relationships and shared parenting, and scientific research on father-daughter relationships and shared parenting." We note that "trial courts are afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony' " and such a decision "will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*,

358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)).

Our Supreme Court has established "a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Id.* (internal citations omitted). Here, defendant challenges both Dr. Neilsen's competency as an expert and the relevancy of her testimony.

We first address defendant's challenge to Dr. Neilsen's competency to testify to matters of clinical psychology and, specifically, facts relating to the parties' relationships with their children. Dr. Neilsen testified that she was as a professor of adolescent psychology at Wake Forest University and had 15 years of experience researching shared parenting and father-daughter relationships. The trial court, upon qualifying Dr. Neilsen as an expert, made clear that she was not qualified "to talk about any specifics of this case or these children." Accordingly, Dr. Neilsen testified to, among other things, "research regarding young adults who have grown up in shared parenting families and sole parenting families . . . ." When referring to "these" children, her testimony focused on the children within this research, and not the parties' children specifically.

"Under the North Carolina Rules of Evidence, a witness may qualify as an expert by reason of 'knowledge, skill, experience, training, or education,' where such qualification serves as the basis for the expert's proffered opinion." *Id.* at 461, 597 S.E.2d at 688 (quoting N.C.R. Evid. 702(a)). Given Dr. Neilsen's extensive experience and education in research related to shared parenting relationships, and the trial court's limitation of her testimony to those areas, we hold that the trial court did not err in concluding that Dr. Neilsen was qualified to testify as an expert witness.

[15] We next address defendant's arguments that Dr. Neilsen's testimony was irrelevant. Relevant evidence is defined as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. " '[I]n judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the [trier of fact] to draw certain inferences from facts because the expert is better qualified than the [trier of fact] to draw such inferences.' " *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688-89 (quoting *State v. Goode*, 341 N.C. 513, 529, 461 S.E.2d

631, 641 (1995)). Furthermore, a trial court has inherent authority to limit the admissibility of expert testimony under Rule 403 of the Rules of Evidence. *Howerton*, 358 N.C. at 462, 597 S.E.2d at 689. Rule 403 provides that relevant evidence may nonetheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

We find Dr. Neilsen's testimony regarding research on shared parenting arrangements was relevant to the custodial arrangement in this case because it assisted the trial court in deciding what was in the best interests of the children. As the trial court found in Finding of Fact No. 90, based on Dr. Neilsen's testimony, "six (6) monthly overnights is grossly inadequate for a parent to participate in shared residential parenting and to maintain an engaged, authoritative relationship with the minor children . . . ."

Defendant has not shown that the trial court erred in deciding that the probative nature of the testimony was not outweighed by a danger of unfair prejudice, confusion of the issues, or misleading the trier of fact. Other than the fact that the trial court assigned significant weight to Dr. Neilsen's testimony in altering the final custody determination, defendant fails to point to any way in which the testimony unfairly prejudiced defendant or confused or misled the trial court. Although a party "may disagree with the trial court's credibility and weight determinations, those determinations are solely within the province of the trial court." *Brackney v. Brackney*, 199 N.C. App. 375, 391, 682 S.E.2d 401, 411 (2009).

Accordingly, we find that the trial court did not abuse its discretion in admitting Dr. Neilsen's testimony or the corresponding authenticated exhibits. Furthermore, to the extent defendant argues that the findings in the custody order based on Dr. Neilsen's testimony are unsupported by competent evidence, we disagree and affirm the trial court.

B. Award of Equal Physical Custody

[16] Defendant next argues that the trial court's findings of fact that underlie the order's provision for an equal custody arrangement are unsupported by competent evidence because they arbitrarily ignore or alter the findings of fact in the temporary custody order. Defendant essentially contends that without a showing of changed circumstances prior to the permanent custody order, the trial court was not permitted to deviate from the findings in the temporary order. We disagree.

"If a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine [permanent] custody using the best interests of the child test without requiring either party to show a substantial change of circumstances." *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002). Therefore, " '[t]he rule established by section 50-13.7(a) and developed within our case law requires a showing of changed circumstances only where an order for permanent custody already exists.' " *Lamond v. Mahoney*, 159 N.C. App. 400, 404, 583 S.E.2d 656, 659 (2003) (quoting *Regan v. Smith*, 131 N.C. App. 851, 853, 509 S.E.2d 452, 454-55 (1998)).

Subsequent to the trial court's entry of the Order for Temporary Custody and Temporary Child Support on 21 February 2011, hearings were held on the issues of custody and child support in September of 2011. Because the 21 February 2011 order was temporary, the trial court was not required to find changed circumstances in order to deviate from that earlier order in entering the 9 July 2014 permanent child support and custody order.

[17] Next, defendant challenges the trial court's Findings of Fact Nos. 62, 70, 77, 80, and 85 in the permanent custody order. Finding of Fact No. 62 states that when the parties first daughter was born, "Plaintiff/Father took a couple of days off from work at her birth and the month of December to help care for [her]" and that at this time defendant "reduced her work schedule by approximately half." Finding of Fact No. 70 states that both parties "had a loving relationship with the minor children during the marriage and were actively involved in the minor children's daily care and activities . . .," while Finding of Fact No. 77 states that "Plaintiff/Father has not been precluded by his work and travel schedule from maintaining an active and involved relationship with the minor children since the date of separation." In addition, Findings of Fact Nos. 80 and 85 state, respectively, that "Defendant/Mother is actively involved in the minor children's daily care and activities" and that the equal custody arrangement "during the summer of 2011 worked very well for the minor children as well as the parties . . . ."

Defendant argues that Finding of Fact No. 62 arbitrarily deletes the portion of the corresponding finding from the temporary order that states: "With the exception of December 1996, Mother has been the primary custodian of Meg since her birth." Because the trial court was not bound to repeat the findings of fact from the temporary order, but rather could determine what findings it found most pertinent or which evidence was entitled to greater weight, defendant has presented no legitimate basis for questioning Finding of Fact No. 62.

We also find that the record contains ample evidence to support Findings of Fact Nos. 70, 77, and 80, despite the fact that there may also be evidence to the contrary which supported the temporary order. Competent evidence suggests that plaintiff has played a major part in his children's upbringing both before and after the date of separation. During the marriage, the evidence indicated that plaintiff made efforts to make it home for dinner, bathe his children, and put them to bed. Furthermore, the trial court heard evidence that plaintiff spent significant amounts of time both before and after the date of separation participating in his daughters' extracurricular activities. Because these findings were based on competent evidence, even though there was evidence to the contrary, we reject defendant's challenges to Findings of Fact Nos. 70, 77, and 80.

As a final matter, we note that defendant has no basis for contesting Finding of Fact No. 85 as unsupported by the evidence because it is based directly on her testimony that she believed "splitting the summer custody has worked out very well." We therefore, hold that these findings of fact are supported by competent evidence and that they furthermore support the conclusion of the trial court that an equally shared custodial arrangement is in the best interests of the children.

C. Award of Joint Legal Custody

Plaintiff essentially repeats his assault on the trial court's order requiring him to pay his children's private school tuition by arguing that such an order erroneously contradicts the trial court's grant of "permanent joint legal and physical care, custody, and control of the minor children[.]" Specifically, plaintiff points to the fact that the permanent child custody order granting the parties joint legal custody requires that "Plaintiff/Father and Defendant/Mother shall make joint decisions on all major issues affecting the health, education, and general welfare of the minor children, including but not limited to educational issues . . . ." However, the order also concludes that "[i]t continues to be in the best interest of the minor children to be enrolled at Providence Day School."

This Court has held that legal custody "refer[s] generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006). Although our General Assembly has not defined "joint legal custody," this omission "implies a legislative intent to allow a trial court 'substantial latitude in fashioning a joint [legal] custody arrangement,' " *Id.* at 647, 630 S.E.2d 28 (quoting *Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000)),

so long as the court "focus[es] on the best interests and welfare of the child[.]" *Patterson*, 140 N.C. App. at 96, 535 S.E.2d at 378.

Plaintiff relies on *Diehl* in arguing that the trial court erred in "simultaneously award[ing] both parties joint legal custody, but stripp[ing] [plaintiff] of all decision-making authority" regarding where the children were enrolled in school. 177 N.C. App. at 646, 630 S.E.2d at 28. However, in *Diehl*, this Court reversed the trial court's order because, although it gave both parties joint legal custody, it granted primary decision-making authority on all issues to one parent. *Id.* Nothing in *Diehl* limits the authority of the trial court to decide what is in the best interests of the children if there is a conflict between the parents. The trial court here did not violate *Diehl* by awarding joint custody, while simultaneously giving one parent primary decision-making authority over the children's schooling. Instead, the trial court awarded joint legal custody, but exercised its authority, given the disagreement between the parents, to determine that it was in the best interests of the children to remain enrolled at PDS. This determination was adequately supported by findings of fact that the children had been enrolled exclusively at PDS, that they had excelled at PDS, and that both parents preferred private school over public school. Because plaintiff does not challenge these findings of fact, they are binding on appeal and amply support the trial court's conclusion that it is in the best interests of the children to continue attending PDS.

IV. Equitable Distribution

A. Defendant's Paternal Inheritance as a Distributional Factor

[18] Plaintiff asserts that the trial court committed reversible error by failing to make findings of fact and corresponding conclusions of law relating to defendant's paternal inheritance of nearly $1.25 million as a distributional factor. We agree.

In an equitable distribution action, N.C. Gen. Stat. § 50-20(c)(1) (2015) provides that one of the factors the court "shall" consider in making an equitable division of property is "[t]he income, property, and liabilities of each party at the time the division of *property* is to become effective." (Emphasis added.) "[W]hen evidence of a particular distributional factor is introduced, the court must consider the factor and make an appropriate finding of fact with regard to it." *Fox v. Fox*, 114 N.C. App. 125, 135, 441 S.E.2d 613, 619 (1994).

Here, the trial court erroneously made no mention of defendant's paternal inheritance in the final equitable distribution order. Defendant

attempts to justify the trial court's failure to specifically address this inheritance by citing a conclusion in the order that states: "The Court notes that a number of factors which relate to the distributional factors to be considered by the Court . . . are found in other sections of the findings of fact herein. . . . [This] does not mean that the Court did not consider them as distributional factors." However, this general conclusion is simply not adequate to compensate for the total lack of findings to address defendant's paternal inheritance. *See Rosario v. Rosario*, 139 N.C. App. 258, 262, 533 S.E.2d 274, 276 (2000) ("[A] finding stating that the trial court has merely given 'due regard' to the section 50-20 factors is insufficient as a matter of law.").

Defendant also argues that because the inheritance is not a specifically enumerated factor in N.C. Gen. Stat. § 50-20, the court is not required to make such specific findings. Contrary to defendant's arguments, we find that defendant's inheritance qualifies as "property." Accordingly, we reverse the order and remand for findings of fact regarding defendant's paternal inheritance.

B. Amendment of the Equitable Distribution Order

[19] Defendant also challenges the order granting plaintiff's motion to amend the 22 July 2013 equitable distribution order pursuant to Rules 52 and 59 of the Rules of Civil Procedure. In response, plaintiff claims that defendant failed to give proper notice of appeal of this order pursuant to Rule 3(d) of the Rules of Appellate Procedure because defendant's notice of cross-appeal only designated the amended equitable distribution order entered on 20 November 2013 and failed to designate the simultaneously-entered order granting plaintiff's Rule 52 and 59 post-trial motions.

Rule 3(d) requires that a notice of appeal "designate the judgment or order from which appeal is taken . . . ." If the court does not have proper notice, it will not have jurisdiction over the matter. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). However, there are exceptions to this rule that allow us to liberally construe a notice of appeal. The first is that " 'a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake.' " *Id.* at 156-57, 392 S.E.2d at 424 (quoting *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979)). "Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine

that the party complied with the rule if the party accomplishes the '*functional equivalent*' of the requirement." *Id.* at 157, 392 S.E.2d at 424 (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L. Ed. 2d 285, 291, 108 S. Ct. 2405, 2409 (1988)).

Neither of these exceptions is applicable here. The second exception is clearly inapplicable because defendant actually complied with all the procedural requirements of filing her notice of appeal. The first exception is also inapplicable as suggested in *Von Ramm* and *Chee v. Estes*, 117 N.C. App. 450, 451 S.E.2d 349 (1994), two cases with circumstances analogous to those here. In *Chee*, the trial court found that because the plaintiff had noticed an appeal "from the judgment entered in accordance with the verdict . . . it cannot be fairly inferred from the notice that plaintiffs intended as well to appeal the denial of their motion for new trial." *Id.* at 452, 451 S.E.2d at 351. The converse occurred in *Von Ramm*, where the appellant noticed appeal from the judgment denying a Rule 59 motion, but this Court found it could not fairly infer from the notice of appeal the appellant's intent to appeal the order underlying the appellant's Rule 59 motion. 99 N.C. App. at 157, 392 S.E.2d at 425.

Similarly, here, defendant clearly included the Amended Judgment and Order regarding equitable distribution in her notice of appeal, but failed to include the order entered granting plaintiff's Rule 52 and 59 motions. Consistent with *Von Ramm* and *Chee*, we hold that we cannot fairly infer defendant's intent to appeal the order granting plaintiff's Rule 52 and 59 motions and, therefore, we do not have jurisdiction to address the issues raised by defendant on appeal regarding the grant of plaintiff's motion. As defendant has not requested we review these issues pursuant to a petition for writ of certiorari, we also decline to review these issues under Rule 21 of the Rules of Appellate Procedure.

C. Plaintiff's Post-Separation Payments Towards the Marital Debt

[20] Plaintiff contends the trial court improperly classified two debt payments in the final Equitable Distribution Order. First, plaintiff claims the trial court failed to designate as divisible property in its findings of fact plaintiff's post-separation debt payments in the amount of $101,441.00 towards the marital mortgage, property taxes, homeowners' insurance, repairs, and neighborhood residence fees. Second, plaintiff claims the trial court also erred in failing to account for $11,764.00 in country club dues as divisible property.

The final equitable distribution order found that the parties stipulated that upon the sale of the marital home, each would receive half of its net equity, defined as "the gross sales price less mortgage payoffs,

realtor commissions, tax prorations, revenue stamps, homeowners' association dues, mutually agreed upon repairs, and other closing costs directly attributable to the sellers . . . ." The trial court later concluded that "[b]y entering into the referenced Stipulations, the parties have fully and finally resolved any and all claims arising out of each party's marital and, separate and/or divisible property interests in and into the marital residence."

The trial court further found that while plaintiff was responsible for all mortgage fees and other expenses relating to the marital home from the date of separation until the date the marital residence was sold, plaintiff lived in the house, but did not pay defendant her share of the rental value, which was no less than $3,500.00 per month. This value, the trial court concluded, exceeded the expenditures that plaintiff incurred on a monthly basis, therefore leaving "no divisible property interest [in the marital home] to be valued, classified, and/or awarded in this Judgment."

In regard to the parties' country club membership, the trial court found that "[t]he Ballantyne Country Club's membership was in Plaintiff/Husband's name[,]" that "the initiation fee was paid from a portion of Defendant/Wife's inheritance[,]" and that after the date of separation, defendant "had no right to utilize the facilities . . . unless she was a guest of Plaintiff/Husband." The trial court also made a finding that the membership was sold and transferred along with the marital residence, which was "divided equally between the parties" pursuant to the parties' stipulations. In conclusion, the trial court found there was "no divisible property interest . . . to take into account with regard to any monthly dues or assessments that Plaintiff/Husband may have incurred and paid to Ballantyne Country Club."

It is well settled that "divisible property includes '[i]ncreases *and decreases* in marital debt and financing charges and interest related to marital debt.' " *Warren v. Warren*, 175 N.C. App. 509, 517, 623 S.E.2d 800, 805 (2006) (quoting N.C. Gen. Stat. § 50-20(b)(4)(d) (2003)). Furthermore, "mortgage payments and payment of property taxes, have been treated by this Court as payments made towards a marital debt." *Smith v. Smith*, 111 N.C. App. 460, 510, 433 S.E.2d 196, 226 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

It is also true that "[i]n equitable distribution actions, our courts favor *written stipulations* which are duly executed and acknowledged by the parties." *Fox*, 114 N.C. App. at 132, 441 S.E.2d at 617. Stipulations are treated as "judicial admissions which, unless limited as to time or application, continue in full force *for the duration of the controversy*." *Id.* at 131, 441 S.E.2d at 617.

Plaintiff makes general assertions that the trial court's findings of fact regarding the classification of these marital debts are unsupported by competent evidence, but fails to point to any specific evidence that suggests they are erroneous. As such, they are binding on appeal. We further hold that these findings adequately support the trial court's corresponding conclusions of law that plaintiff has no divisible property interest in the payments made towards the marital residence or the country club membership. This is evident because after the date of separation and until these interests were sold, defendant was effectively barred from realizing any benefit from these marital interests. Furthermore, the stipulations referenced by the trial court indicate that the net equity in the marital residence, including the country club membership, was split evenly between the parties, thereby resolving all claims arising out of the interests in the marital residence. Accordingly, we affirm this portion of the final equitable distribution order.

D. Valuation of Plaintiff's Partnership Interest

[21] Plaintiff lastly argues that the trial court failed to make appropriate findings of fact regarding the valuation methodology used for valuing plaintiff's PwC partnership interest. Here, the trial court examined at length both parties' valuation methods, and the proffered evidence supporting them. Although it ultimately questioned "the accuracy and validity of both parties' methods of computing the value of Plaintiff/Husbands' partnership interest in PricewaterhouseCoopers, LLP," the trial court adopted defendant's methodology after concluding that it "appears to be the most appropriate of the two." The court arrived at a date of separation value of $94,118.00 by taking the net capital account balance ("CAB") as of the date of separation and subtracting the outstanding loan balance owed to PwC as of the date of separation. The parties do not dispute this outstanding loan balance of $93,190.00. The trial court found from defendant's evidence that the CAB is impacted by three different numbers: "(1) Capital contributions during the Time Period in question, (2) increases in capital (shares of earned income[)] during the Time Period, and (3) decreases to capital (mainly withdrawals in distributions made to the partner[)] during the Time Period[.]" Applying these factors, the trial court arrived at a date of separation net CAB of $187,308.00. Subtracting the undisputed outstanding loan balance from this amount, the trial court concluded plaintiff's partnership valuation totaled $94,118.00.

"If there is 'no single best approach to valuing' an asset, '[t]he task of [this Court] on appeal is to determine whether the approach used by the trial court reasonably approximated' the value of the asset at the

date of separation." *Fountain v. Fountain*, 148 N.C. App. 329, 338, 559 S.E.2d 25, 32 (2002) (quoting *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270 (1985)). If it appears that " 'the trial court reasonably approximated the net value of the [asset] . . . based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.' " *Id.* (quoting *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272). Although plaintiff urges that the trial court should have adopted his methodology rather than defendant's, the trial court's adopted approach appears to apply sound techniques and relies upon competent evidence to "reasonably approximate[]" the value of plaintiff's PwC partnership interest. Plaintiff has, therefore, failed to demonstrate that the trial court erred in valuing his partnership interest.

Conclusion

We affirm the trial court's custody order. We further affirm the trial court's child support order requiring plaintiff to pay his children's private school tuition at PDS in full upon due according to a payment plan allowed by PDS on a prospective basis until changed circumstances or further review. However, because we find that the trial court's orders regarding child support and equitable distribution were not fully supported by appropriate findings of fact, we reverse these orders and remand for further findings of fact as to the following: (1) defendant's paternal inheritance, both as to the child support and equitable distribution orders, (2) defendant's ability to reimburse plaintiff for 25% of their children's PDS tuition, (3) the clerical error in Finding of Fact No. 183 of the child support order, erroneously requiring plaintiff pay $4,000.00 per month to defendant in child support for the period from 1 June 2007 through June 2009, and (4) the inconsistency between Findings of Fact Nos. 108 and 194 in the child support order regarding plaintiff's payment of private school tuition for the 2007-2008 school year. We leave the decision regarding whether to hear additional evidence to the sound discretion of the trial judge.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and TYSON concur.

SMITH v. SMITH

[247 N.C. App. 166 (2016)]

CRAIG STEVEN SMITH, PLAINTIFF
v.
VERA CRANFORD SMITH, DEFENDANT

No. COA15-331

Filed 19 April 2016

1. Child Custody and Support—child support order—enforceable during pendency of appeal

Where plaintiff-father requested emergency relief from a permanent child support order that required him to pay his children's private school tuition, the Court of Appeals rejected plaintiff's argument that the trial court was without jurisdiction to hold him in contempt for violating that order during the pendency of his appeal. Pursuant to N.C.G.S. § 50-13.4(f)(9), the order of child support requiring periodic payments toward his children's school tuition was enforceable during the pendency of the appeal.

2. Child Custody and Support—child support order—cross-appeal by mother—enforceable

Where plaintiff-father requested emergency relief from a permanent child support order that required him to pay his children's private school tuition, the Court of Appeals rejected plaintiff's argument that defendant-mother's cross-appeal of that order precluded her from enforcing it. Defendant cross-appealed the order only with respect to the requirement that she reimburse plaintiff for 25 percent of the tuition after plaintiff paid it in full and on time. The Court of Appeals could conceive of no justification for precluding defendant from enforcing plaintiff's court-ordered obligation to pay his children's school tuition on time.

3. Child Custody and Support—contempt order—bond to stay enforcement

Where the trial court denied plaintiff-father's motion to stay the execution of a permanent child support order requiring him to pay his children's private school tuition and held him in contempt for failing to pay the tuition pursuant to the order, the Court of Appeals rejected plaintiff's argument that the trial court erred in failing to set a bond to stay enforcement of the private school tuition directive pursuant to Rule 62(d) of the Rules of Civil Procedure and N.C.G.S. § 1-289. By acknowledging that child support was excepted from this process because the children affected had nothing to do with

the disputes between the two parties, the trial court appropriately exercised its discretion in refusing to set a bond pending appeal of the order requiring plaintiff to pay child support.

4. Child Custody and Support—contempt order—findings and conclusions supported—purge condition

Where the trial court denied plaintiff-father's motion to stay the execution of a permanent child support order requiring him to pay his children's private school tuition and held him in contempt for failing to pay the tuition pursuant to the order, the Court of Appeals affirmed the contempt order. The trial court's conclusions of law were adequately supported by competent findings of fact, which were supported by competent evidence, and there was no merit to plaintiff's argument that the purge condition was erroneous.

Judge TYSON dissenting.

Appeal by plaintiff from orders entered 15 October 2014 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 22 September 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, G. Russell Kornegay, III, and John Paul Tsahakis, for plaintiff-appellant.

William L. Sitton, Jr., Attorney at Law, by William L. Sitton, Jr.; and Brendle Law Firm, PLLC, by Andrew S. Brendle, for defendant-appellee.

GEER, Judge.

This is the second appeal before this Court arising out of the parties' claims for equitable distribution, child custody, and child support. In the first action, both parties appealed the permanent child custody and support order and the equitable distribution order. In the instant case, plaintiff Craig Steven Smith appeals (1) the order denying his motion to stay the execution and enforcement of the permanent child support order and (2) the order holding him in contempt for failing to pay his children's private school tuition pursuant to the permanent child support order. He primarily argues that statutory law requires the automatic stay of the permanent child support order upon the parties' appeals of that order and that, as a result, the trial court did not have jurisdiction to hold him in contempt for violating the order. He also asserts that defendant Vera

Cranford Smith is precluded from enforcing the child support order from which she had also appealed. We hold that N.C. Gen. Stat. § 50-13.4(f)(9) (2015) allowed the trial court to enforce the child support order that was pending appeal.

Plaintiff also contends that because his income has declined since the entry of the permanent child support order, he did not willfully violate the permanent child support order and should not be held in contempt. We hold that the trial court's conclusion that plaintiff was willfully in contempt of the child support order was supported by factual findings, which in turn were supported by competent evidence. Accordingly, we affirm the orders of the trial court below.

Facts

In the first appeal before this Court, plaintiff challenged the rulings in the 9 July 2014 permanent child support and custody order that required him to pay his children's private school tuition at Providence Day School ("PDS"). Defendant cross-appealed from the same child support order because it required her to reimburse plaintiff for 25% of the tuition payments. On 19 August 2014, a few days after defendant filed her notice of cross-appeal, she also filed and served on plaintiff a motion for emergency relief and motion for contempt in the trial court below. The basis for those post-appeal motions was plaintiff's refusal to pay the required tuition with the result that their children were in danger of forfeiting their enrollment at PDS as a result of the outstanding amount due to the school.

As allowed under the child support order, plaintiff chose to pay for the 2014-2015 PDS tuition on a 10-month installment plan, which required payment of $6,141.00 on the 20th day of each month beginning 20 July 2014. On 8 August 2014, plaintiff's counsel informed defendant's counsel that he was unable to make the July and August 2014 payments as a result of his increasing debt and decreased income. On 11 August 2014, defendant's counsel responded by requesting certain documentation concerning plaintiff's financial circumstances. The deadline for securing continued enrollment of the minor children at PDS was, however, 18 August 2014, forcing defendant to file a motion seeking emergency relief.

On the same day that defendant filed her motions for emergency relief and contempt, Judge Donnie Hoover entered an Order to Appear and Show Cause and Notice of Hearing, requiring plaintiff to appear at a contempt hearing two days later on 21 August 2014. On 20 August 2014, plaintiff filed and served a Motion to Stay Execution and Enforcement

of Judgment During Appeal to stay enforcement of the PDS tuition payment directive while the first appeal before this Court was pending. At the hearing on 21 August 2014, plaintiff introduced an updated financial affidavit showing his average net monthly income had reduced to $16,533.01, and that he was now running a monthly deficit of $1,266.72.

After hearing all motions on 21 August 2014, Judge Hoover first denied plaintiff's motion to stay and found that the trial court "has the authority to enforce the Child Support Order . . . notwithstanding the appeal[.]" Judge Hoover also found plaintiff in civil contempt, ordering him imprisoned in the Mecklenburg County jail for 30 days or until he pays the tuition owed according to the support order. The trial court subsequently issued a written order on 15 October 2014, specifically requiring plaintiff to pay "the entire balance currently owed to PDS for the 2014-2015 school year." Plaintiff timely appealed to this Court.

I

In challenging the trial court's denial of his motion to stay, plaintiff makes several different arguments. First, he argues that his original appeal from the 9 July 2014 child support order automatically stayed enforcement of the directive to pay his children's private school tuition at PDS pursuant to N.C. Gen. Stat. § 1-294 (2015), effectively taking defendant's motion for contempt out of the jurisdiction of the trial court. Second, relying solely on federal precedent, he attempts to persuade this Court that defendant's cross-appeal of the child support order also requires an automatic stay of the tuition payment directive. Finally, plaintiff argues that the trial court erred by failing to set a bond under N.C. Gen. Stat. § 1-289 (2015) to stay enforcement of the PDS tuition directive.

Normally, we review the denial of a motion to stay under an abuse of discretion standard. *Park E. Sales, LLC v. Clark-Langley, Inc.*, 186 N.C. App. 198, 202, 651 S.E.2d 235, 238 (2007). Here, however, our standard of review is de novo because where a party "presents a question of 'statutory interpretation, full review is appropriate, and the conclusions of law are reviewable de novo.' " *Romulus v. Romulus*, 216 N.C. App. 28, 32, 715 S.E.2d 889, 892 (2011) (quoting *Mark IV Beverage, Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 480, 500 S.E.2d 439, 442 (1998)). Also, where the trial court's subject matter jurisdiction to hear an issue is questioned, " '[t]he standard of review . . . is *de novo*.' " *Id.* (quoting *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009)).

[1] We first address plaintiff's argument that the trial court was without jurisdiction to hold him in contempt for violating the permanent support order because it was automatically stayed pending appeal. As a general

rule, under N.C. Gen. Stat. § 1-294, "[w]hen an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . ." However, N.C. Gen. Stat. § 50-13.4(f)(9) establishes an express exception to that rule when the trial court has ordered child support payments. N.C. Gen. Stat. § 50-13.4(f)(9) provides in pertinent part: "Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division *is enforceable in the trial court by proceedings for civil contempt* during the pendency of the appeal." (Emphasis added.) This exception was applied in *Guerrier v. Guerrier*, 155 N.C. App. 154, 159, 574 S.E.2d 69, 72 (2002), which held that "orders for the payment of child support are enforceable pending appeal . . . ."

Plaintiff attempts to deflect this exception by arguing that it is only applicable to child support orders requiring "periodic payments" equating to "a specific, unequivocal directive . . . to pay child support on a certain schedule and/or by certain dates." *Brown v. Brown*, 171 N.C. App. 358, 361, 362, 615 S.E.2d 39, 40-41 (2005). Plaintiff claims that because the trial court's order that he pay tuition allowed him "to choose between the options available" at PDS, this is not a "specific, unequivocal directive," *id.*, contemplated by the exception in N.C. Gen. Stat. § 50-13.4(f)(9) and *Brown*. However, *Brown* does not control here because it only applies in cases "[w]here an *order reducing child support arrears to a money judgment* does not include a provision for periodic payments or other deadline for payment[.]" 171 N.C. App. at 362, 615 S.E.2d at 41 (emphasis added). Because neither party has moved to reduce the tuition payment directive to a money judgment, plaintiff's reliance on *Brown* is misplaced. Furthermore, because we agree with the trial court that the PDS tuition payment directive "is still a periodic payment, whether [plaintiff] chooses to pay it once a year, once a semester or over ten months[,]" we find N.C. Gen. Stat. § 50-13.4(f)(9) controlling in this matter. Accordingly, the child support order was not automatically stayed and the trial court had proper jurisdiction to enforce it.

[2] Plaintiff next argues that defendant's cross-appeal of the child support order should necessarily preclude her from enforcing the very rulings that she is challenging. In support of this proposition, plaintiff cites a number of federal cases. *See generally Bronson v. La Crosse & Milwaukee R.R. Co.*, 68 U.S. 405, 410, 17 L. Ed. 616 (1863); *Trustmark Ins. Co v. Gallucci*, 193 F.3d 558, 559 (1st Cir. 1999); *Enserch Corp. v. Shand Morahan & Co.*, 918 F.2d 462, 464 (5th Cir. 1990); *TN Valley Auth. v. Atlas Mach. & Iron Works, Inc.*, 803 F.2d 794, 797 (4th Cir. 1986). We are, of course, not bound by these decisions, but we also do not

find them persuasive authority since the cases do not address appeals from child support orders. Moreover, defendant cross-appealed the final child support order only with respect to the requirement that she *reimburse* plaintiff for 25% of the tuition after he paid it in full and on time to PDS. We can conceive of no justification for precluding defendant from enforcing plaintiff's court-ordered obligation to pay the PDS tuition in full upon becoming due.

[3] Plaintiff also argues that the trial court erred in failing to set a bond to stay enforcement of the private school tuition directive pursuant to Rule 62(d) of the Rules of Civil Procedure and N.C. Gen. Stat. § 1-289. Because N.C. Gen. Stat. § 1-289(a1) states that "the court shall specify the amount of the undertaking required to stay execution of the judgment pending appeal[,]" we review the trial court's decision to deny the setting of a bond for an abuse of discretion. *See Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 456, 481 S.E.2d 349, 358 (1997) (holding decision to set surety amount " 'adjudged by the court' " reviewed for abuse of discretion (quoting N.C. Gen. Stat. § 1-285(a) (1995)). Here, we find that the trial court, by acknowledging that "child support is excepted from this process" because the children affected "have nothing to do with the disputes that have gone on between these two parties[,]" appropriately exercised its discretion in refusing to set a bond pending appeal of the order requiring plaintiff to pay child support. We, therefore, affirm the trial court's order denying plaintiff's motion to stay execution and enforcement of the child support order.

The dissent holds that the trial court erred in failing to set a bond pursuant to N.C. Gen. Stat. § 1-289. The dissent and plaintiff misread N.C. Gen. Stat. § 1-289 and Rule 62(d). Plaintiff filed a motion under the statute and rule "to stay enforcement of the PDS tuition payment directive . . . ." Both the statute and rule, however, address obtaining a stay of "execution" on a judgment and do not specifically address the ability to hold a party in contempt during an appeal. That issue is specifically addressed by N.C. Gen. Stat. § 50-13.4(f)(9).

While the dissent cites *Quick v. Quick*, 305 N.C. 446, 462, 290 S.E.2d 653, 663 (1982), as holding that a child support order can be a money judgment for purposes of N.C. Gen. Stat. § 1-289, both the dissent and plaintiff have overlooked the fact that our courts have restricted execution and, therefore, the applicability of N.C. Gen. Stat. § 1-289 to past due installments. *See Clark v. Bichsel*, ___ N.C. App. ___, ___, 767 S.E.2d 145, 148 (2015) ("We have previously held that, as a general rule, once a

judgment fixes the amount due, execution, not contempt, is the appropriate proceeding."); *Potts v. Tutterow*, 114 N.C. App. 360, 364, 442 S.E.2d 90, 92 (1994), (emphasizing that "this Court [has] held that execution is only available for past due installments of alimony"), *aff'd per curiam*, 340 N.C. 97, 455 S.E.2d 156 (1995).

Moreover, *Quick* predates the 1983 amendment that enacted the provision in N.C. Gen. Stat. § 50-13.4(f)(9) that allows a court to hold a party in contempt for failure to pay child support pending appeal. *See* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.127[a] (5th ed. 2002). The proper remedy for plaintiff was to seek a stay from this Court. *See* N.C. Gen. Stat. § 50-13.4(f)(9) ("Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.").

II

[4] Plaintiff also argues that the order holding him in civil contempt should be reversed because (1) he did not have adequate notice of the contempt hearing, (2) the trial court did not make adequate findings of a willful violation of the directive to pay PDS tuition, and (3) the purge condition in the contempt order erroneously modified the underlying tuition payment directive. " 'When reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings and whether the findings support the conclusions [of law].' " *Wellons v. White*, 229 N.C. App. 164, 173, 748 S.E.2d 709, 716 (2013) (quoting *Shumaker v. Shumaker*, 137 N.C. App. 72, 77, 527 S.E.2d 55, 58 (2000)). " 'The trial court's conclusions of law drawn from the findings of fact [in civil contempt proceedings] are reviewable *de novo*.' " *Id.*, 748 S.E.2d at 716-17 (quoting *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009)).

As an initial matter, plaintiff argues that the trial court committed reversible error by failing to provide him with the full five-day notice period required for a show cause order entered pursuant to N.C. Gen. Stat. § 5A-23(a) (2015). The Order to Appear and Show Cause and Notice of Hearing required plaintiff to appear before the trial court only two days after its issuance on 19 August 2014. Upon objection, Judge Hoover noted that he had issued the child support order the previous month, and that because plaintiff had ample time to construct a defense to the enforcement of that order, there was sufficient notice to plaintiff and good cause to hear the contempt proceedings on short notice. Because "the purpose of notice is to enable the one charged to prepare

his defense," *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 101, 370 S.E.2d 431, 434 (1988), we agree with the trial court, and find that it had good cause to shorten the notice period.

With regard to the substance of the civil contempt order, the trial court ultimately concluded that (1) plaintiff "has failed to comply with the [permanent support order]" by refusing to pay his children's private school tuition, (2) that plaintiff "has the present ability to comply with the [permanent support order,]" and (3) that his "noncompliance . . . was willful." These conclusions are supported by several findings of fact setting out plaintiff's testimony at the contempt hearing regarding his income and expenses. Preceding these findings is Finding of Fact No. 17, which reads: "The court finds that despite the Father's contentions, ample evidence was presented that Father is well able and capable of paying the permanent child support obligations set forth in the July 9, 2014 Order . . . ." A sampling of this "ample evidence" is as follows: plaintiff indicated a monthly income of $47,000.00 on a July 2013 loan application for his purchase of a residence worth approximately $840,000.00; he owns over $140,000.00 worth of stocks, bonds, and securities; he owns five rental properties separately or jointly with his present wife and realizes uncharacteristically low profits from them; his retirement accounts are worth in excess of $900,000.00; the court found his monthly expenses as represented on his financial affidavit were unreasonable; and plaintiff failed to account for the fact that his stepchildren's father covers some of their expenses. In conclusion, the trial court found that as a result of plaintiff's willful violation of the permanent support order, he would be imprisoned for 30 days or until he "pay[ed] the remaining balance of any tuition owed to Providence Day School on behalf of the Minor Children for the entire 2014-2015 school year[.]"

The relevant contempt statute holds in pertinent part that "[f]ailure to comply with an order of a court is a continuing civil contempt as long as . . . [t]he noncompliance by the person . . . is willful; and . . . [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order." N.C. Gen. Stat. § 5A-21(a) (2015). As with all proceedings in which the court sits without a jury, the trial court's ultimate findings "are conclusive on appeal if supported by competent evidence, even though there may be evidence to support contrary findings." *Bridges v. Bridges*, 85 N.C. App. 524, 526, 355 S.E.2d 230, 231 (1987). However, "findings are inadequate [if] they are 'mere recitations of the evidence and do not reflect the processes of logical reasoning.' " *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 3 (2003) (quoting *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000)).

Plaintiff first challenges the findings that utilize his testimony by categorically dismissing them as insufficient recitations of evidentiary fact. He argues that because they "merely recapitulate [his] testimony," they "do not meet the standard set by [Rule 52(a)(1) of the Rules of Civil Procedure]." *Id.* We disagree. The detailed findings and the corresponding conclusions noted above do more than merely recite plaintiff's testimony. They also " 'reflect the processes of logical reasoning.' " *Id.* (quoting *Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339). This is most evident in the preamble to Finding of Fact No. 17, which asserts that plaintiff's contentions that he is unable to pay his children's private school tuition are sufficiently refuted by the "ample evidence" to the contrary. We, therefore, hold that the trial court's findings of fact describing plaintiff's own testimony were not in error.

Plaintiff also claims that these enumerated findings do not support a conclusion that he is presently able to pay his children's tuition and that his refusal to do so is willful. In his appellate brief, plaintiff attempts to refute each finding with contrary evidence or a different interpretation of each finding. Despite this effort, we determine that the findings of fact, drawn in part from plaintiff's own testimony or admissions, are supported by evidence and sufficiently establish plaintiff's substantial monthly income, his accumulated wealth in the form of real property, retirement, and stocks and bonds, and the unreasonable aspects of his most recent affidavit in which he claims he is unable to afford the PDS tuition. These findings support the conclusion that plaintiff has sufficient income and assets to comply with the permanent child support order by paying the PDS tuition in monthly installments as he elected to do or by "tak[ing] reasonable measures that would enable [him] to comply with the order" as provided in N.C. Gen. Stat. § 5A-21(a)(3). Accordingly, we affirm the trial court's ruling that plaintiff was in willful violation of the permanent support order.

Plaintiff's final argument is that the purge condition requiring him to pay the remaining balance of the PDS tuition owed for the 2014-2015 school year erroneously modified the permanent support order in place, which allowed plaintiff to "choose between the [payment] options available" at PDS. Plaintiff cites to *Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999), in support of this argument, which holds that "a trial court is without authority to *sua sponte* modify an existing support order." However, we find that a simple reading of the contempt order shows that "Plaintiff/Father must pay the *remaining balance* of any tuition owed to Providence Day School . . . ." (Emphasis added.)

Thus, as plaintiff "elected to pay PDS tuition by monthly installments," the trial court did not *sua sponte* modify the permanent child support order because the contempt order did not require plaintiff to pay the tuition for the school year in its entirety, but only the remaining balance for the entire 2014-2015 school year given his monthly installment plan. Accordingly, because we find the purge condition was not erroneous, and because the trial court's conclusions of law were adequately supported by competent findings of fact, which were in turn supported by competent evidence, we affirm the trial court's contempt order.

AFFIRMED.

Judge BRYANT concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously affirms the trial court's civil contempt order, which concluded plaintiff willfully failed to pay his children's private school tuition as required by the support order, while that order was pending before this Court on cross-appeals from both parties. Presuming, without agreeing, defendant possessed the right to seek enforcement through contempt, while also contesting the same order on appeal, the trial court erred and prejudiced plaintiff by failing to rule upon his motion to stay the execution and enforcement of the appealed order and to set bond conditions pursuant to N.C. Gen. Stat. § 1-289.

Plaintiff retained a statutory right to seek and secure the trial court's determination of a bond or security to stay execution of the child support order. The trial court failed to make the statutorily required bond determination to allow plaintiff to stay execution of the party's jointly appealed order, which would have allowed plaintiff to avoid being held in civil contempt. The trial court's order should be reversed. I respectfully dissent.

I. Standard of Review

This Court reviews whether a trial court has properly followed, interpreted, or applied a statutory mandate *de novo*. *McKinney v. McKinney*, 228 N.C. App. 300, 301, 745 S.E.2d 356, 358 (2013) (citation omitted), *disc. review denied and dismissed as moot*, 367 N.C. 288, 753 S.E.2d 679 (2014).

II. Analysis

N.C. Gen. Stat. § 1-289, as applicable, provides:

> (a) If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment *unless* a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment[.]

N.C. Gen. Stat. § 1-289(a) (2009) (emphasis supplied).

Our Supreme Court held an order for the payment of child support is "a judgment directing the payment of money" within the meaning of N.C. Gen. Stat. § 1-289. *Quick v. Quick*, 305 N.C. 446, 462, 290 S.E.2d 653, 663 (1982) (citations omitted) (noting a child support order is a money judgment and an appeal does not stay execution for the collection of judgment unless a stay or supersedeas is ordered). Our Supreme Court's holding in *Quick* remains controlling law. Nothing shows the 1983 amendment to N.C. Gen. Stat. § 50-13.4(f)(9) altered or limited *Quick*'s holding, as posited in the majority's opinion. *See Romulus v. Romulus*, 216 N.C. App. 28, 35, 715 S.E.2d 889, 893-94 (2011) (noting our Supreme Court has recognized judgments directing the payment of alimony or child support are "judgments directing the payment of money" under N. C. Gen. Stat. § 1-289).

Here, plaintiff timely filed a motion to stay execution and enforcement of judgment during appeal on 20 August 2014, after an order to show cause was issued by the trial court with only two (2) days prior notice to plaintiff, in violation of N.C. Gen. Stat. § 5A-23(a1) (2015).

In support of his motion, plaintiff averred "North Carolina law permits [plaintiff] to seek a stay of execution and enforcement of the child support provisions of the Support/Custody Order pending disposition of the parties' respective cross-appeals[,]" citing N.C. Gen. Stat. § 1-289 (2009). Plaintiff correctly asserted "N.C. [Gen. Stat.] § 1-289 authorizes such a stay where [plaintiff] executes a written undertaking by one or more sureties in an appropriate amount and after consideration of the relevant factors set forth in and contemplated by [N.C. Gen. Stat.] § 1-289."

The majority's opinion purports to limit plaintiff's options to obtain a stay of execution on the judgment solely to filing a motion for supersedeas with this Court. While N.C. Gen. Stat. § 50-13.4(f)(9) authorizes this

Court to "stay any order for civil contempt entered for child support," *see* N.C. Gen. Stat. § 50-13.4(f)(9) (2015), this option is not the *only* permissible avenue through which a party may obtain a stay of "a judgment directing the payment of money." *Quick*, 305 N.C. at 462, 290 S.E.2d at 663 (citations omitted).

Nothing in the plain language of N.C. Gen. Stat. § 50-13.4(f)(9) or the pertinent case law restricts or diminishes plaintiff's right to seek a stay of execution under N.C. Gen. Stat. § 1-289. Plaintiff's motion was filed in accordance with the explicit statutory language of N.C. Gen. Stat. § 1-289, and does not conflict with other statutory alternatives.

The trial court failed to rule upon plaintiff's motion for determination of a bond as statutorily required and summarily denied plaintiff's motion to stay execution and enforcement of judgment on 15 October 2014. In the order denying plaintiff's motion, the trial court stated "N.C. Gen. Stat. § 50-13.4(f)(9) and the ruling in *Guerrier v. Guerrier*, 155 N.C. App. 154, 574 S.E.2d 69 (2002) are controlling." The trial court wholly ignored and did not rule upon plaintiff's rights under N.C. Gen. Stat. § 1-289 to set a bond and to allow him to post security to stay execution and enforcement of the jointly appealed child support order. The trial court's failure to do so permitted defendant to "have her cake and eat it to," by forcing plaintiff's compliance, under pain of contempt, with a contested matter on appeal, while allowing defendant to continue challenging those portions of the same order on appeal which were unfavorable to her.

The plain language of N.C. Gen. Stat. § 1-289 authorized plaintiff to seek a stay of execution and required the trial court to determine conditions and set a bond. The trial court, as fact finder, and the forum where defendant's contempt motion was pending, was a proper forum to determine and set conditions of the bond to stay the order. The trial court failed to consider and rule upon plaintiff's motion in accordance with the statutory mandate. The trial court's order denying plaintiff's motion to stay execution and enforcement of judgment during appeal was erroneously entered based upon a disregard or misapprehension of law. *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 312, 677 S.E.2d 1, 11 (2009) ("Where a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light." (citations and quotation marks omitted)).

The trial court erroneously refused to consider plaintiff's motion to determine the bond or security and stay execution of the appealed judgment. As a result, the trial court permitted defendant to proceed on

her motion for contempt and show cause order against plaintiff upon only two (2) days prior notice. Had the trial court properly considered plaintiff's motion to stay execution of the judgment and set a bond as set forth in N.C. Gen. Stat. § 1-289, defendant's motion to hold plaintiff in civil contempt would have inevitably failed. *See Smith v. Miller*, 155 N.C. 242, 71 S.E. 355 (1911) (holding there will be a stay of execution as to the parties appealing, upon compliance with this section); *Bryan v. Hubbs*, 69 N.C. 423 (1873) (holding posting of security operates as stay of execution of judgment).

If the trial court had properly ruled upon plaintiff's motion to set a bond and stay execution of the judgment, defendant's motion to hold plaintiff in civil contempt would have failed. Defendant could not demonstrate plaintiff's "willful noncompliance" or "stubborn resistance" if a bond had been determined, posted, and the money judgment stayed. N.C. Gen. Stat. § 5A-21(a) (2015).

The trial court entirely ignored an apt and permissible basis to allow plaintiff to stay execution of the judgment under § 1-289. Plaintiff was prejudiced by subsequently being found in civil contempt for his willful noncompliance with the very order he sought to have stayed and pending on cross-appeals by both parties. *See Meehan v. Lawrence*, 166 N.C. App. 369, 378, 602 S.E.2d 21, 27 (2004) ("In explaining the 'willfulness' requirement necessary to find a party in civil contempt, our Supreme Court has noted this term imports knowledge and a stubborn resistance." (citations and internal quotation marks omitted)).

The trial court erred by holding plaintiff in willful civil contempt for the non-payment of the private school tuition expenses set out in the appealed child support order. I vote to reverse the contempt order appealed from, and remand to the trial court for ruling and entry of an order consistent with the statutory mandate set forth in N.C. Gen. Stat. § 1-289.

III. Conclusion

Plaintiff was statutorily allowed to seek a stay of execution of the judgment and for the trial court to determine and set bond conditions, pursuant to N.C. Gen. Stat. § 1-289. The trial court's order failed to rule upon plaintiff's motion, and set a bond and security conditions to stay execution of the judgment. The trial court's contempt order was entered based upon a disregard for and misapprehension of the law.

Plaintiff was entitled to a ruling on his motion under N.C. Gen. Stat. § 1-289 and for the trial court to determine bond conditions to stay

execution of the judgment, from which defendant had also appealed. Doing so would have precluded the trial court from having to rule on defendant's two-day noticed motion for contempt, in violation of N.C. Gen. Stat. § 5A-23(a1). I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JUAN FITZGERALD ALLEN

No. COA15-708

Filed 19 April 2016

Appeal and Error—misdemeanor citation—jurisdiction—failure to object in district court

Where defendant was tried and convicted on a misdemeanor open container citation in district court and failed to object to that court's exercise of jurisdiction, he was no longer in a position to assert his statutory right to object to trial on citation. The Court of Appeals held that his appellate challenge to the trial court's jurisdiction was without merit.

Appeal by defendant from judgments entered 23 January 2015 by Judge R. Stuart Albright in Surry County Superior Court. Heard in the Court of Appeals 17 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for the State.

Appellate Defender Staples Hughes, by James R. Grant, for defendant-appellant.

BRYANT, Judge.

Where defendant was tried without objection and convicted on a misdemeanor citation in district court, appealed the conviction for a trial *de novo* in superior court and was convicted by jury on the same misdemeanor citation, again without objection to the citation, defendant's challenge to the jurisdiction of the trial court is without merit.

On 27 July 2013, defendant Juan Fitzgerald Allen was issued North Carolina Uniform Citations charging him with willfully operating a motor

vehicle on a street or highway/public vehicular area (1) while subject to an impairing substance, (2) while his drivers' license was revoked, (3) while displaying an expired registration plate knowing the same to be expired, (4) without having a current electronic inspection, such vehicle requiring such an inspection, and (5) for transporting an open container of fortified wine or spirituous liquor. Defendant submitted to a chemical analysis of his breath approximately one hour after his arrest and registered a 0.23 blood alcohol level. The record indicates that a bench trial was held in Surry County District Court followed by a trial *de novo* commenced on 21 January 2015, during the criminal session in Surry County Superior Court, the Honorable Stuart Albright, Judge presiding.

During a pre-trial conference in superior court, the State made an unchallenged oral motion before the trial court to join for trial the charges of transporting fortified wine or spirituous liquor without being in an unopened original container, driving while impaired, and driving while license revoked. The State took a voluntary dismissal on charges of driving with an expired registration and no vehicle inspection. The matter proceeded to trial before a jury.

Following the presentation of all evidence and the trial court's instruction to the jury, the jury returned guilty verdicts against defendant for impaired driving, driving a motor vehicle on a highway while his driver's license was revoked, and transporting within the passenger area of a motor vehicle spirituous liquor in other than the manufacturer's unopened original container. The jury further found as an aggravating factor that "[a]t the time of the offense, . . . defendant's license was revoked because of impaired driving." Based on the jury's finding of the aggravating factor, the trial court arrested judgment on the offense of driving a motor vehicle on a highway while his driver's license was revoked. In accordance with the remaining jury verdicts, the trial court entered judgment against defendant for the offense of impaired driving and sentenced him to an active term of two years. Judgment was entered against defendant for transporting an open container of spirituous liquor, for which he was sentenced to an active term of twenty days, to be served concurrent with his DWI sentence. Defendant entered written notice of appeal.

On appeal, defendant argues the trial court lacked jurisdiction to try him for transporting an open container of spirituous liquor, a misdemeanor, when the charging citation failed to allege an essential element of that offense. Specifically, defendant contends that the charging

citation was fatally defective as it failed to allege that the open container was transported in the passenger area of defendant's vehicle. We disagree.

"There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17–18 (1966) (citations and quotation marks omitted). "[A] citation . . . serves as the pleading of the State for a misdemeanor prosecuted in the district court, unless the prosecutor files a statement of charges, or there is objection to trial on a citation." N.C. Gen. Stat. § 15A-922(a) (2015). "A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges." *Id.* § 15A-302(a) (2015). "The citation must: (1) [i]dentify the crime charged, including the date, and where material, identify the property and other persons involved[.]" *Id.* § 15A-302(c).

Initially, we note that a defendant may object to a trial on a citation; "[a] defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading." *Id.* § 15A-922(c). However, this Court has held that a defendant may not challenge the derivative jurisdiction of the superior court to try a misdemeanor offense on a citation, where that challenge was not raised before the district court. *See State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857 (2002) ("[A] defendant's objection to trial by citation must be asserted in the court of original jurisdiction, in this case, the district court. *See State v. Monroe*, 57 N.C. App. 597, 599, 292 S.E.2d 21, 22 (1982) . . . . Thus, . . . '[o]nce jurisdiction had been established and [the] defendant had been tried in district court, . . . he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court.' *Id.*").

Defendant appeals from the conviction by jury of a misdemeanor allowed by his *de novo* appeal to superior court. "[T]he superior court has jurisdiction to try a misdemeanor . . . [w]hen a misdemeanor conviction is appealed to the superior court for trial de novo . . . ." N.C. Gen. Stat. § 7A-271(a)(5) (2015). The record does not indicate that defendant—tried and convicted in district court before his appeal to superior court for a trial *de novo*—challenged the charges in the citation during proceedings in the district court, or the superior court. Now before this Court, defendant raises this challenge to the jurisdiction of the trial courts for the first time. We acknowledge defendant is allowed

to challenge jurisdiction for the first time on appeal. *See* N.C. R. App. P. 10(a)(1) (2015) ("[W]hether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal."). However, the ability to raise a jurisdictional challenge at any time does not ensure that the jurisdictional challenge has merit.

Defendant argues that "[a] citation, like a warrant or an indictment, may serve as a pleading in a criminal case and must therefore allege lucidly and accurately all the essential elements of the [crime] . . . charged." However, defendant fails to direct our attention to any opinion from this Court or other authority equating the requirements for a valid citation with those of a valid indictment, and we find none. *Compare id.* § 15A-302(c) ("The citation must: (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved[.]"), *with id.* § 15A-644(a)(3) ("An indictment must contain: . . . (3) Criminal charges pleaded as provided in Article 49 of [Chapter 15A], Pleadings and Joinder[.]"); *see also State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) ("An indictment, as referred to in [N.C. Const. art. I, § 22] . . . , is a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. To be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." (citation and quotation marks omitted)); *State v. Jones*, 157 N.C. App. 472, 477, 579 S.E.2d 408, 411 (2003) ("[A] citation is not an indictment[.]").

On 27 July 2013, defendant was issued a Uniform Citation by a law enforcement officer with the Mt. Airy Police Department: "Defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) (public vehicular area) transport open container of fortified wine/spirituous liquor unopened original container G.S. 18B-401(a)." Section 401 of General Statutes Chapter 18B ("Regulation of Alcoholic Beverages") states that "[i]t shall be unlawful for a person to transport fortified wine or spirituous liquor in the passenger area of a motor vehicle in other than the manufacturer's unopened original container. . . . Violation of this subsection shall constitute a Class 3 misdemeanor." N.C. Gen. Stat. § 18B-401(a) (2015).

Defendant argues that the citation failed to state that he transported the fortified wine or spirituous liquor "in the passenger area" of his motor vehicle and as such, is fatally defective to confer jurisdiction. Defendant contends that the citation failed to include an essential element of the crime charged and that a citation, which may be issued by

a law enforcement officer, *see* N.C.G.S. § 15A-302(b) ("An officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction."), is to be held to the same standard as an indictment issued by a grand jury, *see* N.C. Gen. Stat. § 15A-641(a) (2015) ("Any indictment is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses."). Defendant's contention does not comport with the statutory law of North Carolina, where the standard for issuance of an indictment is not precisely the same as a citation.

Nevertheless, in pertinent part, General Statutes, section 15A-302 states that a citation must "[i]dentify the crime charged." N.C.G.S. § 15A-302(c). As noted above, the citation issued to defendant on 27 July 2013 sufficiently identified the crime charged—transporting an open container of fortified wine or spirituous liquor while operating a motor vehicle—and put defendant on notice of the charge. Defendant was tried on the citation at issue without objection in the district court, and by a jury in the superior court on a trial *de novo*. Thus, once jurisdiction was established and defendant was tried in the district court, "he was no longer in a position to assert his statutory right to object to trial on citation . . . ." *Monroe*, 57 N.C. App. at 599, 292 S.E.2d at 22. Therefore, defendant's challenge to the trial court's jurisdiction is without merit.

NO ERROR.

Judges GEER and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
WILLIAM EDWARD GODWIN, III, DEFENDANT

No. COA15-766

Filed 19 April 2016

1. Witnesses—expert—qualification required—testimony about HGN test

The trial court erred in an impaired driving prosecution by admitting testimony from an officer about the results of a Horizontal Gaze Nystagmus (HGN) test. N.C.G.S. § 8C-1, Rule 702(a1) requires that a witness be qualified as an expert by knowledge, skill, experience, training, or education before testifying as to the results of an HGN test.

2. Evidence—HGN test—unqualified witness—prejudice

In an impaired driving prosecution, the erroneous admission of testimony about HGN test results from an officer who was not qualified as an expert was prejudicial where there was a reasonable possibility of a different result without the testimony.

3. Criminal Law—request for instruction denied—Intoximeter—no error

The trial court did not err in an impaired driving prosecution by not giving a requested instruction concerning the results of the Intoximeter. Defendant's argument had been previously rejected.

Appeal by defendant from judgment entered 15 November 2013 by Judge Gary M. Gavenus in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General Teresa L. Townsend, for the State.

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

ELMORE, Judge.

William Edward Godwin, III (defendant), appeals his conviction for driving while impaired following a jury trial in superior court. The

question for decision is whether Rule 702(a1) of the North Carolina Rules of Evidence requires a witness to be qualified as an expert before he may testify to the issue of impairment related to HGN test results. We hold that it does.

I. Background

The State's evidence at trial tended to show the following: On 18 January 2011, at approximately 10:14 p.m., Daniel Kennerly, an officer with the Charlotte Mecklenburg Police Department, observed defendant driving fourteen miles per hour over the posted speed limit and executed a traffic stop. When he approached the vehicle, Officer Kennerly noticed that defendant's eyes were red and glassy, and he detected a strong odor of alcohol coming from defendant's breath. Officer Kennerly asked defendant where he was coming from and how much alcohol, if any, he had consumed that evening. In response, defendant stated that he had just left a restaurant where he had consumed three beers. Officer Kennerly then asked defendant to step out of his vehicle and began an investigation for impaired driving.

As part of his investigation, Officer Kennerly administered three field sobriety tests: the Horizontal Gaze Nystagmus (HGN) test, the walk-and-turn, and the one-leg stand. He observed four out of six possible indicators of impairment during the HGN test, six out of eight possible indicators during the walk-and-turn, and two out of four possible indicators during the one-leg stand. At that time, Officer Kennerly placed defendant under arrest for driving while impaired and transported him to the Mecklenburg County Sheriff's Office's Intoximeter site to perform a EC/IR II breath test. The results of the Intoximeter showed that defendant's blood-alcohol concentration was .08.

On 20 December 2011, defendant was convicted in Mecklenburg County District Court of driving while impaired. He appealed to superior court, and the matter came to trial at the 12 November 2013 Criminal Session of the Superior Court for Mecklenburg County. At trial, defendant objected to Officer Kennerly's HGN testimony, arguing that the officer had to be qualified as an expert under Rule 702 of the North Carolina Rules of Evidence before such testimony could be admitted. Over defendant's objections, the trial court allowed Officer Kennerly to testify, based on his training and experience, as to his administration of the HGN test, the indicators of impairment, and his opinion regarding defendant's impairment based on the indicators which he observed. At the conclusion of the trial, the jury found defendant guilty of driving while impaired. Defendant gave notice of appeal in open court.

II. Discussion

[1] Defendant first argues that the trial court erred in admitting Officer Kennerly's testimony regarding the HGN test results. Specifically, defendant maintains that Rule 702(a1) requires a party offering testimony about the results of an HGN test to do so through a properly qualified witness who has been accepted as an expert by the trial court. Defendant contends, therefore, that in overruling his objection and allowing Officer Kennerly to offer such testimony as a lay witness, the trial court acted under a misapprehension of the law.

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citing *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008)). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

The North Carolina Supreme Court first addressed the admissibility of HGN evidence in *State v. Helms*, 348 N.C. 578, 580, 504 S.E.2d 293, 294 (1998). On discretionary review, the Court agreed with our conclusion that "the HGN test does not measure behavior a lay person would commonly associate with intoxication, but rather represents *specialized knowledge that must be presented to the jury by a qualified expert*." *Id.* at 581, 504 S.E.2d at 295 (emphasis added); *see also State v. Helms*, 127 N.C. App. 375, 379, 490 S.E.2d 565, 568 (1997) ("[The HGN test] is based upon a scientific principle that the extent and manner in which one's eye quivers can be a reliable measure of the amount of alcohol one has consumed." (citation omitted)), *rev'd on other grounds*, 348 N.C. 578, 504 S.E.2d 293. This meant that under the prior version of Rule 702, the State had to show, *inter alia*, that the methodology underlying the test was "sufficiently reliable," *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990) (citations omitted), and that it "can be properly applied to the facts in issue," *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993)). Where no evidence was admitted, and no inquiry conducted, as to the reliability of HGN testing, the Court held that it was error to admit an officer's testimony regarding the results of the HGN test administered on the defendant. *Helms*, 348 N.C. at 582, 504 S.E.2d at 295.

After *Helms* was decided, the North Carolina General Assembly passed House Bill 1048, which added subsection (a1) to Rule 702. 2006 Sess. Laws ch. 253, § 6. Rule 702(a1) provides, in pertinent part, as follows:

> (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> > (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C. Gen. Stat. § 8C-1, Rule 702(a1) (2015). The first sentence of this subsection contemplates that testimonial evidence concerning HGN test results be offered by an expert witness. Although the prior version of Rule 702(a) was still in effect when subsection (a1) was added, the bases on which a witness may be qualified as an expert are the same under the current version. Rule 702(a), as amended, provides as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge*, *skill*, *experience*, *training*, *or education*, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> > (1) The testimony is based upon sufficient facts or data.
> >
> > (2) The testimony is the product of reliable principles and methods.
> >
> > (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015) (emphasis added); *cf*. N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009) ("[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.").

In accordance with *Helms*, therefore, Rule 702(a1) requires that before a witness can testify as to the results of an HGN test, he must be "qualified as an expert by knowledge, skill, experience, training, or

education." *See Helms*, 348 N.C. at 580–81, 504 S.E.2d at 294–95. If the witness is so qualified and "proper foundation" is established, the witness may "give *expert testimony*" as to the HGN test results, subject to the additional limitations in subsection (a1). N.C. Gen. Stat. § 8C-1, Rule 702(a1) (emphasis added). Namely, the expert witness may testify "solely on the issue of impairment and *not* on the issue of specific alcohol concentration," and the HGN test must have been "administered by a person who has successfully completed training in HGN." *Id.* (emphasis added).

In the case *sub judice*, although Officer Kennerly completed a training course in DWI detection and standardized field sobriety tests, there was never a formal offer by the State to tender him as an expert witness. In fact, after conducting its own *voir dire*, the trial court rejected defendant's contention that Officer Kennerly must be qualified as an expert before testifying as to the results of the HGN test:

> THE COURT: I will allow this officer to testify that he administered the HGN test, the walk-and-turn test, and the one-legged test. He will be allowed to testify as to the indicators of impairment he observed of this defendant in giving these tests. Anything else?
>
> MR. POWERS: I'd ask the Court to note my exception. Is the Court disqualifying him as an expert on the HGN?
>
> THE COURT: I'm not—he doesn't have to be qualified as an expert. I'm not going to make that requirement.

Thereafter, over defendant's objection, Officer Kennerly testified that he "observed four out of six" possible clues during the HGN test, which "indicates a probability that the person could be impaired as a result of the consumption of alcohol." Furthermore, based on his interactions with defendant and defendant's performance on all of the field sobriety tests, including the HGN test, Officer Kennerly opined that defendant's "mental and physical faculties were appreciably impaired as a result of the consumption of some impairing substance, that substance in this case being alcohol." Our application of Rule 702(a1) to the facts of this case leads us to conclude that the trial court erred in allowing a witness who had not been qualified as an expert under Rule 702(a) to testify as to the issue of impairment based on the HGN test results.

The State, relying on our decision in *State v. Smart*, 195 N.C. App. 752, 674 S.E.2d 684 (2009), *disc. review denied*, 363 N.C. 810, 692 S.E.2d 874 (2010), nevertheless argues for an interpretation of Rule 702(a1) that

would not require an arresting officer who administered the HGN test to be qualified as an expert before testifying as to the HGN test results and the issue of impairment related thereto. Unlike this case, however, the arresting officer in *Smart* was qualified as an expert under Rule 702 before she testified as to her administration of the test. *Id.* at 755–56, 674 S.E.2d at 685–86. And although the defendant's argument, as it was initially phrased, attacked the officer's qualifications as an expert witness, the defendant's actual challenge went toward the testimony itself: "[The defendant] in fact specifies that his argument pertains to whether the officer's 'method of proof'—that is, the nystagmus testing—is sufficiently reliable as a basis for expert testimony." *Id.* at 755, 674 S.E.2d at 685; *see also Goode*, 341 N.C. at 529, 461 S.E.2d at 640 ("Once the trial court has determined that the method of proof is sufficiently reliable as an area for expert testimony, the next level of inquiry is whether the witness . . . is qualified as an expert to apply this method to the specific facts of the case." (citing N.C. Gen. Stat. § 8C-1, Rule 702 (1992)). Addressing this argument, we explained that, at least under the prior version of Rule 702(a), before admitting expert opinion testimony the trial court had to make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid." *Id.* at 756, 674 S.E.2d at 686 (quoting *Goode*, 341 N.C. at 527, 461 S.E.2d at 639); *see also* N.C. Gen. Stat. § 8C-1, Rule 104(a) (2015) ("Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)."). At that time, we interpreted subsection (a1) "as obviating the need for the State to prove that the HGN testing method is sufficiently reliable." *Id.* Our holding in *Smart* went no further, and it has no application here. While some may even question whether *Smart* survives the amendment to Rule 702(a), that issue is not the one presently before us.

[2] Having concluded that the trial court erred in admitting Officer Kennerly's testimony, we must now determine whether the error was prejudicial so as to warrant a new trial. "In order to establish prejudicial error in the erroneous admission of the HGN evidence, defendant must show only that had the error in question not been committed, a reasonable possibility exists that a different result would have been reached at trial." *Helms*, 348 N.C. at 583, 504 S.E.2d at 296 (citing N.C. Gen. Stat. § 15A-1443(a) (1997)).

The remaining evidence presented at trial shows the following: (1) Officer Kennerly stopped defendant for speeding; (2) when Officer Kennerly initiated the stop, defendant activated his turn signal, pulled onto the next side street, and came to a stop at roadside in a safe

location; (3) defendant was not weaving, and he made no sharp or sudden turns to avoid the traffic stop; (4) two experts testified that they would have expected to see some indicators of impairment which defendant did not exhibit while operating the vehicle; (5) defendant had no problem retrieving his license or registration; (6) defendant did not tilt his head away from Officer Kennerly or otherwise try to avoid contact with him; (7) Officer Kennerly noticed that defendant's eyes were red and glassy, and he smelled a "strong odor of an alcoholic beverage coming from his breath"; (8) one expert testified that "the odor of alcohol is simply an indicator of presence of alcohol" and that there is "no basis for an opinion that correlates the strength of an odor to . . . blood alcohol concentration in the body"; (9) defendant told Officer Kennerly that he had just left a restaurant where he had consumed three beers that evening; (10) when asked to step out of the vehicle, defendant removed his seatbelt without difficulty, he did not use the doorframe or the vehicle for support while exiting, and he did not stagger or sway once he was out of the vehicle; (11) Officer Kennerly observed six out of eight possible clues during the walk-and-turn test, and two out of four possible clues on the one-leg stand test; (12) defendant repeatedly told Officer Kennerly that he had to use the restroom, and two experts agreed that defendant's need to urinate could have adversely affected his performance on the tests; (13) one of the experts, who reviewed the video from Officer Kennerly's dash camera, testified that Officer Kennerly should not have counted three of the six clues he observed during the walk-and-turn test; that the steep grade of the road where defendant performed the one-leg stand could have adversely affected defendant's performance on the test; and that the presence of traffic on the narrow road where the tests were administered, along with the cold weather that evening, could also have affected defendant's performance on the tests; (14) Helen Godwin, defendant's mother, testified that when she saw defendant at the police station, his eyes were not red or glassy, he did not smell of alcohol, his speech was normal, and she did not believe he was impaired; (15) after being placed under arrest and transported to the Intoximeter site, defendant registered a .08 on the Intoximeter. Based on the foregoing, particularly the conflicting evidence regarding defendant's performance on the other field sobriety tests, we conclude a reasonable possibility exists that, had the HGN test results not been admitted, a different result would have been reached at trial.

A. Jury Instructions

[3] Defendant also contends that trial court erred in denying his request for the following jury instruction concerning the results of the Intoximeter:

> A chemical analysis of defendant's breath obtained from an EC/IR-II, which shows an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath, is deemed sufficient to prove defendant's alcohol concentration. However, such chemical analysis does not compel you to so find beyond a reasonable doubt. You are still at liberty to consider the credibility and/or to give such chemical analysis when considering whether the defendant's guilt has been proven beyond a reasonable doubt.

According to defendant, the requested instruction was necessary to inform the jury that the Intoximeter results were sufficient to support a finding of impaired driving but did not compel such a finding beyond a reasonable doubt. By charging the jury using Pattern Jury Instruction 270.20A, defendant claims the trial court impressed upon the jury that it could not consider evidence which showed that defendant was not impaired.

"When a defendant requests a special jury instruction, 'the trial court is not required to give [the] requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance.' " *State v. Beck*, 233 N.C. App. 168, 171, 756 S.E.2d 80, 82 (alteration in original) (quoting *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976)), *writ of supersedeas denied*, *disc. review denied*, 367 N.C. 508, 759 S.E.2d 94 (2014). To establish error, therefore, the defendant "must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions." *State v. Garvick*, 98 N.C. App. 556, 568, 392 S.E.2d 115, 122 (citing *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792, *cert. denied*, 315 N.C. 189, 337 S.E.2d 864 (1985)), *aff'd per curiam*, 327 N.C. 627, 398 S.E.2d 330 (1990). "The defendant also bears the burden of showing that the jury was misled or misinformed by the instructions given." *Beck*, 233 N.C. App. at 171, 756 S.E.2d at 82 (citing *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005)).

As defendant acknowledges in his brief, we have previously rejected his argument concerning Pattern Jury Instruction 270.20A. In *Beck*, we concluded that

> the trial court's use of the pattern jury instruction [270.20A] informed the jury that in order to return a verdict of guilty, it must be convinced beyond a reasonable doubt that Defendant's alcohol concentration was .08 or

> more. This instruction informed the jury, in substance, that it was not compelled to return a guilty verdict based simply on the chemical analysis results showing a .10 alcohol concentration.

Beck, 233 N.C. App. at 171–72, 756 S.E.2d at 83. The trial court also "informed the jury that it possessed the authority to determine the weight of any evidence offered to show that Defendant was—or was not—impaired." *Id.* at 172, 756 S.E.2d at 83 (citations omitted). Despite defendant's attempt to distinguish *Beck* from the case *sub judice*, we are unable to do so. Accordingly, we reject defendant's second argument. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

III. Conclusion

Although the trial court's jury instructions were proper, we conclude that the trial court erred in admitting Officer Kennerly's testimony regarding the HGN test results and the issue of defendant's impairment related thereto, without requiring him to be qualified as an expert under Rule 702(a). Based on the remaining evidence presented at trial, we further conclude a reasonable possibility exists that, had the error not occurred, the jury would have reached a different result. Defendant is entitled to a new trial.

NEW TRIAL.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
DARRYL ANTHONY HOWARD

No. COA14-1021

Filed 19 April 2016

1. Jurisdiction—subject matter jurisdiction—motion for relief—post-conviction DNA statutes

The trial court did not have subject matter jurisdiction to rule on defendant's claim for relief under post-conviction DNA statutes in a double murder and arson case. Consequently, that portion of the trial court's order granting such relief was void.

2. Civil Procedure—motion for appropriate relief—failure to conduct evidentiary hearing

The trial court erred by failing to conduct an evidentiary hearing before granting defendant's motion for appropriate relief (MAR) in a double murder and arson case given the nature of defendant's post-conviction claims and the unusual collection of evidence offered in support of them. The case was remanded for an evidentiary hearing.

Appeal by the State from order entered 27 May 2014 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 8 April 2015.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Babb, for the State.

Womble Carlyle Sandridge & Rice, LLP, by James P. Cooney III, and Innocence Project, by Barry Scheck and Seema Saifee (both admitted pro hac vice), for defendant.

CALABRIA, Judge.

The State appeals from the trial court's order granting defendant's motion for appropriate relief ("MAR") on the basis of newly discovered evidence pursuant to N.C. Gen. Stat. § 15A-1415(b)(3), "favorable" post-conviction DNA results pursuant to N.C. Gen. Stat. § 15A-270(c), and violations of the U.S. Constitution. For the reasons that follow, we vacate the trial court's order and remand for an evidentiary hearing.

I. Background

The factual genesis of this case was the 27 November 1991 murders of Doris Washington ("Doris") and her thirteen-year-old daughter, Nishonda Washington ("Nishonda"). Approximately one year after the murders, Darryl Anthony Howard ("defendant") was arrested and indicted on two counts of first degree murder and one count of first degree arson. At defendant's trial in March 1995, both first degree murder charges were reduced to second degree murder. The jury found defendant guilty of both murders and the associated arson. Defendant received an eighty-year sentence, which he appealed. This Court concluded that his trial was free from error. *See State v. Howard*, 122 N.C. App. 754, 476 S.E.2d 147 (1996), No. COA95-1156, WL 34899110, at *1, *disc. review denied*, 347 N.C. 272, 493 S.E.2d 755 (1997). The evidence presented by the State at defendant's 1995 trial established the following facts.

Shortly after 1:00 a.m. on 27 November 1991, the Durham Fire Department responded to a call regarding an apartment fire in Few Gardens, a Durham public housing community. Shortly after Durham Firefighter Robert Wesley McLaughlin, Jr. ascended to the smoke-filled apartment's second floor, he discovered the nude bodies of Doris and Nishonda lying face down on a bed in the front bedroom. The fire had been intentionally set in a closet located in the rear upstairs bedroom.

Eric Campin ("Campin"), a crime scene technician with the Durham Police Department ("DPD"), arrived at the crime scene around 7:00 a.m. During his investigation, Campin observed a console TV sitting on the apartment's lower level floor. The TV had been pulled away from the wall, and cable or VCR wires lay on the floor beside it. After Campin observed a dust pattern on top of the TV, which in his experience was an indication of theft, he surmised that a VCR or similar appliance was missing.

Doris and Nishonda's autopsies were performed at approximately 10:30 a.m. on 27 November 1991. Dr. Robert L. Thompson, a forensic pathologist, testified regarding the results, which revealed that Nishonda died from ligature strangulation. While certain evidence suggested that Doris was also strangled, it was determined that she had died from a "blunt force injury to [her] abdomen which caused extensive internal bleeding." Both Nishonda and Doris died before the apartment caught fire.

Sexual assault kits ("rape kits") were collected from Doris and Nishonda, a routine occurrence when a victim "has obviously [been sexually assaulted] or [there is] a possibility of having been sexually

assaulted." Dr. Thompson discovered "a moderate number of well[-] preserved" sperm heads in Nishonda's anal cavity, and subsequent testing of Nishonda's rape kit also detected sperm on her vaginal smears. DNA analysis excluded defendant as a source of the sperm found in Nishonda's vagina and anus. Doris' vagina was torn (one-half inch laceration) and contained a small amount of blood-tinged fluid, but no sperm was detected in any of her body cavities or in her rape kit. Dr. Thompson determined that Doris' vagina was torn around the time of her death and that "something had to be placed inside [it] . . . some pressure put on it to cause that tear." He also determined that Doris had ingested cocaine "fairly recent[ly]" prior to her death.

Roneka Jackson ("Jackson"), a Few Gardens resident who knew Doris, Nishonda, and defendant, testified that Doris used and sometimes sold cocaine. According to Jackson, during the afternoon of 26 November 1991, defendant went to Doris' apartment in search of his girlfriend, but Doris would not let him inside. An argument ensued, and before defendant left, he said to Doris, "I am going to kill you and your daughter." Around 10:00 p.m. that evening, Jackson saw defendant and his brother, Bruce, walking out of Doris' back door carrying a television. After setting the television in his car, defendant placed a three or four minute phone call from a public telephone and then drove away with his brother. Jackson then noticed smoke coming from a back window of Doris' apartment; fire trucks arrived approximately fifteen minutes later.

Rhonda Davis ("Davis") was at Doris' apartment getting high on cocaine from approximately 10:30 a.m. to 10:30 p.m. on 26 November 1991. To the best of Davis' knowledge, Doris did not sell cocaine but she did allow a group of dealers from Miami and another from New York[1] to sell drugs from her apartment. After Nishonda went to bed around 10:30 p.m., Davis and Doris left the apartment for a short while and split up. Hoping to buy some cocaine, Davis returned to Doris' apartment around midnight and knocked on the back door. After approximately five minutes, defendant appeared at the window and told Davis that he and Doris were "busy." Davis then "heard some dishes rattling in the sink or something." After walking around to the front door, Davis "heard somebody going up the steps." Davis then left.

Few Gardens resident Terry Suggs ("Suggs") saw smoke coming from Doris' apartment sometime after midnight on 27 November 1991.

---

1. Testimony at trial indicated that a gang of teen-age drug dealers known as the "New York Boys" operated in Few Gardens. Defendant proceeded at trial under the theory that the New York Boys were responsible for these crimes.

A few minutes before seeing the smoke, Suggs saw defendant and a female walking through the gap between Doris' apartment building and the adjacent building.

Around midnight on 27 November 1991, Kevin Best ("Best") and Dwight Moss ("Moss") were standing across from Doris' apartment. According to Best, defendant and another male—who Moss claimed was defendant's brother, Kenny—exited the back door of Doris' apartment carrying a television and a VCR. "[N]o more than [ten] minutes" later, Best saw smoke coming from Doris' apartment window.

Moss had heard that Doris sold drugs for a person he referred to as "the New York Boy." According to Moss, defendant "hung around" with the New York Boys and was "kind of with them." During his testimony, Moss stated that he saw defendant and Doris arguing about money and drugs during the afternoon of 26 November 1991. Defendant told Doris that she had "messed up the money" and "messed up the drugs," yelled "I'll kill you," and then walked away. Around 11:10 p.m., Moss saw defendant and another male[2] "coming around from the backside of" Doris' apartment. The men were carrying what looked like a television and a VCR.

Angela Oliver ("Oliver"), who knew defendant but did not know Doris, testified for the State and was designated a hostile witness by the trial court. Oliver testified that she was interviewed by Detective Darryl Dowdy of the DPD ("Detective Dowdy"). On 10 October 1992, nearly a year after the murders, Detective Dowdy—the lead investigator on the case—received a tip that Oliver wanted to talk and he interviewed her the same day. During her trial testimony, Oliver stated that she told the truth to Detective Dowdy in the interview, that the interview was tape recorded, and that a transcript of the tape was prepared. The interview transcript was admitted into evidence and Oliver's tape-recorded statement was played in court.

During the interview, Oliver stated that she and defendant went to Doris' apartment between 5:00 and 6:00 p.m. "to get [defendant's] money or drugs," but Doris did not have either one. Defendant told Doris that if she did not have his money or his drugs when he returned, he would "kill her mother-–-ing ass." Sometime later, between 10:00 p.m. and 1:00 a.m., defendant, his brother, Harvey, and Oliver returned to Doris' apartment. Doris still did not have the money or drugs, so defendant "started jumping on her" and pushing her against the wall. Defendant then asked

2. Best testified that Moss identified the male as defendant's brother, Kenny, but at trial, Moss claimed not to recall who the person was.

Oliver to go outside because he did not want her to "be around what he [was] fixing to do." Before Oliver exited the apartment, she saw defendant taking Doris upstairs. According to Oliver, "the next thing I kn[e]w, there was a lot of noise. [Doris] was hollering and screaming[,]" saying something about Nishonda being in the apartment. Eventually, the upstairs lights went on and "it got quiet." At that time, defendant's brother entered the apartment. After defendant set a fire in the apartment, he told his brother that "he had to burn them up. He didn't want to leave no evidence." Before they left, defendant's brother removed something from the apartment wrapped in a sheet and sold it on the street.

When defendant and his brother, Harvey, were taken into custody in November 1992[3], Durham Fire Marshall Milton Smith ("Smith")—who had investigated the fire and murder scene at Doris' apartment—arrived at the Durham Magistrate's Office to complete the booking process. While Smith was collecting information from Harvey, defendant told Smith that his brother, Kenny, not Harvey, was with him at Few Gardens when the fire occurred. Smith then asked defendant, "So, it was your brother Kenneth when you did this thing," to which defendant responded, "Yes, it was me and Kenny." Defendant then leaned over to Smith and added, "You are a smart mother----er, ain't you?"

Gwyndelyn Taylor ("Taylor"), who testified that she knew both defendant and Doris, saw defendant at a Durham nightclub sometime between 27 November and 31 December 1991. While there, Taylor overheard someone ask defendant if he killed Doris, to which defendant responded, "[Y]eah, I killed the bit--. The next one to get in [my] way [I'll] mess them up too."

---

3. To provide context, we briefly outline the events that led to defendant being charged in this case. Defendant was arrested in Few Gardens around 7:30 a.m. on 27 November 1991 for trespassing and driving with a revoked license. While defendant was in custody, he told DPD Officer R.M. Davis that "Doris was his close friend," and emphasized that she had killed Nishonda before killing herself. Defendant was released later that morning; however, he was interviewed by Durham Police again during the afternoon of the 27th. While speaking with investigators, defendant stated that Doris sold drugs for the "Miami Boys" and claimed that he saw several individuals exiting the back of Doris' apartment after the fire had been set. Defendant was eventually released without charge. In June 1992, defendant was admitted to the hospital after being shot five times; allegedly, New York Boys gang members "King" and "O" were responsible for the shooting. Detective Dowdy interviewed defendant regarding O's involvement in two murders unrelated to defendant's shooting. During the interview, defendant stated that the New York Boys had murdered Doris and Nishonda. On 12 November 1992, after multiple witnesses implicated defendant in Doris and Nishonda's murders during interviews with investigators, defendant and his brother were arrested. Defendant was charged with two counts of first degree murder and one count of first degree arson. Harvey was charged only with arson, but that charge was dropped shortly after defendant's conviction.

Defendant and Natasha Mayo ("Mayo")—defendant's girlfriend and the mother of his son—testified in defendant's defense. According to Mayo, defendant went to Doris' apartment two days before her death, and he was looking for Mayo. Defendant was angry to find Mayo there because Doris had encouraged Mayo and other women to have sex with men in exchange for drugs. Mayo further testified that on 26 November, she was with defendant while he was selling drugs out of the Few Gardens apartment of Sharon Bass ("Bass"). Around midnight, Bass and defendant went to get cocaine from "the New York Boy['s]" apartment, which was located in Doris' apartment building. At that time, defendant and Mayo noticed smoke coming from Doris' apartment so they ran back to Bass' apartment because defendant feared he would be cited for trespassing in Few Gardens. Mayo maintained that she and defendant remained at Bass' apartment for the rest of the night, smoking cocaine.

According to defendant, Doris never sold drugs for him but she did sell drugs for the New York Boys. Defendant acknowledged retrieving Mayo from Doris' apartment two days before the murders because, "Doris ha[d] a habit of using other women to get her own drugs." He also stated that Doris did not owe him any money or drugs at the time of her death. Defendant denied killing Doris and Nishonda and denied setting their apartment on fire.

Approximately five months after defendant's trial, in August 1995, Jackson was murdered in Brooklyn, New York, by two members of the New York Boys gang. "Because they could not find a gun," the two men "broke [Jackson's] neck, doused her with gasoline, and lit her on fire." *United States v. Celestine*, 43 F. App'x 586, 589-90 (4th Cir. 2002).

In May 1997, defendant filed a *pro se* MAR in Durham County Superior Court, which was denied. Shortly thereafter, in October 1997, the North Carolina Supreme Court denied defendant's petitions for writ of certiorari and for discretionary review. *State v. Howard*, 347 N.C. 272, 493 S.E.2d 755 (1997).

In May 2004, Moss executed a sworn affidavit recanting a prior statement that he had given to Detective Dowdy, which was read into evidence at defendant's trial. Moss alleged that he was coerced by Detective Dowdy and other DPD officers to provide a false and inaccurate statement against defendant. Moss also claimed that he could not possibly have been in all the places described in his statement.[4]

---

4. We note that the copy of Moss' affidavit contained in the record is essentially illegible. However, we do not question the State's or defendant's representations regarding the affidavit's content.

In 2009, defendant's *pro bono* counsel moved the Durham County trial court to have post-conviction DNA testing performed on Doris and Nishonda's rape kits pursuant to N.C. Gen. Stat. § 15A-269. The court granted defendant's motion. Using advanced technology, a private lab conducted testing on Doris' vaginal swabs and discovered a previously undetected male DNA profile. Defendant was excluded as the source. However, a search of "CODIS," the FBI's national DNA database, generated a "hit" on the profile of Jermeck Jones ("Jones"), who had lived in the Few Gardens area as a teenager and dated Nishonda in the weeks preceding her murder, and who was later incarcerated in Tennessee for various offenses.[5] Consequently, in late 2012, defendant's counsel sent private investigator Jerry Waller ("Waller") to interview Jones. During the interview, Jones stated that he had sex with Nishonda at a friend's house on the night before her murder, but maintained that he had neither met nor had sex with Doris and that he had never been to Doris and Nishonda's apartment. Waller reduced the content of his interview with Jones to a sworn affidavit in September 2013.[6]

After moving for post-conviction DNA testing in 2009, defendant's counsel received—pursuant to an open-file discovery request—the State's entire investigative file from the 1995 murder trial. Included in the State's files was a police informant's routing slip ("the memo"), which contained information from an anonymous informant regarding Doris and Nishonda's murders. The memo, dated 1 December 1991, contained the following information:

> Reference Double Homicide/Arson Phew [sic] Gardens. Informant advised me that subjects were probably murdered because mother owed $8,000.00 to drug dealers from either Philadelphia or New York.
>
> Informant stated that many residents in Phew [sic] Gardens were offered two-thousand dollars a week for use of their apartment but apparently not many accepted.
>
> Informant further stated that perpetrators were believed to have left 4 bags of drugs at the apt. and apparently found some contents missing when they came for them.

---

5. The lab also tested sperm found in Nishonda's vaginal and rectal smears, which revealed a partial male profile. Defendant was excluded as the source and the profile did not match that of Jones. In addition, the partial profile from the unknown male was ineligible for a CODIS search.

6. The affidavit contained only Waller's account of his interview with Jones.

> The perps. then told the victim/tenant she owed them eight-thousand dollars. When perps. came for the money they first raped her before strangling her. The 13 yr. old daughter may have unknowingly walked in on the seen [sic] so then killed her.

Also written in the memo's margin was a note to Detective Dowdy from then-Durham Police Captain E.E. Sarvis ("Captain Sarvis): "Dowdy There may be something to this. I don't remember any public info on the rape. EES[.]" In conjunction with the police memo, defendant submitted the affidavit of his trial counsel, H. Wood Vann ("Vann"), who averred that he had no "independent recollection of ever receiving or seeing" this document, "through discovery or otherwise," before trial. Vann also averred that the memo was "highly exculpatory" and that it would have "eviscerate[d] the State's theory at trial."

On 19 March 2014, defendant filed a second MAR in Durham County Superior Court. Defendant based his motion for a new trial primarily upon the grounds of newly discovered evidence: Jackson's murder, Moss' recantation, the post-conviction DNA results and Waller's affidavit containing Jones' statements regarding the results, and the memo. Pursuant to our Criminal Procedure Act,

> a defendant at any time after verdict may by [an MAR], raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon . . . the defendant's guilt or innocence.

N.C. Gen. Stat. § 15A-1415(c). "This section of the statute codifies substantially the rule previously developed by case law for the granting of a new trial for newly discovered evidence." *State v. Powell*, 321 N.C. 364, 371, 364 S.E.2d 332, 336 (1988) (citing *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976)). To prevail upon an MAR based on the ground of newly discovered evidence, a defendant is required to establish that:

> (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict,

> impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

State v. Rhodes, 366 N.C. 532, 535, 743 S.E.2d 37, 39 (2013) (citing *Beaver*, 291 N.C. at 143, 229 S.E.2d at 183).

Defendant also alleged violations of his due process rights based on the State's failure to disclose material exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) and the State's presentation of false evidence under *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217 (1959). Finally, defendant claimed that the post-conviction DNA results were "favorable" to him pursuant to N.C. Gen. Stat. § 15A-270(c).

The State filed a 1 May 2014 response, and moved that defendant's MAR be denied. Defendant replied to the State's response on 16 May 2014. On 27 May 2014, without conducting an evidentiary hearing, the trial court entered an order which granted defendant's MAR, vacated his convictions, and granted him a new trial. The State appeals.

II. Analysis

A. *Appellate Jurisdiction*

[1] As an initial matter, we must address defendant's motion to dismiss on the grounds that the State has no right to appeal from certain portions of the trial court's order. In this case, the trial court granted defendant's MAR on three different legal grounds: (1) newly discovered evidence, (2) constitutional violations, and (3) "favorable" post-conviction DNA test results. The State cites *State v. Peterson*, 228 N.C. App. 339, 744 S.E.2d 153, *review denied and review dismissed*, 367 N.C. 284, 752 S.E.2d 479 (2013), for the proposition that N.C. Gen. Stat. § 15A-1445(a)(2) "provides a means for the State to appeal an order granting [an MAR] in its entirety even where, as here, the trial court grants the motion based upon both newly discovered evidence and other grounds." In response, defendant argues that, under *State v. Norman*, 202 N.C. App. 329, 688 S.E.2d 512 (2010), the State has no right to appeal an MAR granted, in part, pursuant to N.C. Gen. Stat. § 15A-270(c).[7] According to defendant,

7. Defendant also argues that the State has no right to appeal an MAR granting relief on the ground of constitutional violations. We conclude that, under *Peterson*, this argument is without merit. Our Supreme Court's decision in *State v. Stubbs* also defeats this argument. 368 N.C. 40, 770 S.E.2d 74, 75 (2015) (holding that this Court had subject matter jurisdiction to review the State's appeal from a trial court's order granting the defendant's MAR, which was based on a violation of his rights under the Eight Amendment to the U.S. Constitution).

even if this Court determines that the trial court erred in granting him a new trial based on newly discovered evidence, the State's appeal under section 15A-1445(a)(2) is futile because it cannot appeal the other bases upon which the trial court granted defendant's MAR. As a precautionary measure, the State filed an alternative petition for writ of certiorari contemporaneously with its response to defendant's motion to dismiss. The alternative petition requested this Court to review the trial court's MAR order "pursuant to Rule 21 and/or Rule 2 of the North Carolina Rules of Appellate Procedure[.]"

Our Supreme Court has recognized that the State's right to appeal "in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982) (citations omitted). Appellate jurisdiction in criminal appeals by the State is governed, in general, by section 15A–1445.

In *Peterson*, the trial court granted the defendant's MAR for a new trial based on newly discovered evidence and constitutional violations. *Id.* at 342-43, 744 S.E.2d at 156-57. This Court concluded that the State's appeal was properly before it:

> Pursuant to N.C. Gen. Stat. § 15A–1445[(a)(2)], the State may appeal an order granting a motion for a new trial "on the ground of newly discovered or newly available evidence but only on questions of law." Accordingly, because the trial court granted [the] defendant's MAR based, in part, on newly discovered evidence, the State had the right to appeal the MAR order. We note that the State, in case we found that the MAR order was based solely on *Brady* violations, filed a petition for *writ of certiorari*. Since *certiorari* is not necessary to confer jurisdiction on this Court, we dismiss the State's petition.

Id. at 343, 744 S.E.2d at 157.

According to defendant, however, our decision in *State v. Norman* precludes the State from appealing the portion of the MAR order that was granted pursuant to N.C. Gen. Stat. § 15A-270(c). To understand *Norman*'s holding, a short explanation of our post-conviction DNA testing statutes is necessary.

When certain criteria are met, criminal defendants in North Carolina may move for post-conviction DNA testing of biological evidence. N.C. Gen. Stat. § 15A-269 (2013). If a trial court denies a "defendant's motion

for DNA testing[,]" the defendant may appeal that order. *Id.* § 15A-270.1. When the trial court grants a defendant's motion for DNA testing, it must conduct a hearing on the results. *Id.* § 15A–270(a) ("upon receiving the results of the DNA testing conducted under G.S. 15A-269, the court shall conduct a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant."). If the test results "are unfavorable to the defendant, the court shall dismiss the motion . . . ." *Id.* § 15A-270(b). However, if the DNA testing reveals evidence which is "favorable" to the defendant, "the court shall enter any order that serves the interests of justice, including [one] that . . . (1) [v]acates and sets aside the judgment[,] (2) [d]ischarges the defendant[,] (3) [r]esentences the defendant[, or] (4) [g]rants a new trial." *Id.* § 15A-270(c).

In *Norman*, the trial court granted the defendant's motion for DNA testing and conducted a hearing on the results, which the court determined were unfavorable to the defendant. 202 N.C. App. at 330, 688 S.E.2d at 513-14. As a result, the defendant's motion was dismissed pursuant to subsection 15A-270(b). *Id.* at 331, 688 S.E.2d at 514. On appeal, this Court concluded that although section 15A-270.1 provided a right to appeal from the denial of a motion for DNA testing, the defendant had no right to appeal "from an order denying relief following a hearing to evaluate the test results." *Id.* at 332, 688 S.E.2d at 515. The *Norman* Court presumed that "[i]f the legislature intended to provide a right to appeal from the trial court's ruling on the results of DNA testing, . . . it would have stated as such." *Id.*

Here, defendant contends that "the State has no more right to appeal from a determination that the DNA results were 'favorable' and ordering a new trial, than [the defendant in *Norman*] did from a determination that the results were 'unfavorable.' " Defendant insists that even if the trial court erred in granting him a new trial based on newly discovered evidence, he will receive a new trial anyway because the State has no independent statutory right to appeal the portion of the court's MAR order granting defendant relief on the basis of favorable post-conviction DNA tests results pursuant to subsection 15A-270(c). In other words, defendant argues that the State's appeal under subdivision 15A-1445(a)(2) is futile. We disagree. In fact, defendant had no statutory right to bring his claim for relief under our post-conviction DNA testing statutes in his MAR.

As noted above, defendant filed his MAR pursuant to subsection 15A-270(c) (post-conviction DNA results), subsection 15A-1415(c) (newly discovered evidence) and subdivision 15A-1415(b)(3)

(constitutional violations based upon the newly discovered evidence). The trial court granted him a new trial based on all of those grounds. "According to [subsection] 15A-1415(b), a convicted criminal defendant is entitled to seek relief from his or her convictions by means of [an MAR] filed more than ten days after the entry of judgment on certain specifically enumerated grounds." *State v. Harwood*, 228 N.C. App. 478, 484, 746 S.E.2d 445, 449 (2013). In *Harwood*, this Court recognized that because subsection 15A-1415(b)

> clearly provides that the eight specific grounds listed in that statutory subsection are 'the only grounds which the defendant may assert by a[n MAR] made more than [ten] days after the entry of judgment,' a trial court has no authority to grant a request for relief from a criminal conviction based upon a request made more than ten days after the entry of judgment unless the defendant's request falls within one of the eight categories specified in [subsection] 15A-1415(b)."

Id. at 484, 746 S.E.2d at 450 (quoting N.C. Gen. Stat. § 15A-1415(b)). "For that reason, a trial court lacks jurisdiction over the subject matter of a claim for post[-]conviction relief which does not fall within one of the categories specified in [subsection] 15A-1415(b)." *Id.* (citations omitted). Our review of subsection 15A-1415(b) reveals that defendant's constitutional claims were cognizable under subdivision 15A-1415(b)(3). Defendant was also permitted to file an MAR and seek relief on newly discovered evidence grounds pursuant to subsection 15A–1415(c). However, defendant's claim requesting the trial court to grant relief pursuant to subsection 15A-270(c) could not be brought in his MAR, which was filed well past ten days after the entry of judgment upon his convictions. Indeed, no provision of subsection 15A-1415(b) authorized the trial court to enter an order vacating defendant's original judgment and order a new trial on the basis of "favorable" post-conviction DNA test results. In other words, the trial court did not have subject matter jurisdiction to rule on defendant's claim for relief under our post-conviction DNA statutes. Consequently, that portion of the trial court's order granting such relief is void. *State v. Daniels*, 224 N.C. App. 608, 617, 741 S.E.2d 354, 361 (2012).

This conclusion is in harmony with the fact that our Legislature has provided a specific procedural vehicle for asserting, and obtaining relief on, claims for relief based on post-conviction DNA testing. *See* N.C. Gen. Stat. §§ 15A-269, -270. That statutory scheme has already been

discussed in detail above. Defendant should have requested relief pursuant to subsection 15A-270(c) in an independent proceeding, separate and apart from his MAR.[8] Accordingly, since *all* of the relief granted to defendant was inextricably linked to, and based on, what the court found to be newly discovered evidence, the State properly relied on subdivision 15A-1445(a)(2) as its ground for appellate review. *Peterson*, 228 N.C. App. at 343, 744 S.E.2d at 157 (holding that this Court had jurisdiction to review a trial court's ruling on an MAR that was based, in part, on newly discovered evidence).[9] Defendant's motion to dismiss is therefore denied and the State's (alternative) petition for writ of certiorari is dismissed, as it is unnecessary to confer jurisdiction on this Court.

B. *Evidentiary Hearing*

[2] We now proceed to the State's contention that the trial court erred by failing to conduct an evidentiary hearing before granting defendant's MAR. According to the State, "[i]f defendant has properly supported the allegations of each claim in the MAR with relevant, admissible, factual, proffered evidence, and each claim has merit such that defendant would prevail on that claim if the evidence in the supporting affidavits is deemed credible by the trial court after hearing the evidence from defendant's witnesses, then defendant has at most met the threshold showing required to obtain an evidentiary hearing." For the reasons that

---

8. Although we do not reach the merits of this appeal, if we did, nothing would preclude us from reviewing the same post-conviction DNA test results as newly discovered evidence: the DNA test results would be evaluated pursuant to subsection 15A-1415(c), which states the requirements that must be met before evidence may be characterized as "newly discovered"; at the same time, we would not apply subsection 15A-270(a)'s "favorable" or "unfavorable" analysis to the test results.

9. We note that our Supreme Court has recently held that this Court "has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court." *Stubbs*, 368 N.C. at __, 770 S.E.2d at 76. The Court also recognized that N.C. Gen. Stat. § 15A-1422(c)(3) expressly provides that a trial court's MAR ruling is subject to review by writ of certiorari. *Id.* Accordingly, after *Stubbs*, Rule 21 was amended and now reads in pertinent part: "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review . . . pursuant to [subdivision] 15A-1422(c)(3) of an order of the trial court *ruling* on a motion for appropriate relief." N.C.R. App. P. 21(a)(1) (emphasis added). Prior to the Supreme Court's decision in *Stubbs*, Rule 21 stated in pertinent part "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court . . . for review pursuant to [subdivision] 15A–1422(c)(3) of an order of the trial court *denying* a motion for appropriate relief." N.C.R. App. P. 21(a)(1) (2013) (emphasis added). Given that this case is solely focused on newly discovered evidence, appellate jurisdiction must be analyzed under subdivision 15A-1445(a)(2) rather than subdivision 15A-1422(c)(3).

follow, we conclude that the trial court improperly ruled on defendant's motion without conducting an evidentiary hearing.[10]

We begin by briefly explaining the general nature of MARs and the characteristics of the order issued in the instant case. An MAR, which is created by statute, constitutes "a motion in the original cause[,] . . . not a new proceeding." N.C. Gen. Stat. § 15A-1411(b) (2013). It "is a post-verdict motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial." *State v. Handy*, 326 N.C. 532, 535, 391 S.E.2d 159, 160-61 (1990). Generally, all post-trial motions related to a defendant's trial must be brought under an MAR. N.C. Gen. Stat. § 15A-1411(c).

Our Legislature has specifically characterized the MAR as a procedural vehicle for defendants to challenge their convictions and sentences. *Id.* § 15A-1412. To that end, North Carolina's MAR statutes provide a mechanism to assert multiple, different claims for post-conviction relief in one procedural device. *See* official comment to *id.* § 15A-1411. When a defendant asserts multiple claims in an MAR, the trial court is ultimately charged with evaluating each individual claim on the merits and under the applicable substantive law. As a result, the trial court also sits as the trier of fact during MAR proceedings.

"Whether the trial court was required to afford defendant an evidentiary hearing is primarily a question of law subject to *de novo* review." *State v. Marino*, 229 N.C. App. 130, 140, 747 S.E.2d 633, 640 (2013) (italics added). The procedure governing MARs is set out in N.C. Gen. Stat. § 15A-1420, and subsection (c) contains directives regarding the trial court's duty to hold an evidentiary hearing:

---

10. Although neither party cites this Court's decision in *State v. Stukes*, 153 N.C. App. 770, 571 S.E.2d 241 (2002), we find it necessary to briefly discuss it. In *Stukes*, the trial court granted the defendant's MAR and allowed him a new trial on all charges. *Id.* at 773, 571 S.E.2d at 243. At the trial level, the State "affirmatively argued against the need for an evidentiary hearing" on the defendant's MAR. *Id.* at 774, 571 S.E.2d at 244. On appeal, however, the State asserted that the trial court's decision not to hold such a hearing was error. *Id.* After concluding that the State had not preserved the issue for review, and noting that " '[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct[,]' " this Court rejected the State's argument. *Id.* (quoting *State v. Bruno*, 108 N.C. App. 401, 412, 424 S.E.2d 440, 447 (1993) (citation omitted)).

We find that *Stukes* has no application to the instant case, where the State simply argued—within the confines of the MAR statutes and applicable case law—that defendant's motion should be summarily denied and an evidentiary hearing was not required if the court could determine, based on the pleadings, that the motion was without merit.

> (c) Hearings, Showing of Prejudice; Findings.
>
> (1) *Any party* is entitled to a hearing on questions of law or fact arising from the motion . . . unless the court determines that the motion is without merit. The court *must determine*, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact . . . .
>
> (3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law . . . .
>
> (4) If the court cannot rule upon the motion without the hearing of evidence, it *must conduct* a hearing for the taking of evidence, and must make findings of fact. . . .

N.C. Gen. Stat. § 15A-1420(c) (2015) (emphasis added). "In an evidentiary hearing for appropriate relief where the judge sits without a jury the moving party has the burden of proving by the preponderance of the evidence every fact to support his motion." *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1984) (citing N.C. Gen. Stat. § 15A-1420(c)(5)). As explained in *State v. McHone*, "[u]nder subsection [15A-1420](c)(4), read in *pari materia* with subsections (c)(1) . . . and (c)(3), an evidentiary hearing is *required unless* the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law[.]" 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998) (emphasis added).[11]

An evidentiary hearing is not automatically required before a trial court grants a defendant's MAR, but such a hearing is the general procedure rather than the exception. Indeed, *McHone* dictates that an evidentiary hearing is mandatory unless summary denial of an MAR is proper, or the motion presents a pure question of law.

In the instant case, although the State denied "each and every allegation of fact made by . . . defendant except those facts supported by the record and those specifically admitted[,]" the trial court granted defendant's MAR based upon extensive findings of what it characterized as "undisputed facts." In its lengthy MAR order, the court routinely faulted

---

11. In addition, "[a]n evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact." N.C. Gen. Stat. § 15A-1420(c)(2). This provision does not apply here, as defendant's MAR was made pursuant to section 15A-1415.

the State for failing to present evidence in rebuttal of defendant's allegations. Implicit in the trial court's ruling was its view that, after all MAR materials had been received from defendant and the State, only questions of law remained.

As a result, the trial court treated the MAR proceeding as a burden-shifting scheme. For example, when ruling on defendant's *Brady* claim, the trial court faulted, and even chastised, the State for failing to "tender any evidence by affidavit or otherwise that [the memo] was produced to [defendant] or his counsel."[12] Yet the defendant who seeks relief in an MAR "must show the existence of the asserted ground for relief." N.C. Gen. Stat. § 15A-1420(c)(6). By contrast, the opposing party—here, the State—is not required to "file affidavits or other documentary evidence" or rebut allegations contained in the motion. *Id.* § 15A-1420(b)(2). Defendant nevertheless embraced the trial court's approach at oral argument, asserting that the State neither disputed "many material facts" nor forecasted what an evidentiary hearing would produce. As the State suggests in its brief, the trial court's ruling looks more like a summary judgment, *see* N.C. Gen. Stat. § 1A-1, Rule 56(a), (b) (2013) (allowing for summary judgment by either party in a civil case), than one rendered within the confines of our MAR statutes. *See id.* § 15A-1412 ("The provision in this Article for the right to seek relief by [MAR] is procedural and is not determinative of the question of whether the moving party is entitled to the relief sought or to other appropriate relief."). The State was not required to forecast evidence; defendant was required to *present* evidence for the trial court's evaluation, which he did. The court's evaluation of the evidence, however, was inherently flawed. We agree with the State that as a general matter, unless an MAR presents only pure questions of law, the motion's principal purpose is to obtain an evidentiary hearing on a defendant's claims for relief.

---

12. The court made this finding despite record evidence that: (1) the memo was found "in a bound package of materials that were part of the screening package," presumably a reference to the materials that the State allowed defendant's trial counsel to "screen" before trial; (2) Vann's affidavit specified only that he had no "independent recollection" that the memo had ever been turned over; and (3) in a 2014 interview with the Washington Post, Vann stated that while he would have "seen" and "used" the memo had it been turned over, he could not "say 'with 100 percent certainty' that [the prosecutor] never gave him the [document]." To prevail under *Brady*, a defendant must prove that favorable and material evidence was "actually suppressed." *State v. Kilpatrick*, 343 N.C. 466, 471, 471 S.E.2d 624, 627 (1996). In this instance, a conflict in the evidence regarding the suppression issue arose from the record itself.

Our conclusion is supported by recent language from our Supreme Court in a decision that addressed the trial court's role at hearings on motions to suppress evidence:

> The trial judge who presides at a suppression hearing "sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth." For this reason, our appellate courts treat findings of fact made by the trial court as "conclusive on appeal if they are supported by the evidence." "The logic behind this approach is clear. In this setting, the trial judge is better able than we at the appellate level to gauge the comportment of the parties . . . and to discern the sincerity of their responses to difficult questions." But a trial court is in no better position than an appellate court to make findings of fact if it reviews only the cold, written record. We therefore reject an interpretation of [the statutes governing suppression motions] that would diminish the trial court's institutional advantages in the fact-finding process.

State v. Bartlett, 368 N.C. 309, 776 S.E.2d 672, 674-75 (2015) (citations omitted). These principles share equal application in this case, where the trial court sat as the post-conviction trier of fact. Here, the trial court was obligated to ascertain the truth by testing the supporting and opposing information at an evidentiary hearing where the adversarial process could take place. Instead of doing so, the court wove its findings together based, in part, on conjecture and, as a whole, on the cold, written record.

Given the nature of defendant's asserted grounds for relief, the trial court was required to resolve conflicting questions of fact at an evidentiary hearing. Moss' affidavit illustrates this point. The trial court found that this recantation "by an important witness for the State" rendered Moss' trial testimony false and "undermined the credibility of the State's theory of the case." Consequently, the court concluded that it was newly discovered evidence.

Pursuant to section 15A-1415(c), claims of newly discovered evidence may be based on recanted testimony. If a new trial is to be granted on such testimony, "1) the court [must be] reasonably well satisfied that the testimony given by a material witness is false, and 2) there [should be] a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial." *State v. Britt*,

320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987), *superseded by statute on other grounds as stated in State v. Defoe*, 364 N.C. 29, 33-38, 691 S.E.2d 1, 4-7 (2010).

As to the first *Britt* requirement, the trial court's finding that Moss' repudiation of his pretrial statement rendered his trial testimony false is unsupported by the evidence. The testimony given by Jackson, Davis, Oliver, and Best, which was substantially similar to Moss', suggests that his testimony was true and that his recantation was not. Moss' affidavit does not explain why it was impossible for him to have been in all the places described in his statement. Furthermore, the circumstances under which Moss repudiated his statement—approximately 13 years after he gave it—are absent from the record: Did Moss recant on his own? Did defendant's post-conviction counsel or family members pressure Moss to do so? Did Moss wish to avoid giving further testimony at a new trial? Has Moss changed his tune on the recantation since executing the affidavit in 2004? This Court has previously found that such circumstances have a direct bearing on the veracity of a witness's testimony. *See State v. Doisey*, 138 N.C. App. 620, 628, 532 S.E.2d 240, 245-46 (2000) (affirming the trial court's denial of an MAR based on recanted testimony because the recanting witness testified, during the second hearing on the motion, that she repudiated her recantation and that "she signed the affidavit after being repeatedly questioned" by friends and family members of the defendant about the facts that led to his conviction).

Since the trial court had no opportunity to evaluate Moss' specific reasons for his recantation and his demeanor in giving that explanation, it could not properly determine whether the recantation was genuine and whether the statement and relevant trial testimony were false. Moss should have been questioned about whether his recantation was truthful, or merely a product of defendant's direction as to what to state. Accordingly, an evidentiary hearing was required in order to assess the truthfulness of Moss' affidavit. *See State v. Brigman*, 178 N.C. App. 78, 94-95, 632 S.E.2d 498, 509 (2006) ("Based on the record before us, we cannot determine the veracity of [the recanting witness's] testimony. Nor can we discern whether there is reasonable possibility that a different result would have been reached at trial had [the witness's] testimony at trial been different or non-existent. Accordingly, we must remand the [MAR] based upon her alleged recantation to the trial court for an evidentiary hearing.").

The record is replete with similar factual disputes, many of which the trial court purported to resolve in its findings of fact despite the lack of an evidentiary hearing. We will not address each one, since we are

vacating the trial court's order and a new hearing will be held on remand followed by entry of a new order.

All told, the trial court was presented with a broad range of post-conviction claims based on a large and unusual constellation of conflicting evidence. Most of defendant's claims, and by extension, the trial court's findings, relied heavily on affidavits—and inferences drawn from them—for support. Resolution of those claims necessarily required the trial court to make credibility determinations, which could not be done unless the evidence and witnesses were actually *before* the court. Furthermore, the North Carolina Rules of Evidence apply to post-conviction proceedings. *See Adcock*, 310 N.C. at 37, 310 S.E.2d at 608 ("In hearings before a judge sitting without a jury 'adherence to the rudimentary rules of evidence is desirable . . . . Such adherence invites confidence in the trial judge's findings.' ") (citation omitted); *State v. Foster*, 222 N.C. App. 199, 202-03, 729 S.E.2d 116, 118-19 (2012) ("If we were to adopt the State's position, then the Rules of Evidence would not apply to . . . [MARs] in criminal cases . . . . Obviously, that cannot be the law. . . . [Therefore,] the Rules of Evidence apply to post-conviction DNA testing motions or proceedings."). Some of the trial court's findings of fact in the MAR order were based upon evidence which the State argues was inadmissible as hearsay, hearsay within hearsay, and third-party guilt evidence. Suffice it to say that, on remand, the trial court should base its determinations upon only competent evidence. For the reasons stated above, we conclude that the trial court erred by reaching the merits of defendant's MAR without conducting an evidentiary hearing.

III. Conclusion

Defendant has supported the allegations contained in his MAR with sufficient and potentially compelling evidence. However, under no circumstances did the information offered in support and opposition to the MAR present only undisputed facts and pure questions of law. Given the nature of defendant's post-conviction claims and the unusual collection of evidence offered in support of them, the trial court erred in failing to conduct an evidentiary hearing and make findings on the conflicting assertions before it granted the MAR and ordered a new trial.

Accordingly, we vacate the trial court's order granting defendant's MAR and remand for an evidentiary hearing.

VACATED AND REMANDED FOR AN EVIDENTIARY HEARING.

Judges STROUD and TYSON concur.

STATE OF NORTH CAROLINA
v.
JOSEPH M. ROMANO, DEFENDANT

No. COA15-940

Filed 19 April 2016

Motor Vehicles—habitual impaired driving—driving while license revoked—suppression of blood evidence—warrantless search—reasonableness—no good faith exception

The trial court did not err in a habitual impaired driving and driving while license revoked after receiving a previous impaired driving revocation notice case by suppressing blood evidence an officer collected from a nurse who was treating defendant while he was unconscious. Under the totality of the circumstances, considering the alleged exigencies of the situation, the warrantless blood draw was not objectively reasonable. The officer never attempted to obtain a search warrant prior to the blood draw and could not objectively and reasonably rely on the good faith exception.

Appeal by the State from an order entered 23 March 2015 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 11 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

The State appeals following an order granting Joseph Mario Romano's (Defendant) pre-trial motion to suppress. The State contends the trial court erred in suppressing blood draw evidence Sergeant Ann Fowler ("Fowler"), of the Asheville Police Department, collected from a nurse who was treating Defendant. After appropriate appellate review, we affirm the trial court.

I. Factual and Procedural Background

On 17 February 2014, Defendant was charged with driving while impaired ("DWI") and driving while license revoked after receiving a

previous impaired driving revocation notice. On 6 October 2014, a Buncombe County grand jury indicted Defendant for habitual impaired driving and driving while license revoked after receiving a previous impaired driving revocation notice.

On 26 January 2015, Defendant filed a pre-trial motion to suppress. The record evidence and hearing transcript tended to show the following.

On 17 February 2014, Asheville police received a call that a white male, age thirty to thirty-five, wearing a gray sweater backwards, stopped his SUV on Wood Avenue near Swannanoa River Road. The man got out of the SUV and stumbled towards the rear entrance of Frank's Roman Pizza while carrying a large bottle of liquor.

Officer Tammy Bryson ("Bryson"), of the Asheville Police Department, went to the Wood Avenue intersection and found an SUV parked behind another vehicle at a red light. She searched for the driver while Officer Rick Tullis ("Tullis") inspected the SUV. Bryson and Fowler found Defendant sitting behind Frank's Roman Pizza, about 400 feet from the SUV, drinking from a 1.75 liter bottle of Montego Bay Light Rum. He was wearing a gray sweater backwards and he was covered in vomit.

When Bryson approached, Defendant put the liquor bottle down and staggered in an attempt to stand up. Bryson told him to sit down. Defendant's speech was slurred, his eyes were bloodshot and glassy, and he smelled of alcohol. Then, Bryson handcuffed Defendant. Defendant became very agitated and cursed at the police. He looked towards the SUV and saw a tow truck nearby, and yelled, "What are you doing with my car [expletive]? That's my car."

Fowler asked Defendant to complete field sobriety tests but he was "belligerent" and "would not follow instructions." Fowler kept trying to stand Defendant upright but he kept falling down, and Fowler quit trying to conduct the sobriety tests because it was "unsafe." Fowler administered a roadside portable alco-sensor and it indicated Defendant was impaired by alcohol.

Tullis inspected the SUV and found the hood was still warm and there were no keys inside the SUV. He checked the vehicle's registration and discovered it belonged to Defendant. The keys to the SUV were found in Defendant's left pants pocket.

The police officers called an ambulance, and another officer, Officer Loiacono, rode in the ambulance with Defendant to the hospital. Bryson

followed the ambulance to the hospital. Fowler stayed at the intersection until the SUV was towed, and then went to the hospital.

At the hospital, Defendant became "combative," kicking and spitting while hospital staff tried to treat him. Fowler talked to Defendant and calmed him down for moments at a time, but he then became "irate . . . to the point that the hospital [staff] had to give him medication to calm him down."

Fowler described the following: "[The nurse] knew we wanted to draw blood sooner or later. We had to wait until [Defendant] calmed down. Once he was sedated, he was out, and the hospital was drawing their blood [sic], [the nurse] had drawn enough [blood] to where we could use what she had drawn." This happened, as Fowler described, "[p]retty much right off the bat. They knew he was a DWI [sic]. They knew that he was going to be physically arrested, and we would have somebody with him until he was released from the hospital." Once Defendant was sedated, Fowler and Bryson stepped out of the hospital room.

Fowler testified she "always" tries to collect a chemical analysis of a suspect's blood alcohol level when they are suspected of DWI. According to her, collection is dependent upon "the [suspect's] willingness . . . who has the evidence inside their body, if [sic] they are willing to give that evidence to [police] or not." Defense counsel asked her, "Did you think you would be able to get a blood sample [from Defendant?]" She answered, "If not, I would have gotten a search warrant." Fowler did not attempt to get a search warrant for Defendant's blood at any point, nor did she direct any of her subordinate officers to obtain a search warrant.

Rather, Fowler waited until the nurse drew a "large [vial] of blood." The nurse told Fowler that the police could use the blood and Fowler said to her, "Let me make sure [Defendant] is unconscious." Fowler confirmed Defendant was sedated and unconscious and "advised him of his rights." She "attempted to wake [Defendant] up to get a verbal response from him, but he did not respond to [her]." Nevertheless, she took possession of the excess blood the nurse had drawn.

Defendant was never conscious to be advised of his rights, and consequently, he never refused the blood draw or signed an advice of rights form. None of the police officers obtained a search warrant from the magistrate's office, which is "a couple of miles" from the hospital.

The parties were heard on Defendant's motion to suppress on 2 February 2015. In addition to his motion to suppress the blood

evidence, Defendant moved to suppress the discovery of his driver's license and SUV keys, which the trial court denied. In a 23 March 2015 order, the trial court granted Defendant's motion to suppress the blood evidence. The trial court made the following findings of fact, *inter alia*:

> 5. Upon arrival at the hospital, the Defendant remained belligerent and also became combative toward the medical staff and the officers present. He fought with the staff by flailing about, spitting and kicking. The medial staff had to tie his hands down and the officers attempted to physically restrain his legs. . . .
>
> 6. Sgt. Fowler discussed with the treating nurse that she would likely need a blood draw for law enforcement purposes;
>
> 7. At some point prior to any blood draw, the medical staff determined it was necessary to medicate the Defendant in order to calm him down. Prior to this point, the Defendant had not lost consciousness and was in no way cooperative with medical staff or law enforcement. Sgt. Fowler had not yet advised the Defendant of his chemical analysis rights nor had she requested that he submit[] to a blood draw;
>
> 8. After being medicated, the Defendant lost consciousness to some degree. The restraints were then removed and physical restraint by medical staff or law enforcement personnel was no longer necessary. Sgt. Fowler left the hospital room for some period of time and, in her absence, the treating nurse drew blood from the Defendant at 4:47 [p.m.]. This blood draw was for medical treatment purposes, but the nurse drew additional blood beyond what was needed for medical treatment purposes. When Sgt. Fowler returned to the hospital room, the nurse offered her the additional blood for law enforcement use. Sgt. Fowler initially declined receipt of the blood on the basis that she first wanted to see if the Defendant would consent to the blood draw or receipt of the evidence. To that end, Sgt. Fowler attempted to advise the Defendant of his chemical analysis rights at 4:50 [p.m.], less than fifty minutes after his transport to the hospital. Sgt. Fowler found the Defendant to be in an unconscious state at the time and she was unable to wake him up. Based upon his unconscious state, Sgt. Fowler then took custody of the

> excess blood for law enforcement testing purposes. Due to his medically induced state, the Defendant was rendered unable to meaningfully receive and consider his blood test rights, unable to give or withhold his informed consent, and/or unable to exercise his right to refuse the warrantless test;
>
> 9. Sgt. Fowler expressly relied upon . . . . [N.C. Gen. Stat.] § 20-16.2(b) wherein a person who is unconscious or otherwise in a condition that makes the person incapable of refusal may be tested. As such, Sgt. Fowler did not obtain, or attempt to obtain, a search warrant prior to taking custody of the blood sample. Sgt. Fowler did not believe that any exigency existed, instead she relied on the statutory per se exception;
>
> 10. At all relevant times during the encounter, there were multiple law enforcement officers present and available to assist with the investigation both at the scene and later at the hospital. . . . There were a sufficient number of officers present such that an officer could have left to drive the relatively short distance (only a few miles) to the Buncombe County Magistrate's Office to obtain a search warrant. There were Magistrates on-duty and available at the time. Sgt. Fowler was familiar with the search warrant procedure and had previously obtained blood search warrants in other cases. The "blood draw" search warrant utilizes a fill-in-the-blank form and is not a time-consuming process. The Defendant was purposefully rendered into an unconscious or sedated state by the medical intervention. The Defendant never consented to any blood draw or to law enforcement taking possession of his blood. . . .
>
> 13. Pursuant to *Missouri v. McNeely*, [___ U.S. ___,] 133 S. Ct. 1552 (2013), "a warrantless search of the person is reasonable only if it falls within a recognized exception."

Based upon these findings of fact and the totality of the circumstances, the trial court concluded "no exigency existed justifying a warrantless search." Further, the trial court concluded that N.C. Gen. Stat. § 20-16.2(b), as applied in this case, violated *Missouri v. McNeely*. Accordingly, the trial court suppressed the blood draw evidence. The State timely appealed the trial court's order.

On appeal, the State challenges finding of fact 10 "to the extent it suggests [Defendant] refused or withdrew consent . . . and to the extent it offers a legal conclusion on the issue of consent or implied consent."

II. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). "[T]he trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998) (citation omitted).

III. Analysis

The Fourth Amendment protects the "right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV. Our State Constitution protects these same rights by prohibiting general warrants, which "are dangerous to liberty." N.C. Const. art. I, section 20.

It is a "basic constitutional rule" that "searches conducted outside the judicial process, without prior approval by [a] judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971). These exceptions are jealously and carefully drawn. *Id.* at 455; *see also Jones v. U.S.*, 357 U.S. 493, 499 (1958). The party seeking the exception to the warrant requirement bears the burden of showing "the exigencies of the situation made that [warrantless] course imperative." *Coolidge*, 403 U.S. at 455. The exigent circumstances doctrine "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1558 (2013).

These principles apply to blood draw searches in DWI cases, which involve physical intrusion into a defendant's veins. *Id.* ___ U.S. at ___, 133 S. Ct. at 1554. This "invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.' " *Id.*

___ U.S. at ___, 133 S. Ct. at 1558 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616 (1989)). The United States Supreme Court has held "the natural metabolization of alcohol in the bloodstream" does not present a "*per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1556. Rather, "exigency in this context must be determined case by case based on the totality of the circumstances." *Id.*

Under North Carolina's Uniform Driver's License Act, all drivers who "drive[] a vehicle on a highway or public vehicular area" give "consent to a chemical analysis" if they are "charged with an implied-consent offense." N.C. Gen. Stat. § 20-16.2(a) (2015). "Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person." *Id.* Before the chemical analysis can be administered, the person charged must be taken before a chemical analyst or a law enforcement officer authorized to administer chemical analysis, both of whom must inform the person orally and in writing of the following:

> (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your driver[']s license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
>
> (2) [repealed]
>
> (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
>
> (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
>
> (5) After you are released, you may seek your own test in addition to this test.
>
> (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you

> are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Id. (2015).

Fowler did not advise Defendant of these rights, and did not obtain his written or oral consent to the blood test. Rather, she waited until an excess of blood was drawn, beyond the amount needed for medical treatment, and procured it from the attending nurse. Fowler testified that she believed her actions were reasonable under N.C. Gen. Stat. § 20-16.2(b), which provides the following:

> (b) Unconscious Person May Be Tested—If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary.

N.C. Gen. Stat. § 20-16.2(b) (2015).

It is true, as the State contends, that this Court has affirmed the use of N.C. Gen. Stat. § 20-16.2(b) to justify warrantless blood draws of unconscious DWI defendants. *See State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985); *see also State v. Garcia-Lorenzo*, 110 N.C. App. 319, 430 S.E.2d 290 (1993). However, these cases did not have the benefit of the United States Supreme Court's guidance in *McNeely*, which sharply prohibits *per se* warrant exceptions for blood draw searches.

Applying section 20-16.2(b) to the case *sub judice*, the record suggests, but does not affirmatively show, that Fowler had "reasonable grounds" to believe Defendant committed the implied consent offense of DWI. Reasonable grounds are the equivalent of probable cause in this context. *See Moore v. Hodges*, 116 N.C. App. 727, 729–30, 449 S.E.2d 218, 220 (1994) (citations omitted). It is undisputed that Defendant owned the SUV and possessed the keys. However, when Bryson and Fowler found him behind Frank's Roman Pizza, he was actively drinking rum. The record does not affirmatively show Defendant was intoxicated while he drove his SUV; rather, it raises a question as to whether he became very intoxicated while drinking rum during and/or after his 400-foot

walkabout to Frank's Roman Pizza. More importantly, Fowler testified that she did not attempt to obtain a search warrant at any time, even though the magistrate's office was "a couple of miles" away from the hospital. Additionally, she did not direct the nurse or any other qualified person to draw Defendant's blood.

The State's *post hoc* actions do not overcome the presumption that the warrantless search is unreasonable, and it offends the Fourth Amendment, the State Constitution, and *McNeely*. As the party seeking the warrant exception, the State did not carry its burden in proving "the exigencies of the situation made that [warrantless] course imperative." *Coolidge*, 403 U.S. at 455. Under the totality of the circumstances, considering the alleged exigencies of the situation, the warrantless blood draw was not objectively reasonable. *See McNeely*, ___ U.S. at ___, 133 S. Ct. at 1558. Therefore, we hold the trial court's findings of fact are supported by competent evidence, and they support the trial court's conclusions of law.

Lastly, for the first time on appeal, the State contends the blood should be admitted under the independent source doctrine, or alternatively, through the good faith exception.

"The independent source doctrine permits the introduction of evidence initially discovered, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality." *State v. Robinson*, 148 N.C. App. 422, 429, 560 S.E.2d 154, 159 (2002) (citation omitted). The sequence of events in this case does not follow this framework. Moreover, Fowler's testimony shows the nurse knew the officers "wanted to draw blood sooner or later," that "[Defendant] was a DWI [sic]," and that Defendant was going to be arrested. Therefore, the nurse cannot be an independent lawful source.

The good faith exception allows police officers to objectively and reasonably rely on a magistrate's warrant that is later found to be invalid. *See U.S. v. Leon*, 468 U.S. 897 (1984). In the case *sub judice*, the officers never attempted to obtain a search warrant prior to the blood draw, and they cannot objectively and reasonably rely on the good faith exception.

IV. Conclusion

For the foregoing reasons we affirm the trial court.

Affirmed.

Judges STEPHENS and INMAN concur.

STATE v. TAYLOR

[247 N.C. App. 221 (2016)]

STATE OF NORTH CAROLINA
v.
RODNEY NIGEE PLEDGER TAYLOR, DEFENDANT

No. COA14-21-2

Filed 19 April 2016

1. Confessions and Incriminating Statements—custodial interrogation—right to counsel—ambiguous question—asked during phone call with third party

Where, during a police interview, defendant asked a detective, "Can I speak to an attorney?" while having a phone conversation with his grandmother, it was ambiguous whether defendant was conveying his own desire to receive assistance of counsel or he was merely relaying a question from his grandmother. Because defendant did not unambiguously communicate that he desired to speak with counsel, the detective was not required to cease questioning.

2. Confessions and Incriminating Statements—custodial interrogation—right to counsel—alleged error not prejudicial

Where the Court of Appeals held that the trial court did not err by denying defendant's motion to suppress in his trial for first-degree murder, the State showed that, even assuming the trial court erred, the alleged constitutional error would have been harmless beyond a reasonable doubt. The overwhelming evidence, including eyewitness testimony from three people, supported the jury's verdict that defendant killed the victim with premeditation and deliberation.

Appeal by defendant from judgment entered on or about 23 January 2013 by Judge Carl R. Fox in Superior Court, Wake County. Originally heard in the Court of Appeals on 4 June 2014, with opinion filed 5 August 2014. An order reversing in part the decision of the Court of Appeals and remanding for consideration of "defendant's Fifth Amendment argument on the merits" was filed by the Supreme Court of North Carolina on 6 November 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

STROUD, Judge.

Rodney Nigee Pledger Taylor ("defendant") appeals from a judgment entered on a jury verdict finding him guilty of first-degree murder. Among defendant's arguments on appeal, defendant argued that the trial court erred in denying his motion to suppress because he invoked his Fifth Amendment right to counsel during a custodial interrogation. In our previous opinion, filed on 5 August 2014, we declined to address defendant's Fifth Amendment argument on the merits and held that the trial court committed no error. *See State v. Taylor*, ___ N.C. App. ___, 763 S.E.2d 928 (2014) (unpublished). But on 6 November 2015, on discretionary review, the North Carolina Supreme Court reversed in part this Court's decision and remanded the case to this Court for consideration of "defendant's Fifth Amendment argument on the merits." *State v. Taylor*, 368 N.C. 419, 777 S.E.2d 759 (2015). Accordingly, we address defendant's Fifth Amendment argument on the merits. We find no error.

I. Background

We review our discussion of the factual and procedural background from our previous opinion:

> Defendant was indicted for first degree murder on 12 June 2011. He pled not guilty and proceeded to jury trial. Before trial, defendant filed a motion to suppress statements he made to police. He argued that he had been unconstitutionally seized and that he was subjected to custodial interrogation without the benefit of *Miranda* warnings. The trial court denied defendant's motion by order entered 17 January 2013.
>
> At trial, the State's evidence tended to show that on the evening of 23 June 2011, defendant (also known as "Sponge Bob"), Alex Walton (also known as "Biz" or "Mr. Business"), and Floyd Creecy (also known as "Bruno" or "Big Bs") got together to hang out and smoke marijuana. All three men were involved in a local gang named "Bounty Hunters," which was affiliated with the larger "Crips" gang.[1] The three men went to a store on Poole Road in east Raleigh to buy some cigars to make "blunts."

1. This Court added a footnote here that "Mr. Creecy denied being in a gang, but Mr. Walton testified that Mr. Creecy was [a] 'mentor' to the two younger men in the 'Bounty Hunters.' " *Taylor*, ___ N.C. App. ___, 763 S.E.2d 928, slip op. at 2 n.1.

They all rode together in the black Chrysler Pacifica owned by Mr. Creecy's wife.

After buying what they needed from the store, the three men got back into Mr. Creecy's car and drove back down Poole Road. Mr. Creecy was driving, defendant was in the passenger seat, and Mr. Walton was sitting in the back. As they were riding down Poole Road, defendant said, "There's Polo," and told Mr. Creecy to pull over. There were three individuals walking down the sidewalk—Darius Johnson (also known as "Polo"), Damal [O'Neal], and Kyonatai Cleveland. Mr. Creecy pulled into a church parking lot behind them. Defendant exited the car and approached the three; Mr. Walton then got out and followed defendant.

As defendant and Mr. Walton approached, Mr. Johnson took out what he had in his pockets, including his cell phone, and gave it to Ms. Cleveland. He also took out a wine opener that he had in his pocket, opened a small knife at the end of the opener, then closed the knife and put the opener back in his pocket. Defendant said to Mr. Johnson, "Why didn't you get back to us?" Mr. Johnson responded, "I don't know." Defendant then said, "Well, I gave you more than enough time." At that point, defendant said to Mr. Walton, "Watch out, Biz," pulled out a black revolver and began shooting at Mr. Johnson.

During this encounter, Ms. Cleveland called 911. However, she was unable to tell the operator what was happening because when they saw the gun, Mr. Johnson and his two friends tried to run. Mr. Johnson was hit by one bullet in his front left abdomen. The forensic evidence suggested that the bullet was fired from a close distance—perhaps less than two feet. After shooting Mr. Johnson, defendant and Mr. Walton ran back to the black Pacifica, which Mr. Creecy had pulled around to the next street. The gun was still in defendant's hand when he got back into Mr. Creecy's car.

At trial, Mr. [O'Neal], Ms. Cleveland, Mr. Walton, and Mr. Creecy all testified to the events of that night. The three men all positively identified defendant as the shooter. Mr. Walton and Mr. Creecy testified that defendant and

> Mr. Johnson had an argument approximately a week before the shooting. Mr. Johnson had been asking defendant about joining the Bounty Hunters. Defendant told Mr. Johnson to call him. When Mr. Johnson failed to call him, defendant said that he was going to "bang," i.e. shoot, Mr. Johnson.
>
> Defendant was asked to come to the police station to be interviewed by detectives. He initially denied knowing anything about the shooting, but later admitted that he was in the SUV. He said that the shooter was someone named "Chuck." He later conceded that there was no one named Chuck but continued to deny that he was the shooter. Defendant claimed that after the shooting, he brought the gun back to his house. The detectives went to defendant's grandmother's house, where he was living. When they arrived, defendant's grandmother informed them that she had found a gun in her grandson's room, under his bed. She explained that she did not want the gun in her house, so she took it outside and hid it in her backyard. The police recovered the gun—a black .38 caliber revolver. Four spent shell casings were found in the revolver. Once the gun was recovered and the interview was complete, defendant was placed under arrest. Upon being transported to the jail, two deputies searched defendant's pockets and found two .38 caliber bullets.
>
> The jury found defendant guilty of first degree murder. The trial court accordingly sentenced defendant to life in prison without the possibility of parole. Defendant gave notice of appeal in open court.

Taylor, ___ N.C. App. ___, 763 S.E.2d 928, slip op. at 1-5 (footnote omitted).

II. Discussion

Defendant argues that the trial court erred in denying his motion to suppress because he invoked his Fifth Amendment right to counsel during a custodial interrogation.

A. Standard of Review

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the

> findings of fact support the conclusions of law. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

B. Analysis

[1] In *Edwards v. Arizona*, the U.S. Supreme Court held that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 387 (1981) (discussing *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966)). In *Edwards*, the police interrogated the petitioner on the evening of January 19 but ceased their questioning when the petitioner invoked his right to counsel. *Id.* at 486-87, 68 L. Ed. 2d at 387. The following day, the police returned and advised the petitioner of his *Miranda* rights but did not provide access to counsel. *Id.* at 487, 68 L. Ed. 2d at 387-88. The petitioner "stated that he would talk, but what prompted this action does not appear." *Id.*, 68 L. Ed. 2d at 388. During this interrogation, the petitioner made a self-incriminating statement. *Id.*, 68 L. Ed. 2d at 388. The U.S. Supreme Court held that the petitioner's "statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible." *Id.*, 68 L. Ed. 2d at 388.

In *Davis v. United States*, the U.S. Supreme Court reiterated its holding in *Edwards* that "law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation" and addressed the question of "how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning." *Davis v. United States*, 512 U.S. 452, 454, 129 L. Ed. 2d 362, 368 (1994).

> The applicability of the rigid prophylactic rule of *Edwards* requires courts to determine whether the accused *actually invoked* his right to counsel. To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry.

> Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.
>
> Rather, the suspect must unambiguously request counsel. As we have observed, a statement either is such an assertion of the right to counsel or it is not. Although a suspect need not speak with the discrimination of an Oxford don, . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.
>
> We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. . . . [I]f a suspect is indecisive in his request for counsel, the officers need not always cease questioning.
>
> . . . .
>
> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. . . . But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

Id. at 458-62, 129 L. Ed. 2d at 371-73 (citations and quotation marks omitted). "The test is an objective one that assesses whether a reasonable officer under the circumstances would have understood the statement to be a request for an attorney." *State v. Hyatt*, 355 N.C. 642, 655, 566 S.E.2d 61, 70 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). In *Davis*, the U.S Supreme Court held that the petitioner's

remark—"Maybe I should talk to a lawyer"—was not a request for counsel and thus the Naval Investigative Service agents were not required to cease questioning the petitioner. *Id.* at 462, 129 L. Ed. 2d at 373.

The U.S. Supreme Court had previously explained the difference between invocation and waiver and held that courts must not examine a defendant's statements made *after* his invocation of the right to counsel in determining whether his invocation was ambiguous:

> First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.
>
> . . . .
>
> Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquires, and the two must not be blurred by merging them together.
>
> The importance of keeping the two inquiries distinct is manifest. *Edwards* set forth a "bright-line rule" that *all* questioning must cease after an accused requests counsel. In the absence of such a bright-line prohibition, the authorities through badgering or overreaching—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver cannot be established by showing that the accused responded to further police-initiated custodial interrogation. Using an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable. No authority, and no logic, permits the interrogator to proceed on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt

> on his initial statement that he wished to speak through an attorney or not at all.
>
> . . . .
>
> [A]n accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver.

Smith v. Illinois, 469 U.S. 91, 95-100, 83 L. Ed. 2d 488, 493-96 (1984) (*per curiam*) (citations, quotation marks, brackets, footnote, and ellipsis omitted).

In evaluating whether a defendant's request for counsel is unambiguous, the Seventh Circuit Court of Appeals has held that the questions—"Can I have a lawyer?"—and—"I mean, but can I call [a lawyer] now?"—and—"Can you call my attorney?"—were unambiguous requests for an attorney. *U.S. v. Lee*, 413 F.3d 622, 626 (7th Cir. 2005); *U.S. v. Wysinger*, 683 F.3d 784, 795-96 (7th Cir. 2012); *U.S. v. Hunter*, 708 F.3d 938, 943-44 (7th Cir. 2013). In *Hunter*, the Court explained that

> [i]nstead of using a word like "should" or "might," which would suggest that the defendants were still undecided about whether they wanted a lawyer, all three defendants used the word "can." The defendants' choice of the word "can," by definition, means that they were inquiring into their present ability to be "able to" obtain a lawyer or to "have the opportunity or possibility to" obtain a lawyer. In sum, given the text of the previous statements that our circuit has found sufficient to invoke the right to counsel, the text of [the defendant's] request was sufficient to have put a reasonable officer on notice that [the defendant] was invoking his right to counsel.

Hunter, 708 F.3d at 943-44 (citation omitted). Similarly, in *Sessoms v. Grounds*, the Ninth Circuit Court of Appeals held that the question—"There wouldn't be any possible way that I could have a—a lawyer present while we do this?"—was an unambiguous request for an attorney. *Sessoms v. Grounds*, 776 F.3d 615, 626 (9th Cir. 2015), *cert. denied*, ___ U.S. ___, 193 L. Ed. 2d 207 (2015). In contrast, the Eighth Circuit Court of Appeals held that a state court was not unreasonable in determining that the question—"Could I call my lawyer?"—was not an unambiguous request for counsel. *Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001), *cert. denied*, 534 U.S. 962, 151 L. Ed. 2d 281 (2001).

In *Hyatt*, our Supreme Court held that the defendant's statement "to the effect that his *father* wanted him to have a lawyer present during the interrogation was insufficient to constitute an invocation of [the] defendant's Fifth Amendment right to counsel[,]" because the "statement did not unambiguously convey [the] *defendant's* desire to receive the assistance of counsel." *Hyatt*, 355 N.C. at 656-57, 566 S.E.2d at 71. The Court also noted that the detective "made no attempt to dissuade [the] defendant from exercising his Fifth Amendment right" but "clarified that [the] defendant, and not his father, must be the one to decide whether to seek the assistance of counsel." *Id.* at 657, 566 S.E.2d at 71.

Here, during the police interview, after defendant asked to speak to his grandmother, Detective Morse called defendant's grandmother from his phone and then handed his phone to defendant. While on the phone, defendant told his grandmother that he called her to "let [her] know that [he] was alright." From defendant's responses on the phone, it appears that his grandmother asked him if the police had informed him of his right to speak to an attorney. Defendant responded, "An attorney? No, not yet. They didn't give me a chance yet." Defendant then responds, "Alright," as if he is listening to his grandmother's advice. Defendant then looked up at Detective Morse and asked, "Can I speak to an attorney?" Detective Morse responded: "You can call one, absolutely." Defendant then relayed Detective Morse's answer to his grandmother: "Yeah, they said I could call one." Defendant then told his grandmother that the police had not yet made any charges against him, listened to his grandmother for several more seconds, and then hung up the phone.

Detective Morse then filled out a *Miranda* waiver form and advised defendant of his *Miranda* rights. Defendant refused to sign the form and explained that his grandmother told him not to sign anything. Detective Morse than responded: "Okay. Are you willing to talk to me today?" Defendant responded: "I will. But [my grandmother] said—um—that I need an attorney or a lawyer present." Detective Morse responded: "Okay. Well you're nineteen. You're an adult. Um—that's really your decision whether or not you want to talk to me and kind-of clear your name or—" Defendant then interrupted: "But I didn't do anything, so I'm willing to talk to you." Defendant then orally waived his *Miranda* rights.

Because defendant asked Detective Morse the question—"Can I speak to an attorney?"—during his telephone conversation with his grandmother after she raised the issue of his right to counsel, it is ambiguous whether defendant was conveying his own desire to receive the assistance of counsel or whether he was merely relaying a question from his grandmother to Detective Morse. In the case of the latter, defendant's

question would not constitute an invocation, because a defendant's statement that a family member would like for him to have the assistance of counsel does not "unambiguously convey [the] *defendant's* desire to receive the assistance of counsel." *See Hyatt*, 355 N.C. at 656-57, 566 S.E.2d at 71. Under *Davis*, defendant's ambiguous remark did not require Detective Morse to cease questioning. *Davis*, 512 U.S. at 461-62, 129 L. Ed. 2d at 373 ("If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him."). Defendant's later statement—"But [my grandmother] said—um—that I need an attorney or a lawyer present."—is also not an invocation since it does not "unambiguously convey *defendant's* desire to receive the assistance of counsel." *See Hyatt*, 355 N.C. at 656-57, 566 S.E.2d at 71.

A few minutes later, after Detective Morse advised defendant of his *Miranda* rights, he properly clarified that the decision to invoke the right to counsel was defendant's decision, not his grandmother's. *See Davis*, 512 U.S. at 461, 129 L. Ed. 2d at 373 ("Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney."); *Hyatt*, 355 N.C. at 657, 566 S.E.2d at 71 (noting with approval that the detective "clarified that [the] defendant, and not his father, must be the one to decide whether to seek the assistance of counsel").

Defendant's reliance on *U.S. v. Lee* and *U.S. v. Hunter* is misplaced, because the defendants in those cases did not make their requests within the context of a simultaneous conversation with a third-party. *Lee*, 413 F.3d at 624; *Hunter*, 708 F.3d at 940. Had defendant asked the question—"Can I speak to an attorney?"—before or after his phone conversation, *Lee* and *Hunter* would become much more factually similar. But defendant asked this question *during* the phone conversation with his grandmother after she raised the issue of his right to counsel. The context of defendant's request creates ambiguity concerning whether he was conveying his own desire to receive the assistance of counsel or whether he was merely relaying a question from his grandmother to Detective Morse. We distinguish *Wysinger* and *Sessoms* for the same reason. *See Wysinger*, 683 F.3d at 795-96; *Sessoms*, 776 F.3d at 626. Following *Davis* and *Hyatt*, we hold that Detective Morse was not required to cease questioning, because defendant did not unambiguously convey that he desired to receive the assistance of counsel. *See Davis*, 512 U.S. at 461-62, 129 L. Ed. 2d at 373; *Hyatt*, 355 N.C. at 656-57, 566 S.E.2d at 71.

Because defendant orally waived his *Miranda* rights before he made the statements at issue on appeal, we need not address the issue of whether defendant was in custody for purposes of *Miranda*. We therefore hold that the trial court did not err in denying defendant's motion to suppress.

C. Prejudice

[2] Even assuming *arguendo* that the trial court erred in denying defendant's motion to suppress, we hold that the State has shown that this alleged constitutional error would have been harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2013). We preliminarily note that defendant admitted to killing Mr. Johnson ("the victim") during an inquiry pursuant to *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986); thus, the central issue at trial was whether defendant acted with premeditation and deliberation. We also note that during the police interview, defendant never confessed to shooting the victim; rather, he said Floyd Creecy shot the victim.

Defendant argues that his following statements and omission during the police interview prejudiced him: (1) defendant's admission that he left the car with a gun before approaching the victim; (2) defendant's admission that he put four bullets in the gun; (3) defendant's admission that he warned Biz Walton immediately before the shooting; and (4) defendant's failure to mention that the victim brandished a knife. Defendant argues that these statements and this omission tended to support the State's theory at trial that defendant shot the victim with premeditation and deliberation rather than defendant's theory at trial that he did not act with premeditation and deliberation and shot the victim only because the victim brandished a knife. Although defendant's statements and omission do tend to support a finding of premeditation and deliberation, any alleged error in their admission would be harmless beyond a reasonable doubt given the overwhelming evidence of defendant's premeditation and deliberation.

All three eyewitnesses, Mr. O'Neal, Ms. Cleveland, and Mr. Walton, testified that defendant confronted the victim, shot the victim, and fired multiple shots.[2] *See State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008) (holding that a jury may infer premeditation and deliberation from a defendant's conduct, including "entering the site of the murder with a weapon, which indicates the defendant anticipated a

2. Mr. Creecy testified that he heard multiple gunshots but did not see the shooting.

confrontation and was prepared to use deadly force to resolve it" and "firing multiple shots, because some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger") (citation and quotation marks omitted), *cert. denied*, 558 U.S. 851, 175 L. Ed. 2d 84 (2009). All three witnesses also testified that the victim never threatened defendant with a knife. Biz Walton testified that defendant continued to shoot at the victim while the victim was running away. The State also proffered a recording of the 911 call in which defendant says, "Watch out, Biz," followed by four gunshots. Dr. Jonathan Privette opined that the victim was shot from less than two feet away. Mr. Walton also testified that defendant had previously told him that he was going to "bang" the victim. In light of this overwhelming evidence of defendant's premeditation and deliberation, we hold that the State has shown that any alleged constitutional error in denying defendant's motion to suppress would have been harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b).

III. Conclusion

For the foregoing reasons, we hold that the trial court committed no error.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
BURL RAVON TORRENCE, DEFENDANT

No. COA15-949

Filed 19 April 2016

Motor Vehicles—driving while impaired—officer testimony—expert testimony—impairment—alcohol concentration level

The trial court erred in a driving while impaired case by admitting an officer's testimony on the issue of impairment relating to the results of the HGN test without first determining if he was qualified to give expert testimony. The trial court also erred in admitting the officer's testimony on the specific alcohol concentration level relating to the results of the HGN test. Defendant was entitled to a new trial.

STATE v. TORRENCE

[247 N.C. App. 232 (2016)]

Appeal by defendant from Judgment entered 4 February 2015 by Judge Alan Z. Thornburg in Macon County Superior Court. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.

Richard J. Costanza for defendant.

ELMORE, Judge.

Burl Ravon Torrence (defendant) was found guilty of driving while impaired under N.C. Gen. Stat. § 20-138.1. On appeal, defendant argues that the trial court erred in admitting lay opinion testimony on the results of the Horizontal Gaze Nystagmus (HGN) test. After careful review, and consistent with our opinion in *State v. Godwin*, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 19, 2016) (No. COA15-766), we agree and conclude defendant is entitled to a new trial.

I. Background

The State's evidence tended to show the following: Deputy Jonathan Phillips with the Macon County Sheriff's Office was working as part of the traffic safety unit on the morning of 4 August 2013. He was on patrol around 1:00 a.m. on Route 64, or Highlands Road, when he observed a silver car, driven by defendant, in front of him. Phillips testified that defendant was driving around twenty miles per hour, and the speed limit was fifty miles per hour. He stated that he observed defendant "slow down to 20" and then "speed back up" approximately three times. Phillips "also observed him weaving within his lane, the white line to the yellow line, never breaking those lines but just weaving within the lane."

After following defendant for a few miles, Phillips initiated a stop when defendant began to exit off Route 64, then "all of a sudden made an abrupt lane change," and drove back onto Route 64. When defendant lowered the car window Phillips noticed a strong odor of alcohol, which prompted him to ask defendant to step out of the vehicle. Phillips stated that he detected a strong odor of alcohol coming from defendant's breath, defendant's eyes were red and glassy, defendant "had a little bit of trouble getting out of the vehicle[,]" and defendant's speech was slow. As a result, Phillips offered defendant two portable breath tests and conducted several field sobriety tests, including the HGN test, the vertical gaze nystagmus test, the "one-leg stand test," the "walk-and-turn test," and the "finger-to-nose test."

Afterward, Phillips placed defendant under arrest for driving while impaired and transported him to the Macon County Detention Center to test his breath for alcohol using the Intox EC/IR II device. Phillips administered the test three times but was unable to obtain a breath sample. Phillips indicated that defendant refused the test and presented defendant to a magistrate.

On 16 April 2014, defendant pleaded guilty to driving while impaired under N.C. Gen. Stat. § 20-138.1 in Macon County District Court. The Honorable Donna F. Forga suspended defendant's sentence of sixty days imprisonment and ordered twelve months unsupervised probation. Defendant appealed to Macon County Superior Court for a trial by jury where he was found guilty of driving while impaired on 4 February 2015. The Honorable Alan Z. Thornburg suspended defendant's sentence of sixty days imprisonment and ordered twelve months supervised probation. Defendant appeals.

II. Analysis

Defendant argues that the trial court erred in admitting Phillips's testimony on the issue of impairment relating to the results of the HGN test, and in accepting the State's argument that Phillips was simply reporting his observations, not giving expert testimony. Defendant claims that the trial court erred in failing to evaluate the admissibility of the testimony under Rule 702.

Where the appellant "contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) (citing *Smith v. Serro*, 185 N.C. App. 524, 527, 648 S.E.2d 566, 568 (2007); *FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99 (2000)).

A. Testimony on the HGN Test Results

Expert witness testimony is governed by Rule 702, which provides,

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> > (1) The testimony is based upon sufficient facts or data.

> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.
>
> (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C. Gen. Stat. § 8C-1, Rule 702 (2015).

Accordingly, if an officer is going to testify on the issue of impairment relating to the results of an HGN test, the officer must be qualified as an expert witness under Rule 702(a) and establish proper foundation. *Id.*; *see State v. Godwin*, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 19, 2016) (No. COA15-766) ("Our application of Rule 702(a1) to the facts of this case leads us to conclude that the trial court erred in allowing a witness who had not been qualified as an expert under Rule 702(a) to testify as to the issue of impairment based on the HGN test results."). Moreover, the officer may not testify to a specific alcohol concentration level relating to the results of an HGN test. N.C. Gen. Stat. § 8C-1, Rule 702(a1).

On appeal, the State argues that although Phillips was not tendered as an expert witness, he was qualified to give expert testimony on the HGN test because he "provided substantial evidence of his training, knowledge and skill[.]" At trial, however, the State specifically argued that Phillips was not being offered as an expert witness and that he was "just showing what he saw regarding the test and that's it."

Phillips testified to the meaning of nystagmus, resting nystagmus, lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and onset of nystagmus prior to forty-five degrees. Over objection Phillips stated that defendant did not present resting nystagmus, which indicated that defendant did not have a head injury. Phillips also testified, over objection, "if four or more clues exist that it's a 77 percent chance that they are at a .10 or higher blood alcohol level." He explained that a person may exhibit six clues during the HGN test and that defendant presented with all six clues, as follows:

Q. Let's talk about the lack of smooth pursuit in the left eye. Did you see a lack of smooth pursuit in the left eye?

A. Yes.

Q. And how about the right eye?

A. Yes.

Q. And describe that you saw a lack of smooth pursuit in the defendant's left and right eye.

A. As the eye moves horizontally towards the side of his face, I saw that bouncing motion where his—the pupil would bounce instead of just like it was moving smooth. It would bounce as it heads to the side.

Q. Now the distinct and sustained nystagmus at maximum deviation. Again, what does maximum deviation mean?

A. Maximum deviation is where the pupil is at the corner of the eye without any white showing.

Q. So when you saw the defendant perform this standard field sobriety test, the distinct and sustained nystagmus at maximum deviation, describe his left and right eye?

A. When it was in the corner—

MS. LEPRE: Your Honor, I'm going to renew my objection simply because *State v. Helms* has said that the result of this test is scientifically founded and it does refer then to Rule 702 due to this. And so they are presenting scientific evidence even though he has training in it, there still needs to be a scientific foundation. I have *State v. Helms* here if Your Honor would like to see it.

THE COURT: Mr. Hess?

MR. HESS: Again, we're not asking him to state like the results of the test were. [sic] It's just a standard field sobriety test that he's received training in. So he can testify to what he observed.

THE COURT: Overruled.

. . . .

> A. Both eyes it [sic] was in the corner and it was bouncing there.
>
> Q. And then what was referred to as the onset of nystagmus prior to 45 degrees, what if anything did you notice in the left and right?
>
> A. In both eyes I observed nystagmus prior to 45 degree [sic] angle.

As a lay witness, Phillips effectively informed the jury that, based on the results of the HGN test, there was more than a 77% chance that defendant's blood alcohol level was .10 or higher. Phillips's testimony violated Rule 702(a1) because he testified on the issue of impairment relating to the results of the HGN test without first being qualified under subsection (a), and because he testified on the issue of specific alcohol concentration level relating to the results of the HGN test. N.C. Gen. Stat. § 8C-1, Rule 702(a1). For the reasons discussed below, the error was prejudicial.

B. Prejudicial Error

Because defendant objected to Phillips's testimony at trial, we analyze whether the error was prejudicial under N.C. Gen. Stat. § 15A-1443(a). Defendant has the burden of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2015).

In *State v. Helms*, 348 N.C. 578, 583, 504 S.E.2d 293, 296 (1998), our Supreme Court concluded that the admission of testimony regarding the results of an HGN test administered to the defendant constituted prejudicial error. In reversing this Court's holding that such error was harmless, the Supreme Court explained,

> The evidence presented at trial was clearly sufficient to send the case to the jury and to support a jury finding of guilty of driving while impaired. However, that is not the question before us. The question is not one of sufficiency of the evidence to support the jury verdict. In order to establish prejudicial error in the erroneous admission of the HGN evidence, defendant must show only that had the error in question not been committed, a reasonable possibility exists that a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1997). We

> conclude that, in light of the heightened credence juries tend to give scientific evidence, there is a reasonable possibility that had evidence of the HGN test results not been erroneously admitted a different outcome would have been reached at trial.

Id.

Here, the State points to the following additional evidence to support its argument that any error was harmless: (1) Defendant was driving thirty miles per hour below the speed limit; (2) he was weaving within his lane of travel and made a suspiciously wide left-hand turn into a shopping center after an abrupt lane change; (3) a strong odor of alcohol emanated from his person; (4) he was unsteady on his feet; (5) his speech was slow; (6) his eyes were red and glassy; (7) he performed poorly on the "walk-and-turn test" and the "finger-to-nose test;" (8) the jury watched the video of defendant's driving and sobriety testing; (9) the jury could use the evidence of defendant's refusal with the Intoxilyzer test as evidence of impairment; and (10) the jury deliberated for only forty-two minutes.

Defendant, on the other hand, argues that the State's other evidence did not overwhelming establish defendant's guilt and does not prevent him from meeting his burden of showing prejudice under N.C. Gen. Stat. § 15A-1443(a). Defendant shows the following: (1) The jury heard conflicting evidence about defendant's driving with some testimony showing he was lost; (2) he maintained travel in his own lane and never weaved between different lanes; (3) he promptly pulled over in response to the patrol car's lights; (4) he informed Phillips that he had a medical condition—sciatica—which prevented him from performing some physical dexterity tests, such as the "walk-and-turn test" and the "one-leg stand test;" (5) he walked with a slight limp; and (6) the State failed to obtain a sample of his breath or blood for alcohol concentration testing.

Based on the foregoing and "in light of the heightened credence juries tend to give scientific evidence, there is a reasonable possibility that had evidence of the HGN test results not been erroneously admitted a different outcome would have been reached at trial." *Helms*, 348 N.C. at 583, 504 S.E.2d at 296.

III. Conclusion

The trial court erred in admitting Phillips's testimony on the issue of impairment relating to the results of the HGN test without first determining if he was qualified to give expert testimony. The trial court also erred

in admitting Phillips's testimony on the specific alcohol concentration level relating to the results of the HGN test. Defendant is entitled to a new trial.

NEW TRIAL.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JAMES DAVID WILLIAMS

No. COA15-1052

Filed 19 April 2016

Domestic Violence—unlawfully entering property operated as domestic violence safe house or haven—protective order—sufficiency of evidence

The trial court did not err in an unlawfully entering property operated as a domestic violence safe house or haven by a person subject to a protective order case by denying defendant's motions to dismiss. A violation of the statute occurred as soon as defendant set foot onto the real property upon which the shelter was situated and did not require him to physically enter the building.

Appeal by defendant from judgment entered 8 April 2015 by Judge Joseph N. Crosswhite in Burke County Superior Court. Heard in the Court of Appeals 22 February 2016.

Roy Cooper, Attorney General, by Erin O'Kane Scott, Assistant Attorney General, for the State.

Franklin E. Wells, Jr. for defendant-appellant.

DAVIS, Judge.

James David Williams ("Defendant") appeals from his conviction for unlawfully entering property operated as a domestic violence safe house or haven by a person subject to a protective order in violation of N.C. Gen. Stat. § 50B-4.1(g1). On appeal, he contends that the trial court erred in denying his motions to dismiss because there was no evidence

presented at trial that he actually entered the domestic violence shelter at issue. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: Defendant and Dawn Triplett ("Triplett") were involved in a romantic relationship and lived together in Glen Alpine, North Carolina from December 2013 to July 2014. In April 2014, their relationship began to deteriorate, and on 7 July 2014 a physical altercation occurred during which Defendant pointed a pellet gun at Triplett, pushed her onto a bed, and "threatened to bust [her] head." Defendant then forced Triplett to go outside and get into the driver's seat of his car at which point he "put a cinderblock up against the driver's side so [she] couldn't get out." When Triplett attempted to exit the car through the passenger-side door, Defendant grabbed her by the throat and verbally berated her. A neighbor who witnessed the altercation called the Glen Alpine Police Department, and officers responded to the scene. Triplett related to the officers the events that had transpired, and Defendant was placed under arrest for assault on a female.

On 18 July 2014, Triplett moved into Options Domestic Violence Shelter ("Options"), a safe house for women who are victims of domestic violence and other violent crimes. That same day, Triplett filed a petition for a domestic violence protective order ("DVPO") in Burke County District Court. On 1 August 2014, the Honorable Clifton Smith issued a DVPO preventing Defendant from having any contact with Triplett and further ordering Defendant to "stay away from [Triplett's] residence or any place where [Triplett] receives temporary shelter."

At approximately 6:45 a.m. on 8 August 2014, Defendant drove to the address at which Options was located and parked his car in the parking lot. He exited his vehicle and walked to the front door of the Options building. Defendant attempted to open the door by pulling on the door handle only to discover that it was locked. Defendant then returned to his vehicle and left the premises.

Defendant's presence on the front porch and his attempt to open the door were captured by a surveillance camera that was being monitored at the time by Jessica Dolinger ("Dolinger"), an Options employee. After Defendant's departure, Dolinger and other Options personnel discovered Defendant's identity and contacted law enforcement officers. Defendant was arrested later that day.

On 8 September 2014, Defendant was indicted on charges of (1) violating N.C. Gen. Stat. § 50B-4.1(g1); and (2) attaining the status of an habitual felon. A superseding indictment on the habitual felon charge was issued on 5 January 2015. A jury trial was held before the Honorable Joseph N. Crosswhite in Burke County Superior Court beginning on 6 April 2015. Both at the conclusion of the State's evidence and at the close of all the evidence, Defendant moved to dismiss the charge arising under N.C. Gen. Stat. § 50B-4.1(g1) based on insufficiency of the evidence. The trial court denied both motions.

The jury found Defendant guilty of violating N.C. Gen. Stat. § 50B-4.1(g1), and Defendant subsequently pled guilty to the habitual felon charge. The trial court consolidated Defendant's convictions and sentenced him to 78-106 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

On appeal, Defendant argues that the trial court erred in denying his motions to dismiss based on his contention that in order for him to have been lawfully convicted of violating N.C. Gen. Stat. § 50B-4.1(g1) the State was required to prove that he actually entered the Options *building*. The State, conversely, contends that a violation of the statute occurred as soon as Defendant set foot onto the real property upon which the shelter was situated.

> The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Pressley, __ N.C. App. __, __, 762 S.E.2d 374, 376 (internal citations and quotation marks omitted), *disc. review denied*, 367 N.C. 829, 763 S.E.2d 382 (2014).

N.C. Gen. Stat. § 50B-4.1(g1) is contained within the North Carolina Domestic Violence Act ("the Domestic Violence Act"). *See Comstock v. Comstock*, __ N.C. App. __, __, 780 S.E.2d 183, 185 (2015) ("The issuance and renewal of DVPOs, the means for enforcing them, and the penalties for their violation are governed by North Carolina's Domestic Violence Act, which is codified in Chapter 50B of the North Carolina

General Statutes."). N.C. Gen. Stat. § 50B-4.1(g1) states, in pertinent part, as follows:

> Unless covered under some other provision of law providing greater punishment, any person who is subject to a valid protective order . . . who enters *property* operated as a safe house or haven for victims of domestic violence, where a person protected under the order is residing, shall be guilty of a Class H felony. A person violates this subsection regardless of whether the person protected under the order is present on the property.

N.C. Gen. Stat. § 50B-4.1(g1) (2015) (emphasis added).

The term "property" is not defined in N.C. Gen. Stat. § 50B-4.1. However, our Supreme Court has held that "[n]othing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *State v. Abshire*, 363 N.C. 322, 329, 677 S.E.2d 444, 449 (2009) (citation and quotation marks omitted).

Webster's New World College Dictionary defines property, in pertinent part, as "the right to possess, use, and dispose of something; ownership *[property* in land*]* . . . a thing or things owned; possessions collectively; esp., land or real estate owned[.]" *Webster's New World College Dictionary* 1150 (4th ed. 2010). Therefore, by its plain meaning the term "property" is not limited to buildings or other structures affixed to land but also encompasses the land itself. Accordingly, upon Defendant's entry onto the real property upon which the Options building is situated, he was in violation of N.C. Gen. Stat. § 50B-4.1(g1).[1]

We further observe that the General Assembly's use of the broad term "property" — as opposed to a more restrictive word such as "building" — in N.C. Gen. Stat. § 50B-4.1(g1) is consistent with the purposes underlying the Domestic Violence Act. As the Supreme Court has held, "[o]ur General Assembly enacted the Domestic Violence Act . . . to respond to the serious and invisible problem of domestic violence." *State v. Elder*, 368 N.C. 70, 72, 773 S.E.2d 51, 53 (2015) (citation and quotation marks omitted). "In essence, [the Domestic Violence Act] requires the state to engage in prompt *remedial* action adverse to an individual's property or

1. We note that N.C. Gen. Stat. § 50B-4.1(g1) does not contain a *mens rea* requirement. Therefore, Defendant's act of entry onto the property in and of itself constituted a violation of the statute regardless of his motive for doing so.

liberty interests in order to further the legitimate state interest in immediately and effectively protecting victims of domestic violence." *Thomas v. Williams*, __ N.C. App. __, __, 773 S.E.2d 900, 903-04 (2015) (citation, quotation marks, and brackets omitted). By preventing persons subject to a DVPO from entering not only the domestic violence shelter where the victim resides but also the real property on which the shelter is situated, the General Assembly sought to maximize the protection afforded to victims of domestic violence from their abusers.[2]

Finally, we reject Defendant's argument that the rule of lenity requires a different result. "When construing an ambiguous criminal statute, we must apply the rule of lenity, which requires us to strictly construe the statute in favor of the defendant. However, this rule does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing common sense and legislative intent." *In re N.T.*, 214 N.C. App. 136, 140, 715 S.E.2d 183, 185 (2011) (citation, quotation marks, and brackets omitted). *See Abshire*, 363 N.C. at 332, 677 S.E.2d at 451 ("The rule of lenity requires that we strictly construe ambiguous criminal statutes. However, construing the word 'address' in terms of indicating defendant's residence is not a liberal reading in favor of the State; rather, it is the only plausible reading that comports with the legislative purpose in enacting the registration program." (internal citation omitted)).

As discussed above, adoption of the plain and ordinary meaning of the statutory term "property" in the present context mandates the conclusion that it encompasses both the Options building itself and the land upon which the building sits. We cannot agree with Defendant that the rule of lenity requires us to adopt an unduly narrow definition of the term that would lead to a contrary result.

---

2. While not essential to our holding, we note that in a separate subsection of N.C. Gen. Stat. § 50B-4.1, the General Assembly utilized the phrase "residence or household." *See* N.C. Gen. Stat. § 50B-4.1(b). Thus, by using the term "property" in subsection (g1) rather than repeating the phrase "residence or household," the legislature demonstrated its awareness that the word "property" possessed a different meaning. *See generally Abshire*, 363 N.C. at 332, 677 S.E.2d at 451 (reading statute at issue *in pari materia* with related statutes in order to determine definition of undefined statutory term); *see also Comstock*, __ N.C. App. at __, 780 S.E.2d at 186 (explaining that "statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each. Where . . . the General Assembly includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion" (internal citations, quotation marks, and brackets omitted)).

Defendant does not dispute that (1) he was subject to the DVPO previously obtained by Triplett; (2) Triplett resided at Options on 8 August 2014; and (3) he parked his car in the Options parking lot and then walked up to the front door of the shelter on that date. Having determined that his actions constituted an unlawful entry onto the property of Options within the meaning of N.C. Gen. Stat. § 50B-4.1(g1), we therefore conclude that the trial court properly denied Defendant's motions to dismiss.[3]

Conclusion

For the reasons stated above, we conclude that the trial court did not err in denying Defendant's motions to dismiss and that Defendant received a fair trial free from error.

NO ERROR.

Chief Judge McGEE and Judge GEER concur.

3. Defendant's appellate brief also contains an argument that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of misdemeanor violation of a DVPO. However, because Defendant conceded at oral argument that no legal support existed for this argument, we need not address this issue. *See State v. Stroud*, 147 N.C. App. 549, 564, 557 S.E.2d 544, 553 (2001) ("[Defendant] conceded at oral argument the case law did not support her argument, and she abandoned this argument. Therefore, we dismiss this assignment of error."), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 APRIL 2016)

BARKER v. HATTERAS ISLAND COTTAGE REPAIR No. 15-1205	N.C. Industrial Commission (Y01087)	Affirmed
CORDREY v. FLINN No. 15-1084	Brunswick (14CVS2190)	Affirmed
EDWARDS v. REDDY ICE No. 15-308	N.C. Industrial Commission (13-702146)	Affirmed in part; vacated in part and remanded
ELDER v. ELDER No. 15-778	Mecklenburg (13CVD3235)	Affirmed
EUBANKS v. EUBANKS No. 15-859	Mecklenburg (10CVD25772)	Affirmed
FOSS v. MILLER No. 15-1106	Iredell (05CVD2831)	Affirmed
IN RE A.S.K. No. 15-1061	Caldwell (12J157) (12J158)	Affirmed
IN RE J.S. No. 15-1129	Cumberland (14JA321)	Affirmed
IN RE M.B. No. 15-990	Durham (12JA239)	Affirmed in part, vacated and remanded in part
IN RE CARRITHERS No. 15-867	Guilford (13JA100)	Vacated
LENNON v. N.C. DEP'T OF JUSTICE No. 15-660	Office of Admin. Affirmed Hearings (14DOJ06377)	
LESTER v. GALAMBOS No. 15-1115	Franklin (14CVS804)	Dismissed
LEWIS v. SACKIE No. 15-672	Mecklenburg (10CVD15731)	Dismissed
MAJERSKE v. MAJERSKE No. 15-839	Cumberland (08CVD6664)	Dismissed

NELSON v. ALLIANCE HOSPITALITY MGMT., LLC No. 15-738	Wake (11CVS3217)	Affirmed
PARKS BLDG. SUPPLY CO. v. BLACKWELL HOMES, INC. No. 15-727	Harnett (12CVS2059)	Affirmed
PAYNE v. PAYNE No. 15-457	Stokes (13CVD217)	Affirmed in part; vacated and remanded in part.
RICHARDS v. TIM BELL RACING, LLC No. 15-742	Iredell (14CVS959)	Reversed and Remanded
STATE v. AKBAS No. 15-943	Yadkin (14CRS50149) (14CRS50617) (14CRS50620-21) (15CRS27)	Affirmed
STATE v. BAKER No. 15-723	Forsyth (13CRS58335) (13CRS58338)	Affirmed in Part and Remanded in Part.
STATE v. BASS No. 15-1067	Wayne (12CRS55905)	No Error
STATE v. BLOUNT No. 15-555	Mecklenburg (13CRS214818)	No reversible error.
STATE v. BRADY No. 15-924	Randolph (12CRS29)	Affirmed in part; Dismissed in part; and Remanded
STATE v. BROWN No. 15-1192	New Hanover (14CRS7442-48)	No Error
STATE v. CLAY No. 15-987	Durham (11CRS58619) (12CRS3599) (12CRS50656) (12CRS50704)	No Error
STATE v. DOZIER No. 15-586	Wake (11CRS227765)	Reversed and vacated
STATE v. ELLIS No. 15-665	Wayne (12CRS53254-55)	No Error

STATE v. FOXWORTH No. 15-1092	Guilford (09CRS72211)	Affirmed
STATE v. GUIN No. 15-1007	Union (14CRS53066)	No Error
STATE v. GUSTAVINO No. 15-1193	Buncombe (11CRS58240)	Reversed
STATE v. HARRIS No. 15-770	Mecklenburg (12CRS248102)	Reversed and Remanded
STATE v. HENDERSON No. 15-979	Mecklenburg (13CRS223780)	No Error
STATE v. HUNICHEN No. 15-632	Johnston (12CRS57232-34) (13CRS147) (13CRS2639)	Affirmed
STATE v. JONES No. 15-572	Forsyth (14CRS55466)	Affirmed
STATE v. KEARSE No. 15-994	Onslow (12CRS52711) (12CRS52712)	No Error
STATE v. LANE No. 15-1164	Wake (11CRS220843) (14CRS1442)	No Error
STATE v. LASCO No. 15-1172	Edgecombe (13CRS54115)	No Error
STATE v. LASSITER No. 15-1075	Wayne (11CRS52802-04)	Reversed and Remanded
STATE v. MURCHISON No. 15-563	Columbus (11CRS52451) (11CRS52462)	No Error
STATE v. MURRELL No. 15-1097	Onslow (13CRS56479)	Judgment arrested and remanded
STATE v. NOLASCO No. 15-972	Guilford (12CRS79176)	No Error
STATE v. PERRY No. 15-967	Forsyth (13CRS58953-54) (13CRS58958) (14CRS108-09)	No Error

STATE v. SURRETT No. 15-973	Haywood (13CRS51644)	No Error
STATE v. WEEKS No. 15-1019	Cleveland (14CRS1281-1282) (14CRS51382)	No Error
STATE v. WILLIAMS No. 15-826	Richmond (12CRS50120) (13CRS519)	No Error
STATE v. WINKLER No. 14-442-2	Buncombe (13CRS51036)	No Error
WESLEY v. WINSTON-SALEM/ FORSYTH CNTY. BD. OF EDUC. No. 15-648	Forsyth (14CVS7395)	Reversed in part; and remanded

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS