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COURT OF APPEALS  
REPORTS

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CASES  
ARGUED AND DETERMINED IN THE  
**COURT OF APPEALS**  
OF  
NORTH CAROLINA  
AT  
RALEIGH

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130 OF CHATHAM, LLC, AS A MEMBER OF RUTHERFORD ELECTRIC MEMBERSHIP  
CORPORATION, PLAINTIFF  
v.  
RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, DEFENDANT

No. COA14-1079  
Filed 19 May 2015

**Appeal and Error—mootness—order to produce records**

An appeal was dismissed as moot where the trial court allowed plaintiff to inspect and copy defendant’s membership list and other corporate records. Defendant had already complied with the trial court’s order and it was difficult to discern how any relief would remedy the alleged errors. Neither the public interest exception nor the “capable of repetition yet evading review” exception applied here.

Appeal by Defendant from orders entered 28 July 2014 by Judge Alan Z. Thornburg in Rutherford County Superior Court. Heard in the Court of Appeals 4 March 2015.

*Roberts & Stevens, P.A., by Ann-Patton Hornthal and William Clarke, for Plaintiff.*

*Parker Poe Adams & Bernstein, LLP, by Michael G. Adams, Benjamin Sullivan, and Morgan H. Rogers, for Defendant.*

STEPHENS, Judge.

Defendant Rutherford Electric Membership Corporation (“Rutherford”) appeals from the trial court’s order allowing Plaintiff

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[241 N.C. App. 1 (2015)]

130 of Chatham (“Chatham”) to inspect and copy its membership list and other corporate records. After careful consideration, we hold that because it is moot, this appeal must be dismissed.

*Facts and Procedural History*

Rutherford is an electric membership corporation (“EMC”) organized under Chapter 117 of our General Statutes that owns and operates an electric distribution system for members in its service area, which covers all or portions of 10 counties in western North Carolina. Chatham owns over 18,000 acres of property in Rutherford’s service area, is a member of Rutherford in good standing, and receives electricity from Rutherford at two accounts in McDowell and Burke counties. These parties have been feuding for several years, with their dispute arising from Rutherford’s efforts to build a power line across an undeveloped tract of Chatham’s property that separates two of Rutherford’s electrical substations. When Chatham refused to sell Rutherford an easement, Rutherford initiated condemnation proceedings pursuant to Chapter 40A of our General Statutes. *See Rutherford Elec. Membership Corp. v. 130 of Chatham, LLC*, \_\_ N.C. App. \_\_, 763 S.E.2d 296 (2014), *appeal dismissed and disc. review denied*, \_\_ N.C. \_\_, 769 S.E.2d 192 (2015). The present litigation arises from Chatham’s request, as a member of Rutherford acting pursuant to the North Carolina Nonprofit Act and sections 55A-16-02 and -04 of our General Statutes, to inspect Rutherford’s membership list and other corporate records in order to participate in the nomination and election of directors to Rutherford’s board of directors.

On 12 May 2014, Chatham submitted a written request to inspect and copy Rutherford’s membership list and other corporate records pursuant to N.C. Gen. Stat. § 55A-16-02. On 15 May 2014, Rutherford’s counsel notified Chatham that its request would be denied unless it utilized one of Rutherford’s “Member Information Request” forms, and so on 16 May 2014, Chatham resubmitted its request using the required form. On 20 June 2014, Rutherford provided a 363-page response to Chatham’s request, 238 pages of which consisted of old newsletters mailed to Rutherford’s members. This response did not include Rutherford’s membership list, omitted several additional categories of requested corporate records, and provided incomplete or heavily redacted records pertaining to Chatham’s other requests.

On 30 June 2014, Chatham submitted another written request to inspect and copy Rutherford’s corporate documents, focusing largely on the membership list and other records not included to Rutherford’s

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[241 N.C. App. 1 (2015)]

initial response. This time, Chatham stated that its request was made in good faith and that the documents requested were “directly connected with the purpose of informing [Chatham] about the entity of which it is a member” and “directly connected to [Chatham’s] desire to participate in the nomination of directors to [Rutherford’s] board of directors, the election of directors, the service of current directors and their tenure, the annual meeting in the fall of 2014 and to evaluate nominees to the board of directors.” The request also notified Rutherford that Chatham’s authorized representatives and agents planned to visit Rutherford’s corporate office to inspect and copy the requested documents on 9 July 2014. On 8 July 2014, Rutherford’s counsel replied to Chatham with a supplemental response to Chatham’s 12 and 16 May 2014 Member Information Requests but also stated that Rutherford could not respond to Chatham’s 30 June 2014 member information request by 9 July 2014 and would instead respond by 25 July 2014. Rutherford’s 8 July 2014 response did not include its membership list, but did contain a redacted version of Rutherford’s Board Policy M-12. Policy M-12 provides in pertinent part that Rutherford’s responses to Member Information Requests are determined by Rutherford’s general manager and its corporate attorney “based on their belief that (1) the information requested and the purpose for which it is requested are materially germane to the requesting person’s status and interests as a member of [Rutherford] and (2) furnishing the requested information will not be adverse to [Rutherford’s] best interests.” Policy M-12 also provides that information regarding Rutherford’s membership list and the minutes from its board meetings “will not be furnished except pursuant to a court order.”

On 11 July 2014, Chatham filed a verified complaint in Rutherford County Superior Court alleging that its Member Information Requests fully complied with Chapter 55A’s requirements but that Rutherford had refused to allow Chatham to inspect and copy its records and that the statutorily allotted time for complying with Chatham’s request had expired. As relief, Chatham sought an order to permit immediate inspection and copying of Rutherford’s membership list and other previously requested corporate records on an expedited basis pursuant to N.C. Gen. Stat. § 55A-16-04.<sup>1</sup> Alternatively, Chatham petitioned for a writ of *mandamus* and a mandatory injunction requiring production of Rutherford’s records and also requested a stay of Rutherford’s board

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1. In addition, Chatham’s complaint alleged a similar cause of action under Chapter 55 of our General Statutes. While we express no opinion on the ultimate outcome of this case, we agree with the trial court that Chapter 55, which governs for-profit corporations, is inapplicable here to Rutherford.

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[241 N.C. App. 1 (2015)]

election deadlines and annual meeting. That same day, Chatham filed its Notice of Hearing for 21 July 2014 in McDowell County Superior Court<sup>2</sup> and provided Rutherford's counsel with courtesy copies of its pleadings, although it did not formally serve Rutherford until 30 July 2014.

On 15 July 2014, Rutherford filed a Notice of Designation of this case as a mandatory complex business case under section 7A-45.4 of our General Statutes. That same day, with Chatham's consent, then-Chief Justice Sarah Parker of the North Carolina Supreme Court designated this case as a mandatory complex business case and ordered it to be assigned to the North Carolina Business Court.

On 21 July 2014, a hearing on Chatham's verified complaint was held in McDowell County Superior Court with Judge Alan Z. Thornburg presiding. Before the hearing, Rutherford filed a motion to dismiss the action for lack of subject matter jurisdiction and improper venue or, alternatively, to transfer venue to Rutherford County. In support of its motion, Rutherford argued that: (1) given its status as an EMC, the action should be governed not by Chapter 55A of our General Statutes but instead by Chapter 117, which establishes the North Carolina Rural Electrification Authority and grants broad discretionary authority to the boards of directors of rural electric membership corporations, including the power to regulate the election of board members and the power to establish procedures for handling member requests for information; (2) even if Chapter 55A did apply, McDowell County was an improper venue because claims premised on Chapter 55A must be heard in the county where the corporation's principal place of business is located, *see* N.C. Gen. Stat. § 55A-16-04 (2013), and Rutherford's principal place of business is located in Rutherford County; (3) Rutherford had already provided Chatham with all the records it was entitled to inspect under Chapter 55A; (4) regardless of Chatham's purported reasons, in light of the prior history of litigation between the parties, Chatham's inspection request amounted to an impermissible fishing expedition, and thus Rutherford had acted in accordance with Chapter 55A in denying that request because it was not made for a proper purpose; and (5) it was improper for the matter to proceed any further because Rutherford had not been formally served, had effectively received only four days'

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2. Although this action was filed in Rutherford County, there were no sessions of superior court scheduled there until August 2014, so Chatham sought to take advantage of local rules that would allow the case to be heard in McDowell County, which is in the same judicial district as Rutherford County.

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notice of the hearing, and the matter had already been designated to the Business Court. For its part, Chatham insisted that: (1) Rutherford had not yet provided its membership list and other requested documents covered by Chapter 55A; (2) due to recent changes to Rutherford's policies for electing directors and rapidly approaching related deadlines, Chatham urgently needed the membership list in order to collect the signatures required for nominating directors and collecting proxies before the elections scheduled for Rutherford's annual meeting in October 2014; and (3) in light of Policy M-12's express requirement of a court order, Chatham had no other option apart from the present lawsuit for obtaining relief and, although Chapter 55A's plain language requires such a suit to be *filed* in the county of Rutherford's principal place of business, it is silent as to where the hearing should be held. Since there were no sessions of Superior Court scheduled in Rutherford County until August, and given the aforementioned rapidly approaching election deadlines, Chatham sought to take advantage of local rules that would allow the case to be heard in McDowell County, which is in the same judicial district as Rutherford County. At the close of the hearing, and in a subsequent written order, Judge Thornburg denied Rutherford's motion to dismiss but granted its motion to transfer venue and instructed the parties to appear in Rutherford County Superior Court on 24 July 2014.

On 23 July 2014, the Business Court assigned the case to the Honorable Louis A. Bledsoe III. That same day, Rutherford filed a motion to continue the next day's scheduled hearing in Rutherford County so that the matter could be heard and decided in accordance with the Business Court's rules and procedures. Later that same day, Judge Bledsoe's law clerk sent an email to the parties stating:

Because the pending matters before Judge Thornburg in the above case were heard and calendared for further hearing prior to the designation of the case to the Business Court, it is the policy of the Business Court that Judge Thornburg can decide whether to go forward with the hearing and rule on the matters pending before him at the time of designation.

On 24 July 2014, Rutherford filed a demand for a jury trial. That same day, Judge Thornburg presided over a hearing held in Rutherford County Superior Court regarding Chatham's request for an order to permit inspection and copying of Rutherford's membership list and other corporate records. In support of its motion for a continuance, Rutherford argued that: (1) N.C. Gen. Stat. § 7A-45.4 required all further proceedings in the matter to be held before the Business Court; and (2) N.C.

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Gen. Stat. § 55A-16-04 provides two distinct procedures for inspection requests, and although the statute allows a court to summarily order inspection of certain types of records, it expressly requires that requests involving membership lists be determined on an expedited basis governed by our Rules of Civil Procedure, but in this case Rutherford had not yet been given an opportunity to file an answer to Chatham's complaint or conduct discovery into whether Chatham's request had been made in good faith for a proper purpose. After Judge Thornburg denied Rutherford's motion, Rutherford again accused Chatham of attempting to exploit Chapter 55A to launch an impermissible fishing expedition and also argued that Chatham had not shown that the records it sought were directly connected to its request for the entire membership list, which Rutherford reasoned was overbroad because only two of its three districts were scheduled to elect directors at the annual meeting in October. Rutherford also emphasized privacy concerns for its members' personal information. For its part, Chatham countered that: (1) it only intended to use Rutherford's membership list for the proper purpose of participating in nominating and electing directors; (2) it was necessary to obtain the entire membership list because Rutherford's policies require that director nominations be supported by signatures from at least 1% of its estimated 67,500 members, but only one of those signatures can come from each household and it can only be the signature of the person first named on the member account; and (3) Rutherford's argument about maintaining its members' privacy was critically undermined by its own practice of regularly publishing their names and personal information in its newsletters. At the close of the hearing, Judge Thornburg announced that he would grant Chatham's request for an order permitting inspection and copying of Rutherford's membership list and other corporate records. When Rutherford's counsel inquired about the possibility of obtaining a stay pending appeal, the parties agreed that given the case's designation as a mandatory complex business case and assignment to Judge Bledsoe, the Business Court had jurisdiction over that request and any other motions going forward.

In a subsequent written order signed and filed on 28 July 2014, Judge Thornburg denied Chatham's motions for a writ of *mandamus*, a mandatory injunction, and a stay of Rutherford's board election deadlines, but concluded that Chatham had complied with all the statutory requirements for requesting inspection and copying of Rutherford's records on an expedited basis under Chapter 55A and therefore ordered Rutherford to provide Chatham with its membership list and a sample ballot for its director elections by 1 August 2014, and with all other requested records by 23 August 2014, but expressly limited Chatham's use of all records to



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the purposes set forth in its requests. However, the order denied Chatham's request that Rutherford pay its litigation costs, concluding instead that Rutherford had refused Chatham's request in good faith "because it had [a] reasonable basis for doubt" about Chatham's right to inspect the records requested. That same day, Rutherford filed notice of appeal to this Court and also filed an emergency motion to establish bond for a Section 1-290 stay, or a stay pending appeal. On 30 July 2014, Judge Bledsoe presided over a hearing which the parties joined by teleconference, during which Rutherford's counsel complained that "[a]s a practical matter, if you don't give a stay, any victory we get on appeal is the classic Pyrrhic victory, meaning that wow, it feels good, we get an order, but it accomplishes nothing." Nevertheless, Judge Bledsoe denied Rutherford's motion in a written order and opinion entered 31 July 2014.

Rutherford ultimately complied with Judge Thornburg's order to allow Chatham to inspect its membership list and other corporate records, and now on appeal seeks to challenge: (1) the trial court's holding that Chatham's Member Information Request was governed by Chapter 55A of our General Statutes rather than Chapter 117; (2) the trial court's determination that Chatham requested the membership list for a proper purpose; (3) the trial court's jurisdiction to enter any order in this matter after it had already been designated to the Business Court and assigned to Judge Bledsoe; and (4) a litany of purported procedural errors including the denial of any opportunity to conduct discovery and the denial of Rutherford's demand for a jury trial.

*Analysis*

Several of Rutherford's arguments to this Court appear to raise issues of first impression, but before proceeding to their merits, we must determine whether this appeal is properly before us. Because we find that the issues argued on appeal are moot, we dismiss Rutherford's appeal.

As a general matter, a case is moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citing *Black's Law Dictionary* 1008 (6th ed. 1990)). Thus, "[w]henever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law." *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citation

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omitted). “If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action.” *Id.* (citation omitted).

In the present case, Rutherford has already complied with Judge Thornburg’s order to allow Chatham to inspect and copy its membership list and other corporate records, and the October 2014 director elections that Chatham sought to use this information to participate in have already occurred. Under these circumstances, it is difficult to discern how any relief we could provide would remedy the alleged errors of which Rutherford now complains. Thus, even if we agreed with Rutherford’s arguments that it should never have been required to allow Chatham to inspect and copy its records, because Chatham has already inspected and copied Rutherford’s records, this issue is moot. *See, e.g., Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703 (“This appeal is technically moot because the information sought by [the] plaintiff has been fully disclosed.”), *disc. review denied*, 356 N.C. 433, 571 S.E.2d 221 (2002).

Our determination that the issues brought forth in an appeal are moot does not end our inquiry, however, because “[e]ven if moot . . . [an appellate court] may, if it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution.” *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citations omitted). We may also consider a moot issue on appeal pursuant to other established exceptions to the mootness doctrine. Most relevant here, cases which are “capable of repetition, yet evading review may present an exception to the mootness doctrine.” *Boney Publishers, Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 703 (citations and internal quotation marks omitted). In order for this exception to apply, there are two required elements: “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” *Id.* at 654, 566 S.E.2d at 703-04 (citation omitted).

Here, in its appellant brief, Rutherford offered no argument regarding our mootness doctrine or the exceptions. When asked during oral arguments why this case is not moot, Rutherford focused on the “capable of repetition yet evading review” exception’s first element, arguing that this case evades review because of the relatively brief amount of time that elapsed between Chatham’s Member Information request and the trial court’s order granting that request as compared to the average duration of an appeal to this Court. As to the exception’s

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second element, Rutherford also complained that without an opinion from this Court correcting the trial court's errors, Chatham will be free to engage in future fishing expeditions by exploiting the wrongly decided precedent established in Judge Thornburg's order. For its part, Chatham suggested in its appellee brief that this Court should ignore any mootness concerns based on our recent decision in *In re A.N.B.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 754 S.E.2d 442, 445 (2014) (allowing review of an expired order continuing voluntary admission of a juvenile to a secure inpatient psychiatric treatment facility because this Court has a duty to address otherwise moot cases that raise questions involving matters of public interest and because the harm complained of was capable of repetition yet evading review). Chatham argues further that we should affirm Judge Thornburg's order because Rutherford's refusal to respect its member's inspection rights "is likely to occur again given the annual election of directors from the 10 county region and the substantial public interest in this nonprofit's activities affecting thousands of members and electricity recipients."

After careful consideration, we conclude that neither the public interest exception nor the "capable of repetition yet evading review" exception applies in this case. We are not persuaded by Chatham's assertion that the public interest exception should apply here, given that there is no evidence in the record that this litigation represents anything other than the latest episode in an ongoing private dispute between Chatham and Rutherford. We are similarly unpersuaded that this case satisfies either element of the "capable of repetition yet evading review" exception.

As to the "capable of repetition yet evading review" exception's first element, Rutherford's concerns about the short duration of this litigation evading review in future cases are unfounded because if Rutherford ever again finds itself in a similar position, it can take steps that it failed to take in the present case—such as, for example, seeking a declaratory judgment of the parties' rights from the trial court—in order to ensure that next time, there will be a live controversy remaining for our review. As to the second element, while Chatham bases its argument that this case is capable of repetition on the fact that Rutherford's directors are elected annually, its argument ignores the fact that as a result of having prevailed below, Chatham already has copies of Rutherford's membership list and corporate records, thereby substantially mitigating, if not totally obviating, any future need for it to file additional Member Information Requests in order to participate in Rutherford's director elections. By the same logic, Rutherford's argument that this

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case is capable of repetition also fails, because if Chatham already has Rutherford's membership list and corporate records, it seems unlikely that a court would find Chatham had a proper purpose under Chapter 55A to request them again, and we therefore conclude that there is no "reasonable expectation that [Rutherford] would be subjected to the same action again." *Boney Publishers Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 703-04 (citation omitted). Moreover, although Rutherford's appeal presents this Court with several issues of first impression, we do not believe that the procedural history of this case—marred as it is by irregularities if not outright errors—presents a fitting vehicle for such determinations, and we therefore decline to exercise our discretion in order to reach them. Accordingly, Rutherford's appeal is

DISMISSED.

Judges HUNTER, JR., and TYSON concur.

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 BETH DESMOND, PLAINTIFF

v.

 THE NEWS AND OBSERVER PUBLISHING COMPANY, McCLATCHY NEWSPAPERS,  
 INC., MANDY LOCKE, JOSEPH NEFF, JOHN DRESCHER, AND  
 STEVE RILEY, DEFENDANTS

No. COA14-625

Filed 19 May 2015

**1. Appeal and Error—interlocutory orders and appeals—defamation action—right of free speech—substantial right**

An appeal in a defamation action was properly before the Court of Appeals even though the trial court's order denying defendants' motion for summary judgment was interlocutory. Immediate appeal is available from an interlocutory order which affects a substantial right. A misapplication of the actual malice standard when considering a motion for summary judgment would have a chilling effect on a defendant's right to free speech and implicated a substantial right.

**2. Libel and Slander—newspaper article—expert opinions—genuine issues of fact**

The trial court in a defamation action properly denied defendants' motion for summary judgment as to certain statements about expert opinions in a newspaper article about firearms analysis in

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a first-degree murder trial. There were genuine issues of material fact as to whether defendants accurately reported the opinions and statements the independent experts whom they consulted and about whether the reporter acted with actual malice.

**3. Libel and Slander—newspaper article--firearms analyst—testimony in underlying trial**

In a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work, certain statements and conclusions about bullet fragments in plaintiff's testimony in the underlying criminal action was substantially accurate and thus not actionable.

**4. Libel and Slander—newspaper article—firearms analyst—statements of another expert**

The trial court should have granted summary judgment in favor of defendants in a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work. There was no genuine issue as to the factual accuracy of statements.

**5. Libel and Slander—newspaper article—firearms analyst—scribbled notes**

In a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work, a statement that plaintiff "scribbled" her notes did not tend to disgrace or degrade her. The statement was neither libelous per se nor libelous per quod and the trial court should have granted summary judgment in favor of defendants as to that statement.

**6. Libel and Slander—newspaper article—firearms analyst—criticism of firearm analysis generally**

The trial court should have granted summary judgment in favor of defendants as to a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work. Experts differ on the reliability of firearm and toolmark analysis, so a statement that experts could not provide a probability of error was not incorrect. In addition, the statement was not directly of or concerning plaintiff herself, but more of a criticism of firearm and toolmark analysis generally.

Appeal by defendants from order entered 14 March 2014 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 18 November 2014.

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*DeMent Askew, LLP, by James T. Johnson, for plaintiff-appellee.*

*Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin and Hugh Stevens, for defendants-appellants.*

*The John Bussian Law Firm, PLLC, by John A. Bussian, for amicus curiae the North Carolina Press Association, Inc.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak and W. Michael Dowling, for amicus curiae the North Carolina Association of Broadcasters, Inc.*

STROUD, Judge.

The News and Observer Publishing Company (“N&O”), McClatchy Newspapers, Inc. (“McClatchy”), and Mandy Locke (collectively “defendants”) appeal from the trial court’s order denying their motion for summary judgment as to libel claims brought by Beth Desmond (“plaintiff”). We affirm in part, reverse in part, and remand the case to the trial court.

### I. Factual Background

The alleged defamation arose out of defendants’ newspaper articles regarding plaintiff’s testimony in two criminal trials. Both of the criminal defendants in those cases appealed their convictions to this Court, and we will first review briefly the facts of those underlying cases, as previously described by this Court.

#### A. Underlying Criminal Cases

[In Pitt County, North Carolina, during] the afternoon of 19 April 2005, Loretta Strong and several of her female cousins and friends (collectively, the “Haddock girls”) were socializing in a vacant lot across the street from the home of Strong’s grandmother, Lossie Haddock. [Vonzeil Adams] drove by the lot with a group of her girlfriends. A verbal altercation arose between the two groups of women. [Adams] was angry with the Haddock girls because [Adams’s] sister had complained to [Adams] that the Haddock girls had assaulted the sister in the presence of [Adams’s] children. During the exchange, [Adams] said she would return and that she had “something” for the Haddock girls.

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Later that afternoon, some of the Haddock girls drove by [Adams's] house where another verbal altercation occurred. The Haddock girls returned to and congregated on Lossie Haddock's porch.

Around 6:00 p.m. or 7:00 p.m., [Adams] traveled to Lossie Haddock's house in a reddish Chevrolet Caprice driven by her boyfriend, Jemaul Green. [Adams's] sister and several girlfriends were in the car as well. A car full of [Adams's] girlfriends followed shortly behind. [Green] parked the car across from Lossie Haddock's house. [Adams] exited the vehicle and walked toward the house, exchanging words with the women on the porch. The other women exited the vehicle, but stayed behind [Adams]. Strong stepped off the porch and began to approach [Adams], but stopped before she reached the street.

[Adams] stopped in the middle of the road. She then exclaimed that someone should get a firearm and shoot the Haddock girls. . . . [Green] exited the vehicle and fired a gun into the air. [Green] then pointed the gun in the direction of Lossie Haddock's house and fired several shots. Jasmine Cox, who was on the porch, began running into the house after she saw [Green] point the gun in the air. She was the first person to get into the house, and testified that, after she got in, she heard more gunfire following the first shots.

Ten-year-old Christopher Foggs, who had been playing in the area, was found face down next to the Haddock house. When he was turned over, a gunshot wound to his chest was discovered. He died from the wound at the hospital later that evening.

*State v. Adams*, 212 N.C. App. 235, 713 S.E.2d 251, slip op. at 2-4 (2011) (unpublished). Police never recovered a gun. *Id.*, 713 S.E.2d 251.

On 25 April 2005, a grand jury indicted Green for first-degree murder, among other charges. *State v. Green*, 187 N.C. App. 510, 653 S.E.2d 256, slip op. at 1 (2007) (unpublished), *appeal dismissed and disc. review denied*, 362 N.C. 240, 660 S.E.2d 489 (2008). During the summer 2006 trial, plaintiff, a North Carolina State Bureau of Investigation ("SBI") forensic firearms examiner, opined to a scientific certainty that eight

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cartridge cases, which were found at the site of the shooting, were all fired from the same gun, a High Point 9 millimeter semiautomatic pistol. Plaintiff further opined that two bullets, which were found at the site of shooting, were fired from the same *type* of gun, a High Point 9 millimeter semiautomatic pistol, but that she could not conclusively determine whether the bullets were fired from the same gun. On voir dire, plaintiff testified she was absolutely certain as to her findings. In a lab report, plaintiff stated that the two bullets “exhibit class characteristics that are consistent with ammunition components that are fired by firearms that are manufactured by or known as: Hi-point (Model C)[.]”

At trial, Green testified that, during the confrontation, a person shot a gun at him. He testified that he shot back at the person but that the person ran away. On 2 August 2006, a jury found Green guilty of second-degree murder, among other offenses. *Id.*, 653 S.E.2d 256, slip op. at 1.

A grand jury also indicted Adams for first-degree murder, among other charges. *Adams*, 212 N.C. App. 235, 713 S.E.2d 251, slip op. at 1-2. During the spring 2010 trial, plaintiff gave the same opinion about the cartridge cases and bullets. *Id.*, 713 S.E.2d 251, slip op. at 5. A jury found Adams guilty of voluntary manslaughter, under an aiding-and-abetting theory, among other offenses. *Id.*, 713 S.E.2d 251, slip op. at 7.

During Adams’s trial, her lawyer, David Sutton, arranged for Frederick Whitehurst, who had previously worked as a forensic chemist in a Federal Bureau of Investigation (“FBI”) crime laboratory, to take photographs of the two bullets butt-to-butt with his microscope.

#### B. Newspaper Articles

In March 2010, Locke, an investigative reporter for N&O, became interested in the *Green* and *Adams* cases. Locke interviewed plaintiff; Sutton; Whitehurst; Liam Hendrikse, a firearms forensic scientist; Stephen Bunch, a firearms forensic scientist and former FBI scientist; William Tobin, a forensic material scientist and metallurgist; Adina Schwartz, a professor at the John Jay College of Criminal Justice; Clark Everett, the Pitt County district attorney during the *Green* and *Adams* cases; and Jerry Richardson, the SBI laboratory director.

On 14 August 2010, N&O published an article written by Locke and Joseph Neff, which was entitled, “SBI relies on bullet analysis critics deride as unreliable[.]” In the 14 August article, Locke and Neff are highly critical of plaintiff’s bullet analysis and testimony in the *Green* and *Adams* cases and include one of Whitehurst’s photographs of the two bullets. In September or October 2010, Everett engaged Bunch to



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conduct an outside examination of the eight cartridge cases and two bullets. Bunch agreed with plaintiff that the eight cartridge cases were fired from the same firearm. Bunch also concluded that it is *likely*, but not certain, that the two bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol. Bunch further concluded that the two bullets *could* have been fired from the same gun. On 31 December 2010, N&O published a follow-up article, written by Locke and Neff, which was entitled “Report backs SBI ballistics[.]” In the 31 December article, Locke and Neff discussed Bunch’s results but emphasized that, unlike plaintiff, Bunch refused to ascribe absolute certainty to his finding that the two bullets were likely fired from the same type of gun.

## II. Procedural Background

On 1 September 2011, plaintiff brought libel claims against N&O, McClatchy, N&O’s parent company, Locke, Neff, John Drescher, N&O’s executive editor, and Steve Riley, N&O’s senior editor of investigations, among other defendants who were later dismissed from this action. On 27 June 2013, plaintiff filed her first amended complaint. On or about 22 January 2014, plaintiff moved to amend her first amended complaint. On 27 January 2014, N&O, McClatchy, Locke, Neff, Drescher, and Riley moved for summary judgment. On or about 5 March 2014, the trial court allowed plaintiff’s motion, and plaintiff filed her second amended complaint. On 14 March 2014, the trial court granted Neff, Drescher, and Riley’s motion for summary judgment but denied N&O, McClatchy, and Locke’s motion for summary judgment. On 4 April 2014, defendants gave timely notice of appeal.

## III. Interlocutory Appeal

[1] As an initial matter, we note that the trial court’s order denying defendants’ motion for summary judgment was interlocutory. “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). But “immediate appeal is available from an interlocutory order or judgment which affects a substantial right.” *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted). Defendants contend that the trial court’s order misapplied the actual malice standard, which adversely affected their rights to free speech and freedom of the press as guaranteed by the First Amendment to the U.S. Constitution and article I, section 14 of the North Carolina Constitution. *See* U.S. Const. amend. I; N.C. Const. art. 1, § 14. “Our Courts have recognized that because a misapplication of the actual malice standard when

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considering a motion for summary judgment would have a chilling effect on a defendant's right to free speech, a substantial right is implicated." *Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 474, 710 S.E.2d 309, 314 (quotation marks omitted) ("Boyce II"), *disc. review denied*, 365 N.C. 365, 718 S.E.2d 403 (2011), *cert. denied*, \_\_\_ U.S. \_\_\_, 182 L. Ed. 2d 1018 (2012). Accordingly, we hold that this appeal is properly before us.

## IV. Standard of Review

We review a trial court's summary judgment order *de novo* and view the evidence in the light most favorable to the non-movant. *Erthal v. May*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 736 S.E.2d 514, 517 (2012), *appeal dismissed and disc. review denied*, 366 N.C. 421, 736 S.E.2d 761 (2013). We engage in a two-part analysis of whether:

- (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

*Id.* at \_\_\_, 736 S.E.2d at 517 (citations and quotation marks omitted).

## V. Libel

Defendants argue that the trial court erred by denying their motion for summary judgment as to plaintiff's libel claims. "In North Carolina, the term defamation applies to the two distinct torts of libel and slander." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 898 (2002) ("Boyce I"), *appeal dismissed and disc. review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 157 L. Ed. 2d 310 (2003). In order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person. *See id.*, 568 S.E.2d at 897. This statement must be a statement of fact, not opinion, but "an individual cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability." *Lewis v. Rapp*, 220 N.C. App. 299, 306, 725 S.E.2d 597, 603 (2012) (quotation marks and brackets omitted).

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Whether a statement constitutes fact or opinion is a question of law for the trial court to decide. Like all questions of law, it is subject to *de novo* review on appeal. . . . In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made. Specifically, we consider whether the language used is loose, figurative, or hyperbolic language, as well as the general tenor of the article.

*Id.* at 304-05, 725 S.E.2d at 602 (citation and quotation marks omitted). “[T]he court must view the words within their full context[.]” *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899.

Moreover,

[w]here the plaintiff is a public official and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The rule requiring public officials to prove actual malice is based on First Amendment principles and reflects the Court’s consideration of our national commitment to robust and wide-open debate of public issues.

When a defamation action brought by a public official is at the summary judgment stage, the appropriate question for the trial judge is whether the evidence presented is sufficient to allow a jury to find that actual malice had been shown with convincing clarity.

It is important to acknowledge that evidence of personal hostility does not constitute evidence of actual malice. Additionally, reckless disregard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

*Lewis*, 220 N.C. App. at 302-03, 725 S.E.2d at 601 (citations, quotation marks, and brackets omitted). Plaintiff stipulates that she is a public official.

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Plaintiff contends that the following 12 statements in the 14 August 2010 article are false, defamatory statements of or concerning her, which defendants published with actual malice. We number the statements for clarity:

1. They asked Desmond, an SBI firearms analyst, to determine whether the two bullet fragments had passed through the same gun, a Hi-Point 9 mm she had already linked to a cluster of casings at the crime scene.
2. Desmond would turn to firearms and toolmark identification . . . to harness these clues into proof that Green was the only gunman.
3. The day after getting the request from prosecutors, [Desmond] testified that she was absolutely certain both bullets were fired from a Hi-Point 9 mm Model C handgun, the same type she had matched to casings scattered about the ground where Green stood that day. Her report eliminated doubt about another shooter.
4. She scribbled down the measurements of the lands and grooves[.]
5. This spring, Sutton asked a former FBI crime lab analyst to photograph the bullets under a microscope. Butt to butt, amplified several times, the bullets look starkly different.
6. Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.
7. "This is a big red flag for the whole unit," said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. "This is as bad as it can be. It raises the question of whether she did an analysis at all."
8. Experts, therefore, can't provide probability of error.
9. [A]ssuring a jury of a match is risky.
10. The independent analysts say the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number.

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11. “You don’t even need to measure to see this doesn’t add up,” said Hendrikse, the firearms analyst from Toronto. “It’s so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice.”

12. Other firearms analysts say that even with the poor photo lighting and deformed bullets, it’s obvious that the width of the lands and grooves are different.

Plaintiff further contends that the following 4 statements in the 31 December 2010 article are also false, defamatory statements of or concerning her, which defendants published with actual malice:

13. However, agent’s courtroom certainty that bullets came from one gun in question.

14. But SBI ballistics analyst Beth Desmond went beyond the finding of her lab report when she testified under oath that she was certain the bullets were fired from the same make of gun. The report’s findings undermined the certainty of her testimony.

15. The photo, taken under a microscope by a former FBI scientist, showed bullet fragments with dissimilar markings.

16. Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm.

We will address these 16 statements in four groups: (1) statements about expert opinions; (2) statements about plaintiff’s testimony in the *Green* and *Adams* cases; (3) statements about Whitehurst’s photographs; and (4) any remaining statements. For each, before we consider the question of actual malice, we will address whether the statements as alleged are actually false, defamatory statements of or concerning plaintiff.

A. Statements About Expert Opinions

**[2]** Statements 6, 7, 10, 11, 12, and 16 discuss the opinions of various experts that Locke consulted about plaintiff’s analysis of the bullets:

6. Independent firearms experts who have studied the photographs question whether Desmond knows anything

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about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.

7. “This is a big red flag for the whole unit,” said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. “This is as bad as it can be. It raises the question of whether she did an analysis at all.”

10. The independent analysts say the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number.

11. “You don’t even need to measure to see this doesn’t add up,” said Hendrikse, the firearms analyst from Toronto. “It’s so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice.”

12. Other firearms analysts say that even with the poor photo lighting and deformed bullets, it’s obvious that the width of the lands and grooves are different.

16. Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm.

We first note that defendants argue that “[m]any of the statements identified in [plaintiff’s] Complaint are simply expressions of opinion” by various experts whom Locke interviewed, not assertions of fact, and thus not actionable. Defendants contend that “[t]he Supreme Court consistently has held that such statements cannot form the basis for a defamation claim.” See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L. Ed. 2d 1 (1990). But in *Milkovich*, the U.S. Supreme Court did not create “an artificial dichotomy between ‘opinion’ and fact” and noted that “expressions of ‘opinion’ may often imply an assertion of objective fact.” *Id.* at 18-19, 111 L. Ed. 2d at 17-18. The Supreme Court gave this example:

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in

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terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "It would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words 'I think.'"

*Id.*, 111 L. Ed. 2d at 17-18 (brackets omitted). Thus, the Supreme Court held that "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth." *Id.* at 20, 111 L. Ed. 2d at 19.

In this case, which involves mostly Locke's reports of opinions of experts regarding Desmond's work, fact and opinion are difficult to separate. Some of the allegedly defamatory statements, though stated as expressions of opinion from experts, may be factually false because Locke reported that the experts expressed opinions regarding Desmond's work that they actually did not express. In some instances, the evidence indicates that Locke asked the experts a hypothetical question, and they answered on the assumption that the facts of the hypothetical question were true, while the facts were actually false and Locke either knew the facts were false or she asked the question with reckless disregard for the actual facts. The experts' opinions were then stated in the article as opinions which the experts gave about Desmond's actual work, instead of in response to a hypothetical question. Thus, the statements, even as opinions, "imply a false assertion of fact" and may be actionable under *Milkovich*. See *id.* at 19, 111 L. Ed. 2d at 18.

With regard to Statement 6, Locke stated in her deposition that her sources who questioned whether plaintiff "knows anything" about fire-arms analysis and who suspected that plaintiff "falsified the evidence" were Tobin, Hendrickse, and Bunch. Each of these experts denied making these comments to Locke. In their brief, defendants attribute the source of this statement to Locke's interview with Schwartz. But even assuming *arguendo* that Schwartz was Locke's source for this statement, defendants ignore the fact that the article clearly attributes this statement to multiple experts. Therefore, Schwartz's interview with Locke could not fully support this statement. In the light most favorable to plaintiff, this evidence creates a genuine issue of material fact as to whether Locke wrote Statement 6 "with knowledge that it was false or with reckless disregard of whether it was false or not." See *Lewis*, 220

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N.C. App. at 302, 725 S.E.2d at 601; *Cochran v. Piedmont Publishing Co.*, 62 N.C. App. 548, 550, 302 S.E.2d 903, 904-05 (holding that the publication of a statement attributed to a source, which that source denied making, created a genuine issue of material fact as to whether the statement was published with actual malice), *appeal dismissed and disc. review denied*, 309 N.C. 819, 310 S.E.2d 348 (1983), *cert. denied*, 469 U.S. 816, 83 L. Ed. 2d 30 (1984).

With regard to Statement 7, in his deposition, Tobin disputed that he made those comments. He specifically denied that he questioned whether plaintiff had done an analysis at all. Additionally, he stated that that his comments regarding “a big red flag” and the analysis being “as bad as it can be” were only made in response to a hypothetical question posed by Locke that assumed an error had been made and that those comments were never intended to apply to plaintiff’s actual work in the *Green* and *Adams* cases. Tobin further stated that, after the 14 August article was published, he contacted the SBI and told Richardson that he had never intended any of the comments he provided to Locke to apply specifically to plaintiff’s work. In the light most favorable to plaintiff, Tobin’s deposition testimony created a genuine issue of material fact as to whether Locke acted with actual malice when she published Statement 7, because Tobin either denied making these comments or he explained that the material meaning of his comments had been deliberately altered. *See Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 115 L. Ed. 2d 447, 473 (1991) (“[A] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement.”).

Defendants respond that Tobin testified several times that he did not recall everything he told Locke, and that, based on Locke’s notes, the statement attributed to Tobin was accurate. But Tobin’s deposition testimony and Locke’s notes, at best, create a contradiction in the evidence, which must be resolved by the jury, not the trial judge. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 395, 651 S.E.2d 261, 265 (2007) (“Contradictions or discrepancies in the evidence even when arising from plaintiff’s evidence must be resolved by the jury rather than the trial judge.”).

With regard to Statements 10 and 12, defendants assert that these statements are factually accurate and thus cannot be defamatory. *See Letter Carriers v. Austin*, 418 U.S. 264, 284, 41 L. Ed. 2d 745, 761 (1974)



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“Before the test of reckless or knowing falsity can be met, there must be a false statement of fact.”).

There was much deposition testimony about the differences between an analysis based upon a physical examination of the actual bullets and an analysis of Whitehurst’s photographs, particularly considering how the bullets were oriented in the photographs. Defendants correctly assert that even plaintiff acknowledges that, in Whitehurst’s photographs, the bullets look different. In her deposition, plaintiff admitted this:

[Defendants’ lawyer:] . . . [I]s it accurate to say that butt to butt and amplified seven times, the bullets look starkly different? . . .

[Desmond:] I agree.

. . . .

[Desmond:] All right. The statement itself, if you take the statement by itself, essentially it’s based on truth, because Sutton did ask Whitehurst to photograph the bullets and he—and Whitehurst did photograph them butt to butt. And the photograph itself does look—and the bullets in the photograph do look different.

But the potentially defamatory, and allegedly false, portion of Statements 10 and 12 is the report of the opinions of various experts about the photographs of the bullets. Viewed in context, Statements 10 and 12 indicate that, after examining the photographs, independent analysts concluded that plaintiff’s analysis was incorrect. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602 (“[C]ourts look to the circumstances in which the statement is made.”); *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899 (“[T]he court must view the words within their full context[.]”). But in their depositions, Tobin, Hendrikse, and Bunch stated that they told Locke that they could not give an opinion based on the photographs alone. Additionally, Bunch, the only one of the three to physically examine the actual bullets, concluded that it was likely that the two bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol.

Defendants also claim that these statements are either not defamatory of Desmond or not “of and concerning” Desmond, but this argument requires that we take the statements entirely out of context, which we cannot do. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602;

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*Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899. In context, all the statements are criticizing Desmond's analysis of the bullets, and therefore are "of and concerning her" and potentially defamatory of her. In the light most favorable to plaintiff, we hold that there is a genuine issue of material fact as to whether Locke acted with actual malice when she published Statements 10 and 12. See *Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson*, 501 U.S. at 517, 115 L. Ed. 2d at 473.

With regard to Statement 11, Hendrikse averred that his comments were "taken out of context." He admitted that he said, "You don't even need to measure to see this doesn't add up." But he averred that his full comment "was something to the effect that you don't even need to measure to see that a second opinion was warranted, again, making it clear to Ms. Locke that only by physically examining the evidence can you determine whether [plaintiff] was right or wrong." He also averred that he commented that plaintiff may have accidentally measured the same bullet twice only in response to a hypothetical question that assumed plaintiff had made an error. Thus, in the light most favorable to plaintiff, we hold that there is a genuine issue of material fact as to whether Locke acted with actual malice when she published Statement 11. See *Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson*, 501 U.S. at 517, 115 L. Ed. 2d at 473.

With regard to Statement 16, Bunch, the "second FBI scientist who wrote the report released Thursday," did not conclude that the two bullets could not have been fired from the same gun; on the contrary, he concluded that the two bullets *could* have been fired from the same gun. Additionally, he, Tobin, and Hendrikse stated that they could not give an opinion based on the photographs alone. We also note that plaintiff never testified that the bullets were fired from the same gun; rather, she testified that the bullets were fired from the same *type* of gun. Thus, in the light most favorable to plaintiff, we hold that there is a genuine issue of material fact as to whether Locke acted with actual malice when she published Statement 16. See *Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson*, 501 U.S. at 517, 115 L. Ed. 2d at 473.

In summary, we hold that the trial court properly denied defendants' motion for summary judgment as to the statements about expert opinions, specifically Statements 6, 7, 10, 11, 12, and 16.

#### B. Statements About Plaintiff's Testimony

**[3]** Statements 1, 2, 3, 9, 13, and 14 discuss plaintiff's testimony in the *Green* and *Adams* cases:

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1. They asked Desmond, an SBI firearms analyst, to determine whether the two bullet fragments had passed through the same gun, a Hi-Point 9 mm she had already linked to a cluster of casings at the crime scene.

2. Desmond would turn to firearms and toolmark identification . . . to harness these clues into proof that Green was the only gunman.

3. The day after getting the request from prosecutors, [Desmond] testified that she was absolutely certain both bullets were fired from a Hi-Point 9 mm Model C handgun, the same type she had matched to casings scattered about the ground where Green stood that day. Her report eliminated doubt about another shooter.

9. [A]ssuring a jury of a match is risky.

13. However, agent's courtroom certainty that bullets came from one gun in question.

14. But SBI ballistics analyst Beth Desmond went beyond the finding of her lab report when she testified under oath that she was certain the bullets were fired from the same make of gun. The report's findings undermined the certainty of her testimony.

Defendants contend that the fair report privilege protects them from a defamation claim as to these statements, because the articles report on North Carolina's judicial system generally and the criminal trials of Green and Adams in particular. Defendants note that this Court has held that the press has a privilege to report on such judicial proceedings, provided the reporting offers a substantially accurate account. *See LaComb v. Jacksonville Daily News Co.*, 142 N.C. App. 511, 512-13, 543 S.E.2d 219, 220-21, *disc. review denied*, 353 N.C. 727, 550 S.E.2d 778 (2001). Plaintiff's brief fails to address this privilege.

The fair report privilege flows from the absolute privilege which attaches to statements made in the due course of a judicial proceeding. Official statements made in a judicial proceeding will not support a civil action for defamation. This privilege includes statements made in arrest warrants. Statements in pleadings and other papers filed in a judicial proceeding which are relevant or pertinent to the subject matter in controversy are cloaked with this absolute privilege.

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*Id.* at 513, 543 S.E.2d at 221 (citations, quotation marks, and brackets omitted). Under the fair report privilege, “[t]he law does not require absolute accuracy in reporting. It does impose the word ‘substantial’ on the accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct account of the proceedings.” *Id.* at 512, 543 S.E.2d at 220.

With respect to Statement 1, plaintiff contends that she did not testify that a High Point 9 millimeter gun was linked to the cartridge cases. But plaintiff testified that the cartridge cases were all fired from the same gun, a High Point 9 millimeter semiautomatic pistol. We thus hold that Statement 1 is substantially accurate. *See id.*, 543 S.E.2d at 220.

With respect to Statement 2, plaintiff contends that she never testified that Green was the only shooter. But neither party disputes that the State in the *Green* and *Adams* cases proffered plaintiff’s testimony as evidence supporting the State’s theory that Green was the only shooter, and that when considered along with the rest of the evidence, a jury might reasonably infer that Green was the only shooter. We thus hold that Statement 2 is substantially accurate. *See id.*, 543 S.E.2d at 220.

With respect to Statement 3, plaintiff asserts that (1) she did not testify that the bullets were fired from the same gun; (2) her report did not eliminate doubt about another shooter; and (3) she did not testify with absolute certainty before a jury. First, we acknowledge that plaintiff did not testify that the bullets were fired from the same gun; rather, she testified that the bullets were fired from the same *type* of gun. Although Statement 3 is ambiguous about whether plaintiff testified that the bullets were fired from the same gun or same type of gun, we hold that this statement is substantially accurate given that plaintiff testified that both bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol. Second, as noted above, neither party disputes that the State proffered plaintiff’s testimony as evidence supporting the State’s theory that Green was the only shooter, and that when considered along with the rest of the evidence, a jury might reasonably infer that Green was the only shooter. Finally, plaintiff admits that, on voir dire, outside the presence of the jury, she testified that she was absolutely certain as to her findings:

[Green’s counsel:] Can you tell with absolute certainty that these came from a 9 mm weapon?

[Plaintiff:] Yes.

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[Green's counsel:] As opposed to being consistent with a 9 mm weapon?

[Plaintiff:] I am with absolute certainty saying that it's a 9 mm High Point firearm.

Sworn testimony presented in court, whether before the judge on voir dire or to the jury, is undoubtedly made "in the due course of a judicial proceeding." *See id.* at 513, 543 S.E.2d at 221. Plaintiff has not presented any authority for her seeming assertion that there is a difference between testimony presented on voir dire or testimony presented to a jury. As demonstrated by the quoted testimony above, plaintiff did testify with absolute certainty that the bullets came from the same type of gun. We thus hold that Statement 3 is substantially accurate. *See id.* at 512, 543 S.E.2d at 220.

With regard to Statement 9, plaintiff asserts that she did not assure a jury of a match. But Locke did not make this claim. We must examine Statement 9 in context. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602; *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899. The 14 August article states:

Experts say they can use smaller markings on a bullet to pinpoint a particular gun.

The use of those finer markings can be inexact, too. One study suggests that up to 20 percent of guns of the same model produce identical markings on fired bullets. In other words, assuring a jury of a match is risky.

The article does not state that plaintiff "assur[ed]" a jury, as plaintiff suggests in her complaint. Accordingly, we hold that Statement 9 is not actionable.

With regard to Statement 13, plaintiff contends that she never testified that the bullets were fired from the same gun. Again, plaintiff is correct but plaintiff did testify that both bullets were fired from the same *type* of gun, a High Point 9 millimeter semiautomatic pistol. While Statement 13 is not absolutely accurate, we hold that, under the fair report privilege, this statement is *substantially* accurate and thus not actionable. *See LaComb*, 142 N.C. App. at 512, 543 S.E.2d at 220; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 41 L. Ed. 2d 789, 805-06 (1974) ("Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.").

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With regard to Statement 14, plaintiff contends that she did not testify with absolute certainty before a jury and that her lab report did not undermine the certainty of her testimony. As noted above, the articles correctly state that plaintiff testified with absolute certainty that the bullets were fired from the same type of gun, a High Point 9 millimeter semi-automatic pistol. In contrast, in her lab report, plaintiff did not ascribe absolute certainty to her findings; rather, she stated that the two bullets “exhibit class characteristics that are *consistent* with ammunition components that are fired by firearms that are manufactured by or known as: Hi-point (Model C)[.]” (Emphasis added.) She also noted: “Do not use this list to eliminate any suspect firearm of similar caliber and class characteristics.” Accordingly, we hold that Statement 14 is substantially accurate. *See LaComb*, 142 N.C. App. at 512, 543 S.E.2d at 220.

With respect to Statements 1, 2, 3, 9, 13, and 14, defendants are protected by the fair report privilege. Accordingly, we hold that the trial court should have granted summary judgment in favor of defendants as to these statements.

## C. Statements About Whitehurst’s Photographs

**[4]** Statements 5 and 15 discuss Whitehurst’s photographs:

5. This spring, Sutton asked a former FBI crime lab analyst to photograph the bullets under a microscope. Butt to butt, amplified several times, the bullets look starkly different.

15. The photo, taken under a microscope by a former FBI scientist, showed bullet fragments with dissimilar markings.

Defendants contend that these statements are factually accurate and thus not actionable. *See Austin*, 418 U.S. at 284, 41 L. Ed. 2d at 761 (“Before the test of reckless or knowing falsity can be met, there must be a false statement of fact.”). We agree.

Plaintiff contends that Whitehurst is not a qualified expert and that his photographs are misleading. But there is no genuine dispute as to the truth of Statements 5 and 15. First, Whitehurst was in fact a “former FBI crime lab analyst[.]” regardless of his qualifications to review plaintiff’s analysis. Second, Sutton asked Whitehurst to photograph the bullets under a microscope, and he did. As noted above, even plaintiff admitted that the bullets look different in the photographs. Thus, there is no genuine issue as to the factual accuracy of Statements 5 and 15.

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Accordingly, we hold that the trial court should have granted summary judgment in favor of defendants as to these statements.

## D. Remaining Statements

[5] We finally address the remaining statements, Statements 4 and 8:

4. She scribbled down the measurements of the lands and grooves[.]
8. Experts, therefore, can't provide probability of error.

With regard to Statement 4, plaintiff contends that this statement is either libel *per se* or libel *per quod*. To be libelous *per se*, a statement “must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that [it] tend[s] to disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided.” *Skinner v. Reynolds*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 764 S.E.2d 652, 655 (2014). To be libelous *per quod*, a statement must be defamatory “when considered in conjunction with innuendo, colloquium, and explanatory circumstances[.]” *Id.* at \_\_\_, 764 S.E.2d at 657. Plaintiff essentially contends that she does not “scribble” her notes and the assertion that she did is defamatory. But even if the statement that plaintiff “scribbled” is false, we hold that it does not “tend to disgrace and degrade [plaintiff] or hold [her] up to public hatred, contempt, or ridicule, or cause [her] to be shunned and avoided.” *See id.* at \_\_\_, 764 S.E.2d at 655. We further hold that Statement 4 does not become defamatory “when considered in conjunction with innuendo, colloquium, and explanatory circumstances[.]” *See id.* at \_\_\_, 764 S.E.2d at 657. Because Statement 4 is neither libelous *per se* nor libelous *per quod*, we hold that the trial court should have granted summary judgment in favor of defendants as to that statement.

[6] With regard to Statement 8, plaintiff contends that this statement is false, because “[f]orensic firearms examiners have established and recognized error rates that stem from proficiency tests and validation studies.” But defendants proffer academic literature from the National Academy of Sciences, which states: “[T]he decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates.” We must examine Statement 8 in context. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602; *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899. The 14 August article states:

As forensic science goes, firearm and toolmark analysis stands on shaky legs. It's built on the idea that every tool leaves a unique mark.

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Unlike with DNA, there is no statistical foundation. Experts, therefore, can't provide probability of error. Every bullet identification boils down to a subjective evaluation by an analyst.

Viewed in context, Statement 8 represents an opinion that firearm and toolmark analysis lacks a statistical foundation for error rates similar to those used for DNA analysis. Unlike the opinions of experts whom Locke interviewed, discussed in section A above, Statement 8 refers to the reliability of firearm and toolmark analysis in general. Experts differ on the reliability of firearm and toolmark analysis, so Statement 8 is not incorrect. Plaintiff has failed to show how this statement makes a false assertion of objective fact. See *Milkovich*, 497 U.S. at 19, 111 L. Ed. 2d at 18. In addition, the statement is not directly of or concerning plaintiff herself, but is more of a criticism of firearm and toolmark analysis generally. Accordingly, we hold that the trial court should have granted summary judgment in favor of defendants as to Statement 8.

In summary, we hold that there is a genuine issue of material fact as to whether Statements 6, 7, 10, 11, 12, and 16 are false and defamatory and whether Locke acted with actual malice when she attributed those statements to firearms experts, as they either denied making those statements or claim that those statements were made in a different context that materially changed their meaning. In the light most favorable to plaintiff, the evidence is "sufficient to allow a jury to find that actual malice [has] been shown with convincing clarity." See *Lewis*, 220 N.C. App. at 303, 725 S.E.2d at 601. But we hold that defendants were entitled to summary judgment as to Statements 1, 2, 3, 9, 13, and 14, which discussed plaintiff's testimony in the *Green* and *Adams* cases; Statements 5 and 15, which discussed Whitehurst's photographs; and Statements 4 and 8, the remaining statements.

Moreover, [i]t is well settled that all who take part in the publication of a libel or who procure or command libelous matter to be published may be sued by the person defamed either jointly or severally." *Taylor v. Press Co.*, 237 N.C. 551, 552, 75 S.E.2d 528, 529 (1953). Defendants do not argue otherwise, so plaintiff's surviving claims should proceed against all three defendants.

## VI. Conclusion

Taking the evidence presented in the light most favorable to plaintiff, there were genuine issues of material fact as to whether defendants published defamatory statements of or concerning plaintiff with actual



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malice. The trial court properly denied defendants' motion for summary judgment as to the statements identified above as

6. Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.

7. "This is a big red flag for the whole unit," said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. "This is as bad as it can be. It raises the question of whether she did an analysis at all."

10. The independent analysts say the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number.

11. "You don't even need to measure to see this doesn't add up," said Hendrikse, the firearms analyst from Toronto. "It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice."

12. Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different.

16. Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm.

As to the remaining statements which were addressed above as "statements about plaintiff's testimony" or "statements about Whitehurst's photographs" or "the remaining statements," the trial court erred in failing to grant defendants' motion for summary judgment. Accordingly, we affirm the trial court's order in part, reverse it in part, and remand the case to the trial court for further proceedings consistent with this opinion.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Judges CALABRIA and McCULLOUGH concur.

## IN THE COURT OF APPEALS

IN RE D.L.W.

[241 N.C. App. 32 (2015)]

IN THE MATTER OF D.L.W., D.L.N.W., V.A.W.

No. COA14-1341

Filed 19 May 2015

**1. Termination of Parental Rights—neglect of children—findings not sufficient**

None of the findings in a termination of parental rights case supported a conclusion that respondent-mother “neglected” her children under N.C.G.S. § 7B-1111(a)(1). The findings addressed respondent-mother’s interactions and relationship with DSS and respondent-father rather than respondent-mother’s relationship or care, visitation, or support or lack thereof of her children.

**2. Termination of Parental Rights—mother’s social phobia—not statutorily authorized—not cause of deficiencies with child**

A trial court may not order a parent to undergo any course of conduct not provided for in N.C.G.S. § 7B-904. The district court in a termination of parental rights hearing had no authority under N.C.G.S. § 7B-904 to order respondent-mother to make reasonable progress to comply with requirements that she obtain treatment for “social phobia” as recommended by her mental health assessment. The juveniles were removed from respondents’ care due to domestic violence between respondents, respondents’ lack of housing, and respondents’ failure to provide the juveniles with sufficient food, nutrition, and hygiene. No evidence in the record or finding suggests that respondent-mother’s “social phobia” led or contributed to these deficiencies.

**3. Termination of Parental Rights—lack of progress toward correcting conditions—employment and transportation—evidence not sufficient**

The trial court erred in a termination of parental rights case by concluding that respondent-mother’s lack of stable employment and transportation showed a lack of reasonable progress towards “correcting those conditions which led to the removal of the juveniles without making a finding of willfulness. Moreover, the court’s findings must acknowledge the statutory mandate that no parental rights shall be terminated for the sole reason of the parent’s poverty. No evidence showed the respondent-mother’s failure to prepare a budget caused or perpetuated the neglect of the children or the conditions that led to the children being removed from her custody, and this was not a statutorily enumerated course of conduct.

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**4. Termination of Parental Rights—mother ordered to submit a budget—no statutory authority**

The district court exceeded its authority in a termination of parental rights proceeding under N.C.G.S. § 7B-904(d1)(3) by ordering respondent-mother, after a review hearing, to submit to DSS a budgeting plan.

**5. Termination of Parental Rights—father’s termination—finding on every option—not required**

The district court’s decision to terminate respondent-father’s parental rights was supported by the findings of fact on each of the dispositional factors set forth in N.C.G.S. § 7B-1111(a)(1)-(5). The trial court is not required to make findings of fact on all the evidence presented or to state every option it considered in arriving at its disposition under N.C.G.S. § 7B-1110.

Appeal by respondent-parents from order entered 29 September 2014 by Judge Kathryn Overby in Alamance County District Court. Heard in the Court of Appeals 20 April 2015.

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

*Derrick J. Hensley for guardian ad litem.*

*Jeffrey William Gillette for respondent-appellant mother.*

*Richard Croutharmel for respondent-appellant father.*

TYSON, Judge.

Marisha Nicole Wade (“respondent-mother”) and Dammien Lamar Worth (“respondent-father”) (collectively “respondents”) appeal from an order terminating their parental rights as to their minor children D.L.W., D.L.N.W., and V.A.W (collectively “the juveniles”). We reverse those portions of the order concerning respondent-mother and affirm those portions of the order concerning respondent-father.

**I. Background**

On 1 March 2013, the Alamance County Department of Social Services (“DSS”) filed juvenile petitions seeking an adjudication of neglect and dependency concerning two-year-old D.L.W., three-year-old

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D.L.N.W., and five-year-old V.A.W. The petitions alleged DSS had received reports respondents were “residing with their three children in a van located in the woods that is heated by a kerosene heater,” and respondents refused to disclose their location to DSS or otherwise cooperate with an investigation. The petitions also alleged “significant domestic violence between the parents that places the juveniles at risk” and that the juveniles were denied adequate nutrition and hygiene and subjected to inappropriate physical discipline by respondent-father.

DSS obtained nonsecure custody of the juveniles on 28 February 2013 and placed them in foster care. On 27 March 2013, V.A.W. was placed with her maternal grandmother (“Ms. W.”), who already had custody of one of respondent-mother’s two older daughters. The other older daughter, A.I.C., was in the custody of her great-grandmother (respondent-mother’s grandmother). Once Ms. W. obtained housing sufficient to accommodate D.L.W. and D.L.N.W., the two boys joined V.A.W. and the older sibling in Ms. W.’s home on 23 May 2013.

At the adjudication hearing on 1 May 2013, based on stipulations entered into by the parties, the court made the following findings relevant to the court’s determination that the juveniles were neglected:

e. At the time of the filing of the petition the Respondent Mother and Father were residing at times with their three children in a van located in the woods.

f. The Respondent Mother denies the van is heated with a kerosene heater but states the van is run during the night to keep warm, but also states the van is cool enough to store milk.

g. The Respondent Parents refused to disclose the location of the van so that the Alamance County Department of Social Services can assess safety and risk issues.

h. It is reported there was domestic violence between the parents that places the juveniles at risk. For example, [V.A.W.] has intervened when the parents are arguing.

....

j. At times, the family has difficulty providing for basic necessities such as housing, baths and so forth. Their skin is very pale and dry, needing lotion.

....

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- l. The Respondent Father is not employed.
- m. The Respondent Mother is employed at AW-NC as a factory worker. She works from 6:00 a.m. until 2:30 p.m.-6:00 p.m. She has been employed for approximately ten months.
- n. The Respondent Mother reports she made the van payment for the first time in several months a few weeks ago. She reports the van is not drivable because the finance company turned the car off [sic].
- o. The Respondent Mother reports she did not have enough money to maintain a household since becoming a permanent employee on February 18, 2013.

Based on its findings of fact, the court adjudicated the juveniles as “neglected” as defined by N.C. Gen. §7B-101(15) (2013).

The district court held a permanency planning hearing on 23 October 2013 and established a primary permanent plan of reunification with a secondary plan of custody with a court-approved caretaker by order entered 18 November 2013. The court found that respondents made no progress on their “Out of Home Services” case plans and were homeless, “living in motels.” The court also found respondent-mother inconsistently contacted and called her social worker outside of business hours, maintained her full-time job, and completed her mental health assessment.

The court found neither parent had signed a voluntary support agreement with the Child Support Agency, but found respondent-mother was paying child support through income withholding. Although respondent-mother had full-time employment, she had not provided DSS with a “budgeting plan that can account for where the funds coming into the household go,” as was ordered by the court.

Respondent-father remained unemployed, provided no child support for his children, and had not attended any visitation or participated in a domestic violence course. He had arranged “access to reliable transportation” but respondents had not negotiated a plan for shared use of the transportation with respondent-mother.

Following a review hearing on 18 December 2013, the district court found respondent-mother had not completed all of the objectives presented in her case plan. She failed to follow the recommendation of treatment for her “social phobia,” as diagnosed in the mental health

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assessment, to obtain appropriate housing, and to provide a plan for shared transportation with respondent-father.

Respondent-father likewise was found to have failed to find appropriate housing, and verifiable employment. He had not participated in domestic violence courses and had attended only a few visits with the children. The court found the parents had made “no progress on any aspect of the case plan has been completed [sic].” The court changed the permanent plan for the juveniles from a primary plan of reunification and secondary plan of custody to a court-approved caretaker to a primary plan of adoption with a secondary plan of guardianship. DSS filed a motion to terminate respondents’ parental rights on 11 March 2014.

After hearing evidence on 6-8 August 2014 and 3 September 2014, the district court found grounds to terminate respondents’ parental rights for neglect and for failure to make reasonable progress since 28 February 2013 in correcting the conditions that led to the juveniles’ placement outside the home. N.C. Gen. Stat. § 7B-1111(a)(1)-(2) (2013).

The court found a third ground for termination of respondent-father’s parental rights due to his failure to pay a reasonable portion of the juveniles’ cost of care. N.C. Gen. Stat. § 7B-1111(a)(3) (2013). The court determined that terminating respondents’ parental rights was in the best interests of the juveniles. Respondents gave timely notice of appeal from the termination order. We address each party’s arguments in turn.

## II. Respondent-Mother’s Appeal

Respondent-mother challenges the district court’s determination that grounds exist to terminate her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2). She claims she had resolved, made progress toward, and intended to resolve the issues which led to the juveniles’ removal from her home and their adjudication as neglected in 2013. To the extent she failed to satisfy elements of her DSS case plan or requirements imposed by the court, respondent-mother argues “this was the result of [her] poverty and was not willful.” She further contends that the court exceeded its statutory authority in imposing certain requirements for reunification, and finding lack of progress to terminate her parental rights because they were “unrelated to the conditions that led to the children’s removal or adjudication” as neglected. *See* N.C. Gen. Stat. § 7B-904 (2013).

### A. Standard of Review

On appeal, our standard of review for the termination of parental rights is whether the trial court’s findings of fact

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are based on clear, cogent and convincing evidence and whether the findings support the conclusions of law

The trial court’s ‘conclusions of law are reviewable *de novo* on appeal.’

*In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

B. Analysis

**[1]** The district court determined respondent-mother had neglected the juveniles under N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile is one who “does not receive proper care [or] supervision” from the juvenile’s parent or who “lives in an environment injurious to the juvenile’s welfare.” N.C. Gen. Stat. § 7B-101(15) (2013). To support an adjudication under N.C. Gen. Stat. § 7B-1111(a)(1), “[n]eglect must exist at the time of the termination hearing.” *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 729 (2007). Where “the parent has been separated from the child for an extended period of time, the petitioner must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future.” *Id.* (citation omitted). The determination of whether a child is neglected is a conclusion of law and is reviewed *de novo* on appeal. *In re J.N.S.*, 180 N.C. App. 573, 575, 637 S.E.2d 914, 915 (2006).

The district court made the following findings of fact in support of its determination that respondent-mother had neglected the juveniles under N.C. Gen. Stat. § 7B-1111(a)(1):

26[-27]. . . . At the time of the filing of the motion to terminate parental rights, [both parents were] residing at 740 Ivey Road Graham, NC 27253. [They are] currently residing at the Allied Homeless Shelter in Burlington, North Carolina.

. . . .

30. The juveniles have consistently been in out-of-home placement since being removed from the care of the parents.

. . . .

45. The Respondent Mother entered into and was court ordered to comply with [an] out-of-home family services agreement. She was to obtain a mental health assessment. She did an initial assessment which indicated diagnoses

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of social phobia and cannabis dependency full remission. She did not seek out services to address social phobia.

....

48. The Respondent Mother was to obtain and maintain appropriate housing. She did obtain three different homes and, at times, resided with friends in Durham. She was not stable, would pay rent for one month but not subsequently without good reason and she does not currently have appropriate housing . . . .

49. The Respondent Mother was to obtain and maintain employment. She was employed at AW working 65 hours a week earning between \$11.00 and \$13.00 per hour. The money was direct deposited in[to her] account. She could not figure out why she could not pay bills or where the money went. In March of 2014, she lost her employment due to incarceration. Initially she lied about the loss of employment, saying she resigned, then that she lost employment due to snow days and then due to incarceration.

50. The Respondent Mother was to develop a reliable means of transportation. She does not have a valid North Carolina driver's license. She continued to drive without a valid driver's license. In December of 2013, she was charged with careless and reckless and fleeing to elude still [sic]. She drove a vehicle registered in the Respondent Father's name with his knowledge that she did not have a license.

....

52. The Respondent Mother was to attend counseling for victims of domestic violence and be able to articulate what she has learned. She attended seven sessions of the support group at Family Abuse Services in 2013. She attended several meetings since losing her job in March of 2014 but has not consistently attended and has not articulated an[] understanding of what she has learned. She continued in a relationship with the Respondent Father and there were significant issues regarding ongoing domestic violence.

....



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62. The Respondent Parents were required to do a budgeting plan but failed to do so despite being employed for periods of more than one month. Their failure to appropriately budget their funds has continued to result in instability.

. . . .

65. On two differen[t] occasions in 2014, law enforcement has been called to the home of the parents due to domestic violence between the parents.

Based on these findings, the court concluded that “[t]here is a likelihood of repetition of neglect of the minor child[ren] in that neither the mother nor the father ha[s] made reasonable progress given their individual circumstance[s] in the twelve months preceding the filing of the motion for the termination of parental rights.”

In her challenge to the evidence supporting the enumerated findings, respondent-mother excepts to the district court’s statement in finding 52 that she “has not articulated and [sic] understanding of what she has learned” from domestic violence counseling. While noting she was never ordered to “articulate” anything related to her domestic violence counseling, respondent-mother argues that the court’s finding “fails to take into account [her] testimony” at the termination hearing, in which she acknowledged domestic violence and other controlling behaviors by respondent-father and declared her intention to end the relationship.

She submitted and the court found she had attended seven domestic violence group sessions in 2013. She testified she had attended two sessions since losing her employment in March 2014, and failed to attend others because she lacked transportation.

Respondent-mother denied engaging in domestic violence with respondent-father on 16 and 19 March 2014. She attributed difficulties in her relationship with respondent-father to “the loss of our kids and . . . us discussing this case plan.” She acknowledged having told police on 16 March 2014 that respondent-father “beat [her] up all the time,” but claimed she had lied to the police in an attempt to get them to leave her residence. Respondent-mother also acknowledged lying at a Child and Family Team meeting on 4 April 2014, when she claimed her relationship with respondent-father had ended.

After respondent-father testified, the tenor of respondent-mother’s testimony changed the following day. She disavowed her previous

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testimony as untrue and proceeded to describe a longstanding pattern of abusive, controlling behavior by respondent-father toward her.

None of these findings support a conclusion that respondent-mother “neglected” her children under N.C. Gen. Stat. § 7B-1111(a)(1). These findings do not address respondent-mother’s relationship or care, visitation or support or lack thereof of her children. Rather, they address respondent-mother’s interactions and relationship with DSS and respondent-father.

**[2]** Respondent-mother also challenges the district court’s findings regarding her failure to obtain treatment for “social phobia,” as recommended by her mental health assessment; to secure stable employment and reliable transportation; and to submit a budgeting plan to DSS. She argues that the district court had no authority under N.C. Gen. Stat. § 7B-904 to order her to make reasonable progress to comply with these requirements. We agree.

“A trial court may not order a parent to undergo any course of conduct not provided for in N.C. Gen. Stat § 7B-904.” *In re W.V.*, 204 N.C. App. 290, 297, 693 S.E.2d 383, 388 (2010) (citation and internal quotation marks omitted). In *W.V.*, the trial court ordered the father to obtain and maintain stable employment. There was no evidence that the father’s unemployment “led to or contributed to the juvenile’s adjudication.” *Id.*

Here, respondent-mother’s initial mental health assessment indicated a diagnosis of “social phobia.” A treatment option of group therapy was suggested to “assist her in developing [her] sense of self.”

Based on the petitions filed by DSS on 1 March 2013, the juveniles were removed from respondents’ care due to domestic violence between respondents, respondents’ lack of housing, and respondents’ failure to provide the juveniles with sufficient food, nutrition, and hygiene. No evidence in the record or finding suggests respondent-mother’s “social phobia” led or contributed to these deficiencies. The trial court’s finding that respondent-mother failed to make reasonable progress to reunite with her children because she failed to seek services to address her “social phobia” is without statutory authority. The court’s reliance on this finding to support lack of reasonable progress is error.

**[3]** Respondent-mother argues the trial court erred by finding she had not made reasonable progress in obtaining stable employment and reliable transportation. A stable job and reliable transportation may be steps which could “remedy conditions in the home that led to or contributed to the juvenile’s adjudication or to the court’s decision to remove

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custody of the juvenile[s]” from respondents’ care, as authorized by N.C. Gen. Stat. § 7B-904(d1)(3). However, after the juveniles were removed from her care, respondent-mother obtained employment, which she subsequently lost due to her arrest involving domestic violence with respondent-father and being stranded in Durham due to the weather. Nonetheless, the trial court found respondent-mother regularly and consistently paid child support, attended parenting classes when she was able, and had a nurturing bond with her children.

The trial court’s findings concerning respondent-mother’s reasonable progress towards correcting the conditions which led to the removal of her children must acknowledge N.C. Gen. Stat. § 7B-1111(a)(2)’s final sentence: “no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.” “A finding that a parent has ability to pay support is essential to termination for nonsupport” pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). *In re Ballard*, 311 N.C. 708, 716–17, 319 S.E.2d 227, 233 (1984); *In re T.D.P.*, 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004) *aff’d per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005).

Here, the trial court found that respondent-mother had been employed, but had lost employment due to weather and incarceration. “Where a respondent has been and continues to be incarcerated, our courts have prohibited termination of parental rights solely on that factor.” *In re D.R.B.*, 182 N.C. App. 733, 738, 643 S.E.2d 77, 81 (2007).

The court found respondent-mother had obtained housing, but had been unable to pay rent. The court made no finding that respondent-mother “willfully” failed to seek employment or “willfully” failed to pay support of her children based on clear, cogent and convincing evidence.

In the absence of finding willful failure as supported by clear, cogent and convincing evidence, the trial court erred in concluding respondent-mother’s lack of stable employment and transportation showed a “lack of reasonable progress” towards “correcting those conditions which led to the removal of the juvenile[s].” N.C. Gen. Stat. § 7B-1111(a)(2).

**[4]** Respondent-mother also argues the district court exceeded its authority under N.C. Gen. Stat. § 7B-904(d1)(3) by ordering respondent-mother, after a review hearing on 31 July 2013, to submit to DSS “a budgeting plan that can account for where the funds coming into the household goes [sic] and [respondents’] plan for maintaining appropriate funds for the care of their children.” Finding of Fact 49 of the termination order shows respondent-mother earned substantial income

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through her employment at AW from February 2013 until March 2014, yet was unable to pay all her bills or to account for her expenditures, even though she paid child support for her children from her employment.

Respondent-mother initially estimated she was “bringing home about \$2,400 a month” when she and respondent-father were evicted from Deer Trails Apartments for non-payment of rent in the Fall of 2013. When asked how she had spent her income, respondent-mother stated “child support, food, trying to pay off some debts. I have to pay on my electric bill . . . to have electric[ity] cut on. That’s it. I was buying toys for my kids which I might not should have been doing but I was buying toys.” Respondent-mother also later testified that respondent-father took all of her money for his own use, which was not disclosed prior to the termination hearing.

Pursuant to N.C. Gen. Stat. § 7B-904(d1)(3), the trial court may order a parent to “[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile’s adjudication or to the court’s decision to remove custody of the juvenile from the parent.” N.C. Gen. Stat. § 7B-904(d1)(3). The “trial court may not order a parent to undergo any course of conduct not provided for in [N.C. Gen. Stat. § 7B-904].” *In re Cogdill*, 137 N.C. App. 504, 508, 528 S.E.2d 600, 603 (2000); *see also*, *In re W.V.*, 204 N.C. at 297, 693 S.E.2d at 388-89.

No evidence shows the respondent-mother’s failure to prepare a budget caused or perpetuated the neglect of the children or the conditions that led to the children being removed from her custody. As this is not an enumerated course of conduct, the trial court exceeded its authority under N.C. Gen. § 7B-904 in finding her failure to prepare a budget plan showed lack of reasonable progress to reunify with her children.

The trial court failed to make findings of fact to establish either willfulness or lack of reasonable progress to correct the conditions which led to the removal of the juveniles by clear, cogent and convincing evidence and to support the termination for neglect under N.C. Gen. Stat. §§ 7B-904 or 7B-1111(a)(1). *In re J.S.L.*, 177 N.C. App. at 160-164, 628 S.E.2d at 392-394. DSS “must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future.” *In re C.W.*, 182 N.C. App. at 220, 641 S.E.2d at 729; *In re Ballard*, 311 N.C. at 714-15, 319 S.E.2d at 231-32. The trial court’s order does not include these findings to support its conclusions and is reversed as to respondent-mother.

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III. Respondent-Father's Appeal

[5] Respondent-father does not challenge the grounds for termination of his parental rights found by the district court under N.C. Gen. Stat. § 7B-1111(a)(1)-(3), but argues that the court improperly chose termination as the disposition serving the best interests of the juveniles. In his brief, respondent-father cites the bond he shares with his children and proposes guardianship as providing the juveniles with “both a permanent plan and a continuing relationship with their parents.” He further notes that “the prospective adoptive parent in this case was the children’s unmarried paternal [sic] grandmother.”

The district court’s decision to terminate respondent-father’s parental rights is supported by the findings of fact. The court made findings of fact on each of the dispositional factors set forth in N.C. Gen. Stat. § 7B-1111(a)(1)-(5). Respondent-father asserts the court was obliged to make a specific finding regarding the juveniles’ “need for ongoing contact with their parents” under the catchall provision of N.C. Gen. Stat. § 7B-1111(a)(6). “[T]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered” in arriving at its disposition under N.C. Gen. Stat. § 7B-1110. *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005).

Insofar as respondent-father suggests that preserving his parental rights would “keep [him] on the hook for child support,” the record shows he paid nothing toward the support of the juveniles during the course of these proceedings and evidence shows he took respondent-mother’s wages for himself. Respondent-father’s objections and arguments are overruled.

IV. Conclusion

The portions of the trial court’s order to terminate respondent-mother’s parental rights are reversed and the portions of the order to terminate respondent-father’s parental rights are affirmed.

REVERSED IN PART AS TO RESPONDENT-MOTHER AND  
AFFIRMED AS TO RESPONDENT-FATHER.

Judges ELMORE and INMAN concur.

## IN RE J.W.

[241 N.C. App. 44 (2015)]

IN THE MATTER OF J.W. AND K.M.

No. COA14-927

Filed 5 May 2015

**1. Child Abuse, Dependency, and Neglect—findings of fact—same wording as juvenile petition—sufficiency of evidence**

The trial court did not err in a child neglect and custody case by its findings of fact that allegedly “regurgitated” the same wording used in the juvenile petition. It is not *per se* reversible error for a trial court’s findings of fact to mirror the wording of a party’s pleading. The Court of Appeals concluded the record of the proceedings demonstrated that the trial court, through processes of logical reasoning based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case.

**2. Child Visitation—visitation plan—frequency and length of visits**

The trial court did not err in a child neglect and custody case in its child visitation order even though respondent mother contended that the visitation plan allegedly did not include the frequency and length of visits as required by N.C.G.S. § 7B-905.1. However, the two orders complied with the statutory mandate in setting respondent’s visitation.

**3. Child Custody and Support—non-secure custody—Department of Social Services**

The trial court did not err in a child neglect case by awarding the Department of Social Services (DSS) non-secure custody of the juveniles at the dispositional hearing even though respondent mother contended that the statute did not provide for non-secure custody. Respondent did not provide any reason why the children should have been placed in secure custody, and there was none.

**4. Child Custody and Support—failure to return custody to parent after completion of case plan—conditions leading to removal still existed**

The trial court did not abuse its discretion in a child neglect and custody case by failing to return the children to respondent mother’s custody even though she completed her case plan and had the financial means to provide for the children. The trial court found that respondent behaved inappropriately at several visits with the

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children and that respondent appeared to be under the influence of drugs or alcohol during one of the visits. The court also found that respondent “has been unable to consistently care for herself or any of her children” and that the conditions leading to the removal of the children continued to exist.

Appeal by respondent from orders entered 8 and 22 May 2014 by Judge Susan Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 17 February 2015.

*Hanna Honeycutt for petitioner-appellee Buncombe County Department of Social Services.*

*Sydney Batch for respondent-appellant mother.*

*Amanda Armstrong for guardian ad litem.*

DIETZ, Judge.

Respondent, the mother of J.W. and K.M., appeals from orders adjudicating her children neglected and placing them in the custody of the Department of Social Services.

Respondent’s lead argument is one we see with increasing frequency in this Court: that the trial court’s fact findings are infirm because they are “cut-and-pasted” directly from the juvenile petition. This argument stems from language in a series of this Court’s decisions holding that fact findings “must be more than a recitation of allegations.”

As explained below, we clarify today that it is not *per se* reversible error for a trial court’s findings of fact to mirror the wording of a party’s pleading. It is a long-standing tradition in this State for trial judges to “rely upon counsel to assist in order preparation.” *In re A.B.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 768 S.E.2d 573, 579 (2015). It is no surprise that parties preparing proposed orders might borrow wording from their earlier submissions. We will not impose on our colleagues in the trial division an obligation to comb through those proposed orders to eliminate unoriginal prose.

Instead, as we previously have held on many occasions, when examining whether a trial court’s fact findings are sufficient, we will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we

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are confident the trial court did so, it is irrelevant whether those findings appear cut-and-pasted from a party's earlier pleading or submission. We thus reject Respondent's argument that the trial court's order is infirm because it "regurgitated" the same wording used in the juvenile petition.

We also reject Respondent's remaining arguments concerning custody, visitation, and the denial of reunification, all of which are controlled by well-settled law from this Court. Accordingly, we affirm the trial court's orders adjudicating the juveniles neglected and the dispositional orders placing the juveniles in the custody of the Buncombe County Department of Social Services.

**Facts and Procedural History**

On 10 September 2013, Buncombe County Department of Social Services (DSS) filed petitions alleging that J.W. and K.M. were neglected juveniles. DSS recounted Respondent's history with Child Protective Services which dated back to 2004, and which included issues with drug abuse and domestic violence. DSS's latest involvement with Respondent stemmed from a report by Child Protective Services in February 2013. The report stated that Respondent had been raped and assaulted by K.M.'s father. Respondent took out a Domestic Violence Protective Order against the father, but failed to prosecute the case and allowed the father contact with the minor children. The report further alleged that Respondent was suicidal and was abusing a prescription painkiller.

Child Protective Services also found that the father had physically assaulted Respondent during her pregnancy with K.M., and that Respondent was afraid of the father. The agency created a safety plan which provided that Respondent would abide by the Domestic Violence Protective Order and that the father's contact with the juveniles would occur only at a visitation center.

On 7 March 2013, Respondent placed the juveniles in kinship arrangements after she admitted to violating the provisions of the Domestic Violence Protective Order and stated that she was unable to care for the juveniles. Respondent received mental health counseling and help for her domestic violence issues. On 11 July 2013, Respondent was granted sole physical and legal custody of J.W. Respondent also was granted unsupervised visitation with K.M. However, on 8 August 2013, Respondent sent a letter to her social worker stating she no longer wished to participate in voluntary services and requested that DSS take custody of her children. According to DSS, Respondent indicated she did not want her children at that time, that she believed K.M. should be adopted by his kinship care providers, and that J.W. should



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stay in kinship care until he was five so that Respondent could get her “life in order.” The father was released from jail at the end of August 2013. Following his release, Respondent reported that he was leaving her threatening messages on Facebook, and that somebody had tampered with the brakes on her car.

DSS filed another juvenile petition regarding K.M. on 3 January 2014, this time adding an allegation that K.M. was dependent. DSS alleged that there had been ongoing difficulties between Respondent and the juveniles’ kinship providers since the filing of the August 2013 petitions. Specifically, on 2 January 2014, K.M. was taken to a hospital due to breathing issues. While at the hospital, Respondent threatened K.M.’s kinship provider, stating “I will kick your ass.” K.M. was discharged from the hospital on 3 January 2014. Following his release, Respondent was unwilling to allow K.M. to be discharged to his kinship providers and stated that she wanted him moved to another kinship placement. DSS concluded that it was in K.M.’s interests to remain in his placement, noting that his kinship providers had provided a safe and appropriate placement, and further that it was unsafe for K.M. to return to Respondent’s care.

The trial court held adjudicatory hearings on 25 through 28 February 2014. The trial court adjudicated the juveniles as neglected and entered an interim dispositional order granting custody to DSS and providing for their continued placement with their kinship providers. Respondent was granted supervised visitation.

The trial court held a full dispositional hearing on 10 April 2014. The court awarded non-secure custody to DSS, with placement to be continued with the children’s kinship care providers. Respondent again was granted supervised visitation. Respondent timely appealed from these orders.

### Analysis

#### I. Adjudication of Neglect

[1] Respondent first challenges the trial court’s adjudication of neglect with respect to her two children. Specifically, Respondent contends that the trial court failed to make proper findings of fact and that the findings, even if proper, are not supported by clear and convincing evidence.

“The role of this Court in reviewing a trial court’s adjudication of neglect and abuse is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact.” *In re T.H.T.*, 185 N.C.

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App. 337, 343, 648 S.E.2d 519, 523 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008) (internal quotation marks omitted).

At an adjudicatory hearing, “the trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law.” *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (internal quotation marks omitted). These findings “must be more than a recitation of allegations. They must be the specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.” *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (internal quotation marks omitted).

**A. Wording of the Trial Court’s Findings**

Respondent first argues that the trial court’s fact findings are improper because the court simply “regurgitated” the allegations in the juvenile petitions. Respondent accurately notes that nearly every fact finding in the trial court’s orders is copied verbatim from a corresponding allegation in the juvenile petitions. Respondent asserts that “[i]t is blatantly obvious that the trial court failed to craft ultimate findings of facts as evidenced by its ‘cut-and-paste’ process of drafting its order.”

We do not agree that findings by the trial court are insufficient simply because they are similar, or even identical, to the wording of the juvenile petition. The cases on which Respondent relies for this proposition do not prohibit “cut-and-pasted” findings, but instead prohibit findings that do not actually *find* any facts. For example, *In re Anderson* concerned an order stating only that “the grounds *alleged* for terminating the parental rights are as follows . . .” 151 N.C. App. at 97, 564 S.E.2d at 602. This Court held that “[a]s indicated by the word ‘alleged,’ the findings are not the ‘ultimate facts’ required by Rule 52(a) to support the trial court’s conclusions of law.” *Id.* Similarly, *In re O.W.* involved a series of findings that simply stated what witnesses had said. As this Court observed, this type of finding “is not even really a finding of fact as it merely recites the testimony that was given.” 164 N.C. App. at 703, 596 S.E.2d at 854.

To the extent our previous decisions created any confusion, we clarify today that it is not *per se* reversible error for a trial court’s fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court

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did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.

This holding is compelled not only by our existing precedent, but also by the reality of how trial court orders are prepared in our State. As this Court recently observed, “initial drafts of most court orders in cases in which the parties are represented by counsel are drafted by counsel for a party. . . . District Court judges have little or no support staff to assist with order preparation, so the judges have no choice but to rely upon counsel to assist in order preparation.” *In re A.B.*, \_\_\_ N.C. App. at \_\_\_, 768 S.E.2d at 579. In light of this reality, it would impose an impossible burden on trial court judges if we were to hold that any findings “cut-and-pasted” from a party’s pleading automatically warranted reversal of the order. If a trial court, after carefully considering the evidence, finds that the facts are exactly as alleged in a party’s pleading, there is nothing wrong with repeating those same words in an order. The purpose of trial court orders is to do justice, not foster creative writing.

In this case, we readily conclude that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to support its conclusions of law. The trial court heard four days of witness testimony before reaching its decision to adjudicate the juveniles as neglected. The court found that Respondent took out a Domestic Violence Protective Order against the father after he physically assaulted her while she was pregnant; that Respondent failed to enforce that protective order and that she allowed the father contact with the juveniles; that Respondent had a history of substance abuse and domestic violence; that Respondent indicated that she no longer wished to participate in her case plan; and that there were ongoing difficulties between Respondent and the children’s kinship providers. The court also made the ultimate fact finding that the juveniles were neglected because they did not receive proper care, supervision, or discipline; they were not provided with necessary medical care; and they lived in an environment injurious to their welfare.

Although many of these findings in the court’s orders appear to be “cut-and-pasted” from wording in the juvenile petitions, the findings are based on evidence presented to the court. In light of the entire record and the transcript of the proceedings, we are confident that the trial court’s findings are the result of its own independent, reasoned decision. Accordingly, we reject Respondent’s argument that the trial court’s orders are erroneous because they contain language cut-and-pasted from the juvenile petitions.

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**B. Evidence Supporting Finding of Neglect**

Respondent next argues that, even if the trial court's findings of neglect are sufficient on their face, those findings are not supported by the record. We disagree.

A neglected juvenile is a "juvenile who does not receive proper care, supervision, or discipline . . . or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2013). In addition, there must be "some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment.*" *In re A.B.*, 179 N.C. App. 605, 613, 635 S.E.2d 11, 17 (2006) (internal quotation marks omitted). In determining whether a child is neglected, domestic violence in the home contributes to an injurious environment. *See In re K.D.*, 178 N.C. App. 322, 328, 631 S.E.2d 150, 155 (2006).

During the adjudicatory hearing in this case, social worker Karina Pizarro testified that Respondent took out a Domestic Violence Protective Order against the father after he strangled and attempted to rape her and that Respondent admitted to having contact with the father despite the protective order. She also stated that Respondent was afraid to enforce the protective order, that Respondent went back and forth about where she wanted her children placed multiple times, that Respondent stated that she could not care for the children because she was having a rough time and did not have any money, and that Respondent has a history of problems with her children requiring intervention by DSS.

Social worker Rachel Crandall testified that Respondent sent her a letter indicating that she no longer wanted to participate in her case plan services and that she wished for the children to be placed in foster care. She also testified about ongoing difficulties between Respondent and her children's kinship providers and that Respondent often expressed her desire to remove the children from their kinship placements only to quickly change her mind again. Crandall also stated that Respondent behaved inappropriately during some of her visits with her children.

Respondent testified to her prior involvement with DSS due to domestic violence and her past substance abuse treatment and mental health treatment. She also admitted that the father physically assaulted her while she was pregnant and, importantly, that she had contact with the father and allowed him contact with the children despite the protective order being in place to prevent any contact for her own safety and the safety of her children. This testimony, taken together, is sufficient to support the trial court's findings of neglect.

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[241 N.C. App. 44 (2015)]

**II. Visitation Order**

**[2]** Respondent next argues that the trial court erred in its visitation order because the visitation plan did not include the frequency and length of visits as required by N.C. Gen. Stat. § 7B-905.1. We disagree.

Section 7B-905.1 provides that, “[i]f the juvenile is placed or continued in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved or ordered by the court. The plan shall indicate the minimum frequency and length of visits and whether the visits shall be supervised.” N.C. Gen. Stat. § 7B-905.1(b) (2013).

The court’s dispositional order for J.W. grants Respondent “weekly, supervised visits with the minor child, supervised by a social worker at the Buncombe County Department of Social Services or the Haywood County Department of Social Services.” The order also states that “all prior orders of the Court should remain in full force and effect, unless specifically modified by this order.” In an interim order entered 8 May 2014, the court ordered that Respondent “shall have two hours of supervised visitation with [J.W.] per week” at a specified McDonald’s restaurant supervised by DSS. Reading the two orders together, the visitation order for J.W. provides for weekly two hour visits supervised by DSS. Thus, the visitation order properly complies with N.C. Gen. Stat. § 7B-905.1.

The dispositional order for K.M. also states that “all prior orders of the Court should remain in full force and effect, unless specifically modified by this order” and orders that “the Child and Family Team shall have discretion to allow the respondent mother to have unsupervised visits at the Department.” The interim order entered 8 May 2014 granted Respondent “a maximum of one hour of supervised visitation with [K.M.] per week” to be “supervised by the Department or another appropriate adult approved by the Department and shall occur at a time mutually agreeable to the parties.” Viewing the two orders together, the court granted Respondent one hour of supervised visitation per week with the possibility of unsupervised visits to be decided by the Child and Family Team, of which Respondent is a member. Thus, the order complies with the statutory mandate in setting Respondent’s visitation.

**III. Award of Non-Secure Custody**

**[3]** Respondent next argues that the trial court erred in awarding DSS non-secure custody of the juveniles at the dispositional hearing. Respondent contends that, although the statute allows for the court to

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grant “custody” to DSS, the statute does not provide for “non-secure custody.” We disagree.

N.C. Gen. Stat. § 7B-903 provides the various dispositional alternatives available to the trial court. Under the statute, if the court determines the juvenile needs more adequate care or supervision, “the court may . . . [p]lace the juvenile in the custody of the department of social services.” N.C. Gen. Stat. § 7B-903(a)(2)(c) (2013). The use of the term “non-secure custody” merely distinguishes the custody from “secure custody,” in which the juvenile is placed in a detention facility or other government-supervised confinement. Respondent does not provide any reason why the children should have been placed in secure custody, and there is none. Accordingly, we reject this argument.

**IV. Denial of Reunification**

[4] Finally, Respondent argues that the trial court erred by failing to return the children to her custody because she completed her case plan and has the financial means to provide for the children. We disagree.

“The district court has broad discretion to fashion a disposition from the prescribed alternatives in N.C. Gen. Stat. § 7B-903(a), based upon the best interests of the child. . . . We review a dispositional order only for abuse of discretion.” *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008).

The trial court found that Respondent behaved inappropriately at several visits with the children and that Respondent appeared to be under the influence of drugs or alcohol during one of the visits. The court also found that Respondent “has been unable to consistently care for herself or any of her children” and that the conditions leading to the removal of the children continue to exist. These findings are supported by evidence presented during the hearing and support the trial court’s conclusion that the children should remain in the custody of DSS. Therefore, the court did not abuse its discretion in declining to return the children to Respondent’s custody at the dispositional hearing.

**Conclusion**

For the reasons discussed above, we affirm the trial court’s orders adjudicating the juveniles neglected and the dispositional orders placing the juveniles in the custody of the Buncombe County Department of Social Services.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

**IN RE P.A.**

[241 N.C. App. 53 (2015)]

## IN THE MATTER OF P.A

No. COA14-1086

Filed 5 May 2015

**1. Juveniles—guardianship—fundamentally fair procedures—scrutiny of guardian and mother**

In a guardianship proceeding for respondent-mother's child, respondent contended that the hearing lacked fundamentally fair procedures in that the trial court subjected her to closer scrutiny than it did Ms. Smith, an unrelated person who was to be the guardian. Respondent's arguments were in substance directed at the trial court's weighing of the evidence and determination of the credibility of the witnesses. While it is true that some of the evidence could be viewed as respondent suggested, the appellate court cannot reweigh the evidence or credibility as determined by the trial court.

**2. Juveniles—guardianship—fundamentally fair procedures—cross-examination—prior neglect adjudication**

Respondent-mother's right to fundamentally fair procedures in a guardianship proceeding for her child was not violated by a Department of Social Services (DSS) attorney's cross-examination of her concerning a prior adjudication of neglect that was overturned on appeal. Examined in context, the questions were not improper in any way. The questions related not to the legal conclusions of the prior adjudication but to facts as to prior events in the long history of DSS's involvement with respondent's children.

**3. Juveniles—guardianship—guardian's understanding and resources—evidence not sufficient**

The trial court's determination that legal guardianship of respondent-mother's child should be granted to Ms. Smith, a third party, was remanded for further proceedings. The trial court's finding that Ms. Smith was aware of the legal significance of her appointment as legal guardian of the juvenile was supported by the evidence, as Ms. Smith was present in court and the trial court directly addressed her at the hearing. However, there was insufficient evidence in the record to support a determination that Ms. Smith would have adequate resources to care appropriately for the juvenile. Ms. Smith's unsworn affirmative answer to the trial court's inquiry as to whether she had the financial and emotional ability to support the child and provide for its needs alone was not sufficient. The trial court has the

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responsibility to make an independent determination, based upon facts in the particular case.

**4. Juveniles—guardianship—further review waived by trial court—requisite findings not made**

In a guardianship proceeding vacated and remanded on other grounds, the trial court erred by not making the requisite findings before waiving further review hearings.

Appeal by respondent from orders entered 6 July 2014 by Judge Susan Dotson-Smith in District Court, Buncombe County. Heard in the Court of Appeals 6 April 2015.

*Buncombe County Department of Social Services, by Hanna Honeycutt, for petitioner-appellee.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.*

*Michael N. Tousey, for guardian ad litem.*

STROUD, Judge.

Respondent-mother appeals from a permanency planning review order and guardianship order in which the trial court awarded guardianship of her minor child P.A. (“Parker”) to Ms. H.-M. (“Ms. Smith”), ceased reunification efforts by the Buncombe County Department of Social Services (“DSS”), and waived further review hearings in this juvenile case.<sup>1</sup> Respondent contends that the trial court (1) violated her right to fundamentally fair procedures; (2) failed to verify that Ms. Smith had adequate resources to care appropriately for Parker; and (3) failed to make requisite findings of fact before waiving further review hearings. We vacate the trial court’s orders and remand this matter for further proceedings.

### I. Background

On 15 September 2011, DSS filed a petition alleging Parker was a neglected juvenile in that he did not receive proper care, supervision, or discipline from respondent and lived in an environment injurious to his welfare. DSS assumed non-secure custody of Parker that same day,

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1. Pseudonyms are used to protect the identity of the juvenile and for ease of reading.



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and on 20 September 2011, DSS placed Parker with his biological father (“Father”), who lived with his girlfriend, Ms. Smith. On 25 September 2012, the trial court entered an adjudication and dispositional order on the juvenile petition. The trial court concluded that Parker was a neglected juvenile and that the conditions that led to the removal of Parker from respondent’s care had not been fully resolved, and thus DSS should remain involved in the case. In summary, the adjudication of neglect was based upon respondent’s pattern of residential instability and involvement in domestic violence with Father. Nevertheless, the trial court concluded that Father was a fit and proper person to care for Parker and granted him custody of Parker.

After a review hearing, the trial court entered an order on 2 April 2013 in which it concluded that sole custody of Parker should remain with Father and waived further review hearings in the juvenile case. But six days later, respondent filed a request for emergency custody alleging that Father had been arrested for three counts of taking indecent liberties with A.H. (“Annie”), the minor child of Father’s girlfriend, Ms. Smith. Ms. Smith had reported the incident to the police and had removed Annie from the home that she had shared with Father.

On 8 April 2013, DSS filed a new juvenile petition alleging that Parker was an abused and neglected juvenile based upon Father’s alleged sexual abuse of Annie and his resulting incarceration. DSS again assumed non-secure custody of Parker and placed him with Ms. Smith. After conducting a hearing on the second juvenile petition, the trial court entered adjudication and dispositional orders on 3 September 2013. The trial court concluded that Parker was an abused and neglected child and that Father was a “responsible individual, as he has abused and seriously neglected the minor child.”<sup>2</sup> The trial court continued custody of Parker

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2. It is not entirely clear whether the trial court adjudicated Parker as neglected, abused, or both. The 8 April 2013 Juvenile Petition alleged both abuse and neglect, and specifically alleged that Parker was abused based upon the claim that Father had “committed, permitted, or encouraged the commission of a sex or pornography offense with or upon the juvenile in violation of the criminal law.” But the only allegations of sexual abuse were the acts upon Annie; based upon the record, it appears that Parker was not present when these acts occurred. The 3 September 2013 order addressed the allegations of sexual abuse of Annie in detail but then concluded that “the minor child [(apparently referring to Parker, not Annie)] is an abused and neglected child, pursuant to N.C.G.S. §§ 7B-101(1), and 7B-101(15), in that the juvenile’s parent has committed, permitted, or encouraged the commission of a sex or pornography offense with the juvenile or upon the juvenile in violation of criminal law; and as the juvenile lives in an environment injurious to the juvenile’s welfare, and does not receive proper care, supervision, or discipline from their parent.” The 3 September 2013 order thus appears to confuse two children, Annie, the actual victim

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with DSS, continued to sanction placement of Parker with Ms. Smith, established several requirements for respondent to meet before regaining custody of Parker, and awarded respondent visitation with Parker several days each week.

On or about 22 October 2013, the trial court sanctioned a trial home placement in respondent's home. At first, this placement went well. But on 20 December 2013, respondent married a man with a long criminal history ("Mr. King"), whom she had just met in October 2013. Mr. King's convictions include assault with a deadly weapon, assault on a female, and drug-related offenses. Respondent did not notify DSS about her marriage to Mr. King. On 4 January 2014, after a domestic disturbance, respondent asked Mr. King to leave their home. Because of this incident, a criminal warrant was issued for respondent's arrest for an alleged domestic assault on Mr. King that she had committed in Parker's presence. On or about 21 January 2014, after learning of the outstanding warrant, DSS terminated the trial placement and returned Parker to Ms. Smith's care.

On 20 and 21 March 2014, the trial court held a permanency planning and review hearing. On 6 June 2014, the trial court entered an order in which it set the permanent plan for Parker as guardianship, granted guardianship of Parker to Ms. Smith, awarded respondent visitation with Parker, relieved DSS of making further efforts toward reunification of Parker with his parents, and waived further review hearings. The trial court also entered a separate guardianship order that granted guardianship of Parker to Ms. Smith. Respondent gave timely notice of appeal from the permanency planning review order and guardianship order.

## II. Fundamentally Fair Procedures

[1] Respondent contends that the hearing lacked fundamentally fair procedures, because (1) she was held to a higher standard of conduct than Ms. Smith; (2) there was no evidence that Ms. Smith had a job; (3) Ms. Smith was not forced to comply with a case plan; (4) DSS abruptly transitioned the juvenile from her home to Ms. Smith's home when it had

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of the sexual abuse, and Parker, who apparently was not abused but was properly adjudicated as neglected based upon N.C. Gen. Stat. § 7B-101(15) because he "live[d] in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *See* N.C. Gen. Stat. § 7B-101(15) (2013). This apparent confusion in the order does not change our analysis of the order on appeal by respondent-mother, as she does not challenge the trial court's adjudication of neglect by Father. In fact, she herself filed a pro se "complaint and request for emergency custody" on 8 April 2013 based upon the same allegations of sexual abuse of Annie. (Original in all caps.)

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previously gradually transitioned the juvenile from Ms. Smith's home to her home; and (5) DSS's attorney extensively cross-examined her about a previous juvenile case involving one of her other children that had been dismissed. In short, respondent argues that the hearing was fundamentally unfair because the trial court subjected her, the child's biological mother, to closer scrutiny than it did Ms. Smith, an unrelated person. In addition, she notes, accurately, that Ms. Smith had made essentially the same bad choices regarding the men that she permitted to reside with her children and that Ms. Smith's child, Annie, had also been the subject of a DSS investigation, but that the trial court did not view these facts as disqualifying Ms. Smith as a guardian, while it did rely on similar facts in disqualifying respondent as a parent. In support of her argument, respondent relies on N.C. Gen. Stat. § 7B-100(1) and *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007).

N.C. Gen. Stat. § 7B-100(1) states that a purpose of abuse, neglect, and dependency proceedings is “[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]” N.C. Gen. Stat. § 7B-100(1) (2013). In *K.N.*, this Court held that the General Assembly achieved this aim “in part through statutory provisions that ensure a parent’s right to counsel and right to adequate notice of such proceedings.” 181 N.C. App. at 737, 640 S.E.2d at 814 (citing N.C. Gen. Stat. §§ 7B-1101.1, -1106 (2005)). But *K.N.* is inapplicable here, as respondent has not asserted that the trial court violated her right to counsel or her right to adequate notice. *See id.*, 640 S.E.2d at 814. Respondent’s arguments are in substance directed at the trial court’s weighing of the evidence and determination of the credibility of the witnesses. It is true that some of the evidence could be viewed as respondent suggests, but this court cannot reweigh the evidence or credibility as determined by the trial court. *See In re S.C.R.*, 198 N.C. App. 525, 531-32, 679 S.E.2d 905, 909 (“It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony.” (brackets omitted)), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009).

**[2]** With respect to DSS’s attorney’s cross-examination of respondent, we first note that respondent did not object to this questioning. But respondent couches this argument as based upon her right to “fundamentally fair” procedures and not any particular evidentiary rule, relying on *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321 (1935). But *Berger* is inapposite. There, the prosecutor was

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guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.

*Id.* at 84, 79 L. Ed. at 1319. In contrast, here, DSS's attorney cross-examined respondent about a previous juvenile case in which the trial court had adjudicated one of respondent's other children neglected. Respondent emphasizes that this Court reversed that order and the trial court on remand dismissed the juvenile petition. *See In re C.Q.*, 183 N.C. App. 489, 645 S.E.2d 229 (2007) (unpublished). Respondent is correct that the adjudication order upon which she was cross-examined was reversed by this Court and therefore no longer had any legal effect. *See id.*, 645 S.E.2d 229. But after examining the entirety of the transcript and particularly respondent's testimony in context, we do not find that the questions on cross-examination were improper in any way. The questions related not to the legal conclusions of the prior adjudication but to facts as to prior events in the long history of DSS's involvement with respondent's children. We hold that the trial court did not violate respondent's right to fundamentally fair procedures. *See K.N.*, 181 N.C. App. at 737, 640 S.E.2d at 814.

## III. Guardian Verification

## A. Standard of Review

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re R.A.H.*, 182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Jones*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 767 S.E.2d 341, 344 (2014).

## B. Analysis

**[3]** Respondent contends that the trial court failed to verify that Ms. Smith had adequate resources to care appropriately for Parker, in

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contravention of N.C. Gen. Stat. §§ 7B-600(c), -906.1(j) (2013). N.C. Gen. Stat. § 7B-600(c) provides: “If the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile.” N.C. Gen. Stat. § 7B-600(c). N.C. Gen. Stat. § 7B-906.1(j) similarly provides:

If the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

N.C. Gen. Stat. § 7B-906.1(j). The trial court “may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” *Id.* § 7B-906.1(c). The trial court also “shall consider information from the parents, the juvenile, the guardian, any person providing care for the juvenile, the custodian or agency with custody, the guardian ad litem, and any other person or agency that will aid in the court’s review.” *Id.*

In its order, the trial court specifically found that Ms. Smith “is aware of the legal significance of her appointment as legal guardian of the juvenile and will have adequate resources to care appropriately for the juvenile.” The trial court’s finding that Ms. Smith “is aware of the legal significance of her appointment as legal guardian” is supported by the evidence, as she was present in court and the trial court directly addressed Ms. Smith at the hearing:

THE COURT: . . . Do you understand that the Court may be asking you to become a permanent guardian today?

[Ms. Smith]: Yes, ma’am.

THE COURT: And you understand the nature and legal significance of having that label?

[Ms. Smith]: Yes, ma’am.

THE COURT: And are you prepared to support this minor child, not only as an infant, but as a rebellious teenager as they grow?

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[Ms. Smith]: Yes.

THE COURT: Do you have the financial and emotional ability to support this child and provide for its needs?

[Ms. Smith]: I do.

THE COURT: And do you have the willingness to reach out when your resources are running [out], so that you could make sure that they have whatever is in their best interest?

[Ms. Smith]: Definitely.

....

THE COURT: And you feel comfortable that you can provide this child with a home?

[Ms. Smith]: Yes.

Respondent contends that this inquiry is insufficient to support the trial court's finding because the trial court questioned Ms. Smith without having her sworn. But respondent did not object to Ms. Smith's testimony and thus may not argue on appeal that the trial court erred in allowing Ms. Smith to testify without being sworn. *See In re Nolen*, 117 N.C. App. 693, 696, 453 S.E.2d 220, 222-23 (1995). This evidence supported the trial court's finding that Ms. Smith was "aware of the legal significance of her appointment as legal guardian of the juvenile[.]"

But possessing an understanding of the "legal significance" of guardianship is not necessarily the same thing as having "adequate resources" to serve as a guardian. *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j). We have been unable to find sufficient evidence in the record to support a determination that Ms. Smith "will have adequate resources to care appropriately for the juvenile." DSS argues that specific findings of fact are not required by statute for the trial court to make the determinations under N.C. Gen. Stat. § 7B-906.1(j), citing to *In re J.E., B.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (2007) (construing predecessor statute, N.C. Gen. Stat. § 7B-907(f) (2005), as well as N.C. Gen. Stat. § 7B-600(c) (2005)). After reciting the statutory requirements of N.C. Gen. Stat. § 7B-600(c) and N.C. Gen. Stat. § 7B-907(f), this Court noted that "neither N.C. Gen. Stat. § 7B-600(c) nor N.C. Gen. Stat. § 7B-907(f) require that the court make any specific findings in order to make the verification." *Id.* at 616-17, 643 S.E.2d at 73. But the next paragraph goes on to note the evidence as to the resources of the guardians:

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Here, the order appointing the maternal grandparents as guardians shows that the trial court received into evidence and considered a home study conducted by Grayson County (Virginia) Department of Social Services (“Grayson County”). In the home study report, Grayson County reported that:

The maternal grandparents have both raised children in the past. They are aware of the importance of structure and consistency in a child’s life.

The maternal grandparents both appear to have a clear understanding of the enormity of the responsibility of caring for B.E. They are aware of the negative impact the past several years have had on his life. They are committed to raising B.E. and providing for his needs regardless of what may be required.

They have adequate income and are financially capable of providing for the needs of their grandson.

They are in good physical health.

Based on these findings, Grayson County recommended that the maternal grandparents be considered for placement of B.E. A home study conducted in 2001 regarding both J.E. and B.E. made similar findings and recommendations. Accordingly, based on its consideration of these reports, we conclude that the court adequately complied with N.C. Gen. Stat. § 7B-907(f) and N.C. Gen. Stat. § 7B-600(c).

*Id.* at 617, 643 S.E.2d at 73 (ellipses and brackets omitted). *In re J.E.* does not hold that no *evidence* is required regarding the resources of the guardian. *In re J.E.* is easily distinguishable from this case based upon the extensive evidence regarding the guardians presented in that case, which included two home study reports. *See id.*, 643 S.E.2d at 73.

It is correct that the trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian’s situation and resources, nor does the law require any specific form of investigation of the potential guardian. *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j). But the statute does require the trial court to make a determination that the guardian has “adequate resources” and some evidence of the

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guardian's "resources" is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence. *See id.*; *R.A.H.*, 182 N.C. App. at 57-58, 641 S.E.2d at 408 (holding that competent evidence must support a trial court's findings). Neither DSS nor the guardian ad litem ("GAL") has directed us to sufficient evidence in this record.

Although Parker had lived at least part of the time with Father and Ms. Smith before Father was incarcerated, at the time of the 20 March 2014 hearing, he had lived solely with Ms. Smith for the periods of April to October 2013 and then from 21 January 2014 until the hearing. Thus, the only evidence that could have been presented regarding Ms. Smith's actual history of caring for Parker on her own spanned only these two time periods, the most recent lasting less than 60 days. The GAL and DSS reports and court orders during the times when Parker was living with Father focused quite appropriately upon *Father's* situation and resources; Ms. Smith was noted only as Father's girlfriend who also resided in the home. The evidence regarding Ms. Smith's resources at the 20 March 2014 hearing consisted of the testimony of Teresa Jenkins, a DSS social worker, as follows:

[DSS's counsel]: . . . And the Department is recommending that the Court award guardianship of the minor child to [Ms. Smith]; is that correct?

[Jenkins]: Yes.

[DSS's counsel]: And have you run a Child Protective Services and criminal record check on [Ms. Smith]?

[Jenkins]: Yes.

[DSS's counsel]: And were there any concerns noted from those record checks?

[Jenkins]: No.

[DSS's counsel]: Have you visited the home of [Ms. Smith]?

[Jenkins]: Yes.

[DSS's counsel] Have you found it to be appropriate?

[Jenkins]: Yes.

[DSS's counsel]: And can you describe the nature of the relationship between [Parker] and [Ms. Smith]?



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[Jenkins]: They are very bonded.

[DSS's counsel]: Are there other children in the home?

[Jenkins]: Yes.

[DSS's counsel]: How many other children?

[Jenkins]: One.

[DSS's counsel]: And is that child a boy or girl?

[Jenkins]: It's a girl.

[DSS's counsel]: What is her name?

[Jenkins: Annie.]

[DSS's counsel]: And how old is [Annie]?

[Jenkins]: Eight.

[DSS's counsel]: Eight. And does [Parker] have a relationship with [Annie]?

[Jenkins]: Yes.

[DSS's counsel]: And how would you describe that relationship?

[Jenkins]: I have seen them interact in very positive manners. There are some sibling-like conflicts at times.

[DSS's counsel]: Has [Ms. Smith] been able to provide for all of [Parker]'s medical, dental, [and] financial needs?

[Jenkins]: Yes.

[DSS's counsel]: And do you have any concerns about [Parker] being in [Ms. Smith's] care?

[Jenkins]: No.

On cross examination, Jenkins further testified as follows:

[Respondent's counsel]: How many times has [Ms. Smith] moved with [Parker]?

[Jenkins]: I do not know exactly.

[Respondent's counsel]: Repeatedly; is that true?

[Jenkins]: There have been at least three addresses that I have seen him at.

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[Respondent's counsel]: Okay. And there is another child in that home?

[Jenkins]: Yes.

[Respondent's counsel]: And it's just the three of them; just [Ms. Smith], her daughter [Annie]—is that her daughter?

[Jenkins]: Yes.

[Respondent's counsel]: And then [Parker], just those three?

[Jenkins]: There is a roommate.

[Respondent's counsel]: And a roommate?

[Jenkins]: Yes.

[Respondent's counsel]: How many bedrooms is the home that she's in currently?

[Jenkins]: It is a three-bedroom.

[Respondent's counsel]: Okay. Do the children share a room?

[Jenkins]: No.

[Respondent's counsel]: Okay.

[Jenkins]: The daughter shares a room with the mother.

[Respondent's counsel]: So [Parker] has his own room?

[Jenkins]: Yes.

The trial court also considered the GAL reports, but these added no substantial information to the testimony above regarding Ms. Smith's resources. The GAL report filed on or about 14 May 2013 noted:

Currently, [Parker] resides in the home of [Ms. Smith], the former girlfriend of his father, who is living in an apartment in West Asheville with friends. There, [Parker] lives with [Ms. Smith]'s daughter, [Annie], and approximately two other children and one adult female.

....

. . . [Parker] has his own bed and shares a room with [Annie.]

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Ms. Smith's unsworn affirmative answer to the trial court's inquiry as to whether she had "the financial and emotional ability to support this child and provide for its needs" alone is not sufficient evidence, as this is Ms. Smith's own opinion of her abilities. No doubt, had the trial court asked respondent the same question, she also would have said "yes," but her answer alone would not have been sufficient evidence of her actual resources or abilities to care for Parker either. The trial court has the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact "adequate[.]" *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j). In this case, there is no evidence at all of what Ms. Smith considered to be "adequate resources" or what her resources were, other than the fact that she had been providing a residence for Parker. *See id.* And the evidence indicated that, even in providing a residence, Ms. Smith had moved several times and had lived with friends or roommates. The trial court even seemed to recognize that Ms. Smith may at some point lack resources to care for Parker on her own, as indicated by the question: "And do you have the willingness to reach out when your resources are running [out], so that you could make sure that they have whatever is in their best interest?"

The evidence noted above is the only evidence which is cited by the GAL and DSS as supporting the trial court's finding that Ms. Smith has "adequate resources" to be Parker's guardian, and upon our own examination of the record, we cannot find any additional evidence.<sup>3</sup> Therefore, the trial court's finding that Ms. Smith "will have adequate resources to care appropriately for the juvenile" is not supported by the evidence. For this reason, we vacate the trial court's determination that legal guardianship should be granted to Ms. Smith and remand for further proceedings.

## IV. Waiver of Further Review Hearings

**[4]** As we have already determined that the orders granting guardianship to Ms. Smith must be vacated for the reasons noted above and are remanding this case, further review hearings will be necessary. But because this issue is likely to arise on remand, we will address it in order to provide guidance to the trial court.

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3. We realize that DSS and the trial court may have been aware of more extensive background information about Ms. Smith and her resources than is reflected in this record, based upon the fact that DSS had presumably had some involvement with her family due to Father's sexual abuse of Annie. But we must base our analysis only on the evidence which appears in the record on appeal in this case.

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Respondent next contends that the trial court failed to make requisite findings of fact before waiving further review hearings, in contravention of N.C. Gen. Stat. § 7B-906.1(n). The GAL concedes that the order does not include the required findings but contends that there is sufficient evidence in the record to support the proper findings. A trial court may waive further review hearings if the court finds by clear, cogent, and convincing evidence each of the following:

- (1) The juvenile has resided in the placement for a period of at least one year.
- (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
- (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
- (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
- (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n). The trial court must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B-906.1(n), and its failure to do so constitutes reversible error. *See In re L.B.*, 184 N.C. App. 442, 447, 646 S.E.2d 411, 413-14 (2007) (construing predecessor statute, N.C. Gen. Stat. § 7B-906(b) (2005)).

Here, the trial court failed to make any findings of fact in support of the first, third, and fourth criteria set forth in N.C. Gen. Stat. § 7B-906.1(n). And it would have been impossible for the trial court to make a finding as to the first criterion that “[t]he juvenile has resided in the placement for a period of at least one year” since Parker had been placed with Ms. Smith for only about 60 days at the time of the March 2014 hearing. *See* N.C. Gen. Stat. § 7B-906.1(n). Accordingly, we hold that the trial court committed reversible error in waiving further review hearings. *See L.B.*, 184 N.C. App. at 447, 646 S.E.2d at 413-14.

On remand, we also note that the trial court should more clearly address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent,

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should the trial court again consider granting custody or guardianship to a nonparent. As directed by this Court in *In re B.G.*:

[T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status.

Here, the trial court concluded that it was in the best interest of Beth to remain with the Edwardses but failed to issue findings to support the application of the best interest analysis—namely that Respondent acted inconsistently with his custodial rights. Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact. Rather, our review is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. Accordingly, we must reverse the order awarding custody to the minor child's non-parent relative and remand for reconsideration in light of this opinion.

*In re B.G.*, 197 N.C. App. 570, 574-75, 677 S.E.2d 549, 552-53 (2009) (citations and quotation marks omitted).

## IV. Conclusion

For the foregoing reasons, we vacate the trial court's 6 June 2014 Subsequent Permanency Planning and Review Order and Guardianship Order and remand this matter for further proceedings.

VACATED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.

## IN THE COURT OF APPEALS

## ISENBERG v. N.C. DEP'T OF COMMERCE

[241 N.C. App. 68 (2015)]

ERIN ISENBERG, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT  
SECURITY, RESPONDENT

No. COA14-808

Filed 5 May 2015

**Process and Service—petition for judicial review—denial of  
unemployment benefits—service of notice**

Actual delivery was required for service of a petition for judicial review of a decision by the Division of Employment Security that petitioner was disqualified from receiving unemployment insurance benefits. The language in N.C.G.S. § 96-15(h) closely mirrored the language in N.C.G.S. § 1A-1, Rule 4(j) and required actual delivery to achieve service on petitioner's former employer. The service requirements are jurisdictional.

Appeal by petitioner from order entered 28 April 2014 by Judge A. Robinson Hassell in Guilford County Superior Court. Heard in the Court of Appeals 18 November 2014.

*Hopler & Wilms, LLP, by Adam J. Hopler, for petitioner-appellant.*

*N.C. Department of Commerce, Division of Employment Security, by Chief Counsel Thomas H. Hodges and Sharon A. Johnston, for respondent-appellee.*

McCULLOUGH, Judge.

Erin Isenberg (“petitioner”) appeals from an order dismissing her petition for judicial review of a decision of the North Carolina Department of Commerce, Division of Employment Security (“respondent” or “Division”). Upon review, we affirm.

### I. Background

On 21 January 2014, petitioner filed a petition for judicial review (the “petition”) in Guilford County Superior Court seeking review of a 2 January 2014 decision by respondent that petitioner was disqualified from receiving unemployment insurance benefits. Respondent responded to the petition on 12 February 2014 by filing a motion to dismiss on the ground that petitioner failed to serve the petition upon all

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parties of record in the Division proceedings as required by N.C. Gen. Stat. § 96-15(h). Attached to respondent's motion was an affidavit of the Director of Business and Finance of petitioner's former employer, Growing Years Burlington, indicating that petitioner's former employer had not been served with a copy of the petition as of the date of the affidavit, 11 February 2014.

On 10 March 2014, petitioner filed an affidavit of service dated 5 March 2014. The affidavit of service, along with the attachments, show that petitioner mailed a copy of the petition to the former employer via certified mail on 31 January 2014. The U.S. Postal Service attempted delivery on 3 February 2014 and left notice because there was no authorized recipient available. Thereafter, the mailing was available for pickup from 12 February 2014 to 20 February 2014. The mailing was returned to petitioner unclaimed on 27 February 2014. During the time the mail was held by the U.S. Postal Service, petitioner communicated with respondent by email. In their communications, respondent indicated that it had been in contact with petitioner's former employer about the mailing but petitioner's former employer never received it.

In addition to the affidavit of service, petitioner submitted a brief in which he opposed respondent's motion to dismiss the petition.

Respondent's motion to dismiss came on for hearing in Guilford County Superior Court on 9 April 2014 before the Honorable A. Robinson Hassell. By order filed 28 April 2014, the superior court granted respondent's motion and dismissed the petition. In doing so, the superior court concluded it did not obtain jurisdiction to review the petition because petitioner failed to comply with the statutory requirements of N.C. Gen. Stat. § 96-15(h) in that petitioner failed to serve the petition on petitioner's former employer within the time allowed. Petitioner now appeals.

## II. Discussion

On appeal, petitioner raises two issues concerning the superior court's interpretation of N.C. Gen. Stat. § 96-15(h). That statute, in full, provides the following concerning judicial review of a decision of the Division:

Any decision of the Division, in the absence of judicial review as herein provided, or in the absence of an interested party filing a request for reconsideration, shall become final 30 days after the date of notification or mailing thereof, whichever is earlier. Judicial review shall be permitted only after a party claiming to be aggrieved

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by the decision has exhausted his remedies before the Division as provided in this Chapter and has filed a petition for review in the superior court of the county in which he resides or has his principal place of business. The petition for review shall explicitly state what exceptions are taken to the decision or procedure of the Division and what relief the petitioner seeks. *Within 10 days after the petition is filed with the court, the petitioner shall serve copies of the petition by personal service or by certified mail, return receipt requested, upon the Division and upon all parties of record to the Division proceedings.* Names and addresses of the parties shall be furnished to the petitioner by the Division upon request. The Division shall be deemed to be a party to any judicial action involving any of its decisions and may be represented in the judicial action by any qualified attorney who has been designated by it for that purpose. Any questions regarding the requirements of this subsection concerning the service or filing of a petition shall be determined by the superior court. Any party to the Division proceeding may become a party to the review proceeding by notifying the court within 10 days after receipt of the copy of the petition. Any person aggrieved may petition to become a party by filing a motion to intervene as provided in [N.C. Gen. Stat. §] 1A-1, Rule 24.

N.C. Gen. Stat. § 96-15(h) (2013) (emphasis added).

In the review proceedings below, the superior court interpreted the service requirement in the N.C. Gen. Stat. § 96-15(h) to require that copies of the petition “must be *delivered* to the Division and all parties of record to the Division’s proceedings within ten (10) days after the petition is filed.” (Emphasis added). Now in petitioner’s first issue on appeal, petitioner claims the superior court’s interpretation is error. Specifically, petitioner contends actual delivery is not required for service, but instead service under N.C. Gen. Stat. § 96-15(h) is complete upon deposit of the petition into the mail.

The crucial inquiry in deciding this issue is whether Rule 4 or Rule 5 of the N.C. Rules of Civil Procedure applies to service of the petition under N.C. Gen. Stat. § 96-15(h).<sup>1</sup> “Issues of statutory construction are

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1. All references to rules in this opinion are to the N.C. Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1.



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questions of law, reviewed de novo on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

Rule 4 governs the manner of service to exercise personal jurisdiction and provides that service of process may be made upon a natural person, agencies of the State, and business entities “[b]y delivering a copy of the summons and of the complaint . . .” or “[b]y mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested . . . [.]” among other methods. N.C. Gen. Stat. § 1A-1, Rule 4(j) (2013). As both parties acknowledge, service under Rule 4 is complete upon actual delivery.

As a complement to Rule 4, Rule 5 governs the service of pleadings and other papers. It provides that “[w]ith respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service shall be made upon the party’s attorney of record . . . . If the party has no attorney of record, service shall be made upon the party.” N.C. Gen. Stat. § 1A-1, Rule 5(b) (2013). Service upon the party’s attorney of record or upon the party may be made in a manner provided in Rule 4 or by delivering or mailing a copy of the pleading or other paper to the party’s attorney of record or the party. *Id.* Under Rule 5, “[s]ervice by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the [U.S.] Postal Service.” *Id.* “A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4.” N.C. Gen. Stat. § 1A-1, Rule 5(b1) (2013).

In this case, petitioner asserts “[s]ervice of a petition for judicial review should be looked at as service under [Rule 5] as opposed to Rule 4.”

In support of this position, petitioner points to the following language in N.C. Gen. Stat. § 96-15(h): “Any party to the Division proceeding may become a party to the review proceeding by notifying the court within 10 days after *receipt* of the copy of the petition.” N.C. Gen. Stat. § 96-15(h) (emphasis added). Petitioner contends that “[i]f the legislature had equated service with actual delivery then one would presume that the legislature would have used the word ‘service’ instead of ‘receipt’ to start the period of time for the [e]mployer to request participation.” Petitioner further argues that if actual delivery is required for service under N.C. Gen. Stat. § 96-15(h), the statute provides an unreasonably short period of time, “[w]ithin 10 days after the petition is filed with

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the court,” to accomplish service when compared to the 60 day period allowed for service in Rule 4. *See* N.C. Gen. Stat. § 1A-1, Rule 4(c).

Upon review, we disagree. While we acknowledge the short time period allowed for service of the petition under N.C. Gen. Stat. § 96-15(h) provides little room for mistakes in service, we are bound by the language of the statute, which we hold supports the superior court’s determination that actual delivery, as required in Rule 4, is required for service of the petition under N.C. Gen. Stat. § 96-15(h).

Similar to service by mail under various subsections of Rule 4(j), N.C. Gen. Stat. § 96-15(h) provides service may be accomplished by “certified mail, return receipt requested[.]” When a statute requires “certified mail, return receipt requested,” it is clear to this Court that the emphasis is on actual delivery. *See Nissan Div. of Nissan Motor Corp. in USA v. Nissan*, 111 N.C. App. 748, 755, 434 S.E.2d 224, 228 (1993) (“When a statute requires registered mail, . . . the emphasis is on delivery of a written document.”), *rev’d sub nom. on other grounds, Nissan Div. of Nissan Motor Corp. in U.S. v. Fred Anderson Nissan*, 337 N.C. 424, 445 S.E.2d 600 (1994). Rule 5(b), on the other hand, places no emphasis on actual delivery and merely requires pleadings and other papers to be mailed to the party’s last known address. Instead of proof of actual delivery by return receipt, Rule 5(b1) requires a certificate of service to accompany all pleadings or other papers required to be served.

Where the language in N.C. Gen. Stat. § 96-15(h) closely mirrors the language in Rule 4(j), we hold actual delivery is required to accomplish service of the petition. This holding guarantees that all parties to the Division proceedings have notice that a petition for judicial review of a final decision of the Division has been filed in superior court.

Additionally, N.C. Gen. Stat. § 96-15(h) does not distinguish between the service of a petition for judicial review upon the Division and service upon all parties of record to the Division proceedings. Therefore, we assume the service requirements for the Division and all parties of record to the Division proceedings are the same. N.C. Gen. Stat. § 96-4 provides that “[s]ervice of process upon the Division in any proceeding instituted before an administrative agency or court of this State shall be pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 4(j)(4)[.]” N.C. Gen. Stat. § 96-4(y) (2013). Thus, we hold N.C. Gen. Stat. § 96-15(h) requires actual delivery to achieve service on petitioner’s former employer. The superior court’s interpretation was not error.

On appeal, petitioner also argues in the alternative that even if service under N.C. Gen. Stat. § 96-15(h) requires actual delivery, service of

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the petition upon petitioner's former employer was not a jurisdictional defect necessitating dismissal. We disagree.

The courts have long recognized that

[t]here is no inherent or inalienable right of appeal from an inferior court to a Superior Court or from a Superior Court to the Supreme Court.

*A fortiori*, no appeal lies from an order or decision of an administrative agency of the State or from the judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute. If the right exists, it is brought into being, and is a right granted, by legislative enactment.

There can be no appeal from the decision of an administrative agency except pursuant to specific statutory provision therefor.

Obviously then, the appeal must conform to the statute granting the right and regulating the procedure.

The statutory requirements are mandatory and not directory. They are conditions precedent to obtaining a review by the courts and must be observed. Noncompliance therewith requires dismissal.

*In re State ex rel. Emp't Sec. Comm'n*, 234 N.C. 651, 653, 68 S.E.2d 311, 312 (1951) (quotation marks and citations omitted). Nothing in the many amendments to N.C. Gen. Stat. § 96-15(h) to date have changed the mandatory nature of the service requirements. Thus, we hold the service requirements are jurisdictional and the superior court did not err in dismissing the petition where petitioner's former employer, a party of record to the Division proceedings, was not properly served.

### III. Conclusion

For the reasons discussed above, we affirm the superior court's dismissal of the petition.

AFFIRMED.

Judges CALABRIA and STROUD concur.

**LARSEN v. BLACK DIAMOND FRENCH TRUFFLES, INC.**

[241 N.C. App. 74 (2015)]

KAREN LARSEN, BENEFICIARY, MORGAN STANLEY AS IRA CUSTODIAN F/B/O KAREN  
 LARSEN, MARY JO STOUT, CHIARA IDHAMMAR, AND  
 CHRISTER IDHAMMAR, PLAINTIFFS

v.

BLACK DIAMOND FRENCH TRUFFLES, INC. AND SUSAN RICE, DEFENDANTS

No. COA14-1040

Filed 5 May 2015

**Appeal and Error—interlocutory orders and appeals—failure to  
 establish grounds for appellate review—reply brief too late**

The Court of Appeals dismissed defendants’ appeal of the trial court’s order that granted plaintiffs’ motion on the pleadings as to three of the plaintiffs but denied the motion as to the fourth plaintiff in a suit by shareholders seeking to inspect corporate records. The trial court did not certify the judgment for appellate review, and defendants’ principal appellant brief failed both to state the grounds for appellate review and to address the interlocutory nature of their appeal. The Court of Appeals would not permit defendants to establish grounds for appellate review in their reply brief. Defendants’ appeal was dismissed.

Appeal by Defendants from an order entered on 16 June 2014 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals on 4 March 2015.

*H. Gregory Johnson and Jane Soboleski, Ferikes & Bleyinat, PLLC,  
 for Defendant-Appellants.*

*R. Palmer Sugg and Neil T. Oakley, Robbins May & Rich, LLP, for  
 Plaintiff-Appellees.*

HUNTER, JR., Robert N., Judge.

Black Diamond French Truffles, Inc. (“BDFT”) and Susan Rice (collectively, “Defendants”) appeal from an order granting Plaintiffs’ motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. For the following reasons, we dismiss Defendants’ appeal as interlocutory.

**I. Factual & Procedural History**

Defendant BDFT is a North Carolina corporation. Since its incorporation in 2007, Defendant Susan Rice has been BDFT’s president. On

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19 March 2008, Plaintiff Karen Larsen purchased 25,000 shares of BDFT Series B Preferred Stock. On 15 May 2008, Plaintiffs Chiara and Christer Idhammar purchased 25,000 shares of BDFT Series A Preferred Stock. On 24 June 2008, Plaintiff Mary Jo Stout purchased 25,000 shares of BDFT Series A Preferred Stock.

On 25 November 2013, Plaintiffs filed a verified complaint, alleging that they are qualified shareholders of BDFT and are entitled to inspect certain corporate records under N.C. Gen. Stat. § 55-16-02. Plaintiffs' complaint contended that they met the statutory notice and demand requirements of N.C. Gen. Stat. § 55-16-02, but Defendants refused to provide the requested documents. Plaintiffs asked the trial court to order Defendants to permit them to inspect the corporate records, and to order Defendants to pay Plaintiffs' costs incurred to obtain the order, including reasonable attorney's fees.

On 30 January 2014, Defendants answered Plaintiffs' complaint. In their answer, Defendants admitted that Plaintiff Idhammar sent a written demand to Defendant Rice and admitted that Defendant Rice "agreed to provide the requested information 'as soon as [Defendants] have it in proper form[.]'" Defendants denied all other relevant allegations, including Plaintiffs' contention that they desired to inspect the records in good faith and for a proper purpose.

On 14 May 2014, Plaintiffs filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. The motion was heard on 30 May 2014. On 16 June 2014, the trial court issued an order granting the motion for judgment on the pleadings as to Plaintiffs Larsen, Christer Idhammar, and Stout, but denying the motion as to Plaintiff Chiara Idhammar. The trial court also ordered Defendant BDFT to pay Plaintiffs Larsen, Christer Idhammar, and Stout's attorney's fees in the amount of \$4,520.62. Defendants filed timely written notice of appeal on 23 June 2014.

Defendants filed their principal appellant brief with this Court on 25 November 2014. Defendants argue in their brief that the trial court erred in granting Plaintiffs' motion for judgment on the pleadings and awarding attorney's fees. Defendants contend that the trial court's grant of Plaintiffs' motion for judgment on the pleadings was erroneous because, among other things, the order "did not fully resolve all issues between all of the parties." Despite that admission, Defendants' principal brief to this Court does not address the interlocutory nature of their appeal, or allege that the trial court's order deprives them of a substantial right. Furthermore, Defendants' principal brief contains no statement of the grounds for appellate review.

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On 15 January 2015, Plaintiffs filed their appellee brief with this Court. In their brief, Plaintiffs argue that Defendants' appeal should be dismissed as interlocutory. Plaintiffs contend that the appeal is interlocutory because it does not finally determine the entire controversy, and neither a substantial right is implicated nor did the trial court certify the case for appellate review pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Defendants served Plaintiffs with a reply brief on 29 January 2015. In their reply brief, Defendants admit that the appeal is interlocutory, but argue that grounds for appellate review exist because the trial court's judgment on the pleadings creates "a potential for inconsistent trial verdicts" and therefore "affects a substantial right." We need not reach the issue of whether a substantial right is implicated here because Defendants failed to properly establish grounds for appellate review. Defendants' appeal must be dismissed.

**II. Analysis**

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazy v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). As a general rule, there is no right of appeal from an interlocutory order. See *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985) (citation omitted). However, there are two circumstances under which a party is permitted to appeal an interlocutory order:

First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

*Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253 (internal citations and quotation marks omitted). "Under either of these two circumstances, it

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is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]” *Id.* “It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right[.]” *Id.* at 380, 337 S.E.2d at 254.

In this case, the trial court's order is interlocutory because it does not dispose of the case as to Plaintiff Chiara Idhammar. Furthermore, the trial court did not certify in the judgment that there is no just reason for delay of the appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure. Therefore, in order for this Court to accept Defendants' interlocutory appeal, Defendants must show that the trial court's order deprives Defendants of a substantial right.

Here, Defendants' only allegation of a substantial right deprivation is in their reply brief, as a reaction to Plaintiffs' argument that the appeal should be dismissed as interlocutory. Therefore, for this Court to find that proper grounds exist for appellate review, we must either: (1) find that Defendants' principal brief sufficiently states grounds for appellate review; or (2) allow Defendants to establish grounds for appellate review via reply brief. We refuse to do so for the following reasons.

Defendants' principal brief is wholly insufficient to establish grounds for appellate review. Not only did the principal brief not mention the interlocutory nature of the appeal or the issue of a substantial right deprivation, but also it did not include *any* statement of grounds for appellate review, in violation of Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure. Rule 28(b) provides:

An appellant's brief *shall* contain . . .

(4) *A statement of the grounds for appellate review.* Such statement *shall* include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement *must contain* sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C. R. App. P. 28(b)(4) (2014) (emphasis added). Our Supreme Court has held that noncompliance with “nonjurisdictional” rules such as Rule 28(b) “normally should not lead to dismissal of the appeal.” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). However, when an appeal is interlocutory, Rule 28(b)(4) is not a “nonjurisdictional” rule. Rather, the *only way*

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an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right. In this case, because Defendants failed to state *any* grounds for appellate review in their principal brief, their appeal can only survive if we allow Defendants to establish grounds for appellate review via reply brief.

We will not allow Defendants to use their reply brief to independently establish grounds for appellate review. Rule 28(h) of the North Carolina Rules of Appellate Procedure governs reply briefs. Rule 28(h) was amended in 2013 to provide greater opportunity for an appellant to submit a reply brief. The amended Rule provides:

Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief.

N.C. R. App. P. 28(h) (2014). Although this Rule is permissive, allowing appellants to freely file reply briefs so long as they follow the Rule's requirements, this Court has noted that "[a] reply brief does not serve as a way to correct deficiencies in the principal brief." *State v. Greene*, 753 S.E.2d 397, 2013 WL 5947337, at \*5 (N.C. Ct. App. 2013) (unpublished); *see also Red Arrow v. Pine Lake Preparatory, Inc. Bd. of Dirs.*, 741 S.E.2d 511, 2013 WL 1314053, at \*2 (N.C. Ct. App. 2013) (unpublished).<sup>1</sup>

For example, we have held that where a criminal defendant did not ask this Court to review an unpreserved issue under the plain error standard in his principal brief, he may not cure this deficiency by mentioning plain error in his reply brief. *See State v. Dinan*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 757 S.E.2d 481, 485 (2014) ("[A] reply brief is not an avenue to correct the deficiencies contained in the original brief."); *see also Greene*, at \*5.

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1. Under the old version of Rule 28(h), an appellant was not permitted to submit a reply brief except under certain circumstances, one of which was "if the appellee has presented in its brief new or additional issues[.]" N.C. R. App. P. 28(h) (2012). In *Red Arrow*, this Court held that where an appellant did not mention the interlocutory nature of the appeal in her principal brief, and the appellees subsequently raised the issue in their brief, the appellees' raising of the issue was not "new or additional[.]" rather, it was a different argument on the grounds for appeal. *Red Arrow*, 2013 WL 1314053, at \*2. Therefore, we refused to consider the appellant's reply brief. *Id.* at \*2. Our opinion here, under the new Rule 28(h), is consistent with our holding in *Red Arrow*.



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[241 N.C. App. 79 (2015)]

Furthermore, we have held that under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief. *See Beckles-Palomares v. Logan*, 202 N.C. App. 235, 246, 688 S.E.2d 758, 765 (2010) (holding that appellant abandoned its statute of limitations argument “by its failure to advance the issue in its principal brief”); *see also* N.C. R. App. P. 28(b)(6) (2014) (“An appellant’s brief shall contain . . . the contentions of the appellant with respect to each issue presented. Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

Therefore, in this case, we will not allow Defendants to correct the deficiencies of their principal brief in their reply brief. Because “it is the appellant’s burden to present appropriate grounds for this Court’s acceptance of an interlocutory appeal[.]” *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253, and Defendants have not met their burden, Defendants’ appeal must be dismissed.

**III. Conclusion**

For the foregoing reasons, Defendants’ appeal is dismissed as interlocutory.

DISMISSED.

Judges STEPHENS and TYSON concur.

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KAREN LARSEN, MARY JO STOUT, CHIARA IDHAMMAR, AND  
CHRISTER IDHAMMAR, PLAINTIFFS  
v.  
SUSAN RICE TRUFFLE PRODUCTS LLC AND SUSAN RICE, DEFENDANTS

No. COA14-1041

Filed 5 May 2015

**Appeal and Error—interlocutory orders and appeals—failure to establish grounds for appellate review—reply brief too late**

The Court of Appeals dismissed defendants’ appeal of the trial court’s order that granted plaintiffs’ motion on the pleadings as to three of the plaintiffs but denied the motion as to the fourth plaintiff in a suit by shareholders seeking to inspect corporate records. The trial court did not certify the judgment for appellate review, and

**LARSEN v. SUSAN RICE TRUFFLE PRODS. LLC**

[241 N.C. App. 79 (2015)]

defendants' principal appellant brief failed both to state the grounds for appellate review and to address the interlocutory nature of their appeal. The Court would not permit defendants to establish grounds for appellate review in their reply brief. Defendants' appeal was dismissed.

Appeal by Defendants from an order entered on 16 June 2014 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals on 4 March 2015.

*H. Gregory Johnson and Jane Soboleski, Ferikes & Bleynt, PLLC, for Defendant-Appellants.*

*R. Palmer Sugg and Neil T. Oakley, Robbins May & Rich, LLP, for Plaintiff-Appellees.*

HUNTER, JR., Robert N., Judge.

Susan Rice Truffle Products, LLC and Susan Rice (collectively, "Defendants") appeal from an order granting Plaintiffs' motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure.

Defendants' assignments of error and arguments in the present case are similar to those in companion case COA14-1040. In both cases, Defendants argue that the trial court erred in granting Plaintiffs' motion for judgment on the pleadings. In COA14-1040, Defendants use N.C. Gen. Stat. § 55-16-01 (governing corporate records) to support their argument, whereas in this case, Defendants cite N.C. Gen. Stat. § 57C-3-04 (repealed effective 1 January 2014, formerly governing LLC members' ability to access records).

Defendants' principal brief and reply brief in this case have the same fatal jurisdictional deficiencies as the briefs in the companion case. For the reasons stated in COA14-1040, we dismiss Defendants' appeal as interlocutory.

DISMISSED.

Judges STEPHENS and TYSON concur.

**MARTIN MARIETTA MATERIALS, INC. v. BONDHU, LLC**

[241 N.C. App. 81 (2015)]

MARTIN MARIETTA MATERIALS, INC., PLAINTIFF

v.

BONDHU, LLC, DEFENDANT

No. COA14-908

Filed 19 May 2015

**Statutes of Limitation and Repose—equally applicable statutes of limitations—longer limitations period governs**

The trial court did not err by granting summary judgment in favor of plaintiff in an action for recovery of property taxes paid by plaintiff on defendant's behalf. Pursuant to North Carolina's choice of law rules, the Court applied North Carolina's procedural rules and Virginia's substantive law. Because two statutes of limitations were equally applicable in this case, the longer limitations period of ten years governed.

Appeal by defendant from order entered 22 May 2014 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 3 December 2014.

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell and Lauren H. Bradley, for plaintiff-appellee.*

*Erwin, Bishop, Capitano & Moss, PA, by Fenton T. Erwin, Jr. and Matthew M. Holtgrewe, for defendant-appellant.*

DAVIS, Judge.

Bondhu, LLC ("Defendant") appeals from the trial court's order granting summary judgment in favor of Martin Marietta Materials, Inc. ("Plaintiff") on its action seeking the recovery of \$71,947.00 in property taxes paid by Plaintiff on Defendant's behalf and denying Defendant's motion for partial summary judgment. On appeal, Defendant contends that the trial court improperly granted summary judgment in Plaintiff's favor because its claims for reimbursement were barred, in part, by the statute of limitations. After careful review, we affirm.

**Factual Background**

This case arises from the parties' joint ownership of a 90-acre tract of real property ("the Property") located in Chesterfield County, Virginia. Property owners in Chesterfield County receive bills for the *ad valorem*

## MARTIN MARIETTA MATERIALS, INC. v. BONDHU, LLC

[241 N.C. App. 81 (2015)]

property taxes they owe from the Chesterfield County Treasurer's Office twice a year. When Plaintiff first acquired its one-half interest in the Property, its then co-tenant, Tamojira, Inc. ("Tamojira"), had already failed to pay its share of the property taxes for the years 2002, 2003, and the first half of 2004. After Plaintiff acquired its interest in the Property, Tamojira failed to pay the taxes for the second half of 2004 and the first half of 2005. Plaintiff brought suit and subsequently obtained a default judgment against Tamojira for the unpaid taxes. Tamojira's interest in the Property was then transferred to Defendant by deed recorded 24 May 2005. Defendant has not paid *ad valorem* property taxes on the Property since acquiring its interest in 2005.

On 31 October 2013, Plaintiff filed a verified complaint in Wake County Superior Court alleging that (1) Defendant has failed to pay any property taxes since Defendant acquired its one-half interest in the Property on 24 May 2005; and (2) "[a]s the other one-half owner of the Property, [Plaintiff] has had to satisfy the tax debts owed by Defendant in the amount of \$67,831.60, plus any amounts in taxes, fees, and interest [Plaintiff] must pay for the property taxes for the second half of 2013." In its complaint, Plaintiff sought reimbursement from Defendant for the property taxes it had paid on Defendant's behalf.

On 26 February 2014, Defendant filed an answer asserting the statute of limitations as an affirmative defense and seeking the appointment of a receiver pursuant to N.C. Gen. Stat. § 1-502. Plaintiff filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on 4 February 2014 and an amended motion for summary judgment on 19 February 2014. On 15 May 2014, Defendant filed a motion for partial summary judgment, alleging that the applicable statute of limitations barred Plaintiff's recovery of any property taxes that were paid before the three-year period immediately preceding its 31 October 2013 complaint.

The parties' cross-motions for summary judgment came on for hearing before the Honorable Donald W. Stephens on 20 May 2014. On 22 May 2014, the trial court entered an order granting summary judgment in Plaintiff's favor, denying Defendant's motion for partial summary judgment, and awarding Plaintiff \$71,947.00<sup>1</sup> plus costs and interest. Defendant gave timely notice of appeal to this Court.

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1. The amount awarded to Plaintiff in the trial court's judgment included the additional \$4,115.40 in property taxes Plaintiff paid on Defendant's behalf for the second half of 2013, bringing the total amount from \$67,831.60 to \$71,947.00.

## MARTIN MARIETTA MATERIALS, INC. v. BONDHU, LLC

[241 N.C. App. 81 (2015)]

**Analysis**

The entry of summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Premier, Inc. v. Peterson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 755 S.E.2d 56, 59 (2014) (citation and quotation marks omitted). An order granting summary judgment is reviewed *de novo* on appeal. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

In this case, no material factual dispute exists as Defendant does not contest (1) its status as a co-owner of the Property during the relevant time period; (2) its nonpayment of property taxes; or (3) the amount of the property tax debt. Rather, the sole issues presented on appeal are (1) which statute of limitations applies to Plaintiff’s claims; and (2) whether the applicable statute of limitations serves to render Plaintiff’s claims partially time-barred. Defendant contends that the trial court erred in granting Plaintiff’s motion for summary judgment because Plaintiff’s claims for reimbursement are barred, in part, by the three-year limitations period contained in N.C. Gen. Stat. § 1-52(1). Plaintiff, conversely, asserts that the “catch-all” ten-year limitations period contained in N.C. Gen. Stat. § 1-56 is applicable to its action.

Although this case was filed in Wake County, North Carolina, the claims asserted by Plaintiff involve obligations arising from the parties’ relationship as co-tenants of the Property in Chesterfield County, Virginia. The Chesterfield County Treasurer’s Office — the entity that assessed taxes on the Property — is located in Virginia, and the tax debt on the Property resulting from Defendant’s nonpayment of its share of the taxes accrued there as well.

“Under North Carolina choice of law rules, we apply the substantive law of the state where the cause of action accrued and the procedural rules of North Carolina.” *Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 112-13, 323 S.E.2d 470, 475 (1984), *disc. review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985); *see also Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 16, 598 S.E.2d 570, 581 (2004) (explaining that “according to North Carolina’s choice of law rules, as traditionally applied, the law of North Carolina . . . control[s] the procedural matters in this . . . lawsuit, such as determining the statute of limitations” and “the substantive law of the state where the injury occurred” is applied to plaintiffs’ claims and utilized for purposes of determining

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available remedies and damages). Thus, Virginia's substantive law governs Plaintiff's claims for relief.

Because, however, "statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover," *Boudreau v. Baughman*, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988), we must apply the appropriate statute of limitations under North Carolina law to Plaintiff's substantive claims — that is, the limitations period that would apply to such causes of action in this State, *see id.* at 341, 368 S.E.2d at 857 (explaining that statutes of limitations are procedural "in the context of choice of law"). "When determining the applicable statute of limitations, we are guided by the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs." *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (citation and quotation marks omitted), *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). Accordingly, in order to determine the appropriate statute of limitations to apply, we must first identify the nature of the substantive claims asserted by Plaintiff as they exist under Virginia law.

In its complaint, Plaintiff asserted two claims for relief. Without specifically identifying or labeling the first cause of action, Plaintiff made the following allegations in support of this claim:

20. Defendant, as a co-owner of the Property, is liable for its fair share of the property taxes owed on the Property.

21. By virtue of Defendant's failure to pay the taxes owed, and failure to reimburse [Plaintiff] for such amounts, [Plaintiff] is entitled to have and recover of Defendant the principal amount of \$67,831.60 plus any amount in taxes, fees, and interest [Plaintiff] must pay for the property taxes for the second half of 2013, plus interest. [Plaintiff] is also entitled to have and recover of Defendant the costs of this action.

Plaintiff's second claim for relief — pled in the alternative — sought recovery in *quantum meruit* on the theory that Defendant was unjustly enriched by Plaintiff's full payment of property taxes owed on the Property for which Defendant was jointly responsible. It is clear that the statute of limitations for unjust enrichment is three years. *See Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 85, 712 S.E.2d 221, 228 (2011) ("A claim for unjust enrichment must be brought within three years of accrual under subsection 1 of section 1-52."). However, because the unjust enrichment claim was pled merely as an alternative means

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[241 N.C. App. 81 (2015)]

of recovery, we must determine the appropriate limitations period that applies to Plaintiff's first cause of action.

The parties differ in their respective positions on this issue. Defendant contends that Plaintiff's right to receive reimbursement as pled in its first claim for relief stems from an implied contract between the parties. Defendant argues that this cause of action is therefore grounded in principles of contract law and more properly denominated as a claim for contribution arising out of a joint debt. Quoting *Tuttle v. Webb*, Defendant asserts that "[w]hen two or more persons are jointly liable to pay a debt, the law *implies a contract* between the co-obligors to contribute ratably toward the discharge of the obligation." 284 Va. 319, 327, 731 S.E.2d 909, 913 (2012) (citation, quotation marks, and brackets omitted and emphasis added); see *Ohio Cas. Ins. Co. v. State Farm Fire and Cas. Co.*, 262 Va. 238, 241-42, 546 S.E.2d 421, 423 (2001) (explaining that right to contribution is based on implied contract "between the parties to contribute ratably toward the discharge of a common obligation"). Consequently, Defendant argues, North Carolina's three-year statute of limitations applicable to an "obligation or liability arising out of a contract, express or implied" applies. N.C. Gen. Stat. § 1-52(1) (2013).

Plaintiff, conversely, contends that its claim against Defendant should be treated as a cause of action for an "accounting in equity" between two tenants in common under Virginia law. As such, Plaintiff argues, its first claim for relief falls under Va. Code Ann. § 8.01-31, which provides that "[a]n accounting in equity may be had against any fiduciary or by one joint tenant, tenant in common, or coparcener for receiving more than comes to his just share or proportion, or against the personal representative of any such party." While North Carolina does not have a statute of limitations expressly addressing claims seeking an equitable accounting, Plaintiff contends that its claim is governed by the ten-year limitations period provided in N.C. Gen. Stat. § 1-56 for "action[s] for relief not otherwise limited by this subchapter." N.C. Gen. Stat. § 1-56 (2013).

In so arguing, Plaintiff notes that North Carolina courts have previously applied N.C. Gen. Stat. § 1-56 to claims seeking an accounting between the parties. See *Hamlet HMA, Inc. v. Richmond Cty.*, 138 N.C. App. 415, 422, 531 S.E.2d 494, 498 (explaining that "N.C. Gen. Stat. § 1-56 has been applied mainly in cases related to trusts, *accountings*, tax liens and fiduciary duty" (emphasis added)), *appeal dismissed and disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000); see also *Jarrett v. Green*, 230 N.C. 104, 107, 52 S.E.2d 223, 225 (1949) (determining that ten-year statute of limitations was applicable to plaintiff's claims to establish resulting trust, to recover property, and for accounting).

## MARTIN MARIETTA MATERIALS, INC. v. BONDHU, LLC

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Both parties cite *Jenkins v. Jenkins*, 211 Va. 797, 180 S.E.2d 516 (1971), in which two ex-spouses owned a parcel of real property as tenants in common following their divorce. The plaintiff paid the mortgage payments on the property after the divorce and until the property was sold on 4 October 1968. *Id.* at 798-99, 180 S.E.2d at 517. She then sought reimbursement from the defendant for his portion of the mortgage payments as well as an order requiring the defendant to pay half of the real estate taxes on the property that had accrued. *Id.* at 798, 180 S.E.2d at 517. The Virginia Supreme Court determined that the plaintiff was entitled to reimbursement because “unless something more can be shown than the mere fact that one co-tenant is in possession of the premises, each co-tenant should be ratably responsible for taxes and other liens against the property.” *Id.* at 800, 180 S.E.2d at 518. The *Jenkins* Court noted that “[a]n accounting in equity may be had . . . by one . . . tenant in common . . . against the other as bailiff, for receiving more than comes to his just share or proportion.” *Id.* at 800 n. 1, 180 S.E.2d at 518 n. 1.

While *Jenkins* supports the right of a co-tenant such as Plaintiff to obtain reimbursement from its co-tenant under these circumstances, it does not explain the precise nature and origin of this right under Virginia law. However, in *Grove v. Grove*, 100 Va. 556, 42 S.E. 312 (1902), the Virginia Supreme Court held that “[t]he right of a co-tenant, who discharges an incumbrance upon the common property, . . . to ratable contribution from his cotenants, is said to *arise out of the trust relationship which exists among joint owners of property*, rather than by way of subrogation.” *Id.* at 561, 42 S.E. at 314 (emphasis added).

Thus, Plaintiff’s first claim for relief can also be interpreted as asserting a substantive right stemming from the parties’ trust relationship as co-tenants rather than one arising from principles of contract law. Under this theory, Plaintiff’s first claim for relief would be governed not by the three-year statute of limitations under N.C. Gen. Stat. § 1-52(1) that is applicable to obligations arising from implied contracts but rather by the ten-year limitations period contained in N.C. Gen. Stat. § 1-56. *See Jarrett*, 230 N.C. at 107, 52 S.E.2d at 225 (stating that ten-year statute of limitations under N.C. Gen. Stat. § 1-56 was applicable to action for accounting and to establish resulting trust); *Teachey v. Gurley*, 214 N.C. 288, 293-94, 199 S.E. 83, 87-88 (1938) (explaining that ten-year limitations period applies to claims grounded in equitable principles which impose trust relationship between parties).

Consequently, we are unable to discern a clear answer to the question of which of the two respective limitations periods applies most directly to the substantive claim Plaintiff has pled in its first claim for



**MARTIN MARIETTA MATERIALS, INC. v. BONDHU, LLC**

[241 N.C. App. 81 (2015)]

relief. However, our Supreme Court has held that “where there is doubt as to which of two possible statutes of limitation applies, the rule is that the longer statute is to be selected.” *Fowler v. Valencourt*, 334 N.C. 345, 350, 435 S.E.2d 530, 533 (1993). Such doubt exists here because the first claim for relief in Plaintiff’s complaint can be construed as setting forth either of two distinct, legally cognizable claims under Virginia law: (1) a claim for contribution; or (2) a claim for an accounting in equity. While Plaintiff would be entitled under either legal theory to reimbursement from Defendant for its share of the property taxes, a contribution claim would be governed by the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52(1) because the substantive right underlying such a claim is derived from an implied contract whereas a claim for equitable accounting — grounded in equity and arising from a trust relationship — would be subject to the ten-year limitations period set out in N.C. Gen. Stat. § 1-56.

Thus, because there are two statutes of limitations that are equally applicable to Plaintiff’s first claim for relief, we conclude — based on our Supreme Court’s decision in *Fowler* — that application of the longer ten-year limitations period is appropriate. *See id.* at 350, 435 S.E.2d at 533. As such, because all of the payments for which Plaintiff seeks reimbursement fall within the ten-year period immediately preceding the date Plaintiff filed suit, Plaintiff’s first claim for relief is not barred in any respect by the statute of limitations. Accordingly, the trial court did not err in granting Plaintiff’s motion for summary judgment and denying Defendant’s motion for partial summary judgment.

**Conclusion**

For the reasons stated above, we affirm the trial court’s order.

**AFFIRMED.**

Judges ELMORE and DIETZ concur.

**STATE v. DUFFIE**

[241 N.C. App. 88 (2015)]

STATE OF NORTH CAROLINA

v.

LINWOOD EARL DUFFIE, DEFENDANT

No. COA14-925

Filed 5 May 2015

**1. Appeal and Error—alleged Rule 403 error—discretionary ruling—not subject to plain error review**

In defendant's appeal from his convictions for common law robbery, conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status, the Court of Appeals dismissed his argument that the trial court committed plain error under Rule of Evidence 403 by admitting a videotaped police interview of his co-perpetrator. Rulings subject to the trial court's discretion are not subject to plain error review.

**2. Evidence—corroboration—additional statements—substantially consistent**

In defendant's appeal from his convictions for common law robbery, conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status, the trial court did not commit plain error by admitting a videotaped police interview of his co-perpetrator for corroborative purposes. The co-perpetrator's statements in the video were consistent with his statements at trial, and the additional information contained in the video interview did not render the video inadmissible.

**3. Conspiracy—to commit robbery—jury instructions—definition of “firearm”**

The trial court did not commit plain error by incorrectly defining “firearm” in its jury instructions on conspiracy to commit robbery with a dangerous weapon. Even though the co-perpetrator testified that he used a BB gun to commit the robberies, proof that a dangerous weapon was actually used to commit a robbery was not required to establish conspiracy to commit robbery with a dangerous weapon.

**4. Sentencing—habitual felon—misapprehension of sentencing statute—remanded**

The trial court erred by sentencing defendant as a habitual felon to three consecutive sentences for his three common law robbery convictions. This sentencing was based on the trial court's

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misapprehension that N.C.G.S § 14-7.6 “requires consecutive sentences on habitual felon judgments.” The Court of Appeals remanded the case for resentencing to allow the trial court to exercise its discretion in determining whether defendant’s sentences should run consecutively or concurrently.

Appeal by defendant from judgments entered 21 November 2013 by Judge Robert H. Hobgood in Pitt County Superior Court. Heard in the Court of Appeals 7 January 2015.

*Roy Cooper, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State.*

*Paul F. Herzog for defendant-appellant.*

DAVIS, Judge.

Linwood Earl Duffie (“Defendant”) appeals from judgments entered upon jury verdicts finding him guilty of three counts of common law robbery, three counts of conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status. On appeal, Defendant contends that the trial court erred in (1) admitting a videotaped interview of Kumetrius Friason (“Friason”), Defendant’s co-perpetrator; (2) its instruction to the jury defining the term “firearm”; and (3) sentencing him to consecutive sentences based on a misapprehension of N.C. Gen. Stat. § 14-7.6. After careful review, we conclude that Defendant received a fair trial free from prejudicial error but remand for resentencing.

**Factual Background**

The State presented evidence at trial tending to establish the following facts: On 22 April 2013, Defendant drove Friason, his girlfriend’s 16 year-old son, to Emerald City Internet Café (“Emerald City”), which featured online sweepstakes games in which players were eligible to win cash prizes. While Defendant went inside and played games, Friason waited in Defendant’s car. After some time, Friason went inside Emerald City with a bandana covering his face and demanded that the cashier, Zapora Washington (“Washington”), “give [him] the money.” As Friason was emptying the cash register, Washington noticed that he was holding a gun by his side. Friason put the money in a bag and exited the café. Defendant then ran out the door of the café, telling Washington that he was going to go find the person who had robbed the store. Defendant

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drove to Hopkins Apartments to pick up Friason who was waiting there with the money from the robbery. Friason kept “a little bit” of the money, and Defendant “got the rest.”

Six days later on 28 April 2013, Defendant drove Friason to a Family Dollar store in Winterville, North Carolina. Defendant stayed in his car while Friason entered the store, told the two employees on duty that “this [is] a robbery,” pointed a gun, and said “give me your money.” Friason took money from the cash register and from one of the employees’ wallets. Friason then told the employees to “lay down on the floor and don’t even look up. Don’t say a word. . . . if you move, I’ll come back and I’ll shoot both of you.” Friason ran out of the store, and Defendant picked him up in the parking lot of a nearby gas station. Defendant and Friason “split” the “thousand or two” dollars from the Family Dollar store robbery.

On 30 April 2013, Defendant and Friason committed a third robbery at a Trade Mart convenience store in Greenville, North Carolina. Defendant parked his car behind a nearby Outback Steakhouse, and Friason exited the vehicle and entered the Trade Mart. He covered his face with a bandana and approached the two cashiers. Friason “really didn’t say nothing, [he] just had the gun pointed towards them and they gave [him] the money.” Friason obtained approximately \$1,000.00 from the Trade Mart and “split it” with Defendant. Defendant then drove Friason back to Friason’s house.

On 21 May 2013, law enforcement officers apprehended Defendant and Friason after receiving information from Martin Lichty (“Lichty”), a witness who observed Defendant’s vehicle parked near a Dollar General store in Beaufort County. Lichty noticed that the license plate on Defendant’s vehicle was obscured by a black rag, which he thought was “suspicious,” and that the driver of the vehicle had “shot across the street” in the same direction as a person who was “dressed in all black” and proceeding on foot. Shortly thereafter, Lichty saw the vehicle leaving a car wash. He noticed that there were now two occupants in the vehicle and the rag that had previously covered the license plate had been removed. Lichty dialed 911 and gave the dispatcher the tag number and a description of the vehicle. A resulting investigation led law enforcement officers to Defendant, who was arrested at the Carriage House Apartments complex later that day.

On 14 October 2013, a Pitt County grand jury returned bills of indictment charging Defendant with three counts of robbery with a dangerous weapon, three counts of conspiracy to commit robbery with a dangerous

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weapon, and having attained the status of an habitual felon. The indictments also alleged two statutory aggravating factors: (1) that Defendant “induced Kumetrius Friason to participate in the commission of the offense or occupied a position of leadership or dominance of Kumetrius Friason”; and (2) that Defendant “took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.”

A jury trial was held before the Honorable Robert H. Hobgood beginning on 18 November 2013. At the close of the State’s evidence, the trial court reduced the three counts of robbery with a dangerous weapon to common law robbery but denied Defendant’s motion to dismiss or reduce the counts of conspiracy to commit robbery with a dangerous weapon. The jury found Defendant guilty of all charges, including attaining the status of an habitual felon, and also found that for each offense the State had proven the existence of an aggravating factor — that Defendant had induced Friason to participate in the commission of the offense or occupied a position of leadership or dominance over Friason — beyond a reasonable doubt. The trial court entered judgment on the jury’s verdicts and sentenced Defendant as an habitual felon to three consecutive sentences of 150 to 192 months imprisonment for each of the common law robbery offenses. The trial court consolidated the three conspiracy to commit robbery with a dangerous weapon offenses and imposed a concurrent sentence of 50 to 72 months. Defendant gave oral notice of appeal in open court.

**Analysis**

Defendant’s brief addresses the following three issues: (1) the admission of a videotaped interview of Friason by law enforcement officers; (2) the trial court’s instruction to the jury defining the term “firearm”; and (3) the trial court’s interpretation of N.C. Gen. Stat. § 14-7.6 as mandating the imposition of consecutive terms of imprisonment when sentencing an habitual felon.<sup>1</sup> We address each of these arguments in turn.

**I. Admission of Videotaped Interview**

Defendant first argues on appeal that the admission of a videotaped interview between law enforcement officers and Friason constituted

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1. In the “Questions Presented” section of his appellate brief, Defendant raised the additional issue of whether the trial court erred by denying his motion to dismiss the three counts of conspiracy to commit robbery with a dangerous weapon. However, Defendant failed to include any substantive argument addressing this issue in the remainder of his brief. Accordingly, this issue is deemed abandoned on appeal. *See* N.C.R. App. P. 28(b) (6) (explaining that any issue “not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned”).

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plain error because some portions of the video that were “highly inflammatory” to Defendant were not “muted” or referenced with specificity in the trial court’s curative instruction to the jury. Defendant asserts that the officers questioning Friason repeatedly attacked Defendant’s character during the interview by referring to him in derogatory terms, calling him — among other things — a “coward” and “a piece of crap” who was “trying to set [Friason] up to take the fall.”

Defendant concedes that his trial counsel only objected once during the presentation of the video to the jury — an objection which was sustained by the trial court and followed by a curative instruction in which the court instructed the jury to disregard the words “career criminal” and “habitual” that had been used to describe Defendant. As such, Defendant requests that we review the admission of the remainder of the videotaped interview for plain error. The plain error doctrine “is to be applied cautiously and only in the exceptional case” and requires a defendant to demonstrate that the asserted error “had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

**A. Rule 403 Argument**

**[1]** Defendant’s primary argument concerning the admission of the video is that its probative value was substantially outweighed by the danger of unfair prejudice to him such that the trial court should have excluded the video under Rule 403 of the North Carolina Rules of Evidence. Pursuant to Rule 403, a trial court may exclude relevant evidence if it determines that the probative value of such evidence “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.” N.C.R. Evid. 403.

However, it is well established that plain error review is inapplicable to issues that “fall within the realm of the trial court’s discretion,” which include a trial court’s determination as to the admissibility of evidence based on the Rule 403 balancing test. *State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (citation and quotation marks omitted). For this reason, Defendant’s Rule 403 argument concerning the admission of the video is overruled. *See id.* (refusing to review under plain error standard defendant’s argument relating to trial court’s application of Rule 403).

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**B. Admission for Corroborative Purposes**

[2] Defendant also contends that the statements contained in the video did not corroborate Friason's trial testimony and, therefore, constituted inadmissible hearsay that "injected fundamental unfairness into [Defendant's] trial." Because, unlike his argument based on Rule 403, this contention does not involve a purely discretionary ruling by the trial court, plain error review is appropriate.

The prior consistent statements of a witness may be offered at trial for corroborative, nonhearsay purposes. *State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 740-41 (2009). "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Lloyd*, 354 N.C. 76, 103, 552 S.E.2d 596, 617 (2001) (citation and quotation marks omitted). "In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *Id.* (citation omitted). The trial court "has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes." *State v. Bell*, 159 N.C. App. 151, 155, 584 S.E.2d 298, 301 (2003) (citation and quotation marks omitted), *cert. denied*, 358 N.C. 733, 601 S.E.2d 863 (2004).

Defendant claims that while Friason's statements in the videotaped interview suggested that Defendant had influence over him and induced him to commit the robberies, these implications were absent from his trial testimony. Consequently, he asserts, the prior statements were "contradictory" to Friason's testimony at trial and were "not admissible under the guise that [the statements] tended to add weight or credibility to his trial testimony."

Our Supreme Court has explained that "prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992). As such, when a prior statement substantially strengthens or confirms in-court testimony, "it is not rendered incompetent by the fact that there is some variation. Such variations affect only the weight of the evidence which is for the jury to determine." *Lloyd*, 354 N.C. at 104, 552 S.E.2d at 617 (citations and quotation marks omitted).

Here, Friason's statements during the interview established a timeline of the robberies, an account of how they were committed, and

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Friason's and Defendant's respective roles in the commission of the crimes — topics that were all covered in his testimony at trial. While the statements Friason made in his interview did, in fact, contain the additional suggestion that he likely would not have committed the robberies absent Defendant's involvement, the statements made during the interview did not contradict his trial testimony and, indeed, his accounts of the robberies in both contexts were substantially similar. Both during his interview and at trial, Friason consistently acknowledged that going to the various stores was his idea, that Defendant transported them to each location, and that he and Defendant split the proceeds of the robberies. Accordingly, we cannot conclude that the trial court committed error — much less plain error — in admitting the videotape for corroborative purposes.<sup>2</sup>

## II. Jury Instruction Defining “Firearm”

[3] Defendant next argues that the trial court erred in defining the term “firearm” in its jury instructions. Both at trial and in his videotaped interview, Friason referred to the weapon he carried during the robberies as a “BB gun” or a “fake gun.” In response to a question from the jury as to “how the law defines firearm in regards to the conspiracy charge,” the trial court instructed the jury that a firearm “is a weapon that when fired, that the projectile fired therefrom can cause death or serious bodily injury to a human being if the projectile strikes and enters a vital part of the human body.”

Defendant acknowledges that his trial counsel failed to object to this instruction and that as a result, he is entitled only to plain error review on appeal as to this issue. As noted above, under the plain error standard, Defendant bears the burden of demonstrating to this Court that the instructional error “had a probable impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (citation and quotation marks omitted).

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2. Defendant also argues that Friason's statements in the interview were the only evidence of the aggravating factor that Defendant “took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense” and therefore contradicted his trial testimony. Contrary to the contentions made in Defendant's brief, however, this aggravating factor was not even submitted to the jury for determination. Rather, the only aggravating factor actually submitted to the jury was whether Defendant “induced Kumetrius Friason to participate in the commission of the offense or occupied a position of leadership or dominance of Kumetrius Friason.” As such, Defendant cannot show that the admission of such evidence prejudiced him. *See State v. Simpson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 748 S.E.2d 756, 760 (2013) (explaining that defendant must establish prejudice in order to show plain error).



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Defendant contends that the trial court plainly erred in giving this instruction because (1) “Friason testified, without contradiction, that he used a BB gun in all of the cases for which [Defendant] was on trial”; and (2) the General Assembly has recognized a distinction between firearms and BB guns. However, we need not determine the propriety of the trial court’s definitional instruction because even assuming, without deciding, that the instruction was erroneous, Defendant has failed to show sufficient prejudice to warrant a finding of plain error.

Here, Defendant was convicted on the charge of *conspiracy* to commit robbery with a dangerous weapon — not the charge of robbery with a dangerous weapon itself. “[C]riminal conspiracy is an agreement between two or more persons to do an unlawful act . . . [and] no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.” *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975). Notably, Defendant does not argue on appeal that the instruction was erroneous on the theory that the evidence only supported a finding of the lesser-included offense of conspiracy to commit common law robbery. Indeed, as noted above, Defendant has abandoned on appeal his contention that the trial court erred in denying his motion to dismiss the charges of conspiracy to commit robbery with a dangerous weapon. Rather, he appears to be contending that the instruction was misleading solely because of Friason’s testimony that he used a BB gun or a “fake gun” to actually commit the robberies.

However, proof that a dangerous weapon was actually used to commit the robberies was not required to establish that Defendant and Friason *conspired* to commit the robberies with a dangerous weapon. *See id.* at 616, 220 S.E.2d at 526 (“The conspiracy is the crime and not its execution.”). While a determination of whether the instrument used was, in fact, a firearm capable of endangering life would have been necessary to the resolution of the issue of whether Defendant was guilty of robbery with a dangerous weapon, that issue was never placed before the jury because the trial court reduced the robbery with a dangerous weapon charges to common law robbery at the conclusion of the State’s case.<sup>3</sup>

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3. While not the basis for our ruling on this issue, we note that the evidence presented at trial did not conclusively establish that the weapon used in the commission of the robberies was, in fact, a BB gun. The weapon was never recovered, and witnesses testified both that the weapon appeared to be real and that the robber had threatened to shoot them if they did not comply with his demands. *See State v. Joyner*, 312 N.C. 779, 787, 324 S.E.2d 841, 846 (1985) (upholding trial court’s denial of motion to dismiss robbery with a dangerous weapon charge despite fact that defendant presented

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Accordingly, Defendant has not established prejudice from the trial court's instruction. *See Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335 (concluding that defendant could not "show the prejudicial effect necessary" to establish plain error where trial court's jury instruction regarding conspiracy to commit robbery with a dangerous weapon was erroneous).

**III. Sentencing**

**[4]** Defendant's final argument on appeal is that this matter must be remanded for resentencing because the trial court imposed consecutive sentences based on a misapprehension of N.C. Gen. Stat. § 14-7.6. We agree.

N.C. Gen. Stat. § 14-7.6 provides that

[w]hen an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article (except where the felon has been sentenced as a Class A, B1, or B2 felon) be sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted; but under no circumstances shall an habitual felon be sentenced at a level higher than a Class C felony. In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used. *Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section.*

N.C. Gen. Stat. § 14-7.6 (2013) (emphasis added).

During the sentencing hearing, the trial court sentenced Defendant as an habitual felon to three consecutive terms of imprisonment for his three common law robbery convictions, stating that "the law requires consecutive sentences on habitual felon judgments." However, based on the language of N.C. Gen. Stat. § 14-7.6, a trial court is only required to impose a sentence consecutively to "any sentence being served by" the defendant. *Id.* Thus, if the defendant is not currently serving a term of imprisonment, the trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences. *See* N.C. Gen.

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evidence indicating that weapon used was inoperative because "the statement of the robber to the victim during the course of the robbery that he would kill the victim" constituted evidence that weapon was capable of endangering or threatening life of victim).

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Stat. § 15A-1354(a) (2013) (explaining that generally “sentences may run either concurrently or consecutively, as determined by the court”).

In *State v. Nunez*, 204 N.C. App. 164, 169, 693 S.E.2d 223, 227 (2010), we analyzed the meaning of nearly identical language contained in N.C. Gen. Stat. § 90-95, which describes the penalties for various drug offenses and states that “[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.” This Court determined that the above-quoted language

means that if the defendant is already serving a sentence, the new sentence under N.C. Gen. Stat. § 90-95(h) must run consecutively to that sentence. It does not mean that when a defendant is convicted of multiple trafficking offenses at a term of court that those sentences, as a matter of law, must run consecutively to each other. When this occurs, the trial court has the discretion to run the sentences either consecutively or concurrently.

*Id.*

We conclude that the same is true of the corresponding language in N.C. Gen. Stat. § 14-7.6. As such, because Defendant was not already serving a sentence at the time of the sentencing hearing, the trial court was incorrect in its belief that consecutive sentences were mandatory in this case. We must therefore remand for resentencing so the trial court may properly exercise its discretion in determining whether Defendant’s sentences should run consecutively or concurrently. *See id.* at 170, 693 S.E.2d at 227 (remanding for resentencing where “trial court erroneously believed that it was mandated by law to impose consecutive sentences” and explaining that “[w]hen a trial judge acts under a misapprehension of law, this constitutes an abuse of discretion”).

**Conclusion**

For the reasons stated above, we conclude that Defendant received a fair trial, free from prejudicial error. We remand, however, for a new sentencing hearing so the trial court may (1) exercise its discretion as to whether Defendant should receive consecutive or concurrent terms for his offenses; and (2) sentence Defendant accordingly.

NO PREJUDICIAL ERROR AT TRIAL; REMANDED FOR RESENTENCING.

Judges ELMORE and TYSON concur.

**STATE v. ENGLISH**

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STATE OF NORTH CAROLINA,  
v.  
JULIE ANN ENGLISH, DEFENDANT

No. COA14-952

Filed 19 May 2015

**Homicide—second-degree murder—voluntary manslaughter—  
motion to dismiss—sufficiency of evidence**

The trial court did not err in a voluntary manslaughter case by denying defendant's motion to dismiss the charges of second-degree murder and its lesser-included offense, voluntary manslaughter. Based on the circumstantial evidence presented and viewed in the light most favorable to the State, it was reasonable for the jury to infer that defendant intentionally struck the victim with her car.

Appeal by Defendant from a judgment entered 4 March 2014 by Judge Claire V. Hill in Brunswick County Superior Court. Heard in the Court of Appeals 18 February 2015.

*Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.*

*Glover and Petersen P.A., by Ann B. Petersen, for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Julie Ann English ("Defendant") appeals from a judgment after a jury found her guilty of voluntary manslaughter. Defendant contends it was error to deny her motion to dismiss. We disagree.

**I. Factual and Procedural History**

On 24 February 2014, Defendant was tried before a jury based on an indictment charging her with second-degree murder in Brunswick County. At trial, the State's evidence tended to show the following:

On 27 May 2012, Defendant and her boyfriend, Michael Pate ("Pate"), had a party celebrating Pate's birthday at their shared residence ("Pate residence"). Dixie Costlow ("Costlow"), Defendant's employer, and her son, Timothy Staruch ("Staruch"), attended the party.

The State called Staruch, who arrived at the party at approximately 1:30 pm, as its first witness. He testified partygoers grilled out, drank

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alcohol, and swam in the pool. Staruch admitted he did “a little bit of drugs, a little marijuana and a few hits of crack.” He observed both Defendant, a casual acquaintance, and Pate, whom he had never previously met, doing drugs and drinking alcohol. After the party ended and the partygoers dispersed, Staruch remained behind to purchase drugs with Defendant and Pate. He asked Pate for a ride to Costlow’s house for drug money. Pate admitted he “drank too much that day and he didn’t want to get a DUI” so Defendant drove Staruch to Costlow’s house, where he obtained the purchase money. He watched as Defendant arranged by phone for a drug dealer to deliver cocaine to the Pate residence. At approximately 9:00 pm, Staruch and Defendant returned to the Pate residence. After Defendant pulled in the driveway, Staruch exited the car and walked up the stairs toward the porch.

Staruch testified just as he reached the top of the steps, Pate came out of the porch door, accusing Staruch of “messing around” with his wife. Staruch testified when Pate “pushed at” him, he “came down off the steps.” He observed Defendant step between the two men. After he turned to leave, Staruch “heard” a punch and immediately turned back around. He saw Defendant lying on the ground. He then watched Defendant stand up and resume her argument with Pate. Thinking “she obviously can handle it,” Staruch turned and walked away.

As he walked, Staruch heard arguing and sounds of people “running in and out of the house.” He stopped about 200 yards away and looked back toward the Pate residence. Although it was dark and trees were in his line of sight, he claimed he could “see and hear silhouettes.” Staruch watched a figure run out of the house and into the car; another figure unsuccessfully tried to get into the car. He observed the back-up lights of the car switch on. Thinking Defendant was leaving the house and might stop to pick him up, Staruch turned and continued to walk away from the house. He then heard “a wreck, a boom,” and immediately turned around. He saw the car “tilted up” on the porch. Staruch walked back to the Pate residence and observed “most of [Pate’s] body . . . behind the tire, and [his] legs . . . sticking out.” Staruch testified Defendant was on her cell phone and she appeared “hysterical.”

The State called Chief Mark Hewett (“Chief Hewett”) of the Civietown Fire and Rescue Squad, who was the first official to arrive at the Pate residence. He testified that after receiving a call from 911 dispatch, he arrived at the Pate residence, where Defendant was standing in the yard and motioning toward the car. Chief Hewett saw Pate’s body under the car, immediately checked for a pulse, and determined “[Pate] was already gone.” He observed damage to the left-hand side of

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the steps. Chief Hewett smelled alcohol on Defendant, who was crying and screaming “Help him.”

The State called Corporal Jeff Elwood (“Corporal Elwood”) of the Brunswick County Sheriff’s Office, who arrived at the Pate residence at the same time as First Sergeant Long. He testified that Chief Hewett informed him the “gentleman under the car was deceased.” He observed that the vehicle was “up towards the front porch, and the rail was leaning where it looked like the vehicle had struck the rail.” Corporal Elwood heard Sergeant Long direct Defendant to sit in a lawn chair in the yard and instruct her she was not free to leave. Corporal Elwood read Defendant her *Miranda* rights.

The State called Captain Donna Simpson (“Captain Simpson”) of the Brunswick County Sheriff’s Office, who arrived at the Pate residence at approximately 10:30 pm. Captain Simpson testified Defendant appeared a “little shaken up” and was bleeding from the left side of her face. Captain Simpson walked Defendant to the EMS truck, where she advised Defendant of her *Miranda* rights, conducted a recorded interview, and took some photographs. The recorded interview was played for the jury.<sup>1</sup> In the interview, Defendant stated:

I walked up on the porch and said “Mike what are you doing?” And he took his fists -- as soon as I walked on the steps, and he hit me in the face and knocked me from the porch to the yard, and my face started pouring blood. So I went inside and got my pocketbook, got my keys, and got in my car and went to back up. . . . He was standing in the yard. . . . He hit me in the face, I’m just going to knock the porch down. . . . And I seen him standing in the yard. . . . I don’t know how he got under my car. . . . I went to pull back and I couldn’t pull back, probably because Mike was under my car.

Following the interview, Captain Simpson retrieved Defendant’s cell phone from inside the Pate residence and examined the area outside the car. She testified the “vehicle was next to the front of the residence, where it hit a couple of steps” and there were “tire tracks on the concrete.”

The State called Detective John Holman (“Detective Holman”), the lead investigator on the case. Holman first interacted with Defendant

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1. This Court was not provided with a transcript of this interview. The recording on the CD is incredibly difficult to understand at certain times.

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at the hospital and testified “[she] [t]old me that they had gotten into an argument, that her and [Staruch] were walking onto the porch, and [Pate] confronted [Staruch] and attempted to push him. She got upset, got hit, walked in, got the keys, and got into the vehicle.” Shortly after midnight, Detective Holman and Captain Simpson conducted a formal recorded interview of Defendant in her room at Brunswick Novant Hospital. The recorded interview was played for the jury.<sup>2</sup>

In the interview, Defendant explained: “I’ve never been hit like that before in my life. . . . [h]e hit me and knocked me all the way into the yard [and] I laid there for a bit.” Detective Holman asked about the source of Defendant and Pate’s argument; Defendant responded: “He was jealous over that -- over Timmy -- thought I was messing with him and I can swear on my daddy’s life that it wasn’t like that.” When asked “what happened after he hit you?”, Defendant responded: “I went back in and got my pocketbook and keys and went and got in the car. [inaudible] My thought was that I’d back up and run into the porch steps. I seen him out in the yard part out in the sand.” Defendant admitted the reason behind hitting the steps was: “I just got hit in the face. I was being evil too I guess.” Detective Holman asked “[a]nd at no point in time you saw him in front of you?”; Defendant responded:

No, he was standing out in the -- well he walked around my car and when he walked around my car I said I got to go to the hospital. I see him standing in the dirt in the front yard not even on the concrete part so I turned the car to hit the step. I don’t know if he ran up there at the same time I was pulling up or what -- or how he got in that position.

Following the interview, Detective Holman drew a warrant for Defendant’s arrest.

The State called Dr. John Almeida, who performed a forensic autopsy on Pate’s body on 29 May 2012. Dr. Almeida testified that Pate’s injuries consisted of a broken right ankle, abrasions throughout the body, a pelvic fracture, broken ribs, and a punctured left lung from a sharp piece of rib. He opined: “I believe the cause of death to be multiple blunt trauma with crushed ribs and crushed chest and pelvis.” Dr. Almeida explained that Pate’s pelvic and rib fractures were the result of “extreme pressure” and “extreme compression of the chest” and Pate’s abrasions could have been “caused by being struck by a vehicle” or “by the body itself striking

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2. This Court was not provided with a transcript of this interview. The recording on the CD is difficult to understand at times.

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something, such as a porch.” Although tripping over the lip of concrete could cause a fractured ankle, Dr. Almeida testified that it was more likely “there was some pressure brought on [Pate’s] ankle.” He further explained: an ankle fracture is a “characteristic injury that is seen in motor vehicle accidents when a pedestrian is struck by a vehicle.”

At the close of the State’s evidence, Defendant’s counsel moved to dismiss for insufficient evidence of second-degree murder, stating “[t]here may be enough evidence for voluntary manslaughter but not second-degree murder[.]” The motion was denied. Defendant then presented the testimony of her expert witness and testified on her own behalf.

Defendant, a cosmetologist with two sons, began her testimony by explaining the nature of her relationship with Pate. Defendant testified she started dating Pate in 2001 and in the beginning, “[i]t was like [they] couldn’t do without each other, [they] were in love.” She respected the fact that Pate was a hard worker and a Christian man, and her sons even called him “Pop” and “Dad.” Defendant admitted that the couple drank alcohol recreationally and between 2003 and 2005, they started using cocaine “[j]ust [on the] weekends.” Under the influence of drugs and/or alcohol, Defendant claimed the couple began to “argue and fight.” Defendant explained: “[s]ometimes [the fighting] would be physical” and “[t]here was a lot of cussing and yelling and calling each other names, to the point where I had to leave or I was made to leave. And a few days later, [Pate] would call me back, and it would start over again, and we would do the same thing again.” She continued:

I was scared most of the time, didn’t know what to look forward to when I got home, I didn’t know how he was going to be, how he was going to act, if he was going to be drunk[.]. . . I was just always scared. I felt like I was stuck. Once I’d move out and move back in, then I would have nowhere to go. It was kind of like if he got mad, he would say, “Get your stuff and get out,” you know. So I felt trapped, I guess, to say.

Defendant then testified as to the events of 27 May 2012. She recounted Pate began drinking alcohol at approximately 11:00 am. She “believed” Pate and other partygoers smoked crack cocaine because they “were gathering in the bathroom or in the bedroom.” Defendant claimed she did not smoke crack at the party, but admitted she “had a glass of wine with [her] most of the time[.]” Because Staruch “wanted to get some drugs,” Defendant drove him to Costlow’s house to pick



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up the purchase money. When Defendant and Staruch returned to the Pate residence, Defendant suspected that Pate was “pretty drunk.” She watched Staruch walk up the stairs and heard Pate “cussing and fussing” at Staruch. As Defendant stepped up on the stairs between Staruch and Pate, Pate hit her left cheek with his fist, propelling her from the stairs to the yard. She thought “[o]h my God, I’ve never been hit like that before[,]” as blood poured down her cheek.

Defendant testified after getting hit, she “didn’t really understand what was going on with [Pate], but [she] went to a different state of mind.” Intending to go to the hospital, she locked herself in her car, but was forced to exit the car to retrieve her keys from the yard. Defendant returned to the car and locked the doors. Before starting the engine, she observed Pate walk to the driver’s side of the car and look in the window. Defendant then watched Pate leave the window and “walk[] off” around the back of her car. She claimed she “didn’t see [Pate] after he went to the back of [her] car.” Although she initially intended to back out and put her car in gear, Defendant testified that she changed her mind and thought “I’ll just hit those steps, and then I’ll back out and leave.” She drove forward and struck the porch stairs. Unable to back up her car, Defendant emerged from the driver’s seat, thinking “my bumper [must be] hung on the steps or something.” She heard Pate moan and saw his hand under the car. She attempted to pull Pate out by his hand, retrieved her phone from her car, and called 911. A recording of the 911 call was played for the jury.

Defendant called Dr. Jennifer Sapia, who evaluated Defendant four times in fourteen months at the Brunswick County Detention Facility. Dr. Sapia testified that in the course of evaluating Defendant, she performed clinical interviews, conducted psychological testing, and reviewed law enforcement investigation records. Dr. Sapia opined: Defendant’s “judgment, planning, and problem-solving were more likely than not appreciably impaired by the acute effects of alcohol intoxication as well as the emotionally aroused state of mind due to that physical assault.”

The State then offered the testimony of Richard Smith, a neighbor of Defendant and Pate, as a rebuttal witness. Smith testified he observed Defendant and Pate argue outside their home on two occasions prior to 27 May 2012 and, both times, Defendant hit Pate “like a girl hits” and Pate walked away.

After the close of all the evidence, Defendant renewed her motion for the court to dismiss the charge of second-degree murder. The motion was again denied. The judge submitted four possible verdicts to the jury:

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(1) second-degree murder, (2) voluntary manslaughter, (3) involuntary manslaughter, and (4) not guilty. The jury found Defendant guilty of voluntary manslaughter and the trial court sentenced her to a minimum term of fifty-one months and a maximum term of seventy-four months imprisonment.

## II. Standard of Review

This Court reviews the trial court's ruling with respect to a motion to dismiss for insufficient evidence on a *de novo* basis. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). "[T]he question for the trial court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense, and of the defendant's being the perpetrator of such offense." *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983) (citation omitted). Substantial evidence is "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Bunn*, 173 N.C. App. 729, 733, 619 S.E.2d 918, 921 (2005). The evidence can be circumstantial or direct, or both. *State v. Bruton*, 264 N.C. 488, 497, 142 S.E.2d 169, 175 (1965). However, "the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "In considering such motions, the trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight." *Malloy*, 309 N.C. at 178, 305 S.E.2d at 720 (citations omitted). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000). If, however, the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator . . . the motion to dismiss must be allowed." *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720.

## III. Analysis

Defendant contends the trial court erred as a matter of law by denying her motion to dismiss the charge of second-degree murder and its lesser-included offense, voluntary manslaughter. We disagree.

Voluntary manslaughter is the "unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation." *State v. Jackson*, 145 N.C. App. 86, 90, 550 S.E.2d 225, 229 (2001) (citation and internal quotation marks omitted). "Generally,

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voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is used or defendant is the aggressor.” *Id.* However, “[n]either second degree murder nor voluntary manslaughter has as an essential element an intent to kill.” *Id.* (citation and quotation marks omitted). Therefore, the term intentional killing “is not used in the sense that a specific intent to kill must be admitted or established” but, “refers to the fact that the *act* which resulted in death is intentionally committed and is an assault which in itself amounts to a felony or is likely to cause death or serious bodily injury.” *Id.* (citation and quotation marks omitted).

At trial, Judge Hill instructed the jury on the essential elements of second-degree murder, voluntary manslaughter, and involuntary manslaughter. The judge explained for a conviction of voluntary manslaughter, the State must prove, beyond a reasonable doubt, that: (1) Defendant killed Pate by an “intentional and unlawful act” and (2) Defendant’s act was the “proximate cause of Michael Pate’s death.” During deliberation, the jury asked the court for clarification on the first element of voluntary manslaughter, specifically “what ‘act’ is referring to [in the context of] the act being an ‘intentional and unlawful act[.]’” The judge explained:

Pursuant to your jury instructions, intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

The judge further explained the State is not required to prove Defendant intended to kill, but only must show Defendant intended to act in a manner that was an assault, which, in itself, amounts to a felony or is likely to cause death or serious injury.

On appeal, Defendant contends there was not sufficient evidence presented showing Defendant killed Pate by an intentional and unlawful act, the first essential element of voluntary manslaughter. Defendant argues that without evidence of her intent to strike Pate with a car, there is no evidence of an intentional assault, which in itself amounts to a felony or is likely to cause death or serious bodily injury.

In *State v. Jackson*, this Court found sufficient evidence to support a jury’s conviction of voluntary manslaughter, where the defendant struck and killed the victim with his car. *Jackson*, 145 N.C. App. at 88,

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550 S.E.2d at 228. At trial, the State offered the defendant's statement, explaining the victim "[got] in the middle of the street in front of [defendant's] car[.]" *Id.* (internal quotation marks omitted). In the statement, the defendant also admitted he hit the victim and kept driving because he "wasn't going to stop to get jumped or get [his] car messed up." *Id.* Officers present at the scene testified that the defendant was speeding and failed to slow down or swerve to avoid the victim, who did not make any sudden movements toward the car. *Id.* at 91, 550 S.E.2d at 230. The defendant testified in his own defense. He admitted that after being assaulted by the victim, he was "upset" and "angry" while driving away and "he could not avoid striking decedent when he jumped into the path of defendant's automobile." *Id.* at 89, 550 S.E.2d at 228. On appeal, this Court concluded that the eyewitness' testimony, the defendant's written statement to police, and the nature of the assault itself constituted sufficient evidence of the defendant's intent to strike the victim with his car. *Id.* at 91, 550 S.E.2d at 230.

Defendant correctly asserts the facts in *State v. Jackson* are distinguishable from the facts in this case. In *Jackson*, eyewitness testimony was presented at trial that both contradicted the defendant's prior statements to officers and described the victim's behavior before being hit with the car. *See id.* In this case, Staruch did not witness Defendant strike Pate with the car, so there is neither eyewitness testimony contradicting Defendant's prior statements nor describing Pate's actions immediately preceding the crash. Additionally, the defendant in *Jackson* admitted in a written statement that he hit the victim and continued driving because he did not want to stop. *See id.* In this case, there is no direct evidence that Defendant was aware she hit Pate until she got out of the car, heard him moan, and observed his body. This Court's determination of a defendant's intent, however, is not limited to the evidence we considered in *Jackson*.

"Circumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence[.]" *State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001) (citations omitted). Intent is "a mental attitude" so it "must ordinarily be proven by circumstances from which it can be *inferred*." *Jackson*, 145 N.C. App. at 90, 550 S.E.2d at 229 (citations omitted) (emphasis added). Accordingly, when the jury asked for clarification on the issue of intent at trial, they were instructed that it "is seldom provable by direct evidence." The evidence presented to the jury included the following: (1) Pate had a history, while under the influence of drugs and/or alcohol, of acting emotionally and physically

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abusive toward Defendant; (2) when Pate was angry, he would tell Defendant to “[g]et her stuff and get out,” so Defendant felt “trapped”; (3) on 27 May 2012, Pate drank alcohol and allegedly smoked crack before hitting Defendant in the face with a closed fist, knocking her from the porch to the yard; (4) Defendant felt scared and went “to a different state of mind” after being hit; (5) before driving forward, Defendant observed Pate standing in the sandy part of the yard, near the concrete patio steps; and (6) Defendant struck the stairs because she “wanted to be evil too.”

From this evidence, a jury could find Defendant felt trapped in a cycle of emotional and physical abuse, and after a particularly violent physical assault, she decided it was time to break free. Based on Dr. Almeida’s testimony, a jury could find Pate did not trip and fall in front of the car, for his right ankle fracture was consistent with being struck by an automobile. A jury could also find Defendant was aware of Pate’s location when she put the car in drive, as she testified she had seen him prior to moving the car forward. “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). Based on the evidence presented, viewed in the light most favorable to the State, it was reasonable for the jury to infer Defendant intentionally struck Pate with her car.

Defendant contends the State is bound by the purported truth of her statements to Captain Simpson and Detective Holman, in which she denied intentionally striking Pate. *See State v. Morgan*, 299 N.C. 191, 208, 261 S.E.2d 827, 837 (1980) (citations omitted) (holding “[w]hen the state introduces into evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the state is bound by those statements”). However, when evidence of the defendant’s intent contradicts a previous exculpatory statement, the State is not bound by the truth of the prior statement and the matter is properly submitted to the jury. *See id.* at 209, 261 S.E.2d at 838 (explaining where inconsistencies in defendant’s statement present a jury question as to whether a killing was accidental or intentional, “the state is not bound by the exculpatory portions of defendant’s statement and is entitled to go to the jury on the issue of defendant’s guilt of the crime charged[.]”). Here, Defendant contends that neither eyewitness testimony nor physical evidence contradict her statements to investigating officers, in which she denies intentionally striking Pate with her car. However, Defendant discounts the significance of circumstantial evidence, from which a jury could

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infer intent. As discussed above, the jury was presented with circumstantial evidence suggesting Defendant intentionally struck Pate with her car. Therefore, as there was evidence that contradicted Defendant's prior statements, the trial court was not bound by the purported truth of the statements.

**IV. Conclusion**

On appeal, this Court must only determine whether there was sufficient circumstantial or direct evidence, in the light most favorable to the State, supporting the jury's conviction of voluntary manslaughter. We hold that there was sufficient evidence offered to prove all essential elements of voluntary manslaughter. Therefore, the motion to dismiss was properly denied and the matter was correctly submitted to the jury.

NO ERROR.

Judges STEPHENS and TYSON concur.

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STATE OF NORTH CAROLINA

v.

DANIEL LEE FENNELLS, DEFENDANT

No. COA14-760

Filed 19 May 2015

**Costs—jail fees—daily rate—improper version of statute used**

The trial court erred in a drugs case by calculating the amount of jail fees assessed against defendant by using the daily rate provided in the revised version of N.C.G.S. § 7A-313 (2013). That version was inapplicable to defendant because it did not become effective until after defendant had completed his pretrial confinement. The case was remanded for recalculation of jail fees using the correct daily rate of \$5.00 per diem and for the limited purpose of subtracting \$1,760.00 from the amount of costs assessed against defendant.

Appeal by defendant from judgment entered 17 April 2014 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 4 December 2014.

*Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.*

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*Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.*

GEER, Judge.

Defendant Daniel Lee Fennell appeals from a judgment entered after his fourth sentencing hearing on his convictions for sale of a schedule II controlled substance, possession of a schedule II controlled substance, and being a habitual felon. Defendant's sole argument on appeal is that the trial court erred in calculating the amount of jail fees assessed against him by using the daily rate provided in the revised version of N.C. Gen. Stat. § 7A-313 (2013) – a version that was inapplicable to defendant because it did not become effective until after defendant had completed his pretrial confinement. We agree and remand for recalculation of jail fees using the correct daily rate.

#### Facts

On 2 June 2011, defendant was found guilty by a jury of possession of a schedule II controlled substance, selling a schedule II controlled substance, and delivering a schedule II controlled substance. Defendant pled guilty to being a habitual felon and stipulated to having a prior record level of VI. The trial court entered a consolidated judgment and sentenced defendant to a presumptive-range term of 150 to 189 months imprisonment and ordered him to pay \$720.00 in restitution. Defendant appealed to this Court. In an opinion filed 6 March 2012, this Court held that defendant received a trial free of prejudicial error and that the trial court did not err in ordering restitution. The Court, however, remanded for a new sentencing hearing due to an error in the trial court's prior record level determination. *State v. Fennell*, 219 N.C. App. 401, 722 S.E.2d 212, 2012 WL 698252, at \*3, 2012 N.C. App. LEXIS 302, at \*8 (2012) (unpublished).

At his new sentencing, defendant stipulated that he had a prior record level of V, and the trial court sentenced him to a presumptive-range term of 125 to 159 months imprisonment. The trial court also ordered defendant to pay \$4,454.50 in costs, \$2,606.25 in attorneys' fees, and \$60.00 in miscellaneous fees, for a total of \$7,120.75. However, the trial court did not order payment of any restitution.

Defendant again appealed to this Court, arguing that the trial court again erred in calculating his prior record level and by imposing a more severe monetary judgment than the original sentence. This court held that the trial court erroneously relied on a structured sentencing chart

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that was inapplicable to defendant, remanded for resentencing, and deemed defendant's remaining arguments concerning the monetary judgment moot. *State v. Fennell*, \_\_\_ N.C. App. \_\_\_, 739 S.E.2d 628, 2013 WL 1121500, at \*1, 2013 N.C. App. LEXIS 297, at \*3 (2013) (unpublished).

Defendant's third sentencing hearing was held on 30 April 2013. Defendant stipulated to having a prior record level of IV. The trial court sentenced defendant to a presumptive-range term of 111 to 143 months imprisonment and again ordered defendant to pay \$4,454.50 in costs, \$2,606.25 in attorneys' fees, and \$60.00 in miscellaneous fees, for a total of \$7,120.75. However, the costs and fees were not imposed during the sentencing hearing, but rather were only imposed in the written judgment signed and entered after defendant had left the courtroom.

Defendant appealed and argued that the trial court erred in imposing costs and fees outside of his physical presence. This Court agreed and remanded "for a determination of what costs and fees, if any, to impose after defendant is afforded notice and an opportunity to be heard." *State v. Fennell*, \_\_\_ N.C. App. \_\_\_, 758 S.E.2d 185, 2014 WL 859271, at \*3, 2014 N.C. App. LEXIS 242, at \*7 (2014) (unpublished).

A fourth hearing was held on 17 April 2014. A new judgment was entered ordering defendant to pay \$120.00 in restitution, \$4,120.00 in costs, \$2,531.25 in attorney's fees, and \$60.00 in appointment/miscellaneous fees, for a total of \$6,831.25. Defendant timely appealed to this Court.

### Discussion

On appeal, defendant challenges only the amount of jail fees the trial court assessed against him. N.C. Gen. Stat. § 7A-304(a) (2013) sets forth certain costs that "shall be assessed and collected" in every criminal case in which the defendant is convicted or enters a plea of guilty. Among the fees listed in the statute are "jail fees . . . [that] shall be assessed as provided by law." N.C. Gen. Stat. § 7A-304(c). "Jail fees" are governed by N.C. Gen. Stat. § 7A-313 and relate only to a defendant's pre-trial confinement in jail.

In this case, defendant spent 352 days in jail awaiting trial prior to the original judgment being entered on 3 June 2011. N.C. Gen. Stat. § 7A-313 (2009), as it existed at that time, provided:

Persons who are lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of five dollars (\$5.00) for each 24 hours' confinement, or fraction thereof, except that a



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person so confined shall not be liable for this fee if the case or proceeding against him is dismissed, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill.

Effective 1 August 2011, the General Assembly amended N.C. Gen. Stat. § 7A-313 to increase the jail fee from \$5.00 a day to \$10.00 a day. *See* 2011 N.C. Sess. Laws ch. 145, § 31.26(e); 2011 N.C. Sess. Laws ch. 192, § 7(n). At defendant's sentencing hearing, the trial court calculated the amount of jail fees using the \$10.00 rate in the amended version of the statute. Defendant contends that this was error because his pretrial confinement was completed prior to the effective date of the amendment increasing the jail fee. The State does not dispute that the jail fees should have been calculated at a rate of \$5.00 per day, but argues that the issue is not properly before this Court.

At the sentencing hearing, defendant objected to the jail fees, but not on the specific grounds he now raises on appeal. Rather, defense counsel requested that the trial court not impose jail fees because it was a substantial amount of money and it was "unjust to put a man in jail against his will and charge him for being there." In response, the trial court noted that the jail fees were statutorily mandated pursuant to N.C. Gen. Stat. § 7A-313. Defense counsel later conceded that "in terms of the mandated jail fees, I guess we don't have a choice in that, given the wording of the statute."

The trial court then inquired as to the date of defendant's original judgment and specific date that the statute was amended. Defense counsel, the State, and the trial judge consulted the 2011 General Statutes book and noted that the book did not indicate the exact date in 2011 that the statute was amended. The inquiry concluded with the following exchange:

[DEFENSE COUNSEL]: Logically speaking, your Honor, if it's a 2011 statute book it comes out the first of the year, it probably was changed prior to the date of the judgment.

THE COURT: You would think so. It didn't come out in 2012. It says it came out in 2011. This isn't a hardback, it looks like it's a 2011 edition. So assuming that it was in place on that date, it should have been imposed on that particular date.

The State first contends that defendant did not preserve the issue for appeal because he did not object below to the trial court's use of

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a rate of \$10.00 per day. Generally, “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C.R. App. P. 10(a)(1).

Nevertheless, certain errors may be reviewable despite a defendant’s failure to object at trial. Pertinent to this case, N.C. Gen. Stat. § 15A-1446(d)(18) (2013) authorizes appellate review of alleged errors in sentencing if “[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.” In this case, defendant’s challenge to the trial court’s assessment of court costs amounts to a sentencing error reviewable pursuant to N.C. Gen. Stat. § 15A-1446(d) (18). *See State v. Patterson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 735 S.E.2d 602, 603 (2012) (applying N.C. Gen. Stat. § 15A-1446(d)(18) and reviewing alleged error in imposition of court costs despite defendant’s failure to object at sentencing hearing).

Additionally, it is well settled that “when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.” *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). As recognized by both the trial court and defendant at the sentencing hearing, the assessment of jail fees is statutorily mandated. *See* N.C. Gen. Stat. § 7A-304(a) (providing that jail fees “shall be assessed and collected” (emphasis added)); N.C. Gen. Stat. § 7A-313 (“[p]ersons who are lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of five dollars (\$5.00) for each 24 hours’ confinement, or fraction thereof” (emphasis added)). The trial court acted contrary to the statutory mandate in calculating the jail fees and prejudiced defendant by ordering him to pay twice the amount of jail fees authorized by statute. Accordingly, the issue of jail fees is also preserved under the rule articulated in *Ashe*.

Alternatively, the State argues that defendant is barred from raising this issue by the doctrine of res judicata. The State cites *State v. Speaks*, 95 N.C. 689, 691 (1886), and *State v. Melton*, 15 N.C. App. 198, 200, 189 S.E.2d 757, 758 (1972), for the proposition that “[t]he doctrine of res judicata prohibits a defendant from raising on appeal issues that could have been raised in a prior appeal.” The State reasons that res judicata applies in this case because even though the trial court imposed jail fees in defendant’s second and third judgments, defendant did not challenge the per diem rate used to calculate those fees in his appeals of those

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judgments. We believe that the State misconstrues the doctrine of res judicata as applied with respect to appeals in criminal cases.

“Under the doctrine of res judicata . . . a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies [and] prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action.” *Whitacre P’ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (internal citations and quotation marks omitted). As explained in *State v. Perry*, 122 N.C. 1018, 1019, 29 S.E. 384, 384 (1898), with respect to criminal cases, “[w]here there is an affirmance of a judgment, this necessarily is an adjudication upon every assignment of error, and of any matter which might have been urged[.]” However, when “a new trial [is] granted upon another point, . . . the judgment [is] only *res judicata* upon the errors ruled upon in the opinion.” *Id.*

In this case, the only matters that have been conclusively determined in defendant’s previous appeals are the validity of defendant’s underlying convictions, the proper calculation of his prior record level, and defendant’s right to be heard prior to the imposition of court fees. There has not, however, been any final judgment or adjudication on the issue for which defendant seeks review – the applicable rate for jail fees. Because defendant was granted a new sentencing hearing on another point and this Court did not previously address the jail fees issue, defendant was not barred by res judicata from seeking review of the jail fees issue.

Accordingly, we hold that the trial court should have applied the \$5.00 per diem rate in calculating the jail fees. We vacate defendant’s judgment and remand for the limited purpose of subtracting \$1,760.00 from the amount of costs assessed against defendant.

VACATED IN PART AND REMANDED IN PART.

Judges STEELMAN and STEPHENS concur.

**STATE v. GODBEY**

[241 N.C. App. 114 (2015)]

STATE OF NORTH CAROLINA, PLAINTIFF

v.

MICHAEL JOHN GODBEY, DEFENDANT

No. COA14-1374

Filed 19 May 2015

**1. Evidence—of prior criminal complaint—door opened on direct examination**

In defendant's trial for assault on a female, the trial court did not err by admitting evidence that defendant's criminal complaint against another man for assault had been dismissed. Defendant opened the door to cross-examination on this subject when he testified about it in his direct testimony.

**2. Appeal and Error—improper sentence—already served—dismissed as moot**

The Court of Appeals dismissed as moot defendant's argument that the trial court improperly changed his sentence in response to his notice of appeal. Defendant had already served his term of imprisonment and did not argue that any collateral legal consequences may result from his sentence.

Appeal by defendant from judgment entered 12 August 2014 by Judge Anderson Cromer in Iredell County Superior Court. Heard in the Court of Appeals 6 May 2015.

*Attorney General Roy Cooper by Special Deputy Attorney General Elizabeth Leonard McKay, and Associate Attorney Karmina J. Ishak, for the State.*

*Winifred H. Dillon for defendant-appellant.*

STEELMAN, Judge.

It was not error or plain error for the trial court to allow the State to cross-examine defendant about a case that defendant discussed in his direct testimony. Defendant's argument regarding his active, non-probationary, sentence is dismissed as moot, since his sentence has expired.

**I. Factual and Procedural Background**

On 8 August 2013 Michael Godbey (defendant) went to the Iredell County courthouse annex, where he was involved in an incident with

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a female security guard. He was charged with assault on a female, was convicted in district court on 4 March 2014, and appealed to Superior Court for trial *de novo*. The charge against defendant came on for trial at the 11 August 2014 criminal session of Superior Court for Iredell County. Defendant, who is hearing impaired, used the services of an interpreter during the trial.

A. The State's Evidence

On 8 August 2013 Marsha Isenhour<sup>1</sup> was employed by the Wilson Security Company as a security officer at the Iredell County courthouse annex. Ms. Isenhour checked courthouse visitors through a metal detector and, if an alarm sounded when a person passed through the metal detector, she used a metal detection wand to determine the source of the alarm. At around 10:00 a.m. defendant entered the courthouse and when he passed through the metal detector the alarm sounded. Ms. Isenhour knew that defendant was hearing impaired, so she held up her hands, gestured to defendant to stop, and spoke clearly so he could read her lips. Defendant continued to walk towards Ms. Isenhour and when she turned to seek assistance from a co-worker, defendant shoved her from behind into the wall, pushing her “with both hands quite forcefully.” Her co-worker restrained defendant until a bailiff escorted him outside. Once outside, defendant made “threatening gestures,” and looked at Ms. Isenhour while holding his hand “like he was shooting a gun.”

Lloyd Elliott also worked for Wilson Security at the courthouse annex. On 8 August 2013 he heard the alarm sound and turned to see Ms. Isenhour holding up her hands in front of defendant and yelling “Stop!” However, defendant did not stop, but “slammed her into the wall.” Mr. Elliott saw that defendant had not tripped, but intentionally pushed Ms. Isenhour into the wall. He stayed between defendant and Ms. Isenhour until a deputy took defendant outside. When defendant was outside, he had an “enraged look” on his face and made threatening gestures towards him and Ms. Isenhour.

B. Defendant's Evidence

Defendant testified on his own behalf, with the assistance of an interpreter. In August 2013 he was the prosecuting witness in a criminal case and on 8 August 2013 he went to the Iredell County courthouse to learn why the case had been dismissed. He approached the metal detector and

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1. Although the witness's name is spelled “Eisenhour” in the trial transcript, defendant and the State agree that the correct spelling is “Isenhour.”

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removed coins and keys from his pockets in order to walk through the checkpoint, but Ms. Isenhour and Mr. Elliott told him to get out of the building. He wrote a note asking Ms. Isenhour why she was telling him to leave the building and showed it to her. In response, she threatened him with the metal detector wand. At that point a deputy arrived and took him outside. Defendant testified that he did not understand why Ms. Isenhour was trying to bar him from the building and denied touching her or making threatening gestures. Defendant also testified about a criminal case that had been dismissed in which he had “filed assault charges” against a man and was also cross-examined about the case.

On 12 August 2014 the jury found defendant guilty of assault on a female. Defendant stipulated that he had a prior record level III for purposes of misdemeanor sentencing. As discussed below, the trial court initially imposed a split sentence of 30 days imprisonment followed by a term of probation, but subsequently changed the judgment to 120 days imprisonment without probation.

Defendant appeals.

## II. Cross-examination of Defendant

[1] In his first argument, defendant contends that the trial court “committed plain error in admitting evidence that [defendant’s] criminal complaint against [another man] was dismissed for insufficient evidence because the admission amounted to a judicial opinion that [defendant] was not credible.” Defendant has failed to establish the existence of error or plain error.

### A. Standard of Review

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4). However:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously

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affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

B. Analysis

On direct examination, defendant testified that he went to the courthouse annex on 8 August 2013 to learn why a criminal case in which he was the prosecuting witness had been dismissed two days earlier. Defendant stated that he “didn’t have [a] chance to tell [his] side of the story on August the 6<sup>th</sup>,” and that he had never been told why the case was dismissed. Defendant testified that:

I just want to know why the case I had filed against the gentleman [had] been dismissed. I just went to the DA’s office to try to find out what was going on and explain my side of the case. The DA apparently wasn’t doing his job of representing me.

Defendant also testified that on both 6 August and 8 August 2013 Ms. Isenhour and Mr. Elliott had prevented him from entering the courthouse, telling him to “get out” and “leave the building.” Thus, defendant offered testimony regarding the case that had been dismissed, including assertions that he had not been informed of the reasons for the dismissal and that he had been prevented from entering the courthouse to discuss the case with the prosecutor.

On cross-examination, defendant was questioned about the case in which he was the prosecuting witness, and the State introduced documents associated with the case, including the reports he filed with a magistrate about the alleged assault, and the records of the district court proceedings in that case. Defendant testified that in April 2013 he swore out a warrant before a magistrate, charging another man with simple assault. On 12 June 2013 defendant testified in district court as a prosecution witness. After the evidence was presented, the district court judge dismissed the charge. On 27 June 2013 defendant returned to the magistrate and initiated a new assault proceeding against the same defendant for the same alleged assault. A trial date was set for 6 August 2013, but when defendant went to court on that date, he learned that the second charge had been dismissed because the defendant in that case had been acquitted of the assault at the earlier district court trial. Defendant testified that on August 6<sup>th</sup> Ms. Isenhour prevented him from entering the courthouse, that he returned on 8 August 2013 to learn

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more about the dismissal of the assault charge, and that Ms. Isenhour and Mr. Elliott were “lying” about the incident on 8 August 2013.

“Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.” *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) (citations omitted). “In such a case, the defendant has ‘opened the door’ to this testimony and will not be heard to complain.” *State v. Stanfield*, 292 N.C. 357, 364, 233 S.E.2d 574, 579 (1977) (citation omitted). We hold that, by testifying about the earlier assault case in his direct testimony, defendant opened the door to cross-examination on this subject and that the trial court’s decision to allow the testimony and introduction of documents pertaining to the earlier case was not error. Because the trial court did not err, we do not reach the issue of plain error.

Defendant, however, contends that the documents detailing dismissal of the charge constitute a “judicial opinion” on defendant’s credibility, given that defendant testified under oath before a magistrate and at the district court trial. However, a charge may be dismissed for a variety of reasons; for example, a witness’s unimpeached and credible testimony may simply not establish the elements of a criminal offense. The bare fact that the earlier charge was dismissed does not constitute a judicial opinion on defendant’s credibility.

This argument is without merit.

### III. Sentencing

[2] In his second argument, defendant contends that he is “entitled to a new sentencing hearing because the trial court erred when it based its imposition of sentence on [defendant’s] exercise of his right to appeal.” We conclude that, although the trial court erred, the issue is now moot, given that defendant has served his sentence and cannot be resentenced.

At the sentencing hearing, the trial court listened to the arguments from the prosecutor and defense counsel, and questioned defendant about his living situation. The trial court then engaged in the following dialog with counsel:

THE COURT: All right. Stand, please. Find there’s a factual basis for all of this. I’ve accepted the verdict of the jury. On a conviction of and a guilty finding of assault on a female, the Court’s going to enter the following judgment. It’s a class A1 misdemeanor, record level III with six priors.



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It's 150 days suspended for one year upon the following terms and conditions. You pay the court costs. Are you court-appointed?

MR. LITTLE: I am court-appointed, Your Honor. At this time I have a total right at 21 hours. . . .

THE COURT: At what rate?

MR. LITTLE: That's, I believe, the \$60 rate.

THE COURT: Be an additional \$1,260. You can pay this while you're on probation; however, this includes the following terms and conditions. It will be a 30-day sentence starting today in the Iredell County Jail. When you get out, you're to move to Buncombe County, live with your mother for the remainder of the probation period and not reside, if not with your mother, then at a place in Buncombe County that's been secured for you. Probation will be transferred up there. You're to also enroll in anger management classes and complete anger management class before the end of your probation. First anger management class missed is to result in an arrest by the probation officer and placed under a \$50,000 secured bond. That's my judgment. He's in custody of the Sheriff's Department for 30 days.

MR. LITTLE: Your Honor, if I may, Mr. Godbey has told me he does wish to file notice of appeal in this matter. We would ask that the active portion of the sentence be held in abeyance during the pendency of the appeal. I know that that could take quite awhile. No idea how it might go, might not go, but we'd ask that the active portion of the sentence be held in abeyance [during] the pendency of the appeal.

THE COURT: Well, my judgment has changed. This will be an active sentence of 120 days, no probation, notice his appeal, appoint appellate counsel. I'm not waiving – I'm not setting a bond. He's in the custody of the Sheriff's Department for 120 days.

On appeal, defendant argues that, although the 120 day sentence is within the statutorily permissible range, the transcript indicates that the trial court changed his judgment from a split sentence of 30 days followed by a period of probation to an active term of imprisonment in response to defendant's decision to appeal.

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“A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant’s rights.” *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977) (citing *State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967)). “It goes without saying that no person should ever be penalized for exercising a constitutional right or his right of appeal.” *State v. Stafford*, 274 N.C. 519, 525, 164 S.E.2d 371, 375 (1968).

In this case, the trial court first entered a detailed judgment and then, immediately after defense counsel informed the court that defendant wished to appeal, the trial judge stated “Well, my judgment has changed.” We agree with defendant that the only reasonable interpretation of the above dialog is that the trial court’s decision to change its judgment was an improper response to defendant’s notice of appeal. However, we are not required to reach a definitive conclusion on this issue, because the issue of alleged error in defendant’s sentence has become moot.

The record reflects that on 12 August 2014 defendant was sentenced to 120 days in the custody of the Iredell County Sheriff. We take judicial notice of the records of Iredell County, which show that defendant’s custody was transferred to Mecklenburg County, pursuant to the Statewide Misdemeanant Confinement Program, and that defendant was released on 10 December 2014, following expiration of his sentence. Generally, “‘this Court will not hear an appeal when the subject matter of the litigation . . . has ceased to exist.’” *In re Swindell*, 326 N.C. 473, 474, 390 S.E.2d 134, 135 (1990) (quoting *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968)). “Once a defendant is released from custody, ‘the subject matter of [a sentencing error] has ceased to exist and the issue is moot.’” *State v. Stover*, 200 N.C. App. 506, 509, 685 S.E.2d 127, 130 (2009) (quoting *Swindell*, 326 N.C. at 475, 390 S.E.2d at 135). “In the instant case, defendant already has served his [term of imprisonment]. Furthermore, defendant has not argued to the Court any collateral adverse legal consequences that may result from the . . . defendant’s sentence. Therefore, we hold that the issue of whether defendant’s active sentence [was improperly imposed] is moot.” *Stover*, 200 N.C. App. at 509, 685 S.E.2d at 130-31.

**IV. Conclusion**

We conclude that the trial court did not err by allowing the State to cross-examine defendant about a criminal case that defendant had

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testified about in his direct testimony. The issue of whether defendant's sentence was improperly imposed is dismissed as moot.

NO ERROR IN PART, DISMISSED IN PART.

Judges STEPHENS and McCULLOUGH concur.

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STATE OF NORTH CAROLINA  
v.  
RAYMOND L. HARGETT

No. COA14-1252

Filed 19 May 2015

**1. Appeal and Error—preservation of issues—failure to renew objection**

Although defendant appealed from the denial of a pretrial motion to suppress evidence and from judgments entered upon his convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and possession of drug paraphernalia, as well as his subsequent guilty plea to habitual felon status, he failed to preserve the error based on a failure to renew his objection. Thus, the appeal was dismissed.

**2. Constitutional Law—effective assistance of counsel—failure to preserve appeal—failure to show prejudice**

Defendant's motion for appropriate relief based on ineffective assistance of counsel was denied based on failure to show prejudice. Even if defense counsel properly preserved defendant's right to appellate review of the trial court's denial of his motion to suppress or properly raised a plain error argument in his opening brief, defendant would not have prevailed.

Appeal by Defendant from order entered 7 April 2014 and judgments entered 9 April 2014 by Judge Jack W. Jenkins in Craven County Superior Court. Heard in the Court of Appeals 8 April 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton III, for the State.*

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*Appellate Defendant Staples Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant.*

STEPHENS, Judge.

*Evidence and Procedural Background*

Defendant Raymond L. Hargett appeals from the denial of a pretrial motion to suppress evidence and from the judgments entered upon his convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and possession of drug paraphernalia, as well as his subsequent guilty plea to habitual felon status. Because Hargett failed to preserve the error he alleges in this appeal, we must dismiss.

The charges against Hargett arose from the events of 23 May 2013. On that morning, the New Bern Police Department (“NBPD”) received a call from a citizen who requested a security check on a residence at 708 A Street in New Bern. The caller stated that the owner of the residence was incarcerated, but that he had driven past that morning and noticed that “the window shades had been pushed back.” Officer Edwin D. Santiago, Jr., and Detective David Upchurch of the NBPD responded to the residence, and, upon arriving, Officer Santiago saw “that the shade had been — the screen had been pushed to the side. [It l]ooked like it had been pulled back. . . . and that the window was up.” Concerned that someone might have broken into the residence, Officer Santiago knocked on the front door and got no response. Officer Santiago knocked several more times before finally getting a response. After Officer Santiago identified himself as a police officer, Hargett opened the door. At the suppression hearing, Officer Santiago testified as follows about what happened next:

I asked him if he was the homeowner of the residence, and he hesitated to answer that question, didn’t come out and immediately say no. He finally did answer the question and said no. And then I asked him for his name, in which he hesitated giving me his name, but then he initially gave me his name as Raymond Hargett.

. . . .

He finally told me his name was Raymond Hargett, and then I asked him if he was the — if he was the owner of the residence, and he stated no. Then I asked him for ID. He didn’t have any ID on him.

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. . . .

While talking to him, at that point I asked him to step out of his residence and I detained him. I told him he was — I told him he was not under arrest, but because he couldn't tell me who he was and who the homeowner is at the residence, that he was being detained so that I could find out who the actual homeowner of the house was.

. . . .

While I was talking to him, he kept putting his hands in his pocket, and I asked him, "Don't put your hands in your pocket." He kept putting his hands in his pocket. So when he came out, and based on, you know, not knowing who he was at the time because he couldn't produce any ID, and he hesitated to tell me who his name was and he hesitated on telling me he wasn't — you know, who the homeowner was and everything, I detained him.

Officer Santiago testified that he was concerned for his safety and unsure whether Hargett might have a weapon. As a result, he handcuffed Hargett and

patted him down from the top up, from the waist and then down towards his legs, you know, his pocket area, his groin area, then down his legs. When I patted down towards his left leg, I could smell an odor of marijuana, and I felt two bulges in his left — left pant leg. When I lifted it up, there was two bulges in his sock. He had his socks up.

. . . .

The smaller bulge felt to me as a small baggy of marijuana, through my training and experience. And then the large bag had just — had several but, I mean, I couldn't tell what that was. But when I rolled down the sock — when I rolled his sock down, of course, the small bag came out and it was marijuana. And when I opened the other bag, what came out was a brown paper bag. When I opened that up, there was several other baggies of marijuana inside.

When asked about his training and experience in identifying controlled substances such as marijuana, Officer Santiago explained:

Through, of course, basic law enforcement training, they teach us and they show us what — you know, they put it in

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your pocket so you can feel what it feels like when you're patting somebody down. Also, the odor of marijuana. We do controlled burns and stuff like that. And I have arrested numerous individuals with marijuana in their pocket, based on the odor of marijuana, and it felt the same way.

Officer Santiago then arrested Hargett, and, shortly thereafter, two other NBPD officers arrived at the residence. Officer Santiago had the other officers conduct a security sweep of the residence to determine whether anyone else was inside. The officers did not find any other person in the home, but did discover more plastic baggies and a smoking pipe made from a soda bottle. In addition, as Hargett was being placed into a patrol car after his arrest, Officer Santiago frisked him again and discovered a small baggie containing at least twenty smaller baggies of cocaine in Hargett's sock.

On 14 October 2013, Hargett was indicted on one count each of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, possession of drug paraphernalia, and having attained the status of an habitual felon. On 2 February 2014, Hargett moved to suppress the cocaine, marijuana, and drug paraphernalia discovered by officers on 23 May 2013. Hargett's case came on for trial at the 7 April 2014 session of Craven County Superior Court. Following a hearing on his motion, Hargett's motion to suppress was denied by the trial court. The jury returned guilty verdicts on all three possession offenses, and Hargett then entered a plea of guilty on the habitual felon charge. The trial court consolidated certain convictions and entered two judgments with concurrent sentences, the greater of which imposed 90-120 months imprisonment. Hargett gave notice of appeal from those judgments in open court.

*Preservation of Hargett's Appellate Issue*

[1] The law in this State is now well settled that “a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.” *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted; emphasis in original). In *Oglesby*, our Supreme Court considered the exact question presented in this appeal: whether a “defendant should be barred from raising this issue [error in the denial of a motion to suppress evidence] on appeal since he did not renew his objection at trial and has not argued, alternatively, that the trial court committed plain error by allowing the [challenged evidence] entered into evidence.” *Id.* at 553-54, 648 S.E.2d at 821 (citations

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omitted). The Court noted that, in failing to object to the challenged evidence at his trial in May 2004, the

defendant may have relied to his detriment on a 2003 amendment to [ ] North Carolina Rule[ ] of Evidence [103(a)(2)], which provides in pertinent part: Once the [trial] court makes a definitive ruling on the record admitting or excluding evidence, *either at or before trial*, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. There is a direct conflict between this evidentiary rule and North Carolina Rule of Appellate Procedure 10(b)(1),<sup>1</sup> which this Court has consistently interpreted to provide that a trial court's evidentiary ruling on a pretrial motion is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.

*Id.* at 554, 648 S.E.2d at 821 (citations and internal quotation marks omitted; emphasis in original). *Oglesby* was the first Supreme Court case to address the conflict between the amended evidentiary rule and Rule of Appellate Procedure.<sup>2</sup> The Court held Rule 103(a)(2) unconstitutional because

[t]he Constitution of North Carolina expressly vests in this Court the exclusive authority to make rules of procedure and practice for the Appellate Division. Although Rule 103(a)(2) is contained in the Rules of Evidence, it is manifestly an attempt to govern the procedure and practice of the Appellate Division as it purports to determine which issues are preserved for appellate review. Accordingly, we hold that, to the extent it conflicts with Rule of Appellate Procedure 10(b)(1), Rule of Evidence 103(a)(2) must fail.

*Id.* (citations and internal quotation marks omitted). However, because “the amendment to Rule 103(a)(2) was presumed constitutional at the time of [the] defendant’s trial, which was held before the Court of Appeals decision in *Tutt* [and g]iven the harsh consequences of barring review when a defendant has relied to his detriment on existing law,”

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1. Former North Carolina Rule of Appellate Procedure 10(b)(1) is now Rule 10(a)(1). *See* N.C.R. App. P. 10(a)(1).

2. As the Supreme Court noted in *Oglesby*, a panel of this Court had already addressed the issue and reached the same holding in *State v. Tutt*, 171 N.C. App. 518, 615 S.E.2d 688 (2005).

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the Supreme Court elected to exercise its “discretion under Appellate Procedure Rule 2 to prevent manifest injustice to [the] defendant and to review his contention on the merits.” *Id.* at 555, 648 S.E.2d at 821-22. Those circumstances are not present in this case.

Here, at trial, Hargett objected to admission of two out of five bags of cocaine, but did not object to the other three bags of cocaine, the eight bags of marijuana, or drug paraphernalia introduced at trial. Hargett did not object to any testimony from the officers about their discovery of the drugs and drug paraphernalia. On appeal, in his opening brief, Hargett did not acknowledge his failure to object to the majority of the evidence he contends should have been suppressed, did not cite *Oglesby*, and did not argue plain error or request that this Court review his argument under Rule 2 of our Rules of Appellate Procedure.

In response to the State’s discussion of Hargett’s failure on these grounds, Hargett has filed a reply brief with this Court, in which for the first time he acknowledges the actual procedural posture of his appeal and that “[t]here is some support for the State’s position in the authorities cited.” This is an understatement to the point of inaccuracy. The authorities cited by the State, including *Oglesby*, are straightforward and clear that the denial of a motion to suppress does not preserve that issue for appellate review in the absence of a timely objection when the evidence is introduced at trial. Almost three dozen appellate opinions in our State cite *Oglesby* for this very proposition. Unlike the defendant in *Oglesby*, Hargett was not relying on a recent amendment to a rule of evidence in failing to object to the challenged evidence when it was introduced at trial. Thus, unlike the defendant in *Oglesby*, who might have relied to his detriment on the then-existing law, Defendant here went to trial seven years after the filing of our Supreme Court’s decision in *Oglesby* and without the possibility of being misled by a lack of clarity in the pertinent case law.

Hargett’s contentions in the reply brief regarding his right to appellate review are largely an argument that *Oglesby* was either wrongly decided or should not apply to Hargett because his trial counsel may have been confused by apparent conflicts between the holding of that case and certain sections of our State’s Criminal Procedure Act. In support of this position, Hargett contends that provisions of Chapter 15A “did not allow . . . Hargett to assert a meaningful Fourth Amendment objection to Officer Santiago’s substantive testimony at trial.” For example, Chapter 15A provides that “[a] motion to suppress evidence made pursuant to this Article is the *exclusive method of challenging the admissibility of evidence* upon [constitutional] grounds,” N.C. Gen.



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Stat. § 15A-979(d) (2013) (emphasis added), but limits renewal of a previously denied pretrial motion to suppress during trial to circumstances where the defendant can show “that additional pertinent facts have been discovered” since the original ruling. N.C. Gen. Stat. § 15A-975(c) (2013). Further, section 15A-979 states that “[a]n order finally denying a motion to suppress evidence *may be reviewed upon an appeal from a judgment of conviction*, including a judgment entered upon a plea of guilty.” N.C. Gen. Stat. § 15A-979(b) (emphasis added); *see also* N.C. Gen. Stat. § 15A-1446(a) (2013) (“No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court.”). In sum, Hargett characterizes his trial counsel’s failure to object to much of the evidence he sought to suppress as understandable and excusable.<sup>3</sup>

These arguments are neither appropriate nor persuasive. As noted *supra*, our Supreme Court has held that “a trial court’s evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.” *Oglesby*, 361 N.C. at 554, 648 S.E.2d at 821 (citations omitted; emphasis in original). This Court “has no authority to overrule decisions of the Supreme Court and has the responsibility to follow those decisions until otherwise ordered by the Supreme Court.” *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (citations, internal quotation marks, and brackets omitted). We are bound by *Oglesby*: Hargett has not preserved his right to appellate review of the denial of his motion to suppress.

Hargett also acknowledges that he is not *entitled* to plain error review because he did not assert plain error in his opening brief. *See State v. Dinan*, \_\_ N.C. App. \_\_, 757 S.E.2d 481, *disc. review denied*, \_\_ N.C. \_\_, 762 S.E.2d 203 (2014) (holding that assertion of plain error for the first time in a reply brief is insufficient to obtain such review). However, Hargett cites *State v. Miller*, 198 N.C. App. 196, 197-99, 678 S.E.2d 802, 804-05 (2009), as an example of a case where we elected to review for plain error in circumstances similar to his own, to wit, the defendant’s pretrial motion to suppress was denied, he failed to object to admission of the evidence at trial, failed to argue plain error in his primary brief, and made an argument of plain error only in his reply brief. We find *Miller* distinguishable on several bases. First, although *Miller*

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3. The sincere and thoughtful argument made by Hargett’s appellate counsel on this point is undercut by the fact that Hargett’s trial counsel did, in fact, object at trial to admission of two out of five bags of cocaine the State sought to admit.

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did not argue plain error in his primary brief, he did request discretionary review under Rule 2 in the event that “this Court find[s] that the argument presented in this brief [is] not properly preserved or presented for appellate review[.]” In addition, the Court noted that the “defendant properly assigned plain error on appeal.” *Id.* at 198, 678 S.E.2d at 805. Finally, that case involved a trial held in July 2008, less than a year after the filing of the Supreme Court’s opinion in *Oglesby* in August 2007, while Hargett’s trial took place some seven years after *Oglesby* when the law on the pertinent point was well settled. In sum, we find *Miller* inapplicable here.

We are mindful of the harsh consequences of our holding on Hargett and sympathetic to his appellate counsel’s predicament as well. However, to address the merits of Hargett’s appeal, despite his failure to recognize and comply with long-standing case law both at trial and in his brief to this Court, would not prevent manifest injustice. Rather, we believe it would be an injustice to the numerous other defendants who have had their appeals dismissed by application of the holding of *Oglesby*. See, e.g., *State v. Bryant*, \_\_ N.C. App. \_\_, 753 S.E.2d 397 (2013) (unpublished); *State v. Berrier*, 217 N.C. App. 641, 720 S.E.2d 459 (2011) (unpublished); *State v. Black*, 217 N.C. App. 196, 719 S.E.2d 255 (2011) (unpublished); *State v. Gause*, \_\_ N.C. App. \_\_, 688 S.E.2d 550 (2009) (unpublished); *State v. Toler*, \_\_ N.C. App. \_\_, 657 S.E.2d 446 (2008) (unpublished); *State v. Sullivan*, \_\_ N.C. App. \_\_, 652 S.E.2d 71 (2007) (unpublished). Hargett has not convinced this panel that invocation of Rule 2 is appropriate here. Accordingly, his appeal is dismissed.

*Hargett’s Motion for Appropriate Relief*

**[2]** On 9 February 2015, Hargett filed a motion for appropriate relief (“MAR”) pursuant to N.C. Gen. Stat. §§ 15A-1415(b)(3) and 15A-1418(a), which was referred to this panel by order entered 20 February 2015. In his MAR, Hargett raises an ineffective assistance of counsel (“IAC”) claim based upon his trial counsel’s failure to preserve his right to appellate review of the denial of his motion to suppress by objecting at trial to the admission of evidence of the drugs and drug paraphernalia seized from him. We deny Hargett’s MAR.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness.

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Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). “[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel’s performance was actually deficient.” *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). Hargett contends that his defense was prejudiced because, had his trial counsel preserved his right to appeal the denial of his motion to suppress, this Court would have reversed that order and granted Hargett a new trial. We disagree.

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) (citations omitted). “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). Here, Hargett does not challenge any of the trial court’s factual findings, but contends only that the findings of fact do not support the conclusion that Officer Santiago’s investigatory seizure and search of Hargett’s person were constitutional because he had “a reasonable, articulable suspicion that criminal activity [might] be afoot.”

The trial court correctly applied our State’s search and seizure case law in denying Hargett’s motion to suppress.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, protects the right of people to be free from unreasonable searches and seizures. This protection applies to seizures of the person, including brief investigatory detentions. As our Supreme Court has explained, only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

## STATE v. HARGETT

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A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch. It is well-settled that the standard for reasonable suspicion is less demanding than that for probable cause.

*State v. Campbell*, 188 N.C. App. 701, 704-05, 656 S.E.2d 721, 724-25 (citations, internal quotation marks, brackets, and ellipsis omitted), *appeal dismissed*, \_\_ N.C. \_\_, 664 S.E.2d 311 (2008). Further, in the context of an investigatory stop, a law enforcement officer may perform a pat down or frisk of the outer clothing to check for weapons if the officer has reasonable suspicion that the suspect may be armed. *State v. Briggs*, 140 N.C. App. 484, 488, 536 S.E.2d 858, 861 (2000). To conduct such a frisk, “the officer need not be absolutely certain that the individual is armed. Rather, the officer is entitled to formulate common-sense conclusions about the modes or patterns of operation of certain kinds of lawbreakers in reasoning that an individual may be armed.” *State v. King*, 206 N.C. App. 585, 589, 696 S.E.2d 913, 915 (2010) (citations, internal quotations marks, and brackets omitted). In addition, under

the plain feel doctrine, when conducting a . . . frisk for weapons, if a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons. The officer may seize the object if he or she has probable cause to believe it is contraband. Probable cause exists if the facts and circumstances within the knowledge of the officer were sufficient to warrant a prudent man in believing that the suspect had committed or was committing the offense.

*State v. Reid*, \_\_ N.C. App. \_\_, \_\_, 735 S.E.2d 389, 399 (2012) (citations and internal quotation marks omitted).

Here, the unchallenged evidence reveals that a police officer received a report from a tipster, for whom a first name, street address, and telephone number were provided. The tip was that a residence

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whose owner was incarcerated had a front window that appeared to have been tampered with. The officer confirmed that a window screen at the home had been pushed aside and the window was open, suggesting the possibility of a breaking and entering. When the officer repeatedly knocked on the door of the residence, there was initially no response. Then, as the trial court found,

[f]inally, there was a response; it was a slow response. That essentially, the individual inside asked, “Who’s there?” The officer responded, “It’s the police.” The individual inside indicated, “Okay,” and did come to the door, did open the door, and they engaged in some limited conversation. Essentially, the officer asked the identity of the person inside. The individual gave a very long, slow response, finally indicated his name was Raymond Hargett. There was a slow response. He did not provide any ID, could not provide any ID. He was asked who the owner of the house is. He either would not or could not give the name of the owner, at least at that time.

....

[Hargett] was asked repeatedly to keep his hands, you know, in a visible place and not have them in his pockets. [Hargett], according to the testimony, several times continued to put his hands in his pockets, was asked to take them out. [Hargett] would take them out and then put them right back in.

The tip that the home’s owner was incarcerated, the pried-open screen and open window, and Hargett’s inability to identify the owner of the home were sufficient to create reasonable suspicion in Officer Santiago that Hargett might have broken into the home through the window. *See Campbell*, 188 N.C. App. at 704, 656 S.E.2d at 725. These circumstances, along with Hargett’s refusal to comply with the officer’s instructions to keep his hands out of his pockets, further supported Officer Santiago’s “common-sense conclusion” that Hargett might be armed and thus justified his frisk of Hargett. *See King*, 206 N.C. App. at 589, 696 S.E.2d at 915. In turn, during that frisk, the officer discovered and identified the baggies of marijuana in Hargett’s sock by plain feel. *See Reid*, \_\_ N.C. App. at \_\_, 735 S.E.2d at 399. In sum, the trial court properly denied Hargett’s motion to suppress because Officer Santiago had reasonable, articulable suspicion that criminal activity might be afoot. Thus, even had Hargett’s trial counsel properly preserved Hargett’s right to appellate review of

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the trial court's denial of his motion to suppress (or had his appellate counsel properly raised a plain error argument in his opening brief), Hargett would not have prevailed. Accordingly, Hargett cannot demonstrate the prejudice required to sustain his IAC claim.

Appeal DISMISSED; motion DENIED.

Judges STEELMAN and McCULLOUGH concur.

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STATE OF NORTH CAROLINA  
v.  
PURCELL ORLANDO JONES, JR.

No. COA14-1057

Filed 19 May 2015

**1. Evidence—unrelated charges—untimely objection—no prejudice**

The trial court did not err in a robbery with a dangerous weapon and common-law robbery case by admitting evidence of unrelated charges and denying defendant's motion for a mistrial. Defendant's objection to this evidence was untimely. Even if defendant offered a timely objection, the admission of the evidence did not prejudice defendant's case.

**2. Robbery—common law—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the common law robbery charge. Viewing the evidence in the light most favorable to the State, there was substantial evidence to support the charge when the victim fled the mobile home as a result of violence or fear and items were taken from her presence upon her fleeing to find help.

**3. Witnesses—denial of motion to sequester—no basis for request—no prejudice**

The trial court did not abuse its discretion in a robbery with a dangerous weapon and common-law robbery case by denying defendant's motion to sequester the victims. Defendant failed to provide a basis for his request. Further, defendant failed to show prejudice.

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[241 N.C. App. 132 (2015)]

Appeal by defendant from judgments entered 17 April 2014 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 8 April 2015.

*Attorney General Roy Cooper, by Special Deputy Attorney General M. Lynne Weaver, for the State.*

*Adrian M. Lapas for defendant-appellant.*

McCULLOUGH, Judge.

Purcell Orlando Jones, Jr., (“defendant”) appeals from judgments entered upon his convictions for two counts of robbery with a dangerous weapon and one count of common-law robbery. For the following reasons, we find no error.

### I. Background

On 9 July 2013, a Wake County Grand Jury indicted defendant on one count of first-degree burglary, three counts of robbery with a dangerous weapon, and three counts of first-degree kidnapping in connection with the robbery of a mobile home in Knightdale during the early morning hours of 13 May 2013. The case came on for jury trial in Wake County Superior Court before the Honorable Henry W. Hight, Jr., on 14 April 2014.

The evidence at trial tended to show that the mobile home was the home of Brian Jones (“Brian”), his wife Adrienne Jones (“Adrienne”), and his two young children. On the morning of 12 May 2013, Adrienne woke Brian up when two men came to the mobile home to borrow jumper cables. Brian knew one of the men as Millie, later identified by his real name Devaunte Lewis (“Devaunte”), and allowed him to borrow jumper cables. Brian’s friend Sloan Schmitt (“Sloan”), who at the time was asleep on a couch in the mobile home, woke up and noticed the two men but did not recognize either of them.

That day Brian and Sloan hung around the mobile home all afternoon and then began drinking whiskey and beer later in the evening. Brian also smoked marijuana. After the children had gone to bed around seven or eight o’clock and after Adrienne had gone to bed around ten or eleven o’clock, Brian and Sloan stayed up watching a movie on Brian’s computer. Sloan “passed out” during the movie and Brian went to bed once the movie had finished.

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Shortly thereafter in the early morning hours of 13 May 2013, Sloan woke up to someone knocking on the door. Sloan testified he could see three figures outside the front door and he opened the door because someone said they had jumper cables for Brian. At that instant, the men rushed the mobile home, pushing their way in and pushing Sloan into the bathroom near the front door. Sloan thought three people rushed in, but he was not one hundred percent certain. Sloan testified he was tasered and forced to the bathroom floor, where one of the men held him down. Sloan indicated he fought back initially, but then stopped because he kept getting tasered. Sloan recalled that the men demanded money, but only took his cell phone from the couch where he was sleeping.

Brian testified the next thing he remembered after going to bed was being awakened by someone trying to drag him out of bed. Brian recalled he started to struggle with someone but was then tasered and hit the floor, where he was stomped and punched several times. Brian testified he could tell he was fighting one person and a totally different person came around behind him and tasered him. Brian testified that the men demanded money and took items belonging to him and Adrienne before fleeing the mobile home.

Brian identified defendant as the person punching and stomping him. Brian explained that he knew defendant and Devaunte through Brett Stewart (“Brett”), a friend of Brian’s who lived in the mobile home park. Brian indicated he had hung out with defendant on two occasions prior to this incident.

During the commotion, Adrienne was able to escape the mobile home and run to a neighbor’s mobile home for help. Both law enforcement and EMS responded. Brian, Adrienne, and Sloan were all treated for injuries at the scene but refused to go to the hospital.

Detective Alfredo Hicks (“Detective Hicks”) with the Wake County Sheriff’s Office testified that they had been looking for defendant on May 13 and 14 before defendant turned himself in. Defendant initially told Detective Hicks he was turning himself in on a warrant for failure to appear for possession of marijuana and Ecstasy charges and repeatedly denied knowing anything about the robbery of the mobile home. Yet after defendant made a statement including facts about the robbery that the police had not disclosed to defendant, defendant changed his story and told police that he was present at the mobile home during the robbery.

At the close of the State’s evidence, defendant moved to dismiss the charges. The trial court dismissed the two second degree kidnapping



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charges related to Adrienne and Brian, but allowed the remainder of the charges to go forward.

Defendant then took the stand in his own defense and admitted he was present, but denied knowing anything about the robbery before entering the mobile home. Defendant testified that he spent much of 12 May 2013 drinking and, after midnight, got in his mother's van with Terrence Williams ("Terrence") and Devaunte to go home. Terrence drove because defendant had been drinking. Defendant recalled that they stopped and picked up Brett before he dozed off in the front passenger seat. When defendant woke up, they were at Brian's mobile home. Defendant recalled that Terrence said he was returning jumper cables to Brian.

Defendant testified Terrence and Devaunte approached the mobile home and began knocking on the door. Defendant then turned away and when he looked back, Terrence and Devaunte were gone. At that point, defendant said he approached the mobile home, knocked on the door, and entered. Once inside, defendant heard yelling and saw Brian coming at him. Defendant testified that Brian struck him in the face with a fist and he retaliated. Defendant testified he struggled with Brian in the master bedroom, but was able to kick free of Brian and leave out of the front door. Defendant recalled that he heard Terrence yelling "Where is the money?" during the incident, but defendant did not recall anyone getting tasered.

Defendant later found out from his mother that the police were looking for him and he turned himself in. Defendant stated he initially did not tell the police the truth because he was scared of consequences from Terrence.

Upon deliberation of the evidence, on 17 April 2014, the jury returned verdicts finding defendant not guilty of first degree burglary and second degree kidnapping, but guilty on two counts of robbery with a dangerous weapon and one count of common-law robbery. The trial court entered judgments on defendant's convictions and sentenced defendant to three consecutive terms totaling 160 to 226 months imprisonment. Defendant appeals.

## II. Discussion

On appeal, defendant raises the following three issues: whether the trial court erred by (1) admitting evidence of unrelated charges and denying his motion for a mistrial; (2) denying his motion to dismiss one

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of the counts of robbery with a dangerous weapon; and (3) denying his motion to sequester the alleged victims.

Evidence of Unrelated Charges and Mistrial

At trial, Detective Hicks testified about the investigation and indicated that there were other criminal charges pending against defendant at the time defendant turned himself in to the police on 14 May 2013. Specifically, in response to the State's question, "And what did this [d]efendant tell you at first?" Detective Hicks testified as follows:

I -- I usually start my interviews by asking that person why they think they are there at that time to speak with me. [Defendant] indicated that he was there turning himself in on a warrant for failure to appear for possession of marijuana and Ecstasy charges that were initiated by the Raleigh Police Department.

Upon hearing Detective Hicks' testimony, defendant immediately requested to approach the bench. Following an unrecorded bench conference, the State continued to question Detective Hicks. At the conclusion of the State's direct examination of Detective Hicks, the trial court then excused the jury and defendant objected to Detective Hicks' testimony and moved for a mistrial. In support of his motion, defendant argued direct evidence of his prior convictions was improperly offered to the jury and was prejudicial.

Upon hearing from both sides, the trial court clarified that Detective Hicks testified defendant said "he was turning himself in for failure to appear on a warrant for possession of marijuana and Ecstasy charges initiated by the Raleigh Police Department[;]" Detective Hicks did not testify defendant "was convicted of anything at all." The trial court then emphasized that the defense was aware of defendant's statement to Detective Hicks prior to trial and could have objected sooner. Specifically, the trial court explained the following:

I think the [d]efendant is in a position to have objected earlier if he had desired to do so and failed to do so. And, therefore, the late objection does not provide grounds for a mistrial in this particular case.

Further, that may show the state of mind of the [d]efendant as to the reason that he was with the -- this officer in making his statement.

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Despite defendant's untimely objection, the trial court offered to issue a curative instruction and defendant agreed. The trial court then instructed the jury as follows:

Ladies and gentlemen, the evidence was received before you that this [d]efendant told this officer that he was turning himself in for failure to appear on a warrant for possession of marijuana and Ecstasy charges initiated by the Raleigh Police Department. That evidence is offered solely for the purpose of providing motivation of why the [d]efendant turned himself in to this officer.

It is not proof of any crime. It is not proof that the [d]efendant committed any action in this case at all or the [d]efendant was guilty of any of the charges against him in this case. It is not evidence that the [d]efendant was, in fact, guilty of any offense at all, most particularly for what may have been in any supposed warrants in this particular case.

And, therefore, I tell you to disregard that information completely in your determination in this case of – of determining whether the [d]efendant was guilty of – or innocent of any of the charges facing him at this time.

Defendant then proceeded to cross-examine Detective Hicks.

**[1]** Now on appeal, defendant contends the trial court erred in admitting Detective Hicks' testimony that defendant turned himself in on unrelated charges and erred in denying his motion for a mistrial because the challenged testimony was irrelevant and unduly prejudicial to his case.

“Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). “The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated.” *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000).

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Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the "abuse of discretion" standard which applies to rulings made pursuant to Rule 403.

*Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted). "Furthermore, a [m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict. . . . Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Dye*, 207 N.C. App. 473, 481-82, 700 S.E.2d 135, 140 (2010) (citations and internal quotation marks omitted).

Although we agree Detective Hicks' testimony that defendant turned himself in on unrelated drug possession charges was irrelevant to the charges in the present case, defendant failed to preserve the issue concerning the admission of the evidence for appeal. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2015). In this case, defendant did not object until the State had completed its direct examination of Detective Hicks. As indicated by the trial court, defendant could have objected sooner. The defense was aware of the defendant's statement to Detective Hicks and should have objected immediately upon Detective Hicks testifying about defendant's statement. Instead, defendant waited until the State concluded its direct examination of Detective Hicks and the trial court excused the jury. This objection was untimely.

In a footnote, defendant suggests that he objected during the unrecorded bench conference immediately following Detective Hicks' statement but the trial court waited until a more reasonable time to allow defendant to more thoroughly voice his objection. Upon review of the record, we are not convinced and we will not assume that such objection was made during the unrecorded bench conference when, in addressing defendant's objection and motion for a mistrial at the conclusion of the

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State's direct examination of Detective Hicks, the trial court made clear that "[d]efendant [was] in a position to have objected earlier if he had desired to do so[.]" adding "the late objection does not provide grounds for a mistrial in this particular case."

Moreover, even if defendant offered a timely objection to Detective Hicks' testimony, the admission of the evidence did not prejudice defendant's case. The trial court's thorough curative instruction limited the jury's consideration of the evidence to explain why defendant turned himself into police and eliminated any prejudice that could have resulted from Detective Hicks' testimony. Additionally, during the State's cross-examination of defendant, defendant testified about his prior drug convictions and offered testimony almost identical to the challenged testimony when he confirmed that "[he] thought that [he was] there because [he was] turning [him]self in on a failure to appear in court for possession of Ecstasy and marijuana[.]"

Given that defendant failed to timely object to Detective Hicks' testimony and given that any prejudice resulting from the testimony was eliminated by the trial court's curative instruction and defendant's own testimony at trial, we hold the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Motion to Dismiss

Both at the close of the State's evidence and at the close of all the evidence, defendant moved to dismiss all the charges against him. With the exception of the two counts of second degree kidnapping related to Adrienne and Brian, which the trial court dismissed at the conclusion of the State's evidence, the trial court allowed all the charges to go to the jury.

**[2]** In this second issue on appeal, defendant now contends the trial court erred in failing to dismiss the robbery with a dangerous weapon charge related to Adrienne.

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

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is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Pertinent to this issue on appeal, we note that the jury found defendant guilty of common-law robbery of Adrienne, a lesser included offense of robbery with a dangerous weapon. Because defendant was found not guilty of robbery with a dangerous weapon of Adrienne and was convicted of the lesser included offense of common-law robbery, we address defendant’s arguments as they relate to the lesser included offense.

“To withstand a motion to dismiss a common-law robbery charge, the State must offer substantial evidence that the defendant feloniously took money or goods of any value from the person of another, or in the presence of that person, against that person’s will, by violence or putting the person in fear.” *State v. Davis*, 325 N.C. 607, 630, 386 S.E.2d 418, 430 (1989). While reviewing a defendant’s convictions for robbery with a dangerous weapon in *State v. Tuck*, this Court recognized that “[t]he word “presence” . . . must be interpreted broadly and with due consideration to the main element of the crime – intimidation or force . . . .” 173 N.C. App. 61, 67, 618 S.E.2d 265, 270 (2005) (quoting *State v. Clemmons*, 35 N.C. App. 192, 196, 241 S.E.2d 116, 118-19 (1978)). Thus, where the evidence in *Tuck* tended to show that the defendant entered a store, pointed a gun at a store employee causing the store employee to flee the store, and then took money from the store’s cash register, this Court concluded “that the State produced sufficient evidence from which the jury could find that [the] defendant took property from [a store employee’s] person or in her presence, despite [the store employee’s] flight during the incident.” *Id.* at 68, 618 S.E.2d at 271.

We find no reason “presence” should be interpreted differently in this case for common-law robbery, a lesser included offense of robbery with a dangerous weapon.

In support of his argument that the trial court erred in denying his motion to dismiss the robbery with a dangerous weapon charge and lesser included offenses related to Adrienne, defendant contends “no evidence was presented that Adrienne Jones was intimidated, threatened[,] or assaulted in order to deprive her of any property[.]” because

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Adrienne did not testify and neither Brian nor Sloan testified about why, how, or when Adrienne fled the mobile home or whether there was any force or intimidation involved. Therefore, defendant contends the evidence was insufficient as a matter of law. We disagree.

Evidence in this case tended to show that Adrienne lived at the mobile home with Brian and their two young children at the time of the robbery. Brian, Adrienne, and their youngest child slept in the master bedroom and their other child slept in a second bedroom. The night of the robbery, Adrienne went to bed around eleven o'clock while Brian and Sloan were up watching a movie. The children had gone to bed earlier. Later that night when the movie was finished and after Sloan had "passed out" on the couch, Brian went to sleep in the master bedroom where Adrienne and their youngest child were already asleep. The next thing Brian remembered was waking up to someone dragging him out of bed in the middle of the night. Although Brian could not see exactly what was going on with Adrienne as he was being beaten and tasered by the intruders, Brian recalled hearing Adrienne screaming in the hallway. Sloan also testified that, while one of the intruders was on top of him in the bathroom, he heard yelling from the other side of the mobile home where Brian and Adrienne were. By the time the intruders fled and Brian and Sloan were able to gather themselves, Adrienne was outside yelling. Brian testified "[Adrienne] was running around outside the neighborhood screaming." She was trying to get help, "going from door to door knocking, holding the baby." Both Brian and Sloan testified that Adrienne had a busted lip. Brian further explained that "they had punched her, and her teeth had gone into her lips. And she had a – a gash right there (indicating) on her." The State then introduced exhibits 36 and 37 into evidence, which Brian stated showed damage to Adrienne's face that she did not have prior to the incident. Wake County Sheriff's Deputy M. D. Reitman, who responded to the robbery that night, also testified about the injuries sustained by the alleged victims. Concerning Adrienne, Deputy Reitman testified that "she was also beaten very badly. Her mouth was – she had several lacerations on his [sic] her mouth. She had blood all over her face. It looked like somebody had drawn all over her mouth with lipstick." In addition to items belonging to Brian and Sloan, the evidence further revealed that a Louis Vuitton wallet, a Dooney & Bourke purse, and a cell phone belonging to Adrienne were taken from on, in, or near a nightstand next to the bed where Adrienne slept.

Viewing this evidence in the light most favorable to the State, we hold there was substantial evidence to support the charge of common-law robbery of Adrienne Jones. The evidence was sufficient to support

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a conclusion that Adrienne fled the mobile home as a result of violence or fear and items were taken from her presence upon her fleeing to find help. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

Motion to Sequester

[3] Upon the State's first witness being called and sworn, defendant requested to sequester the alleged victims. The trial court summarily denied defendant's request and allowed the State to continue with its first witness. In this last issue on appeal, defendant contends the trial court's summary denial of his request to sequester the alleged victims without inquiry was error.

N.C. Gen. Stat. § 15A-1225 provides that “[u]pon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify . . . .” N.C. Gen. Stat. § 15A-1225 (2013), *see also* N.C. Gen. Stat. § 8C-1, Rule 615 (“At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.”). Recognizing that the statute states the judge “may” order sequestration, our courts have long held that

“ ‘[a] ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court’s denial of the motion will not be disturbed in the absence of a showing that the [action] was so arbitrary that it could not have been the result of a reasoned decision.’ ”

*State v. Roache*, 358 N.C. 243, 276-77, 595 S.E.2d 381, 404 (2004) (quoting *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 286 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001) (quoting *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998))).

When making his request to sequester in this case, defendant did not give a specific reason for sequestration and did not attempt to argue his position. Nevertheless, defendant now contends the trial court's denial could not have been the result of a reasoned decision because no inquiry was made. We disagree.

Although “ ‘[t]he [better] practice should be to sequester witnesses on request of either party unless some reason exists not to[,]’ ” *State v. Sprouse*, 217 N.C. App. 230, 238, 719 S.E.2d 234, 241 (2011) (quoting *State v. Anthony*, 354 N.C. 372, 396, 555 S.E.2d 557, 575 (2001) (alterations in original) (internal quotation marks and citation omitted)), we



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hold the trial court did not abuse its discretion in denying defendant's request to sequester in this case where defendant did not provide a basis for his request. *See State v. Sparrow*, 276 N.C. 499, 511, 173 S.E.2d 897, 905 (1970) (holding a defendant's argument meritless where the "record discloses no reason for sequestration of the witnesses, and no abuse of discretion has been shown.").

Moreover, defendant has failed to show prejudice as a result of the trial court's denial of his request to sequester the alleged victims. Defendant points to two instances where he claims Brian tailored his testimony to Sloan's testimony, resulting in prejudice. First, defendant points to Sloan's testimony that "[he and Brian] were drinking and [he] passed out on the couch[]" and claims that Brian tailored his subsequent testimony to show Sloan did not pass out drunk, but "just went and laid down. . . . [J]ust that he was ready for bed." Defendant contends Brian's testimony prejudiced his case because "[a] true description of Sloan's state of intoxication, that is 'passed out,' would have necessarily impacted the jury's consideration of Sloan's description of what happened." Second, defendant points to Sloan's testimony that one of the intruders wanted money and claims that Brian tailored his testimony to be consistent when he testified he heard an intruder ask, "Where is the money?"

Upon review of the record, we are not convinced that Brian tailored his testimony in either instance; nor was defendant prejudiced.

In regard to the first instance, although Sloan testified he was drinking, Sloan did not specify how much he had to drink, that he was intoxicated, or that he passed out from intoxication. Sloan merely stated he "passed out." Like Sloan, Brian also initially testified that "[he thought] Sloan passed out before I did, if I remember correctly." It was not until a follow-up question that Brian clarified that Sloan just went and laid down because he was ready for bed. Upon review of the testimony, we cannot say that Brian's testimony did not give an accurate impression of Sloan's condition. In fact, an agent from the Wake County CCBI who investigated the incident indicated Sloan did not appear intoxicated, stating it did not appear to him that Sloan had been drinking. Moreover, the jury heard the evidence that Sloan and Brian were drinking and heard Brian's own testimony that "I wasn't sober, but I wasn't drunk." It was within the province of the jury to weigh the credibility of the witnesses. *See State v. Taylor*, \_ N.C. App. \_, 767 S.E.2d 585, 589 (2014) ("It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury.") (citation omitted).

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Concerning the second instance, there is no indication that from Brian's testimony that the intruders wanted money was a reflection of Sloan's prior testimony. The fact that Brian's testimony was consistent with Sloan's does not prove it was tailored. Contrary to defendant's assertion, a review of the record shows that Brian's testimony at trial was consistent with a witness statement he provided to police on 13 May 2013. At trial, Brian was asked to read the witness statement in which he told police "I was woken up to a black guy fighting me. While fighting back, I heard someone asking 'Where is your money at?'" Moreover, there can be no prejudice where even defendant testified that he heard Terrence ask, "Where is the money?"

Because defendant has not shown that Brian altered his testimony and has not shown prejudice, we hold the trial court did not abuse its discretion.

III. Conclusion

For the reasons discussed, we hold defendant received a fair trial free of prejudicial error.

NO ERROR.

Judges STEELMAN and STEPHENS concur.

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STATE OF NORTH CAROLINA

v.

ALEKSANDR SERGEYEVICH KISELEV

No. COA14-1020

Filed 19 May 2015

**Criminal Law—motion to dismiss—granted after jury verdict—  
violation of statute**

The trial court erred in defendant's trial for driving while impaired by granting defendant's motion to dismiss after the jury returned its guilty verdict, in violation of N.C.G.S. § 15A-1227(c). Because the trial court would have ruled in defendant's favor if it had ruled at the proper time, the trial court's error was prejudicial. The Court of Appeals dismissed the State's appeal.

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Appeal by the State of North Carolina from order entered 2 June 2014 by Judge Tanya T. Wallace in Union County Superior Court. Heard in the Court of Appeals 4 February 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellee.*

DIETZ, Judge.

At the close of the evidence in Defendant Aleksandr Sergeyevich Kiselev's criminal trial for driving while impaired, Kiselev moved to dismiss for insufficient evidence. The trial court determined that it needed to review the transcript of certain trial testimony by the arresting officer before ruling on the motion. While waiting for the court reporter to prepare the transcript, the trial court permitted the jury to begin deliberations.

The parties concede that the trial court's decision to take Kiselev's motion under advisement and permit the jury to deliberate was error. By statute, when a defendant moves to dismiss based on insufficient evidence, the trial court "must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed." N.C. Gen. Stat. § 15A-1227(c) (2013).

Shortly after the jury returned a guilty verdict, the court reporter completed preparation of the transcript and the trial court reviewed it. The court then granted Kiselev's motion to dismiss, explaining that the transcript showed the State had not met its burden of proof as a matter of law. The State appealed, and Kiselev moved to dismiss the appeal.

As explained below, double jeopardy prevents the State from appealing the grant of a motion to dismiss for insufficient evidence if it comes *before* the jury verdict. But the State can appeal that ruling if it comes *after* the verdict (because, if the State prevails, the trial court on remand can enter judgment consistent with the jury verdict without subjecting the defendant to a second trial). This is why the General Assembly enacted § 15A-1227(c), which prohibits trial courts from reserving judgment on these motions until after the verdict, to the defendant's detriment.

In an earlier case, this Court held that a violation of § 15A-1227(c) is prejudicial if the defendant can show that the trial court would have

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ruled in his favor had the court ruled at the proper time. *See State v. Hernandez*, 188 N.C. App. 193, 205, 655 S.E.2d 426, 434 (2008). Kiselev made that showing here; the trial court stated on the record that its ruling turned on what was in the transcript (which would not have changed) and further explained that the ruling should be treated as having been made before the jury returned its verdict.

Consistent with *Hernandez*, we hold that a trial court's violation of § 15A-1227(c) that prejudices a defendant precludes an appeal by the State. Had the trial court complied with the law, no appeal would be possible. Our only remedy for this prejudicial error is to return the parties to the position they would be in absent that error—meaning the State is not permitted to appeal. Accordingly, we dismiss this appeal and let the trial court's grant of the motion to dismiss stand as if it were rendered before the jury returned a verdict, as the law required.

**Facts and Procedural History**

In the early morning hours of 7 February 2011, Deputy Allen Nolan observed Defendant Aleksandr Sergeyevech Kiselev driving north on a highway in Union County. Kiselev approached an intersection, stopping at a red light. He remained stationary the entire time the light was green, then accelerated to drive through the intersection once the light turned yellow.

As Kiselev continued driving, his speed fluctuated between 40 and 50 miles per hour in a 45-mile-per-hour zone. He weaved in his lane of travel. On three separate occasions, Kiselev crossed the center double yellow lines with both of his driver's-side tires.

Based on these observations, Deputy Nolan activated his patrol lights, and Kiselev pulled into a grocery store parking lot. When Deputy Nolan approached Kiselev's vehicle to request his license and registration, he noticed an odor of alcohol. Deputy Nolan also observed that Kiselev's eyes were red and glassy. Kiselev admitted that he had been drinking earlier that evening.

Deputy Nolan then asked Kiselev to step out of his car and perform field sobriety tests. Kiselev passed most of the tests, but when asked to recite the alphabet, Kiselev twice made the identical mistake—leaving out the letter “Y” when reciting the alphabet from “A” to “Z.” Kiselev was born in Russia and speaks both Russian and English. He later explained that he mistakenly left out the letter “Y” because of confusion between the English alphabet and the Russian one. Kiselev also did not count out loud as Deputy Nolan had instructed during the walk-and-turn test,

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although he properly performed the other portions of the walk-and-turn test. Based on his observations of the sobriety tests, Deputy Nolan placed Kiselev under arrest.

The State ultimately charged Kiselev with driving while impaired. In Union County District Court, Kiselev pleaded not guilty but stipulated to facts sufficient to convict him of the crime. The district court found Kiselev guilty and sentenced him to 120 days unsupervised probation, with a condition that he serve two days in custody. Kiselev appealed to Superior Court.

In Union County Superior Court, Kiselev waived formal arraignment and the matter was calendared for a jury trial. At trial, Deputy Nolan testified for the State, recounting the night he arrested Kiselev and offering his opinion “[t]hat [Kiselev’s] mental and physical faculties were impaired by an impairing substance . . . of alcohol.” At the close of the State’s evidence, Kiselev moved to dismiss, arguing that the State failed to present an “adequate showing as to appreciable impairment.” The trial court denied this motion. Kiselev then testified on his own behalf, and the State recalled Deputy Nolan for rebuttal evidence.

At the close of all evidence, Kiselev again moved to dismiss the charge against him for insufficient evidence. The trial court called counsel to the bench and indicated that the court had a concern about Deputy Nolan’s testimony. The court then informed counsel that it would hold the motion “open under advisement” pending preparation of a portion of the transcript that the court needed to review before ruling on the motion. Neither Kiselev nor the State objected to the trial court’s decision to defer ruling on the motion.

Although the trial court had not yet ruled on Kiselev’s motion to dismiss because it was awaiting a copy of the transcript, the trial court charged the jury and let them begin deliberations. The jury returned a guilty verdict later that day.

By the following day, the court reporter had prepared the portion of the transcript requested by the trial court. The court and the parties reviewed the transcript and the court heard additional argument on Kiselev’s still-pending motion to dismiss. Noting that the proceedings were “[s]omewhat out of order,” the trial court explained that it deferred ruling on the motion because “the Court had a concern which the Court believed was not hers to share, that the officer had not particularly stated appreciable impairment in his opinion, and had left out the term appreciably.” The State responded that there was evidence in

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the record sufficient to show appreciable impairment, but the trial court rejected that argument:

[T]he Court also notes that under that argument, as long as I take it there was an odor, the requisite driving, and something noticeable to the officer; such as red glassy eyes, under that argument, that would be noticeable impairment, and therefore that no opinion would be necessary, and the Court can't go that far.

The trial court announced its ruling, explaining that it was “allow[ing], however belatedly, the defendant’s motion . . . at the close of all the evidence” and dismissing all charges against Kiselev. The State appealed the trial court’s ruling on Kiselev’s motion to dismiss.

### Analysis

The dispositive issue in this appeal is whether the State has any right to appeal. Indeed, Kiselev’s appellate brief does not even address the merits of the trial court’s ruling on the motion to dismiss. Kiselev’s only argument is that the State has no right to appeal under the circumstances present in this case. For the reasons discussed below, we agree with Kiselev and dismiss this appeal.

The State may appeal an adverse ruling in a criminal prosecution only in narrow circumstances authorized by statute. *See State v. Scott*, 146 N.C. App. 283, 285, 551 S.E.2d 916, 918 (2001), *rev’d on other grounds*, 356 N.C. 591, 573 S.E.2d 866 (2002). Section 15A-1445(a)(1) of our General Statutes authorizes an appeal by the State “[w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts,” but not if “the rule against double jeopardy prohibits further prosecution.” N.C. Gen. Stat. § 15A-1445(a)(1) (2013).

Ordinarily, if a criminal defendant is subjected to a trial and then has the charges against him dismissed *before* the jury returns a verdict, the State cannot appeal. In that circumstance, a reversal on appeal would require a new trial (because there was no jury verdict), thus subjecting the defendant to a second trial for the same offense in violation of the double jeopardy clause of the U.S. Constitution. *See State v. Murrell*, 54 N.C. App. 342, 344-45, 283 S.E.2d 173, 174 (1981).

But where a motion to dismiss is granted *after* a jury renders a guilty verdict, reversal of the ruling on appeal does not implicate the double jeopardy clause. On remand after reversal, the trial court can simply enter judgment in accordance with the jury’s verdict, without subjecting the defendant to a second trial.

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As a result of these timing issues, it is in the State's interest, and against the criminal defendant's interest, for a trial court to defer ruling on a motion to dismiss until after the jury returns its verdict. This is a common practice in civil trials, where the court will take a motion for directed verdict under advisement and wait to see what the jury does. Recognizing the potential injustice of this practice in criminal cases, the General Assembly prohibits it. Section 15A-1227(c) of the General Statutes states that the trial court "must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed." N.C. Gen. Stat. § 15A-1227(c).

It is undisputed in this case that the trial court violated this statutory mandate and impermissibly permitted the trial to proceed without first ruling on the motion to dismiss.<sup>1</sup> But that does not end our inquiry. To resolve this appeal, we must also determine whether that error prejudiced Kiselev and what remedy, if any, is available to him as a result of that violation.

With regard to prejudice, our analysis is controlled by *State v. Hernandez*, 188 N.C. App. 193, 204, 655 S.E.2d 426, 433 (2008), which established the test for whether a violation of § 15A-1227(c) prejudiced the defendant. *Hernandez* involved a nearly identical procedural history. The defendant moved to dismiss at the close of all the evidence and, as in this case, the trial court reserved its ruling on the motion until after the jury deliberated, in violation of § 15A-1227(c). This Court held that "[t]o determine whether or not the error was prejudicial, the issue is whether there is a reasonable possibility that the trial court would have granted defendants' motions to dismiss" if the trial court had complied with the statute and ruled before sending the case to the jury. *Id.* at 205, 655 S.E.2d at 434. The defendants in *Hernandez* were unable to show prejudice under that test. *Id.*

Here, unlike *Hernandez*, the record readily demonstrates a reasonable possibility (indeed, a near certainty) that the trial court would have granted Kiselev's motion had it ruled at the proper time. The trial court deferred ruling on the motion to review a portion of the transcript involving Deputy Nolan's testimony. That transcript took time to be prepared, so the trial court permitted the jury to deliberate in the interim.

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1. Kiselev did not object to the trial court's violation of the statute during the trial. But this Court previously has held that the defendant need not object to a violation of § 15A-1227(c) in order to preserve the issue for appeal. *Hernandez*, 188 N.C. App. at 204, 655 S.E.2d at 433.

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But in later granting Kiselev's motion to dismiss after the jury returned a guilty verdict, the trial court explained that its ruling turned on what it found in that transcript, and even stated that it considered its ruling as one made "at the close of all the evidence":

[T]his matter came about somewhat under unusual circumstances or awkwardly, in that the defendant made a general motion to dismiss at both the close of the State's evidence and all the evidence. *That in reviewing – it was the Court that had a concern which the Court believed was not hers to share*, that the officer had not particularly stated appreciable impairment in his opinion, and had left out the term appreciably. *However, the Court was not absolutely certain of that fact and required the court reporter to go over that and indeed print out the relevant portions of the officer's opinion*, which the Court does find does not state an opinion that the defendant was appreciably impaired. . . . So the Court will specifically find there was no statement by the officer that the defendant was appreciably impaired *and will allow, however belatedly, the defendant's motion at the close of – and actually I'm going to say at the close of all the evidence*, because the officer was re-tendered and still didn't state appreciable impairment. *So the case is dismissed at the close of all the evidence.*

In short, the trial court expressly stated that its ruling turned on a review of the transcript. Had the court waited on preparation of that transcript without sending the jury to deliberate, as the law required, the transcript still would have been the same. Thus, the trial court's ruling would have been the same.

Moreover, the trial court expressly indicated that its ruling would have been the same by stating that it considered the ruling one made "at the close of all the evidence." Thus, it is clear that the court was not merely waiting (improperly) to see what the jury would decide in the case. Accordingly, Kiselev has satisfied his burden to show prejudice by demonstrating "a reasonable possibility that the trial court would have granted [his] motion[ ] to dismiss" had the court ruled at the proper time. *Hernandez*, 188 N.C. App. at 205, 655 S.E.2d at 434.

We must now determine what remedy is appropriate—a determination not made in *Hernandez* because the Court found no prejudice in that case. We hold that dismissal of the State's appeal is the appropriate



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remedy for a violation of § 15A-1227(c) that prejudiced the defendant. Dismissal is the only remedy that can do justice on these unique facts. We cannot reverse the trial court's ruling—the typical remedy for reversible error—because Kiselev is the appellee and seeks to affirm the court's ultimate ruling. But we are unwilling to affirm the trial court's judgment both because we have not reached the merits of the trial court's decision and because we *should not* reach the merits. After all, the prejudice to Kiselev in this case is the State's ability to appeal the trial court's decision to this Court in the first place.

The purpose of remedying prejudicial error in criminal cases is to actually *remedy* the prejudice—to provide the defendant with the outcome that would have resulted had the trial been free of prejudicial error. The only means to do so in this case is to return the parties to the position they would be in absent that error—which would preclude any appeal by the State. Accordingly, we remedy the trial court's prejudicial error by dismissing this appeal and returning the parties to the positions they would be in had the trial court complied with the statutory command of N.C. Gen. Stat. § 15A-1227(c).

**Conclusion**

The trial court violated N.C. Gen. Stat. § 15A-1227(c) by reserving judgment on the defendant's motion to dismiss for insufficiency of the evidence until after the jury returned a verdict. That error prejudiced the defendant by permitting the State to appeal a ruling that otherwise would be unappealable. We remedy this prejudicial error by dismissing the appeal.

DISMISSED.

Judges STEELMAN and INMAN concur.

**STIKELEATHER REALTY & INVS. CO. v. BROADWAY**

[241 N.C. App. 152 (2015)]

STIKELEATHER REALTY &amp; INVESTMENTS CO., PLAINTIFF-APPELLANT

v.

ELISHA BROADWAY, DEFENDANT-APPELLEE

No. COA14-1136

Filed 19 May 2015

**Landlord and Tenant—Residential Rental Agreements Act—  
no working smoke or carbon monoxide alarms—not  
uninhabitable**

In a summary ejectment action on a residential lease, the trial court erred by granting defendant tenant’s counterclaim for rent abatement under the Residential Rental Agreements Act (RRAA). The trial court’s conclusion that plaintiff landlord violated the RRAA by failing to provide working smoke and carbon monoxide alarms was unsupported by the findings of facts. Such violations alone would not render a rental uninhabitable. The trial court’s judgment awarding plaintiff trebled rent abatement and attorney fees was reversed.

Appeal by plaintiff from judgment entered 18 July 2014 by Judge Matt Osman in Mecklenburg County District Court. Heard in the Court of Appeals 18 March 2015.

*The Law Firm of Ross S. Sohm, PLLC, by Ross S. Sohm, for plaintiff-appellant.*

*No brief filed on behalf of defendant-appellee.*

HUNTER, JR., Robert N., Judge.

Stikeleather Realty & Investments Co. (“Plaintiff-Landlord”) appeals from a bench trial judgment awarding trebled rent abatement and attorney’s fees to Elisha Broadway (“Defendant-Tenant”) on claims of breach of the implied warranty of habitability and unfair and deceptive trade practices. We reverse.

**I. Factual & Procedural History**

On 19 March 2014, Plaintiff-Landlord initiated a summary ejectment action against Defendant-Tenant for breach of a residential lease agreement for failure to pay rent for the month of March. On 31 March 2014, Defendant-Tenant filed an answer and asserted the defense of retaliatory eviction pursuant to N.C. Gen. Stat. § 42-37.1, as well as counterclaims

## STIKELEATHER REALTY &amp; INVS. CO. v. BROADWAY

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for (1) breach of the implied warranty of habitability pursuant to N.C. Gen. Stat. § 42-42, (2) unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 *et seq.*, (3) unfair debt collection practices pursuant to N.C. Gen. Stat. § 75-50 *et seq.*, (4) negligence, and (5) negligence per se.

On 22 April 2014, Plaintiff-Landlord filed an amended complaint, alleging Defendant-Tenant also breached the lease by keeping an unauthorized pet. On 2 May 2014, Defendant-Tenant filed an amended answer and counterclaim, which contained no substantive changes pertinent to this appeal. On 8 May 2014, the magistrate entered judgment in favor of Plaintiff-Landlord on the primary claim of possession and in favor of Defendant-Tenant on his counterclaim of breach of the implied warranty of habitability only, awarding him \$1,000.00 in damages. Plaintiff appealed to the district court.

On 30 June 2014, the case was heard in Mecklenburg County District Court before the Honorable Matt Osman. At that time, Defendant-Tenant had already surrendered possession of the property. Therefore, the sole issue before the trial judge was Defendant-Tenant's counterclaim for breach of the implied warranty of habitability. The transcript of this bench trial, as well as the record on appeal, reveals the following pertinent facts.

In May 2010, Defendant-Tenant entered into a residential lease to rent a home located at 2600 Catalina Avenue in Charlotte ("the property") for \$500 per month. At this time, the property was neither owned nor managed by Plaintiff-Landlord. The lease contained a page signed by Defendant-Tenant stating that a "Carbon/Smoke Detector"<sup>1</sup> existed in the home and that it was in good working condition when Defendant-Tenant took possession of the property. The lease also provided that Defendant-Tenant shall make requests for repairs in writing.

On 4 June 2013, Mr. Kluth, a real estate broker, visited the property to obtain general information to list the house. On 10 June 2013, Mr. Kluth returned to the property for another inspection, this time bringing an interested buyer, Mr. Stikeleather, managing partner of Plaintiff-Landlord, a limited liability corporation in the business of buying and selling residential properties.

---

1. While the word "detector" appears throughout the record on appeal, this Court uses "alarm" synonymously, in order to reflect amendments by the N.C. General Assembly to this same effect. See 2012 N.C. Sess. Laws 350, 350-52, ch. 92, § 1-4 (replacing the word "detector" with "alarm" throughout provisions of the Residential Rental Agreements Act).

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During this second pre-sale inspection, Mr. Stikeleather asked Defendant-Tenant if the property had a smoke alarm and carbon monoxide alarm. Defendant-Tenant responded that it did not. Mr. Kluth then went to his truck and returned with a smoke alarm and carbon monoxide alarm for Defendant-Tenant to put in the property.

On or around 26 June 2013, Plaintiff-Landlord purchased the property and sent a letter to Defendant-Tenant notifying him that Plaintiff-Landlord was the new owner and property manager. The letter also directed Defendant-Tenant to call Plaintiff-Landlord to set up an inspection of the property and to put any requests for repairs in writing.

On or around 24 September 2013, Mr. Stikeleather went by the house to do an inspection, but it had to be “quick” because of the presence of an unauthorized pet on the premises. During this inspection, Mr. Stikeleather testified that he observed an alarm in the living room, plugged into an electrical outlet in the wall, but he admitted he did not verify whether it was working properly.

Near the middle of March 2014, Defendant-Tenant called Mr. Stikeleather and told him he would be late with March’s rent; Mr. Stikeleather responded that he would file eviction papers, which he did on 19 March 2014. Two days after the parties appeared in small claims court near the end of March 2014, Plaintiff-Landlord sent his repairman to install a smoke alarm and carbon monoxide alarm in the premises. Defendant-Tenant felt it was unfair to be evicted for being only a few days late on rent, so he went to City Code Enforcement, which issued an inspection report that does not mention any issue with the property’s smoke alarm and carbon monoxide alarm. Defendant-Tenant did not pay rent for the months of March, April, or May 2014.

The day after the bench trial, on 1 July 2014, the trial judge entered a judgment containing the following pertinent findings of fact, whose order has been reorganized by this Court in an effort to improve clarity:

3. [Defendant-Tenant] lived at 2600 Catalina, Charlotte, NC (“the property”), for four years and three months.

....

43. [Defendant-Tenant’s] son, Ronald Broadway (RB), lived with his father at the property.

....

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4. At the time [Defendant-Tenant] took possession of the property in 2010 it was owned and managed by a different landlord than the Plaintiff in this action.

....

65. [Mr.] Stikeleather is the managing partner of the LLC that is [Plaintiff-Landlord].

....

76. [Plaintiff-Landlord's] LLC owns approximately 200 properties and manages another 300 properties.

....

55. Mike Kluth is a real estate broker in Charlotte and he sold the property to [Plaintiff-Landlord].

56. Prior to selling the house, Mr. Kluth visited the property in June 2013 to obtain general information to list the house.

....

58. During a second pre-sale inspection of the property in June 2013, [Defendant-Tenant] told Mr. Kluth and [Mr. Stikeleather] about the flooding in the basement. The basement was dry when Mr. Kluth and [Mr. Stikeleather] saw it.

59. During the second inspection [Mr. Stikeleather] asked [Defendant-Tenant] about a Smoke/Carbon detector. [Defendant-Tenant] said there was not one present in the property.

60. Mr. Kluth then went to his car and got a Smoke/Carbon detector to place in the house.

61. Mr. Kluth does not know whether the detector, which was not new, was operational. The detector could be plugged into the wall and could also be run on batteries.

62. [Defendant-Tenant] testified that the detector provided by Mr. Kluth did not work.

....

38. In June 2013, [Plaintiff-Landlord] notified [Defendant-Tenant] in writing that the property had been sold and

## STIKELEATHER REALTY &amp; INVS. CO. v. BROADWAY

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that [Plaintiff-Landlord] was the new owner and property manager. Plaintiff[-Landlord] admitted Plaintiff's Exhibit 2, a letter dated June 26, 2013, detailing the change in ownership.

39. In addition to telling [Defendant-Tenant] about the new management company, Plaintiff[-Landlord's] Exhibit 2 also directed [Defendant-Tenant] to put any requests for repair in writing and asked [Defendant-Tenant] to call [Plaintiff-Landlord] to set up an inspection.

....

66. The only potential repair issue that [Plaintiff-Landlord] was aware of at the time of the purchase was the basement and the flooding.

....

2. The parties have also stipulated to the existence of a lease between [Defendant-Tenant] and Plaintiff[-]Landlord. . . .

....

21. The lease contains a page signed by [Defendant-Tenant] stating that the property had a "Carbon/Smoke Detector" in the unit and that it was in good working condition when [Defendant-Tenant] took possession in 2010.

....

29. Paragraph 17 of the lease states that [Defendant-Tenant] shall make a request for repair in writing.

....

70. After taking ownership of the property, [Mr. Stikeleather] went by the house in the fall of 2013 to do a quick inspection. It was a quick inspection due to the presence of [Defendant-Tenant's] dog.

71. [Mr. Stikeleather] testified that the dog was not permitted at the property[.]

72. [Mr. Stikeleather] did observe a detector that was plugged in during [the] fall 2013 inspection but did not verify whether it was working properly.

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....

32. [Defendant-Tenant] called [Mr. Stikeleather] to tell him that he would be late with the March [2014] rent and [Mr. Stikeleather] said that he would file eviction papers.

....

75. [Plaintiff-Landlord] sent his repairman to install a detector after the first hearing in small claims court in late March 2014.

....

22. [Defendant-Tenant] and [Defendant-Tenant's] son[, RB,] were present when a new detector was installed by [Plaintiff-Landlord's] employee in 2014.

....

47. RB testified that the property did not have a Smoke/Carbon detector upon initial[] occupancy. There [was] a blank spot where it appeared one had previously been with a painted[-]over bracket.

48. RB was present when [Plaintiff-Landlord's] staff came out and installed a Smoke/Carbon detector, a few days after the first court appearance in 2014. RB watched the installation and [Plaintiff-Landlord's] staff did not remove an old detector prior to installing a new one.

....

33. [Defendant-Tenant] did not think it was fair to be evicted for being seventeen days late on the rent so he went to City Code Enforcement.

....

40. The city inspected the property and issued a list of code violations. Plaintiff[-Landlord] admitted the Code Enforcement report as Plaintiff's Exhibit 3.

41. The Code Enforcement report does not list the carbon/smoke detector.

....

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68. [Mr. Stikeleather] told [Defendant-Tenant] several times to put repair requests in writing, as required by the lease.

69. [Mr. Stikeleather] testified that he never received any written or verbal repair requests from [Defendant-Tenant].

....

78. [Mr. Stikeleather] testified that he has made numerous requests for access and for a key to the Property, including by certified mail, so that he could do an inspection and make repairs to the property. [Defendant-Tenant] never responded to those requests.

79. [Defendant-Tenant] did not introduce any portion of the Charlotte City Housing Code.

....

1. [Defendant-Tenant] did not pay rent for March, April or May 2014, and that the monthly rent was \$500.

Based upon these findings, the trial judge concluded the following as a matter of law:

2. [Defendant-Tenant] has failed that [sic] show that [Plaintiff-Landlord] breached the implied warranty of habitability for the issues related to the flooded basement, broken step, inoperable and broken windows and faulty electrical system because [Defendant-Tenant] failed to provide proper written notice of these issues and also failed to provide reasonable access to [Plaintiff-Landlord] to permit an inspection to determine if there were any structural or electrical issues;

3. Where [Plaintiff-Landlord] knew on or about June 26, 2013, that the property did not have a smoke alarm or carbon monoxide detector and did not verify that the previously used device provided on or about that date by Mr. Kluth was operable, [Plaintiff-Landlord] violated the Residential Rental Agreement[s] Act which requires provision of an operable smoke alarm and carbon monoxide detector. [Defendant-Tenant] is therefore entitled to rent abatement;

....



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6. [Defendant-Tenant] is entitled to rent abatement of \$150 per month;
7. [Plaintiff-Landlord's] continued collection of rent without verifying that [Defendant-Tenant] had been provided an operable smoke alarm and carbon monoxide detector constituted an Unfair and Deceptive Trade Practice;
8. Because [Plaintiff-Landlord] has committed an Unfair and Deceptive Trade Practice, [Defendant-Tenant's] damages shall be trebled;
9. [Defendant-Tenant's] damages shall be offset by an abatement credit of \$350 for March 2014 where [Defendant-]Tenant did not pay rent but before the new detector was installed and \$500 per month for April and May 2014 where [Defendant-]Tenant did not pay rent but after the new detector was installed for a total abatement credit of \$1350.

Based upon the foregoing, the trial judge entered the following judgment:

1. Defendant[-]Tenant's claim for rent abatement and Unfair and Deceptive Trade Practices is granted;
2. Defendant[-]Tenant is awarded damages in the amount of \$2250 (\$1200 in rent abatement, trebled to \$3600 pursuant to Chapter 75 minus tenant's abatement credit of \$1350);
3. Defendant-[Tenant] is entitled to reasonable attorney fees, pursuant to Chapter 75. [Defendant-Tenant] shall submit an affidavit for attorney fees and [Plaintiff-Landlord] shall have an opportunity to respond;
4. All other counterclaims filed by [Defendant-Tenant] are denied.

Plaintiff-Landlord appeals.

**II. Analysis**

Plaintiff-Landlord contends the trial court erred by (1) granting Defendant-Tenant's counterclaim for rent abatement under the Residential Rental Agreements Act ("RRAA"), (2) improperly calculating the damage award under the RRAA, (3) concluding the alleged RRAA violation constituted a breach of North Carolina's Unfair and Deceptive

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Trade Practices Act (“UDTP”), and (4) awarding Defendant-Tenant reasonable attorney’s fees under UDTP. Because we agree the trial court erred in concluding Plaintiff-Landlord violated the RRAA, the damages awarded for rent abatement, which were trebled under UDTP, as well as the attorney’s fees awarded under UDTP, must necessarily be reversed.

**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) (internal quotation marks and citation omitted). “In all actions tried without a jury, the trial court is required to make specific findings of fact, state separately its conclusions of law, and then direct judgment in accordance therewith.” *Cardwell v. Henry*, 145 N.C. App. 194, 195, 549 S.E.2d 587, 588 (2001) (internal quotation marks and citations omitted). The trial court’s findings of fact must include “specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.” *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977). Put another way, the trial court must make “specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.” *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). “Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts.” *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted). The trial court’s conclusions of law are reviewed *de novo*, wherein this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

**B. Violation of the RRAA**

Plaintiff-Landlord first contends the trial court erred in granting Defendant-Tenant’s claim for rent abatement in violation of the RRAA. We agree.

Specifically, Plaintiff-Landlord challenges the trial court’s conclusion of law No. 3, which states:

3. Where [Plaintiff-Landlord] knew on or about June 26, 2013, that the property did not have a smoke alarm or

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carbon monoxide detector and did not verify that the previously used device provided on or about that date by Mr. Kluth was operable, [Plaintiff-Landlord] violated the Residential Rental Agreement[s] Act which requires provision of an operable smoke alarm and carbon monoxide detector. [Defendant-Tenant] is therefore entitled to rent abatement[.]

This singly-enumerated conclusion actually contains two legal conclusions: first, that Plaintiff-Landlord violated the RRAA; second, that Defendant-Tenant is entitled to rent abatement. We therefore discuss each conclusion separately.

Pursuant to the RRAA, codified at N.C. Gen. Stat. §§ 42-38 to -49 (2013), “a landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation. The implied warranty of habitability is co-extensive with the provisions of the Act.” *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 366, 355 S.E.2d 189, 192 (1987) (citation omitted). The RRAA requires landlords to provide fit premises and imposes upon them the following duties:

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes[] . . . to the extent required by the operation of such codes[.]

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.

(3) Keep all common areas of the premises in safe condition.

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

N.C. Gen. Stat. § 42-42(a)(1)-(4) (2013). It is well established that the RRAA provides an affirmative cause of action to a tenant for recovery of rent due to a landlord’s breach of the implied warranty of habitability. *See, e.g., Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694 (1987) (“Tenants may bring an action for breach of the implied warranty

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of habitability, seeking rent abatement, based on their landlord's non-compliance with [N.C. Gen. Stat.] § 42-42(a)" (citation omitted)); *see also Allen v. Simmons*, 99 N.C. App. 636, 644, 394 S.E.2d 478, 482 (1990) ("Tenants may bring an action seeking damages for breach of the implied warranty of habitability and may also seek rent abatement for their landlord's breach of the statute.").

The purpose of the restitutionary remedy of rent abatement is to compensate tenants for defective conditions of a premises which render it unfit for human habitation. *See Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193 (noting that rent abatement is "in the nature of a restitutionary remedy[]"). This Court has held:

[A] tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with [N.C. Gen. Stat. §] 42-42(a)) and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved.

*Id.* at 371, 355 S.E.2d at 194 (citations omitted). However, N.C. Gen. Stat. § 42-42(a) also imposes duties upon landlords which are not necessarily related to a premises' fitness for human habitation. Pertinent to the instant case, the RRAA requires landlords:

(5) *Provide operable smoke alarms[]* . . . and install the smoke alarms in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord shall replace or repair the smoke alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a smoke alarm is operable and in good repair at the beginning of each tenancy. . . .

. . . .

(7) *Provide a minimum of one operable carbon monoxide alarm per rental unit per level[]* . . . and install the carbon monoxide alarms in accordance with either the standards of the National Fire Protection Association

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or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. A landlord that installs one carbon monoxide alarm per rental unit per level shall be deemed to be in compliance with standards under this subdivision covering the location and number of alarms. The landlord shall replace or repair the carbon monoxide alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a carbon monoxide alarm is operable and in good repair at the beginning of each tenancy. . . .

N.C. Gen. Stat. § 42-42(a)(5), (7) (2013) (emphasis added). Breaches of provisions of the RRAA such as these, while technically included within the implied warranty of habitability, are not necessarily best remedied by retroactive rent abatement, particularly without proof that a tenant has suffered actual damage. We conclude that a landlord's violation of N.C. Gen. Stat. § 42-42(a)(5) or (7), without more, cannot sustain an action for rent abatement.

In the instant case, in reviewing the trial court's decision *de novo*, we hold its findings of fact do not support its conclusions that Plaintiff-Landlord breached the RRAA nor that Defendant-Tenant is entitled to rent abatement. Therefore we reverse.

First, as to the alleged breach of the implied warranty of habitability, it is true the RRAA imposed upon Plaintiff-Landlord a duty to verify the property had an operable smoke alarm and carbon monoxide alarm once it became the new property owner and manager on 26 June 2013. However, the trial court never made any specific findings of the ultimate facts essential to conclude that Plaintiff-Landlord violated the RRAA. For instance, the trial court failed to make any findings as to the current applicable building and housing codes and which, if any, of the codes were violated. Nor did the trial court make any findings as to how verifying the operability of an alarm would put or keep the premises in a fit and habitable condition, or how doing so would keep the safety of the premises. Not only did the trial court fail to make findings of whether Plaintiff-Landlord knew or had reason to know the alarm provided by Mr. Kluth was not new or in good or safe working order, but also it made no findings as to how failing to verify the operability of an alarm rendered the premises unfit for human habitation, or how this unfitness devalued the fair rental value of the property such that Defendant-Tenant should be entitled to rent abatement.

**STIKELEATHER REALTY & INVS. CO. v. BROADWAY**

[241 N.C. App. 152 (2015)]

Second, as to the award of rent abatement, the trial court did not articulate its rationale with any specificity in declaring how Plaintiff-Landlord's alleged failure to verify the property had an operable smoke alarm and carbon monoxide alarm—without more—entitles Defendant-Tenant to a restitutionary remedy such as rent abatement. The trial court made no finding that the premises was uninhabitable during the period in which Defendant-Tenant paid rent. There was no finding that the premises was unfit or of the value of the premises in its “uninhabitable” state. Without a finding that the property was unfit for human habitation, or of the fair rental value of the property in its unwarranted condition as required by our case law, an award of rent abatement cannot be sustained.

In summary, lacking these and other specific findings of the ultimate facts essential to support its conclusions that Plaintiff-Landlord breached the RRAA or that Defendant-Tenant is entitled to rent abatement, the trial court's judgment is unsupported by competent evidence. Furthermore, our independent review of the record fails to disclose any evidence to support the trial court's conclusions or its ensuing judgment. Therefore it must be reversed.

Because we conclude that Plaintiff-Landlord never breached the RRAA, Defendant-Tenant's claims for rent abatement and UDTP, as well as the award of trebled damages and attorney's fees pursuant to UDTP, necessarily fail.

**III. Conclusion**

Based upon the foregoing and our review of the record, we reverse the trial court's judgment.

REVERSED.

Judges STEPHENS and TYSON concur.

**TAYLOR v. HOWARD TRANSP., INC.**

[241 N.C. App. 165 (2015)]

BRUCE D. TAYLOR, PLAINTIFF

v.

HOWARD TRANSPORTATION, INC. AND TRAVELERS INDEMNITY COMPANY  
OF AMERICA, DEFENDANTS

No. COA14-922

Filed 5 May 2015

**Workers' Compensation—subject matter jurisdiction—last act of employment contract**

The Industrial Commission lacked subject-matter jurisdiction over plaintiff employee's workers' compensation claim. Plaintiff's contract of employment was not made in North Carolina. The last act of the employment contract took place in Mississippi. Thus, the opinion and award was vacated.

Appeal by defendants from opinion and award entered 14 April 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 January 2015.

*Holt, Longest, Wall, Blaetz & Moseley, PLLC, by W. Phillip Moseley, for plaintiff-appellee.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by Neil P. Andrews and M. Duane Jones, for defendants-appellants.*

STROUD, Judge.

Howard Transportation, Inc. ("HT") and Travelers Indemnity Company of America (collectively "defendants") appeal from an opinion and award by the Full Commission. Defendants contend that the Commission (1) lacked subject-matter jurisdiction over a workers' compensation claim by Bruce D. Taylor ("plaintiff") and (2) erred in concluding that plaintiff is entitled to ongoing disability compensation. We vacate the Commission's opinion and award.

**I. Factual Background**

In 2002, plaintiff, a resident of Burlington, North Carolina, sent an employment application to Dorothy Ivey, a recruiter for HT, a trucking company. On 25 September 2002, Ivey sent plaintiff's employment application to HT's safety department in Ellisville, Mississippi. After HT's employees confirmed plaintiff's eligibility, Ivey arranged for a van to pick

**TAYLOR v. HOWARD TRANSP., INC.**

[241 N.C. App. 165 (2015)]

up plaintiff and take him to HT's headquarters in Laurel, Mississippi. After arriving in Mississippi on 9 December 2002, plaintiff successfully completed HT's orientation, a road test, a drug test, and a physical exam. HT then hired plaintiff as a truck driver. On or about 13 June 2003, plaintiff resigned his employment with HT and began working for another trucking company.

On or about 14 May 2004, Michele King, a recruiter for HT, sent plaintiff a letter inviting him to reapply to work for HT. Plaintiff called King from his North Carolina residence and told her that he would be willing to work for HT if HT gave him a better truck and assigned him to a different dispatcher. King responded that she would need to talk with Suzanne Skipper and Larry Knight, two of HT's managers. King called plaintiff and told him that Skipper and Knight were willing to meet plaintiff's conditions if plaintiff would "come back to work." Plaintiff responded that he would "come back to work," and King arranged for a van to pick up plaintiff and take him to Laurel, Mississippi. On 16 August 2004, plaintiff arrived in Mississippi. Over the next three days, he completed HT's orientation, a road test, a drug test, a physical exam, and employment paperwork. On 19 August 2004, HT rehired plaintiff as a truck driver.

On 6 October 2006, while working for HT, plaintiff was struck by a pick-up truck at a truck stop in Maryland. Plaintiff sustained injuries to his left knee, hip, and back.

## II. Procedural Background

On 3 June 2008, plaintiff filed Industrial Commission Form 18 giving notice of his workers' compensation claim. On 14 August 2008, defendants filed Form 61 denying plaintiff's claim. On or about 19 August 2010, Deputy Commissioner Philip Baddour found that the Commission lacked subject-matter jurisdiction over plaintiff's claim and ordered that plaintiff's claim be dismissed with prejudice. Plaintiff appealed to the Full Commission. In its 11 March 2011 opinion and award, the Full Commission by Commissioner Bernadine Ballance found that the Commission had subject-matter jurisdiction over plaintiff's claim, reversed the deputy commissioner's opinion, and remanded the case for a full evidentiary hearing. Defendants appealed to this Court. On 6 March 2012, this Court held that the Full Commission's 11 March 2011 opinion and award was a non-appealable interlocutory order and dismissed defendants' appeal. *Taylor v. Howard Transp., Inc.*, 219 N.C. App. 402, 722 S.E.2d 212 (2012) (unpublished).



**TAYLOR v. HOWARD TRANSP., INC.**

[241 N.C. App. 165 (2015)]

On or about 12 September 2013, Deputy Commissioner Myra Griffin awarded plaintiff, *inter alia*, \$579.73 per week in temporary total disability benefits from 6 October 2006 to 18 June 2007 and from 5 November 2009 continuing until “Plaintiff returns to work or further order of the Commission.” Defendants appealed to the Full Commission. In its 14 April 2014 opinion and award, the Full Commission by Commissioner Danny Lee McDonald affirmed with modifications Deputy Commissioner Griffin’s opinion and award. On or about 21 April 2014, defendants received by certified mail the Full Commission’s 14 April 2014 opinion and award. On 19 May 2014, defendants timely gave notice of appeal.

**III. Subject-Matter Jurisdiction**

Defendants contend that the Commission (1) lacked subject-matter jurisdiction over plaintiff’s workers’ compensation claim and (2) erred in concluding that plaintiff is entitled to ongoing disability compensation. Because we hold that the Commission lacked subject-matter jurisdiction over plaintiff’s claim, we do not reach defendants’ second issue.

**A. Standard of Review**

As a general rule, the Commission’s findings of fact are conclusive on appeal if supported by any competent evidence. It is well settled, however, that the Commission’s findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

*Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (citations and quotation marks omitted).

**B. Analysis**

N.C. Gen. Stat. § 97-36 provides:

Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer’s principal place of business is in this State, or (iii) if the employee’s principal place of employment is within this State[.]

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N.C. Gen. Stat. § 97-36 (2013). Neither HT's principal place of business nor plaintiff's principal place of employment was in North Carolina. Thus, in order for the Commission to have subject-matter jurisdiction, plaintiff's contract of employment must have been made in North Carolina. *See id.*

"To determine where a contract for employment was made, the Commission and the courts of this state apply the 'last act' test. For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998) (citations, quotation marks, and brackets omitted) (citing *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 96, 398 S.E.2d 921, 926 (1990), *disc. review denied*, 328 N.C. 576, 403 S.E.2d 522 (1991)).

In *Murray*, the defendant's agent telephoned the plaintiff at his North Carolina residence and offered him a position in Mississippi to work as an instrument and pipe foreman. *Id.* at 295, 506 S.E.2d at 725. The plaintiff had previously worked for the defendant. *Id.*, 506 S.E.2d at 725. The plaintiff accepted the offer on the phone and traveled to the Mississippi work site. *Id.*, 506 S.E.2d at 725. The plaintiff was required to fill out certain administrative paperwork, but because he was a rehired, he was not required to submit to a physical exam, drug test, or go to the local employment security office. *Id.*, 506 S.E.2d at 725. This Court held that, because the paperwork was "mostly administrative[.]" the last act of the employment contract took place in North Carolina. *Id.* at 297, 506 S.E.2d at 726-27.

In *Thomas*, the plaintiff, a North Carolina resident and experienced truck driver, applied for a job with the defendant by filling out an application form and submitting it at the defendant's terminal in North Carolina. *Thomas*, 101 N.C. App. at 91, 398 S.E.2d at 922. The defendant arranged for the plaintiff to fly to Indiana where he completed an orientation, a road test, and a physical exam. *Id.* at 91, 94, 398 S.E.2d at 922, 924. While the plaintiff was in Indiana, the defendant offered to hire the plaintiff, and the plaintiff accepted. *Id.* at 94-95, 398 S.E.2d at 924-25. This Court held that the last act of the employment contract took place in Indiana, not North Carolina. *Id.* at 97, 398 S.E.2d at 926.

On or about 14 May 2004, King sent plaintiff a letter inviting him to reapply to work for HT. Plaintiff called King from his North Carolina residence and told her that he would be willing to work for HT if HT gave him a better truck and assigned him to a different dispatcher. King responded that she would need to talk with Skipper and Knight.

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King called plaintiff and told him that Skipper and Knight were willing to meet plaintiff's conditions if plaintiff would "come back to work." Plaintiff responded that he would "come back to work," and King arranged for a van to pick up plaintiff and take him to Laurel, Mississippi. On 16 August 2004, plaintiff arrived in Mississippi. Over the next three days, he completed an orientation, a drug test, a physical exam, and employment paperwork. In her deposition, Ivey stated that HT's orientation includes a road test, and plaintiff admits that he completed a road test during his 2004 orientation. Additionally, plaintiff testified that HT would not have allowed him to drive one of their trucks if he had not passed the drug test and physical exam:

[Defendants' lawyer]: Now when you were down there in August of '04, did you—did you pick up your truck down there, also?

[Plaintiff]: Yes.

....

[Defendants' lawyer]: Okay. And you actually didn't get assigned your truck until after you completed your physical and passed your DOT exam, correct?

[Plaintiff]: Yeah—about three days.

[Defendants' lawyer]: Okay. And so you were there for three days before they let you take a truck and leave, correct?

[Plaintiff]: Yes.

....

[Defendants' lawyer]: Right. And you agree that Howard wouldn't—as a new hire, [HT] wouldn't let you take one of their trucks out of their Mississippi terminal until you had passed your DOT physical, correct?

[Plaintiff]: Yes.

[Defendants' lawyer]: And you agree that [HT] won't let you take one of their trucks out of their terminal in Mississippi until you'd passed their drug test?

[Plaintiff]: Yes.

Additionally, in her deposition, Ivey similarly stated that plaintiff would not have been hired as an employee if he had failed one of these tests:

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[Defendants' lawyer]: If any of these things weren't completed in terms of the written test or the road test or the criminal checks or things of that nature, would [plaintiff] be considered an employee of [HT] before that?

. . . .

[Ivey]: No.

. . . .

[Defendants' lawyer]: Okay. Well, do you have an opinion of when someone would be effectively an employee of [HT]?

. . . .

[Ivey]: Again, as I said, they have to go down and pass their physical, their drug screen, their road test, and complete the final paperwork in Mississippi.

[Defendants' lawyer]: Have you sent people down to Mississippi that weren't hired by [HT]?

[Ivey]: I have.

[Defendants' lawyer]: And what reasons were they not hired?

[Ivey]: Various things—failing drug screens, not being able to pass the physical. I've actually had drivers . . . send me an application that someone else filled out for them, and when they would get to Mississippi wouldn't be able to read or write, things like that.

[Defendants' lawyer]: All right. So you're aware of people who—who have gotten the quote approval, went down to Mississippi, and then never became employees of [HT]?

[Ivey]: Yes.

[Defendants' lawyer]: How often does that happen, percentage wise, to your knowledge?

[Ivey]: Maybe one out of ten.

On 19 August 2004, at the end of the orientation, Skipper signed a payroll change notice form in which she rehired plaintiff. The effective date of the payroll change is 16 August 2004, the day plaintiff began the orientation.

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We hold that this case is more closely analogous to *Thomas* than to *Murray*. Like in *Thomas* and unlike in *Murray*, plaintiff was required to complete a three-day orientation, a road test, a drug test, and a physical exam outside North Carolina, a hiring procedure extending well beyond “mostly administrative” paperwork. *See Thomas*, 101 N.C. App. at 91, 94, 398 S.E.2d at 922, 924; *Murray*, 131 N.C. App. at 297, 506 S.E.2d at 726-27. HT did not consider plaintiff an employee until after he had successfully completed the orientation, road test, drug test, and physical exam.

Plaintiff mentions that he was paid during the orientation since the effective rehire date listed on the payroll change notice form is 16 August 2004, the date he arrived in Mississippi. But Skipper signed that form on 19 August 2004, at the end of the orientation. The fact that plaintiff was paid for this three-day period does not vitiate the fact that plaintiff’s employment was contingent upon his successful completion of the orientation, road test, drug test, and physical exam. Following *Thomas*, we hold that the last act of the employment contract took place in Mississippi. *See Thomas*, 101 N.C. App. at 97, 398 S.E.2d at 926. Accordingly, we hold that the Commission lacked subject-matter jurisdiction to hear plaintiff’s claim. *See N.C. Gen. Stat. § 97-36.*

## IV. Conclusion

Because the Industrial Commission lacked subject-matter jurisdiction to hear plaintiff’s claim, we vacate the Commission’s 14 April 2014 opinion and award.

VACATED.

Judges BRYANT and HUNTER, JR concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MAY 2015)

COOPER v. CAMERON No. 14-1017	Carteret (12CVS150)	Affirmed
CRABTREE v. EVP PROPS., LLC No. 14-928	N.C. Industrial Commission (PH-3192) (Y16592)	Reversed and Vacated
GEORGE v. COOPER No. 14-1195	Lincoln (12CVS1518)	Dismissed in Part, No Error in Part.
GRAHAM v. JENKINS No. 14-1128	Brunswick (10CVS1979)	Affirmed
HUGGINS v. MARLATEX CORP. No. 14-1232	N.C. Industrial Commission (W12544)	Dismissed
IN RE D.A.C. No. 14-1242	Randolph (13JA16)	Affirmed
IN RE LL-M. No. 14-1233	Cumberland (06JT561)	Affirmed
IN RE L.S. No. 14-1122	Onslow (11JA158) (13JA41)	Affirmed in part; Vacated and Remanded in Part
IN RE LALL No. 14-1325	Iredell (10SP706)	Affirmed
IN RE M.S. No. 14-1273	Beaufort (11JA91)	Affirmed
INTEGON NAT'L INS. CO. v. MOORING No. 14-1303	Wayne (13CVS609)	Affirmed
MAVILLA v. ABSOLUTE COLLECTION SERV. No. 14-1097	Wake (11CVS6878)	Dismissed
N.C. STATE BAR v. GILBERT No. 14-1139	Disciplinary Hearing Commission (03DHC16)	Affirmed

STATE v. BAILEY No. 14-1151	Buncombe (14CRS816-818)	Affirmed
STATE v. BERRY No. 14-800	Craven (13CRS50605) (13CRS831) (13CRS950-951) (13CRS953)	No Error
STATE v. BOLICK No. 14-1072	Catawba (13CRS1448-50)	No Error
STATE v. BRANCH No. 14-1180	Duplin (12CRS51582)	No Error
STATE v. BRYANT No. 14-1218	Lenoir (12CRS51477)	No Error
STATE v. CLYBURN No. 14-1275	Union (09CRS53667)	Reversed and Remanded
STATE v. GOMEZ No. 14-1174	Durham (11CRS52203)	No Error
STATE v. GRAHAM No. 14-1229	Cabarrus (13CRS2333) (13CRS50468)	No Error
STATE v. HAMMONDS No. 14-1134	Union (80CRS2302) (80CRS3176)	Affirmed
STATE v. HOYLE No. 14-1238	Lincoln (13CRS51677) (13CRS51679) (13CRS51687)	NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR
STATE v. JEFFERIES No. 14-1104	Cleveland (13CRS50720) (13CRS789)	No Prejudicial Error
STATE v. JOHNSON No. 14-1170	Mecklenburg (11CRS212187)	No Error
STATE v. MACK No. 14-1221	Guilford (12CRS24304) (12CRS68166) (12CRS68172) (12CRS68173-76) (12CRS68178)	Affirmed

STATE v. McPHAIL No. 14-1280	Mecklenburg (11CRS218388)	Vacated and Remanded
STATE v. ROBERTSON No. 14-1149	Guilford (12CRS85608-09) (13CRS24320)	No prejudicial error
STATE v. ROBINSON No. 14-917	Guilford (13CRS81488)	No Prejudicial error
STATE v. SPRY No. 14-1279	Guilford (13CRS68566)	Affirmed
STATE v. STURDIVANT No. 14-1053	Cabarrus (12CRS53689)	Affirmed
STATE v. WEST No. 14-983	Forsyth (12CRS51921) (12CRS51925) (13CRS146-147)	No Error
STATE v. WILLIAMS No. 14-1113	Wake (12CRS223032) (13CRS204337)	No error in part; reversed and remanded in part.
STATE v. WILSON No. 14-638	Onslow (09CRS54843-44)	Affirmed; Remanded for Resentencing.
STATON v. JOSEY LUMBER CO. No. 14-1001	N.C. Industrial Commission (X93563)	Affirmed
STATON v. UNION CNTY. DEPT OF SOC. SERVS. No. 14-1014	Union (13CVS273)	Affirmed
TAYLOR v. CAROLINAS HEALTHCARE SYS. No. 14-835	N.C. Industrial Commission (Y18410)	Affirmed



## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 MAY 2015)

BLEDSON v. BLEDSON No. 14-876	Nash (10CVD491)	Vacated in part and remanded
COMMUNITYONE BANK, N.A. v. BOONE STATION PARTNERS, LLC No. 14-932	New Hanover (13CVS3888)	Dismissed
CORNETT v. CORNETT No. 14-919	Cabarrus (08CVD3928)	Affirmed
ELAM v. WILLIAM DOUGLAS MGMT., INC. No. 14-1377	Mecklenburg (13CVS14231)	Affirmed
FERGUSON v. HAWKINS No. 14-1093	Iredell (12CVS2593)	Dismissed
FRYE v. FRYE No. 14-1169	Rowan (11CVD739)	Remanded for further proceedings
HOBCO AUTO SALES, INC. v. DEW No. 14-976	Wake (13CVS850)	Affirmed
IN RE C.E.N. No. 14-1243	Forsyth (14JB38)	The district court's adjudication order is Affirmed. Juvenile's arguments regarding the disposition order are Dismissed.
IN RE J.C. No. 14-1327	Cherokee (11JT23-25)	Affirmed
IN RE SUTTON No. 14-761	Guilford (11SP3688)	Affirmed
IN RE T.A.P. No. 14-1382	Caldwell (12JA65-66)	Vacated and Remanded
IN RE T.E.B. No. 14-1408	Wake (14JB529)	Dismissed
LUCIANO v. WYATT No. 14-1203	Catawba (13CVD2495)	Affirmed

O'NEAL v. INLINE FLUID POWER, INC. & AUTO. PARTS CO., INC. No. 14-1144	N.C. Industrial Commission (X51359)	Affirmed
SMITH v. N.C. DEP'T. OF PUB. SAFETY No. 14-1282	Rowan (12CVS2810)	Dismissed
STATE v. BARNES No. 14-840	Nash (12CRS53727-28) (12CRS55355)	No Error
STATE v. DAVIS No. 14-1322	Buncombe (12CRS64161)	No Error
STATE v. GRISSETT No. 14-1361	Brunswick (12CRS4222-23) (12CRS55968)	No Error
STATE v. McKENZIE No. 14-1216	Scotland (11CRS52610)	No Error
STATE v. McKINNEY No. 14-1245	Beaufort (09CRS51863) (10CRS51469) (12CRS50693-95)	Vacated and Remanded
STATE v. MILLER No. 14-1310	Mecklenburg (12CR246557) (12CR246559)	Dismissed
STATE v. MOORE No. 14-1263	Haywood (13CRS51819-23) (13CRS51825-26)	No Error
STATE v. ODOM No. 14-964	Rowan (10CRS52393-94)	No Error
STATE v. OVANDO No. 14-1188	Carteret (03CRS404) (03CRS50433)	Affirmed
STATE v. RIESON No. 14-965	Rockingham (12CRS1674) (12CRS51735)	No Error
STATE v. ROBINSON No. 14-726	Columbus (11CRS52384-85) (11CRS52388) (11CRS52390) (11CRS52393) (11CRS52396)	Vacated in part; no error in part

STATE v. RUMLEY No. 14-1162	Rockingham (12CRS53045)	No error
STATE v. SYKES No. 14-1099	Wake (11CRS213829-30) (11CRS7982)	Affirmed
STATE v. THOMAS No. 14-1135	Lincoln (12CRS51604)	No Error
STATE v. WILLIAMS No. 14-1129	Wilson (12CRS55006)	No error as to trial, Dismissed as to ineffective assistance of counsel claim
WOLFE v. ARCHIMEDES ACAD. No. 14-1132	Durham (13CVD5392)	Affirmed

## ADCOX v. CLARKSON BROS. CONSTR. CO.

[241 N.C. App. 178 (2015)]

THOMAS F. ADCOX, EMPLOYEE, MOVANT

v.

CLARKSON BROTHERS CONSTRUCTION COMPANY, EMPLOYER, AND  
UTICA MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA14-313-2

Filed 2 June 2015

**Workers' Compensation—attorney fees—law of the case**

A November 2008 opinion and award in a workers' compensation case did not deny plaintiff's attorneys' request for attorney fees. Defendants' contention that the Industrial Commission's sub silentio reversed the deputy commissioner's award of fees was not tenable and was inconsistent with controlling authority. Defendants bore the burden to appeal that opinion and award to the Court of Appeals. When they failed to do so, the deputy commissioner's approval of an attorney fee became the law of the case. On remand, since the Commission denied plaintiff's motion under a misapprehension of law regarding the effect of its 2008 opinion and award, the Commission must reconsider its ruling on that motion.

Appeal by plaintiff from order entered 17 September 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 28 August 2014. Petition for rehearing granted 13 November 2014. The following opinion supersedes and replaces the opinion filed 16 September 2014.

*R. James Lore, Attorney at Law, by R. James Lore; and Nicholls & Crampton, PA, by Nicholas J. Dombalis, II, for plaintiff-appellant.*

*Hedrick, Gardner, Kincheloe & Garofalo, LLP, by Kari L. Schultz and M. Duane Jones, for defendants-appellees.*

GEER, Judge.

In a 27 March 2008 Opinion and Award, the deputy commissioner approved an attorneys' fee of 25% of the attendant care compensation awarded to plaintiff Thomas F. Adcox for his wife's services. Although defendants Clarkson Brothers Construction Company and Utica Mutual Insurance Company asked the Full Commission to reverse this award, the Commission, in a 25 November 2008 Opinion and Award, affirmed the deputy commissioner's Opinion and Award with modifications only

## ADCOX v. CLARKSON BROS. CONSTR. CO.

[241 N.C. App. 178 (2015)]

as to the amount and rate of pay for the attendant care -- the Commission did not specifically address the 25% attorneys' fee award.

Subsequently, plaintiff filed a motion seeking an order requiring that the 25% be paid directly to plaintiff's counsel in order to alleviate the bookkeeping burden on plaintiff's wife. Defendants contended — and the Commission agreed in an order entered 10 December 2012 — that the Commission's November 2008 Opinion and Award, by not specifically mentioning the attorneys' fees, necessarily denied plaintiff's attorneys' request for approval of a fee. Plaintiff appealed to the superior court, and the trial court dismissed his appeal on the grounds that the Commission had not, in its December 2012 order, denied a request for fees.

We cannot agree with the Commission's and defendants' position that the November 2008 Opinion and Award denied plaintiff's attorneys' request for fees. Defendants' contention that the Commission *sub silentio* reversed the deputy commissioner's award of fees is not tenable and is inconsistent with controlling authority. The Commission's silence in November 2008 on the issue of the deputy commissioner's award of an attorneys' fee can be interpreted in only one of two ways: either the Commission affirmed the deputy commissioner or the Commission did not address the issue.

In either event, defendants bore the burden to appeal that Opinion and Award to this Court. When they failed to do so, the deputy commissioner's approval of an attorneys' fee became the law of the case, and the Commission had no authority to declare, in December 2012, that the original panel had *sub silentio* reversed the deputy commissioner and denied plaintiff's request for approval of an attorneys' fee. Consequently, we reverse and remand to the trial court for further remand to the Commission for reconsideration of plaintiff's motion.

#### Facts

On 28 February 1983, while employed by defendant Clarkson, plaintiff suffered an admittedly compensable head injury that left him permanently and totally disabled. Defendant Clarkson and defendant Utica National Insurance Group agreed to compensate plaintiff for his disability at a weekly rate of \$248.00.

In February 2003, the parties filed a settlement agreement pursuant to which defendants agreed to pay plaintiff a lump sum of \$250,000.00 in reimbursement for attendant care services provided by plaintiff's family members, including his wife Joyce Adcox, from 28 February 1983 until

**ADCOX v. CLARKSON BROS. CONSTR. CO.**

[241 N.C. App. 178 (2015)]

3 February 2003. The Commission approved a 25% attorneys' fee for plaintiff's counsel, which was deducted from the sum due plaintiff and paid directly to plaintiff's counsel. Thereafter, defendants authorized and began providing plaintiff with 60 hours of in-home professional attendant care services per week, provided by Kelly Home Health Services.

In 2007, Mrs. Adcox retired, and plaintiff moved to have defendants pay Mrs. Adcox directly for attendant care services instead of Kelly Services. The matter was heard by Deputy Commissioner John B. DeLuca on 30 August 2007. On 27 March 2008, the deputy commissioner entered an Opinion and Award allowing Mrs. Adcox to assume attendant care responsibilities seven days a week at a rate of \$188.00 per day. In his award, the deputy commissioner ordered that "[a]n attorneys' fee of 25% of the attendant care compensation is approved for the Plaintiff's counsel."

Both parties appealed to the Full Commission. On 25 November 2008, the Full Commission entered an Opinion and Award affirming the deputy commissioner's Opinion and Award "with modifications including the amount of attendant care and rate of pay for said care." The Full Commission allowed Mrs. Adcox to assume attendant care responsibilities seven days per week for 16 hours per day at a rate of \$10.00 per hour. The Opinion and Award did not mention the 25% attorneys' fee award to plaintiff's counsel. Plaintiff appealed to this Court for reasons unrelated to the 25% attorneys' fee award. Defendants chose not to appeal. On 8 December 2009, this Court affirmed the 25 November 2008 Opinion and Award. *See Adcox v. Clarkson Bros. Constr. Co.*, 201 N.C. App. 446, \_\_\_ S.E.2d \_\_\_, 2009 WL 4576065, 2009 N.C. App. LEXIS 2308 (2009) (unpublished).

On 12 July 2012, plaintiff filed a motion with the Full Commission requesting that it direct payment of the attorneys' fees to plaintiff's counsel. The motion explained that "Mrs. Adcox is responsible for her own income tax record-keeping and reporting of the attendant care income she receives. For tax purposes the failure by the carrier to direct separate checks makes it appear as though Mrs. Adcox's attendant care income is higher than it actually is." Plaintiff requested that defendants be ordered to deduct 25% of the compensation payable to Mrs. Adcox to be paid directly to plaintiff's counsel because the record keeping "has become burdensome for Mrs. Adcox."

A new panel of commissioners heard plaintiff's 2012 motion. Commissioners Linda Cheatham and Tammy R. Nance replaced Commissioners Dianne C. Sellers and Laura Kranifeld Mavretic from the

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original 2008 panel. Commissioner Danny Lee McDonald served on both panels. On 10 December 2012, the Full Commission entered an order denying plaintiff's motion.

The Commission found that both parties had appealed Deputy Commissioner DeLuca's Opinion and Award to the Full Commission. Regarding defendants' appeal, the Commission noted that although defendants had not specifically assigned error to the attorneys' fee award in their form 44, they had generally challenged each paragraph of the deputy commissioner's award and had addressed the 25% attorneys' fee award in their brief to the Commission. The Commission then concluded:

The Full Commission's Opinion and Award filed on November 25, 2008 directs Defendants to pay Mrs. Adcox for attendant care services from the date of the filing of the Opinion and Award at a rate of \$10.00 per hour, 7 days per week, 16 hours per day. The Opinion and Award does not include an award of attorneys' fees for Plaintiff's counsel.

Plaintiff appealed the Full Commission's decision to the North Carolina Court of Appeals. Based upon a review of the Court's Opinion, it does not appear that Plaintiff assigned error to the Full Commission's decision in its Opinion and Award not to award an attorneys' fee to Plaintiff's counsel.

As Plaintiff seeks to have the Full Commission direct Defendants to deduct and pay directly to counsel for Plaintiff attorneys' fees which have not been awarded by the Full Commission, Plaintiff's Motion to Direct Payment of Attorneys' Fees to Plaintiff's Counsel is hereby DENIED.

Commissioner McDonald — the one commissioner who had served on the 25 November 2008 panel — dissented without opinion.

On 12 December 2012, plaintiff appealed the order to superior court pursuant to N.C. Gen. Stat. § 97-90. On 19 June 2013, defendants moved to dismiss plaintiff's appeal pursuant to Rules 12(b)(1), (2), and (6) of the Rules of Civil Procedure. On 25 June 2013, plaintiff moved to strike defendants' motion to dismiss for lack of standing.

After a 26 August 2013 hearing, the trial court entered an order dismissing plaintiff's appeal on 17 September 2013. The trial court took

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judicial notice of the 25 November 2008 Opinion and Award and the 10 December 2012 order of the Full Commission. It found in pertinent part:

(2) that the December 10, 2012 Order from which Movant now purportedly appeals did not deny any attorneys fees, but simply clarified that the Commission had not awarded attorneys fees in the November 25, 2008 Order;

(3) that Movant's litigated request for attorney fees was denied on November 25, 2008;

(4) that Movant's current request for attendant care attorney fees per N.C. Gen. Stat. § 9-90 [sic] should be barred by § 97-90 and the doctrine of *res judicata*;

(5) that the November 25, 2008, Order of the North Carolina Industrial Commission and the parties' appeal therefrom to the North Carolina Court of Appeals, represented a final judgment on the merits as to the issue of any attorney fee based on a percentage of attendant care medical benefits provided to Movant pursuant to North Carolina General Statutes § 97-25, which is the only claim at issue in this litigation[.]

The trial court, therefore, dismissed plaintiff's appeal with prejudice. Plaintiff timely appealed to this Court. After this Court filed an opinion on 16 September 2014, defendants petitioned for a rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. The petition for rehearing was granted 13 November 2014. This opinion supersedes and replaces the opinion filed 16 September 2014.

#### Discussion

Plaintiff first contends that defendants lacked standing to oppose both his motion to the Full Commission and his appeal from the 10 December 2012 decision of the Full Commission to superior court. As explained by this Court in *Diaz v. Smith*, 219 N.C. App. 570, 573-74, 724 S.E.2d 141, 144 (2012) (internal citations and quotation marks omitted):

The Workers' Compensation Act provides that an appeal from an opinion and award of the Industrial Commission is subject to the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. Under N.C. Gen. Stat. § 1-271 (2009), "[a]ny party aggrieved" is entitled to appeal in a



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civil action. A party aggrieved is one whose legal rights have been denied or directly and injuriously affected by the action of the trial tribunal. If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed.

Plaintiff argues that because his motion to direct payments to plaintiff's counsel does not affect the total amount to be paid by defendants, defendants are not an "aggrieved" party. Defendants counter that they are an "aggrieved" party because (1) "if Plaintiff's Counsel is awarded attorney's fees as a result of this appeal, Defendants would either be required to pay an additional 25% in the form of attorneys [sic] fees, or fund Plaintiff's Counsel's attorney's fees by reducing the amount of compensation to Mrs. Adcox, thereby subjecting Defendants to liability for compensation owed to Mrs. Adcox, as mandated in the Opinion and Award" and (2) "allowing a plaintiff's counsel to have a pecuniary interest in an authorized medical provider could create a conflict between his obligations to represent his client and a defendant's obligation to manage medical treatment pursuant to N.C. Gen. Stat. § 97-25."

Because of our resolution of this appeal, we need not decide whether defendants have standing in this case to challenge an award of attorneys' fees to plaintiff's attorney that does not affect the total amount payable by defendants. We express no opinion whether defendants' contentions are sufficient to make them aggrieved parties for purposes of an appeal.

Plaintiff's primary argument on appeal is that the trial court erred in finding that the Full Commission denied his request for attorneys' fees in its 25 November 2008 Opinion and Award and, as a result, erred in dismissing his appeal on the grounds of res judicata. Plaintiff argues that the deputy commissioner's award of attorneys' fees became final when defendants did not specifically assign as error the award of attorneys' fees in their Form 44 as required by Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission. Alternatively, plaintiff argues that the Commission affirmed the award of attorneys' fees. We review these questions of law de novo. *McAllister v. Wellman, Inc.*, 162 N.C. App. 146, 148, 590 S.E.2d 311, 312 (2004).

Rule 701 provides:

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated

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with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. *Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3).* . . .

(3) *Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.*

(Emphasis added.)

This Court has emphasized that “the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission. Without notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission.” *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). “Such notice is required for the appellee to prepare a response to an appeal to the Full Commission.” *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 252, 652 S.E.2d 713, 717 (2007). Thus, “the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned.” *Id.* at 249, 652 S.E.2d at 715.

Defendants argue that they properly appealed the issue of attorneys’ fees to the Full Commission because they specifically listed Deputy Commissioner DeLuca’s Award, which included the award of attorneys’ fees, in the third assignment of error on their Form 44 Application for review:

Deputy Commissioner John B. DeLuca’s Award, dated March 27, 2008, on the grounds that it is based upon Findings of Fact and Conclusions of Law which are erroneous, not supported by competent evidence or evidence of record, and are contrary to the competent evidence of record, and are contrary to law: Award Nos. 1-3.

This assignment of error is similar to the appellant’s assignment of error in *Walker v. Walker*, 174 N.C. App. 778, 782, 624 S.E.2d 639, 642 (2005), which asserted generally that several rulings of the trial court were “‘erroneous as a matter of law.’” In concluding that this assignment of error was insufficient under the 2005 version of Rule 10 of the

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Rules of Appellate Procedure, this Court held that the “assertion that a given finding, conclusion, or ruling was ‘erroneous as a matter of law’ ” violated Rule 10 because it “completely fail[ed] to *identify* the issues actually briefed on appeal.” *Walker*, 174 N.C. App. at 782, 624 S.E.2d at 642. Instead, “[s]uch an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. This assignment — like a hoopskirt — covers everything and touches nothing.” *Id.* at 783, 624 S.E.2d at 642 (quoting *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005)).

Similarly, here, defendant’s assignment of error “ ‘covers everything and touches nothing.’ ” *Id.* (quoting *Wetchin*, 167 N.C. App. at 759, 606 S.E.2d at 409). Although it states a general objection to each paragraph of the award (without specifically mentioning the attorneys’ fee award), it does not state the basis of any objection to the attorneys’ fee award with sufficient particularity to give plaintiff notice of the legal issues that would be addressed by the Full Commission such that he could adequately prepare a response. *See Roberts*, 173 N.C. App. at 744, 619 S.E.2d at 910.

Defendants’ third assignment of error also is in stark contrast to defendants’ fourth assignment of error: “Deputy Commissioner John B. DeLuca’s Award dated March 27, 2008, in that it failed to award attorney fees as requested by Defendants pursuant to §97-88.1.” In this assignment of error, defendants indicated specifically which particular aspect of the award they challenged. Significantly, defendants did not include a similar assignment of error for the award of attorneys’ fees challenged here.

Defendants nonetheless contend that they met the particularity requirement by addressing the question of attorneys’ fees in their brief to the Full Commission, citing *Cooper v. BHT Enters.*, 195 N.C. App. 363, 672 S.E.2d 748 (2009). In *Cooper*, the plaintiff argued that, pursuant to *Roberts*, the defendant’s failure to file a Form 44 constituted an abandonment of defendants’ grounds for appeal to the Full Commission, and therefore the Commission erred by hearing the appeal. *Id.* at 368, 672 S.E.2d at 753. This Court disagreed, reasoning that

unlike the appealing plaintiff in *Roberts*, defendants in the present case complied with Rule 701(2)’s requirement to state the grounds for appeal with particularity by timely filing their brief after giving notice of their appeal to the Full Commission. Additionally, plaintiff does not argue that she did not have adequate notice of defendants’ grounds

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for appeal. Plaintiff asserts only that defendants' failure to file a Form 44 should have been deemed an abandonment of defendants' appeal. Since both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission, we overrule these assignments of error.

*Id.* at 368-69, 672 S.E.2d at 753-54.

In other words, failure to file a Form 44 does not automatically result in a mandatory dismissal of the appeal by the Industrial Commission -- it is within the discretion of the Commission whether to deem the grounds for appeal waived. In determining whether the Commission abused its discretion in deciding not to deem an issue on appeal waived, this Court in *Cooper* considered whether the appellant provided the appellee with adequate notice of the grounds for appeal through other means such as addressing the issue in its brief to the Full Commission.

Here, unlike in *Cooper*, the Commission did not explicitly address the issue purportedly raised by defendants on appeal in its Opinion and Award. Under *Cooper*, it would not have been an abuse of discretion for the Commission to address the attorneys' fee issue, but it is unclear whether the Commission considered the issue or not. Although defendants contend that the "Full Commission Award removed the appealed prior award of attendant care attorney fees and awarded attendant care compensation to be paid directly to Mrs. Adcox[.]" nothing in the Commission's Opinion and Award indicates that it was "remov[ing]" the attorneys' fee award. Defendants have cited no authority — and we have found none — supporting their position that silence by the Commission regarding a determination by the deputy commissioner can amount to reversal when the Commission is not required to review the issue and there is no other indication that the Commission intended to exercise its discretion to do so.

Indeed, in *Polk v. Nationwide Recyclers, Inc.*, 192 N.C. App. 211, 218, 664 S.E.2d 619, 624 (2008), this Court concluded that the Commission intended to *affirm* certain findings in the deputy commissioner's opinion and award, even though the findings were omitted from the Commission's opinion and award. The Court rejected the plaintiff's argument that the omitted findings indicated that the Commission failed to consider all the evidence presented, reasoning:

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[I]n this case, the Full Commission's opinion states outright that it "affirms the Opinion and Award of Deputy Commissioner Deluca *with modifications*." . . . That is, the Full Commission's opinion is not an order meant to stand on its own, but rather a modification of the deputy commissioner's order. As plaintiff herself states, the facts at issue were included in the deputy commissioner's order. We see no reason to require that such an order restate all the findings of fact and conclusions of law from the original order that need no modification. Considering that defendants filed an appeal containing thirty-two alleged errors, it is not surprising that the Full Commission did not address each individually.

*Id.* This Court assumed with regard to the omitted findings that the Commission wished to affirm the deputy commissioner's opinion and award, nothing else appearing in the opinion and award to the contrary. *Id.* at 218-19, 664 S.E.2d at 624.

Similarly, here, the Full Commission's Opinion and Award states that it "affirms the Opinion and Award of Deputy Commissioner DeLuca with modifications including the amount of attendant care and rate of pay for said care." As such, *Polk* establishes that the Full Commission's opinion "is not an order meant to stand on its own." *Id.* at 218, 664 S.E.2d at 624. While defendants contend that parties should not be required to look at both Opinions and Awards, that is the case whenever the parties decide not to appeal some aspect of the deputy commissioner's Opinion and Award. Defendants again cite no authority requiring the Full Commission to specifically address issues that were not appealed.

Turning to the question of which portions of the deputy commissioner's Opinion and Award the Commission modified, the Commission only specifically indicated that it intended to modify the amount and rate of pay for attendant care. While we recognize that the plain language of the Opinion and Award does not specifically *limit* the modifications to the attendant care award, all of the modifications to the deputy commissioner's findings of fact were relevant to the attendant care determination and necessary to support the different conclusion of law reached by the Commission with respect to the attendant care award.

In contrast, the Commission did not make any findings of fact that would justify or explain a reversal of the deputy commissioner's approval of a 25% attorney's fee. Indeed, plaintiff correctly notes that under N.C. Gen. Stat. § 97-90(c) (2013), the statute authorizing the award

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of attorneys' fees in this instance, any decision by the Commission to *deny* attorneys' fees must be supported by specific findings. N.C. Gen. Stat. § 97-90(c) provides:

If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed.

The lack of findings in the November 2008 Opinion and Award to justify a denial of attorneys' fees is contrary to defendants' contention and the Commission's assumption that the Commission in 2008 intended to deny the fee request. Accordingly, we conclude that there is no indication that the Commission intended to modify the deputy commissioner's approval of attorney's fees.

In short, based on a review of the November 2008 Opinion and Award, either the Commission intended to affirm the deputy commissioner's award, or, alternatively, the Full Commission did not consider the issue — whether through inadvertence or because it deemed the matter waived based on defendant's Form 44. Nothing in the Opinion and Award suggests, and no authority exists that we can find, which would permit us to conclude that the Commission silently reversed the deputy commissioner's award in part and denied plaintiff's counsel the 25% attorney's fee.

Defendants argue, however, that this conclusion, and the reasoning in *Polk*, are contrary to the Commission's duties pursuant to N.C. Gen. Stat. § 97-85 (2013). As stated in *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992) (quoting *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988)), "when the matter is 'appealed' to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties. . . . '[I]nasmuch as the Industrial Commission decides claims without formal pleadings, it is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission.' "

In *Vieregge*, this Court held that the plaintiff, "having appealed to the full Commission pursuant to G.S. 97-85 and having filed his Form

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44 ‘APPLICATION FOR REVIEW,’ [was] entitled to have the full Commission respond to the questions directly raised by his appeal.” *Id.* at 639, 414 S.E.2d at 774 (emphasis added). The Court held that because the Commission did not specifically address the issues directly raised in the plaintiff’s Form 44, but instead simply entered an order stating only that “[t]he undersigned have reviewed the record in its entirety and find no reversible error;” the Commission did not satisfy the requirements of N.C. Gen. Stat. § 97-85. *Id.* See also *Lewis v. N.C. Dep’t of Corr.*, 138 N.C. App. 526, 529, 531 S.E.2d 468, 470 (2000) (holding that defendant “having filed a Form 44,” was entitled to have Commission respond to questions directly raised by its appeal and Commission violated § 97-85 by failing to do so); *Jauregui v. Carolina Vegetables*, 112 N.C. App. 593, 596, 436 S.E.2d 268, 269 (1993) (holding where Commission entered an order adopting the deputy commissioner’s order as its own, “the Commission failed to carry out its statutory duties pursuant to N.C. Gen. Stat. § 97-85 by not making its own findings of fact and conclusions to support its disposition of plaintiff’s claim[,]” but additionally finding error not prejudicial).

As we have already determined, however, the issue of plaintiff’s attorney’s fee was not properly set forth in defendant’s Form 44. Accordingly, the Commission did not have a duty to address it. See *Hurley v. Wal-Mart Stores, Inc.*, 219 N.C. App. 607, 613, 723 S.E.2d 794, 797 (2012) (holding Commission did not have authority to address issues not raised by defendant’s Form 44, as such issues were not before Commission for review and not “in controversy” on appeal to Full Commission).

Regardless, the question whether the Commission had a duty to address the issue of attorneys’ fees is not before this Court. The question before this Court is what did the Commission, in fact, do with respect to the attorney’s fee award, and what is the status of the deputy commissioner’s approval of the attorney’s fee. Defendants have cited no authority even suggesting that complete silence on the part of the Commission on an issue can be deemed a reversal of the deputy commissioner as to that issue, especially when the Commission’s Opinion and Award states that it is affirming the deputy commissioner and the Commission’s silence could be due to defendants’ failure to specifically include the issue in their Form 44.

Assuming, without deciding, that defendants had standing to challenge the deputy commissioner’s award of attorneys’ fees, the burden was on defendants — as the party appealing the approval of the award — to obtain a ruling from the Full Commission on the issues they appealed. When the Full Commission failed to explicitly reverse the

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deputy commissioner's award, defendants could have requested reconsideration and, if the Commission did not rule in their favor, appealed to this Court. *See id.* at 614, 723 S.E.2d at 798 (holding where Commission failed to address defendants' appeal of deputy commissioner's award of attorneys' fees to plaintiff's counsel in its opinion and award, defendants properly appealed to this Court after Commission denied their motion to reconsider).

This Court has held that "when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes 'the law of the case' and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T., L.L.C.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009). Here, when defendants failed to appeal the Full Commission's 25 November 2008 Opinion and Award, defendants abandoned any contention that the ruling was erroneous, and the deputy commissioner's award of attorneys' fees became the law of the case.

Under the law of the case doctrine, defendants could not attack and the Commission could not reverse the award of attorneys' fees. *See id.* (holding that "since [defendant] did not appeal Deputy Commissioner Berger's 2003 opinion and award finding that it did not have workers' compensation insurance coverage on the date of plaintiff's accident," this finding was the law of the case, and defendant "was barred from relitigating that issue in subsequent proceedings").

Because the November 2008 Opinion and Award did not address the deputy commissioner's award of attorney's fees and defendants did not appeal the Commission's omission, plaintiff's 12 July 2012 motion to direct payment of attorneys' fees to plaintiff's counsel was not, as defendants contend, a motion to re-litigate the substantive issue whether attorneys' fees had been awarded by the Full Commission. Rather, it was simply a procedural motion regarding the way in which the awarded fees would be paid. The Commission's December 2012 order, as a result, had the effect of improperly denying plaintiff's attorneys' fees. Consequently, plaintiff was entitled to appeal the December 2012 order to superior court pursuant to N.C. Gen. Stat. § 97-90, and the superior court erred in dismissing plaintiff's appeal.

Defendants, nevertheless, contend that the Commission and the superior court did not have authority to award plaintiff's counsel fees under the rule set forth in *Palmer v. Jackson*, 157 N.C. App. 625, 579 S.E.2d 901 (2003). This argument — addressing the merits of plaintiff's request for attorneys' fees — is not properly before this Court because the award of attorneys' fees is the law of the case. *See Barrington*



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*v. Emp't Sec. Comm'n*, 65 N.C. App. 602, 605, 309 S.E.2d 539, 541 (1983) (declining to consider appellant's legal arguments when bound by law of the case). Defendants' arguments should have been raised in the first appeal to this Court. Nothing in this opinion expresses any view regarding defendants' arguments under *Palmer*.

We, therefore, reverse and remand to the superior court for remand to the Commission. On remand, since the Commission denied plaintiff's motion under a misapprehension of law regarding the effect of its 2008 Opinion and Award, the Commission must reconsider its ruling on that motion.

REVERSED AND REMANDED.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

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JOHN WILTON ANDERSON, SR., TRUSTEE FOR THE JOHN WILTON ANDERSON, SR. REVOCABLE TRUST DATED MAY 1990; ROBERT D. ANDERSON AND WIFE, PATRICIA A. ANDERSON; AL ARTALE AND WIFE, DEBBIE ARTALE; BALD EAGLE VENTURES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; ROBERT W. BARBOUR AND WIFE, KATHERINE G. BARBOUR; DOUGLAS R. BARR AND WIFE, KAREN W. BARR; DANIEL T. BARTELL AND WIFE, BARBARA J. BARTELL; MITCHELL W. BECKER; GEORGE D. BEECHAM AND WIFE, JACQUELINE J. BEECHAM; KAREN H. BEIGER; GARY E. BLAIR AND WIFE, KATHLEEN P. BLAIR; ANN M. BOILEAU AND HUSBAND, PAUL BOILEAU; GERARD C. BRADLEY AND WIFE, SUSAN M. BRADLEY; ROBERT WILLIAM BRICKER AND WIFE, PATRICIA ANNE BRICKER; TOBY J. BRONSTEIN; JAMES W. BURNS AND WIFE, CAROL J. BURNS; JOHN T. BUTLER; JOSEPH R. CAPKA AND WIFE, SUSAN J. CAPKA; JOSEPH S. CAPOBIANCO AND WIFE, BARBARA K. CAPOBIANCO; ISAAC H. CHAPPELL AND JEAN M. HANEY AS CO-TRUSTEES OF THE ISAAC H. CHAPPELL TRUST DATED OCTOBER 10, 2000; KENNETH A. CLAGETT AND WIFE, MARY ELLEN CLAGETT; EDWARD EARL CLAY AND WIFE, CHARLENE HOUGH CLAY; GARY E. COLEMAN AND WIFE, HOLLY H. COLEMAN; WALTER N. COLEY AND WIFE, CARROLL M. COLEY; HARRY W. CONE AND WIFE, ELENORE W. CONE; MAURICE C. CONNOLLY AND WIFE, MADELINE S. CONNOLLY; JERRY W. CRIDER AND WIFE, BELINDA W. CRIDER; RICHARD S. CROMLISH, JR. AND WIFE, SANDRA K. CROMLISH; LAURA DEATKINE AND HUSBAND, MICHAEL J. WARMACK; NORVELL B. DEATKINE AND WIFE, THERESA M. DEATKINE; ROBERT E. DEMERS AND WIFE, DONNA L. FOOTE; JAN S. DENEROFF AND KAREN GILL DENEROFF, AS CO-TRUSTEES OF THE DENEROFF FAMILY TRUST DATED NOVEMBER 2, 2006; PAUL A. DENETT AND WIFE, LUCY Q. DENETT; JEROME V. DIEKEMPER AND WIFE, KAREN M. DIEKEMPER; MARK W. DORSET AND WIFE, DEBORAH M. DORSET; MICHAEL R. DUPRE, SR. AND WIFE, MOLLY H. DUPRE; DONALD D. EDWARDS AND BETTY M. EDWARDS AS TRUSTEES OF THE EDWARDS FAMILY TRUST DATED DECEMBER 21, 1992; TROY D. ELLINGTON AND WIFE, BETTY S. ELLINGTON; PETER W. FASTNACHT AND WIFE, CAROLE ANN FASTNACHT; RICK D. FAUTEUX AND WIFE, BRENDA S. FAUTEUX; WILLIAM H. FOERTSCH AND WIFE, PAMELA G. FOERTSCH; LOUIS J. FRATTO, JR. AND WIFE, EILEEN M. FRATTO; ROBERT A. FUNK AND WIFE, BEATRIZ B. FUNK; ROBERT A. MINK AND WIFE, BEATRIZ B. FUNK, AS TRUSTEES OF THE FUNK

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LIVING TRUST DATED MARCH 22, 1999; JOLANTA T. GAL; JOSEPH GARBARINO AND WIFE, BETTY GARBARINO; ROBERT J. GETTINGS AND WIFE, KATHERINE ANNE GETTINGS; TIM GIBBLE AND WIFE, SUSAN GIBBLE; ROCKLIN E. GMEINER, JR. AND MARSHA A. GMEINER, TRUSTEES UNDER THE GMEINER FAMILY TRUST, DATED AUGUST 21, 2008; HARRY J. GRAHAM AND WIFE, MARYANNE S. GRAHAM; RICHARD A. GRANO AND WIFE, ANGELA M. GRANO; RODNEY LAVERNE GROW AND WIFE, JO ELAINE GROW; RONALD E. GUAY AND WIFE, DORIS M. GUAY; LEON J. HARRISON AND WIFE, MARGARET A. HARRISON; GLEN A. HATZAI AND WIFE, BARBARA A. HATZAI; KJELL HESTVEDT AND WIFE, ANNE T. HESTVEDT; LARRY H. HITES AND WIFE, KARI F. HITES; DENNIS E. HOFFACKER AND SUE E. HOFFACKER AS TRUSTEES OF THE SUE E. HOFFACKER REVOCABLE LIVING TRUST DATED FEBRUARY 9, 1998; JOHN E. HOWARD AND WIFE, MARYE C. HOWARD; JAMES S. HUTCHISON AND WIFE, PAMELA E. HUTCHISON; CHARLES L. INGRAM AND WIFE, RHONDA M. INGRAM; THOMAS M. INMAN AND WIFE, DIANE M. INMAN; WILLIAM R. JONAS AND WIFE, DIAN M. JONAS; MICHAEL G. KIDD AND WIFE, VIRGINIA G. KIDD; H. WILLIAM KUCHLER AND WIFE, PATRICIA A. KUCHLER; SCOTT C. LEE AND WIFE, CYNTHIA A. LEE; PETER J. LEWIS AND WIFE, JANET L. LEWIS; JAMES R. LITTLE AND WIFE, BONITA S. LITTLE; PATRICK M. LOONAM AND WIFE, PATRICIA E. LOONAM; DONALD G. LUFF AND WIFE, JUDITH A. LUFF; MARK E. MAINARDI AND FRANCES B. MAINARDI, AS TRUSTEES OF THE MAINARDI LIVING TRUST DATED JANUARY 23, 1997; ANTHONY MARGLIANO AND WIFE, ERIN MARGLIANO; JOSEPH E. McDERMOTT AND WIFE, MARY M. McDERMOTT; JOHN O. McELROY AND WIFE, KETHLEEN A. McELROY; GEORGE J. McQUILLEN AND WIFE, BARBARA J. McQUILLEN; STEVEN J. MEADOW AND BRENDA K. MEADOW, TRUSTEES OF THE MEADOW REVOCABLE TRUST DATED JANUARY 12, 2010; GEORGE EDWARD MERTENS, III AND WIFE, NANCY MERTENS; MICHAEL A. MICKIEWICZ, TRUSTEE OF THE MICHAEL A. MICKIEWICZ TRUST DATED APRIL 21, 2011; JACQUELINE A. MICKIEWICZ, TRUSTEE OF THE JACQUELINE A. MICKIEWICZ TRUST DATED APRIL 21, 2011; TERRY LEE MILLER AND WIFE, JOAN C. MILLER; TERRY STEPHEN MOLNAR; MARIAN E. CARLUCCI; MICHAEL R. MONETTI AND WIFE, IRENE A. MONETTI; MIMA S. NEDELCOVYCH AND WIFE, SALLY NEDELCOVYCH; WILLIAM W. NIGHTINGALE AND WIFE, BONNIE NIGHTINGALE; KEITH OKOLICHANY AND WIFE, LINDA A. OKOLICHANY; RICHARD L. PASTORIUS AND WIFE, BONNIE L. PASTORIUS; JOHN J. PATRONE AND WIFE, LINDA D. PATRONE; LOUIS M. PACELLI AND WIFE, MARLEEN S. PACELLI; LAURENCE F. PIAZZA AND WIFE, CHERYL ANN PIAZZA; JACK L. RAIDIGER AND WIFE, JUDY K. RAIDIGER; FRANK RINALDI AND WIFE, ROSEMARIE RINALDI; TIMOTHY T. ROSEBERRY AND WIFE, SUZANNE ROSEBERRY; EILEEN ROSENFELD AND ROBERT W. ROSENFELD, AS TRUSTEES UNDER THE EILEEN ROSENFELD LIVING TRUST DATED AUGUST 9, 2000; GEORGE M. SAVELL AND WIFE, MARIA VIOLET SAVELL; DENNIS J. SCHARF AND WIFE, CHERYL H. SCHARF; FRANCIS G. SCHAROUN AND WIFE, DEBORAH M. SCHAROUN; ROBERT L. SCHORR; JOHN FRANCIS SEELY AND WIFE, JANET CAVE SEELY; ERNEST J. SEWELL AND WIFE, ROWENA P. SEWELL; WILLIAM M. SHOOK AND WIFE, SUSAN M. SHOOK; CRAIG A. SKAJA AND WIFE, CHRISTINE C. SKAJA; CHARLES M. SMITH AND WIFE, LOIS S. SMITH; HELGA SMITH; THOMAS W. SMITH AND WIFE, MARTHA B. SMITH; ALAN H. SPIRO AND WIFE, RHONDA B. SPIRO; KENNETH STEEPLES AND WIFE, EILEEN P. STEEPLES; RICHARD L. STEINBERG AND WIFE, BARBARA J. STEINBERG; THOMAS STURGILL AND WIFE, LINDA STURGILL; SCOTT SULLIVAN AND WIFE, LORETTA F. SULLIVAN; JOHN M. SWOBODA AS TRUSTEE OF THE JOHN M. SWOBODA REVOCABLE LIVING TRUST DATED NOVEMBER 29, 2002; CAROL L. SWOBODA AS TRUSTEE OF THE CAROL L. SWOBODA REVOCABLE LIVING TRUST DATED OCTOBER 28, 2002; ROBERT C. THERRIEN AND WIFE, JANE A. THERRIEN; HARVEY L. THOMPSON AND WIFE, ROSALYN THOMPSON; PAULINE TOMPKINS; DERRAIL

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TURNER AND WIFE, PANSEY TURNER; WILLIAM E. WILKINSON AND WIFE, BETTY R. WILKINSON; JAMES M. WILLIAMS AND WIFE, PATRICIA E. WILLIAMS; THOMAS P. WOLFE AND WIFE, JULIA T. WOLFE; JAMES J. YORIO AND WIFE, DEBORAH L. YORIO; JOSEPH ZALMAN AND WIFE, VALERIE ZALMAN; EUGENE E. ZIELINSKI AND WIFE, REBECCA R. ZIELINSKI, PLAINTIFFS

v.

SEASCAPE AT HOLDEN PLANTATION, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A SEASCAPE AT HOLDEN PLANTATION, INC.; THE COASTAL COMPANIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, D/B/A MARK SAUNDERS LUXURY HOMES; EASTERN CAROLINAS' CONSTRUCTION & DEVELOPMENT LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A EASTERN CAROLINAS' CONSTRUCTION & DEVELOPMENT CORPORATION; COASTAL CONSTRUCTION OF EASTERN NC, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A COASTAL DEVELOPMENT & REALTY BUILDER, INC.; MAS PROPERTIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; MARK A. SAUNDERS; CAPE FEAR ENGINEERING, INC., A NORTH CAROLINA CORPORATION; EXECUTIVE BOARD OF SEASCAPE AT HOLDEN PLANTATION PROPERTY OWNERS ASSOCIATION, INC.; ERIC JOHNSON; CURT BOLDEN; HELEN STEAD; TONY BRADFORD CHEERS; CARROLL LIPSCOMBE; SEAN D. SCANLON; DANIEL H. WEEKS; RICHARD GENOVA; SUSAN LAWING; DEAN SATRAPE; GRACE WRIGLEY; BRUNSWICK COUNTY; BRUNSWICK COUNTY INSPECTION DEPARTMENT; ELMER DELANEY AYCOCK; HAROLD DOUGLAS MORRISON; ANTHONY SION WICKER; DAVID MEACHAM STANLEY, DEFENDANTS

No. COA14-1088

Filed 2 June 2015

**1. Appeal and Error—interlocutory orders and appeals—derivative action—some claims dismissed**

There was appellate jurisdiction in an action involving a derivative action by members of a property owner's association where claims remained pending, the trial court did not certify its orders for immediate appeal, and there was the potential for multiple trials on the same issues.

**2. Jurisdiction—standing—derivative claims—property owners association**

The trial court did not err by concluding the plaintiffs lacked standing to bring derivative claims against third parties or by denying plaintiffs' motion to dismiss a property owners association (POA) intervenor complaint. All of plaintiffs' claims were derivative pursuant to N.C.G.S. § 55A-7-40 in the North Carolina Nonprofit Corporation Act. Although the POA contended that plaintiffs failed to comply with the pleading requirements of N.C.G.S. § 55A-7-40(b), there was no need to resolve the issue because a prior decision rendered it the law of the case that the POA had the right to intervene

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in this litigation. The POA did so by filing an intervenor complaint alleging substantially the same claims against the third parties that plaintiffs brought derivatively.

**3. Jurisdiction—standing—derivative claims—property owners association and members bringing same claims**

No prior North Carolina appellate court decision has applied the principles of standing where both a corporation and its shareholders attempted to bring the same claims against third parties. The determination must be (1) whether the steps taken by the property owners association (POA) to institute the litigation were valid and (2) what legal effect the POA's filing of the intervenor complaint had on plaintiffs' derivative action.

**4. Corporations—derivative claims—property owners association and members—claim initiated by POA—members lacked standing**

In an action in which property owners and, eventually, the property owners association (POA) asserted the same claims against third parties, the decision to initiate litigation against the third parties was a valid act of the Executive Board for the POA under the By-Laws and taken in a Special Meeting at which two directors constituted a quorum and the majority of disinterested directors. The "real party in interest" for the derivative claims brought by plaintiffs was the POA. The requirement that a shareholder exhaust all intra-corporate remedies and make a demand on the corporation in order to acquire standing, unless such demand would be futile, was consistent with the principle that standing will not be conferred to the shareholder if the corporation chooses to assert claims for itself. Because the POA elected to bring its own claims against the third parties, it must be concluded that plaintiffs did not have standing to bring those same claims on the POA's behalf.

**5. Statutes of Limitation and Repose—derivative claims—property owners association**

In an action involving derivative claims against third parties by the members of a property owners association (POA), the statute of limitations was an insurmountable bar to recovery against five Executive Board members and plaintiffs failed to raise arguments on appeal relating to the dismissal of any of the other claims against the Executive Board members or any claims against the Executive Board as an entity.

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**6. Fraud—constructive—claim against property owners association board members—properly dismissed**

A complaint failed to state a valid claim of constructive fraud against the dismissed property owners association (POA) Board members where it alleged that the POA knew or should have known of a defective bulkhead at least two years after the dismissed Executive Board members had stepped down from the board. There was similarly no allegation that the dismissed Executive Board members knew about the developers' installation of the perforated pipe.

Judge Robert N. HUNTER, JR., concurring.

Appeal by plaintiffs from orders entered 9, 12, and 22 May 2014 by Judge W. David Lee in Brunswick County Superior Court. Heard in the Court of Appeals 18 March 2015.

*Whitfield Bryson & Mason LLP, by Daniel K. Bryson and Matthew E. Lee, for plaintiffs-appellants.*

*Ward and Smith, P.A., by Ryal W. Tayloe and Allen N. Trask, III, for intervenor-appellee SeaScape at Holden Plantation Property Owners Association, Inc.*

*Wall Templeton & Haldrup, P.A., by Mark Langdon and William W. Silverman, for defendants-appellees SeaScape at Holden Plantation LLC, The Coastal Companies LLC, and Eastern Carolinas Construction and Development LLC.*

*Hamlet & Associates, PLLC, by H. Mark Hamlet and Rebecca A. Scherrer, for defendant-appellee Coastal Construction of Eastern NC, LLC.*

*Young Moore and Henderson, P.A., by Robert C. deRosset, and Graebe Hanna & Sullivan, PLLC, by Christopher T. Graebe, for defendants-appellees Mark A. Saunders and MAS Properties, LLC.*

*Cranfill Sumner & Hartzog LLP, by John D. Martin and Patrick M. Mincey, for defendant-appellee Cape Fear Engineering, Inc.*

*Chesnutt, Clemmons & Peacock, P.A., by Gary H. Clemmons, for defendants-appellees Daniel Weeks, Susan Lawing, Richard Genova, Sean Scanlon, Dean Satrape, and the Executive Board of*

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*SeaScape at Holden Plantation Property Owners Association, Inc.*

INMAN, Judge.

Plaintiffs are 262 property owners in SeaScape at Holden Plantation (“SeaScape”), a residential subdivision near Holden Beach, North Carolina. They appeal from the trial court’s orders: (1) dismissing plaintiffs’ derivative claims brought on behalf of SeaScape at Holden Plantation Property Owners Association, Inc. (“the POA”) against third parties involved in the development and construction of SeaScape<sup>1</sup>; (2) dismissing plaintiffs’ derivative claims against certain members of the POA’s Executive Board and the Executive Board itself<sup>2</sup>; and (3) denying plaintiffs’ motion to dismiss the POA’s intervenor complaint. After careful review, we affirm the trial court’s orders.

Although the facts of this case are unique, the legal issues presented are characteristic of corporate governance disputes between homeowners and managing bodies of planned communities. Among other things, this Court must consider the principles of derivative litigation as well as the statutory framework for intracorporate governance under the North Carolina Planned Community Act and the North Carolina Nonprofit Corporation Act.

### Background

Plaintiffs allege the following in their Fourth Amended Verified Complaint filed 31 March 2014: In 1999, Mark Saunders (together with related LLCs<sup>3</sup>, “the Developers”) began developing SeaScape, an upscale 542-lot coastal residential subdivision. The SeaScape plans provided for

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1. As property owners at SeaScape, plaintiffs are members of the POA. The third parties that they sued derivatively are: Mark Saunders; MAS Properties, LLC; Coastal Construction of Eastern NC, LLC; SeaScape at Holden Plantation, LLC; The Coastal Companies, LLC; Eastern Carolinas’ Construction & Development, LLC; Cape Fear Engineering, Inc.; Brunswick County; Brunswick County Inspection Department; Elmer Delaney Aycock; Harold Douglas Morrison; Anthony Sion Wicker; and David Heacham Stanley (collectively “the third parties”).

2. The Executive Board members dismissed from the suit are Daniel H. Weeks; Susan Lawing; Sean Scanlon; Richard Genova; and Dean Satrape.

3. Saunders is alleged to be the founder, chief executive officer, and/or principal member/owner of SeaScape LLC; MAS Properties, LLC; The Coastal Companies, LLC; Eastern Carolinas’ Construction & Development, LLC; and Coastal Construction of Eastern NC, LLC.

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a 75-slip marina, a concrete bulkhead to protect the shore from natural erosion, and the preservation of existing natural ponds.

The Developers drafted the POA's Master Declaration, reserving the power to veto any action of the POA and to appoint and dismiss Executive Board members until 31 December 2020. Under the Master Declaration, the POA has no right to remove, revoke, or modify any right or privilege of the Developers. Plaintiffs allege that the majority of the members appointed to the Executive Board since SeaScape's creation have been employees of the Developers, and therefore, the Executive Board has an inherent conflict of interest in holding the Developers liable for the defective construction of the SeaScape common areas.

Construction on the bulkhead began in or about 2001, almost two years before the Developers applied for a building permit from Brunswick County. On plaintiffs' information and belief, Brunswick County building inspectors knew or should have known that the marina and bulkhead were being constructed without required permits or inspections but ignored the ongoing construction.

Defects in the bulkhead became apparent in 2005, when two major storms hit the area. Although it should have withstood maximum flood conditions, the SeaScape bulkhead was damaged and moved approximately six inches. On or around 19 October 2006, the Developers asked Cape Fear Engineering, which initially oversaw construction and engineering, to determine the cause of the damages and repair the bulkhead. Cape Fear made no repairs over the following three years.

On 21 December 2009, four years after the first damage to the bulkhead was discovered, Saunders conveyed the marina and bulkhead to the POA. After another storm hit in September 2010, the bulkhead moved an additional six inches.

Plaintiffs also allege that the Developers improperly installed perforated storm sewer pipes around two natural ponds at SeaScape, despite warnings from hydrogeological investigators that such pipes could drain the ponds. Since the installation of the perforated pipes, both of the ponds have completely drained. Plaintiffs complained about the ponds, and although the Developers made assurances that the ponds would be restored, they never informed plaintiffs that improper piping had been installed. In June 2009, plaintiffs discovered the perforated piping.

Plaintiffs allege they demanded that the Executive Board require the Developers to correct the defects in the SeaScape common areas. Plaintiffs claim that, because it is essentially controlled by the

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Developers, the Executive Board has taken no action adverse to those parties and instead attempted to pass the cost of repairs to the POA members.

In 2012, two of the five members on the POA Executive Board—Helen Stead (“Stead”) and Curt Bolden (“Bolden”)—had no employment relationship with the Developers or any of the third parties. At a Special Meeting on 21 September 2012, Stead and Bolden voted to initiate litigation against the third parties seeking repair or to recover costs for damages to the common areas. The three other Executive Board members at that time—Eric Johnson (“Johnson”), Brad Cheers (“Cheers”), and Carroll Lipscombe (“Lipscombe”)—abstained from voting, presumably due to their status as employees of the Developers.

Plaintiffs filed their first complaint on 5 October 2012, almost two weeks after the Special Meeting vote. In addition to various individual claims, plaintiffs brought claims derivatively on behalf the POA against members of the Executive Board and the third parties involved in the development and construction of the common areas. The POA moved to intervene as a party-plaintiff on 27 November 2012. Attached to its motion to intervene was a draft complaint which included essentially the same claims against the third parties as did plaintiffs’ complaint, but omitted claims against Executive Board members. The trial court’s denial of the POA’s motion to intervene was reversed by this Court on 21 January 2014. *See Anderson v. Seascape at Holden Plantation, LLC*, \_\_ N.C. App. \_\_, 753 S.E.2d 691 (2014) (“*Anderson I*”).

On 14 February 2014, less than one month after this Court’s reversal, the POA filed its Amended Intervenor Complaint, alleging the same claims against the third parties that plaintiffs initially pursued derivatively. Plaintiffs filed their Fourth Amended Verified Complaint on 31 March 2014, adding the POA as a nominal defendant. The Fourth Amended Verified Complaint contained no mention of the POA’s Intervenor Complaint or the Special Meeting vote in 2012 to pursue litigation against the third parties.

Shortly after plaintiffs filed the Fourth Amended Verified Complaint, the POA, the third parties, and Executive Board members moved to dismiss the derivative claims brought by plaintiffs, and plaintiffs moved to dismiss the POA’s intervenor complaint. The trial court granted the motions to dismiss plaintiffs’ derivative claims against the third parties, against five of eleven Executive Board members, and against the Executive Board as an entity. The trial court also denied plaintiffs’



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motion to dismiss the POA's intervenor complaint. Plaintiffs filed timely notice of appeal from these orders.

**Grounds for Appellate Review**

[1] We must first address the issue of appellate jurisdiction. Because outstanding individual and derivative claims remain pending before the trial court, the orders from which plaintiffs appeal are interlocutory. *See, e.g., Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). We note that the trial court here did not certify its orders for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 54 (2013). However, appeal from an interlocutory order is proper where the order deprives the appellant of a substantial right which would be lost without immediate review. N.C. Gen. Stat. § 1-277(a) (2013); *N.C. Dep’t of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995).

The avoidance of two trials on the same issues can constitute a substantial right and therefore would warrant immediate appeal. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). This Court has previously held that a substantial right was affected where an order dismissed claims against one of several “collusive” defendants, thus raising the possibility of multiple trials against different members of the same group where the same issues would be in contention. *See Jenkins v. Wheeler*, 69 N.C. App. 140, 142, 316 S.E.2d 354, 356 (1984).

The potential for multiple trials on the same issues exists in this case. Plaintiffs and the POA are wrestling to bring substantially the same claims against the third parties, so that if the dismissal of plaintiffs' derivative claims were reversed after entry of final judgment on the POA's claims, certain issues would have to be relitigated. Plaintiffs also risk multiple trials against two groups of Executive Board members—those who remain at this stage and those who were dismissed by the trial court—based on the same factual allegations. Accordingly, we conclude that plaintiffs have demonstrated that a substantial right would be lost without immediate appellate review of the trial court's orders, and we will reach the merits of their arguments here. *See Jenkins*, 69 N.C. App. at 142, 316 S.E.2d at 356; *see also Green*, 305 N.C. at 608, 290 S.E.2d at 596.

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**I. Derivative Claims Against Third Parties**

**[2]** Plaintiffs first argue that the trial court erred by concluding that they did not have standing to bring derivative claims against the third parties. They also contend that the trial court erred by denying their motion to dismiss the POA's intervenor complaint. We disagree with both contentions.

The third parties and the POA moved to dismiss plaintiffs' derivative claims pursuant to Rule 12(b)(6) and/or Rule 12(c) of the North Carolina Rules of Civil Procedure. "Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Meadows v. Iredell County*, 187 N.C. App. 785, 787, 653 S.E.2d 925, 927 (2007) (internal quotation marks omitted). "One such bar to recovery is a lack of standing, which may be challenged by a motion to dismiss for failure to state a claim upon which relief may be granted." *Id.* "The purpose of Rule 12(c) is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 390, 617 S.E.2d 306, 309 (2005) (quotation marks omitted). For purposes of review on either ground, this Court conducts a *de novo* review of the pleadings to assess their legal sufficiency, *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007), and treats the factual allegations in the complaint as true, *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 760, 529 S.E.2d 693, 694 (2000); *Thompson v. Town of Warsaw*, 120 N.C. App. 471, 473, 462 S.E.2d 691, 692 (1995).

All of plaintiffs' claims at issue in this appeal are derivative. In general terms, "[a] derivative proceeding is a civil action brought by a shareholder in the right of a corporation, while an individual action is one a shareholder brings to enforce a right which belongs to him personally." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000) (citation and quotation marks omitted). As members of the POA, a nonprofit corporation, plaintiffs brought their derivative claims pursuant to N.C. Gen. Stat. § 55A-7-40 (2013) under the North Carolina Nonprofit Corporation Act.

In the first instance, the POA contends plaintiffs failed to comply with the pleading requirements of section 55A-7-40(b). Section 55A-7-40(b) provides that a complaint brought in the right of a nonprofit corporation by its members "shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Plaintiffs argue

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that they were not required to make a demand on the POA prior to filing suit because the words “if any” in section 55A-7-40(b) demonstrate the General Assembly’s intention to allow for the equitable exception of futility to the demand requirement.<sup>4</sup> In the alternative, plaintiffs contend that they satisfied the demand requirement and sufficiently pled their demand attempts in the Fourth Amended Verified Complaint.

In this case, we need not resolve the parties’ dispute regarding the potential pleading requirements of demand and futility in section 55A-7-40 . This Court’s prior decision renders it the law of the case that the POA has the right to intervene in this litigation, *Anderson I*, \_\_ N.C. App. at \_\_, 753 S.E.2d at 698, and the POA has done so by filing an intervenor complaint alleging substantially the same claims against the third parties that plaintiffs brought derivatively.

Even if we assume that all pleading requirements have been met, we cannot conclude that plaintiffs therefore automatically prevail on the issue of standing. The dispositive issue is who — the POA, plaintiffs, or both — has standing to bring these claims where both groups seek the exclusive right to do so.

No prior North Carolina appellate court decision has applied the principles of standing where both a corporation and its shareholders attempt to bring the same claims against third parties. This appears to be the first case to reach our appellate courts that features corporate assent to demand. *See Cox, Heroes in the Law: Alford v. Shaw*, 66 N.C. L. Rev. 565, 577 (1988) (“In no reported case has a special litigation committee recommended continuance of the suit against a colleague. Even more telling is the absence of any reported instance in which the directors have approved a suit’s continuance in response to the plaintiff’s demand.”). In order to resolve this issue, we must determine: (1) whether the steps taken by the POA to institute this litigation were valid; and (2) what legal effect the POA’s filing of the intervenor complaint had on plaintiffs’ derivative claims.

Here, in deciding to take action against the third parties, the POA availed itself of the statutory procedure set out in N.C. Gen. Stat. § 55A-8-31 (2013) under the Nonprofit Corporation Act for conducting

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4. Plaintiffs cite for support of this argument section 55A-7-40’s predecessor in the business corporation context—N.C. Gen. Stat. § 55-7-40—which contains nearly identical language. *See* N.C. Gen. Stat. § 55-7-40(b) (1990) (repealed); *see also Allen ex rel. Allen & Brock Const. Co., Inc. v. Ferrera*, 141 N.C. App. 284, 288, 540 S.E.2d 761, 765 (2000) (noting that section 55-7-40(b) allowed for a futility exception to the demand requirement where the directors in control of the corporation were alleged of wrongdoing).

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a “conflict of interest transaction.” Section 55A-8-31 provides that a transaction by the corporation is not voidable solely on the ground that one or more directors has a direct or indirect conflict of interest where one of the following is true:

- (1) The material facts of the transaction and the director’s interest were disclosed or known to the board of directors or a committee of the board and the board or committee authorized, approved, or ratified the transaction;
- (2) The material facts of the transaction and the director’s interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction; or
- (3) The transaction was fair to the corporation.

N.C. Gen. Stat. § 55A-8-31(a)(1)-(3). Additionally, section 55A-8-31 alters the requirement for achieving a quorum to vote on a conflict of interest transaction:

[A] conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction shall not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section.

N.C. Gen. Stat. § 55A-8-31(c).

It is undisputed that two of the five members on the Executive Board in 2012—Stead and Bolden—had no employment relationship with the Developers or any of the third parties. At a Special Meeting on 21 September 2012, convened nearly two weeks before plaintiffs filed their first complaint, Stead and Bolden voted to initiate litigation against the third parties seeking to hold them to account for damages to the common areas. Johnson, Cheers, and Lipscombe abstained from voting.

The parties dispute the legal effect of the Special Meeting vote. Plaintiffs contend that N.C. Gen. Stat. § 47F-3-108(c) (2013) of the North Carolina Planned Community Act requires that meetings of the Executive Board be held in accordance with *Robert’s Rules of Order*

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*Newly Revised* (“*Robert’s Rules*”) unless the POA’s Bylaws state otherwise. Because the Bylaws are silent on the effect of an abstention vote, plaintiffs argue *Robert’s Rules* dictate that an abstention has the same effect as a vote of “no.” Thus, they argue that the abstentions of Johnson, Cheers, and Lipscombe outnumbered the two votes in favor of initiating litigation at the Special Meeting and rendered the two votes of Stead and Bolden ineffective to constitute an act of the Executive Board. We are unpersuaded.

N.C. Gen. Stat. § 47F-3-102 provides that the POA may “[i]nstitute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community,” thus granting the POA authority to sue the third parties. Article VII, Section 4 of the Bylaws states: “Every act or decision done or made by a majority of the directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Executive Board.” As discussed above, Stead and Bolden comprised a majority of disinterested directors when they decided to initiate litigation; therefore, as defined in section 55A-8-31(c), a quorum was present at the Special Meeting. Subsection (c) provides explicitly that “[t]he presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken” under section 55A-8-31. Therefore, a plain reading of Article VII, Section 4 of the Bylaws, section 47F-3-102, and section 55A-8-31 leaves no doubt that: (1) the POA had authority to sue the third parties or intervene in ongoing litigation against them; (2) Stead and Bolden voted to sue the third parties in a Special Meeting at which they constituted a quorum and the majority of disinterested directors; and therefore (3) the decision to initiate litigation against the third parties was a valid act of the Executive Board for the POA.

**[3]** Having determined that the POA was properly authorized by a quorum of disinterested directors to file the intervenor complaint, we must now turn to the issue of standing.

“By its very nature, a derivative action requires that the shareholder bringing such an action have proper standing to bring the action.” *Robbins v. Tweetsie R.R., Inc.*, 126 N.C. App. 572, 577, 486 S.E.2d 453, 455 (1997). “As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing.” *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007). There are certain procedural and pleading requirements necessary to confer standing on shareholders in a derivative action, such as exhaustion of intra-corporate remedies, prior demand on directors, and contemporaneous ownership. *See Alford v. Shaw*, 320 N.C. 465, 471, 358 S.E.2d 323, 327 (1987);

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*Swenson v. Thibaut*, 39 N.C. App. 77, 100, 250 S.E.2d 279, 294 (1978). Due to the unique circumstances of this case, the procedural aspects of standing alone are insufficient to resolve this dispute. We must examine standing in light of the broader principles of corporate governance.

Generally, the proper plaintiff to bring a civil action is a “real party in interest.” N.C. Gen. Stat. § 1-57 (2013). “A real party in interest . . . is benefited or injured by the judgment in the case, . . . [and] has the legal right to enforce the claim in question.” *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18-19, 234 S.E.2d 206, 209 (1977) (citations and quotation marks omitted); see also *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008) (“As a general matter, the North Carolina Constitution confers standing on those who suffer harm[.]”).

In the context of derivative litigation, the corporation is the real party in interest, because it is the corporation that has suffered the alleged harm, not the individual shareholders. See *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23, 91 L. Ed. 1067, 1073 (1947) (“The [derivative action] which such a plaintiff brings before the court is not his own but the corporation’s. It is the real party in interest and he is allowed to act in protection of its interest somewhat as a ‘next friend’ might do for an individual, because it is disabled from protecting itself.”); see also *Ashburn v. Wicker*, 95 N.C. App. 162, 166, 381 S.E.2d 876, 879 (1989), *abrogated on other grounds*, *Alford*, 327 N.C. at 534, 398 S.E.2d at 449.

Given that the corporation is the real party in interest, it follows that derivative actions are typically appropriate only when a corporation is unwilling or unable to litigate its claims for itself. “[Derivative suits] are one of the remedies which equity designed for those situations where the management through fraud, neglect of duty or other cause *declines to take the proper and necessary steps to assert the rights which the corporation has.*” See *Meyer v. Fleming*, 327 U.S. 161, 167, 90 L. Ed. 595, 600 (1946) (emphasis added).

It is important to remember the true nature of a suit of this character. The stockholders, suing and intervening, do not prosecute the cause in their own right and for their own benefit but in the right of the corporation and for its benefit. While nominally the company is named as a defendant, actually and realistically it is the true complainant, for any avails realized from the litigation belong to it and it alone. *The only circumstance under which the individual stockholder is permitted to bring the suit is either the*

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*refusal of those in control of the company to bring the proceeding or the fact that their relation to the subject of the complaint is such that demand upon those in control to bring the suit would be futile.*

*Swenson*, 39 N.C. App. at 99, 250 S.E.2d at 293 (emphasis added) (citation omitted).

The POA is a nonprofit corporation organized in a typical manner, with its affairs managed by a group of directors.

The quintessential characteristic of corporate governance is private decision-making by directors as the appointed delegates of shareholders. Shareholders commit themselves to having their commercial affairs controlled by a board of directors when they make the decision to put their investment capital at risk in a corporation. In instituting derivative actions, shareholders seek to be released from this commitment which they have made to rule by directors. Shareholders are attempting to substitute their litigation decisions for those of their directors. This is the dilemma which shareholders derivative litigation presents to the courts. By entertaining such litigation, courts are required to sanction a fundamental change in the most basic of intra-corporate relationships. Derivative litigation is predicated upon the willingness of the court to reverse the roles of the directors and shareholders in corporate decision-making. . . . The courts wish to accommodate meritorious derivative litigation while at the same time preserving, to the greatest extent possible, the traditional intra-corporate relationship between shareholders and directors.

*Brown*, *Shareholder Derivative Litigation and the Special Litigation Committee*, 43 U. PITT. L. REV. 601, 644 (1982).

Based on the foregoing principles and the facts specific to this case, we hold that the POA, not plaintiffs, has standing to sue the third parties. This conclusion is dependent upon the evolution of respective actions taken by plaintiffs and the POA and the status of those actions at this juncture. Nothing in this opinion should be construed to preclude homeowners from bringing derivative claims in the absence of proper corporate action.

As discussed above, the “real party in interest” for the derivative claims brought by plaintiffs is the POA. *See Ashburn*, 95 N.C. App. at 166,

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381 S.E.2d at 879. The requirement that a shareholder exhaust all intra-corporate remedies and make a demand on the corporation in order to acquire standing, unless such demand would be futile, is consistent with the principle that standing will not be conferred to the shareholder if the corporation chooses to assert claims for itself. *See Fleming*, 327 U.S. at 167, 90 L. Ed. at 600; *Swensen*, 39 N.C. App. at 99, 250 S.E.2d at 293. Because the POA has elected to bring its own claims against the third parties, we must conclude that plaintiffs do not have standing to bring those same claims on the POA's behalf.

Nevertheless, plaintiffs cite two New Jersey decisions for the proposition that members of a property owners' association can bring derivative claims on behalf of the association whenever it is under the control of the developer, *regardless* of the association's willingness to bring the claims for itself. *See Siller v. Hartz Mountain Associates*, 461 A.2d 568, 574 (N.J. 1983) (noting in *obiter dictum* that under New Jersey law homeowners may sue a developer on behalf of a homeowners' association "irrespective of its governing board's willingness to sue during the period of time that the association remains under the control of the developer"); *Harbor View Condominium Ass'n, Inc. v. Manhattan Skyline III*, 2011 WL 3207956 (N.J. Super. Court 2011) (unpublished) (citing *Siller* for the same proposition). These decisions are not binding on this Court. *Morton Buildings, Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005).

Furthermore, neither of the New Jersey decisions applied the rule relied upon by plaintiffs. In *Siller*, the court concluded that because the dispute was "confined to the common areas and facilities, [it] agree[d] with the trial court and the Appellate Division that the Association had exclusive standing to maintain the action." *Siller*, 461 A.2d at 575. The *Harbor View* decision, which was unpublished and focused on the doctrine of laches, merely noted *Siller's dicta* in its own *dicta*. Neither *Siller* nor *Harbor View* applied this reasoning to allow homeowners to bring derivative claims.

In any event, we do not find the rule alluded to in the New Jersey decisions persuasive here. This bright-line rule would reverse the relationship between a property owners' association's members and directors regarding litigation decisions whenever the developer has control over the board. Such a rule alters the traditional principles of corporate governance in the context of property owners' association litigation, and its application here would usurp the role of our legislature in striking the appropriate balance of power among members and directors of a property owners association.



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The relationships between the parties here is not unique to this case, but were clearly authorized by our General Assembly in the North Carolina Planned Community Act. *See* 1998 N.C. Sess. Laws § 199. Under N.C. Gen. Stat. § 47F-3-103(d) (2013), a planned community declaration “may provide for a period of declarant control of the association, during which period a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board.” The Developers, as the declarants, were therefore well within their statutory rights to include a period of control over the Executive Board into the terms of Master Declaration, which plaintiffs assented to when they purchased their homes subject to the conditions in the property management agreement. This arrangement is specifically authorized under both the Uniform Planned Community Act, approved by the national Conference of Commissioners on Uniform State Laws in 1980, and the North Carolina Condominium Act, which sets out similar rules for North Carolina condominium developers. *See* Hetrick, *Of “Private Governments” and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 Campbell L. Rev. 1, 60-61 (1999) (noting that “[i]t is typical with planned communities that the declarant controls the association in the early stages of the development”); *see also* N.C. Gen. Stat. § 47C-3-103 cmt. 3 (2013) (referring to declarant control over a condominium owners’ association during initial stages of development as a “practical necessity”).

We acknowledge plaintiffs’ concern that, given the declarant’s statutory right to appoint and remove members of a property owners’ association’s executive board, the association itself may be prone to “give away the store” rather than pursue litigation against the developer as vigorously as property owners believe necessary. However, the fact that the declarant has the ability to appoint the members of an executive board does not mean that the board will always refuse to take adverse action against the declarant. We are satisfied that the statutory frameworks in both the Planned Community Act and the Nonprofit Corporation Act utilized here contain sufficient safeguards to prevent that type of abuse.

The members of the Executive Board are required by N.C. Gen. Stat. § 55A-8-30 to discharge their duties in good faith and in the manner reasonably believed to be in the best interests of the POA. The Special Meeting vote to initiate litigation against the third parties would not have been effective pursuant to section 55A-8-31 without at least two disinterested members of the Executive Board, demonstrating at the very least a threshold structural safeguard. Plaintiffs could have challenged whether the Special Meeting vote fit into one of the three categories

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in section 55A-8-31(a), but there is no indication in the record or their briefs that they did so. Plaintiffs also contend that the POA's delay in initiating litigation demonstrates a refusal of plaintiffs' demands, but they overlook the fact that the Special Meeting vote took place almost two weeks before plaintiffs initiated this lawsuit.

Finally, we note that plaintiffs' derivative claims for breach of fiduciary duty, constructive fraud, actual fraud, and civil conspiracy against certain Executive Board members are still viable. Defendants Stead, Bolden, Johnson, Cheers, Lipscombe, and Wrigley have not appealed the trial court's denial of their motion to dismiss these claims. More importantly, plaintiffs have not been deprived of standing to bring derivative claims against the Executive Board members because the POA *has* refused to bring those claims, and it would be futile to ask the Executive Board members to sue themselves.

In sum, without more, plaintiffs' bare assertion that the POA cannot be trusted to litigate its own claims against the third parties is premature and at this stage of the proceedings cannot overcome: (1) the POA's decision was made by disinterested directors through a valid act of the Executive Board, and (2) well-settled law and principles of corporate governance requiring refusal by the corporation or futility before members may litigate claims on its behalf. *See Fleming*, 327 U.S. at 167, 90 L. Ed. at 600; *Swensen*, 39 N.C. App. at 99, 250 S.E.2d at 293. Accordingly, we conclude that the POA, not plaintiffs, had standing to sue the third parties for the alleged harm done to the corporation. Accordingly, we affirm the trial court's dismissal of plaintiffs' derivative claims against the third parties for lack of standing, and we affirm the trial court's denial of plaintiffs' motion to dismiss the POA's intervenor complaint.<sup>5</sup>

## II. Derivative Claims Against Five Executive Board Members

[5] Plaintiffs next argue that the trial court erred by dismissing their derivative claims against five of the eleven Executive Board members named as defendants in the Fourth Amended Verified Complaint and the Executive Board itself. The trial court concluded that the statute of limitations was an insurmountable bar to recovery against the five Executive Board members, and that the complaint otherwise failed to

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5. Given our ruling that the POA, and not plaintiffs, has standing to pursue these claims against the third parties because of the POA's actions following plaintiffs' demands, we need not address: (1) whether plaintiffs' derivative claims were rendered moot upon the filing of the POA's intervenor complaint; (2) the Developers' argument that some plaintiffs were not members of the POA at the time of the alleged wrongdoing; or (3) arguments pertaining to the rule in *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997).

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state a claim upon which relief could be granted against the Executive Board. We affirm the trial court's order.

We review an order granting a 12(b)(6) motion for whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. *Country Club of Johnston County, Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

It appears from the record that the derivative claims dismissed by the trial court against the Executive Board members were for: (1) breach of fiduciary duty; (2) constructive fraud; (3) actual fraud; and (4) civil conspiracy. The only arguments plaintiffs have raised on appeal regarding their derivative claims against the Executive Board members is that the trial court improperly applied a three-year statute of limitations for the claim of constructive fraud when it should have instead applied the ten-year limitation under N.C. Gen. Stat. § 1-56 (2013) and that the claim of constructive fraud was sufficiently pled.

Plaintiffs failed to raise arguments on appeal relating to the dismissal of any of the other claims against the Executive Board members or any claims against the Executive Board as an entity. Accordingly, any such arguments are deemed abandoned. *See* N.C. R. App. P. 28(a) (2013) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *see also Tyll v. Berry*, \_\_ N.C. App. \_\_, \_\_, 758 S.E.2d 411, 423 (2014).

**[6]** Turning to plaintiffs' sole remaining argument on appeal in this context, we conclude that even under a ten-year statute of limitations, plaintiffs' derivative claims of constructive fraud against former Executive Board members Weeks, Lawing, Scanlon, Genova, and Satrape were properly dismissed.

The elements of constructive fraud are: "(1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004).

Plaintiffs allege that these Executive Board members served to benefit the Developers (and by extension themselves) and harm the POA in

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the following ways: (1) by concealing or failing to disclose the defects to the common areas; (2) failing to remedy the defects; (3) accepting ownership of defective common areas; (4) paying for maintenance and repair work to the common areas while they were owned by the Developers; and (5) failing to take adverse action against the Developers.

However, none of the five dismissed Executive Board members served in the capacity of board member later than 2006. The Developers conveyed the ponds and the bulkhead to the POA in December 2008 and December 2009, respectively. The complaint alleges that “the Board knew, or should have known, of the defective condition of the bulkhead *at that time*”—after December 2008 and 2009—at least two years after the dismissed Executive Board members had stepped down from the board. There are no facts alleged in the complaint indicating when the perforated pipes were installed or when the ponds began to drain. There is similarly no allegation that the dismissed Executive Board members knew about the Developers’ installation of the perforated pipes. All other allegations regarding the bulkhead took place at least two years after the dismissed Executive Board members had left the board.

In short, the Fourth Amended Verified Complaint contains no allegation that the five dismissed Executive Board members took advantage of their positions of trust to benefit themselves and harm the corporation—two essential elements of the claim of constructive fraud—during their years of service on the board when they owed a duty to the corporation. *See White*, 166 N.C. App. at 294, 603 S.E.2d at 156; *see also Trillium Ridge Condominium Ass’n, Inc. v. Trillium Links & Village, LLC*, \_\_ N.C. App. \_\_, \_\_, 764 S.E.2d 203, 220 (2014) (affirming summary judgment for the defendants on a claim of constructive fraud where the plaintiff adduced no evidence “tending to show that [the defendants] sought to benefit themselves in the transaction”).

Accordingly, the Fourth Amended Verified Complaint failed to state a valid claim of constructive fraud against the dismissed Executive Board members. We therefore affirm the trial court’s order, albeit for a reason other than the statute of limitations. *See Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 519, 257 S.E.2d 109, 113 (1979) (“A correct ruling by a trial court will not be set aside merely because the court gives a wrong or insufficient reason for its ruling. The ruling must be upheld if it is correct upon any theory of law.” (citation omitted)).

### Conclusion

For the foregoing reasons, we affirm the trial court’s orders: (1) dismissing plaintiffs’ derivative claims against the third parties;

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(2) dismissing plaintiffs' derivative claims against Weeks, Lawing, Scanlon, Genova, Satrape, and the Executive Board; and (3) denying plaintiffs' motion to dismiss the POA's intervenor complaint.

AFFIRMED.

Judge ELMORE concurs.

Judge HUNTER, JR. concurs in result only by separate opinion.

HUNTER, JR., Robert N., Judge, concurring.

I join the opinion of the majority because I concur the trial court's decisions were correct under our current statutes as discussed in detail in the majority opinion.

I write separately to discuss the "exclusive standing" issue. The majority opinion, in its analysis, relies very heavily upon analogies to shareholders and corporate governance of stock companies. In my opinion this metaphor is imperfect. In the corporate world, shareholders invest money and purchase share certificates which may be a voting share and if so, it gives them the right to elect directors to guide their investments. The risk of loss of the initial investment is the limitation of monetary liability. In a homeowner's association, a purchaser buys a home and has a right to participate in the management of the association which has the ability to assess each homeowner with common expenses to cover common areas, maintenance, and litigation costs. The risk of loss is an ongoing concern to the homeowner.

Here, unlike the corporate structure, homeowners within the residential subdivision SeaScape at Holden Plantation do not enjoy the right to replace the management. Indeed they are estopped by agreement (the Master Agreement) and our prior precedent from complaining about this issue because they have agreed to these conditions upon purchase. I would hold they have "standing" but cannot meet the preconditions of demand or exhaustion of pre-corporate remedies to bring their derivative actions. I realize that our precedents discuss this issue as a standing issue, however I would not hold that the homeowner's association has "exclusive standing" even if such demand is made. Such a holding may prevent the ability of all parties with interests in a legal dispute to join in and have all claims determined efficiently. In my view, these homeowners have standing as intervenors under N.C. Gen. Stat. § 1A-1, Rule 24, which provides for intervention of right and permissive intervention,

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should the trial court in its discretion decide that such intervention would be meritorious. N.C. Gen. Stat. § 1A-1, Rule 24 (2013). Relevant to this action, N.C. Gen. Stat. § 1A-1, Rule 24 provides:

(a) Intervention of right.—Upon timely application anyone shall be permitted to intervene in an action:

....

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.<sup>1</sup>

(b) Permissive intervention.—Upon timely application anyone may be permitted to intervene in an action.

....

(2) When an applicant's claim or defense and the main action have a question of law or fact in common.

Allowing intervention under N.C. Gen. Stat. § 1A-1, Rule 24<sup>2</sup> and subsequent judicial determination at a fairness hearing on any settlement would, in my opinion, make unnecessary the New Jersey solution to this kind of litigation. In this matter however, I realize my concurrence is merely advisory and not directory.

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1. This Court has held that "a party is entitled to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) in the event that he or she can demonstrate (1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties." *Bailey & Assoc., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 185, 689 S.E.2d 576, 583 (2010).

2. A few federal cases have supported the notion that where the shareholder's interest may not be adequately represented, the shareholders can intervene under a "watchdog principle." See *Shareholder Intervention in Corporate Litigation*, 63 Harv. L. Rev. 1426, 1431 (1950); see also *Park & Tilford, Inc. v. Schulte*, 160 F.2d 984, 988-89 (2d Cir. 1947); *Twentieth Century-Fox Film Corp. v. Jenkins*, 7 F.R.D. 197 (S.D.N.Y. 1947).

**BRANCH BANKING & TR. CO. v. PEACOCK FARM, INC.**

[241 N.C. App. 213 (2015)]

BRANCH BANKING AND TRUST COMPANY, PLAINTIFF

v.

PEACOCK FARM, INC., RODOLPHE T. LYNCH AND WILLARD A. RHODES, DEFENDANTS

No. COA14-889

Filed 2 June 2015

**Appeal and Error—interlocutory orders and appeals—cross-claims pending—failure to show affected substantial right**

Defendant's appeal from the trial court's order granting summary judgment in favor of plaintiff bank in an action seeking to enforce a guaranty agreement was from an interlocutory order and was thus dismissed. The trial court's 16 April 2014 order failed to confer jurisdiction upon the Court of Appeals to review the trial court's 5 June 2012 order. Cross-claims between some of the parties were still pending; and defendant Lynch failed to show that the 5 June 2012 order affected a substantial right. Further, the 5 June 2012 order did not contain a Rule 54(b) certification.

TYSON, Judge, dissenting.

Appeal by defendant Rodolphe T. Lynch from order entered 5 June 2012 by Judge Anderson D. Cromer in Moore County Superior Court. Heard in the Court of Appeals 21 January 2015.

*Howard, Stallings, From & Hutson, P.A., by Matthew M. Lawless and John N. Hutson, Jr., for plaintiff-appellee.*

*Van Camp, Meacham & Newman, PLLC, by William M. Van O'Linda, Jr. and Michael J. Newman, for defendant-appellant Rodolphe T. Lynch.*

DAVIS, Judge.

Defendant Rodolphe T. Lynch ("Lynch") appeals from the trial court's order granting summary judgment in favor of plaintiff Branch Banking & Trust Company ("BB&T") in this action seeking to enforce a guaranty agreement. After careful review, we dismiss the appeal for lack of appellate jurisdiction.

**BRANCH BANKING & TR. CO. v. PEACOCK FARM, INC.**

[241 N.C. App. 213 (2015)]

**Factual Background**

Willard A. Rhodes (“Rhodes”) is a developer and the sole owner of Peacock Farm, Inc. (“Peacock Farm”). Lynch operates a business that specializes in farm management and field preparation of horse farms. In spring 2007, Lynch and Rhodes began discussing development of a residential horse farm in Southern Pines, North Carolina to be called Pelham Farms. The two men entered into a Memorandum of Understanding, which provided that Lynch would do the site work for the development at cost and receive 50% of the net profits from the development.

According to Lynch, he understood that Peacock Farm would initially own the Pelham Farms property, but that it would ultimately transfer the property to a separate partnership between Lynch and Rhodes. The Memorandum of Understanding, however, provided that Peacock Farm would hold title to the land and that Lynch’s interest would be limited to receiving 50% of the net profits from the sale of the property.

On 15 May 2007, Peacock Farm and Lynch executed a loan agreement with BB&T, which provided that BB&T would loan Peacock Farm \$2,250,000.00 and that Lynch and Rhodes would each personally guarantee Peacock Farm’s promissory note. On the same day, Lynch signed an agreement guaranteeing the loan. The guaranty agreement provided, in part, that Lynch guaranteed the debts of Peacock Farm absolutely and unconditionally “at any time, now or hereafter” acquired and that his obligation would be a primary rather than a secondary obligation.

On 9 August 2007, when BB&T made three additional loans to Peacock Farm, Lynch signed three corresponding personal guaranty agreements with virtually identical language. The loans were also secured by a deed of trust encumbering Pelham Farms.

Sometime in early 2008, Lynch realized that he did not own half of the property that made up Pelham Farms and had no control over the development. He contacted a loan officer with BB&T to inform him that it had been Lynch’s understanding that he would ultimately have an ownership interest in Pelham Farms. On 24 April 2009, Lynch, through counsel, wrote BB&T a letter conveying this same information. Lynch indicated to BB&T that he would not participate in the renewal of the loan or execute any other notes.

On 12 June 2009, an employee of BB&T inadvertently emailed Lynch a document prepared by BB&T’s in house counsel entitled “Problem Loan Review for Peacock Farm, Inc.” This document reviewed the file materials concerning the loans and addressed possible concerns with



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the documentation, including concerns regarding what benefit Lynch was receiving as consideration for him serving as a guarantor, and ultimately recommended that BB&T confirm that proper consideration actually existed.

Peacock Farm defaulted on the BB&T notes, and BB&T filed suit against Peacock Farm, Rhodes, and Lynch, seeking to hold them jointly and severally liable. Lynch filed a motion to dismiss, an answer, various counterclaims, and cross-claims against Rhodes and Peacock Farm seeking indemnity and contribution. Peacock Farm and Rhodes also asserted cross-claims against Lynch for contribution.

On 27 January 2012, BB&T filed a notice of voluntary dismissal with prejudice of its claims against Rhodes and Peacock Farm. On 23 February 2012, BB&T moved for summary judgment with respect to its claims against Lynch and Lynch's counterclaims against BB&T.

Lynch moved to amend his answer on 30 May 2012 to add the defense of release. Lynch alleged in the motion that BB&T had settled its claims with Peacock Farm and Rhodes and released their obligations under the notes and guaranty agreements. Lynch contended that "BB&T's release of Defendants [sic] Peacock Farm, Inc. operates as a discharge of Defendant's [sic] Lynch's obligations under his guaranty . . . ."

The trial court entered an order on 5 June 2012 (1) granting Lynch's motion to amend his answer; and (2) granting BB&T's motion for summary judgment. The order entered judgment in favor of BB&T and against Lynch in the amount of \$3,749,255.85. Lynch filed a notice of appeal and moved for a stay pending appeal. On 12 July 2012, the trial court granted Lynch's motion for a stay on the condition that Lynch post an appeal bond in the amount of \$25,000.00. BB&T filed a notice of cross-appeal from the order granting the stay.

On 6 August 2013, this Court issued an opinion dismissing Lynch's appeal on the grounds that (1) it was interlocutory due to the fact that cross-claims between Lynch, Peacock Farm, and Rhodes were still pending; and (2) Lynch had failed to show that the 5 June 2012 order affected a substantial right. *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, \_\_ N.C. App. \_\_, 749 S.E.2d 111 (2013) (unpublished).<sup>1</sup>

Over eight months later, Lynch obtained an order from the trial court on 16 April 2014 purporting to certify its 5 June 2012 judgment in

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1. This Court also dismissed BB&T's cross-appeal. *Branch Banking & Trust Co.*, \_\_ N.C. App. \_\_, 749 S.E.2d 111, slip op. at 10-11.

## BRANCH BANKING &amp; TR. CO. v. PEACOCK FARM, INC.

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favor of BB&T for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.<sup>2</sup> On 8 May 2014, Lynch filed a new notice of appeal seeking once again to appeal the trial court's 5 June 2012 order.

### Analysis

It is undisputed by the parties that the current appeal remains interlocutory given that the cross-claims between Lynch, Peacock Farms, and Rhodes remain unresolved. Generally, there is no right of immediate appeal from an interlocutory order. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, \_\_ N.C. App. \_\_, \_\_, 745 S.E.2d 69, 72 (2013).

However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

*N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

In dismissing Lynch's initial appeal, we held that

the [5 June 2012] summary judgment order contained no Rule 54(b) certification. . . . Lynch was, therefore, required to set forth sufficient facts and argument to show that the order affected a substantial right. However, . . . Lynch's statement of grounds for appellate review asserted in its entirety:

This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) as the 5 June 2012 Judgment is a final judgment in favor of BB&T and against Defendant Lynch on his affirmative defenses and counterclaims.

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2. In its 16 April 2014 order, the trial court also lifted the stay it had previously entered, thereby allowing BB&T to proceed with execution on its judgment within 30 days.

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Thus, . . . Lynch's brief implicitly acknowledged that the summary judgment order resolved only the claims pending between BB&T and . . . Lynch and not the other claims pending among the co-defendants. Nonetheless, the brief does not argue and makes no showing that this order would affect a substantial right in the absence of an immediate appeal.

*Branch Banking & Trust Co.*, \_\_ N.C. App. \_\_, 749 S.E.2d 111, slip op. at 8 (emphasis omitted).

After our dismissal of the appeal, over eight months passed before Lynch obtained the 16 April 2014 order from the trial court, which stated, in pertinent part, as follows:

[T]his Court finds that a money judgment in the amount of Three Million Seven Hundred Forty-Nine Thousand Two Hundred Fifty-Five Dollars and Eighty-Five Cents (\$3,749,255.85) affects a substantial right under North Carolina law. Wachovia Realty Inv. Housing, Inc., 292 NC 93, 99 (N.C. 1977). Further, the only remaining claims in this case are cross-claims between the Defendants Lynch and Rhodes for contribution or indemnity. However, these cross-claims cannot be finally resolved until there is a determination of (a) the validity of BB&T's judgment against Mr. Lynch, and (b) the amount BB&T is actually able to recover from Mr. Lynch. Thus, pursuant to Rule 54(b) this Court finds, in its discretion, that there is no just reason for the Defendant Lynch to delay appealing BB&T's judgment herein.

The 16 April 2014 order was not an amended judgment regarding BB&T's claim against Lynch. It did not set out the substantive basis for ruling that the granting of BB&T's motion was proper under Rule 56. Instead, it served as a "stand-alone" order, simply making reference to its prior judgment in favor of BB&T and stating its belief that "in its discretion" an immediate appeal as to that judgment was appropriate.

Rule 54(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason for delay *and it is so determined in the judgment*. Such judgment shall then be subject to review by appeal or as otherwise provided by these

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rules or other statutes.” N.C.R. Civ. P. 54(b) (emphasis added). However, “the trial court’s determination that there is no just reason to delay the appeal, while accorded great deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.” *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (internal citations and quotation marks omitted); see *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) (affirming dismissal of interlocutory appeal where trial court’s use of certification language under Rule 54(b) was insufficient to establish appellate jurisdiction; “That the trial court declared it to be a final . . . judgment does not make it so.”).

We conclude here that the trial court’s 16 April 2014 order fails to confer jurisdiction upon this Court to review the trial court’s 5 June 2012 order. Had Lynch desired to take a proper appeal of the trial court’s 5 June 2012 interlocutory order, he had two options. First, he could have noticed an appeal and then demonstrated in his appellate brief how the trial court’s order deprived him of a substantial right. Instead, while he did notice an appeal within 30 days of the 5 June 2012 order, he failed to even argue — much less make a valid showing — in his brief that he would be deprived of a substantial right absent an immediate appeal. As a result, his appeal was dismissed by this Court.<sup>3</sup> Lynch has failed to cite any caselaw suggesting that litigants are entitled to multiple “bites at the apple” to establish the existence of appellate jurisdiction over an interlocutory appeal based on the “substantial right” doctrine.

Alternatively, he could have obtained from the trial court the inclusion of appropriate language *in the 5 June 2012 order itself* certifying the case for immediate review pursuant to Rule 54(b) on the ground that there was no just reason to delay the appeal. See *Brown v. Brown*, 77 N.C. App. 206, 208, 334 S.E.2d 506, 508 (1985) (“Rule 54(b) expressly requires that this determination be stated *in the judgment itself*.” (emphasis added)), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986); see also *Tridyn Indus.*, 296 N.C. at 490, 251 S.E.2d at 447 (holding that “Rule 54(b) permits the trial judge *by determining in such a judgment* that ‘there is no just reason for delay’ to release it for immediate appeal before the litigation is complete as to all claims or all parties.”)

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3. In the event Lynch believed that this Court erred in dismissing his initial appeal, he could have filed a petition for discretionary review with our Supreme Court. However, he failed to do so.

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(emphasis added)). However, Lynch either did not seek the inclusion of such certification language in the order or was unsuccessful in persuading the trial court to add such language. In any event, the 5 June 2012 order did not contain a Rule 54(b) certification.

While, as explained above, Lynch ultimately obtained a *separate* order from the trial court on 16 April 2014 purporting to certify for immediate appeal the 5 June 2012 order it had issued almost two full years earlier, the 16 April 2014 order is not the order from which Lynch seeks to appeal. Neither Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a *prior* order for immediate appeal in this fashion. Therefore, because Rule 54(b) cannot be used to create appellate jurisdiction based on certification language that is not contained in the body of the judgment itself from which appeal is being sought, dismissal of Lynch's appeal is, once again, appropriate.

In reaching a contrary conclusion, the dissent neither cites any North Carolina caselaw supporting its interpretation of Rule 54(b) nor acknowledges the express language contained in the rule itself that certification language must be included "in the judgment." Notably, while the dissent cites our decision in *Newcomb v. Cty. of Carteret*, 207 N.C. App 527, 701 S.E.2d 325 (2010), *disc. review denied*, 365 N.C. 212, 710 S.E.2d 26 (2011), this Court held in *Newcomb* that it *lacked* appellate jurisdiction pursuant to Rule 54(b) where — as here — the trial court's attempt to retroactively certify its prior order failed to comply with the Rules of Civil Procedure.

The trial court did not certify the issue of Carteret County's right to control permanent structures in Marshallberg Harbor for immediate review in its initial summary judgment order. However, in its amended summary judgment order, the trial court attempted to add a certification relating to this issue in apparent reliance on its authority to correct clerical errors under N.C. Gen. Stat. § 1A-1, Rule 60(a). A careful review of the relevant authorities establishes that the trial court lacked the authority to amend its summary judgment order in this fashion.

*Id.* at 543, 701 S.E.2d at 337.

This Court concluded that "the trial court lacked the authority to amend the original summary judgment order for the purpose of certifying additional issues for immediate appeal pursuant to Rule 54(b)." *Id.*

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at 545, 701 S.E.2d at 338<sup>4</sup>; see also *Pratt v. Staton*, 147 N.C. App. 771, 774-75, 556 S.E.2d 621, 624 (2001) (“[B]y adding the trial court’s Rule 54(b) certification and establishing grounds for immediate appellate review of an otherwise interlocutory order, the trial court’s 10 October 2000 amended order . . . altered the substantive rights of the parties. . . . [T]he amended order in the instant case allowed plaintiffs to circumvent the established procedural rules governing the bringing of an appeal and secure appellate review of an otherwise unappealable order [pursuant to Rule 54(b)].” (internal citation and quotation marks omitted)).

Nor do we agree with the dissent’s alternative suggestion that we treat Lynch’s appeal as a petition for certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, thereby granting a petition that Lynch did not actually file. “[O]ur courts have frequently observed that a writ of certiorari is an extraordinary remedial writ.” *N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), *aff’d per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997).

In our view, Lynch’s appeal fails to present a compelling basis for such extraordinary relief here. Lynch has now failed on two separate occasions to properly bring an interlocutory appeal that complies with the rules governing the appealability of such orders. See generally *Tridyn Indus.*, 296 N.C. at 494, 251 S.E.2d at 449 (declining to exercise certiorari powers under Appellate Rule 21 where appeal was properly dismissed as interlocutory despite trial court’s inclusion of language purporting to certify it for immediate appeal).

Indeed, it is appropriate to note that this case involves a straightforward commercial dispute that is unremarkable either factually or legally. Neither the dissent nor the trial court’s 16 April 2014 order explain precisely *why* the pending cross-claims cannot be resolved in the trial court absent immediate appellate review of the 5 June 2012 order. Lynch has failed to cite any North Carolina case for the proposition that cross-claims between a debtor and a guarantor are unable to be litigated until there has been final appellate review of a judgment in favor of the creditor on the guarantor’s liability for the underlying debt. Moreover, the eight-month delay between the dismissal of Lynch’s first appeal and the 16 April 2014 order — a delay the dissent ignores — belies the notion that there is an urgent need for immediate appellate review over the

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4. While the *Newcomb* court deemed it appropriate to treat the record and briefs as a petition for the issuance of a writ of certiorari and to grant the “petition” *sua sponte*, see *Newcomb*, 207 N.C. App. at 545, 701 S.E.2d at 338-39, we decline to do so here for the reasons set out below.

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trial court's 5 June 2012 order. As such, we do not discern any basis for excusing Lynch from compliance with the same rules which every other appellant in this Court is bound to follow.

Rather than deciding on an *ad hoc* basis whether or not an appellant should be held to strict compliance with the laws governing appellate jurisdiction over interlocutory appeals, we believe instead that consistent enforcement of the existing jurisdictional rules is more in keeping with the goal of North Carolina's appellate courts to ensure the uniform application of the laws to all similarly situated litigants. As our Supreme Court has long held, "[w]hen litigants resort to the judiciary for the settlement of their disputes, they . . . should not forget that rules of procedure are necessary, and must be observed . . ." *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930).

**Conclusion**

For the reasons stated above, Lynch's appeal is dismissed.

DISMISSED.

Judge ELMORE concurs.

TYSON, Judge, dissenting.

As the majority's opinion notes, this is the second time this case has been brought before this Court. In the previous appeal, this Court did not address the merits due to the following grounds: (1) the 5 June 2012 order from which he appealed was interlocutory and did not contain the trial court's Rule 54(b) certification; and, (2) Lynch failed to argue or show the 5 June 2012 order affected a substantial right. *Branch Banking & Trust Co. v. Peacock Farms, Inc.*, \_\_ N.C. App. \_\_, 749 S.E.2d 111 (2013) (unpublished).

I respectfully dissent from the majority's holding to dismiss Lynch's appeal for lack of appellate jurisdiction. I vote to address the merits pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. In the alternative, I vote to treat this notice of appeal and briefs as a petition for the issuance of a writ of *certiorari* pursuant to N.C.R. App. P. 21(a) (1) (2013) and to grant that petition for judicial economy.

The trial court's 16 April 2014 order stated the "cross-claims between the Defendants Lynch and Rhodes for contribution or indemnity . . . cannot be finally resolved until there is a determination of . . . the validity of BB&T's judgment against Mr. Lynch." Upon review of the merits

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of Lynch's appeal, the trial court's order granting summary judgment in favor of BB&T should be affirmed.

I. Interlocutory Appeal

A. Standard of Review

Our Supreme Court has stated:

Generally, a party cannot appeal from an interlocutory order unless failure to grant immediate review would affect a substantial right pursuant to N.C.G.S. sections 1-277 and 7A-27(d).

A party may appeal an interlocutory order under two circumstances. First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work injury to him if not correct before an appeal from the final judgment.

*Davis v. Davis*, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (citations and internal quotation marks omitted).

B. Analysis

The majority's opinion holds "[n]either Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a *prior* order for immediate appeal." I disagree.

Rule 54(b) of the North Carolina Rules of Civil Procedure enables review of interlocutory orders and judgments "when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citation omitted). The final sentence of Rule 54(b) further provides "in the absence of entry of such a final judgment, any order or other form of decision is subject to revision *at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.*" N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013) (emphasis supplied). Our Supreme Court held "[c]ertification under Rule 54(b) permits an interlocutory appeal from orders that are final as to specific portion of the case, but which do not dispose of all claims as to all parties." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013).



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The majority's opinion notes this Court dismissed Lynch's prior appeal because the trial court's summary judgment order did not contain a Rule 54(b) certification, nor did Lynch argue this order affected a substantial right which would be lost without immediate review. *Branch Banking & Trust Co. v. Peacock Farms, Inc.*, \_\_ N.C. App. \_\_, 749 S.E.2d 111 (2013) (unpublished).

After dismissal of the prior appeal, the trial court entered an order, which lifted the stay on enforcement of its 5 June 2012 judgment and granted Lynch's motion to certify BB&T's judgment as immediately appealable pursuant to Rule 54(b) on 16 April 2014. The trial court's order states

the only remaining claims in this case are cross-claims between the Defendants Lynch and Rhodes for contribution or indemnity. However, *these cross-claims cannot be finally resolved until there is a determination of (a) the validity of BB&T's judgment against Mr. Lynch, and (b) the amount BB&T is actually able to recover from Mr. Lynch.* Thus, pursuant to Rule 54(b) this Court finds, in its discretion, that *there is no just reason for the Defendant Lynch to delay appealing BB&T's judgment herein.*

(emphasis supplied).

Based on the last sentence of Rule 54(b), and the absence of any case law to the contrary, the trial court properly certified its 5 June 2012 order as immediately appealable pursuant to Rule 54(b). This Court has jurisdiction to address the merits of Lynch's appeal.

The parties at bar have been entangled in litigation since March 2011. Unless and until this Court reaches the merits of this appeal, the parties cannot move forward or obtain any final resolution on their respective claims.

Under judicial economy, this Court should resolve this issue on the merits. Our decision will not only expedite the ultimate resolution of this case and, as the trial court stated in its order, doing so is *essential* for the parties to reach any finality in the case. *Wilkins v. Safran*, 185 N.C. App. 668, 671, 649 S.E.2d 658, 661 (2007) (electing to review interlocutory appeal "because there is no just reason for delay and our review will avoid both piece-meal litigation and the risk of inconsistent verdicts").

In addition, and in the alternative, I would treat Lynch's notice of appeal and brief as a petition for the issuance of a writ of *certiorari*

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directed toward the issue of the validity of BB&T's judgment against him pursuant to Rule 21(a)(1) and grant the petition. N.C.R. App. P. 21(a); see *Newcomb v. Cty. of Carteret*, 207 N.C. App. 527, 545, 701 S.E.2d 325, 339 (2010) (electing to treat the record and briefs as a petition for the issuance of a writ of *certiorari* where consideration of the issue on the merits would expedite the ultimate disposition of case).

## II. Summary Judgment in Favor of BB&T

### A. Issues

Lynch argues the trial court erred by granting summary judgment in favor of BB&T. He asserts genuine issues of material facts exist concerning whether (1) the parties involved mistakenly believed Lynch was a 50/50 owner and partner in Peacock Farms; and (2) BB&T's release from further liability of defendants Rhodes and Peacock Farms also released Lynch from his absolute guaranty.

### B. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c); see *Draughon v. Harnett Cty. Bd. Of Educ.*, 158 N.C. App. 208, 211, 580 S.E.2d 732, 735 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

A party moving for summary judgment may prevail by "(1) proving that an essential element of the [nonmoving party's] case is nonexistent, or (2) showing through discovery that the [nonmoving party] cannot produce evidence to support an essential element of his or her claim, or (3) showing that the [nonmoving party] cannot surmount an affirmative defense." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).

"In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citation omitted).

"Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial."

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*Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735 (citation and quotation marks omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

C. Guaranty

A Guaranty of payment is an absolute promise by the guarantor to pay the debt at maturity if it is not paid by the principal debtor. The obligation of the guarantor is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon failure of the principal debtor to pay the debt at maturity.

*EAC Credit Corp. v. Wilson*, 281 N.C. 140, 145, 187 S.E.2d 752, 755 (1972) (citation omitted).

Lynch argues BB&T should be estopped from enforcing the guaranties because they were obtained without consideration. This argument misstates the well-settled law in North Carolina and does not present a genuine issue of material fact.

This Court held "in a guaranty contract, a consideration moving directly to the guarantor is not necessary. The promise is enforceable if a benefit to the principal debtor is shown or if a detriment or inconvenience to the promisee is disclosed." *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 196, 188 S.E.2d 342, 345 (1972) (citation omitted).

The evidence Lynch proffered tends to show: (1) BB&T had a long-standing prior relationship with Rhodes and Peacock Farms; (2) BB&T loaned more than 100% of the appraised value of the project; (3) Lynch and Rhodes signed a Memorandum of Understanding, in which the parties allegedly agreed to a 50/50 share of net profits; (4) BB&T settled with and released Peacock Farms and Rhodes for \$100,000.00; (5) Lynch was not a party to the settlement and release; and, (6) the property was conveyed by a quit-claim deed to a third party, purportedly leaving Lynch with no recourse on the original collateral.

The arguments raised by Lynch are issues between Lynch and Rhodes, not Lynch and BB&T. No genuine issue of material fact exists between Lynch and BB&T on his liability under the guarantees. Lynch was unable to proffer any evidence to show BB&T was mistaken about whether Lynch had any ownership interest in Peacock Farms.

## BRANCH BANKING &amp; TR. CO. v. PEACOCK FARM, INC.

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The record also shows no proffer of evidence that BB&T extended the payment terms or issued any additional credit to Peacock Farms after Lynch gave notice to BB&T he would not participate in and guarantee further extensions of credit. The trial court properly granted summary judgment to BB&T.

This record evidence suggests Lynch may have entered into an unfavorable business arrangement with Peacock Farms and Rhodes. The evidence does not, however, raise genuine issues of material facts of whether BB&T had the right to enforce Lynch's guaranties, even when viewed in the light most favorable to Lynch.

N.C. Gen. Stat. § 26-3.1 provides where a guarantor pays the debt of his principal, the guarantor has a right to "either sue his principal for reimbursement or sue his principal on the instrument and may maintain any action or avail himself of any remedy which the creditor himself might have had against the principal debtor." N.C. Gen. Stat. § 26-3.1 (2013).

Lynch's loan agreements and his guaranty agreements with BB&T expressly incorporated the terms of Peacock Farms' promissory notes. Lynch agreed BB&T "shall have the unlimited right to release any person who might be liable hereon, and such release shall not affect or discharge the liability of any other person who is or might be liable hereon."

The remaining issues left for resolution concern Lynch's rights of indemnity and contribution from Peacock Farms and Rhodes. The trial court properly granted summary judgment on BB&T's action to enforce Lynch's guaranties.

#### Conclusion

This Court has jurisdiction to address the merits of Lynch's interlocutory appeal. The trial court certified its 5 June 2012 order for immediate appeal under Rule 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013). The trial court also stated the case could not proceed further until Lynch's liability to BB&T was resolved. Alternatively, this Court should treat the notice of appeal and briefs as a petition for writ of *certiorari*, and grant that petition to address the merits. *Newcomb*, 207 N.C. App. at 545, 701 S.E.2d at 339.

Lynch did not proffer any evidence BB&T mistakenly believed he had an ownership interest in Peacock, or that BB&T extended any additional credit to Peacock Farms after Lynch notified BB&T he would not participate in further extensions of credit.

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[241 N.C. App. 227 (2015)]

The trial court correctly found no genuine issue of material fact exists and properly granted summary judgment in favor of BB&T. The uncontroverted evidence showed BB&T did not release Lynch when it settled and released defendants Rhodes and Peacock Farms. I vote to affirm the decision of the trial court, which granted summary judgment to BB&T. I respectfully dissent.

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PATRICK JOSEPH CAMPBELL, PLAINTIFF

v.

VIRGINIA QUINN CAMPBELL, DEFENDANT

No. COA14-1155

Filed 2 June 2015

**1. Appeal and Error—interlocutory orders and appeals—substantial right**

Defendant's interlocutory appeal in an equitable distribution action could be heard by the Court of Appeals where the appeal involved a preliminary injunction that concerned a business that was marital property. There was a business plan devised by plaintiff that would involve the company spending all of the money in its operating account to implement a new product. Defendant, an owner of the company, had a substantial right affected when the trial court exerted significant control over the company.

**2. Divorce—equitable distribution—corporation owned by husband and wife—corporation not a party to action**

The trial court in an equitable distribution action did not have the authority to order that certain actions be taken by a corporation owned by the parties where the corporation was not a party to the action. The courts are not free to completely ignore the existence of a legal entity.

Appeal by Defendant from preliminary injunction entered 23 April 2014 by Judge Michael Denning in District Court, Wake County. Heard in the Court of Appeals 6 April 2015.

*Wake Family Law Group, by Marc W. Sokol, for Plaintiff-Appellee.*

*Gailor, Hunt, Jenkins, Davis, & Taylor P.L.L.C., by Cathy C. Hunt and Jonathan S. Melton, for Defendant-Appellant.*

## CAMPBELL v. CAMPBELL

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McGEE, Chief Judge.

Virginia Quinn Campbell (“Defendant”) appeals from a preliminary injunction, entered by the trial court on 23 April 2014 (“the 23 April 2014 order”), as part of the equitable distribution action filed by her husband, Patrick Joseph Campbell (“Plaintiff”). The preliminary injunction ordered: (1) Defendant to transfer assets belonging to Triangle Strategy Group, LLC (“TSG”), a company owned by the parties; (2) ordered the parties to act on behalf of TSG to hire an interim controlling manager during the pendency of their equitable distribution action; and (3) ordered TSG to pay and indemnify the interim manager, post an unsecured bond, and implement a six- to-twelve month business plan, which would deplete all of TSG’s finances in an effort to expand the business. The trial court also found that Defendant was not a manager of TSG. Because TSG was not a party to the equitable distribution action, the trial court did not have jurisdiction to exercise control over TSG’s assets, operations, and management structure, and Defendant, an owner of TSG, had a substantial right affected thereby. Therefore, we must vacate the order of the trial court.

### I. Background

Plaintiff and Defendant were married on 24 July 1999. In June 2007, they incorporated TSG in Delaware and established its principal office in Wake County. Plaintiff owns a fifty-one percent share of TSG, and Defendant owns the remaining forty-nine percent. TSG has been the parties’ sole source of income since 2007, and it is uncontested that TSG is a marital asset.

TSG operates mainly as a consulting firm that focuses on “impulse marketing” for large corporations. Plaintiff is the primary operator of TSG, although Defendant has authority to sign checks, transfer funds, and conduct some transactions for TSG in the ordinary course of business. Plaintiff also has been developing and seeking patents for a new type of sensor technology for TSG over the last several years, which reportedly would allow companies to collect data on how consumers interact with their products in actual stores (“Shelf Lab”).

The parties separated on 18 October 2013, after Plaintiff was arrested for assaulting Defendant and their two children. An *ex parte* domestic violence protective order was entered against Plaintiff on 21 October 2013. The parties signed a consent domestic violence protective order in January 2014.

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At the time of Plaintiff's 18 October 2013 arrest, the TSG operating account contained approximately \$751,000.00. Defendant transferred \$350,000.00 of those funds into a separate account that same night, shortly after Plaintiff was taken into custody. Defendant did not spend any of the \$350,000.00 and, at the time of the hearing on the present action, that money was held in a corporate account to which only Defendant had access. Defendant also took a \$75,000.00 "owner's draw" from the TSG operating account within several days of Plaintiff's arrest.<sup>1</sup> Finally, between 25 and 30 October 2013, Defendant transferred all of the funds from the parties' private Fidelity investment account, totaling approximately \$226,727.00, into another private account to which only Defendant had access.

Plaintiff originally attempted to recover the \$350,000.00 of TSG funds by filing an action on behalf of TSG in Wake County Superior Court. However, Plaintiff dismissed that action and filed the present one because he felt he could have the issue adjudicated more quickly as part of an equitable distribution action in district court. Specifically, in the present action, Plaintiff sought, *inter alia*, equitable distribution, an interim distribution, and injunctive relief requiring Defendant to return the \$350,000.00 of TSG funds to TSG. Defendant's response, *inter alia*, sought to join TSG as a party and to have a receiver appointed to run TSG during the pendency of the present action. Defendant also moved for the imposition of a constructive trust for Defendant's benefit for her share of the proceeds and property of TSG. The trial court held a hearing on these matters on 10 March 2014, during which counsel for Defendant argued that "the only issues that can be decided by [the trial court] are the Chapter 50 domestic issues" because TSG was not a party to the action.

The trial court, in an order entered 18 March 2014, made an interim distribution to the parties and directed Defendant to return to Plaintiff half of the approximately \$226,727.00 that Defendant had removed from the parties' private investment account. That order has not been appealed by either party.

In the 23 April 2014 order that is the subject of the present appeal, the trial court issued a preliminary injunction and ordered Defendant to return the \$350,000.00 of TSG funds to TSG, declared that Defendant was not a manager of TSG, ordered her to not interfere with the operations

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1. In response, pursuant to the TSG operating agreement, Plaintiff was later required to take an owner's draw of approximately \$78,000.00, in proportion to his ownership interest in TSG.

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of TSG, declined to impose a constructive trust for Defendant's benefit on any of TSG's assets, and declined to add TSG as a party to the action. The trial court also declined to appoint a receiver to run TSG; however, at Plaintiff's request, the trial court did order the parties to appoint Dr. Alan L. Tharp ("Dr. Tharp") to serve as an interim controlling manager of TSG. The trial court also ordered TSG specifically to indemnify Dr. Tharp for his management of TSG, pay him \$110.00 per hour, and ordered the company to post a \$500.00 unsecured bond during the pendency of the preliminary injunction.

The trial court further ordered that "Dr. Tharp's powers and duties as interim-manager of TSG shall be consistent and in furtherance of the current [six-to-twelve] month business plan" of TSG. This business plan was devised by Plaintiff and reportedly would involve TSG spending all of the money in its operating account by March 2015 in order to implement Shelf Lab, in the hope that this investment would bring about a "significant" financial payoff thereafter. This business plan also reportedly called for no shareholder distributions during the plan's implementation.

## II. Appealability

**[1]** We first must determine whether Defendant's interlocutory appeal may be reviewed by this Court.

An order is interlocutory when it does not dispose of the entire case but instead, leaves outstanding issues for further action at the trial level. Ordinarily, when an order is interlocutory, it is not immediately appealable. However, we will review the trial court's order if it affects some substantial right claimed by the appellant and will work an injury to [her] if not corrected before an appeal from the final judgment.

*Mecklenburg Cnty. v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 667, 704 S.E.2d 48, 51 (2010) (citations and internal quotation marks omitted). "The decision as to whether to grant [a preliminary] injunction [in an equitable distribution action] for the purpose of preserving the *status quo* pending trial is left to the discretion of the trial judge, and generally no appeal lies from the issuance of such an injunction." *Dixon v. Dixon*, 62 N.C. App. 744, 745, 303 S.E.2d 606, 607 (1983) (citations omitted). Nonetheless, "[w]hether an interlocutory appeal affects a substantial right is determined on a case-by-case basis." *Grant v. High Point Reg'l Health Sys.*, 172 N.C. App. 852, 853, 616 S.E.2d 688, 689 (2005).



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In the present action, Defendant contends that the trial court's preliminary injunction did not preserve the *status quo* during the parties' equitable distribution action, but instead would allow Plaintiff to entirely deplete the cash reserves of TSG as part of a new business plan. Defendant also maintains that the injunction hindered her ability to protect her interest in TSG because the trial court exerted significant control over TSG's assets and operations, declared that Defendant was not a manager of TSG, and ordered Defendant to not interfere with TSG's operations – even though the trial court denied Defendant's motion to add TSG as a party to the present action. In light of the business plan's goal of spending all of TSG's funds, Defendant, an owner of TSG, did have a substantial right affected when the trial court exerted significant control over TSG's assets, operations, and management structure in order to effectuate the business plan while TSG was not a party to the present action. Therefore, Defendant's interlocutory appeal may be heard by this Court. *See Mecklenburg Cnty.*, 208 N.C. App. at 667, 704 S.E.2d at 51.

## III. Analysis

[2] Defendant's brief raises a number of jurisdictional challenges to the 23 April 2014 order. Specifically, Defendant objects to the trial court (1) ordering Defendant to transfer \$350,000.00 in TSG assets; (2) ordering the parties, as members of TSG, to appoint Dr. Tharp as an interim controlling manager; (3) ordering TSG to indemnify and pay Dr. Tharp, and to post an unsecured bond during the pendency of the preliminary injunction; and (4) declaring that Defendant was not a manager of TSG. Defendant contends that the trial court did not have the authority to take these actions because TSG was not a party to the present action. We agree.

“The courts are not free, for the sake of convenience, to completely ignore the existence of a legal entity, such as [an] LLC.” *Keith v. Wallerich*, 201 N.C. App. 550, 558, 687 S.E.2d 299, 304 (2009). “A corporation, even one closely held, is recognized as a separate legal entity . . . [even when its members are] engaged in litigation which is personal in nature[.]” *See Quick v. Quick*, 305 N.C. 446, 460, 290 S.E.2d 653, 662 (1982). More specifically, where a separate legal entity has not been made a party to an action, the trial court does not have the authority to order that entity to act. *See Southern Athletic/Bike v. House of Sports, Inc.*, 53 N.C. App. 804, 806, 281 S.E.2d 698, 699 (1981). Moreover, even where a named party to an action is a member-manager of an LLC, the assets of which are contested in a pending equitable distribution action,

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“[t]he trial court exceed[s] its authority when it order[s] [that named party] to transfer the assets of the LLC” without first adding the LLC as a party to the action. *See Keith*, 201 N.C. App. at 552, 558, 687 S.E.2d at 300, 304.

In the present case, the trial court ordered Defendant to transfer \$350,000.00 of TSG assets without first adding TSG as a party. The trial court also effectively ordered TSG to act by ordering the parties, as the only members of TSG, to appoint Dr. Tharp as an interim controlling manager of TSG, and it specifically ordered TSG to act by ordering TSG to indemnify and pay Dr. Tharp and to post an unsecured bond during the pendency of the preliminary injunction. Finally, the trial court affected the management structure of TSG by finding that Defendant was not a manager of TSG, even though TSG’s filings consistently listed Defendant as a manager of TSG and TSG’s attorney repeatedly testified that Defendant was a manager, albeit not one “necessary to the function of the company.” Because TSG was not made a party to the present action, the trial court did not have the authority to exercise control over TSG. *See id.*; *Southern Athletic/Bike*, 53 N.C. App. at 806, 281 S.E.2d at 699. Therefore, we must vacate the 23 April 2014 order of the trial court.

VACATED.

Judges HUNTER, JR. and DIETZ concur.

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BRANDIE FINTCHRE, PLAINTIFF

v.

DUKE UNIVERSITY, DUKE UNIVERSITY HEALTH SYSTEMS, JANE DOE, R.N., AND  
HARDEE KLITZMAN, R.N., IN THEIR INDIVIDUAL CAPACITIES, DEFENDANTS

No. COA14-1096

Filed 2 June 2015

**1. Medical Malpractice—Rule 9(j)—second complaint—motion to amend**

A trial court order granting defendants’ motion to dismiss pursuant to Rule 9(j) was affirmed where the trial court denied plaintiff’s motion to amend her second complaint in order that it comply with N.C.G.S. § 1A-1, Rule 9(j). Granting plaintiff’s motion to amend her second complaint would have been futile where she failed to

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file a complaint with a valid Rule 9(j) certification within the statute of limitations.

**2. Pleadings—failure to use correct name—findings**

Findings of fact regarding the name of Duke University Health System, Inc. in plaintiff's two complaints were supported by competent evidence in the record and the trial court did not err by concluding that plaintiff failed to name Duke University Health System, Inc. as a defendant.

**3. Costs—interests—Rule 41(d)**

The trial court erred by awarding interest on costs incurred by defendants in the first of two medical malpractice actions filed from the same event. N.C.G.S. § 1A-1, Rule 41(d) did not allow the trial court to award interest on the costs assessed.

Judge STEPHENS concurs by a separate written opinion.

Appeal by plaintiff from order entered 24 June 2014 by Judge W. Osmond Smith, III, in Durham County Superior Court. Heard in the Court of Appeals 8 April 2015.

*Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors, and Ekstrand & Ekstrand, LLP, by Robert Ekstrand, for plaintiff-appellant.*

*McGuire Woods, LLP, by Mark E. Anderson, Heather R. Wilson, and Justin T. Yedor, for defendant-appellees.*

McCULLOUGH, Judge.

Plaintiff Brandie Fintchre appeals from an order dismissing her action with prejudice against defendants Duke University, Duke University Health Systems, Jane Doe, R.N., and Hardee Klitzman, R.N., in their individual capacities. For the reasons stated herein, we affirm in part and reverse and remand in part.

**I. Background**

On 6 October 2011, plaintiff Brandie Fintchre filed a complaint against defendants Duke University, Duke University Health Systems, Jane Doe, R.N., and Hardee Klitzman, R.N. ("first complaint"). The first complaint set forth claims of medical negligence against Jane Doe, R.N. in her individual and official capacities; medical negligence against

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Hardee Klitzman, R.N. in her individual and official capacities; negligence against Duke University, Duke University Health Systems, and Duke University Medical Center; negligent and intentional infliction of emotional distress against all defendants; and punitive damages. The first complaint also contained a Rule 9(j) certification pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j) and provided that “the medical care provided to Plaintiff was reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under N.C. R. Evid. 702 who are willing to testify that the medical care at issue in this action failed to comply with the standard of care.”

On 14 December 2011, defendants filed an “Answer and Defenses.” Defendants argued, *inter alia*, that plaintiff had failed to comply with the requirements pursuant to Rule 9(j). Defendants also made a motion to dismiss all “punitive damages claims” pursuant to provisions of N.C. Gen. Stat. §§ 1D-15 *et seq.* and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 19 December 2012, defendants filed a “Motion to Dismiss, or For Other Relief.” Defendants argued that plaintiff had failed to comply with the trial court’s discovery scheduling order entered 10 January 2012 and that defendants were thereby prejudiced.

On 3 January 2013, plaintiff voluntarily dismissed her first action against defendants without prejudice.

On 20 December 2013, plaintiff filed a complaint against defendants Duke University, Duke University Health Systems, Jane Doe, R.N., and Hardee Klitzman, R.N., in their individual and official capacities. (“second complaint”). Plaintiff’s causes of action included the following: medical negligence against Jane Doe, R.N. and Hardee Klitzman, R.N., in their individual and official capacities and against Duke University and Duke University Health Systems; negligence against Duke University, Duke University Health Systems, and Duke University Medical Center; negligent infliction of emotional distress against defendants and Duke University Medical Center; intentional infliction of emotional distress against defendants and Duke University Medical Center; and, punitive damages. The second complaint contained the following Rule 9(j) certification:

82. Pursuant to North Carolina General Statute Section 1A-1, Rule 9(j), the medical care provided to Plaintiff was reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under N.C. R. Evid. 702 who are willing to testify that the medical care at issue in this action failed to comply with the standard of care.

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Plaintiff alleged that on 15 October 2008, plaintiff underwent a hysterectomy after being diagnosed with adenocarcinoma of the cervix. Following surgery, she was transferred to the Post Anesthesia Care Unit where she was evaluated by defendant Jane Doe, a nurse. Defendant Doe, disregarding plaintiff's physician's orders that required plaintiff to be catheterized indefinitely, removed plaintiff's catheter. Plaintiff alleged that defendant's actions resulted in a stretched bladder, abdominal pain, damage to her bladder, and loss of normal bladder functioning. Throughout 2008 and 2009, plaintiff suffered multiple urinary tract infections and ongoing inability to completely void her bladder. On 22 April 2010, plaintiff underwent a vaginal biopsy to determine if her cancer had returned. Defendant Hardee Klitzman provided postoperative nursing care. Plaintiff alleged that defendant Klitzman incorrectly evaluated plaintiff's bladder as "not distended" multiple times and authorized plaintiff's release from the hospital. Following discharge, plaintiff went to the emergency department of Duke University Medical Center complaining of severe pain in her abdomen.

Plaintiff was hospitalized for five (5) days and diagnosed with an infection caused by "a large amount of urine that . . . was released into the intraperitoneal cavity when plaintiff's bladder tore due to over-distention." Plaintiff was required to undergo a surgery to drain the urine from her abdomen. From October 2008 until February 2011, plaintiff had not been able to void the entire contents of her bladder without assistance. Plaintiff alleged that she suffered from incontinence, recurring pain and infections, and a reduced quality of life.

On 31 January 2014, defendants filed a "Response to Complaint." Defendants argued that "Duke University Health System" is not an existing entity and that plaintiff was provided notice in 2012 for the correct name of the entity that provided healthcare to plaintiff, Duke University Health System, Inc. Defendants also argued that in 2012, plaintiff was provided notice regarding the identity of defendant Jane Doe, Kimberly Emory, R.N. Based on the foregoing, defendants moved to dismiss the second complaint on behalf of defendant Jane Doe and Duke University Health System for insufficiency of process, insufficiency of service of process, lack of personal jurisdiction, and failure to state a claim pursuant to Rules 4, 12(b)(2), and 12(b)(4-6) of the North Carolina Rules of Civil Procedure. Defendants also moved to dismiss plaintiff's second complaint as to Duke University, pursuant to Rule 12(b)(6). Defendants argued that Duke University was not a healthcare provider to plaintiff nor employed anyone who provided healthcare to plaintiff. Defendants moved to dismiss plaintiff's action in its entirety pursuant to Rule 41(d)

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of the North Carolina Rules of Civil Procedure for failure to pay the costs of plaintiff's first action. In addition, defendants moved to dismiss plaintiff's action for failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Defendants also presented the following defenses, *inter alia*: expiration of the applicable statute of limitations and/or repose; punitive damages claims are unconstitutional; compliance with standards of care; lack of proximate cause; and, contributory negligence and other affirmative defenses.

On 4 March 2014, defendants filed a motion for costs and fees pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 6-20, and N.C. Gen. Stat. § 7A-305(d).

On 24 March 2014, plaintiff filed a "Motion to Amend the Pleadings" pursuant to N.C. Gen. Stat. § 1A-1, Rule 15. Plaintiff sought to amend paragraph 82 of the second complaint which dealt with the Rule 9(j) certification.

A hearing was held on 24 March 2014 in Durham County Superior Court, Judge W. Osmond Smith, presiding. The trial court considered defendants' motion to dismiss plaintiff's second complaint, plaintiff's motion to amend the second complaint, and defendants' motion for costs. On 24 June 2014, the trial court entered an "Order Dismissing Action with Prejudice and Taxing Costs to Plaintiff." The trial court entered the following findings of fact, in pertinent part:

3. Plaintiff filed an action against Defendants on October 6, 2011, captioned *Brandie Fintchre v. Duke University, et al.*, No. 11 CVS 5194 (referred to herein as the "First Lawsuit" or the "First Complaint").

4. The First Lawsuit named as defendants Duke University, Duke University Health Systems, Jane Doe, RN, and Hardee Klitzman, RN.

....

6. On December 12, 2011, through counsel, all named Defendants answered the First Complaint. The Answer set forth that Plaintiff's healthcare that is the subject of the action was provided by Duke University Health System, Inc. Plaintiff did not name Duke University Health System, Inc. as a Defendant in the First Lawsuit, or attempt to amend to add Duke University Health System Inc. to that Lawsuit.

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7. On March 16, 2012, Defendants responded to Plaintiff's Interrogatories, and identified "Jane Doe, RN" as Kimberly Emory, RN, a registered nurse employed by Duke University Hospital. Plaintiff did not move to amend to add Ms. Emory as a defendant or to substitute her for Jane Doe.

....

10. The First Complaint does not allege, as required under Rule 9(j), that a person reasonably expected to qualify as an expert reviewed the medi[c]al records pertaining to the alleged negligence that were available to Plaintiff at the time she filed the First Complaint.

11. On January 3, 2013, Plaintiff Brandie Fintchre filed a voluntary dismissal, without prejudice, of her claims against Duke, pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

....

13. On December 20, 2013, Plaintiff refiled the present action (the "Second Lawsuit" or the "Second Complaint").

14. The Second Complaint asserts the same causes of action against the same Defendants as the First Complaint.

15. The Second Complaint does not name Duke University Health System, Inc. or Ms. Emory as Defendants.

16. Plaintiff did not serve Duke University Health System, Inc. or Ms. Emory with the Second Complaint.

....

18. The Second Complaint, like the First Complaint, does not allege that a person reasonably expected to qualify as an expert reviewed the medi[c]al records pertaining to the alleged negligence that were available to Plaintiff at the time she filed the Second Complaint.

....

21. On March 24, 2014, Plaintiff moved to amend the Complaint to change the name of Defendant Duke University Health Systems to Duke University Health System, Inc. in the caption and Summons.

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22. Plaintiff also moved to amend Paragraph 82 of the Complaint to include a certification that a person expected to qualify as an expert witness had reviewed all medical records pertaining to the alleged negligence that were available to Plaintiff at the time she filed the Complaint.

The trial court concluded that plaintiff's naming of Duke University Health Systems instead of Duke University Health System, Inc. was a misnomer and granted plaintiff's motion to amend the second complaint and summons to name defendant Duke University Health System, Inc. Defendants' motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), insufficiency of process under Rule 12(b)(4), and insufficiency of service of process under Rule 12(b)(5) was denied. The trial court concluded that despite defendants informing plaintiff of defendant Jane Doe's true identity, plaintiff failed to name the correct defendant in both of her suits prior to the lapse of the statute of limitations, in violation of N.C. Gen. Stat. § 1-166, and failed to serve Ms. Emory with either complaint. Plaintiff's claims as to Jane Doe/Emory were dismissed with prejudice pursuant to Rule 12(b)(2) for lack of jurisdiction. The trial court concluded that plaintiff failed to file a complaint containing the required Rule 9(j) certification required within three (3) years of her alleged injuries. Furthermore, the trial court concluded that plaintiff's motion to amend was futile because the statute of limitations has elapsed. Thereby, defendants' motion to dismiss pursuant to Rule 9(j), Rule 12(b)(6), and the applicable statute of limitations was granted. The trial court taxed plaintiff with costs pursuant to Rule 41(d) and N.C. Gen. Stat § 7A-305.

Plaintiff appeals.

## II. Discussion

Plaintiff advances three issues on appeal. Plaintiff argues that the trial court erred by (A) denying her motion to amend the second complaint in order that it comply with Rule 9(j) of the North Carolina Rules of Civil Procedure; (B) entering findings of fact and conclusions of law that were not supported by the evidence; and, (C) taxing interest on costs awarded pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure.

### A. Rule 9(j)

**[1]** Plaintiff argues that the trial court erred by denying her motion to amend the second complaint in order that it comply with N.C. Gen. Stat. § 1A-1, Rule 9(j). We disagree.



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Motions to amend are governed by N.C. Gen. Stat. § 1A-1, Rule 15. Rule 15(a) provides that:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

N.C.G.S. § 1A-1, Rule 15(a) (2014).

Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced. . . . [O]ur standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion. Denying a motion to amend without any justifying reason appearing for the denial is an abuse of discretion. However, proper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party. Other reasons that would justify a denial are bad faith, futility of amendment, and repeated failure to cure defects by previous amendments. When the trial court states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling.

*Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165-66, 510 S.E.2d 690, 694 (1999) (internal citations omitted).

The North Carolina Rules of Civil Procedure address pleadings in medical malpractice suits and Rule 9(j) mandates as follows:

Medical malpractice. – Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 *shall be dismissed unless:*

- (1) The pleading *specifically asserts* that the medical care and *all medical records pertaining to the alleged negligence* that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert

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witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014) (emphasis added). “We [] review the trial court’s ruling on Rule 9(j) compliance *de novo*.” *McKoy v. Beasley*, 213 N.C. App. 258, 262, 712 S.E.2d 712, 715 (2011) (citation omitted).

In its 16 June 2014 order, the trial court concluded that plaintiff had “failed to file a complaint containing the required Rule 9(j) certification within three years of the acts that caused her alleged injuries” based on plaintiff’s failure to allege that all medical records pertaining to the alleged negligence were reviewed by a person who plaintiff reasonably expected to qualify as an expert witness. The trial court further concluded that plaintiff’s motion to amend the 9(j) certification in her second complaint, filed 24 March 2014, was “futile because the statute of limitations elapsed.”

On appeal, plaintiff concedes that her “counsel inadvertently failed to expressly state [that] this pre-filing evaluation included a review of ‘all medical records pertaining to the alleged negligence.’” Nonetheless, plaintiff argues that although the language of her complaints was deficient, because she complied with the substantive requirements of Rule 9(j) before she filed her first action, filed her first action within the statute of limitations, and filed her second action within one year of taking a voluntary dismissal of her first action, the trial court should have granted her motion to amend the Rule 9(j) certification in her second complaint. Plaintiff’s contentions are not convincing.

Plaintiff relies on the holding in *Brisson v. Santoriello*, 351 N.C. 589, 528 S.E.2d 568 (2000), for her argument. First, we note that *Brisson* was “overruled by the Supreme Court in *Bass [v. Durham County Hospital Corp.]*, 358 N.C. 144, 592 S.E.2d 687 (2004).” *McKoy*, 213 N.C. App. at 263, 712 S.E.2d at 716. Second, the circumstances in *Brisson* are distinguishable from those found in the case *sub judice*. In *Brisson*, the plaintiffs’ first complaint failed to comply with Rule 9(j). *Brisson*, 351 N.C. at 591-92, 528 S.E.2d at 569. The plaintiffs voluntarily dismissed their claims against the defendants pursuant to Rule 41(a)(1)<sup>1</sup> and subsequently filed

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1. Rule 41(a)(1) provides that “[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.” N.C. Gen. Stat. § 1A-1, Rule 41(a) (2014).

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a second complaint that included the appropriate Rule 9(j) certification. *Id.* at 592, 528 S.E.2d at 570. The second complaint was filed beyond the applicable three year statute of limitations. The trial court granted the defendants' motion for judgment on the pleadings, stating that the first complaint did not extend the statute of limitations because the first complaint did not comply with Rule 9(j). *Id.* Our Court reversed the trial court and reinstated the plaintiffs' action. *Id.* at 593, 528 S.E.2d at 570. Upon review, the North Carolina Supreme Court stated that the only issue before it was whether the plaintiffs' voluntary dismissal pursuant to Rule 41 effectively extended the statute of limitations by allowing the plaintiffs to refile their complaint against the defendants within one year and concluded that it does. *Id.* The *Brisson* Court stated that the purpose of the one-year extension of Rule 41 was to "provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit." *Id.* at 597, 528 S.E.2d at 573. Unlike in *Brisson*, plaintiff in the present case failed to file a proper Rule 9(j) certification in either of her two complaints. In addition, the issue before our Court is not whether Rule 41 provided a one-year extension from the voluntary dismissal of the first complaint, but whether the trial court should have granted plaintiff's motion to amend the second complaint.

We find our holding in *McKoy v. Beasley*, 213 N.C. App. 258, 712 S.E.2d 712 (2011), to be instructive. In *McKoy*, the plaintiff filed a wrongful death action on 7 April 2007, within two years of the decedent's death on 30 April 2005. *Id.* at 260, 712 S.E.2d at 713. The trial court dismissed the plaintiff's action without prejudice, pursuant to Rule 41(b), for failure to comply with Rule 9(j). Our Court reasoned that the trial court's dismissal pursuant to Rule 41(b) was the functional equivalent of the plaintiff taking a voluntary dismissal under Rule 41(a)(1) for purposes of the analysis. *Id.* at 263, 712 S.E.2d at 716. The plaintiff then filed the second action on 20 December 2007 and an amended action on 20 March 2009. *Id.* at 260, 712 S.E.2d at 714. Our Court stated that because the second action was filed more than two years following the decedent's death, the plaintiff must rely on the 7 April 2007 action in order to have timely filed her action for wrongful death. *Id.* at 263, 712 S.E.2d at 715. "Since the original complaint, that was filed within the two year limitations period was defective, the subsequent complaint must be dismissed." *Id.* Our Court relied on the case of *Bass v. Durham Cty. Hosp. Corp.*, 158 N.C. App. 217, 580 S.E.2d 738 (2003), *rev'd per curiam for reasons stated in the dissent*, 358 N.C. 144, 592 S.E.2d 687 (2004), which held as follows:

A Rule 41(a) voluntary dismissal would salvage the action and provide another year for re-filing had plaintiff filed a

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complaint complying with Rule 9(j) before the limitations period expired. Plaintiff's complaint was untimely filed beyond the expiration of the applicable statute of limitations and the Rule 9(j) extension.

*Id.* at 263, 712 S.E.2d at 716 (citation omitted). Accordingly, our Court held that "the defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j), where the second complaint is filed outside of the applicable statute of limitations." *Id.*

In the present case, the alleged medical malpractice occurred in October 2008 and April 2010. The first complaint was filed on 6 October 2011, within the three year statute of limitations<sup>2</sup>. Plaintiff subsequently filed a voluntary dismissal without prejudice on 3 January 2013 pursuant to N.C. Gen. Stat. § 1A-1, Rule 41. The second complaint was filed on 20 December 2013. Both the first and second complaints included the following language in its 9(j) certification:

Pursuant to North Carolina General Statute Section 1A-1, Rule 9(j), the medical care provided to Plaintiff was reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under N.C. R. Evid. 702 who are willing to testify that the medical care at issue in this action failed to comply with the standard of care.

Both complaints failed to allege that a person reasonably expected to qualify as an expert had reviewed all available medical records pertaining to the alleged negligence. Because the second complaint was filed following the expiration of the statute of limitations, plaintiff must rely on the first complaint in order to have timely filed her medical malpractice action. We hold that where plaintiff failed to file a complaint including a valid Rule 9(j) certification within the statute of limitations, granting plaintiff's motion to amend her second complaint would have been futile, as the trial court found. Therefore, we affirm the order of the trial court, granting defendants' motion to dismiss pursuant to Rule 9(j).

B. Findings of Fact and Conclusions of Law

**[2]** In her second argument on appeal, plaintiff asserts that the trial court erred by entering findings of fact and conclusions of law that were unnecessary and not supported by the evidence.

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2. See N.C. Gen. Stat. § 1-15 (2014).

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“The standard of review for this Court is whether the findings of fact by the trial court are supported by competent evidence in the record[.]” *Embark, LLC v. 1105 Media, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 753 S.E.2d 166, 170 (2014) (citation and quotation marks omitted). Findings of fact are conclusive on appeal if supported by competent evidence, “even though the evidence might sustain a finding to the contrary.” *In re Foreclosure of a Deed of Trust Executed by Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citation omitted). “A trial court’s unchallenged findings of fact are presumed to be supported by competent evidence and [are] binding on appeal.” *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012) (citation and internal quotation marks omitted). Conclusions of law are reviewable *de novo*. *Ge Betz, Inc. v. Conrad*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 752 S.E.2d 634, 645 (2013).

In the present case, plaintiff named “Duke University Health Systems” as a defendant in the caption of both complaints. Plaintiff then identified “Duke University Health Systems, Inc.” in the body of both complaints. The trial court held that “Duke University Health Systems” was not an existing entity and that “Duke University Health System, Inc.” was the entity that supervised plaintiff’s healthcare. The trial court concluded that plaintiff’s naming of Duke University Health Systems instead of Duke University Health System, Inc. in both her first and second complaints was a misnomer and granted plaintiff’s motion to amend the second complaint and summons to name Duke University Health System, Inc. in place of Duke University Health Systems. Plaintiff does not challenge the aforementioned conclusions.

Instead, plaintiff challenges the following findings of fact:

4. The First Lawsuit named as defendants Duke University, Duke University Health Systems, Jane Doe, RN, and Hardee Klitzman, RN.

....

6. On December 12, 2011, through counsel, all named Defendants answered the First Complaint. The Answer set forth that Plaintiff’s healthcare that is the subject of the action was provided by Duke University Health System, Inc. Plaintiff did not name Duke University Health System, Inc. as a Defendant in the First Lawsuit, or attempt to amend to add Duke University Health System, Inc. to that Lawsuit.

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[241 N.C. App. 232 (2015)]

15. The Second Complaint does not name Duke University Health System, Inc. or Ms. Emory as Defendants.

Plaintiff also challenges the following conclusion of law:

3. Neither the First Complaint nor the Second Complaint names Duke University Health System Inc. as a defendant.

After thorough review, we hold that findings of fact numbers 4, 6, and 15 are supported by competent evidence in the record. The caption of the first complaint named Duke University, Duke University Health Systems, Jane Doe, RN, and Hardee Klitzman, R.N. as defendants. In its 14 December 2011 “Answer and Defenses,” defendants stated that plaintiff’s healthcare that is the subject of the action was provided by Duke University Health System, Inc. In addition, the record indicates that plaintiff did not name Duke University Health System, Inc. as a defendant in either complaint and that plaintiff did not attempt to amend the first complaint in order to add Duke University Health System, Inc. as a defendant. Based on the foregoing findings of fact, the trial court did not err by concluding that plaintiff failed to name Duke University Health System, Inc. as a defendant.

C. Interest on Costs

**[3]** In her last argument, plaintiff contends that the trial court erred by awarding interest on costs incurred by defendants in the first action. We agree.

In the 24 June 2014 order, the trial court ordered the following:

6. The Motion by all Defendants to tax to Plaintiff the costs arising from 11 CVS 5194 [(the first complaint)] allowed by N.C. Gen. Stat. § 7A-305 and Rule 41(d) is GRANTED. Defendants shall have and recover the amount of \$1,388.80 from Plaintiff Brandie Fintchre plus interest at the maximum legal rate after entry of this Order. This Order shall be entered as a Judgment against Plaintiff Brandie Fintchre in the records of the Durham County Clerk of Court in the amount of \$1,388.80.

N.C. Gen. Stat. § 1A-1, Rule 41(d) (2014) provides that:

A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same

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claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

“[I]t is the general rule that interest on costs properly assessed may not be allowed without statutory authority.” *Charlotte v. McNeely*, 281 N.C. 684, 696, 190 S.E.2d 179, 188 (1972) (citation omitted). Because N.C. Gen. Stat. § 1A-1, Rule 41(d) does not allow the trial court to award interest on costs assessed, we reverse and remand the portion of the 24 June 2014 order awarding “interest at the maximum legal rate” pursuant to Rule 41(d).

III. Conclusion

We affirm the 24 June 2014 order of the trial court, denying plaintiff’s motion to amend the second complaint in order that it comply with Rule 9(j), and entering findings of fact numbers 4, 6, 15, and conclusion of law number 3. We reverse and remand the portion of the order awarding interests on costs pursuant to Rule 41(d).

Affirmed in part; Reversed and remanded in part.

Judge STEELMAN concurs.

Judge STEPHENS concurs by a separate written opinion.

STEPHENS, Judge, concurring.

I agree with the holding of the majority opinion that the mandatory language of Rule 9(j) requires the result we reach here. However, I write separately to distinguish the reasoning underlying that result from the circumstances presented in the cases cited in the majority opinion and also to draw our General Assembly’s attention to the possibly unforeseen and certainly harsh consequence of the result this language in Rule 9(j) requires us to reach.

Rule 9(j) provides, *inter alia*:

Any complaint alleging medical malpractice by a health care provider . . . shall be dismissed unless . . . [t]he

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

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013). The intent of Rule 9(j) is to prevent the filing of entirely frivolous medical malpractice claims. *See* 1995 N.C. Sess. Laws ch. 309 (“Act To Prevent Frivolous Medical Malpractice Actions By . . . Requiring Expert Witness Review As A Condition Of Filing A Medical Malpractice Action”). This intent is plainly accomplished by the *act* of having a would-be plaintiff’s relevant medical care and records *reviewed* by a medical expert prior to the filing of a medical malpractice action. The rule’s further requirement that the complaint must specifically assert that this act has occurred serves to put a defendant on notice of the plaintiff’s compliance therewith.

Nothing in the records on appeal in *Bass* and *McKoy* suggests that those plaintiffs actually had their medical care and records reviewed by a medical expert before they filed their medical malpractice complaints. In addition, those plaintiffs’ initial complaints lacked any assertion that would have given the defendants any notice of the plaintiffs’ compliance with the review required under Rule 9(j). Here, in contrast, it is undisputed that plaintiff complied with the requirement that her medical care and records be reviewed by a medical expert before her first complaint was filed and that defendants had notice of that fact. Thus, the *intent* of Rule 9(j), to wit, requiring expert review of medical malpractice claims to prevent frivolous lawsuits, was plainly met before plaintiff filed her first complaint. The obvious failure of plaintiff’s trial counsel to word the Rule 9(j) certification of compliance as specified in the statute is a highly technical failure which here results in the dismissal of a medical malpractice case which is *not* frivolous for the reasons Rule 9(j) is designed to prevent. I am thus sympathetic with the position of plaintiff, who is thereby denied any opportunity to prove her claims before a finder of fact. I question whether such a harsh and pointless outcome was intended by our General Assembly in enacting Rule 9(j).

On the other hand, it is also undisputed that plaintiff’s trial attorneys were alerted to the flawed wording of the purported Rule 9(j) certification in the first complaint and yet, following the voluntary dismissal without prejudice of the first complaint, *included the identical flawed language in the second complaint*. As noted *supra*, plaintiff’s trial



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counsel took the time and effort to have a medical expert review plaintiff's medical care *and medical records* before filing a medical malpractice action, and alleged that plaintiff's medical care had been reviewed by a medical expert, yet, inexplicably, failed to allege that "all medical records pertaining to the alleged negligence" had also been reviewed by the expert so as to make a proper Rule 9(j) certification. In light of plaintiff's trial attorneys' failure to comply with the statutory mandate for properly pleading a medical malpractice action, especially after being informed of the deficiency in the first Rule 9(j) certification, I certainly can find no abuse of discretion in the trial court's denial of plaintiff's motion to amend her second complaint.

In sum, despite the thoughtful distinctions between the facts of this case and the facts of *Bass* and *McKoy* drawn by plaintiff's appellate counsel, I am compelled to concur in the majority's affirmance of the 24 June 2014 order.

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IN THE MATTER OF THE FORECLOSURE BY ROGERS TOWNSEND & THOMAS, PC,  
SUBSTITUTE TRUSTEE, OF A DEED OF TRUST EXECUTED BY JULIA WESKETT BEASLEY, DATED  
FEBRUARY 12, 2007 AND RECORDED ON FEBRUARY 16, 2007 IN BOOK NO. 1211 AT PAGE 169  
OF THE CARTERET COUNTY REGISTRY, NORTH CAROLINA

SUBSTITUTE TRUSTEES:  
ROGERS TOWNSEND & THOMAS, PC

No. COA14-387

Filed 2 June 2015

**1. Mortgages and Deeds of Trust—foreclosure—power of sale—special proceeding**

Rule 41 of the North Carolina Rules of Civil Procedure applied to non-judicial foreclosures. A foreclosure under power of sale is a type of special proceeding to which the Rules of Civil Procedure apply.

**2. Civil Procedure—Rule 41 dismissal—statute of limitations**

Orders to dismiss entered after a second voluntary dismissal in a foreclosure action were void. Rule 41 of the North Carolina Rules of Civil Procedure permits an additional year to refile until the expiration of the ten-year statute of limitations for a foreclosure action. Petitioners' actions were timely filed and the effect of the second voluntary dismissal was such that any subsequent orders were without legal effect.

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**3. Civil Procedure—Rule 41—statute of limitations**

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) provides that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim. This provision is commonly referred to as the “two dismissal” rule, but Rule 41 itself does not bar a subsequent action. It is the doctrine of *res judicata* that bars subsequent actions based on the same claim or claims.

**4. Mortgages and Deeds of Trust—foreclosure—two voluntary dismissals—res judicata—equity**

In a foreclosure where petitioners had twice taken voluntary dismissals, and the issue arose as to whether the Superior Court had jurisdiction to dismiss the action, the dispositive issue was whether each failure to make a payment by a borrower under the terms of a promissory note and deed of trust constituted a separate default, or period of default, such that any successive acceleration and foreclosure actions on the same note and deed of trust involved claims based upon different transactions or occurrences, thus exempting them from the two dismissal rule in Rule 41(a). While the issue had not been addressed in N.C., there was persuasive reasoning from Florida. The two dismissal rule is based on *res judicata*, but the unique nature of the mortgage obligations and the continuing relationship of the parties as well as equity required that *res judicata* not be applied so strictly as to prevent lenders from being able to challenge multiple defaults.

**5. Mortgages and Deeds of Trust—foreclosure—two voluntary dismissals—res judicata not a bar—different acts of default**

In a foreclosure action with two voluntary dismissals, the two dismissal rule of Rule 41(a) did not apply and *res judicata* did not bar a third power of sale foreclosure action. The claims of default and the particular facts at issue in each action differed, and, as a result of the voluntary dismissals, the claims of acceleration and the alleged acts of default were never adjudicated on their merits. Furthermore, the lender had not lost its right to enforce the note and deed of trust merely because its previous two foreclosure actions were dismissed without prejudice.

Appeal by petitioners from order entered 25 September 2013 by Judge Phyllis M. Gorham in Carteret County Superior Court. Heard in the Court of Appeals 24 September 2014.

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*Nelson Mullins Riley & Scarborough, LLP, by Joseph S. Dowdy, Donald R. Pocock, and D. Martin Warf; and Rogers Townsend & Thomas, PC, by Renner Jo St. John, for petitioner-appellants.*

*Shipman & Wright, LLP, by Gregory M. Katzman, for respondent-appellee.*

CALABRIA, Judge.

FV-I, Inc. (“FV-I”), in trust for Morgan Stanley Mortgage Capital Holdings, LLC (“Morgan Stanley”), and substitute trustee Rogers Townsend & Thomas, PC (“RTT”) (collectively with Morgan Stanley and FV-I, “petitioners”), appeal from an order granting Julia Weskett Beasley’s (“Mrs. Beasley”) motion to dismiss, with prejudice, FV-I’s foreclosure proceeding against her. We reverse.

On 12 February 2007, Mrs. Beasley executed a promissory note (“the note”) in favor of Equity Services, Inc. in the original principal amount of one million dollars (\$1,000,000). The purpose of the note was to finance the purchase of 109 Knollwood Drive located in the Pine Knoll Shores subdivision of Atlantic Beach, North Carolina (“the property”). The note was secured by a Deed of Trust recorded on 16 February 2007 in Book 1211 at Page 169 in the Carteret County Public Registry (“the deed of trust”).

On 15 June 2011, Philip A. Glass (“Mr. Glass”), acting as substitute trustee for FV-I, the holder of the note, filed a Notice of Foreclosure Hearing (“first notice”) alleging that Mrs. Beasley had defaulted for failing to make timely payments on the note. According to the first notice, FV-I intended to accelerate payment of the entire amount due on the note and deed of trust; however, Mrs. Beasley could cure the default and prevent the foreclosure by paying the past due indebtedness plus attorneys’ fees and actual costs incurred if FV-I agreed to let her do so. On 17 January 2012, Mr. Glass filed a notice of voluntary dismissal in the foreclosure proceedings.

On 4 April 2013, RTT, a new substitute trustee, filed a second Notice of Foreclosure Hearing (“second notice”) alleging that Mrs. Beasley was still in default on the note and stating that FV-I had accelerated the maturity of the debt. The second notice also stated Mrs. Beasley could cure her default and reinstate the loan obligation if the deed of trust provided her such a right. Mrs. Beasley’s total debt of \$1,208,025.18 included the amount of principal and interest \$1,151,427.01 plus the amount of other

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fees, expenses, or disbursements. On 26 April 2013, Mrs. Beasley filed a motion to dismiss, alleging, *inter alia*, that RTT failed to refile the action within one year in accordance with Rule 41(a) of the North Carolina Rules of Civil Procedure (“Rule 41”).

On 10 July 2013, the day before the scheduled foreclosure hearing, RTT filed a second voluntary dismissal without prejudice. On 11 July 2013, the matter was heard before the Carteret County Clerk of Court (“the Clerk of Court”). The Clerk of Court subsequently entered a 16 July 2013 order which found, *inter alia*, that the second voluntary dismissal operated as an adjudication on the merits of the case pursuant to Rule 41(a). As a result, the Clerk granted Mrs. Beasley’s motion to dismiss with prejudice.

Petitioners appealed to Superior Court. After conducting a hearing *de novo*, the Superior Court found that, because the new foreclosure by power of sale action was filed more than one year after the first voluntary dismissal, Rule 41(a) barred the claim. The Superior Court also concluded that the second voluntary dismissal operated as an adjudication on the merits pursuant to Rule 41(a). The court then struck the notice of voluntary dismissal and granted Mrs. Beasley’s motion to dismiss the action with prejudice. Petitioners appeal.

On appeal, petitioners argue (1) that the Superior Court erred because it lacked jurisdiction to dismiss the matter, and (2) that the Superior Court’s order was erroneous to the extent that it precluded further appropriate foreclosure proceedings.

**[1]** As an initial matter, we address petitioners’ contention that non-judicial foreclosures are not subject to Rule 41. This Court has previously held that “[a] foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply.” *Lifestore Bank v. Mingo Tribal Pres. Trust*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 763 S.E.2d 6, 9 (2014), *disc. review denied*, No. 406P14, 2015 WL 1809347 (N.C. Apr. 9, 2015). Therefore, Rule 41 applies in the instant case.

**[2]** Petitioners next argue that the Superior Court erred because it lacked jurisdiction and misapplied the law. Specifically, petitioners contend that because they filed a notice of dismissal on 10 July 2013, both the Clerk of Court and the Superior Court lacked jurisdiction to grant Mrs. Beasley’s motion to dismiss. Petitioners also argue that even if the Superior Court had jurisdiction to enter the dismissal order, the court’s conclusion that petitioners’ second voluntary dismissal operated as an adjudication on the merits was erroneous to the extent that it prevents them from bringing a third foreclosure action. We agree.

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Our standard of review regarding whether the Superior Court had subject matter jurisdiction to decide the matter is *de novo*. *In re Foreclosure of Young*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 744 S.E.2d 476, 479 (2013).

In this instance, a proper examination of both Rule 41(a) and the relevant Statute of Limitations is necessary to determine whether petitioners were required to file their second foreclosure by power of sale action within one year after dismissing the first action.

Rule 41(a) “permits a plaintiff to dismiss, without prejudice, any claim without an order of the court by filing a notice of dismissal at any time before resting his case, and to file a new action based upon the same claim within one year after the dismissal.” *Richardson v. McCracken Enters.*, 126 N.C. App. 506, 508, 485 S.E.2d 844, 845 (1997). With respect to Rule 41(a), the additional year to refile is often known as the “savings provision.” The extra time granted

is an extension of time beyond the general statute of limitation rather than a restriction upon the general statute of limitation. In other words, a party *always* has the time limit prescribed by the general statute of limitation and in *addition thereto* they get the one year provided in Rule 41(a)(1). But Rule 41(a)(1) shall not be used to limit the time to one year if the general statute of limitation has not expired.

*Whitehurst v. Virginia Dare Transp. Co.*, 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973) (emphasis added). Accordingly, petitioners could refile their action at any time until the expiration of the applicable statute of limitations. N.C. Gen. Stat. § 1–47 (2013) sets a ten-year statute of limitations during which time a foreclosure action may be commenced. Since the note and deed of trust at issue came into existence in 2007, petitioners’ actions were timely filed, and the effect of the second voluntary dismissal was such that any subsequent orders entered by the Clerk or by the Superior Court were without legal effect. *See Carter v. Clowers*, 102 N.C. App. 247, 252, 401 S.E.2d 662, 664 (1991) (“After the dismissal, there is no longer a pending action, and therefore no further proceedings are proper.”) (citations omitted); *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970) (“When a court decides a matter without the court’s having jurisdiction, then the whole proceeding is null and void, [i].e., as if it had never happened.”) (citations omitted).

**[3]** Even though the orders entered after petitioners’ second voluntary dismissal were void, we still must determine the effect of that dismissal. Rule 41(a) provides that “a notice of dismissal operates as an

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adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim.” N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). This provision is commonly referred to as the “two dismissal” rule<sup>1</sup>. According to Rule 41(a)’s two dismissal rule, “a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action . . . operate[s] as an adjudication on the merits and bar[s] a third action based upon the same set of facts.” *Richardson*, 126 N.C. App. at 509, 485 S.E.2d at 846. In order to determine whether a second action was based upon the same transaction or occurrence as a first action, we examine whether the claims in both actions were “based upon the same core of operative facts” and whether “all of the claims could have been asserted in the same cause of action.” *Id.* at 509, 485 S.E.2d at 846–47.

**[4]** Here, petitioners twice voluntarily dismissed foreclosure by power of sale actions against Mrs. Beasley and they filed both notices of dismissal prior to resting their case. In addition, FV-I sought to accelerate Mrs. Beasley’s debt in both actions. Therefore, we must decide whether FV-I’s decision to accelerate the debt placed the entire balance of the note at issue and eliminated any factual distinctions between the two actions. If it did, the second action was based upon the same transaction or occurrence as the first one, and Rule 41 as well as the principles of *res judicata* will bar petitioners from bringing a third foreclosure by power of sale action on the same note. The dispositive issue, as we see it, is whether or not each failure to make a payment by a borrower under the terms of a promissory note and deed of trust constitutes a separate default, or separate period of default, such that any successive acceleration and foreclosure actions on the same note and deed of trust involve claims based upon different transactions or occurrences, thus exempting them from the two dismissal rule contained in Rule 41(a). Neither this Court nor our Supreme Court have addressed this precise issue, but relevant case law exists to resolve it in this case.

Recently, in *Lifestore Bank*, this Court considered the application of Rule 41(a)’s two dismissal rule in the context of foreclosure actions. There, after the borrowers defaulted on two promissory notes, the lender filed two actions for foreclosure by power of sale. *Lifestore Bank*, \_\_\_ N.C. App. at \_\_\_, 763 S.E.2d at 8. In each action, the lender twice entered voluntary dismissals. *Id.* However, the lender filed a third

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1. In construing Rule 41(a), we note that when the two dismissal rule applies and the dismissal of a second action operates as an adjudication on the merits, it is the doctrine of *res judicata* that bars subsequent actions based on the same claim or claims. Thus, Rule 41 itself does not bar a subsequent action.

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action seeking money judgments on both notes and judicial foreclosure on both of deeds of trust that secured them. *Id.* On appeal, the pertinent issue was whether Rule 41 barred the lender's claims for money judgments and judicial foreclosure. *Id.* at \_\_\_, 763 S.E.2d at 9. This Court held that, because an action for foreclosure by power of sale is a special proceeding, limited in jurisdiction and scope, the lender's money judgment and judicial foreclosure claims—though based upon the same core of operative facts—could not have been brought in the previously dismissed actions and, thus, were not barred by Rule 41(a)'s two dismissal rule. *Id.* at \_\_\_, 763 S.E.2d at 11–13. In reaching its conclusion, the *Lifestore Bank* Court anticipated that Rule 41(a) would have barred any subsequent action by the lender for foreclosure by power of sale:

[The lender] pursued two foreclosures by power of sale under N.C.G.S. § 45–21.16(a). . . . [The lender] subsequently took voluntary dismissals of each foreclosure by power of sale action. As such, the “two dismissal rule” of Rule 41 applies here for, by taking two sets of voluntary dismissals as to its claims for foreclosure by power of sale, the second set of voluntary dismissals is an adjudication on the merits which bars [the lender] from undertaking a third foreclosure by power of sale action pursuant to N.C.G.S. § 45–21.16(a).

However, in the instant matter [the lender] has now filed a complaint seeking, in addition to money judgments, judicial foreclosure against [the borrowers].

*Id.* at \_\_\_, 763 S.E.2d at 12.

While the Court did not squarely address the issue presented in this case, the language quoted above suggests that successive foreclosure by power of sale actions on the same notes generally involve the same facts and, thus, constitute the same claims for purposes of the two dismissal rule analysis. Nevertheless, we find that *Lifestore Bank* is easily distinguished from the instant case. Indeed, the *Lifestore Bank* Court did not reveal the alleged dates or periods of default relevant to the lenders' foreclosure by sale actions, and there was no mention that the debts were accelerated. Nor did the Court address the question whether each failure to make a payment by a borrower under the terms of a note secured by a deed of trust constitutes a separate default. As noted above, there are no North Carolina appellate decisions that have directly answered this question, but the Supreme Court of Florida has, and we find that Court's reasoning persuasive.

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In *Singleton v. Greymar Assocs.*, 882 So.2d 1004, 1005 (Fla. 2004), the lender filed a foreclosure action alleging default based on the borrower's failure to make payments due from September 1999 through February 2000, which was dismissed with prejudice. The lender then filed a subsequent foreclosure action alleging default of mortgage payments from April 2000, onward. *Id.* at 1005. Both foreclosure actions sought to accelerate the entire indebtedness against the borrowers. *Id.*, n.1. The trial court rejected the borrower's argument that the prior dismissal barred relief in the second action and granted summary judgment in favor of the lender. *Id.* at 1005. On appeal, Florida's Fourth District Court of Appeals agreed and held that "[e]ven though an earlier foreclosure action filed by [the lender] was dismissed with prejudice, the application of res judicata does not bar this lawsuit. . . . The second action involved a new and different breach." *Singleton v. Greymar Assocs.*, 840 So.2d 356, 356 (Fla. Dist. Ct. App. 2003). Florida's Supreme Court granted the lender's petition for review, *Singleton*, 882 So.2d at 1006, as the holding conflicted with the decision of Florida's Second Circuit Court of Appeals in *Stadler v. Cherry Hill Developers, Inc.*, 150 So.2d 468 (Fla. Dist. Ct. App. 1963) (holding that res judicata barred a second foreclosure action that was identical to the first action other than the period of defaults alleged were different—the acceleration of payments in the first action put the entire balance of the loan at issue at that time and, thus, the second action was identical to the first).

Florida's Supreme Court rejected *Stadler's* "stricter and more technical view of mortgage acceleration elections" and agreed with the Fourth District Court "that when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata." *Singleton*, 882 So.2d at 1006. In reaching this conclusion, the *Singleton* Court reasoned as follows:

While it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue. . . . For example, a [borrower] may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the [lender] had waived reliance on the defaults. In those instances, the [borrower] and [lender] are simply placed back in the same contractual relationship with the same continuing



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obligations. Hence, an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the [borrower] ignores her obligations on the mortgage and a valid default can be proven.

This seeming variance from the traditional law of res judicata rests upon a recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship. . . .

We must also remember that foreclosure is an equitable remedy and there may be some tension between a court's authority to adjudicate the equities and the legal doctrine of res judicata. The ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent [lenders] from being able to challenge multiple defaults on a mortgage. . . .

We conclude that the doctrine of res judicata does not necessarily bar successive foreclosure suits, regardless of whether or not the [lender] sought to accelerate payments on the note in the first suit.

*Id.* at 1007-08 (emphasis added). In the Court's view, "the subsequent and separate alleged default created a new and independent right in the [lender] to accelerate payment on the note in a subsequent foreclosure action." *Id.* at 1008.

We recognize that this view of foreclosure actions involving acceleration on a note is not universal. See *U.S. Bank Natl. Assn. v. Gullotta*, 120 Ohio St. 3d 399, 405, 899 N.E.2d 987, 992 (2008) (holding that each missed payment under a promissory note and mortgage did not give rise to a new claim because "[o]nce [the borrower] defaulted and [the lender] invoked the acceleration clause of the note, the . . . obligations to pay each installment merged into one obligation to pay the entire balance on the note"). Even so, *Singleton's* pronouncement that an "acceleration and foreclosure [action] predicated upon subsequent and different defaults present[s] a separate and distinct" claim expresses the better reasoned view. 882 So. 2d at 1007. As the *Singleton* Court stated,

[i]f res judicata prevented a [lender] from acting on a subsequent default even after an earlier claimed default could not be established, the [borrower] would have no incentive to make future timely payments on the note.

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The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note—merely because she prevailed in the first action. Clearly, justice would not be served if the [lender] was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.

*Id.* at 1007–08. Other state and federal courts have recognized these concerns and reached similar conclusions after examining *Singleton*. See, e.g., *Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006) (“res judicata does not bar successive foreclosure claims. . . . Here, the subsequent and separate alleged defaults under the note created a new and independent right in the [lender] to accelerate payment on the note in a subsequent foreclosure action.”); *Fairbank’s Capital Corp. v. Milligan*, 234 F. App’x 21, 24 (3d Cir. 2007) (“stipulated dismissal with prejudice . . . cannot bar a subsequent mortgage foreclosure action based on defaults occurring after dismissal of the first action. . . . If we were to so hold, it would encourage a delinquent [borrower] to come to a settlement with a [lender] on a default in order to later insulate the [borrower] from the consequences of a subsequent default. This is plainly nonsensical.”). Moreover, several of this Court’s decisions support the proposition that we adopt in this case: that a lender’s election to accelerate payment on a note and foreclose on a deed of trust does not necessarily place future payments at issue such that the lender is barred from filing subsequent foreclosure actions based upon subsequent defaults, or periods of default, on the same note.

“Where payments arising from [an installment] contract are at issue, this Court has [acknowledged] that more than one claim may arise from a single contract and that a dismissal with prejudice of a suit based on a default with respect to some payments does not bar future claims with respect to subsequent payments.” *Centura Bank v. Winters*, 159 N.C. App. 456, 459, 583 S.E.2d 723, 725 (2003) (citing *Shaw v. Lanotte, Inc.*, 92 N.C. App. 198, 202, 373 S.E.2d 882, 884–85 (1988)).

In *Shaw*, this Court held that res judicata was not applicable where the first action—which was dismissed with prejudice—sought to determine the issue of default on three particular payments under an asset purchase agreement and the second action was for the total amount due. 92 N.C. App. at 202–03, 373 S.E.2d at 884–85. Significantly, the *Shaw* Court reached this conclusion even though the lender sought to accelerate the entire debt in the first action. *Id.* at 199, 373 S.E.2d at 883. In addressing the lender’s attempt at acceleration, the Court noted that

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the issue in the first action “was whether [the borrower] was in default for three particular installment payments.” *Id.* at 202, 373 S.E.2d at 884. Thus, because “the issue involved in the prior action was not whether [the borrower] had defaulted on the entire amount due under the agreement but whether he had defaulted on three particular payments, acceleration of the entire debt was never an issue in the first [action].” *Id.* at 202, 373 S.E.2d at 884–85. In other words, the order of dismissal with prejudice in the first action served to adjudicate, in favor of the borrower, the merits of the lender’s claim and to determine that there was neither a default nor an effective acceleration of the debt.

[5] In the instant case, FV-I filed voluntary dismissals in two foreclosure by power of sale actions and, as a result, its claims of acceleration and Mrs. Beasley’s alleged acts of default have never been adjudicated on their merits. Nonetheless, as with the first action in *Shaw*, the acceleration issue in this case has yet to materialize. This is especially true here given that “a foreclosure by power of sale is a type of special proceeding . . . in which the clerk of court determines whether a foreclosure pursuant to a power of sale [and, by extension, an acceleration of the debt,] should be granted[.]” *Lifestore Bank*, \_\_\_ N.C. App. at \_\_\_, 763 S.E.2d at 10. Further, under the “new and independent right” reasoning in *Singleton*, FV-I has not lost its right to enforce the note and deed of trust merely because its previous two foreclosure actions, in which acceleration was invoked, were dismissed without prejudice.

In *Winters*, after citing *Shaw*, this Court held that Rule 41(a)’s two dismissal rule did not bar an automobile lessor from bringing a third action against a lessor for the balance due on a lease, even where the two previous suits also sought to collect the entire balance due on the lease at the time the complaints were filed. 159 N.C. App. at 459–60, 583 S.E.2d at 725. The *Winters* Court explained its conclusion as follows:

Each lawsuit in the present case was based on a default with respect to a separate set of payments. Plaintiff’s first civil action alleged defendants were in default for approximately four rental payments totaling \$3,714.51. The complaint sought judgment in the amount of \$13,572.00. Plaintiff then voluntarily dismissed the complaint after defendants agreed to cure the default by paying plaintiff \$3,050.00 towards the arrearage. . . . Subsequently, defendants defaulted again on the lease after which plaintiff filed a second action that sought a judgment in the amount of \$35,513.49. Although plaintiff’s prior lawsuits arose from

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breaches of the same lease agreement, both suits were based on separate defaults. Thus, the prior suits involved claims which were based upon different transactions.

*Id.*

Similarly here, each foreclosure action was based on different periods of missed payments constituting separate defaults. In both the first and second actions, FV-I sought foreclosure by power of sale and acceleration of the balance due on the note secured by the deed of trust. While neither the first nor the second notice alleged a particular date of default, the record indicates that the due date of the last scheduled payment made by Mrs. Beasley was 1 July 2009, and there is no evidence that she made any payments after that date. An issue pertinent to both actions, therefore, was whether Mrs. Beasley defaulted on 1 July 2009 or any time thereafter. Because the facts at issue in each foreclosure action differed, the possible dates of default also differed.

The first foreclosure action was voluntarily dismissed on 17 January 2012, and the issue in that action was whether Mrs. Beasley defaulted between 1 July 2009 and January of 2012. By contrast, the second foreclosure action was voluntarily dismissed on 10 July 2013. Consequently, the issue in that action was whether Mrs. Beasley defaulted between July of 2009 and July of 2013. When compared side by side, the facts necessary to establish a default in the first foreclosure action differ from those necessary to establish a default in the second foreclosure action, i.e., these facts present separate and subsequent periods of alleged default.

In construing Rule 41(a)'s two dismissal rule, "[o]ur courts have required the strictest factual identity between the original claim, and the new action, which must be based upon the same claim . . . as the original action." *Brannock v. Brannock*, 135 N.C. App. 635, 639–40, 523 S.E.2d 110, 113 (1999) (citations omitted) (internal quotation marks omitted). Therefore, Rule 41(a) applies when there is an identity of claims, the determination of which depends upon a comparison of the operative facts constituting the underlying transaction or occurrence. If the same operative facts serve as the basis for maintaining the same defaults in two successive foreclosure actions, and the relief sought in each is based on the same evidence, the voluntary dismissal of those actions under Rule 41(a) bars the filing of a third such action.

We find no strict factual identity between the two foreclosure by sale actions filed in this case. FV-I's second action was not simply a continuation of its original action and it was not an attempt to relitigate the same alleged default. Certainly, in both foreclosure actions, the Clerk

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of Court would have to determine whether FV-I could establish that a default occurred between July 2009 and January 2012. But in the second foreclosure action, the Clerk would also have had to determine whether Mrs. Beasley defaulted between January 2012 and July 2013—this is a claim that FV-I could not have brought in the first foreclosure action. Consequently, the operative facts and transactions necessary to the disposition of both actions gave rise to separate and distinct claims of default, and some of the particular default claims relevant to the second action could not have been brought in the first one. As the claims of default and particular facts at issue in each action differed, Rule 41(a)'s two dismissal rule does not apply. Accordingly, petitioners' second voluntary dismissal did not operate as an adjudication on the merits and the principles of *res judicata* do not bar a third power of sale foreclosure action.

In conclusion, petitioners filed a voluntary dismissal prior to the hearing on FV-I's second foreclosure action; thus, both the Clerk of Court and the Superior Court lacked jurisdiction to enter orders in the matter. Furthermore, since petitioners filed successive foreclosure by power of sale actions based upon different claims of default, Rule 41(a) does not bar them from filing a third such action. The trial court's order granting Mrs. Beasley's motion to dismiss is therefore reversed. Because we reverse the trial court's order on the bases of lack of jurisdiction and its misapplication of Rule 41(a)'s two dismissal rule, we need not address petitioners' remaining arguments.

Reversed.

Judges STEELMAN and McCULLOUGH concur.

## IN RE FORECLOSURE OF GARVEY

[241 N.C. App. 260 (2015)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY MICHAEL JAMES GARVEY AND JANE HOLZER GODBREY A/K/A EMILY J. HOLZER A/K/A JANE HOLZER AND JACQUELINE HOLZER DATED MARCH 9, 2004, AND RECORDED ON APRIL 14, 2004, IN BOOK 311 AT PAGE 347, ASHE COUNTY REGISTRY; SUBSTITUTE TRUSTEE SERVICES, INC., SUBSTITUTE TRUSTEE

No. COA14-570

Filed 2 June 2015

**Mortgages and Deeds of Trust—foreclosure—N.C.G.S. § 45-21.16(d) criteria—insufficient findings of fact**

In its order allowing petitioner's foreclosure on certain real property to proceed, the superior court failed to make sufficient findings of fact pursuant to Rule of Civil Procedure 52(a)(1) regarding whether the six criteria of N.C.G.S. § 45-21.16(d) had been satisfied. The case was reversed and remanded with instructions to conduct a de novo hearing followed by entry of an order setting out specific findings of fact on the N.C.G.S. § 45-21.16(d) criteria.

Appeal by respondent from order entered 12 August 2013 by Judge Richard L. Doughton in Ashe County Superior Court. Heard in the Court of Appeals 6 November 2014.

*Hutchens, Senter, Kellam & Pettit, P.A., by Lacey M. Moore, for petitioner- appellee.*

*Katherine S. Parker-Lowe for respondent-appellant.*

GEER, Judge.

Respondent Michael J. Garvey appeals from an order allowing petitioner, Substitute Trustee Services, Inc., to proceed with foreclosure on certain real property that Mr. Garvey owned. On appeal, Mr. Garvey primarily argues that the superior court failed to conduct a de novo hearing as required by N.C. Gen. Stat. § 45-21.16(d1) (2013) and failed to make specific findings of ultimate fact and conclusions of law as required by Rule 52(a)(1) of the Rules of Civil Procedure. We agree that the superior court's order lacked sufficient findings of fact to comply with Rule 52(a)(1). Moreover, we cannot determine from the order or the transcript whether the superior court conducted a de novo hearing as required by statute, as opposed to essentially engaging in an appellate review of the order of the clerk of superior court. We, therefore, reverse and remand for a de novo hearing and entry of an order compliant with Rule 52(a)(1).

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Facts

On 9 March 2004, Mr. Garvey executed a mortgage with Quicken Loans Inc. in the amount of \$80,700.00. The mortgage included an Adjustable Rate Note (“ARN”), a Second Home Rider, and an Adjustable Rate Rider. The mortgage was secured with property in West Jefferson, North Carolina by a deed of trust executed by Mr. Garvey, Jane Holzer Godbrey, and Jaqueline Holzer.

The ARN was endorsed by Quicken Loans to Countrywide Document Custody Services, then by Countrywide Document Custody Services to Countrywide Home Loans Inc., and then by Countrywide Home Loans in blank. At some point, Countrywide Home Loans changed its name to BAC Home Loans Servicing LP, which subsequently merged with Bank of America, N.A.

Mr. Garvey defaulted on the mortgage, and on 27 August 2012, Substitute Trustee Services filed “AMENDED NOTICE OF HEARING PRIOR TO FORECLOSURE OF DEED OF TRUST.” This notice explained that petitioners intended to foreclose on the West Jefferson real property by power of sale. It further explained that petitioners

have the right to appear at the hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d). To authorize the foreclosure the clerk must find the existence of (i) a valid debt of which the party seeking to foreclose is the holder, (ii) a default, (iii) a right to foreclose under the instrument, (iv) notice to those entitled to notice, and (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A.

Mr. Garvey served petitioner Bank of America with a request for admissions on 17 September 2012 and with a request for production of documents on 25 September 2012. On 15 November 2012, Mr. Garvey filed a motion to compel and motion for sanctions on the grounds that petitioners had not responded to his discovery requests. Bank of America responded by filing, on 12 December 2012, a motion for a protective order, contending that Mr. Garvey’s discovery requests were not relevant to the subject matter of the power of sale foreclosure action

## IN RE FORECLOSURE OF GARVEY

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and that respondents were required to file a separate civil action in superior court if they wished to conduct discovery.

On 8 January 2013, Pam W. Barlow, Clerk of Superior Court for Ashe County, held a hearing on whether the substitute trustee was entitled to foreclose by power of sale. That same day, Ms. Barlow entered an order denying Mr. Garvey's motion to compel and motion for sanctions and granting Bank of America's motion for protective order. She also entered an order that day "find[ing] that the Substitute Trustee can proceed to foreclose under the terms of the . . . Deed of Trust and give notice of and conduct a foreclosure sale as by statute provided." On 15 January 2013, Mr. Garvey and Ms. Holzer filed a notice of appeal from the clerk's order authorizing the foreclosure. In addition, on 2 August 2013, respondents filed a second request for admissions and a second request for production of documents.

On 12 August 2013, a hearing was held as a result of respondents' notice of appeal in Ashe County Superior Court. At that hearing, Mr. Garvey appeared *pro se*. Petitioners submitted to the court a copy of the mortgage and what was represented to be the original ARN, as well as a "MILITARY AFFIDAVIT," an "AFFIDAVIT OF DEFAULT," and an "AFFIDAVIT OF PAYMENT HISTORY." Although Mr. Garvey appears to have prepared evidence to introduce to the superior court, he ultimately introduced no evidence other than his own statement that Ms. Holzer did not receive written notice of the hearing.<sup>1</sup>

On 12 August 2013, the superior court entered a written order providing in pertinent part:

It appear[s] to the Court that the Appeal is properly before this Court, that all parties have been given adequate and timely notice of the hearing on this matter, that Andrew Cogbill appeared and represented Bank of America, N.A. and Substitute Trustee Services, Inc., and that Michael J. Garvey appeared *pro se*.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. That Bank of America, N.A. has satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16 and

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1. Apparently Jane Holzer Godfrey had passed away prior to this hearing. A guardian ad litem appeared at the hearing on behalf of any unknown heirs.



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the Substitute Trustee is entitled to proceed with the foreclosure sale; and

2. That the Clerk of Superior Court's January 8, 2013 Order be and the same herewith is affirmed.

On 21 August 2013, Mr. Garvey filed a pro se notice of appeal. Subsequently, Katherine S. Parker-Lowe gave notice of appearance on behalf of Mr. Garvey and filed an amended notice of appeal to reflect her representation.

Discussion

Upon the filing and service of a notice of hearing on a mortgagee's or trustee's request to foreclose pursuant to a power of sale, N.C. Gen. Stat. § 45-21.16(d) provides that the clerk of court in the county where the land or any portion of it is situated shall conduct a hearing at which "the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents." The statute further provides:

If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

*Id.*

The order of the clerk following the hearing set out in N.C. Gen. Stat. § 45-21.16(d) "may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. *Appeals from said act of the clerk shall be heard de novo.*" N.C. Gen. Stat. § 45-21.16(d1) (emphasis added). In reviewing the superior court's order under § 45-21.16(d1), this Court first determines whether the superior court applied the proper scope of review. *In re Watts*, 38 N.C. App. 90, 94-95, 247 S.E.2d 427, 430 (1978). If so, then this Court decides only

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“ ‘whether competent evidence exists to support the trial court’s findings of fact and whether the conclusions reached were proper in light of the findings.’ ” *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011) (quoting *In re Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010)).

Mr. Garvey first argues on appeal that the superior court, in its order, failed to make adequate findings of fact and conclusions of law in violation of Rule 52(a)(1). The parties in this appeal all assume that Rule 52(a)(1) applies to proceedings under N.C. Gen. Stat. § 45-21.16(d1), and this Court has previously held that “[a] foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply.” *Lifestore Bank v. Mingo Tribal Pres. Trust*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 763 S.E.2d 6, 9 (2014), *disc. review denied*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2015 WL 1809347, 2015 N.C. Lexis 297 (Apr. 9, 2015). *See also* N.C. Gen. Stat. § 1-393 (2013) (“The Rules of Civil Procedure . . . are applicable to special proceedings, except as otherwise provided.”).

Nonetheless, a recent unpublished opinion cited *Furst v. Loftin*, 29 N.C. App. 248, 224 S.E.2d 641 (1976), as establishing that “our Rules of Civil Procedure generally do not apply in the context of a foreclosure proceeding brought under N.C. Gen. Stat. § 45-21.16 . . . .” *In re Foreclosure by Cornish*, \_\_\_ N.C. App. \_\_\_, 753 S.E.2d 743, 2013 N.C. App. LEXIS 1327, at \*7, 2013 WL 6669278, at \*3 (2013) (unpublished). *Furst* did in fact “reject plaintiffs’ contention and the trial court’s conclusion that the foreclosure of the deed of trust under the power of sale contained therein [was] an action or proceeding subject to the Rules of Civil Procedure.” 29 N.C. App. at 255, 224 S.E.2d at 645. However, *Furst* did not address whether the action before it – an “action to have defendants restrained and enjoined” from foreclosing by power of sale, *id.* at 250, 224 S.E.2d at 642 – was a “special proceeding” to which the Rules of Civil Procedure would have applied under N.C. Gen. Stat. § 1-393. Significantly, after holding that the action before it was not subject to the Rules of Civil Procedure, the Court specifically “noted that the foreclosure in this case antedated the 1975 amendments to Article 2A of G.S. Chapter 45[,]” which enacted N.C. Gen. Stat. § 45-21.16(d).<sup>2</sup> *Furst*, 29 N.C. App. at 255, 224 S.E.2d at 645. Moreover, N.C. Gen. Stat. § 45-21.16(d1), governing the hearing before the superior court, was not enacted until 1993, 17 years after *Furst*. *See* 1993 N.C. Sess. Laws ch. 305, § 8. Thus, *Furst* did not hold that the Rules of Civil Procedure are inapplicable to foreclosures by power of sale initiated under N.C. Gen. Stat. § 45-21.16(d) and (d1).

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2. *See* 1975 N.C. Sess. Laws ch. 492, § 2 (enacting N.C. Gen. Stat. § 45-21.16(d)).

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*Lifestore Bank*, therefore, controls, and the proceeding below was a special proceeding to which Rule 52(a)(1) applied. *See also In re Cooke*, 37 N.C. App. 575, 576, 246 S.E.2d 801, 803 (1978) (“[Petitioner] commenced this special proceeding . . . before the Clerk . . . seeking an order, pursuant to G.S. 45-21.16, allowing him to proceed to sell the property under the power of sale contained in the deed of trust.” (emphasis added)). *Cf. In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 400, 722 S.E.2d 459, 467 (2012) (“Indisputably, a foreclosure by power of sale is a special proceeding.” (Newby, J., dissenting)).

Rule 52(a)(1) provides that “[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment.” It is well established that “the purpose for requiring findings of fact and conclusions of law under Rule 52 [is] to allow meaningful appellate review[.]” *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 370-71, 649 S.E.2d 14, 24 (2007). According to our Supreme Court, Rule 52(a) “require[s] the trial judge to do the following three things *in writing*: ‘(1) to find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly.’” *Hinson v. Jefferson*, 287 N.C. 422, 428, 215 S.E.2d 102, 106 (1975) (emphasis added) (quoting *Coggins v. City of Asheville*, 278 N.C. 428, 434, 180 S.E.2d 149, 153 (1971)). Further, this Court has explained that Rule 52(a) requires the findings to be “‘*specific findings* of the ultimate facts established by the evidence, admissions and stipulations . . . .’” *Overcash v. N.C. Dep’t of Env’t & Natural Res.*, 179 N.C. App. 697, 708, 635 S.E.2d 442, 449 (2006) (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982)).

Under N.C. Gen. Stat. § 45-21.16(d1), the superior court is required to make findings regarding whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied. *In re Foreclosure of Carter*, 219 N.C. App. 370, 373, 725 S.E.2d 22, 24 (2012). In other words, the superior court must make specific findings of fact relating to (1) the existence of a valid debt of which the party seeking to foreclose is the holder, (2) the occurrence of a default, (3) the existence of a right to foreclose under the instrument at issue, (4) the giving of notice to those entitled to receive notice, (5) whether the mortgage debt is a home loan under N.C. Gen. Stat. § 45-101(1b) (2013), and (6) whether the sale is barred by N.C. Gen. Stat. § 45-21.12A (2013). 219 N.C. App. at 372, 725 S.E.2d at 24.

Here, the only specific findings in the superior court’s order were that “the Appeal is properly before this Court, [and] that all parties have

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been given adequate and timely notice of the hearing on this matter . . . .” After that single recitation of fact – which was not even labeled as a finding of fact – the superior court made no express conclusions of law, but rather moved directly to the decretal portion of the order. As part of the decree, the superior court concluded that “Bank of America, N.A. has satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16 and the Substitute Trustee is entitled to proceed with the foreclosure sale[.]” The superior court then ordered that “the Clerk of Superior Court’s January 8, 2013 Order be and the same herewith is affirmed.” In sum, the superior court only found one of the six criteria: that proper notice was given.

Bank of America, however, argues that Rule 52(a) was satisfied because the superior court’s written order summarily concluded that petitioners “ha[d] satisfied the requirements” of the statute. According to Bank of America, this statement satisfies Rule 52(a) because it indicates that the superior court necessarily found the existence of all required facts and conclusions of law under N.C. Gen. Stat. § 45-21.16(d). Bank of America’s position, if adopted, would eviscerate Rule 52(a)’s requirement of findings of fact since it effectively requires us to infer from a conclusion of law that the superior court made all the pertinent findings of fact.

The sole case relied upon by Bank of America – *In re Gilmore*, 206 N.C. App. 596, 698 S.E.2d 768, 2010 N.C. App. LEXIS 1582, 2010 WL 3220675 (2010) (unpublished) – does not support its position.<sup>3</sup> In *Gilmore*, this Court reversed an order allowing foreclosure, noting that “the superior court’s order lacks the requisite fifth finding required by revised N.C.G.S. § 45-21.16(d).” *Id.*, 2010 N.C. App. LEXIS 1582, at \*8, 2010 WL 3220675, at \*3. This Court pointed out that although the clerk’s order contained a finding on that issue, “[i]n an appeal of a foreclosure order, a *de novo* hearing occurs, not just a *de novo* review of the Clerk’s order. Therefore, the superior court’s order does not merely ‘affirm’ the clerk’s order, but replaces it as the order of foreclosure. As such, it must contain all the statutorily required findings, and the fifth finding is absent from the superior court’s order.” *Id.* (internal citation omitted).

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3. We note that Bank of America contends that because the panel in *Gilmore* was presented with “a similar situation” as the one here, *Gilmore* “has precedential value to the material issue before this Court.” To the contrary, while an unpublished opinion from a prior panel of this Court with substantially similar facts may be persuasive to the case on appeal, it nonetheless carries no binding precedential weight. See *Espinosa v. Tradesource, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_ n.9, 752 S.E.2d 153, 165 n.9 (2013) (“Unpublished opinions lack any precedential value and are not controlling on subsequent panels of this Court. N.C.R. App. P. 30(e).”), *disc. review denied*, \_\_\_ N.C. \_\_\_, 763 S.E.2d 391 (2014).

## IN RE FORECLOSURE OF GARVEY

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In short, under N.C. Gen. Stat. § 45-21.16(d1), because the superior court was required to conduct a de novo hearing and not just a de novo review, the superior court, in this case, was required – like the superior court in *Gilmore* – to make its own findings of fact as to each of the statutorily-required factors set forth in N.C. Gen. Stat. § 45-21.16(d). Because the superior court did not do so, we must reverse and remand.

Further, Mr. Garvey also argues that the superior court erred in failing to conduct a de novo hearing. The lack of findings of fact hinders our ability to review this issue. We cannot determine from the order whether the superior court in fact did conduct the de novo hearing mandated by statute as opposed to conducting an appellate review of the clerk's order. Although Bank of America points to the transcript as suggesting that the superior court conducted a de novo hearing, the transcript is ambiguous – it is not obvious that the superior court understood its role.

The superior court stated that Mr. Garvey was “entitled to a de novo review of the clerk's order,” identified the proceeding as an “appeal,” and explained that the court's “review is to review [the clerk's] findings and to determine whether or not there is sufficient evidence of each and every one of those.” (Emphasis added.) These quotes suggest that the superior court was reviewing the clerk's order to determine whether it was supported by the evidence. Bank of America, however, points to the superior court's statement that its duty was “to review those findings [made by the clerk] in this proceeding, de novo. And if I find that all those things exist, then I'm *required to uphold her findings*.” (Emphasis added.) Far from clarifying how the superior court viewed its role, the quote relied upon by Bank of America is itself unclear – it contains indications both that the superior court understood that it was to make its own findings of fact and that the superior court believed it was reviewing the clerk's findings of fact.

Consequently, on remand, the superior court must apply the correct standard. It must conduct a de novo hearing followed by entry of an order setting out the superior court's own findings of fact regarding the criteria set forth in N.C. Gen. Stat. § 45-21.16(d). Based on those findings of fact, the superior court must then make its own conclusions of law deciding whether to authorize the Substitute Trustee to proceed to foreclose on the property at issue.

Because of our disposition of this appeal, remanding for a de novo hearing before the superior court, we need not address Mr. Garvey's remaining arguments. Those arguments either address the hearing before the clerk, involve issues that should be addressed in the first

## IN RE VIENNA BAPTIST CHURCH

[241 N.C. App. 268 (2015)]

instance by the superior court, or argue alleged errors that may not recur on remand.

REVERSED AND REMANDED.

Judges STEELMAN and STEPHENS concur.

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IN THE MATTER OF VIENNA BAPTIST CHURCH FROM THE DECISION OF THE FORSYTH COUNTY  
BOARD OF EQUALIZATION AND REVIEW CONCERNING THE TAXATION OF CERTAIN REAL PROPERTY FOR  
TAX YEAR 2012

No. COA14-1267

Filed 2 June 2015

**1. Taxes—religious exemption—new church building**

A church was properly denied a tax exemption for the year in which a building was constructed where the building was not certified for occupancy until 16 March of that year. Even though the building was roofed and had an outside wall by 1 January, the determination of the tax exemption is based on whether the building is wholly and exclusively used for religious purposes, not on the existence of a building.

**2. Taxes—religious exemption—unfinished building—used for retreats**

The use of a partially completed building for spiritual retreats such as campouts was not sufficient to qualify the building for a tax exemption where the certificate of occupancy was not issued until 16 March of that year.

Appeal by appellant from order entered 23 June 2014 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 7 April 2015.

*B. Gordon Watkins, III, for Forsyth County.*

*SMITH LAW GROUP, PLLC, by Matthew L. Spencer and Steven D. Smith, for appellant.*

ELMORE, Judge.

## IN RE VIENNA BAPTIST CHURCH

[241 N.C. App. 268 (2015)]

Vienna Baptist Church (“Appellant”) appeals from the 23 June 2014 decision of the North Carolina Property Tax Commission denying Appellant’s request for a tax exemption for 2012 pursuant to N.C. Gen. Stat. § 105.287.3. After careful consideration, we affirm.

**I. Background**

Appellant is a religious organization located in Forsyth County. In 2002, Appellant purchased a 28.85 acre tract of land located at 1831 Chickasha Drive (“the property”), and has paid property taxes thereon ever since. There was no building on the property when Appellant purchased it. Appellant held its services at a nearby church located on Yadkinville Road. In 2011, Appellant began construction of a church building on the property. As of 1 January 2012, the building was one-half completed, and a certificate of occupancy had not yet been issued.

Despite the fact that construction of the church building was not complete, Appellant applied for an exemption from property taxes for the property for the tax year 2012. The Forsyth County Tax Administrator denied the exemption application. Appellant challenged the Tax Administrator’s denial by filing an appeal with the Forsyth County Board of Equalization and Review. After conducting a hearing, the County Board issued a decision affirming the Tax Administrator’s denial of Appellant’s application for tax exemption.

Appellant then challenged the County Board’s decision by filing a Notice of Appeal and Application for Hearing before the North Carolina Property Tax Commission (“the Commission”). On appeal to the Commission, Appellant contended that the property should be eligible for a tax exemption pursuant to N.C. Gen. Stat. § 105-278.3. The County disputed Appellant’s argument, contending that the property did not qualify for the tax exemption because it was not being used for religious purposes as of 1 January 2012.

In its final decision, the Commission made the following findings: During the time of construction, Appellant held religious services at a church located on Yadkinville Road, approximately one-half mile away from the property. “Prior to January 1, 2012, Appellant met at [the property] for three occasions only for campouts, prayer ceremonies, and a beam signing ceremony on September 21, 2011.” “The prayer ceremonies were not for the congregation or the public; rather the minister met with the general contractor’s workers at the construction site.” “At no time prior to 2012 was Appellant authorized to occupy or use the construction site as a church.” A Certificate of Compliance and Occupancy was issued for the property on 16 March 2012. After receiving the Certificate

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of Occupancy, Appellant moved its church activities to the property from the Yadkinville Road location. Appellant was granted tax exemption for the tax year 2013.

The Commission held that the property was not entitled to tax exemption for the tax year 2012: “Appellant did not use [the property] wholly and exclusively for religious purposes, because it was forbidden to do so by law. As of January 1, 2012, the property was only a construction site with no finished building. As a result, the intermittent use of the property was not sufficient to constitute wholly and exclusive use for religious purposes as provided by N.C.G.S. § 105-278.3(a).”

Appellant appealed the Commission’s decision to this Court, arguing that the Commission erred by failing to find and conclude that Appellant wholly and exclusively used the subject property for religious purposes as of 1 January 2012. For the reasons outlined below, we affirm the decision of the North Carolina Property Tax Commission.

## **II. Analysis**

### **a.) Standard of Review**

This Court reviews decisions of the North Carolina Property Tax Commission pursuant to N.C. Gen. Stat. § 105-345.2(b) (2013):

So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission’s findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or



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## (6) Arbitrary or capricious.

*In re Appeal of Westmoreland-LG&E Partners*, 174 N.C. App. 692, 696, 622 S.E.2d 124, 128 (2005). “Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission’s decision are reviewed under the whole-record test.” *In re Appeal of the Church of Yahshua the Christ at Wilmington*, 160 N.C. App. 236, 238, 584 S.E.2d 827, 829 (2003) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). Under a *de novo* review, the Court “considers the matter anew and freely substitutes its own judgment for that of the Commission.” *Yahshua*, 160 N.C. App. at 238, 584 S.E.2d at 829.

**b.) Whole and Exclusive Use of Property for Religious Purposes**

[1] On appeal, Appellant argues that the Commission erred in determining that there was no building on the property that was being wholly and exclusively used for religious purposes. We disagree.

All real property located in North Carolina is subject to property taxation, unless it is exempted by a statutory or constitutional provision. N.C. Gen. Stat. § 105-274 (2013). Requests for exemption are based upon the use of the property as of January 1 of the tax year at issue. *See, e.g., In re Univ. for the Study of Human Goodness & Creative Grp. Work*, 159 N.C. App. 85, 86, 582 S.E.2d 645, 646–47 (2003). Each property owner applying for an exemption has the burden of proving that it is entitled to such exemption. *Id.*; N.C. Gen. Stat. § 105-282.1(a) (2013). “Buildings, the land they actually occupy, and additional adjacent land reasonably necessary for the convenient use of such building shall be exempted from taxation if . . . [w]holly and exclusively used by its owner for religious purposes[.]” N.C. Gen. Stat. § 105-278.3. (2013). Therefore, in order to qualify for the religious property tax exemption, Appellant has the burden of proving that it was using a building on the property wholly and exclusively used for religious purposes as of 1 January 2012.

Appellant specifically contends that a building existed on the property as early as the beam signing in September 2011. Further, before 1 January 2012, Appellant argues that the property was wholly and exclusively to promote its spiritual and religious purposes. As such, Appellant contends that they are entitled to a tax exemption pursuant to N.C. Gen. Stat. § 105-278.3. We are not persuaded.

This Court’s ruling in *Yahshua*, 160 N.C. App. at 239, 584 S.E.2d at 829, is instructive on the issue presented here. In *Yahshua*, the appellant, a religious organization, challenged a decision of the North Carolina

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Property Tax Commission that denied its application for a religious purposes tax exemption. *Id.* at 237, 584 S.E.2d at 828. While there were no formal buildings on the property, the appellant used the land for camping and recreational outings, and had plans to construct buildings in the future. *Id.* On appeal, the appellant argued that the property at issue should be exempted from taxation, even though the land did not have a building on it. *Id.* This Court held that “the tax exemption set out in § 105-278.3 applies only to buildings and the land necessary for their convenient use.” *Id.* “The statute is unambiguous. The focus of the exemption is on ‘buildings.’ Land is exempted only to the extent necessary for convenient use of the building.” *Id.* at 239, 584 S.E.2d at 829.

Here, Appellant attempts to distinguish *Yahshua* from the case at bar by explaining that, although there were no buildings on the land in *Yahshua*, a “building,” as defined by the Forsyth County Unified Development Ordinance (“UDO”), existed on the property in question as early as the September 2011 beam signing. Under the Forsyth County UDO, a building is “any structure having a roof supported by columns or walls and intended for shelter, housing or enclosure of any person, process, equipment, or good.” Winston-Salem/Forsyth County UDO § A.II. According to Appellant’s testimony, at the September 2011 hearing, the “superstructure” was up, roofed and had an outside wall—therefore satisfying the definition of “building” as of 1 January 2012. Thus, Appellant claims that the existence of such a building distinguishes this case from *Yahshua*, and qualifies the property for tax exempt status.

Appellant is misguided. It has been settled that the determination of tax exemption is not based on the existence of a building, but rather on whether the building is “wholly and exclusively used by its owner for religious purposes.” See N.C. Gen. Stat. § 105-278.3. A building cannot be used or occupied “until the inspection department has issued a certificate of compliance.” N.C. Gen. Stat. § 153A-363. Violation of this pronouncement constitutes a Class 1 misdemeanor. *Id.* Therefore, the property could not be used wholly and exclusively for religious purposes until the building was certified for occupancy, which was not until 16 March 2012. Thus, we cannot conclude that the property was used wholly and exclusively for religious purposes as of 1 January 2012.

[2] Appellant also contends that its use of the property for spiritual retreats such as campouts is sufficient to qualify it for a tax exemption, despite the fact that arguably no building had been erected on the property. In support of this argument, Appellant cites *In re Worley*, 93 N.C. App. 191, 377 S.E.2d 270 (1989). In *Worley*, the appellant (a religious organization) had recently expanded the land surrounding its church

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complex. *Id.* at 193, 377 S.E.2d at 271. The church complex included a sanctuary building on one lot, and an adjacent lot (Lot 37) consisting of a largely wooded area which did not contain any buildings. *Id.* Lot 37 was purchased to serve as a “buffer zone” between the church grounds and the surrounding industrial area. *Id.* at 193, 377 S.E.2d at 271–72. Although there were no buildings on it, Lot 37 was regularly used as a spiritual retreat and for recreational activities. *Id.* at 193–94, 377 S.E.2d at 271–72. This Court held that Lot 37 qualified for tax exemption because the use of the land was “reasonably necessary for the convenient use of [church] buildings.” *Id.* at 187, 377 S.E.2d at 274 (alteration in original) (citing N.C. Gen. Stat. § 105-278.3(a)).

Thus, although the specific lot in *Worley* did not have a building on it, this Court determined that the use of the lot was wholly and exclusively for religious purposes because it was reasonably necessary for the convenient use of the existing religious building. *See id.*

Here, unlike *Worley*, there was no functional building being used by Appellant for religious purposes located on or adjacent to the property as of 1 January 2012. Rather, the purported building was under construction, and it could not legally be used or occupied. Without the existence of a building on adjacent property owned by Appellant that was also being used wholly and exclusively for religious purposes, the property in question does not qualify for tax exemption under *Worley*.

### **III. Conclusion**

The property at issue here does not qualify for tax exemption for the tax year 2012 under N.C. Gen. Stat. § 105-278.3. In order for property to qualify for the religious purposes tax exemption, there must have been a building on the property that was actually being used for religious purposes as of January 1 of the tax year in question. “Land is exempted only to the extent necessary for convenient use of the building.” *Yahshua*, 160 N.C. App. at 239, 584 S.W.2d at 829. A building that is not certified for occupancy cannot be used for religious purposes. Therefore, the property does not qualify for the religious purposes tax exemption.

Affirmed.

Judges GEER and DILLON concur.

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PATRICIA MITCHELL MALONE, PLAINTIFF

v.

CALVIN EUGENE BARNETTE, PARKER TRUCKING SERVICES, INC., ADVANTAGE  
TRUCK LEASING, LLC, YOUNG'S TRUCK CENTER, INC, VOLVO/GMC TRUCK  
CENTER OF THE CAROLINAS, AND PAXTON VAN LINES OF  
NORTH CAROLINA, INC., DEFENDANTS

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 YOUNG'S TRUCK CENTER, INC., CROSS-CLAIMANT

v.

 PAXTON VAN LINES OF NORTH CAROLINA, INC., CROSS-DEFENDANT
 

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CALVIN EUGENE BARNETTE, CROSS-CLAIMANT

v.

 ADVANTAGE TRUCK LEASING, LLC AND YOUNG'S TRUCK CENTER, INC.,  
CROSS-DEFENDANTS

v.

PAXTON VAN LINES OF NORTH CAROLINA, INC., CROSS-DEFENDANT

No. COA14-822

Filed 2 June 2015

**1. Appeal and Error—interlocutory orders and appeals—remaining claims—certification under Rule 54(b)**

Although the trial court's order granting partial summary judgment in favor of Young's Truck Center, Inc. was interlocutory since it did not dispose of all the claims asserted by the parties, the trial court certified the order for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b).

**2. Indemnification—contractual indemnification—no per se prohibition—past negligence conduct**

The trial court did not err by entering partial summary judgment in favor of Young's Truck Center, Inc. as to its cross-claims for contractual indemnification. There are no North Carolina cases expressly articulating a *per se* prohibition against indemnity contracts that hold an indemnitee harmless from its past negligent conduct. Further, the indemnity provision between reflected an arms-length bargained-for contractual agreement between two commercial entities which prevented public confusion about who was financially responsible if accidents occurred by specifically identifying the party bearing financial responsibility for claims arising out

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of injuries occurring during the lease term that resulted from the maintenance or operation of the truck.

Appeal by cross-defendant Paxton Van Lines of North Carolina, Inc. from order entered 28 March 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 January 2015.

*Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Ellen P. Wortman, for cross-claimant-appellee Young's Truck Center, Inc.*

*Teague Campbell Dennis & Gorham, L.L.P., by Leslie P. Lasher, for cross-defendant-appellant Paxton Van Lines of North Carolina, Inc.*

DAVIS, Judge.

Paxton Van Lines of North Carolina, Inc. (“Paxton”) appeals from the trial court’s order granting partial summary judgment in favor of Young’s Truck Center d/b/a Advantage Truck Leasing, LLC (“Young’s”) on Young’s cross-claims against Paxton for contractual indemnification. On appeal, Paxton contends that the entry of partial summary judgment in favor of Young’s was improper because the claims for which Young’s seeks indemnification are not covered by the indemnity provision contained in the rental agreement between them. After careful review, we affirm the trial court’s order.

**Factual Background**

On 1 August 2013, Patricia Mitchell Malone (“Malone”) filed a complaint in New Hanover County Superior Court against Calvin Eugene Barnette (“Barnette”), Parker Trucking Services, Inc., Young’s, Volvo/GMC Truck Center of the Carolinas, and Paxton (collectively “Defendants”). The complaint alleged that on 1 August 2010, Malone was driving east on Holly Tree Road in Wilmington, North Carolina when a 2004 GMC truck (“the Truck”) driven by Barnette, an employee of Paxton, struck her vehicle at the intersection of Holly Tree Road and South College Road. In her complaint, Plaintiff further asserted that the Truck had been leased from Young’s by Paxton pursuant to a rental agreement (“the Rental Agreement”) executed 29 July 2010 and that Defendants had been negligent in failing to inspect and maintain the braking system on the Truck, leading to Barnette’s collision with Malone’s vehicle and her resulting injuries.

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On 21 October 2013, Barnette filed a cross-claim against Young's alleging that it had "breached its general and statutory duty of care by leasing a truck with defective brakes to Paxton . . . which [Young's] knew or should have known would cause injury to persons either driving the truck or traveling on roadways." Barnette's cross-claim alleged that Young's negligence proximately caused the physical injuries he suffered in the collision and sought compensatory and punitive damages. Barnette filed an amended cross-claim against Young's on 10 January 2014, which eliminated his prior allegations of gross negligence and his request for punitive damages.

In response to both Malone's and Barnette's negligence claims, Young's filed cross-claims against Paxton on 1 October 2013 and 15 January 2014, respectively. In these cross-claims, Young's alleged that pursuant to the Rental Agreement, Paxton was contractually required to indemnify Young's for any monetary damages that Young's may be obligated to pay as a result of a settlement or judgment relating to the 1 August 2010 accident as well as for any attorneys' fees and costs Young's incurs in defending such claims.

Young's filed a motion for partial summary judgment as to its cross-claims for contractual indemnification on 16 January 2014. The motion came on for hearing on 17 February 2014 before the Honorable Phyllis M. Gorham, and on 28 March 2014, Judge Gorham entered an order granting partial summary judgment in Young's favor, stating in pertinent part as follows:

After reviewing the pleadings and other documents of record, and after hearing arguments of counsel, the Court finds that there are no genuine issues of material fact and Defendant Young's . . . is entitled to judgment in its favor as a matter of law. After reviewing the pleadings of record, and after hearing arguments of counsel, the court further finds that Paxton is not entitled to judgment on the pleadings as to [Young's].

IT IS THEREFORE, ordered that Young's . . . MOTION FOR PARTIAL SUMMARY JUDGMENT is GRANTED and Young's . . . is entitled to contractual indemnification for monetary damages payable as a result of settlement or judgment against Young's . . . and for defense costs and attorney fees incurred by Young's . . . as a result of or in defense of the actions asserted by Patricia Mitchell

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Malone, Calvin Eugene Barnett [sic] and/or any other party in this matter.

Paxton filed a notice of appeal to this Court.<sup>1</sup>

**Analysis****I. Appellate Jurisdiction**

[1] We first note that the trial court’s order granting partial summary judgment in favor of Young’s is interlocutory as it does not dispose of all the claims asserted by the parties. *See Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (“An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.” (citation and quotation marks omitted)). Generally, interlocutory orders are not immediately appealable. *N.C. Dep’t of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). However, when the trial court’s order constitutes a final determination as to some, but not all, of the claims asserted and the trial court certifies the order for appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, an immediate appeal will lie. *Id.* at 734, 460 S.E.2d at 334.

Here, in its 28 March 2014 order, the trial court noted that its order constituted a final judgment as to Young’s cross-claims for indemnification and certified the order for immediate appeal pursuant to Rule 54(b). Therefore, we possess jurisdiction over Paxton’s appeal. *See Feltman v. City of Wilson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 767 S.E.2d 615, 619 (2014) (explaining that appellate jurisdiction existed where trial court resolved two of four claims asserted by plaintiff and certified case pursuant to Rule 54(b)).

**II. Entitlement of Young’s to Contractual Indemnity**

[2] On appeal, this Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). The entry of summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

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1. Prior to oral argument, the parties filed a “Notice Regarding Partial Settlement,” informing the Court that a confidential settlement had been reached relating to Barnette’s cross-claims. However, the parties advised the Court that the settlement did not resolve the parties’ dispute as to the issues raised in this appeal. Therefore, we proceed to consider the merits of the appeal.

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and that any party is entitled to a judgment as a matter of law.” N.C.R. Civ. P. 56(c). A trial court may enter summary judgment in a contract dispute if the provision at issue is not ambiguous and there are no issues of material fact. *See Premier, Inc. v. Peterson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 755 S.E.2d 56, 59 (2014) (“In a contract dispute between two parties, the trial court may interpret a plain and unambiguous contract as a matter of law if there are no genuine issues of material fact.”); *Metcalfe v. Black Dog Realty, LLC*, 200 N.C. App. 619, 633, 684 S.E.2d 709, 719 (2009) (“[W]hen the language of a contract is not ambiguous, no factual issue appears and only a question of law which is appropriate for summary judgment is presented to the court.”).

Paxton and Young’s entered into the Rental Agreement on 29 July 2010, and it took effect as of that date. The Truck is the only vehicle covered in the agreement. In this appeal, the parties disagree as to whether the indemnification provision contained within the Rental Agreement should be construed as obligating Paxton, the lessee of the Truck, to indemnify Young’s, the lessor, in connection with the personal injury claims brought against Young’s stemming from the 1 August 2010 accident. The indemnification provision states as follows:

10. [Paxton] agrees to release, indemnify and hold [Young’s] harmless from and against any and all claims, demands, suits, causes of action or judgments for death or injury to persons or loss or damage to property arising out of or caused by the ownership, maintenance, leasing, repair, possession, use or operation of any Vehicle covered by this Agreement, including, but not limited to the following:

- (a) Any claims or causes of action arising from requirements of Insurance and which [Young’s] would not otherwise, pursuant to the terms hereof, be required to pay.
- (b) Any and all losses, damages, costs and expenses incurred because of injury or damage sustained by any occupant of said Vehicle, including without limitation [Paxton], [Paxton’s] employees, agents or representatives and loss or damage to cargo or property owned by or in the possession of [Paxton], [Paxton’s] employees, agents or representatives or occupants.



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- (c) All loss, damage, cost and expense resulting from [Paxton's] violation of any term of this agreement or breach of [Paxton's] warranties as expressed herein.
- (d) The value of all tires, tools and accessories damaged, lost or stolen from the Vehicle.
- (e) All cost of retaking the Vehicle, including but not restricted to attorney's fees and court costs.
- (f) Any fines or penalties including forfeiture or seizure resulting from the use of the Vehicle.
- (g) All claims for damages which [Paxton] or any other party may sustain as a result of any actions taken by [Young's] under paragraphs 13 and 14 hereof.
- (h) All costs of defense and expenses of every kind, including attorneys' fees incurred in connection with any suits or claims covered under this Paragraph 10.

Paxton essentially makes three arguments on appeal. First, Paxton argues that, as a general proposition, North Carolina law does not permit the contractual indemnification of a party for its own prior negligent acts. Second, it contends that the language contained in the indemnification provision here should not be construed as indemnifying Young's for its own past acts of negligence. Third, Paxton asserts that Young's interpretation of the indemnification provision is inconsistent with the Federal Motor Carrier Safety Act. We address each of these arguments in turn.

**A. Limits on Indemnity Provisions under North Carolina Law**

Our Supreme Court has previously recognized the right of a party to contractually provide for indemnification against its own negligence. *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965). In so doing, the Court emphasized the fundamental principle of freedom of contract that exists in North Carolina. *See id.* (explaining that “[f]reedom of contract is a fundamental basic right” in upholding indemnity agreement providing that defendant-company would be indemnified against liability for its own negligence). This Court has expressly held that North Carolina public policy is not violated by an indemnity contract that provides for the indemnification of a party against the consequences of its own negligent conduct, particularly when the agreement is made “at arms length and without the exercise

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of superior bargaining power.”<sup>2</sup> *Cooper v. H.B. Owsley & Son, Inc.*, 43 N.C. App. 261, 267, 258 S.E.2d 842, 846 (1979). We further noted that the enforcement of such provisions “would have no greater tendency to promote carelessness on the part of the indemnitee than would enforcement against the insurer of a policy of liability insurance” and recognized that “the occasion for the indemnitee seeking indemnity would not arise unless it had itself been guilty of some fault, for otherwise no judgment could be recovered against it.” *Id.* at 266-68, 258 S.E.2d at 846 (citation and brackets omitted).

Paxton attempts to distinguish the present case from our previous decisions enforcing indemnification contracts that hold a party harmless against the consequences of its own negligence by emphasizing that here Young’s alleged negligent acts occurred *prior* to the parties’ execution of the Rental Agreement (and the indemnity provision included therein). However, neither Paxton’s brief nor our own research reveal any North Carolina case expressly articulating a *per se* prohibition against indemnity contracts that hold an indemnitee harmless from its past negligent conduct. Indeed, to the contrary, in discussing the nature of a contract for indemnity, our Supreme Court has stated the following: “In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which *he has incurred or is about to incur* to a third party . . . .” *New Amsterdam Cas. Co. v. Waller*, 233 N.C. 536, 537, 64 S.E.2d 826, 827 (1951) (emphasis added). Accordingly, we reject Paxton’s argument on this issue.

**B. Applicability of Indemnity Provision in Rental Agreement to Prior Negligent Acts by Young’s**

Paxton’s next argument is that the parties did not intend for the indemnity provision to cover the prior negligent acts of Young’s. When interpreting an indemnification clause within a contract, a court’s primary objective “is to ascertain and give effect to the intention of the parties, and the ordinary rules of construction apply.” *Schenkel & Schultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (citation and quotation marks omitted). An indemnification provision “will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses which are neither expressly within its terms nor of such character that it can reasonably

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2. Because Young’s and Paxton were similarly situated commercial entities, this case does not require us to address the extent to which public policy concerns may be triggered by the existence of unequal bargaining power between the contracting parties.

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be inferred that they were intended to be within the contract.” *Dixie Container Corp. of N.C. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968) (citation and quotation marks omitted).

Paxton contends that the indemnity Young’s seeks in this action was neither contemplated nor intended by the parties because “the indemnification provision on its face applies only prospectively to the operation and maintenance of the [T]ruck which occurred on or after 29 July 2010,” the date of the Rental Agreement. Specifically, Paxton asserts, it is not required to provide indemnification for the claims asserted against Young’s by Malone and Barnette — which allege that Young’s “failed to properly inspect, maintain and repair the brakes on the [T]ruck prior to leasing the [T]ruck to Paxton” — because these alleged negligent acts occurred before the Rental Agreement was executed. We disagree.

The indemnification provision is devoid of any language suggesting that the parties intended for Young’s to be indemnified only as to liability or claims arising from *future* acts of negligence. Instead, the indemnification provision broadly requires Paxton to “release, indemnify and hold [Young’s] harmless from and against *any and all* claims, demands, suits, causes of action or judgments for . . . injury to persons . . . arising out of or caused by the ownership, maintenance, leasing, repair, possession, use or operation of any Vehicle covered by this Agreement . . . .” without containing the restriction advanced by Paxton in this appeal. (Emphasis added.) See *Cooper*, 43 N.C. App. at 267, 258 S.E.2d at 846 (explaining that language used by parties in indemnification agreement did not lend itself to narrow construction advanced by indemnitor where parties had agreed that indemnitee would be held harmless from any claims “[a]rising from the use of, transportation of, or in any way connected with the said equipment or any part thereof, from whatsoever cause arising”).

While the negligent acts attributed to Young’s are alleged to have occurred prior to the execution of the Rental Agreement, the claims for which Young’s seeks indemnity are nevertheless covered under the indemnification provision as they are predicated on injuries that occurred on 1 August 2010 (the date of the subject motor vehicle accident and the resulting injuries to Malone and Barnette), which was during the term in which the Rental Agreement was in effect. See *Blue Ridge Sportcycle Co. v. Schroader*, 60 N.C. App. 578, 581, 299 S.E.2d 303, 305 (1983) (explaining that “[i]njury, or damage, is an essential element of the tort [of negligence]” and that where there is no injury, there is no actionable negligence). Thus, because the Truck was a “Vehicle covered by this Agreement” on the date of the accident, the claims asserted against Young’s fall squarely within the scope of the indemnification provision,

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and as such, Paxton is obligated to hold Young's harmless from such claims based on the plain language of the indemnification provision.

Moreover, were we to adopt Paxton's narrow interpretation of the indemnity provision, the language therein providing for indemnification for claims arising out of the *maintenance* of the Truck would be rendered essentially meaningless. As Young's notes in its brief, the federal regulations governing the leasing of trucks, tractors, and trailers between motor carriers required Paxton to "have exclusive possession, control, and use of the [Truck] for the duration of the lease." 49 C.F.R. 376.12 (c) (1) (2012). Thus, it is unlikely that Young's would have had the ability to perform *any* maintenance on the Truck while the Rental Agreement was in effect as the Truck would have been in Paxton's exclusive possession and control during that time period.

Basic rules of construction applicable to contracts preclude an interpretation rendering such language in the parties' agreement purposeless. *See Cooper*, 43 N.C. App. at 267, 258 S.E.2d at 846 (declining to construe indemnification clause in manner that "render[ed] it largely purposeless"); *see also S. Seeding Serv., Inc. v. W.C. English, Inc.*, 217 N.C. App. 300, 305, 719 S.E.2d 211, 215 (2011) (noting that "[t]his Court has long acknowledged that an interpretation which gives a reasonable meaning to all provisions of a contract will be preferred to one which leaves a portion of the writing useless or superfluous" (citation omitted)). Accordingly, we do not accept Paxton's contention that it only contracted to indemnify Young's from claims arising out of the negligent maintenance of the Truck occurring during the lease period.

**C. Federal Motor Carrier Safety Act**

Paxton's final argument is that construing the indemnity provision so as to allow Young's to be indemnified for its own prior acts of negligence would be inconsistent with the requirements of the Federal Motor Carrier Safety Act ("the Act"). Once again, we reject Paxton's argument.

The Act was enacted by Congress to "ensure that interstate motor carriers would be fully responsible for the maintenance and operation of the leased equipment . . . , thereby protecting the public from accidents, preventing public confusion about who was financially responsible if accidents occurred, and providing financially responsible defendants." *Tamez v. Sw. Motor Transport, Inc.*, 155 S.W.3d 564, 572 (Tex. App. 2004). Paxton contends that requiring it to indemnify Young's for negligence that occurred prior to the execution of the Rental Agreement would be contrary to the Act because the Act only requires the lessees of trucks and other leased equipment to "assume complete responsibility

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for the operation of the equipment *for the duration of the lease.*” 49 C.F.R. 376.12 (c)(1) (emphasis added).

In *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28, 46 L.Ed.2d 169 (1975), the United States Supreme Court addressed the issue of whether the enforcement of indemnification provisions between motor carriers conflicted with the provisions of the Act and the regulations promulgated thereunder regarding operational control and responsibility over leased vehicles.<sup>3</sup> The Supreme Court held that the existence of an indemnification provision between motor carriers is not in itself contrary to the Act’s provisions because it “affect[s] only the relationship between the lessee and the lessor” and does not affect the basic responsibilities of the parties to the public and the public’s safety. *Id.* at 39, 46 L.Ed.2d at 178. The Court further ruled that the indemnification provision at issue in that case — providing that the lessor would be responsible for and bear the costs of its own negligence while the leased tractor-trailer was in the lessee’s control — did not contravene the purpose of the Act because placing ultimate financial responsibility on one party “is not in conflict with the safety concerns of the [Interstate Commerce] Commission or with the regulations it has promulgated.” *Id.* at 40-41, 46 L.Ed.2d at 178-79 (noting that applicable regulations “neither sanction nor forbid” indemnification between lessors and lessees and that such provisions do not “offend the regulations so long as the lessee does not absolve itself from the duties to the public and to shippers imposed upon it by the Commission’s regulations”).

We believe the same is true of the indemnification provision at issue here. Enforcement of the indemnity provision in the present case does not leave victims of the alleged negligent acts of Young’s without financial recourse. Instead, it merely shifts the financial responsibility for such negligence from one entity to another. As noted above, a primary focus of the Act is to protect the public by ensuring the presence of a responsible party from whom persons harmed in accidents involving motor carriers may seek recovery for their injuries. *See id.* at 37, 46 L.E.2d at 177 (explaining that policy goal of Act, in addition to safety of operation, is to “fix[] financial responsibility for damage and injuries to shippers and members of the public”). That purpose is not undermined by the enforcement of the indemnification provision here.

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3. While the regulations addressed in *Transamerican* have since been amended, the requirements concerning control and responsibility for leased vehicles discussed therein are substantially the same as those contained in the current version of the regulations.

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Moreover, it is appropriate to reiterate that the indemnity provision between Young's and Paxton reflects an arms-length, bargained-for contractual agreement between two commercial entities, which "prevent[s] public confusion about who [is] financially responsible if accidents occur[]" by specifically identifying the party bearing financial responsibility for claims arising out of injuries occurring during the lease term that result from the maintenance or operation of the Truck. *Tamez*, 155 S.W.3d at 572. Accordingly, the trial court did not err in entering partial summary judgment in favor of Young's.

### Conclusion

For the reasons stated above, we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and TYSON concur.

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NORTH CAROLINA ASSOCIATION OF EDUCATORS, INC., RICHARD J. NIXON,  
RHONDA HOLMES, BRIAN LINK, ANNETTE BEATTY, STEPHANIE WALLACE, AND  
JOHN DEVILLE, PLAINTIFFS

v.

THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA14-998

Filed 2 June 2015

#### 1. **Schools and Education—repeal of teacher career status law—vested contractual right—Contract Clause violated**

The trial court did not err by concluding that the prospective and retroactive repeal of the law governing the employment and career status of public school teachers (Career Status Law) violated the Contract Clause of the United States Constitution for plaintiff teachers who had already earned career status. The Career Status Law created contractual obligations; the State's actions substantially impaired those contractual obligations; and the impairment was not reasonable and necessary to serve an important public purpose.

#### 2. **Schools and Education—repeal of teacher career status law—vested contractual right—Law of the Land Clause violated**

The trial court did not err by concluding that the prospective and retroactive repeal of the law governing the employment and

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career status of public school teachers (Career Status Law) violated the Law of the Land Clause of the North Carolina Constitution for plaintiff teachers who had already earned career status. The repeal of the Career Status Law abrogated plaintiffs' contracted-for and vested career status protections and constituted an unconstitutional taking of property without just compensation.

**3. Schools and Education—repeal of teacher career status law—motion to strike portions of affidavits—any error harmless**

In plaintiffs' challenge to the repeal of the law governing the employment and career status of public school teachers, the trial court did not err by declining to strike certain portions of plaintiffs' affidavits as not based on the affiants' personal knowledge. Even assuming that the challenged portions should have been excluded, any failure to strike was harmless. The trial court's findings of fact were supported by the forecasted evidence.

**4. Schools and Education—repeal of teacher career status law—contract right not yet vested—no standing**

In plaintiffs' challenge to the repeal of the law governing the employment and career status of public school teachers, the trial court did not err by denying summary judgment to plaintiff Link based on a lack of standing. As a probationary teacher, Link had not yet acquired a vested contractual right to career status protections.

DILLON, Judge, concurring in part and dissenting in part

Cross-appeals by Plaintiffs and Defendant from orders entered 6 June 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 22 January 2015.

*Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh, and National Education Association, by Philip A. Hostak, for Plaintiffs.*

*Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.*

STEPHENS, Judge.

Defendant State of North Carolina ("the State") argues that the trial court erred in granting summary judgment in favor of Plaintiffs North Carolina Association of Educators, Inc. ("NCAE"), Nixon, Holmes,

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Beatty, Wallace, and deVillie based on the court's conclusion that the State's enactment of legislation repealing career status teachers' benefits under section 115C-325 of our General Statutes violated Article I, Section 10 of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. The State also argues that the trial court erred in failing to strike certain portions of the affidavits Plaintiffs submitted in support of their motion for summary judgment. Plaintiffs cross-appeal, arguing that the trial court erred in denying summary judgment to Plaintiff Link based on the court's conclusion that, as a probationary teacher who had not yet earned career status, he lacked standing to challenge the General Assembly's repeal of section 115C-325. After careful consideration, we hold that the trial court did not err and we consequently affirm its orders.

*I. Background and Procedural History**A. Legislative Background*

In 1971, our General Assembly enacted a statutory scheme ("the Career Status Law") to govern the employment and dismissal of our State's public school teachers. *See* An Act to Establish an Orderly System of Employment and Dismissal of Public School Personnel, 1971 N.C. Sess. Laws ch. 883. For more than four decades following its passage, the Career Status Law, codified in its most recent form at N.C. Gen Stat. § 115C-325 (2012), provided all public school teachers in North Carolina with certain procedural guarantees regarding the terms of their employment and the reasons they could be terminated.

Under the Career Status Law, teachers who were employed by a public school system for fewer than four consecutive years on a full-time basis were deemed to be "probationary" teachers. *Id.* § 115C-325(a)(5). These probationary teachers were employed from year to year pursuant to annual contracts, which school boards could choose to "non-renew" at the end of a school year for any cause the boards deemed sufficient, so long as the non-renewal was not "arbitrary, capricious, discriminatory, or for personal or political reasons." *Id.* § 115C-325(m)(2). After a probationary teacher completed four consecutive years as a full-time teacher, that teacher became eligible for career status, which was granted or denied by a majority vote of the local school board. *Id.* § 115C-325(c)(1). Teachers who achieved career status would "not be subjected to the requirement of annual appointment." *Id.* § 115C-325(d)(1). Instead, career status teachers were employed on the basis of continuing contracts and could only be dismissed, demoted, or relegated



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to part-time status for one of fifteen statutorily enumerated reasons, including, *inter alia*, “[i]nadequate performance,” “[i]nsubordination,” and “[n]eglect of duty.” *Id.* § 115C-325(e)(1). Moreover, the Career Status Law further provided that, before a career status teacher could be dismissed, demoted, or relegated to part-time status, the school board was required to provide that teacher with notice, an explanation of the charges, and, if requested, a hearing before the board or an impartial hearing officer. *Id.* § 115C-325(h)(2), (3). In those cases in which a career status teacher chose to have a hearing before a hearing officer, that teacher had the right “to be present and to be heard, to be represented by counsel and to present through witnesses any competent testimony relevant to the issue of whether grounds for dismissal or demotion exist or whether the procedures set forth in [the statute] have been followed.” *Id.* § 115C-325(j)(3).

On 24 July 2013, our General Assembly repealed the Career Status Law, both prospectively and retroactively, by enacting Sections 9.6 and 9.7 (“the Career Status Repeal”) of the Current Operations and Capital Improvements Appropriations Act of 2013, which Governor Pat McCrory subsequently signed into law as S.L. 2013-360. Under the Career Status Repeal, as of 1 August 2013, any teacher who had not achieved career status before the beginning of the 2013-14 school year will never be granted career status, but will instead, with limited exceptions, be employed on the basis of one-year contracts until 2018. *See* 2013 N.C. Sess. Law 360 § 9.6(f). Further, as of 1 July 2018, the Career Status Repeal revokes the career status of all teachers who had previously earned that status pursuant to the Career Status Law. *Id.* § 9.6(i). Instead, all teachers will be employed on one-, two-, or four-year contracts that can be non-renewed at their school board’s discretion on any basis that is not “arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law.” *Id.* § 9.6(b). Moreover, the Career Status Repeal provides no right to a hearing for former career status teachers; although such teachers will be permitted to request a hearing after receiving notice of non-renewal, local school boards will have unfettered discretion to decide whether or not to hold one. *Id.* Finally, the Career Status Repeal’s “25% Provision” mandates that before the beginning of the 2014-15 school year, school districts must select one quarter of their teachers with at least three years of experience and offer them four-year contracts, providing for a \$500 raise in each year of the contract, in exchange for their “voluntarily relinquish[ing] career status.” *Id.* § 9.6(g), (h).

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*B. Procedural History*

On 17 December 2013, NCAE and six public school teachers filed a complaint in Wake County Superior Court seeking declaratory and injunctive relief based on their allegations that the Career Status Repeal amounts to both a taking of property without just compensation in violation of Article I, Section 19 of the North Carolina Constitution, and an unconstitutional impairment of their contractual rights under Article I, Section 10 of the United States Constitution. The State filed an answer and motion to dismiss pursuant to N.C.R. Civ. P. 12 on 17 January 2014. Plaintiffs then filed a motion for summary judgment pursuant to N.C.R. Civ. P. 56 on 10 March 2014.

In support of their Rule 56 motion for summary judgment, Plaintiffs submitted affidavits from:

- NCAE president Rodney Ellis, whose nonprofit organization's membership includes thousands of public school teachers, administrators, and education support personnel who either had already attained career status or would have been eligible for it in the coming years, and who, Ellis explained, relied on the Career Status Law for "peace of mind because they know that any issues implicating their jobs will be handled fairly and with due process;"
- Plaintiffs Nixon, Holmes, Beatty, Wallace, and deVille, each of whom are public school teachers who relied on the statutory promise of career status rights in exchange for meeting the requirements of the Career Status Law in accepting their teaching positions, had already attained career status prior to the Law's repeal, and considered its protections to be a fundamental part of their overall compensation that offsets their relatively low pay and allows them the opportunity to grow and improve by being innovative in the classroom, as well as the ability to advocate for their students by raising concerns about instructional issues to administrators without fear of losing their jobs;
- Plaintiff Link, a public school teacher who had not yet attained career status before the Career Status Repeal but would have been eligible for it by the end of the 2013-14 school year and who relied on the statutorily promised opportunity to earn the protections career status provides when he chose to accept a teaching position here in North Carolina over a job offer in Florida;
- eight public school administrators who explained that career status protections help attract and retain teachers despite the relatively

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low salaries established by State salary schedules; that the Career Status Law's four-year probationary period provided more than adequate time for school districts to evaluate teachers and make informed decisions that ensure career status is only granted to teachers who have proven their effectiveness; that the Career Status Law already provided school administrators with sufficient tools to discipline and/or dismiss teachers who have already earned career status and thus did not impede their ability to remove such teachers for inadequate performance; and that although, in the vast majority of cases when a school district seeks removal of a career status teacher, the teacher agrees to resign without a hearing, on the few occasions when hearings do occur, the process is not onerous for the district;

- Representative Richard Glazier, who represents North Carolina's 44th district in the State House of Representatives and explained that before the Career Status Repeal was enacted as part of the Appropriations Act, the House had already passed legislation aimed at reforming the Career Status Law in the form of House Bill 719, which would have "added definitions of teacher performance evaluation standards, teacher performance ratings, and teacher status, thus creating greater consistency in the determination of career status and revocation of career status based on evaluation ratings," by a bipartisan and nearly unanimous vote of 113-to-1; and
- labor economist Jesse Rothstein, who explained that the job security afforded by career status functions as a valuable employment benefit for North Carolina's teachers insofar as it offsets their lower salaries relative to other professions and other teachers in almost every other state in the country, and also serves the State's interest in running an efficient system of public education by helping to recruit and retain experienced and effective teachers who might otherwise leave the profession; by ensuring that non-retention decisions are made in a timely way in order to remove ineffective teachers from the classroom more quickly; and by reducing the need for expensive and disruptive annual retention evaluations for career status teachers, thereby enabling school districts to focus their resources, and teachers to focus their time and energy, on classroom instruction.

In addition, Plaintiffs also submitted resolutions adopted by the Boards of Education of Brunswick, Carteret, Chatham, Cleveland, Craven, Cumberland, Guilford, Haywood, Jackson, Lee, Lenoir, Macon, Onslow, Orange, Person, Robeson, Rockingham, Rowan, Transylvania, Tyrrell, Wake, and Washington Counties calling on our General Assembly to

repeal the Career Status Repeal's 25% Provision because it is too vague to provide any discernible standard for determining who should qualify for the four-year contracts and bonuses and also provides no funding beyond the first year.

In opposition to Plaintiffs' motion for summary judgment, the State submitted affidavits from Terry Stoops, a policy analyst at the John Locke Foundation, and Eric A. Hanushek, a senior fellow at the Hoover Institute. Citing North Carolina students' low scores on standardized tests and arguments by Hanushek and other researchers that raising the quality of the teacher workforce is the key to raising student achievement, Stoops defended the Career Status Repeal because it "will make it easier for public school administrators and school boards to remove ineffective tenured teachers from the classroom" and "will likely produce a much-needed surge in student performance, particularly for public school students in low-income and low-performing schools." For his part, Hanushek described how his research demonstrated that the quality of teachers is the most important factor in maximizing student learning but that teacher quality is difficult to measure and new metrics for best assessing teacher quality are ever-evolving, which means that granting teachers tenure not only makes it more difficult to remove ineffective teachers but also "severely restricts the ability of the schools to use updated teacher performance information in making personnel decisions." Hanushek took issue with aspects of Rothstein's analysis of the Career Status Law's systemic benefits but provided no specific evidence that career status protections adversely impact the quality of education North Carolina's public school children receive.

On 12 May 2014, the trial court held a hearing on Plaintiffs' Rule 56 motion for summary judgment. During that hearing, the State submitted a document entitled "Inadmissible Provisions of Affidavits Submitted in Support of Plaintiffs' Motion for Summary Judgment," which asked the trial court to disregard portions of Plaintiffs' affidavits consisting of hearsay statements, conclusions as to the legal issues in the case, and statements regarding the impact of career status and its repeal on all teachers that the State contended could not have been based on any individual affiant's personal knowledge. In an order entered 6 June 2014, the trial court explained that it had treated the State's request as a motion to strike, which it granted with regard to the portions of Plaintiffs' affidavits that consisted of legal conclusions or inadmissible hearsay, but otherwise denied.

That same day, the trial court entered a separate order granting in part and denying in part Plaintiffs' motion for summary judgment.

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In support of its order, the trial court found as an undisputed material fact that

[Plaintiffs] were statutorily promised career status rights in exchange for meeting the requirements of the Career Status Law. When they made their decisions both to accept teaching positions in North Carolina school districts and to remain in those positions, they reasonably relied on the State's statutory promise that career status protections would be available if they fulfilled those requirements. The protections of the Career Status Law are a valuable part of the overall package of compensation and benefits for [P]laintiffs and other teachers, benefits that they bargained for both in accepting employment as teachers in North Carolina school districts and remaining in those positions. From the perspective of school administrators, career status protections help attract and retain teachers despite the low salaries established by State salary schedules.

After additional findings that the four-year probationary period “ensure[s] that career status is only granted to teachers who have proven their effectiveness” and that the Career Status Law does not impede school administrators' ability to remove career status teachers whose performance is inadequate, the court found as an undisputed material fact that “[t]here is no evidence that the Career Status Law prevents North Carolina school districts from achieving the separation of teachers when they believe dismissal is necessary. School administrators are able to make all necessary personnel changes within the framework of the Career Status Law.”

In light of these undisputed material facts, the trial court concluded that the Career Status Repeal violated Article I, Section 10 of the United States Constitution. The trial court based this conclusion on its application of the three-factor test articulated by the United States Supreme Court in *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 52 L. Ed. 2d 92 (1977) to determine whether a state law violates the Contract Clause. As to the first factor, the trial court concluded based on the United States Supreme Court's holding in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 82 L. Ed. 685 (1938), and our Supreme Court's holdings in *Faulkenbury v. Teachers' & State Employees' Retirement Sys. of N.C.*, 345 N.C. 683, 483 S.E.2d 422 (1997), *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), and *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 643 S.E.2d 904 (2007), that “[a]ll teachers who earned career status before the [26 July 2013]

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enactment of the Career Status Repeal have contractual rights in that status and to the protections established by the Career Status Law.” As to the second factor, the trial court concluded that “[b]y eliminating those protections, the Career Status Repeal substantially impairs the contractual rights of career status teachers.” As to the third factor, the trial court concluded that this impairment of contractual rights “was not reasonable and necessary to serve an important public purpose,” given that the “Career Status Repeal does not further any public purpose because the undisputed facts demonstrate that, under the Career Status Law, school administrators already have the ability to dismiss career status teachers for inadequate performance whenever necessary.” After noting that “eliminating career status hurts North Carolina public schools by making it harder for school districts to attract and retain quality teachers,” the trial court also concluded that “[e]ven if there was an actual need for school administrators to have greater latitude to dismiss ineffective career status teachers, that objective could have been accomplished through less drastic means, such as by amending the grounds for dismissing teachers for performance-related reasons.”

As a separate and independent ground for concluding that the Career Status Repeal is unconstitutional, the trial court also determined that it violated the Law of the Land Clause found in Article I, Section 19 of North Carolina’s Constitution, which “has long been interpreted to incorporate a protection against the taking of property by the State without just compensation.” In light of our Supreme Court’s holding in *Bailey* that “[c]ontract rights, including those created by statute, constitute property rights that are within the Law of the Land Clause’s guarantee against uncompensated takings,” the trial court concluded that by eliminating career status teachers’ contractual rights, “the Career Status Repeal constitutes a taking of property without compensation that violates the Law of the Land Clause beyond a reasonable doubt.”

Consequently, the trial court granted summary judgment to Plaintiffs NCAE, Nixon, Holmes, Beatty, Wallace, and deVille, declared that Sections 9.6 and 9.7 of S.L. 2013-360 “are unconstitutional with regard to teachers who had received career status before [26 July 2013],” and—after concluding those teachers had no other adequate remedy at law and would suffer irreparable harm otherwise—permanently enjoined the State from implementing and enforcing the Career Status Repeal. The trial court also permanently enjoined the State from implementing and enforcing the 25% Provision, which it concluded “violates the constitutional vagueness doctrine because it provides no discernible,

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workable standards to guide local school districts in its implementation” and is “inextricably tied” to the Career Status Repeal because it is “predicated on the revocation of career status as of 2018” and thus “cannot be severed from the unconstitutional revocation of career status.” However, the trial court denied summary judgment on Plaintiff Link’s claims, and therefore granted summary judgment to the State against all claims on behalf of teachers who had not yet earned career status, reasoning that such teachers lacked standing to bring these claims because “[p]robationary teachers who have not yet received career status do not have contractual rights that are protected by the Contract Clause or the Law of the Land Clause.”

The State gave written notice of appeal on 3 July 2014, and, on 7 July 2014, Plaintiffs also gave written notice of appeal.

*II. The State’s Appeal**A. The Career Status Repeal violates the Contract Clause of the United States Constitution*

[1] The State argues that the trial court erred as a matter of law when it granted summary judgment to NCAE and the five teachers who had already earned career status based on its conclusion that the Career Status Repeal violated the Contract Clause. We disagree.

“The standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.” *Hyatt v. Mini Storage on Green*, \_\_ N.C. App. \_\_, \_\_, 763 S.E.2d 166, 169 (2014) (citation, internal quotation marks, and brackets omitted). Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Id.* (quoting N.C. Gen. Stat. § 1A-1, Rule 56). This Court applies a *de novo* standard of review to orders granting or denying a motion for summary judgment. *Id.*

To determine whether a state law violates the Contract Clause of the United States Constitution, our State’s appellate courts apply a three-factor test that examines: “(1) whether a contractual obligation is present, (2) whether the [S]tate’s actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose.” *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (citation omitted).

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*(1) The Career Status Law creates contractual obligations*

In the present case, as to the first factor, the State argues that the trial court erroneously concluded that Plaintiffs Nixon, Holmes, Beatty, Wallace, and deVille had contractual rights under the Career Status Law that were substantially impaired by the Career Status Repeal based on a misapplication of the relevant federal and state precedents the court relied on. Specifically, the State contends that *Brand*, *Faulkenbury*, and *Bailey* are easily distinguishable from the present facts because those cases involved benefits that were automatically conferred on public employees by express statutory promises, whereas here, career status depends upon completion of a four-year probationary period and a majority vote of the local school board. According to the State, this makes it more relevant to focus on Plaintiffs' individual employment contracts with their local school boards, which the State is quick to emphasize contain provisions stating that the contracts are, for example, "subject to the availability of federal and local funds" and "subject to the allotment of personnel by the State Board of Education and subject to the condition that the amount paid from State funds shall be within the allotment of funds." Thus, the State contends that even if Plaintiffs did have contractual rights to career status protections, those rights were not substantially impaired by the Career Status Repeal because Plaintiffs were always subject to termination due to the conditional language in their contracts. Our review of the relevant case law leads us to conclude that this argument is totally baseless.

In *Brand*, the United States Supreme Court reviewed a challenge to legislation that partially repealed Indiana's Teachers' Tenure Law, which provided that teachers who had served under annual contracts for five or more successive years and then entered into a new contract would be considered "permanent" teachers with indefinite, continuing contracts which could be terminated only after notice and a hearing and only for statutorily enumerated reasons. 303 U.S. at 102-03, 82 L. Ed. at 692. Indiana's legislature subsequently amended the Teachers' Tenure Law to exclude teachers employed by "township school corporations." *Id.* The plaintiff, who had been employed as a teacher by a township school for long enough to earn "permanent" status prior to the partial repeal, brought suit after her contract was terminated. In holding that the repeal violated the Contract Clause, the Court noted that "it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions." *Id.* at 100, 82 L. Ed. at 690.



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In *Faulkenbury*, our Supreme Court held that legislation reducing teachers' and other State employees' retirement benefits violated the Contract Clause. As the Court explained, "[a]t the time the plaintiffs' rights to pensions became vested [after they had been employed more than five years], the law provided that they would have disability retirement benefits calculated in a certain way. These were rights that they had earned and that may not be taken from them by legislative action." 345 N.C. at 690, 483 S.E.2d at 427. In so holding, the Court rejected the State's argument that the statute the plaintiffs relied on only announced a policy subject to change by a later legislature. The Court focused instead on the terms of the statute to conclude:

We believe that a better analysis is that at the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract.

*Id.*

Similarly, in *Bailey*, our Supreme Court held that legislation capping the tax exemption for public employee retirement benefits violated the Contract Clause. After tracing the "long demonstrated [] respect" our State's judiciary has shown "for the sanctity of private and public obligations from subsequent legislative infringement," 348 N.C. at 142, 500 S.E.2d at 61, the Court made clear that "[t]he basis of the contractual relationship determinations in these and related cases is the principle that where a party in entering an obligation relies on the State, he or she obtains vested rights that cannot be diminished by subsequent state action." *Id.* at 144, 500 S.E.2d at 62. Furthermore, as the Court noted in rejecting the State's argument that the exemption constituted an unconstitutional contracting away of its power of taxation,

[t]he rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. In this case, the State created the exemption and then proceeded for decades to represent it as a portion of retirement benefits and to reap its contractual benefits. It is clear from the record evidence that the State used these representations as inducement to employment with the State, and employees relied on these representations in consideration of many years' valuable service

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to and with the State. The State's attempt to find shelter under the North Carolina Constitution must be compelling indeed after such a long history of accepting the benefits of the extension of the exemption in question. We find no such compelling case here.

*Id.* at 147, 500 S.E.2d at 64 (citation and internal quotation marks omitted). Thus, given that the tax exemption benefit had "helped attract and keep quality public servants in spite of the generally lower wage paid to state and local employees," *id.* at 150, 500 S.E.2d at 65, the Court concluded that the State's retroactive imposition of a cap on the exemption "is not acceptable in a government guided by notions of fairness, consent and mutual respect between government and man, and certainly not between the government of this State and its employees." *Id.* at 150, 500 S.E.2d at 66.

More recently, in *Wiggs*, our Supreme Court again determined that a retroactive change to a statutory employment benefit for public employees violated the Contract Clause. There, the plaintiff was a deputy sheriff who retired early after three decades of service and received a "special separation allowance" pursuant to N.C. Gen. Stat. § 143-166.42 from the county that employed him. He then obtained part-time employment as a police officer with the Raleigh-Durham Airport Authority, which prompted his former county employer to adopt a resolution providing that special separation allowance payments would terminate upon a retiree's re-employment with another local government entity. 361 N.C. at 319, 643 S.E.2d at 905. Drawing on its prior holding in *Faulkenbury*, the Court recognized that the special separation allowance was an employment benefit that was contractual in nature, and concluded that although the county could have acted within its authority "to pass a resolution which would apply prospectively to those whose rights to the special separation allowance had not yet vested," it could not retroactively apply such a resolution "to [the] plaintiff's vested contractual right" to receive the allowance. *Id.* at 324, 643 S.E.2d at 908.

Based on the record and our review of the case law made relevant by the actual arguments of the parties, we conclude that the trial court did not err in its determination that career status rights constitute a valuable employment benefit and that by satisfying the requirements of the Career Status Law prior to the Career Status Repeal, Plaintiffs Nixon, Holmes, Beatty, Wallace, and deVillie earned vested contractual rights to the valuable employment benefit that career status protections represent. While the benefits at issue here may not be identical to those at issue in *Faulkenbury*, *Bailey*, and *Wiggs*, we conclude that those cases

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demonstrate our Supreme Court's long-standing recognition that when the General Assembly revokes valuable employment benefits that are obtained in reliance on a statute and that offset the relatively low salaries of public employees, it violates the Contract Clause. In reaching this conclusion, we find highly persuasive the affidavit Plaintiffs submitted from labor economist Rothstein, who observes that "[t]here is a useful parallel between job security that derives from a career status award and the economic value of retirement benefits." As Rothstein explains:

It has long been recognized that the prospect of earning future retirement benefits, including pensions and retiree health coverage, has economic value to workers, even those who are not themselves near retirement age. Workers often choose careers based in part on the retirement benefits that are offered. In the same way, the prospect of earning career protections, and the job security that comes with them, has economic value to teachers, and is an important part of the package of pay and benefits that individuals consider when deciding whether to become teachers.

[] There are several aspects of the teacher employment relationship that make career status protections more valuable than they might otherwise be. First, teachers are relatively poorly paid. Nationally, the average teacher earned about \$56,643 in 2011-12 per year, only 67% of the salary earned by the average full-time, full-year college-educated worker. In North Carolina, teacher salaries are even lower than this—the average public school teacher's salary in 2011-12 was \$46,605, down over 12% in real terms since 1999-2000. The 2013-14 North Carolina salary schedule for a teacher with a bachelor's degree specifies a maximum salary of \$53,180 for a teacher with 36 or more years of experience, less than the average teacher's salary nationally, and even teachers with master's degrees do not reach the national average until they have accumulated 35 years of experience.

[] Second, teacher salaries are typically backloaded. Entering teacher salaries are very low relative to other occupations, as are those with few years of experience, but the growth rate is typically higher than in non-teaching jobs. In North Carolina, teacher salaries rise by a total of only 2.8% over the first seven years, then grow by 15.8%

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over the next four years. Total compensation is even more strongly backloaded than are salaries. Teacher pensions do not vest until ten years (for those hired after 2011), and the pension benefit grows with experience much faster than the base salary. Salary-experience profiles are typically much smoother in the economy at large than is the North Carolina teacher's salary schedule. Backloaded salaries mean that it can be quite costly for an experienced teacher to lose his or her job, as he or she has already borne the cost of teaching through the low-compensation early years but will never be able to amortize this through higher earnings in the later part of the career.

. . . .

Based on Rothstein's analysis, we conclude that career status protections have a financial impact that is strongly analogous to, and in some ways directly implicates, the vested contractual rights to benefits as a form of deferred compensation that were at issue in *Faulkenbury*, *Bailey*, and *Wiggs*. We consequently conclude that our Supreme Court's consistent pattern of refusing to allow the State to renege on its statutory promises, after decades of representing the valuable employment benefits conferred by those statutes as inducements to public employment, supports, and even compels, the result we reach here. *See, e.g., Bailey*, 348 N.C. at 147, 500 S.E.2d at 64.

In the present case, the record indicates a similar pattern of inducement and reliance, given Plaintiffs' affidavits describing how they relied on the availability of career status protections when they chose to work as teachers in North Carolina's public schools, as well as affidavits from eight public school administrators describing how they have relied on the Career Status Law to attract and retain qualified teachers. Based on this uncontradicted evidence, we cannot escape the conclusion that for the last four decades, the career status protections provided by section 115C-325, the very title of which—"Principal and Teacher Employment Contracts"—purports to govern teachers' employment contracts, have been a fundamental part of the bargain that Plaintiffs and thousands of other teachers across this State accepted when they decided to defer the pursuit of potentially more lucrative professions, as well as the opportunity to work in states that offer better financial compensation to members of their own profession, in order to accept employment in our public schools. We therefore conclude further that, as in *Faulkenbury*, *Bailey*, and *Wiggs*, the State has reaped benefits by using the Career Status Law as an inducement by which to attract and

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retain public school teachers in spite of the relatively low wages it pays them. Thus, although the dissent cites our Supreme Court's prior observation in *Taborn v. Hammonds*, 324 N.C. 546, 556, 380 S.E.2d 513, 519 (1989), that the purpose of the Career Status Law was "to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons," in support of its conclusion that career status protections were intended merely to advance a policy of providing good teachers "for the children" rather than to provide contractual rights for the teachers, we cannot and will not ignore the thousands of North Carolinians who ended up on the other side of that equation by relying on the inducement of a statutory promise to gain vested rights to valuable employment benefits.

The State's attempt to distinguish the career status protections at issue here from the contractual rights to benefits under the statutory schemes at issue in *Brand*, *Faulkenbury*, and *Bailey* is wholly unpersuasive. Indeed, the State's description of those benefits as being automatically conferred by express statutory guarantees conveniently overlooks striking similarities those statutes share with the Career Status Law. In *Brand*, for example, the granting of tenure, or "permanent" status, was contingent on the teacher successfully completing at least five years of probationary employment and then entering into a new contract. Although the statute did not expressly require approval by the local school board, we can infer that a public school teacher's contract would only be renewed after review by some governmental body or agent with knowledge of Indiana's Teachers' Tenure Law, and we therefore see no meaningful difference between its operation and the procedures by which Plaintiffs earned career status protections under the Career Status Law. In a similar vein, the statutes at issue in *Faulkenbury*, *Bailey*, and *Wiggs* required employees to remain employed for a minimum vesting period before they were entitled to receive any benefits at all; here again, it stands to reason that those employees' performances were evaluated at regular intervals by supervisors with knowledge of the statutory vesting process for retirement benefits and strong incentives to terminate inadequately performing employees before those benefits vested. Therefore, because the State's purported distinctions make no difference, we conclude that these Plaintiffs who relied on the statutory promise offered by the Career Status Law and satisfied its requirements before the Career Status Repeal earned a vested right to career status protections that is every bit as contractual in nature as the plaintiffs' rights in *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs*. Indeed, we believe that to hold otherwise would go against nearly two centuries of respect

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our State's judiciary has shown for the sanctity of private and public contractual obligations and would thus "not [be] acceptable in a government guided by notions of fairness, consent and mutual respect between government and man, and certainly not between the government of this State and its employees." *Bailey*, 348 N.C. at 150, 500 S.E.2d at 66.

The State's emphasis on Plaintiffs' individual employment contracts with their local school boards is similarly misplaced. First, the State's argument fundamentally misconstrues the basis for Plaintiffs' claims under the Contract Clause. Put simply, Plaintiffs are not suing based on their individual contracts, but instead based on the State's statutory promise, contained in section 115C-325 of our General Statutes, that teachers who satisfied the requirements of the Career Status Law and earned that status would be entitled to its protections, and it is that contractual promise—just like the statutory promises at issue in *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs*—that Plaintiffs allege was substantially impaired by the Career Status Repeal. Therefore, the boilerplate disclaimers the State relies on from Plaintiffs' individual employment contracts with local school boards—which do not purport to address the revocation of career status protections in any way but instead merely, and sensibly, recognize that a teacher's salary and continued employment depend on the State not running out of the funds necessary to honor its obligations—have no bearing whatsoever on this litigation.

The State also puts heavy emphasis on a similar provision contained in a sample contract from the Durham Public Schools ("DPS") Board of Education, included in the record with the affidavit from DPS Chair Heidi H. Carter, that specifically refers to the contract as being "subject to the provisions of the school law applicable thereto, which are hereby made a part of this contract." The State contends this language evidences a clear reservation of rights that is consistent with the long-held proposition that one legislature cannot bind another, *see, e.g., Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, 71 S.E. 218 (1911), and therefore demonstrates that career status protections have always been subject to termination by the General Assembly. But this argument also fails. On the one hand, as noted *supra*, our Supreme Court has already rejected a similar argument in *Faulkenbury*. *See* 345 N.C. at 690, 483 S.E.2d at 427. On the other hand, given the State's intense focus on individual employment contracts, it certainly bears noting that none of these Plaintiffs who had already earned career status worked for DPS, which means that none of them would have been bound by this vague caveat. The State further contends that the sample contract is relevant because Plaintiffs' complaint purported to seek relief on behalf of all

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teachers and the trial court's order likewise applies to all teachers, but here again, the State's argument is unavailing because it misconstrues the basis for Plaintiffs' claims under the Contract Clause.

(2) *The Career Status Repeal substantially impairs contractual obligations*

Having determined that Plaintiffs have contractual rights to career status protections, we turn next to the question of whether those rights were substantially impaired. This is not a difficult question. Under the Career Status Law, these Plaintiffs would have continuing contracts; under the Career Status Repeal, their contracts will be limited to a maximum duration of four years. *Compare* N.C. Gen. Stat. § 115C-325(d) (1), *with* 2013 N.C. Sess. Law 360 § 9.6(b). Moreover, under the Career Status Law, if these Plaintiffs were terminated, demoted, or otherwise disciplined, they would be entitled to a hearing with full due process rights; under the Career Status Repeal, there is no guarantee of a hearing. *Compare* N.C. Gen. Stat. § 115C-325(h), (j), *with* 2013 N.C. Sess. Law 360 § 9.6(b). Thus, in light of the relevant state and federal decisions discussed *supra*, we have no trouble concluding that the trial court was correct in its determination that the Career Status Repeal substantially impairs Plaintiffs' vested contractual rights.

For its part, the State argues that Plaintiffs' vested contractual rights to career status protections are not substantially impaired by the Career Status Repeal based on a misapplication of the Fourth Circuit's recent decision in *Cherry v. Mayor & Balt. City*, 762 F.3d 366 (4th Cir. 2014). There, the plaintiffs sought to challenge a municipal ordinance that made actuarial adjustments to a pension plan by replacing a variable benefit with a cost-of-living adjustment. *Id.* at 369. The Fourth Circuit concluded that the city's modification of its pension plan fell within a state-law contract doctrine permitting "reasonable modifications" to pension plans, which would allow the plaintiffs to challenge the reasonableness of the modification by bringing a breach of contract action for damages. *Id.* at 372-73. Because a city does not commit a Contract Clause violation "merely by breaching one of its contracts," the plaintiffs could not maintain a Contract Clause action in the absence of a showing that the city had somehow foreclosed them from pursuing a breach of contract action for damages. *Id.* at 371. In the present case, the State suggests that *Cherry* should control because the Career Status Repeal was merely a contract modification and Plaintiffs have not asserted any breach of contract claims. There are several reasons why this argument lacks merit. First, the State's claim that the Career Status Repeal is merely a "modification" authorized by Plaintiffs' individual

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employment contracts based on the boilerplate disclaimers discussed *supra* once again misconstrues the basis for Plaintiffs' claims under the Contract Clause, and consequently fails. Moreover, the State points to no state-law remedy comparable to the "reasonable modification" doctrine in *Cherry* that would permit Plaintiffs to bring a breach of contract action for damages here. We therefore conclude that *Cherry* is not even remotely applicable to the present facts.

(3) *The Career Status Repeal was not reasonable and necessary to serve an important public purpose*

Finally, the State has the burden of establishing that the Career Status Repeal was a reasonable and necessary means of furthering an important public purpose. *See Bailey*, 348 N.C. at 151, 500 S.E.2d at 66. Our review as to this third factor involves two steps. First, legislation that substantially impairs contractual rights must have "a legitimate public purpose," which essentially means the State must produce evidence that the purported harm it seeks to address actually exists. *See, e.g., Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 74 L. Ed. 2d 569, 581 (1983). Second, if the legislation has a legitimate public purpose, we then examine whether the impairment of contractual rights is a "reasonable and necessary" way to further that purpose or whether the State's objective could have been accomplished through a "less drastic modification" because the State "is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *U.S. Trust Co.*, 431 U.S. at 30-31, 52 L. Ed. 2d at 114-15. While the State is typically granted a degree of deference as to what is reasonable and necessary when legislation impairs purely private contracts, *see Energy Reserves Grp., Inc.*, 459 U.S. at 412-13, 74 L. Ed. 2d at 581, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate" where, as here, public contracts are at issue "because the State's self-interest is at stake." *U.S. Trust Co.*, 431 U.S. at 26, 52 L. Ed. 2d. at 112.

In the present case, the State contends that even if the Career Status Repeal substantially impaired Plaintiffs' contractual rights, such an impairment is reasonable and necessary to serve the important public purpose of improving the educational experience for North Carolina's public school children. Specifically, citing the North Carolina Constitution's guarantee that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right," N.C. Const. art. I, § 15, the State argues that it is imperative for local school boards to be able to dismiss ineffective teachers, and that the Career Status Repeal is therefore crucially important because it gives



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local school boards more flexibility in managing their pool of teachers and increasing the overall quality of the teachers in the pool. The State also urges this Court to consider the Career Status Repeal as just one plank in a broader raft of reforms aimed at improving public education. However, as demonstrated by our review of the record and the relevant case law, this argument is without merit.

While no one can deny the general proposition that improving North Carolina's public schools is an important public purpose, the State's purported rationale for the Career Status Repeal is flatly contradicted by the terms of the Career Status Law itself and the affidavits both parties submitted in response to Plaintiffs' motion for summary judgment. Before its repeal, the Career Status Law already explicitly permitted school districts to terminate career status teachers for "inadequate performance," which the statute defined as "the failure to perform at a proficient level on any standard of the evaluation instrument" or "otherwise performing in a manner that is below standard." N.C. Gen. Stat. § 115C-325(e)(1), (e)(3). Furthermore, Plaintiffs submitted affidavits from eight North Carolina public school administrators, who each confirmed that the Career Status Law is an asset for attracting and retaining quality teachers to serve in our State's public schools; that the four-year probationary period provides more than adequate time for school districts to evaluate teachers, identify performance issues early, provide constructive feedback for improvement, and make informed decisions that ensure career status is only granted to teachers who have proven their effectiveness; and, most importantly, that the Career Status Law effectively provided school administrators with sufficient tools to discipline and/or dismiss teachers who have already earned career status and thus did not impede their ability to remove such teachers for inadequate performance. By contrast, the State submitted affidavits from experts who believe that granting tenure to teachers creates insurmountable obstacles to dismissing ineffective teachers, and that removing those obstacles will therefore help improve student performance. Yet the only support that the State's affidavits offer for this premise consists of vague and sweeping generalizations about tenure as an abstract concept, rather than specific facts regarding the operation of North Carolina's Career Status Law or its allegedly adverse impact on our public schools. Given this Court's prior recognition that "conclusory statements standing alone cannot withstand a motion for summary judgment," *see, e.g., Midulla v. Howard A. Cain Co.*, 133 N.C. App. 306, 309, 515 S.E.2d 244, 246 (1999), we conclude that the vague and conclusory assertions contained in the State's affidavits are plainly insufficient to meet its burden here. Therefore, in light of the un rebutted affidavits concerning real

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North Carolina school administrators' actual experiences implementing the Career Status Law, and the statute's explicit inclusion of "inadequate performance" as a ground for dismissal, we conclude that the substantial impairments the Career Status Repeal imposes on Plaintiffs' vested contractual rights for the purported rationale of making it easier to dismiss ineffective teachers serves no public purpose whatsoever.

Moreover, even assuming *arguendo* that making it easier to dismiss ineffective teachers was an important public purpose, we are not persuaded that the Career Status Repeal was a reasonable and necessary means to advance that purpose. Our Supreme Court's prior decisions make clear what a high bar this represents. For example, *Bailey* established that in this context, "[l]egislative convenience is not synonymous with reasonableness" when it comes to legislation that impairs the vested rights of public employees to whom the State has made promises in consideration of their years of public service, and that "necessary" basically means "essential." 348 N.C. at 152, 500 S.E.2d at 67 ("Thus, we hold the Act which placed a cap on tax-exempt benefits was not necessary to a legitimate state or public purpose, *i.e.*, it was not 'essential' because 'a less drastic modification' of the State's exemption plan was available.") (citation omitted; italics added). In *Faulkenbury*, the State argued that lowering the plaintiffs' retirement benefits was reasonable and necessary to ensure the State pension plan's correct operation. 345 N.C. at 694, 483 S.E.2d at 429. In rejecting that argument, the Court explained that "[w]e do not believe that because the pension plan has developed in some ways that were not anticipated when the contract was made, the state or local government is justified in abrogating it. This is not the important public purpose envisioned which justifies the impairment of a contract." *Id.* In *Bailey*, the Court went even further when it rejected the State's argument that capping the tax exemption for public employee retirement benefits was "necessary" to comply with a decision by the United States Supreme Court because there were "numerous ways that the State could have achieved this goal without impairing the contractual obligations of [the] plaintiffs." 348 N.C. at 152, 500 S.E.2d at 67.

In the present case, we are compelled by *Faulkenbury* and *Bailey* to reach a similar conclusion. On the one hand, if ensuring the correct operation of the State's plan was not a sufficient basis for the *Faulkenbury* Court to conclude the substantial impairment of contractual rights was necessary and reasonable, then surely here, the State's decision to totally abolish its plan based on vague generalizations supported by no direct evidence whatsoever must also fail. Moreover, just because the Career Status Repeal might be a convenient way to further the General

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Assembly's broader efforts to reform public education does not make the abrogation of Plaintiffs' vested contractual rights reasonable. Further, the record is replete with evidence of less drastic available alternatives. The legislative history of the Career Status Law demonstrates that its provisions have been amended numerous times over the last four decades, most recently in 2011 to expand the definition of "inadequate performance." See An Act to Modify the Law Relating to Career Status for Public School Teachers, 2011 N.C. Sess. Law 348. If it had been truly necessary to further augment the ability of local school boards to dismiss teachers for performance-related reasons, our General Assembly could have done so through further reforms; indeed, Plaintiffs' affidavit from Rep. Glazier clearly demonstrates that there was a less drastic alternative available here in the form of H.B. 719, which would have "added definitions of teacher performance evaluation standards, teacher performance ratings, and teacher status, thus creating greater consistency in the determination of career status and revocation of career status based on evaluation ratings," an alternative which enjoyed nearly unanimous bipartisan support. We therefore conclude that the trial court did not err in granting partial summary judgment in favor of NCAE and the five teachers who had already earned career status based on its determination that the Career Status Repeal violated the Contract Clause of the United States Constitution.

*B. The Career Status Repeal violated the Law of the Land Clause of the N.C. Constitution*

**[2]** The State also argues that the trial court erred in concluding that the Career Status Repeal violated the Law of the Land Clause found in Article I, Section 19 of the North Carolina Constitution as a separate and independent basis for the court's partial grant of summary judgment to Plaintiffs. We disagree.

The Law of the Land Clause provides in relevant part that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. North Carolina's appellate courts have long held that the clause protects against the taking of property by the State without just compensation. See, e.g., *Long v. City of Charlotte*, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982) ("We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is

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considered in North Carolina as an integral part of the ‘law of the land’ within the meaning of Article I, Section 19 of our State Constitution.”) (citations omitted); *State ex rel. Utilities Comm’n v. Buck Island, Inc.*, 162 N.C. App. 568, 580, 592 S.E.2d 244, 252 (2004) (“Though the clause does not expressly prohibit the taking of private property for public use without just compensation, our Supreme Court has inferred such a provision as a fundamental right integral to the law of the land.”) (citation and internal quotation marks omitted). In *Bailey*, our Supreme Court recognized that because “[t]he privilege of contracting is both a liberty and a property right,” 348 N.C. at 154, 500 S.E.2d at 68 (citation omitted), the Law of the Land Clause guarantees that contractual rights, including those created by statute, constitute property rights and are therefore protected against uncompensated takings. *Id.* (“[I]f the Legislature had vested an individual with the property in question, . . . [the Law of the Land Clause] would restrain them from depriving him of such right.”) (citation and emphasis omitted).

In the present case, the State contends that, in light of this Court’s prior holding in *Shipman v. N.C. Private Protective Servs. Bd.*, 82 N.C. App. 441, 346 S.E.2d 295, *appeal dismissed and disc. review denied*, 318 N.C. 509, 349 S.E.2d 866 (1986), all that is required for a challenged statute to comport with the Law of the Land Clause is that the statute must serve a legitimate purpose of State government and be rationally related to that purpose. Thus, given its duty imposed by Article I, Section 15 of the North Carolina Constitution to guard and maintain the right of the people to public education, the State argues that the Career Status Repeal is rationally related to the legitimate purpose of improving our children’s educational experience by providing tools for local school boards to more easily dismiss underperforming teachers in order to serve the paramount goal of staffing the public schools with the best teachers possible. The State also heavily emphasizes the great deference and strong presumption of constitutionality that North Carolina’s appellate courts typically afford to legislation enacted by our General Assembly, *see, e.g., Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (“In determining the constitutionality of a statute we are guided by the following principle: [e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.”) (citations, internal quotation marks, and brackets omitted), and implies that by ignoring these presumptions, the trial court violated the doctrine of separation of powers by improperly substituting its views for those of the Legislature. Indeed, while acknowledging that there are differing views on how best to improve public education in North Carolina, the State characterizes the present lawsuit as the sort of partisan policy

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dispute that is for the people's elected representatives, rather than the courts, to resolve. Furthermore, the State argues that Plaintiffs cannot meet their burden of proving the Career Status Repeal is unconstitutional beyond reasonable doubt because the statutory grounds for termination remain largely the same as under the Career Status Law and because teachers whose contracts are not renewed can still petition the local school board for a hearing.

There are many reasons why this argument fails. First, the State's reliance on the standard of review this Court utilized in *Shipman* is wholly misplaced. There, we reviewed a challenge to our General Assembly's enactment of legislation to regulate "those professions which charge members of the public a fee for engaging in many activities which overlap the functions of our public police" by, *inter alia*, requiring that private detectives obtain licenses from a state agency. 82 N.C. App. at 443, 346 S.E.2d at 296. Because we determined that regulating such an occupation is clearly a legitimate purpose of state government, and that licensing is rationally related to that purpose, we rejected the plaintiff private investigator's argument that the statute violated the Law of the Land Clause. *Id.* at 444-45, 346 S.E.2d at 297. Significantly, however, *Shipman* did not involve any takings claim by the plaintiff, whose arguments focused exclusively on whether the statute authorizing the Private Protective Service Board to grant, suspend, or revoke licenses violated his right to due process, and we therefore find *Shipman* inapplicable to the present facts.

Instead, we turn for guidance to the model our Supreme Court established in *Bailey*. As the *Bailey* Court made clear, a statutory promise of employment benefits, once vested, confers a contractual right, which is also a property right, the uncompensated impairment of which by subsequent legislation can constitute a taking in violation of the Law of the Land Clause. 348 N.C. at 154-55, 500 S.E.2d at 68-69. Having already determined that the challenged legislation violated the Contract Clause, the *Bailey* Court had no trouble in concluding that

it is clear that the State has taken [the] plaintiffs' private property by passage of the Act. [The p]laintiffs contracted, as consideration for their employment, that their retirement benefits once vested would be exempt from state taxation. The Act now undertakes to place a cap on the amount available for the exemption, thereby subjecting substantial portions of the retirement benefits to taxation. This is in derogation of [the] plaintiffs' rights established through the retirement benefits contracts and thus

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constitutes a taking of their private property. The State fails to compensate them for such taking through the Act. As such, the act is unconstitutional under the [Law of the Land Clause].

348 N.C. at 155, 500 S.E.2d at 69. Similarly here, having already determined that the Career Status Repeal substantially impairs Plaintiffs' vested rights to career status protections in violation of the Contract Clause, the only remaining issue for our analysis is whether this derogation of Plaintiffs' rights constitutes an unconstitutional taking of property without just compensation. Consistent with *Bailey*, we conclude that it does. Here, as in *Bailey*, Plaintiffs contracted, as consideration for their employment, that after fulfilling the Career Status Law's requirements, they would be entitled to career status protections. Here, as in *Bailey*, the Career Status Repeal purports to abrogate those protections and thus constitutes a taking of Plaintiffs' private property. Here, as in *Bailey*, the Career Status Repeal offers no compensation for this taking. Thus, here, as in *Bailey*, the Career Status Repeal violates the Law of the Land Clause.

The State's argument that Plaintiffs' constitutional rights have not been violated because they retain the same due process protections under the Career Status Repeal fails because it is patently false. While the State may be correct that the statutorily enumerated bases for termination remain largely unchanged, as already discussed *supra*, under the Career Status Law, a teacher who earned career status and was subsequently dismissed or disciplined was entitled to a hearing, whereas under the Career Status Repeal, there is no entitlement to a hearing. Compare N.C. Gen. Stat. § 115C-325(h)(2), (3), with 2013 N.C. Sess. Law 360 § 9.6 – 9.7; see also *Crump v. Bd. of Educ. of Hickory Admin. School Unit*, 326 N.C. 603, 613-14, 392 S.E.2d 579, 584 (1990) (holding that “a career teacher under [section] 115C-325 . . . ha[s] a cognizable property interest in his continued employment,” and is “entitled to a hearing according with principles of due process.”) The State's argument also ignores the fact that it is not merely the Career Status Law's due process protections that are at issue here, since the Career Status Repeal also deprives Plaintiffs of their vested rights to continuing employment. Furthermore, the Career Status Repeal makes no provision for justly compensating Plaintiffs for the derogation of their rights to vested career status protections. The 25% Provision might have provided some degree of compensation to a small minority of career status teachers, but its own explicit terms would provide nothing to at least 75% of teachers who had already earned career status. See 2013 N.C. Sess. Law 360

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§ 9.6(g), (h). In any event, the State makes no argument that the trial court erred in permanently enjoining the 25% Provision's implementation and enforcement based on the court's determination that the provision is inextricably tied to the unconstitutional revocation of career status, as well as unconstitutionally vague.

In light of the preceding analysis, we have no trouble concluding that Plaintiffs have met their burden of proving the Career Status Repeal unconstitutional beyond reasonable doubt and thereby have successfully rebutted the strong presumption of constitutionality this Court typically affords to legislation enacted by our General Assembly. Moreover, contrary to the State's argument, our review of the record and relevant case law makes clear that Plaintiffs are seeking vindication of their constitutional rights, rather than attempting to litigate a partisan policy dispute over education. As such, we hold that the trial court did not err in concluding that the Career Status Repeal violated the Law of the Land Clause of the North Carolina Constitution as a separate and independent basis for its partial grant of summary judgment to Plaintiffs.

*C. The trial court did not err in declining to strike certain portions of Plaintiffs' affidavits*

[3] Additionally, the State argues that the trial court erred in failing to strike certain portions of Plaintiffs' affidavits that it contends were not properly admissible because they were not based on the affiants' personal knowledge. We disagree.

As this Court has previously recognized, because Rule 56(e) of the North Carolina Rules of Civil Procedure provides in relevant part that affidavits supporting and opposing summary judgment "shall be made on personal knowledge," when an affidavit contains statements not based on an affiant's personal knowledge, the trial court "may not consider" those portions of the affidavit. *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2013). In the present case, the State complains that there is no possible way that any of Plaintiffs' affiants could have personal knowledge of what motivates the decisions of every public school teacher in North Carolina. Thus, the State contends that the trial court erred by failing to strike those portions of each of these Plaintiffs' affidavits that included statements about the impact of career status on all teachers in the State, as well as certain portions of the affidavits from school administrators that purported to describe what all teachers in the State "relied upon" or "viewed as important" in making their career decisions.

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This argument is without merit. On the one hand, we are not convinced that the statements the State contests are beyond the personal knowledge of the affiant teachers and administrators, all of whom are experienced North Carolina educators and are thus sufficiently familiar with the Career Status Law to competently describe its benefits and protections in general terms, as well as the basic economic assumptions that motivate members of their profession. On the other hand, even assuming *arguendo* that the trial court should have excluded these contested statements, in light of the fact that the State is unable to specifically identify any aspect of the court's order that relied on them, we conclude that any error in its failure to strike them was entirely harmless. Indeed, the only portion of the order that deals with the Career Status Law's impact on teachers' motivations and career decisions was the trial court's finding that

[Plaintiffs] were statutorily promised career status rights in exchange for meeting the requirements of the Career Status Law. When they made their decisions both to accept teaching positions in North Carolina school districts and to remain in those positions, they reasonably relied on the State's statutory promise that career status protections would be available if they fulfilled those requirements. The protections of the Career Status Law are a valuable part of the overall package of compensation and benefits for [P]laintiffs and other teachers, benefits that they bargained for both in accepting employment as teachers in North Carolina school districts and remaining in those positions. From the perspective of school administrators, career status protections help attract and retain teachers despite the low salaries established by State salary schedules.

Our review of the record demonstrates that this finding of fact is well supported by statements in each of the named Plaintiffs' affidavits about how they personally relied on the Career Status Law's statutory promise, and by statements in each of the administrators' affidavits about how they recognized the Career Status Law's benefits based on their own personal experiences.

The premise for the State's argument here appears to be that because these Plaintiffs do not speak for every teacher in North Carolina, the trial court erred by permanently enjoining the State from implementing and enforcing the Career Status Repeal. But here again, the State misconstrues the basis for Plaintiffs' lawsuit. While the State's argument might have some merit if this were a class action, it is totally inapplicable to



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the present litigation, in which Plaintiffs contend that the Career Status Repeal is unconstitutional as applied to them, given their vested contractual and property rights in the Career Status Law's protections. Despite the State's claims to the contrary, that does not mean that the trial court erred when it concluded that the Career Status Repeal is equally unconstitutional as applied to all similarly situated public school teachers who have already earned career status. Accordingly, we hold that the trial court did not err in granting summary judgment to NCAE and Plaintiffs Nixon, Holmes, Beatty, deVille, and Wallace.

*D. The arguments raised by the dissent are neither persuasive nor properly before this Court*

Finally, we are compelled to note that “[i]t is not the role of the appellate courts . . . to create an appeal for an appellant.” *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *see also Hammonds v. Lumbee River Elec. Membership Corp.*, 178 N.C. App. 1, 13, 631 S.E.2d 1, 9, *disc. review denied*, 360 N.C. 576, 635 S.E.2d 598 (2006). We find this well-established maxim especially applicable where, as here, the appellant is the State and the litigation before us involves the State's attempts to revoke the statutorily vested contract and property rights of thousands of North Carolinians.

In the present case, as demonstrated *supra*, the State's appellate brief asks this Court to reverse the trial court's decision based on its arguments that: (1) all acts of our General Assembly are accompanied by a (rebuttable) presumption of constitutionality; (2) the Career Status Repeal did not violate the North Carolina Constitution's Law of the Land Clause because it was enacted for the legitimate government purpose of “fixing” our public schools; and (3) although teachers do have contracts with their local school boards, the Career Status Repeal did not violate the Contract Clause of the United States Constitution because it did not substantially impair those contract rights in light of: (a) conditional language contained in boilerplate disclaimers in Plaintiffs' employment contracts and a sample contract from the DPS Board of Education, (b) purported distinctions between the Career Status Law's vesting mechanism and those of the statutes at issue in *Brand*, *Faulkenbury* and *Bailey*, and (c) the Fourth Circuit's recent decision in *Cherry*. The State also argues that the trial court erred in failing to strike certain portions of Plaintiffs' affidavits. In its reply brief to Plaintiffs' appellee brief, the State reiterated these arguments. Shortly before this case was orally argued, the State submitted a memorandum of additional authority to call this Court's attention to Article I, Section 15 of the North Carolina

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Constitution, which obligates the State to guard and maintain its citizens' right to public education, and the United States Supreme Court's decision in *Nixon v. Shrink Missouri Gov't PAC et al.*, 528 U.S. 377, 145 L. Ed. 2d 886 (2000), which dealt with campaign finance reform. During oral arguments, this Court and both parties properly focused primarily on the issues raised in the State's appellate brief. As discussed *supra*, these arguments are wholly unpersuasive.

Nevertheless, our learned colleague dissents in part from the majority opinion of this Court based on his view that the trial court erred in concluding that the Career Status Repeal violates the Contract Clause for the reasons articulated in the United States Supreme Court's decision in *Brand*. Instead, our learned colleague would resolve this case in the State's favor based on that Court's prior holdings in *Phelps v. Bd. of Educ.*, 300 U.S. 319, 81 L. Ed. 674 (1937) and *Dodge v. Bd. of Educ.*, 302 U.S. 74, 82 L. Ed. 57 (1937). As neither of these cases was cited by either of the parties at any point in this litigation, we do not believe it would be appropriate to resolve this case by essentially constructing the State's argument for it, as to do so would violate the rationale behind our Supreme Court's holding in *Viar* and this Court's subsequent decision in *Hammonds* by leaving Plaintiffs, as appellees, "without notice of the basis upon which [this Court] might rule." *Hammonds*, 178 N.C. App. at 13, 631 S.E.2d at 9 (quoting *Viar*, 359 N.C. at 402, 610 S.E.2d at 361). While we recognize that *Viar* and *Hammonds* dealt with technical violations of N.C. R. App. P. 10 and 28, we find their rationales equally applicable to the substantive errors of omission committed by the State as the appellant here. Rule 28 of our Rules of Appellate Procedure provides in pertinent part that

[t]he function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C. R. App. P. 28(a) (emphasis added). Moreover, Rule 28(b) mandates that an appellant's brief shall include, *inter alia*, "[a]n argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6). In the present case, we conclude that, if the analysis

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in our learned colleague's dissent is correct, the State has violated Rule 28 by failing to raise any argument on the issue of whether the outcome of this case should be determined based on *Brand* or based on *Phelps* and *Dodge*. We conclude further that to disregard the arguments the State actually made in order to substitute a potentially stronger argument that Plaintiffs have never been given any opportunity to address would fundamentally violate the substance of our Rules and the spirit of basic fairness they aim to preserve, as well as thrust this Court into the improper position of performing as an advocate for one of the parties to this dispute.

Although our Supreme Court held in *Viar* that an appeal that fails to comply with Rule 28 is subject to dismissal, *see* 359 N.C. at 402, 610 S.E.2d at 361, in *Hammonds* this Court made clear that we do not treat violations of our Rules of Appellate Procedure "as grounds for automatic dismissal" but instead apply appropriate sanctions based on the results of a three-factor test that weighs "(1) the impact of the violations on the appellee, (2) the importance of upholding the integrity of the Rules, and (3) the public policy reasons for reaching the merits in a particular case." 178 N.C. App. at 15, 631 S.E.2d at 10. Here, we conclude that the State's failure as the appellant to raise either *Dodge* or *Phelps* as a basis for distinguishing Plaintiffs' and the trial court's reliance on *Brand* substantially prejudiced Plaintiffs as appellees by denying them sufficient notice of the issues to be contested and the basis upon which this Court might rule. Given the circumstances, we believe that the appropriate sanction here is to apply Rule 28's provision that the issue of whether *Dodge* and *Phelps* control the outcome of this case, which was neither presented nor discussed by the State at any point in this litigation, should be deemed abandoned.

In any event, we are also not persuaded by the substantive merits of our learned colleague's dissent. On the one hand, although he attempts to distinguish the Career Status Law from the statute at issue in *Brand* by emphasizing the Supreme Court's finding that the latter was "couched in terms of contract," 303 U.S. at 105, 82 L. Ed. at 693, while the former is not, his analysis overlooks, and for reasons discussed *supra* is significantly undermined by, the fact that the title of section 115C-325 of our General Statutes is "Principal and Teacher Employment Contracts." Furthermore, we are not persuaded by the dissent's efforts to bolster its conclusion that it is within the General Assembly's power to rescind Plaintiffs' vested rights to career status protections based on the Career Status Law's legislative history. Although the Career Status Law has indeed been amended several times since its enactment in 1971, these

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amendments focused not on the protections it offers—*i.e.*, a career status teacher's right to a continuing contract and a mandatory hearing—but instead on the performance-based reasons that a career status teacher can be dismissed. Thus, while the dissent is correct that these amendments in some ways increased the discretion of local school boards, they did so in ways that did not substantially impair the benefits the Career Status Law provided to teachers who earned vested rights to career status protections, and their implications were far less drastic than the wholesale elimination of those rights represented by the Career Status Repeal.

Moreover, in reaching its holding in *Phelps*, the United States Supreme Court noted that “where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state.” 300 U.S. at 322, 81 L. Ed. at 677. Thus, while we are certainly impressed by the breadth of our learned colleague's painstaking research into how courts in other states have addressed this issue, we are equally certain that those cases are beside the point. In the present case, we know of no instance in which our Supreme Court has ever previously answered or even been directly asked the question of whether or not teachers who have already earned the protections of the Career Status Law have obtained vested contractual and property rights that, when violated, implicate the Contract Clause of the United States Constitution or the Law of the Land Clause of the North Carolina Constitution.

We are not persuaded by the dissent's suggestion that we base our decision on our Supreme Court's conclusory assertion in *Taborn v. Hammonds*, 324 N.C. 546, 380 S.E.2d 513 (1989), that the purpose of the Career Status Law was “to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary, or discriminatory reasons.” *Id.* at 556, 380 S.E.2d at 519. In *Taborn*, the Court addressed the issue of how much process is due when a special education teacher is terminated due to budget cuts necessitating a system-wide workforce reduction, which the then-extant version of the Career Status Law explicitly authorized as one of the reasons a career status teacher could be terminated. The quote the dissent relies on was offered in passing, with scant analytic support apart from a citation to where it originally appeared in the case of *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975), in order to focus the *Taborn* Court's interpretation of the requirement contained in subsection (e)(1) that any decrease in the number of teaching positions due to a decrease in funding be “justifiable.” 324 N.C. at 556, 380 S.E.2d at 519. Moreover, *Taylor* addressed a lawsuit by a public school

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principal whose situation in some ways mirrors that of Plaintiff Link in the present case: when the Career Status Law was originally enacted, he had completed three years of probationary employment as a public school principal, and thus was only a year away from potentially earning career status protections, but his local school board voted against the recommendations of his superintendent and declined to renew his contract for a fourth probationary year. 286 N.C. at 493-94, 212 S.E.2d at 384-85. The plaintiff's challenge centered on whether or not the school board should be bound by the superintendent's recommendation, and that is the context in which the Court opined, without any citation or support, on the purpose of the Career Status Law. *Id.* at 496, 212 S.E.2d at 386. Because neither *Taborn* nor *Taylor* addressed any claims under the Contract Clause, we decline to adopt our learned colleague's conclusion, especially when our Supreme Court, as demonstrated by its holdings in *Faulkenbury*, *Bailey*, and *Wiggs*, has repeatedly held that the State violates the Contract Clause when it attempts to revoke public employees' vested rights to valuable employment benefits provided by statutes that the State has encouraged reliance on as an inducement to public employment.

We also take issue with the dissent's conclusion that even if the Career Status Law does give rise to individual contract rights, the Career Status Repeal does not substantially impair those rights except insofar as it fails to provide for a hearing. We do not believe this conclusion is supported by the record given the affidavits from Plaintiffs, public school administrators, and labor economist Rothstein describing how the Career Status Law's protections provide North Carolina's public school teachers with the valuable employment benefit of job security by providing them with continuing contracts. The dissent insists that although the Career Status Repeal eliminates Plaintiffs' continuing contracts in favor of one-, two-, or four-year terms, their rights have not been substantially impaired because the reasons they can be terminated or non-renewed at the end of each term remain largely unchanged. But this argument totally ignores the obvious fundamental differences between a continuing contract of indefinite duration and a contract that must be renewed every one, two, or four years, as well as the constrictive impact that the latter will have on the opportunities North Carolina's teachers will have to grow and improve by being innovative in the classroom, as well as their abilities to advocate for their students by raising concerns about instructional issues to administrators without fear of losing their jobs. To put this point in another context, consider the differences in the relative levels of job security enjoyed by North Carolina's appellate judges, who must face reelection at the end of each term, and federal

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judges, who are appointed for life: while reasonable minds may differ over the wisdom of lifetime tenure, no one would dispute that it is a valuable employment benefit and that federal judges therefore enjoy far more job security than their counterparts in our State's elected appellate judiciary. To take this example a step further, imagine what would happen if our General Assembly decided, for whatever reason, to enact legislation purporting to strip all federal judges within our State's borders of their lifetime tenure and force them to stand for reelection periodically just like state judges. A reviewing court would undoubtedly find such a flagrant violation of Article III and basic premises of federalism unconstitutional—and it would also violate the Contract Clause because the revocation of lifetime tenure would substantially impair the affected judges' rights under their employment contracts. This is an imperfect and perhaps absurd example, offered for purely illustrative rather than substantive analytical purposes, but we nevertheless find it broadly analogous to the predicament North Carolina's teachers face regarding the sense of job security they enjoyed prior to the Career Status Repeal by virtue of their vested contractual rights to career status protections. We therefore decline to join the dissent in its conclusion that career status rights are not substantially impaired by a law that explicitly repeals career status rights.

*III. Plaintiffs' Appeal*

[4] Plaintiffs contend that the trial court erred in denying summary judgment to Plaintiff Link based on its conclusion that, as a probationary teacher who had not yet earned career status, he lacked standing to challenge the Career Status Repeal. The central thrust of Plaintiffs' argument here is that the logic of *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs*—which the trial court relied on for its determination that teachers who have already earned career status have contractual rights to its protections—should apply with equal force to probationary teachers. Specifically, Plaintiffs argue that all teachers who accepted employment while the Career Status Law was in full effect, and relied upon the availability of career status protections when accepting employment with a school district and remaining employed, gained a contractual right to the continuing *availability* of those protections upon satisfaction of the requirements of section 115C-325. Thus, Plaintiffs insist that the trial court erred in concluding that under the Career Status Law, probationary teachers do not have contractual rights to career status protections. We disagree.

Our review of the relevant case law demonstrates that Plaintiffs' reliance on *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs* is misplaced.

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While these cases do support Plaintiffs' general argument that statutory promises of benefits that public employees can earn as part of their overall compensation packages by satisfying certain requirements are contractual in nature, they also fatally undermine Plaintiffs' claim that probationary teachers have contractual rights when, by definition, they have not yet satisfied the Career Status Law's requirements. Put simply, *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs* only dealt with plaintiffs whose contractual rights had already vested before the Legislature changed or repealed the statutes from which those rights arose. Indeed, it was the vesting of those rights that proved determinative in each case.

In *Brand*, the United States Supreme Court concluded that the plaintiff had a contractual right to "permanent" teacher status because she had already satisfied the statutory requirement of teaching for five years and then entering into a new contract prior to the partial repeal of the Teachers' Tenure Law. 303 U.S. at 104, 82 L. Ed. at 693. Likewise, in *Faulkenbury*, our Supreme Court's conclusion that the legislation at issue violated the Contract Clause was based on the fact that "[a]t the time the plaintiffs' rights to pensions became vested, the law provided that they would have disability retirement benefits calculated in a certain way. These were rights that they had earned and that may not be taken from them by legislative action." 345 N.C. at 690, 483 S.E.2d at 427 (emphasis added). The *Faulkenbury* Court further explained that

[w]e believe that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits if those persons fulfilled the conditions. When they did so, the contract was formed.

*Id.* at 691, 483 S.E.2d at 427. Moreover, in assessing whether the plaintiffs in *Bailey* had contractual rights that were substantially impaired by the General Assembly's enactment of legislation to cap tax exemptions on public employee retirement benefits, the Court provided an extensive analysis of nearly two centuries' worth of state and federal decisions "rooted in the protection of expectational interests upon which individuals have relied through their actions, thus gaining a vested right." 348 N.C. at 145, 500 S.E.2d at 62-63. Ultimately, the *Bailey* Court held that the legislation at issue violated both the Contract Clause and the Law of the Land Clause because, before the General Assembly enacted it, the plaintiffs had already earned vested contractual rights to receive

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tax-exempt retirement benefits based on their having satisfied the statutory requirement preconditioning their receipt of those benefits on working for a minimum term of years. *Id.* at 150, 500 S.E.2d at 66. Perhaps most damning for Plaintiffs' argument here, our Supreme Court's decision in *Wiggs* clarified that although the government cannot retroactively abrogate an employee's vested contractual right to benefits, it would not violate the Contract Clause "to pass a resolution which would apply prospectively to those whose rights [to benefits] had not yet vested." 361 N.C. at 324, 643 S.E.2d at 908.

In the present case, the Career Status Law preconditions a public school teacher's right to career status protections on working four consecutive years as a probationary teacher and then passing a majority vote by the local school board. N.C. Gen. Stat. § 115C-325(c)(1). Our review of the relevant case law demonstrates that only then can a teacher's contractual right to career status protections be considered vested. As such, we conclude that *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs* provide no support for Plaintiffs' argument that despite the Career Status Repeal, a probationary teacher has a vested right in the opportunity to earn career status. We are sympathetic to Plaintiff Link's argument that he relied on the availability of career status protections upon satisfaction of the Career Status Law's requirements when he chose to work as a public school teacher in North Carolina instead of accepting a job in another state, and we empathize with the thousands of other similarly situated probationary teachers across this State who no doubt share his skepticism regarding the wisdom of legislation that purports to enhance the educational experience of our State's public school children by essentially yanking the rug out from beneath the feet of those most directly responsible for educating those children in a manner that experienced educators have warned will make it more difficult for North Carolina school districts to attract and retain quality teachers in the future. Nevertheless, this Court may not substitute its views for those of our General Assembly, and we are bound by the aforementioned precedents from our Supreme Court. We therefore hold that the trial court did not err in granting partial summary judgment to the State based on its conclusion that, as a probationary teacher, Plaintiff Link lacked standing to challenge the Career Status Repeal because he had not yet acquired a contractual right to career status protections. Accordingly, the trial court's order is

AFFIRMED.

Judge GEER concurs.



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

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

This case involves an issue important to the educational system of our State. However, as our Supreme Court has stated, “[a]s to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts – it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts.” *State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960).

The majority holds that the Career Status Repeal is constitutional as applied to probationary teachers. I concur fully with this holding and, therefore, do not address any issues raised in that portion of the majority opinion.

The majority also holds that the Career Status Repeal is unconstitutional *in toto* as applied to teachers who have attained career status under the Career Status Law (“career teachers”). I concur in part and dissent in part with this holding for the reasons stated in this opinion.

### I. Summary of Opinion

I disagree with the majority’s conclusions that the Career Status Law created a constitutionally protected *contractual right* to continued employment (i.e., tenure) for career teachers and that the Career Status Repeal impermissibly impairs that contract right, in violation of the Contract Clause of the United States Constitution.

Notwithstanding, based on our Supreme Court’s decision in *Crump v. Bd. of Educ.*, 326 N.C. 603, 392 S.E.2d 579 (1990), career teachers do have a constitutionally protected *property interest* in continued employment under the Career Status Law. *Id.* at 614, 392 S.E.2d at 584. Therefore, I conclude that N.C. Gen. Stat. § 115C-325.3(e) of the Career Status Repeal is *unconstitutional* to the extent that it allows a local school board to deprive a career teacher of this property interest without a hearing. However, I do not believe that the Career Status Law is, otherwise, unconstitutional on its face.

### II. Analysis

It has long been recognized in this State that courts have the power to declare an act of the General Assembly unconstitutional. *See Dickson v. Rucho*, 367 N.C. 542, 549, 766 S.E.2d 238, 244 (2014), *vacated and*

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*remanded on other grounds*, 2015 U.S. LEXIS 2744 (2015); *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). However, it has also long been recognized “that great deference will be paid [by courts] to the acts of the legislature,” see *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989), and that “where a statute may be construed [in a way] . . . which would make it constitutional, [our courts] will give it that construction rather than a contrary one[.]” *Commissioners v. Ballard*, 69 N.C. 18 (1873).

In this opinion, I address my conclusions that (A) the Career Status Law does not create a constitutionally protected *contract right* to continued employment (i.e., tenure); (B) the Career Status Repeal is unconstitutional to the extent that it grants local school boards the authority to strip career teachers of their constitutionally protected *property interest* without first holding a hearing; and (C) the Career Status Repeal, on its face, is not otherwise unconstitutional.

## A. The Career Status Law Did Not Create Contract Rights

The United States Supreme Court has stated: “[t]he presumption is that . . . [a statute enacted by a legislature] is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise,” see *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 58 S. Ct. 98, 100 (1937), and further that generally “an act fixing the term or tenure of . . . an employe[e] of a state agency” is the type which “may be altered at the will of the Legislature.” *Id.* at 78-79, 58 S. Ct. at 100. This “well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state.” *Nat’l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 1451 (1985). “Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of the legislative body.” *Id.*

In the same year that *Dodge* was decided, the Supreme Court followed this presumption by concluding that a New Jersey statute establishing tenure rights for teachers who had completed a number of years of service<sup>1</sup> did *not* create a contract right and, therefore, was not subject

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1. The New Jersey statute at issue was very similar to the Career Status Law, providing that any teacher completing three years of service would not be subject to a contract for a specific term but rather could only be dismissed for cause. See *Phelps*, 300 U.S. at 320-21, 57 S. Ct. at 484.

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to the protections of the Contract Clause. *Phelps v. Bd. of Educ.*, 300 U.S. 319, 323, 57 S. Ct. 483, 485 (1937). Accordingly, the Court held that this New Jersey tenure statute could be changed by a subsequent legislature:

Although the [A]ct of 1909 prohibited [a local school board] . . . from reducing [a] teacher's salary or discharging him without cause, we agree with the courts below that this was *but a regulation of the conduct of the [local school] board* and not a term of a continuing contract of indefinite duration with the individual teacher.

*Id.* (emphasis added). The Court found no error in the lower court's conclusion that the New Jersey statute "established a *legislative status* for teachers" rather than "a contractual one that the Legislature may not modify[.]" *Id.* at 322, 57 S. Ct. at 484 (emphasis added).

I find the *Phelps* decision by the United States Supreme Court extremely persuasive, if not controlling, in deciding the Contract Clause issue in the present case.<sup>2</sup> Like the statute at issue in *Phelps*, language in the Career Status Law is simply not presented in clear and unequivocal language to overcome the strong presumption against finding contract rights. For example, there is no language in the Law which states that contracts with career teachers must contain a provision which grants those teachers the right to continued employment. In fact, the word "contract" almost never appears in the Law – and never in N.C. Gen. Stat. § 115C-325(c1), the section in the Law which established tenure. Rather, the language in the Law is clearly couched in terms of establishing a "legislative status for teachers," *see Phelps*, 300 U.S. at 322, 57 S. Ct. at 484, prominently employing the phrase "career status" all throughout as a label for teachers retained after four years of service.

I am also persuaded by the decisions from the highest courts of the other states which have seemingly universally concluded that statutes establishing tenure for public employees do not create constitutionally protected contract rights. *See, e.g., Proska v. Arizona State Sch. for the Deaf and Blind*, 74 P.3d 939, 943-44 (2003) (Arizona Supreme Court); *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d 1283, 1306 (1990) (Illinois Supreme Court); *Pineman v. Oechslein*, 488 A.2d 803, 808-10 (1985) (Connecticut Supreme Court); *Washington Fed. of State Emps.*,

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2. The majority is troubled by my reliance on *Phelps* and *Dodge* since these cases were not cited or argued by the State. However, the State does argue that the Repeal does not violate the Contract Clause, and I believe it is appropriate for this Court to rely on Supreme Court opinions and other legal authority which may be controlling or relevant in determining the law on a constitutional issue raised by a party.

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*AFL-CIO v. State*, 682 P.2d 869, 872 (1984) (Washington Supreme Court); *Crawford v. Sadler*, 34 So.2d 38, 39 (1948) (Florida Supreme Court); *Morrison v. Bd. of Educ. of City of West Allis*, 297 N.W. 383, 386 (1941) (Wisconsin Supreme Court); *State ex rel. Munsch v. Bd. of Comm'rs of Port of New Orleans*, 3 So.2d 622, 624-25 (1941) (Louisiana Supreme Court); *Lapolla v. Bd. of Educ. of City of New York*, 26 N.E.2d 807 (1940) (New York Court of Appeals, that state's highest court); *Malone v. Hayden*, 197 A. 344, 352-53 (1938) (Pennsylvania Supreme Court).

The majority and the trial court below rely on what seems to be one of the only – if not the only – reported cases in America where the repeal of a tenure statute was declared unconstitutional based on the Contract Clause, the case of *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S. Ct. 443 (1938), decided by the United States Supreme Court during the same term it decided *Dodge* and the year after it decided *Phelps*. *Id.* at 107-08, 58 S. Ct. at 449. However, I believe *Brand* is clearly distinguishable.

In *Brand*, the Court determined that an Indiana tenure statute for teachers *did* create a *contract right* to continued employment, subject to the protections of the Contract Clause. *Id.* at 105, 58 S. Ct. at 448. After recognizing the presumption that statutes do not create contracts, the Court concluded that the particular language of the Indiana statute did evince an intention to create contract rights. *Id.* at 104-05, 58 S. Ct. at 448. The Court homed in on the fact that the Indiana statute – unlike the Career Status Law – was “couched in terms of contract,” pointing out that the word “contract” appears more than 25 times therein. *Id.* at 105, 58 S. Ct. at 448. The Court quoted much of the Indiana statute, which described the contract itself, including that the contract “shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract.” *Id.* Also, the Court found persuasive that the Indiana Supreme Court had held on a number of occasions that the Indiana statute created contract rights. *Id.* at 100, 58 S. Ct. at 446 (stating that “respectful consideration and great weight [should be given] to the views of the state’s highest court”).<sup>3</sup>

*Brand* is still “good law” in that a state *could* employ statutory language which “unequivocally and clearly” demonstrates an intent

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3. Our high court has never held that the Career Status Law creates a *contract right* in continued employment subject to the Contract Clause of the United States Constitution, but rather that the Law creates a property interest subject to the Due Process Clause of the Fourteenth Amendment. See *Crump*, 326 N.C. at 613-14, 392 S.E.2d at 584.

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to create contract rights rather than merely providing for a status. However, the result reached in *Brand* is somewhat of an outlier, due to the language employed in the Indiana statute at issue. An American Law Reports annotation on this issue cites *Brand*, along with *Phelps*, *Dodge*, and many of the state cases cited above and describes the holding in *Brand* as an anomaly:

It is quite generally conceded that a teachers' tenure statute may be so worded as to disclose a legislative intention to confer upon the teachers coming within the provisions of the act contractual rights which may not be taken away from them by subsequent legislation . . . (See, for example, [*Brand*], which is cited and distinguished on this ground in most of the cases cited in this annotation.)

*On the other hand it is almost unanimously recognized that in the absence of any language in the act evincing an intention to confer upon the teacher a contractual right, the mere recognition by such acts of the status of permanency of tenure does not create in the teachers . . . vested contractual rights immune from legislative encroachment by subsequent repealing or modifying statutes, but merely declares a legislative policy, to continue so long as the legislature may ordain, for the protection of such teachers[.]*

147 A.L.R. 293 (1943) (emphasis added). In fact, the article does not cite to a single case reaching the same result as was reached in *Brand*. *See id.*

Based on my conclusion that the language of the Career Status Law is clearly more analogous to the statute at issue in *Phelps* than the statute at issue in *Brand*; and on the presumption against finding contractual rights in statutes; and on the overwhelming weight of authority from across the country, I do not believe that the General Assembly was prohibited by the *Contract Clause* to modify or repeal the laws enacted concerning career status of teachers established by that body in 1971.<sup>4</sup>

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4. Indeed, prior to enactment of the Career Status Repeal, the General Assembly had amended the Career Status Law on a number of occasions, some in ways to increase the discretion of local school boards, as has been done in the Repeal. For example, the General Assembly originally only provided 12 grounds for which a local school board could dismiss a career teacher. N.C. Gen. Stat. § 115-142(e)(1) (1971). Over the next several decades, however, the General Assembly expanded the local school board's power by adding three additional grounds – bringing the total to 15 – most recently, in 1991. N.C. Gen. Stat. § 115C-325(e) (2013). Plaintiffs' counsel conceded during oral argument that *all* 15 grounds applied equally to *all* career teachers, even teachers who attained career status prior to 1991.

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In addition to relying on *Brand*, the majority and the trial court rely on decisions from our Supreme Court which held that statutes allowing public employees to earn deferred compensation benefits in various forms (e.g., pension and benefits) created contract rights and were, therefore, protected by the Contract Clause, citing *Faulkenbury v. Teachers' and State Emps.' Ret. Sys. of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997), *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), and *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 643 S.E.2d 904 (2007). However, those cases are clearly distinguishable. In my view, a statutory right to deferred compensation which has vested based on work performed is fundamentally different from statutory tenure status (the right to continue to work in the future and earn additional compensation for that future work). See *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (stating that pension benefits are “a deferred portion of the compensation earned for services rendered”). In *Faulkenbury*, for example, the Supreme Court held that disability benefits provided by a statute were benefits that were promised in exchange for five years of service. 345 N.C. at 691, 483 S.E.2d at 427. Under the Career Status Law, however, teachers did not “earn” a benefit of continued employment by completing four years of service. They only *became eligible* to be elected to “career status” at the end of four years.

I find persuasive that other states have treated statutes defining deferred compensation differently from statutes defining tenure rights in the context of the Contract Clause. See, e.g., *Washington Fed. of State Emps.*, 682 P.2d at 872 (Washington Supreme Court—distinguishing between pension statutes, which do create contract rights and tenure statutes, which do not); *Kern v. City of Long Beach*, 179 P.2d 799, 801-03 (1947) (California Supreme Court—same).

In conclusion, in my view the presumption - that the Career Status Law was “not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise” - has not been overcome. *Dodge*, 302 U.S. at 79, 58 S. Ct. at 100. In fact, the language of the Career Status Law compels a conclusion that a status was created for career teachers rather than a contract right. As such, I believe the General Assembly is not restricted by the Contract Clause from modifying the Law as it has done so on several occasions since its passage in 1971.<sup>5</sup>

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5. Assuming, *arguendo*, that the Career Status Law did create individual contract rights, I do not believe that the Career Status Repeal significantly impairs those rights. Our Supreme Court has held that the purpose of the Career Status Law was “to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal

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## B. Property Interest—The Right to a Hearing

Our Supreme Court has held that a career teacher has a property interest in continued employment. *Crump*, 326 N.C. at 613-14, 392 S.E.2d at 584. *See also Peace v. Emp't Sec. Comm'n of North Carolina*, 349 N.C. 315, 321-22, 507 S.E.2d 272, 281-82 (1998) (citing *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 2705-06 (1972)). Therefore, I conclude that N.C. Gen. Stat. § 115C-325.3(e) (2013) – which is part of the Career Status Repeal – is unconstitutional in that it does not provide a career teacher the right to a hearing *before* a local school board may act on a decision not to retain the teacher, but rather grants a local school board *the discretion* whether to conduct a hearing.

Regarding the *timing* of the hearing, there are situations where the United States Supreme Court has held that a hearing can be held *after* the deprivation of certain property rights has occurred. *See, e.g., Dixon v. Love*, 431 U.S. 105, 113-15, 97 S. Ct. 1723, 1727-29 (1977) (truck drivers' license). However, that Court has held that where a public employee's job is at stake, the hearing must come *before* the employee is deprived of his right to continued employment. *Cleveland Bd. of Ed. v. Lowdermill*, 470 U.S. 532, 542-44, 105 S. Ct. 1487, 1493-94 (1985). Therefore, a career teacher is entitled to a hearing before a local school board acts not to renew that teacher's contract. *See id.*

## C. The Career Status Repeal is Otherwise Constitutional

Except for its failure to provide a career teacher a hearing, as described above, I believe the Career Status Repeal is constitutional.

Under the Career Status Repeal, career teachers will no longer have contracts with an unspecified duration, but rather their contracts will be subject to renewal at the end of a 1, 2 or 4 year term, as approved by their respective local school boards. N.C. Gen. Stat. § 115C-325.3(a) (2013). At the end of any contract term, a local school board has some discretion not to renew a teacher's contract. However, prior to the Repeal, the

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for political, personal, arbitrary or discriminatory reasons.” *Taborn v. Hammonds*, 324 N.C. 546, 556, 380 S.E.2d 513, 519 (1989). It could be argued that this purpose statement supports the conclusion that the Law was intended as a regulation of the local school boards to advance a policy of providing good teachers “for the children,” rather than to create contract rights for the teachers. In any event, assuming that the Law created a contract right, the Repeal does not substantially impair this right. Specifically, under the Repeal, a career teacher is still not subject to dismissal except for reasons which are not “political, personal, arbitrary or discriminatory.” *See* N.C. Gen. Stat. § 325.3(e) (2013) (local school board is powerless in choosing not to retain a teacher for a reason which is “arbitrary, capricious, discriminatory, [or] for personal or political reasons”).

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local school board already had a measure of discretion to terminate a career teacher. Any increase in this discretion as a result of the enactment of the Repeal appears slight. Specifically, under the Repeal, local school boards do not have the discretion to dismiss a career teacher (by choosing not to renew the contract) for any reason which would be considered “arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law.” N.C. Gen. Stat. § 115C-325.3(e) (2013). As such, I do not believe the Repeal is unconstitutional on its face. Of course, legitimate “as applied” challenges to the Law may be raised in the future. However, that is not the case before us today.

## III. Conclusion

My vote would be to uphold the Career Status Repeal except for that portion of N.C. Gen. Stat. § 115C-325.3(a) that provides a local school board the discretion whether to hold a hearing before depriving a career teacher of his or her property interest in continued employment. In my view, local school boards *must* provide pre-deprivation hearings for career teachers.

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PATRICK B. OLTMANN, PLAINTIFF  
v.  
BABETTE R. OLTMANN, DEFENDANT

No. COA14-690

Filed 2 June 2015

**1. Appeal and Error—mootness—determined at time of rendition**

In a domestic action in which an absolute divorce was granted, an issue involving a divorce from bed and board was moot. The determination of mootness is made at the time of rendition, not entry of judgement.

**2. Child Custody and Support—award of child custody to defendant—plaintiff’s active role**

The trial court acted within its discretion in awarding primary child custody to defendant, as supported by its findings of fact, despite making findings that plaintiff maintains an active role in the lives of the minor children.



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**3. Child Custody and Support—parent-time right of first refusal—not addressed**

The question in a domestic action of whether the trial court improperly denied each party's request for a parenting-time right of first refusal was not addressed where the appellate court was not provided with supporting guidance as to how or why the trial court was required to make such a finding. Moreover, the trial court noted orally that it would not entertain a parent-time right of first refusal as being in the best interests of the minor and it was within the discretion of the court not to include such a provision in its order.

**4. Child Custody and Support—travel restrictions—passports**

The trial court did not err in a child custody action in the travel restrictions on the children, including maintenance of their passports. Both parties requested the passport arrangement.

**5. Child Custody and Support—plaintiff's monthly gross income—over-assessed trivial amount**

The trial court erred in its award of child support where it over-assessed plaintiff's monthly gross income by \$4.00. Although the difference was trivial and did not change the trial court's determination of child support, the case was remanded for correction of the error.

**6. Child Custody and Support—negative income level of party—supported by evidence**

The trial court acted within its discretion in a child support case by setting defendant's negative income level at \$1,063.18 per month, as this figure was supported by the evidence.

**7. Child Custody and Support—uneven allocation of support—mortgages and maintenance expenses of marital home and vacation home**

The plaintiff's contention in a child support case that the trial court erred by not making an even 50/50 allocation as to child support was without merit. Defendant's evidence showed that defendant incurred significantly higher monthly expenses than plaintiff due to defendant having to pay the mortgages and maintenance expenses on the marital home and the vacation home. It was appropriate for the trial court to consider defendant's increased expenses relating to the two homes in determining its award of child support.

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**8. Child Custody and Support—effective date of permanent award—not modified**

The trial court did not abuse its discretion in its award of child support by choosing not to modify the effective date of the permanent award based on the evidence before it.

**9. Child Custody and Support—marital property—houses—post-separation depreciation**

The trial court did not err in a child support action by classifying the post-separation depreciation of two houses as marital property. Plaintiff argued that the trial court failed to make any findings of fact as to why the depreciation of the two homes constituted divisible property, but plaintiff failed to cite any case law which supported his assertion.

Appeal by plaintiff from orders entered 20 February 2012, 7 November 2012, and 31 July 2013 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 6 January 2015.

*James, McElroy & Diehl, P.A., by Preston O. Odom, III, for plaintiff-appellant.*

*Jonathan McGirt for defendant-appellee.*

BRYANT, Judge.

Where the record indicates that both an absolute divorce and a divorce from bed and board were granted, plaintiff's argument that the trial court improperly granted a divorce from bed and board is moot. The trial court did not abuse its discretion in its award of child custody and child support where the trial court made findings of fact and conclusions of law in support of its decisions. Where plaintiff failed to rebut the presumption that a depreciation in certain property was not divisible, the trial court acted within its discretion to classify the depreciation of certain property as divisible.

Plaintiff Patrick B. Oltmanns ("plaintiff") and defendant Babette R. Oltmanns ("defendant") married on 21 December 2001. Two minor children were born of the marriage.

On 28 December 2010, plaintiff filed a complaint against defendant for equitable distribution, post-separation support, alimony, child custody, child support, and attorneys' fees. Defendant filed her answer,

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defenses, counterclaims, and motions requesting, *inter alia*, divorce from bed and board, equitable distribution, child support, child custody, post-separation support, alimony, attorneys' fees, Rule 11 sanctions against plaintiff, and a temporary restraining order and preliminary injunction against plaintiff.

Plaintiff failed to reply to defendant's counterclaims. However, plaintiff filed a motion for judgment on the pleadings concerning defendant's counterclaim for divorce from bed and board. On 20 February 2012, the trial court entered an order "grant[ing plaintiff's motion] in favor of Defendant." The trial court also noted in its findings and conclusions that, as plaintiff had not filed a reply to defendant's counterclaims, the allegations in those counterclaims would be deemed admitted. That same day, the trial court entered orders granting defendant's motion to compel discovery and awarding temporary child custody and attorney's fees to defendant.

On 7 November 2012, the trial court entered an order for permanent child custody, granting primary custody to defendant and secondary custody to plaintiff. On 31 July 2013, the trial court entered an order and judgment for permanent child support and equitable distribution, and reserved judgment as to each party's claim for attorney's fees concerning child support. Plaintiff appeals.

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Plaintiff raises four issues on appeal as to whether the trial court (I) erred in granting judgment on the pleadings as to defendant's counterclaim for divorce from bed and board; (II) erred in its child custody ruling; (III) erred in its award of child support; and (IV) erred in classifying the post-separation depreciation of two houses as marital property.

*I.*

[1] Plaintiff argues that the trial court erred in granting judgment on the pleadings as to defendant's counterclaim for divorce from bed and board. We disagree.

Plaintiff contends the trial court erred in granting judgment in favor of defendant on plaintiff's motion for judgment on the pleadings as to defendant's counterclaim for divorce from bed and board. Plaintiff's argument first claims error based upon the trial court's deeming the allegations of defendant's counterclaim as to divorce from bed and board to be true based upon plaintiff's motion for judgment on the pleadings, since N.C. Gen. Stat. § 50-10(a) provides that the "material facts" of the

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counterclaim are “deemed to be denied . . . whether the same shall be actually denied by pleading or not[.]” N.C.G.S. § 50-10(a) (2014). Plaintiff further argues that defendant’s counterclaim for divorce from bed and board became moot after rendition and that the trial court should not have entered judgment upon the claim for divorce from bed and board because, in the time between rendition and entry, the parties had been granted an absolute divorce. We address plaintiff’s second argument first as we find the issue of mootness to be dispositive, although not exactly in the manner as claimed by plaintiff.

The trial court heard the motion for judgment on the pleadings on 3 January 2012, and rendered the ruling in open court that same day. Judgment for an absolute divorce was entered on 16 February 2012. The written order granting judgment on the pleadings for divorce from bed and board was entered on 20 February 2012.

Plaintiff’s argument that the 20 February 2012 order is moot highlights the difference between “rendition” of judgment and “entry” of judgment.

Under Rule 58 of the North Carolina Rules of Civil Procedure, a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. Announcement of judgment in open court merely constitutes ‘rendering’ of judgment, not entry of judgment. Entry of judgment by the trial court is the event which vests jurisdiction in this Court.

*Mastin v. Griffith*, 133 N.C. App. 345, 346, 515 S.E.2d 494, 494-95 (1999) (citations and quotations omitted).

Although the written entry of judgment is the controlling event for purposes of appellate review, rendition is not irrelevant. The determination of mootness is made at the time of rendition, not entry of judgment. A trial court has an affirmative duty to enter a written order reflecting any judgment which has been orally rendered; failure to enter a written order deprives the parties of the ability to have appellate review. *See In re T.H.T.*, 362 N.C. 446, 456, 665 S.E.2d 54, 60 (2008) (“[A] failure to proceed to judgment within a reasonable time deprives the parties of an adequate remedy at law, including the right to appeal a judgment entered. This Court does not have the authority to tell the trial court what judgment it should enter. We do, however, have the authority and the obligation to require the trial court to proceed to judgment when judgment has not been entered within the statutory time lines.”). If a trial court fails to

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enter a written order, a party may apply to this Court for a writ of mandamus to compel entry of an order. See N.C. R. App. P. 22 (2014); see also *In re T.H.T.*, 362 N.C. at 454, 665 S.E.2d at 60 (“In *Stevens v. Guzman*, [this] Court . . . concluded that a writ of mandamus is the proper remedy for a trial court’s failure to enter a written order.” (citation omitted)). When the trial court *rendered* judgment on the divorce from bed and board, no absolute divorce had occurred. When the order based upon this rendition was entered, the absolute divorce had been granted and the divorce from bed and board no longer had any practical use. But if we were to accept plaintiff’s argument that the trial court should not have entered a written order based upon a rendition which occurred prior to another event which rendered the claim moot, this would essentially eliminate the possibility of appellate review of a trial court’s decision which was rendered prior to an event which might moot the order. Thus, the trial court must still retain the authority to enter an order accurately reflecting the judgment previously rendered, if only to permit appellate review of the trial court’s action. Perhaps this is the meaning of the statement in *Roberts v. Madison Cnty. Realtors Ass’n, Inc.*, that “[a] case is ‘moot’ when a determination is sought on a matter which, *when rendered*, cannot have any practical effect on the existing controversy.” 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (emphasis added) (citation omitted).

Plaintiff’s argument also highlights the fact that the order granting divorce from bed and board is now moot for purposes of appellate review.

Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

*In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978) (citations omitted). In addition, as no motion to dismiss for mootness is required, this Court can dismiss this issue on appeal *ex mero motu*. See *State ex rel. Rhodes v. Gaskill*, 325 N.C. 424, 426, 383 S.E.2d 923, 925 (1989) (“As

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no motion to dismiss for mootness has been filed herein, as is usually the case, we dismiss the appeal *ex mero motu*.”)

In the instant case, there is no need for this Court to consider the interaction of N.C. Gen. Stat. § 50-10(a) and a motion for judgment on the pleadings under N.C. Gen. Stat. § 1A-1, Rule 12(c) because our ruling on this issue “cannot have any practical effect on the existing controversy” and would be a determination of an “abstract proposition[] of law.” *Roberts*, 344 N.C. at 398-99, 474 S.E.2d at 787. Plaintiff has not made any argument as to how the trial court’s determination as to divorce from bed and board has had any effect upon the remaining issues which are in controversy in this appeal, specifically, child custody, child support, and classification of post-separation depreciation of real property. None of the orders relevant to these issues which are under consideration on appeal rely upon or reference any findings or conclusions from the divorce from bed and board order. Now that the parties are absolutely divorced, the divorce from bed and board has no remaining legal relevance. “A divorce from bed and board is nothing more than a judicial separation; that is, an authorized separation of the husband and wife. Such divorce merely suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond.” *Schlagel v. Schlagel*, 253 N.C. 787, 790, 117 S.E.2d 790, 793 (1961) (citation omitted). Plaintiff has made no showing as to why it still matters, legally or practically, that the claim for divorce from bed and board was granted, nor has he put forth any arguments regarding collateral consequences that may arise from that order in the future. The parties are now divorced absolutely and there is no dispute regarding the divorce itself. Thus, as the issue regarding the order granting divorce from bed and board is now moot, we, therefore, dismiss plaintiff’s appeal as to this issue.

## II.

[2] Plaintiff argues that the trial court erred in its child custody ruling. We disagree.

When the trial court makes a determination as to child custody, it must “consider all relevant factors” and grant custody to the party who will “better promote the interest and welfare of the child[ren].” N.C. Gen. Stat. § 50-13.2(a) (2013). As such, a trial court’s findings of fact are conclusive on appeal if supported by competent evidence, *In re Peal*, 305 N.C. 640, 645-46, 290 S.E.2d 664, 667-68 (1982), and the trial court’s decision as to child custody “should not be upset on appeal absent a clear showing of abuse of discretion.” *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000) (citation omitted).

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Plaintiff contends the trial court erred because it awarded primary legal custody to defendant and secondary legal custody to plaintiff, despite making findings that plaintiff maintains an active role in the lives of the minor children and should, therefore, have been granted a joint legal custody arrangement. In its order for permanent child custody, the trial court made findings that plaintiff has “continued to be involved in the children’s education and medical treatment[,]” “has been largely responsible for arranging [the minor daughter’s] carpool to and from school[,]” and has arranged “fun activities” for the minor children “[d]uring his time with [them.]” However, the trial court also made findings of fact that: the parties have disputed school choices for the children; plaintiff struck defendant in the face while defendant was pregnant with their son; plaintiff hid a recording device in defendant’s bedroom without her knowledge or consent; plaintiff sued both of defendant’s parents, who provide the minor children with childcare, and defendant’s paramour, for alienation of affection; defendant “has handled the lion’s share” of the minor children’s educational and medical treatment issues; defendant “continues to encourage [plaintiff’s] relationship with the children[;]” and that the parties can no longer communicate by telephone due to arguments concerning plaintiff’s lawsuits against defendant’s parents and paramour. Moreover, the trial court made the following findings of fact, based upon a co-parenting counseling session the parties underwent in June 2011:

27. “Given that [the] parents have some differing belief systems, values and priorities, there are numerous areas where they might disagree on what is best for the children. Ongoing tension between them over decisions about the children’s upbringing would have a more damaging effect on the children than the unilateral decisions of either parent. If the children sense or perceive that their upbringing is a source of animosity between their parents, there is the danger that the children will internalize responsibility about the tension. They might also use the “power struggle” between the parent[s] as a way to bring their own leverage to the situation and manipulate one [or] both parents.”

28. [The counselor’s] comments to the parties regarding their struggle to make joint decisions summarizes the Court’s concerns in that regard. Due to the lack of trust between the parents, the differing values and parenting styles between them, and the fact that both parents are

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extremely intelligent, the Court finds that the parties are unable to make decisions of significance for the children together and that the power struggle between them is more detrimental to the children than unilateral decision-making authority to one parent would be. As a result, joint decision-making authority is not in the children's best interests. [Defendant] has demonstrated her willingness to rise above animosity and foster the children's relationship with [Plaintiff] and to genuinely consider his point of view in making decisions for the children. Accordingly, it is in the best interests of the minor children that [Defendant] be awarded primary legal custody of the children and have the authority to make decisions of significance for the children in the event there is disagreement between [Defendant] and [Plaintiff] regarding [the] same.

The trial court mirrored these findings of fact in its conclusions of law, noting multiple times that “[Defendant] is a fit and proper person” to have and be awarded the “primary legal care, custody, and control of the minor children[,]” while “[Plaintiff] is a fit and proper person” to have the “secondary legal care, custody, and control of the minor children.” As such, the trial court acted within its discretion in awarding primary legal custody to defendant, as supported by its findings of fact. *Cf. Diehl v. Diehl*, 177 N.C. App. 642, 646-48, 630 S.E.2d 25, 27-29 (2006) (remanding for further findings of fact by the trial court where the child custody order awarded primary legal custody to the defendant-mother despite also indicating that “[b]oth parties are fit and proper to have joint legal custody of the minor children[.]”).

**[3]** Plaintiff further argues the trial court erred in “improperly den[ying] each party’s request for a parenting-time right of first refusal.” However, plaintiff has provided this Court with no supporting guidance as to how or why the trial court was required to make such a finding and, as such, we decline to address this contention. *See* N.C. R. App. P. 28 (2014) (declining to address arguments on appeal which are not supported by case law). Moreover, as the trial court orally noted that it would not entertain a parenting-time right of first refusal as being in the best interests of the minor children, it was within the discretion of the trial court to not include such a provision, either to its granting or denial, in the child custody order.

**[4]** In addition, plaintiff argues that the trial court erred in its child custody order by imposing “unsupported travel restrictions” on the minor children. Specifically, plaintiff contends the trial court’s custody order



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“lacks factual findings supporting such restrictions,” which requires plaintiff to maintain the children’s German passports and defendant to maintain the children’s American passports. Plaintiff’s argument is baseless however, as a review of the record indicates that both parties requested this arrangement for the children’s passports in their proposed child custody orders. As such, plaintiff complains on appeal of an action which he himself requested from the trial court. *See Romulus v. Romulus*, 215 N.C. App. 495, 528-29, 715 S.E.2d 308, 329 (2011) (“A party may not complain [on appeal] of [an] action which he induced.” (citations omitted)). Plaintiff’s argument is overruled.

## III.

**[5]** Plaintiff contends the trial court erred in its award of child support.

In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court’s ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.

*Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citation omitted).

Plaintiff argues that the trial court erred in its award of child support because the permanent support award “improperly determine[d] each party’s gross monthly income.” Specifically, plaintiff contends his total monthly gross income was over-assessed by \$4.00. Plaintiff is correct in his assertion, as plaintiff’s total gross monthly income should be \$7,269.08, rather than \$7,273.08, as calculated by the trial court. Although such a difference is trivial and does not change the trial court’s determination of child support, we remand for correction of this \$4.00 error. *See Peters v. Pennington*, 210 N.C. App. 1, 26, 707 S.E.2d 724, 742 (2011) (remanding for the trial court to correct a calculation error of \$0.50).

**[6]** Plaintiff also argues that the trial court erred in its calculation of defendant’s gross monthly income. Plaintiff contends the trial court’s consideration of “negative rental income” generated by a condominium held by defendant lacked sufficient evidentiary support. This contention is without merit. The evidence presented by defendant in her financial

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affidavits at trial indicated that the condominium's negative rental income fluctuated between 2006 and 2010, and that defendant listed this negative income as costing her \$1,063.18 monthly in her most recent financial affidavit. As such, the trial court acted within its discretion in setting defendant's negative income level at \$1,063.18 per month, as this figure was supported by the evidence.

[7] Plaintiff further contends the permanent child support award "improperly determine[d] and apportion[ed] the children's reasonable needs and expenses." Plaintiff argues that the trial court's determination of child support, which orders plaintiff to pay 19% of the minor children's combined monthly needs, was erroneous because the expenses of plaintiff and defendant were not considered equally.

Pursuant to North Carolina General Statutes, section 50-13.4,

[p]ayments 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) (2013).

In its calculation of child support, the trial court relied on the financial affidavits of both parties to determine each party's average monthly shared family and individual expenses. Although plaintiff contends the trial court erred in its calculation of defendant's expenses, defendant's evidence showed that defendant incurred significantly higher monthly expenses than plaintiff due to defendant having to pay the mortgages and maintenance expenses on the marital home and the vacation home. As N.C.G.S. § 50-13.4(c) requires the trial court to have "due regard to the estates . . . of the child and the parties," it was appropriate for the trial court to consider defendant's increased expenses relating to the two homes in determining its award of child support. As such, plaintiff's contention that the trial court erred in not making an even 50/50 allocation as to child support is without merit. *See Brind'Amour v. Brind'Amour*, 196 N.C. App. 322, 329, 674 S.E.2d 448, 452 (2009) (where this Court's analysis determined that the trial court did not abuse its discretion in its award of child support where the trial court carefully reviewed all of the evidence before it regarding the children's standard of living and the reasonable needs and expenses of both parties, before affirming the

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trial court's decision which denied part of the defendant-mother's claim for expenses).

**[8]** Additionally, plaintiff contends the trial court erred in its award of child support because the permanent award should have been made effective from January 2011, rather than from January 2013. However, it is well-established by this Court that a trial court has not abused its discretion where, based on the evidence before it, the trial court chose not to modify the effective date of a permanent award. *See Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 611, 596 S.E.2d 285, 291 (2004) (“[The] [d]efendant finally contends that the trial court abused its discretion in making his child support obligations retroactive only until 1 February 2002. Prior to the entry of the permanent child support order, [the] defendant had been ordered to pay temporary child support in a greater amount than finally ordered. [The] [d]efendant argues that the trial court erred by not using its discretion to set an even earlier retroactive date for his permanent child support obligation. *We conclude that although the prior temporary child support order was subject to modification, the trial court did not abuse its discretion in failing to modify that . . . order to set an earlier retroactive effective date for permanent child support.*” (citation omitted) (emphasis added)). Plaintiff's argument is overruled.

## IV.

**[9]** Finally, plaintiff contends the trial court erred in classifying the post-separation depreciation of two houses as marital property. We disagree.

The classification of property in an equitable distribution hearing is reviewed by this Court *de novo*. *Romulus*, 215 N.C. App. at 500, 715 S.E.2d at 312 (citations omitted).

Plaintiff argues that the trial court erred because it failed to make any findings of fact as to why the depreciation of the two homes constituted divisible property. However, as plaintiff fails to cite any case law which supports his assertion, we decline to address this issue. *See* N.C. R. App. P. 28(a) (2014) (holding that arguments not supported by appropriate authority will be deemed abandoned).

Accordingly, we affirm in part and remand in part for correction of the \$4.00 error in the calculation of plaintiff's gross monthly income.

AFFIRMED IN PART; REMANDED IN PART.

Judges STROUD and HUNTER, Jr., concur.

**SHORT v. N.C. DEP'T OF HEALTH & HUMAN SERVS.**

[241 N.C. App. 338 (2015)]

KATHRYN SHORT, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT,  
AND SMOKY MOUNTAIN CENTER, RESPONDENT-INTERVENOR

No. COA14-1042

Filed 2 June 2015

**1. Administrative Law—petition for judicial review—North Carolina Innovations Waiver—personal care services**

The superior court did not err by affirming the Administrative Law Judge's final decision denying petitioner personal care services in excess of the maximum allowed under the North Carolina Innovations Waiver policy because substantial evidence in the record supported the court's finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. Any purported risk of institutionalization was caused by petitioner's failure to take advantage of the 24 hour support exception that would keep her in the home.

**2. Appeal and Error—preservation of issues—failure to argue**

Petitioner's argument that the superior court erred by affirming the Administrative Law Judge's (ALJ) final decision, including the 84 hour per week service limit, by denying petitioner's rights to maintain her level of services under her CAP-MR/DD budget was dismissed because it was not preserved for appellate review. Petitioner did not advance the argument before the ALJ, in her petition for judicial review, or in her brief to the superior court. As such, the CAP-MR/DD budget argument was not properly before the superior court or the Court of Appeals for review.

Appeal by petitioner from order entered 9 June 2014 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 18 March 2015.

*WILLIAMS MULLEN, by Mark S. Thomas and Gordon & Rees, LLP, by Knicole C. Emanuel and Robert W. Shaw, for petitioner Kathryn Short.*

*Attorney General Roy Cooper, by Assistant Attorney General Neal T. McHenry, for respondent North Carolina Department of Health and Human Services.*

**SHORT v. N.C. DEP'T OF HEALTH & HUMAN SERVS.**

[241 N.C. App. 338 (2015)]

*Nelson Mullins Riley & Scarborough, LLP, by Stephen D. Martin and Thomas E. Kelly, for respondent-intervenor Smoky Mountain Center.*

ELMORE, Judge.

Petitioner appeals from a Superior Court order entered pursuant to a Petition For Judicial Review affirming a Final Decision by Administrative Law Judge Robin Anderson. After careful consideration, we affirm.

### **I. Background**

Kathryn Short (“petitioner”) is an adult woman diagnosed with Tuberous Sclerosis Complex, a rare genetic disorder that significantly impacts her mental capacity and functional skill level. Petitioner receives Medicaid and also receives behavioral healthcare services pursuant to the North Carolina Innovations Waiver (“the Waiver”). The Waiver is a Medicaid managed health care plan for qualified consumers who require behavioral healthcare services for certain disabilities. Smoky Mountain Center (“SMC” or “respondent-intervenor”) operates the Waiver as a Pre-Paid Inpatient Health Plan (“PIHP”) in twenty-three counties in western North Carolina, including Alexander County where petitioner lives, pursuant to an agreement with the North Carolina Department of Health and Human Services, Division of Medical Assistance (“DMA” or “respondent”).

The Waiver places limits on specific services, including: “Adult participants who live in private homes: No more than 84 hours per week is authorized for any combination of Community Networking, Day Supports, Supported Employment, Personal Care, and/or In-Home Skill Building.” In October 2012, SMC received a service authorization request from petitioner for the plan year of 1 November 2012 through 31 October 2013. Petitioner requested Personal Care Services for 12 hours per day and In-Home Skill Building for 4 hours per day, for a total of 16 hours per day (112 hours per week) of combined services. SMC granted petitioner’s request, in part, allowing her to receive the maximum of 84 service hours per week (12 hours per day) as authorized by the Waiver. However, SMC denied petitioner’s request for an additional 28 hours of services per week.

Petitioner timely appealed the decision through SMC’s reconsideration review process, and after the decision was upheld, petitioner filed for a Contested Case in the Office of Administrative Hearings. On 18 November 2013, Administrative Law Judge Robin Adams Anderson

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("the ALJ") entered a Final Decision determining that respondents "did not substantially prejudice Petitioner's rights nor act outside its authority, act erroneously, act arbitrarily and capriciously, use improper procedure, or fail to act as required by rule or law when it denied Petitioner Personal Care Services in excess of the maximum allowed under t[he] DMA policy."

Petitioner filed a Petition for Judicial Review of the ALJ's Final decision on 17 December 2013 in Wake County Superior Court on the grounds that the ALJ "erroneously upheld the reduction of Medicaid services to Petitioner." On 9 June 2014, Superior Court Judge Michael R. Morgan affirmed the ALJ's Final Decision. Petitioner now appeals to this Court.

## II. Analysis

### a.) Significant Risk of Institutionalization

[1] Petitioner contends the trial court erred by affirming the ALJ's Final Decision to deny, in part, her request for 112 hours of services per week. Specifically, petitioner argues no substantial evidence supported the Superior Court's finding that she failed to demonstrate that "in the absence of receiving 112 hours per week of paid services, she would be at a significant risk of institutionalization." We disagree.

Upon appeal of a superior court judge's order pursuant to a review of an ALJ's Final Decision, we must "determine whether [the superior court judge] utilized the appropriate scope of review and, if so, whether the [superior court judge] did so correctly." *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). Our standard of review depends on the type of error asserted by appellant:

[I]f the appellant contends the agency's decision was affected by a legal error, G.S. § 150B-51(b)(1)(2)(3) & (4), *de novo* review is required; if the appellant contends the agency decision was not supported by the evidence, G.S. § 150B-51(b)(5), or was arbitrary or capricious, G.S. § 150B-51(b)(6), the whole record test is utilized.

*Id.* We review defendant's issue under the whole record test. Under the whole record test, we "must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (quotation marks omitted). We cannot substitute our judgment in place of the agency's "even though th[is] court could justifiably have reached a different result

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had the matter been before it *de novo*.” *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

North Carolina participates in the federal Medicaid Program. See N.C. Gen. Stat. § 108A-54 (2013). As such, this State “must comply with the requirements of federal law.” *Lackey v. N.C. Dep’t of Human Res., Div. of Med. Assistance*, 306 N.C. 231, 235, 293 S.E.2d 171, 175 (1982). Title II of the Americans With Disabilities Act (ADA), in pertinent part, states: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. As such, the ADA provides, “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The “most integrated settings” consist of “those that enable individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (internal citations and quotation marks omitted).

The Supreme Court has recognized “unjustified institutional isolation of persons with disabilities [as] a form of discrimination[.]” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600, 119 S. Ct. 2176, 2187, 144 L. Ed. 2d 540 (1999). One method to establish that such a discriminatory violation has occurred is for a petitioner to demonstrate that she faces a “significant risk of institutionalization due to the termination of [her services].” See *Pashby*, 709 F.3d at 322. A causal relationship between the modification of services and the significant risk of institutionalization must be present. *Clinton L. v. Wos*, No. 1:10CV123, 2014 WL 4274251, at \*8 (M.D.N.C. Aug. 28, 2014). The determination of whether a “significant risk of institutionalization” exists is “fact-intensive and is affected by numerous variables.” *Id.* at \*6. The dispositive inquiry is “whether the reduction in [services] will likely cause a decline in health, safety, or welfare that would lead to the individual’s eventual placement in an institution.” *Id.* at \*7 (internal quotation marks omitted).

The crux of petitioner’s argument is that the 84 hours per week service limit created a 4 hour per day shortfall in her provider-supervised care. In support of petitioner’s contention that the shortfall in the additional supervision service hours would place her at a significant risk of institutionalization, her mother testified:

Q: Can you explain why that four hours would cause Institutionalization?

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MOTHER: Right. Without 16 hours a day of paid support, as legal guardian, I can't account for four hours a day that aren't being provided by anybody. As legal guardian, my primary responsibility is to see that care is provided. It's not to provide care. I have the legal responsibility. So the way [SMC] approved the plan where [petitioner is] alone four hours a day, suddenly, I am very aware that care isn't being provided four hours a day. So, through the appeals process and the continuation of services, we're good to go. But as soon as that's gone, then as legal guardian, I will again be aware that she is unsupervised for four hours a day. So, as a legal guardian, I will have no choice but to resign my legal guardianship, and the new legal guardian will have to figure out where it is she's going to live, because it's not with me.

...

So [petitioner's] services—if it's upheld, then I will resign my guardianship, and the new guardian will have some decisions to make.

...

Q: Is it your anticipation that, if you had to resign your guardianship, that [petitioner] would be placed in a residential setting?

MOTHER: It's whatever the legal—legal guardian would decide, because it's the legal—it's somebody else. It wouldn't be me making those decisions. . . . We get to have a service plan meeting—a service team meeting, and they get to decide the services they're going to apply for.

Petitioner also offered an affidavit of her primary care physician, Dr. Gina Licause, which stated:

It is my professional medical opinion that [petitioner] requires 24-hour a day supervision for health and safety and total care for activities of daily living and [incidental activities of daily living]. . . . [Petitioner] resides with her mother, Mary Short, who is her main caretaker and guardian. [Petitioner] does not attend a day program and, therefore, her home supports, personal care services and in-home skill building are responsible for all of her personal care and habilitative training[.]



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The significant risk of institutionalization, according to petitioner, occurs because the Waiver constraints only allow her to receive 12 hours of paid support each day instead of 16 hours. Due to this shortfall in service hours, petitioner argues, her mother would make the choice to resign guardianship, require petitioner to live outside her home, and allow a new guardian to make placement decisions, which might include community-care options or possible institutionalization. Thus, to the extent petitioner has exhibited any risk of institutionalization, petitioner has failed to show it was caused by SMC's actions. Rather, petitioner's mother's own potential actions would create any purported risk of institutionalization. Moreover, the speculative nature of what might happen in the future as a consequence of petitioner's mother's actions might provide some evidence of the possibility of institutionalization, but it lacks the specificity to meet the "significant risk" standard.

Substantial evidence also establishes that petitioner has other 24 hour per day community-based placements available to safeguard against her purported significant risk of institutionalization. Although petitioner argues on appeal that community-based placement in a group home setting would be inappropriate for her, SMC denied petitioner's request for the additional service hours under the Waiver because her "request for 24 hours per day of supports under the [Waiver] would be appropriately met through residential supports in a group home setting." At the hearing before the ALJ, petitioner presented no evidence that a group home would be inappropriate to meet her needs. Rather, the record reflects that petitioner had previously lived in a group home for five years in California, but petitioner's mother took her out of the home because she "was so afraid of [petitioner] being an institutional child, jumping from one group home to another" and was concerned about potential abuse by staff members. Although petitioner's mother testified that petitioner suffered abuse in North Carolina while she was placed in an Intermediate Care Facilities for Individuals with Mental Retardation (an institutional/non-community placement), the evidence presented did not indicate that the available *community based options* in this State would fail such that petitioner would face a significant risk of institutionalization.

Additionally, as previously discussed, in order for petitioner to succeed on appeal, the significant risk of institutionalization must be causally related to SMC's reduction in available service hours per day. *Clinton L.*, at \*8. The test is whether SMC's actions are "substantially related" to petitioner's significant risk of institutionalization. *Id.*

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A provision of the Waiver states: "Adult and child participants who live in private homes with intensive support needs: These participants may receive up to an additional 12 hours per day in-home intensive supports to allow for 24 hours per day of support with the prior approval of THE PIHP." Thus, despite SMC's decision to only grant petitioner with 84 hours of services pursuant to the Waiver limitations, an explicit exception would have allowed petitioner to receive 24 hours of "in-home" support services. However, the petitioner never applied for the additional hours. As a result, SMC denied the personal care service request in excess of the 84 hour limit set by the Waiver. Thus, any purported risk of institutionalization was also caused by petitioner's failure to take advantage of the 24 hour support exception that would keep her in the home.

For the foregoing reasons, we hold that substantial evidence in the record supports the Superior Court's finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. As such, the Superior Court did not err by affirming the ALJ's Final Decision to deny, in part, petitioner's request for 112 hours of services per week.

**b.) CAP-MR/DD Transition**

**[2]** Petitioner also argues the Superior Court erred by affirming the ALJ's Final Decision, including the 84 hour per week service limit, by denying petitioner's rights to maintain her level of services under her CAP-MR/DD budget.

"When a superior court exercises judicial review over an [ALJ's] final decision, it acts in the capacity of an appellate court." *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 297, 683 S.E.2d 428, 430 (2009) (quotation marks omitted). A superior court can affirm, remand, reverse, or modify the ALJ's final decision. *Id.* "It is a well-established rule in our appellate courts that a contention not raised and argued in the trial court may not be raised and argued for the first time on appeal." *Robinson v. Shanahan*, \_\_ N.C. App. \_\_, \_\_, 755 S.E.2d 398, 400 (2014) (internal quotation marks omitted). "The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions." *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (1991) (internal quotation marks omitted).

At the review hearing before the Superior Court, it is uncontested that petitioner raised the CAP-MR/DD budget argument for the first time. Petitioner did not advance the argument before the ALJ, in her Petition For Judicial Review, or in her brief to the Superior Court. Because petitioner did not argue said theory to the ALJ, the ALJ necessarily never

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ruled on it. As such, the CAP-MR/DD budget argument was not properly before the Superior Court, nor is it properly before this Court for review. *See* N.C. R. App. P. R. 10(a)(1) (“In order to preserve an issue for appellate review, a party must . . . obtain a ruling upon the party’s request, objection, or motion.”). We dismiss this argument on appeal.

**III. Conclusion**

In sum, we affirm the Superior Court’s order affirming the ALJ’s Final Decision because substantial evidence in the record supports the Superior Court’s finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. Additionally, we dismiss petitioner’s second issue on appeal because it is not preserved for our review.

AFFIRMED.

Judges GEER and INMAN concur.

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STATE OF NORTH CAROLINA  
v.  
EDWARD DURANT HICKS, DEFENDANT

No. COA 14-1175

Filed 2 June 2015

**1. Homicide—first-degree murder—failure to disclose felony murder theory—not required**

The trial court did not abuse its discretion in a first-degree murder case by refusing to require the State to disclose its felony murder theory before the jury was empaneled. When the State’s indictment language sufficiently charges a defendant with first degree murder, it is not required to elect between theories of prosecution prior to trial. The State’s legal theories are not “factual information” subject to inclusion in a bill of particulars, and no legal mandate requires the State to disclose the legal theory it intends to prove at trial. Further, defendant failed to establish that he could not adequately prepare his defense without knowledge of the State’s legal theory.

**2. Evidence—hearsay—out-of-court statement—nonprejudicial**

The trial court did not err in a first-degree murder case by admitting an out-of-court statement made by Scott through the testimony

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of Boyce. Assuming *arguendo* that the trial court erred by allowing Boyce to testify about a purported hearsay statement made by Scott or by refusing to instruct the jury on the lesser included offense of second-degree murder, any such error was nonprejudicial. Boyce's testimony alone that he saw defendant pull out a gun renders the admission of Scott's out-of-court statement to defendant as non-prejudicial.

**3. Homicide—first-degree murder—felony murder rule—motion to dismiss—discharging firearm into occupied property**

The trial court did not err by denying defendant's motion to dismiss the first-degree murder charge under the felony murder rule for insufficient evidence. The State presented sufficient evidence to support the felony charge of discharging a firearm into occupied property even though there was conflicting evidence as to whether defendant fired the shots from inside or outside the vehicle. Contradictions and discrepancies do not warrant dismissal of the case and are for the jury to resolve.

**4. Homicide—first-degree murder—motion to dismiss—premeditation and deliberation**

The trial court did not err by denying defendant's motion to dismiss the first-degree murder charge based upon alleged insufficient evidence of premeditation and deliberation. In the light most favorable to the State, the State presented sufficient evidence to put the issue of premeditation and deliberation before the jury.

**5. Homicide—first-degree murder—denial of request for instruction on lesser included offense—second-degree murder**

The trial court did not err by denying defendant's request for an instruction on the lesser included offense of second-degree murder. The evidence showed that defendant acted with premeditation and deliberation and there was no evidence in the record to suggest a lack thereof. Further, defendant cannot show a reasonable possibility that had the second-degree murder instruction been given, a different result would have been reached at trial.

Appeal by defendant from judgment entered 19 March 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Nicholaos G. Vlahos, for the State.*

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*DUNN, PITTMAN, SKINNER & CUSHMAN, PLLC, by Rudolph A. Ashton, III, for defendant.*

ELMORE, Judge.

On 19 March 2014, a jury found defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, and under the first degree felony murder rule. The trial court sentenced defendant to life imprisonment without parole. After careful consideration, we hold that defendant received a trial free from prejudicial error.

**I. Background**

The State's evidence at trial tended to show the following: On 12 May 2012, Raymond Boyce (Boyce) was inside his residence on Zircon Street in Charlotte. Boyce looked outside his bedroom window and observed a Jaguar parked in the yard of his residence. Shortly thereafter, a minivan parked next to the Jaguar. Boyce recognized an individual named Calvin Scott (Scott) exit the Jaguar and walk towards the street while speaking on a cell phone. Scott returned to the Jaguar and sat in the driver's seat. Another person, who was unidentified at trial, exited the back seat of the Jaguar and left the area.

A third vehicle then arrived, and Boyce saw a man he knew to be Edward Durant Hicks (defendant) exit the third vehicle and walk towards the Jaguar while speaking to Scott. Beverly McHam (McHam) had previously seen defendant travel towards the direction of Zircon Street in a car driven by a white female who was later identified as April Bittle (Bittle).

Boyce saw defendant pull out a gun from his back pocket and heard Scott say, "man, what you doing, put that shit up." Defendant put the gun back in his pocket and appeared to walk away from the Jaguar. However, defendant then turned back towards the Jaguar, opened the rear driver's side door, and began shooting the front seat passenger, Nakio Cousart (the victim). Defendant fired at least four shots, each of which struck the victim and caused his death.

**II. Analysis****a.) Disclosure of Felony Murder Theory**

[1] First, defendant argues the trial court erred by refusing to require the State to disclose its felony murder theory before the jury was empaneled. Specifically, defendant avers that because the State used

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a short-form indictment to charge him with murder, he lacked notice as to which underlying felony supported the felony murder charge. We disagree.

We review a trial court's denial of a motion for a bill of particulars for an abuse of discretion<sup>1</sup>. *State v. Garcia*, 358 N.C. 382, 390, 597 S.E.2d 724, 733 (2004). "A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information." N.C. Gen. Stat. § 15A-925(b) (2013). Legal theories, however, do not constitute "factual information" as contemplated by N.C. Gen. Stat. § 15A-925. *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732. N.C. Gen. Stat. § 15-144 (2013) by its very terms authorize a short-form indictments for a murder charge:

In indictments for murder . . . it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment 'with force and arms,' and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law[.] . . . [A]ny bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder[.]

Additionally, our Supreme Court "has consistently held that murder indictments that comply with N.C.G.S. § 15-144 are sufficient to charge first-degree murder on the basis of *any theory* set forth in N.C.G.S. § 14-17." *Garcia*, 358 N.C. at 388, 597 S.E.2d at 731 (emphasis in original). N.C. Gen. Stat. § 14-17 (2013), in relevant part, classifies first degree murder as "[a] murder . . . by . . . willful, deliberate, and premeditated killing, or . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]" A murder committed in the perpetration of the crime of discharging a fire-arm into an occupied vehicle will also support a conviction of felony

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1. Defendant argues that the standard of review should be *de novo*. We disagree and note that even under a *de novo* review of this issue, defendant would not prevail.

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murder under N.C. Gen. Stat. § 14-17. *See State v. Wall*, 304 N.C. 609, 614, 286 S.E.2d 68, 72 (1982).

When the State's indictment language sufficiently charges a defendant with first degree murder, it "is not required to elect between theories of prosecution prior to trial." *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732. Rather, "a defendant must be prepared to defend against any and all legal theories which the facts may support." *Id.* (citations and quotation marks omitted).

On the day of trial, and prior to jury selection, defendant made a motion to compel the State to disclose the felony it intended to use to support its felony murder theory. The trial court denied defendant's motion and noted defendant's objection to its ruling. Defendant, in essence, requested to learn about the State's theory of the case by a bill of particulars. However, the State pled facts sufficient to support the charge of first degree murder pursuant to N.C. Gen. Stat. § 14-17 by alleging in its indictment that defendant "unlawfully, willfully, and feloniously and of malice aforethought kill[ed] and murder[ed] Nakio Terrill Cousart." *See* N.C. Gen. Stat. § 14-17. According to the provisions of N.C. Gen. Stat. § 14-17, the State was authorized to present evidence at trial sufficient to support a first degree murder conviction under the theories of premeditation and deliberation, felony murder, or both. *See* N.C. Gen. Stat. § 14-17. As our case law makes clear, the State's legal theories are not "factual information" subject to inclusion in a bill of particulars, and no legal mandate requires the State to disclose the legal theory it intends to prove at trial. *See Garcia, supra.*

Moreover, defendant has failed to establish that he could not adequately prepare his defense without knowledge of the State's legal theory. At trial, the State, in part, proceeded under a theory of felony murder, presenting evidence that defendant committed the murder during the perpetration of feloniously discharging a firearm into a vehicle occupied by the victim. Before trial, the State complied with the open discovery rule: "Everything in [the State's] file has been turned over to [defendant]. . . . Every information we have about [the victim] that is part of the investigation of this matter has been provided to [defendant]." *See* N.C. Gen. Stat. § 15A-903 (2013). Prior to trial, the State also provided defendant with a copy of Boyce's recorded statement to officers in which he described what he saw and heard relating to the shooting. Furthermore, defendant's attorney indicated his knowledge that an alleged shooting had occurred in or around a vehicle:

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Just so the Court's aware that many parties state in this case that the defendant allegedly was in the car, that [the victim] was allegedly in the car and Mr. Scott was in the car. So we would certainly argue that their statements would tend to be testimonial and self-serving on the part of Mr. Scott to basically help tie the story where he was indeed to be the shooter.

Based on the foregoing analysis, we hold that the trial court did not err by refusing defendant's request to require the State to disclose its felony murder theory before the jury was empaneled.

**b.) Scott's Out-of-Court Statement**

[2] Next, defendant argues the trial court erred by admitting an out-of-court statement made by Scott through the testimony of Boyce. Specifically, defendant avers that the admission of Scott's out-of-court statement constituted prejudicial hearsay because it "basically accused [defendant] of being the shooter." We disagree.

We review this issue *de novo*. See *State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010) ("The admissibility of evidence at trial is a question of law and is reviewed *de novo*.").

The out-of-court statement at issue is Boyce's testimony that "[Scott] said [to defendant], 'man, what you doing, put that shit up.'" At trial the following colloquy occurred:

PROSECUTOR: And on the 12th of May 2012 who was-- what happened on that day?

BOYCE: Well, I was sitting up there in my window picking wild hairs from my face. A Jaguar pulled up, backed into the yard.

PROSECUTOR: Who did?

BOYCE: A Jaguar.

PROSECUTOR: Oh, I'm sorry.

BOYCE: There was another van was [sic] behind him backing up into the yard. So I was sitting at the window talking to a friend of mine in my bedroom. [Scott] got out of his car, he was on the phone walking to the front of the car to the street.

PROSECUTOR: You said [Scott] was on the phone?



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BOYCE: Yes.

PROSECUTOR: What car did he get out of?

BOYCE: The Jaguar.

PROSECUTOR: He walked towards the street on the phone?

BOYCE: Yes.

PROSECUTOR: Then what happened?

BOYCE: [He] [c]ome back to the Jaguar, was on the phone, got back in his car, and after a while then this SUV or another kind of van pulled up. A dude jumped out of it, walked to the Jaguar, talking to [Scott], reached in his back right pocket, pulled out a gun. [Scott] said man, what you doing, put that shit up. So he put it back in his pocket.

DEFENDANT'S ATTORNEY: Objection, Your Honor.

BOYCE: Huh?

THE COURT: To?

DEFENDANT'S ATTORNEY: [Scott's] statement. Motion to strike.

PROSECUTOR: Your Honor, the State would contend that that's an excited utterance or present sense impression. They both apply. Nor is it a statement necessarily offered for the truth of the matter.

THE COURT: Which is it?

PROSECUTOR: I think it falls under all three of those, frankly.

THE COURT: You're not offering it for the truth of the matter?

DEFENDANT'S ATTORNEY: No.

THE COURT: All right.

Even if we presume *arguendo* that Boyce's testimony regarding Scott's out-of-court statement constituted inadmissible hearsay, any purported error arising from its admission was non-prejudicial. *See State v. LePage*, 204 N.C. App. 37, 43, 693 S.E.2d 157, 162 (2010) ("Evidentiary

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errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.”).

Boyce testified that from his window bedroom he observed a Jaguar parked in the yard of his residence. A minivan immediately parked next to the Jaguar. Boyce then observed Scott exit the Jaguar and walk towards the street while speaking on a cell phone. Scott returned to the Jaguar and sat back inside the vehicle. Another person, who was not identified at trial, exited the Jaguar and left the scene. A third vehicle then arrived, and Boyce saw defendant exit the third vehicle and walk towards the Jaguar, reach into his back pocket, pull out a gun, open the vehicle’s rear left door, and shoot into the vehicle multiple times. He further testified that the shooter never went inside the Jaguar. Boyce made an in-court identification of defendant as the sole shooter and recognized him as being a member of his neighborhood. Boyce’s testimony alone that he saw defendant pull out a gun renders the admission of Scott’s out-of-court statement to defendant as non-prejudicial.

However, George Potts also corroborated Boyce’s account. Potts testified that he looked outside a window from his house and observed an individual exit a vehicle that was driven by a white female. The individual walked towards the Jaguar, opened the “back end of the back door” of the Jaguar, and shot “four times in the car.” He also stated that the shooter never went inside the Jaguar.

McHam had known defendant for a year or two before the date of trial. She testified that she was in her front yard and observed the victim drive past her. Approximately twenty minutes later, she saw defendant in a vehicle with a white female and subsequently heard “some shots, three shots.” She walked towards the direction of the gun shot sounds and saw defendant “running towards . . . other apartments.”

The first responding officer found the victim unresponsive in the front passenger seat of the Jaguar, with his head “to the left and leaning back in the seat[.]” The State’s forensic pathologist testified that all of defendant’s four gunshot wounds were consistent with being shot from outside the vehicle’s rear driver’s side door.

Based on the foregoing evidence, defendant has failed to show that the admission of Scott’s lone out-of-court statement could have affected the result of the trial. As such, we hold that the purported erroneous admission of Scott’s statement was not prejudicial to defendant.

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**c.) Motion to Dismiss Murder Charge Under the Felony Murder Rule**

**[3]** Defendant argues the trial court erred by denying his motion to dismiss the first degree murder charge under the felony murder rule for insufficient evidence. Specifically, defendant argues the State failed to present sufficient evidence to support the felony charge of discharging a firearm into occupied property because there was conflicting evidence as to whether defendant fired the shots from inside or outside the vehicle. We disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). This Court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Clagon*, 207 N.C. App. 346, 350, 700 S.E.2d 89, 92 (2010) (citation and quotation marks omitted). "In ruling on a motion to dismiss, [we] must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intentment that can be drawn therefrom." *Id.* (citation and quotation marks omitted).

The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both: the evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if there is evidence which tends to prove the fact or facts in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture.

*State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981) (citations and quotation marks omitted). "Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve." *State v. Agustin*, \_\_ N.C. App. \_\_, \_\_, 747 S.E.2d 316, 318, *review denied*, \_\_, N.C. App. \_\_, \_\_, 749 S.E.2d 864, 865 (2013) (quotation marks omitted).

The felonious crime of discharging a firearm into occupied property, in relevant part, requires that an individual "willfully or wantonly discharges . . . any firearm . . . into any . . . vehicle . . . while it is occupied[.]" N.C. Gen. Stat. § 14-34.1 (2013). An individual discharges a firearm "into" an occupied vehicle under the statute even if the firearm is inside the vehicle, as long as the individual is outside the vehicle when discharging the firearm. *See State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988).

Contrary to defendant's assertion, mere contradictions in the evidence do not warrant a dismissal of the case. *See Agustin*, \_\_ N.C. App.

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at \_\_\_, 747 S.E.2d at 318. Rather, our inquiry is whether the State presented sufficient evidence that defendant was outside the vehicle when he discharged the firearm. In the light most favorable to the State, the State presented sufficient evidence to withstand defendant's motion to dismiss. Boyce testified that defendant was the shooter, and although defendant opened the Jaguar's rear driver's side door, defendant never went inside the vehicle. Potts stated that the shooter never went inside the vehicle when he discharged the firearm. Additionally, the State's forensic pathologist provided testimony to indicate that defendant was outside the vehicle when he shot the victim. Accordingly, the trial court did not err by denying defendant's motion to dismiss the first degree murder charge based on the underlying felony of discharging a firearm into an occupied property.

**d.) Motion to Dismiss Murder Charge Based on Premeditation and Deliberation**

[4] Defendant also argues the trial court erred by denying his motion to dismiss the first degree murder charge based upon the insufficiency of evidence of premeditation and deliberation. We disagree.

Premeditation means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. Deliberation means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

*State v. Clark*, \_\_ N.C. App. \_\_, \_\_, 752 S.E.2d 709, 711 (2013), *review denied*, 367 N.C. 322, 755 S.E.2d 619 (2014) (quotation marks omitted). However, "if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated." *Id.* (quotation marks omitted).

The State must generally prove both premeditation and deliberation by circumstantial evidence. *See id.* Our Courts have articulated situations from which premeditation and deliberation can be implied under the circumstances:

- (1) absence of provocation on the part of the deceased,
- (2) the statements and conduct of the defendant before and after the killing,
- (3) threats and declarations of the

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defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

*State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992).

The evidence presented at trial shows the absence of provocation on the part of the victim. No evidence indicated that the victim exited the Jaguar or interacted with defendant at all. No weapons were found in the Jaguar or on the victim's person when law enforcement officers investigated the scene post mortem, indicating that the victim was unarmed when defendant allegedly shot him. The fact that defendant shot the victim at least four times is further evidence of premeditation and deliberation.

Defendant's actions before the shooting also establish premeditation and deliberation. Bittle testified that she had previously traded her car for drugs. She met an unfamiliar individual on 12 May 2012 to retrieve her car. That individual returned her vehicle and subsequently asked Bittle for a ride home, but gave her the location of Boyce's residence. Bittle dropped the individual at that location and observed him get inside the back seat of another vehicle. As she drove away, she heard shots fired. Bittle was unable to identify defendant as the individual in her car because she "didn't have a clear memory the night that it happened" and had never previously met defendant on the day of the shooting. However, Bittle noticed a beer can in her car on 12 May 2012 that had not been there when she loaned her car. A subsequent DNA swab of the can matched defendant's DNA profile.

Boyce testified that defendant brandished a gun from his back pocket, exchanged a few words with Scott, put the gun back in his pocket as if he was about "to walk off[,] and then "turned around, [came] back, opened the back driver's door, and . . . just started shooting." Thus, the circumstances would indicate, at a minimum, that defendant formed the specific intent to kill the victim over some period of time before the shooting. *See State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008) (asserting that arriving to the scene of a murder with a weapon "supports an inference of premeditation and deliberation"); *see also State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) ("[N]o particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing.").

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Defendant's actions after the shooting provide additional evidence of premeditation and deliberation. After the shooting occurred, the witnesses testified that defendant immediately left the scene. Such evidence would allow the jury to infer that defendant did not attempt to assist the victim. *See State v. Horskins*, \_\_ N.C. App. \_\_, \_\_, 743 S.E.2d 704, 709, *review denied*, \_\_ N.C. \_\_, 752 S.E.2d 481 (2013) (acknowledging that a defendant's failure to attempt "to obtain assistance for the deceased" is a relevant consideration of premeditation and deliberation).

In the light most favorable to the State, the State presented sufficient evidence to put the issue of premeditation and deliberation before the jury. As such, the trial court did not err by denying defendant's motion to dismiss the first degree murder charge based upon the theory of premeditation and deliberation.

**e.) Second Degree Murder Instruction**

**[5]** Finally, defendant argues the trial court erred by denying his request for an instruction on the lesser included offense of second degree murder. We disagree.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[A]n error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quotation marks omitted).

An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater. When the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime, an instruction on lesser included offenses is not required.

*State v. Northington*, \_\_ N.C. App. \_\_, \_\_, 749 S.E.2d 925, 927 (2013), *appeal dismissed*, 367 N.C. 331, 755 S.E.2d 622 (2014) (citations and internal quotation marks omitted). A trial court's failure to instruct on a lesser-included offense "constitutes reversible error not cured by

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a verdict of guilty of the offense charged.” *State v. Tillery*, 186 N.C. App. 447, 449-50, 651 S.E.2d 291, 293 (2007) (quotation marks omitted). Second degree murder requires “(1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation.” *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000).

Here, defendant requested the second degree murder instruction based on two theories: 1.) evidence from which the jury could find a lack of premeditation and deliberation and 2.) sufficient evidence that the shooting occurred inside the vehicle, and therefore the defendant would not be guilty of felony murder. We limit our analysis to a discussion of whether the State presented sufficient evidence of premeditation and deliberation because such an inquiry is dispositive to the question of whether the trial court erred by failing to instruct the jury on second degree murder. *See State v. Rogers*, \_\_ N.C. App. \_\_, \_\_, 742 S.E.2d 622, 629 (2013) (“Given that the State presented evidence of premeditation and deliberation, and there is no evidence in the record to suggest a lack thereof, we hold that the trial court did not err in denying defendant’s request for an instruction on the lesser included offense of second-degree murder.”).

Here, the evidence shows that defendant acted with premeditation and deliberation and there is no evidence in the record to suggest a lack thereof. As previously discussed, defendant asked Bittle for a ride home but provided her with the location of Boyce’s residence where victim was located. Defendant removed a gun from his pocket, put the gun back in his pocket, and appeared to walk away from the Jaguar. However, he returned to the vehicle, fired at least four shots at the victim, and fled the scene.

Moreover, defendant has failed to direct us to conflicting evidence in the record with regard to premeditation and deliberation. Defendant merely points out that there was “no evidence that defendant knew [the victim], that there was any ill will between them, that there was a prior argument, or that the underlying felony was based upon premeditation and deliberation.”

Accordingly, defendant was not entitled to a second degree murder instruction under a theory of premeditation and deliberation because the State’s evidence is positive as to premeditation and deliberation and there is no conflicting evidence on those elements. *See State v. Laurean*, 220 N.C. App. 342, 348, 724 S.E.2d 657, 661-62 (2012) (rejecting defendant’s argument that he was entitled to an instruction on second degree murder where evidence was sufficient to support a first degree murder

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charge and defendant did “not deny that he committed a homicide, he simply challenge[d] what he refer[ed] to as a lack of evidence of premeditation and deliberation”). In sum, the evidence would not permit the jury rationally to find defendant guilty of second degree murder and to acquit him of first degree murder under a theory of premeditation and deliberation.

Based on our analysis with regard to premeditation and deliberation, we need not address the merits of defendant’s argument that a second degree murder instruction was necessary under the felony murder theory because of the alleged conflicting evidence regarding defendant’s location during the shooting. In *State v. Phipps*, the defendant argued on appeal that the trial court erred by failing to instruct the jury on second degree murder. 331 N.C. 427, 457, 418 S.E.2d 178, 194 (1992). Our Supreme Court ruled that the trial court erred because “the State’s evidence would have permitted a rational jury to convict him of second-degree murder” based on a lack of premeditation and deliberation. *Id.* at 457-59, 418 S.E.2d at 194-95. Importantly, however, our Supreme Court upheld defendant’s conviction for first degree murder “because the jury based its verdict on both premeditation and deliberation and the felony murder rule[,]” and “[d]efendant’s first-degree murder conviction under the felony murder rule [was] without error[.]” *Id.* at 459, 418 S.E.2d at 195.

Similar to *Phipps*, the jury in the case *sub judice* convicted defendant on the basis of “malice, premeditation and deliberation” as well as felony murder. Because the first degree murder conviction under a theory of premeditation and deliberation was without error for the reasons previously discussed, any purported error related to the trial court’s failure to instruct on second degree murder with regard to the felony murder charge would be non-prejudicial. Defendant cannot show a reasonable possibility that had the second degree murder instruction been given, a different result would have been reached at trial. *See State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770-71 (2002) (“[I]f a defendant is convicted of first-degree murder on the basis of both premeditation and deliberation and felony murder, then premeditated and deliberate murder alone supports the conviction[.]”). Accordingly, the trial court did not err by failing to provide the jury with a second degree murder instruction.

**III. Conclusion**

In sum, the trial court did not err by: refusing to require the State to disclose its felony murder theory before the jury was empaneled, denying defendant’s motion to dismiss the first degree murder charge under



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the felony murder theory, or denying defendant's motion to dismiss the first degree murder charge under a theory of premeditation and deliberation. If the trial court erred by allowing Boyce to testify about a purported hearsay statement made by Scott or by refusing to instruct the jury on the lesser included offense of second degree murder, any such error was non-prejudicial.

NO PREJUDICIAL ERROR.

Judges GEER and DILLON concur.

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STATE OF NORTH CAROLINA, PLAINTIFF  
v.  
KEITH A. LEAK, DEFENDANT

No. COA14-591

Filed 2 June 2015

**Search and Seizure—seizure of license and registration—no reasonable suspicion—violation of Fourth Amendment**

Defendant was seized in violation of the Fourth Amendment when a police officer, with no reasonable suspicion, took defendant's vehicle registration and driver's license to his patrol vehicle to conduct a check on his computer. The trial court erred by denying defendant's motion to suppress.

Appeal by defendant from judgment entered 14 November 2013 by Judge Mark E. Klass in Anson County Superior Court, that reserved defendant's right to appeal the order entered 7 August 2013 by Judge Tanya Wallace denying his motion to suppress. Heard in the Court of Appeals 8 October 2014.

*Attorney General Roy Cooper by Assistant Attorney General Ebony J. Pittman for the State.*

*Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.*

STEELMAN, Judge.

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When a law enforcement officer took defendant's driver's license to the officer's patrol vehicle to conduct computer research into the status of defendant's driver's license, this amounted to a seizure under the Fourth Amendment to the U.S. Constitution. In *Rodriguez v. United States*, \_\_ U.S. \_\_, 191 L. Ed. 2d 492, 135 S. Ct. 1609 (2015), the United States Supreme Court rejected the argument that an otherwise unconstitutional seizure may be justified simply by characterizing it as a brief or "*de minimus*" violation of a defendant's rights under the Fourth Amendment.

**I. Factual and Procedural History**

At 11:30 p.m. on 30 April 2012, Lilesville Police Chief Bobby Gallimore was on patrol. He noticed a parked car in a gravel area near Highway 74, and stopped to see if the driver needed assistance. Before approaching the car, Chief Gallimore ran the vehicle's license plate through his computer and was advised that the car was owned by Keith Leak (defendant). Chief Gallimore spoke with defendant, who told him that he did not need assistance, and had pulled off the road to return a text message. Chief Gallimore then asked to see defendant's driver's license, and determined that the name on the license – Keith Leak – matched the information he had obtained concerning the car's license plate.

After examining defendant's driver's license, Chief Gallimore took it to his patrol vehicle to investigate the status of defendant's driver's license. It was undisputed that Chief Gallimore had no suspicion that defendant was involved in criminal activity. Defendant remained in his car while Chief Gallimore ran a check on his license and confirmed that his license was valid. However, the computer search revealed that there was an outstanding 2007 warrant for defendant's arrest. Chief Gallimore asked defendant to step out of his car, at which point, defendant informed Chief Gallimore that he "had a .22 pistol in his pocket." Defendant was arrested for possession of a firearm by a convicted felon; the record does not indicate whether defendant was ever prosecuted for the offense alleged in the 2007 arrest warrant.

On 4 June 2012 defendant was indicted for possession of a firearm by a felon and for the related misdemeanor of carrying a concealed weapon. On 5 August 2013 defendant filed a motion to suppress evidence obtained at the time of his arrest, on the grounds that the evidence had been "seized in or as a result of" a seizure in "violation of his rights under the Fourth Amendment of the U.S. Constitution and similar provisions in the North Carolina Constitution[.]" The motion to suppress was heard by Judge Tanya Wallace on 5 August 2013. Chief Gallimore testified for

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the State at the suppression hearing. Defendant did not present evidence. On 7 August 2013 Judge Wallace entered an order denying defendant's motion. On 14 November 2013 defendant entered a plea of guilty to possession of a firearm by a felon pursuant to a plea agreement, reserving his right to appeal the denial of his suppression motion. The trial court determined defendant's prior record level to be II, imposed a suspended sentence of nine to twenty months imprisonment, and placed defendant on supervised probation for twelve months.

Defendant appeals.

**II. Denial of Suppression Motion**

The sole issue raised on appeal is whether Judge Wallace erred by denying defendant's motion to suppress evidence. Defendant argues that he was effectively seized when Chief Gallimore took his driver's license to the patrol vehicle in order to conduct a computer search and that, because Chief Gallimore had no suspicion that defendant was engaged in criminal activity, the seizure violated his rights under the Fourth Amendment to the United States Constitution. We are compelled to agree.

**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, as here, 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." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994), and *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (other citations omitted)). " '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 issue in this case is whether there was a violation of defendant's rights under the Fourth Amendment to the U.S. Constitution.

In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court. We also look for guidance to the decisions of the North Carolina Supreme Court construing federal constitutional and State

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constitutional provisions, and we are bound by those interpretations. We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court.

*Johnston v. State*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 735 S.E.2d 859, 865 (2012) (citing *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749, (2006), and *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)), *affd.*, 367 N.C. 164, 749 S.E.2d 278 (2013).

B. Discussion

The Fourth Amendment provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]” U.S. Const. amend. IV.

The fourth amendment protects individuals against unreasonable searches and seizures. Not every police encounter, however, warrants fourth amendment scrutiny. Under *Terry v. Ohio* and its progeny, a three-tiered standard has developed by which to measure the need to investigate possible criminal activity against the intrusion on individual freedom which the investigation may entail:

- (1) Communication between police and citizens involving no coercion or detention are outside the scope of the fourth amendment.
- (2) Seizures must be based on reasonable suspicion.
- (3) Arrests must be based on probable cause.

*State v. Harrell*, 67 N.C. App. 57, 60-61, 312 S.E.2d 230, 234 (1984) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968) (other citation omitted)).

Chief Gallimore’s initial contact with defendant was consensual, as indicated in several of the trial court’s findings of fact:

...

- (4) Initially Chief Gallimore was concerned about the safety of the vehicle’s occupant or occupants, whether the vehicle had broken down or whether the occupants needed other assistance.

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(5) The only occupant of the vehicle was the Defendant Keith Leak. Mr. Leak assured the officer he did not need assistance, but told Chief Gallimore that he pulled over to text, since he knew he could not text while driving.

(6) When approaching the vehicle, the officer had run the tag on the vehicle, discovering the vehicle to be registered to Keith Leak. . . .

(7) The Chief approached, in uniform, and does not recall whether or not his blue lights were on. He had a service revolver, but it was not displayed. The officer requested the driver's license and registration from Mr. Leak, which were produced. The officer confirmed that Keith Leak was the name on the driver's license.

“Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.” *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) (internal quotation omitted)). Chief Gallimore required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing Chief Gallimore to examine his driver's license and registration.

In its order denying defendant's suppression motion, the court stated two alternative conclusions of law “[t]hat any seizure that occurred was deminimus. [sic] But the court finds that there was no seizure in this instance, based on the facts and circumstances surrounding this encounter.” Defendant argues that Chief Gallimore's conduct in taking defendant's driver's license back to his patrol car in order to investigate the status of defendant's license constituted a seizure that was not justified in the absence of reasonable suspicion of criminal activity. We agree and hold that, under binding precedent of this Court, defendant was seized when Chief Gallimore took his license and registration back to the patrol car for investigation.

An individual is seized by a police officer and is thus within the protection of the Fourth Amendment when the officer's conduct “would have communicated to a reasonable

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person that he was not at liberty to ignore the police presence and go about his business.” . . . Moreover, “an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave” or otherwise terminate the encounter.

*State v. Icard*, 363 N.C. 303,308-09, 677 S.E.2d 822, 826-27 (2009) (quoting *Bostick*, 501 U.S. at 437, 115 L. Ed. 2d at 400 (1991) (internal quotation omitted), and *INS v. Delgado*, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 255 (1984) (internal quotation omitted)).

Chief Gallimore testified that he did not consider defendant to be free to leave when he took his driver’s license back to his patrol car:

PROSECUTOR: And when you asked him for his driver’s license and registration, why did you do that?

CHIEF GALLIMORE: I asked for his driver’s license to – I asked him if he had a valid license, and he said he did. And I said, “Well, may I see your license?” And he handed me his license. And then that’s when I ran them to make sure that they were valid.

...

Q And why is that?

A Because we seem to have a lot of people that drive while license revoked. And I felt obligated – If I would have released - you know, if I told him he’s free to leave from there and he’s okay to drive from there, and he got in a wreck, then I’d be liable for it because he didn’t have a license. (emphasis added).

In *State v. Jackson*, 199 N.C. App. 236, 681 S.E.2d 492 (2009), a prior panel of this Court held that a reasonable person would not feel free to drive away while a law enforcement officer retains possession of his driver’s license. In *Jackson* a car was stopped based upon the officer’s belief that the driver did not have a valid driver’s license. After dispelling this suspicion, the officer continued to question the driver and his passenger (the defendant) about whether there were drugs or weapons in the car. We held that this “interrogation was indeed an extension of the detention beyond the scope of the original traffic stop as

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the interrogation was not necessary to confirm or dispel [the officer's] suspicion that [the driver] was operating [a motor vehicle] without a valid driver's license[.] . . . Accordingly, for this extended detention to have been constitutional, [the officer] must have had grounds which provided a reasonable and articulable suspicion or the encounter must have become consensual." *Jackson*, 199 N.C. App. at 242, 681 S.E.2d at 496-97 (citation omitted). After holding that the detention was not justified by reasonable suspicion of criminal activity, we held that it constituted an unconstitutional seizure:

Furthermore, there is no evidence that the encounter became consensual after [the officer's] suspicion that [the driver] was operating without a license was dispelled. Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration. . . . [The officer] took [the driver's] driver's license to her patrol car and . . . [another officer] brought the vehicle registration card to the patrol car. However, there is no evidence in the record that [the driver's] documentation was ever returned. As a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration, [the officer's] continued detention and questioning of [the driver] after determining that [he] had a valid driver's license was not a consensual encounter. Accordingly, the extended detention of Defendant was unconstitutional[.]

*Jackson* at 243, 681 S.E.2d at 497 (citing *State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (other citation omitted) (emphasis added)). On the basis of Chief Gallimore's testimony, the holding of *Jackson*, and our analysis of the totality of the circumstances, we hold that a seizure occurred when Chief Gallimore took defendant's license back to his patrol car. The trial court erred in ruling that defendant was not seized.

Our conclusion is neither novel nor unusual. *See, e.g., United States v. Jones*, 701 F.3d 1300, 1315 (10th Cir. Kan. 2012) ("the government acknowledges that Mr. Jones was seized once the officers took Mr. Jones's license and proceeded to conduct a records check based upon it") (citing *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995)); *United States v. Farrior*, 535 F.3d 210, 219 (4th Cir. 2008) ("The fact that Officer Morris had returned Farrior's license and registration

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also strongly indicates that the encounter was consensual and that no seizure occurred within the meaning of the Fourth Amendment.”); and *Liberal v. Estrada*, 632 F.3d 1064, 1083 (9th Cir. 2011) (noting that the case before it was “like [*United States v.*] *Chan-Jimenez*, 125 F.3d [1324,] 1326 [(9th Cir. 1997)] in which we held that the motorist had been seized because the police officer had retained possession of his driver’s license and vehicle’s registration”).

The trial court’s alternative conclusion of law that “any seizure that occurred was [*de minimus*] was also contrary to law and was error. In the recent United States Supreme Court case, *Rodriguez v. United States*, \_\_ U.S. \_\_, 191 L. Ed. 2d 492, 135 S. Ct. 1609 (2015),<sup>1</sup> the United States Supreme Court held that continued detention of a motorist beyond the scope of the initial reason for the stop was unconstitutional unless justified by reasonable suspicion. In *Rodriguez*, a law enforcement officer stopped a motorist to issue a citation for swerving off the highway. After issuing the driver a warning ticket, the officer detained the driver until the arrival of a drug-sniffing dog. The 8th Circuit Court of Appeals held that the “resulting seven- or eight-minute delay . . . constituted a *de minimus* intrusion on Rodriguez’s personal liberty[.]” *United States v. Rodriguez*, 741 F.3d 905, 907-08 (8th Cir. 2014). The Supreme Court “granted *certiorari* to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff” and held that “[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.” *Rodriguez*, \_\_ U.S. \_\_, 191 L. Ed. 2d at 495. The Court vacated the judgment of the Eighth Circuit Court of Appeals and remanded for determination of “whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation[.]” *Rodriguez* at \_\_, 191 L. Ed. 2d at 496, rejecting the *de minimus* analysis of the 8th Circuit.

In this case, there is no factual dispute that Chief Gallimore did not have a reasonable suspicion that defendant was engaged in criminal activity. “An officer has reasonable suspicion if a ‘reasonable, cautious officer, guided by his experience and training,’ would believe that criminal activity is afoot ‘based on specific and articulable facts, as well as

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1. *Rodriguez* was decided after the suppression hearing in this case. “Because defendant had entered notice of appeal and his case was pending when [*Rodriguez*] was issued, that decision applies to defendant’s case.” *State v. Morgan*, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004) (citing *Griffith v. Kentucky*, 479 U.S. 314, 322-23, 93 L. Ed. 2d 649, 658 (1987)).



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the rational inferences from those facts.’ ” *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (quoting *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994), and citing *Terry*). Chief Gallimore described his interaction with defendant as “a routine conversation” and testified that his reason for approaching defendant was to ascertain if he needed assistance with a disabled vehicle. Defendant was not parked illegally, and Chief Gallimore did not smell alcohol or discern any other indicia of criminal activity. The trial court found as a fact that “[b]etween the time of the initial speaking with the Defendant and the time that the first hit on the Defendant’s name alerted [Chief Gallimore to the outstanding arrest warrant] there was no actual suspicion of criminal activity.” We hold that defendant was seized in violation of his rights under the Fourth Amendment to the United States Constitution.

“Evidence that is discovered as a direct result of an illegal search or seizure is generally excluded at trial as fruit of the poisonous tree unless it would have been discovered regardless of the unconstitutional search.” *Jackson* at 244, 681 S.E.2d at 497 (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L.Ed.2d 441, 455 (1963)). In this case, Chief Gallimore’s seizure of defendant for purposes of conducting an investigation into his driver’s license led to his arrest and the discovery of the firearm in his possession. There was no evidence that defendant’s pistol was or could have been discovered “by means sufficiently distinguishable to be purged of the primary taint” of the unlawful seizure. *Wong Sun*, 371 U.S. at 487-88, 9 L.Ed.2d at 455. We reverse and remand to the trial court for entry of an order vacating defendant’s guilty plea.

REVERSED AND VACATED.

Judge CALABRIA concurs.

Judge McCULLOUGH dissents in a separate opinion.

McCULLOUGH, Judge, dissents.

From the majority opinion’s conclusion that an officer conducts an impermissible seizure under the rationale of *Rodriguez v. United States*, 575 U.S. \_\_\_, (2015), when that officer conducts a computer search of the driver’s license of an individual that the officer approached to determine if the driver needed assistance, I respectfully dissent.

In the case at bar, Lilesville Police Chief Gallimore was on patrol when he noticed a car parked in a gravel lot just off of Highway 74.

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Chief Gallimore approached the car to determine if the driver needed assistance. Before approaching the car the officer checked the vehicle's license plate and determined that the car was owned by the defendant, Keith Leak. Upon approaching the car, Chief Gallimore requested the driver's identification. The driver provided the Chief with his driver's license which identified him as the registered owner, Keith Leak.

The defendant advised Chief Gallimore that he was texting and thus did not need any assistance. Under the majority's reading of *Rodriguez*, any further investigative activity is prohibited as an impermissible seizure and violates the Fourth Amendment. I do not read *Rodriguez* so narrowly.

In this case, once defendant provided Chief Gallimore with his driver's license, the officer returned to his patrol car, checked to see if Mr. Leak had any outstanding warrants or was carrying insurance as required by law. The computer check showed the license was valid but there was an outstanding 2007 warrant and defendant was asked to exit the vehicle whereupon defendant informed Chief Gallimore that he had a loaded pistol in his pants pocket. Based on his status as a convicted felon defendant was eventually indicted on that charge.

I recognize that *Rodriguez* involved a traffic stop where there was an actual traffic violation committed in the officer's presence while the encounter in this case began as an inquiry to see if the motorist needed assistance. The reality of traffic enforcement shows officers encounter many different circumstances along our highways. They may encounter abandoned vehicles, vandalized vehicles, occupied vehicles where the driver is ill or incapacitated, vehicles where the driver needs assistance due to a mechanical failure, or recently crashed vehicles. In this case, no one disputes the fact that Chief Gallimore approached defendant's vehicle to see if assistance was required. Instead of holding that an officer may not conduct any investigation of a driver when the purpose of the approach is non-criminal such as here where the motive was to offer assistance, I would hold that regardless of why an officer approaches a vehicle (assuming it is for a legitimate reason), that the officer can perform the routine functions we associate with a traffic stop for a traffic violation. The majority would leave police officer's having two standards for investigative activity, one when a violation occurs, another when the approach to a vehicle is to see if assistance is needed. I do not believe that is what *Rodriguez* requires.

Specifically, the majority opinion states "Defendant argues that Chief Gallimore's conduct in taking defendant's license constituted a

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seizure that was not justified in the absence of reasonable suspicion of criminal activity. We agree and hold . . . defendant was seized when Chief Gallimore took his license and registration back to the patrol car for investigation.” I would hold that so long as an officer’s approach to a vehicle is for a valid purpose, including the possibility of rendering assistance, he is able to take the same routine steps that he would be allowed to do if he had observed an actual traffic violation. In fact, the colloquy between the prosecutor and Chief Gallimore quoted in the majority opinion articulates why such action is reasonable. The majority does not dispute that an officer has the right to ask the operator of a vehicle to identify himself. Once the driver is so identified, Chief Gallimore did not actually need the physical license to run defendant’s name, he undoubtedly could have done that without the license in front of him, although it is certainly an easier task to perform if one has the license nearby. Thus I believe that the act of checking a driver’s license is permissible, so long as the approach to the vehicle is for a valid purpose such as offering assistance. The majority concedes an officer can ask the driver to identify himself. I maintain an officer has the right to ask the driver to identify himself to ensure that the driver is the owner and the right to check that driver’s record for insurance or warrants. In other words, I believe that in the area of traffic enforcement and management, the reduced expectations of privacy in the operation of vehicles, that the police in any such encounter do not run afoul of the Fourth Amendment when they take the actions Chief Gallimore took here.

I find support for this view in the *Rodriguez* opinion itself. In *Rodriguez*, Justice Ginsburg recognized that certain actions officers take during traffic stops are warranted on the basis of officer safety and that this doctrine provides an independent ground to make a driver’s license check citing to *United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001). *Rodriguez*, 575 U.S. at \_\_. Justice Ginsburg then went on to recognize the actions an officer is authorized to take during a traffic stop where an officer is determining whether or not to issue a ticket, saying:

Beyond determining whether to issue a traffic ticket an officer’s mission includes “ordinary inquiries incident to [the traffic] stop.” Typically such inquiries involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.

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*Rodriguez*, 575 U.S. at \_\_\_ (internal citations omitted) (alteration in original) (emphasis added).

I would merely hold that when the traffic encounter is for the purpose of rendering assistance the officer may still verify that the car is properly registered, that the operator is the registered owner or is using the vehicle with permission and that the driver has a valid license and no outstanding warrants just as was done here. While *Rodriguez* was a traffic violation case, officers encounter motorists on the highways and byways in a variety of circumstances and I would hold that an officer who approaches a vehicle where the operator has parked his car in such a way as to raise a question as to whether he needs aid has the same right to conduct the limited checks we associate with stops for traffic violations. Therefore I would uphold defendant's conviction and affirm the denial of the motion to suppress.

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STATE OF NORTH CAROLINA  
v.  
ADOLFO REYES MALDONADO

No. COA14-1119

Filed 2 June 2015

**1. Firearms and Other Weapons—discharging a firearm into occupied property—diminished capacity instruction**

The trial court did not err by declining to give a diminished capacity instruction on defendant's charge for discharging a firearm into occupied property. The "willful" element did not subject the offense to the diminished capacity instruction.

**2. Homicide—felony murder—discharging a firearm into occupied property—single transaction**

In defendant's trial resulting in his conviction for felony murder, the trial court did not err by allowing the offense of discharging a firearm into occupied property to serve as the predicate felony for the felony murder conviction. The shooting and the resulting death occurred in a time frame in which they could be perceived as a single transaction.

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**3. Homicide—felony murder—jury instruction—no prejudicial error**

In defendant’s trial resulting in his conviction for felony murder, there was no prejudicial error in the trial court’s failure to instruct the jury on voluntary manslaughter as a lesser-included offense of first-degree murder by premeditation and deliberation. The jury found defendant not guilty of first-degree murder by premeditation and deliberation.

Appeal by Defendant from judgment entered 19 December 2013 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 2 March 2015.

*Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.*

*Mark Montgomery for Defendant.*

McGEE, Chief Judge.

Adolfo Reyes Maldonado (“Defendant”) appeals from his conviction of felony murder, with the predicate felony being discharging a firearm into occupied property. Defendant contends that the trial court erred (1) by not instructing the jury on diminished capacity on the charge of discharging a firearm into occupied property, (2) by instructing the jury that discharging a firearm into occupied property could serve as the predicate felony to Defendant’s felony murder conviction, and (3) by not submitting voluntary manslaughter to the jury as a lesser-included offense of first-degree murder by premeditation and deliberation. We find no error as to Defendant’s first two challenges and no prejudicial error as to the third.

### I. Background

Defendant and his estranged wife, Elizabeth Reyes (“Ms. Reyes”), had a tumultuous relationship. The police regularly were called to intervene in their personal disputes. Defendant sought medical treatment for serious knife wounds inflicted by Ms. Reyes on multiple occasions. Defendant maintains that Ms. Reyes – who was approximately six feet tall and almost three hundred pounds, who was diagnosed with bipolar disorder, and who had a history of alcohol dependency, anger issues, and paranoid ideation – was abusive throughout their relationship. Officer Steve Little (“Officer Little”), who was “routinely involved in domestic

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calls” between Ms. Reyes and Defendant, testified that he never saw Ms. Reyes with anything more than superficial injuries and that she always appeared to be the aggressor in her altercations with Defendant.

However, the State also elicited testimony from Officer Little that, during a previous interview, he stated that both Ms. Reyes and Defendant drank to excess and Ms. Reyes “beat him as much as he beat her[.]” Additionally, Christy Metzger (“Ms. Metzger”), an investigator for the Johnston County Department of Social Services, testified about an interview she had with Ms. Reyes on 10 May 2010, during which Ms. Reyes asserted that Defendant was controlling and would not let her have money, friends, a phone, a car, or a job when they were together.

The couple separated in May 2010, and Ms. Reyes moved in with her mother and stepfather, Sandra and John Benjamin Croft (“Ms. Croft” and “Mr. Croft”), along with the eleven-month-old son (“the Child”) of Ms. Reyes and Defendant. Thereafter, according to Ms. Metzger, Defendant began calling Ms. Reyes upwards of ten times a day while Ms. Reyes was at work, and sometimes at night. Ms. Reyes and Defendant were engaged in an ongoing child support dispute.

Defendant went to Mr. and Ms. Croft’s house (“the house”) on 1 July 2010. A child support hearing was scheduled for the following day. Defendant argued with Ms. Reyes and Mr. Croft in front of the house. Defendant then went to his truck, loaded his shotgun, and returned to the house. Ms. Reyes had gone inside the house. Mr. Croft testified he ran into the house, closed the front door, and said to Ms. Reyes, who was in the kitchen with the Child: “Your old man’s trying to kill us. Run.”

Defendant shot the front door and then entered the house. Mr. Croft ran into the master bedroom and, as he was closing the bedroom door, was shot by Defendant. Mr. Croft then jumped out a window and ran to a neighbor’s house for help. There was a subsequent confrontation inside the house between Defendant and Ms. Reyes that resulted in Ms. Reyes’ death and Defendant being non-critically shot in the face. Ms. Reyes suffered gunshots to her upper left buttock, upper right chest, and the back of her head. Defendant called 911 and was taken into custody when the police arrived.

At trial, Defendant presented a number of character witnesses who testified to his peaceful nature. Defendant also presented the expert testimony of Dr. Ginger Calloway (“Dr. Calloway”). Dr. Calloway testified that, on the night of Ms. Reyes’ death, Defendant was suffering from post-traumatic stress disorder (“PTSD”) as the victim of ongoing abuse from Ms. Reyes.

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During the charge conference, Defendant requested diminished capacity instructions on the charges of first-degree murder by premeditation and deliberation of Ms. Reyes, assault with a deadly weapon with intent to kill inflicting serious injury on Mr. Croft, attempted murder of Mr. Croft, felony breaking and entering, and discharging a firearm into occupied property. The trial court ruled that it would instruct on diminished capacity only on the charges of first-degree murder by premeditation and deliberation of Ms. Reyes, attempted murder of Mr. Croft, and felony breaking and entering. However, the trial court ruled that it would not give diminished capacity instructions on discharging a firearm into occupied property or assault with a deadly weapon inflicting serious injury on Mr. Croft. Defendant also argued that discharging a firearm into occupied property could not serve as a predicate felony to felony murder, on the grounds that there was an insufficient relationship between Ms. Reyes' death and Defendant's shooting into the house. The trial court disagreed.

The jury found Defendant guilty of misdemeanor breaking and entering and felony murder, with the predicate felony being discharging a firearm into occupied property.<sup>1</sup> Defendant appeals from his conviction for felony murder.

## II. Standard of Review

This Court reviews challenges to the trial court's decisions regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

## III. Diminished Capacity

**[1]** Defendant first challenges the trial court's instructions on the charge of "willfully" discharging a firearm into occupied property. Specifically, Defendant argues that the "willful" element of this offense necessarily was subject to a diminished capacity instruction at trial. *See generally* N.C. Gen. Stat. § 14-34.1 (2013). We disagree.

"Diminished capacity is a means of negating . . . specific intent" by a defendant. *State v. Roache*, 358 N.C. 243, 282, 595 S.E.2d 381, 407 (2004) (citation and internal quotation marks omitted). It is not a defense to

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1. The jury also found Defendant guilty of discharging a firearm into occupied property, but the trial court arrested judgment on that conviction. *See State v. Best*, 196 N.C. App. 220, 229, 674 S.E.2d 467, 474 (2009) ("Under the Double Jeopardy Clause, a defendant may not be punished both for felony murder and for the underlying, predicate felony, even in a single prosecution." (citation and internal quotation marks omitted)).

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general intent crimes. *State v. Childers*, 154 N.C. App. 375, 382, 572 S.E.2d 207, 212 (2002). “[S]pecific-intent crimes are crimes which have as an essential element a specific intent that a *result* be reached, while [g]eneral-intent crimes are crimes which only require the doing of some act.” *State v. Barnes*, \_\_ N.C. App. \_\_, \_\_, 747 S.E.2d 912, 916 (2013), *aff’d per curiam*, 367 N.C. 453, 756 S.E.2d 38 (2014) (emphasis added). The North Carolina Supreme Court also has recognized the existence of “malice type” crimes, which are “neither [ ] specific nor [ ] general intent offense[s] but require[ ] *willful* and malicious conduct” by a defendant. *State v. Jones*, 353 N.C. 159, 167, 538 S.E.2d 917, 924 (2000) (internal quotation marks omitted). Our caselaw has interpreted “willful” to mean “the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law. [It] means something more than an intention to commit the offense.” *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citations and internal quotation marks omitted).

N.C.G.S. § 14-34.1, which defines discharging a firearm into occupied property, provides that

[a]ny person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

Because general intent crimes “only require the doing of some act” proscribed by law, *Barnes*, \_\_ N.C. App. at \_\_, 747 S.E.2d at 916, whereas the willful conduct in N.C.G.S. § 14-34.1 requires “something more than an intention to commit” such an act, *see Ramos*, 363 N.C. at 355, 678 S.E.2d at 226, Defendant urges this Court to view discharging a firearm into occupied property as neither a specific nor general intent crime, but rather as a “malice type” crime. Defendant further urges this Court to require diminished capacity instructions on “malice type” crimes when evidence of diminished capacity has been presented at trial.

Defendant’s argument fails on both fronts. His brief correctly notes that our North Carolina Supreme Court recognized the existence of “malice type” crimes in *Jones*, 353 N.C. at 167, 538 S.E.2d at 924. However, we are also bound by *State v. Byrd*, 132 N.C. App. 220, 222, 510 S.E.2d 410, 412 (1999), which held that “discharging a firearm into occupied property is a general intent crime[.]” *See In re Civil Penalty*, 324 N.C. 373,



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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.”).

Even if we were to entertain the contention, *arguendo*, that our Supreme Court’s post-*Byrd* recognition of “malice type” crimes in *Jones* might prompt this Court to view discharging a firearm into occupied property as a “malice type” crime, the end result for Defendant would be no different. Defendant has provided no authority holding that “malice type” crimes are subject to diminished capacity instructions.<sup>2</sup> Moreover, in other crimes requiring malicious conduct, such as second-degree murder, see N.C. Gen. Stat. § 14-17(b)(1) (2013), it is well-established that “[d]iminished capacity that does not amount to legal insanity is not . . . a defense to the element of malice.” See *State v. West*, 180 N.C. App. 664, 668, 638 S.E.2d 508, 511 (2006) (citing *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997)). As such, to the extent that there may be a meaningful distinction between general intent and “malice type” crimes, this distinction does not seem to come into play in the realm of diminished capacity instructions. “Diminished capacity is a means of negating . . . specific intent” only. See *Roache*, 358 N.C. at 282, 595 S.E.2d at 407. Therefore, the trial court did not err by declining to give a diminished capacity instruction on the charge of discharging a firearm into occupied property.<sup>3</sup>

#### IV. “Interrelationship” Between the Predicate Felony and Homicide

**[2]** Defendant challenges the use of discharging a firearm into occupied property as the predicate felony to his felony murder conviction.

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2. Defendant does cite *State v. Gunn*, 24 N.C. App. 561, 211 S.E.2d 508 (1975), for the contention that diminished capacity can negate the willfulness requirement of N.C.G.S. § 14-34.1. In *Gunn*, the trial court instructed the jury that discharging a firearm into occupied property was a specific intent crime. *Id.* at 563, 211 S.E.2d at 510. The jury still found the *Gunn* defendant guilty of this offense. *Id.* On appeal, this Court did not endorse the trial court’s classification of discharging a firearm into occupied property as a specific intent crime, but rather it found that there was no prejudicial error because the specific intent instruction only made the State overcome an even higher burden at trial. *Id.*

3. Also, contrary to Defendant’s position, it is not the case that “eliminat[ing] diminished capacity as a defense” here transformed discharging a firearm into occupied property into a strict liability offense by “effectively negat[ing] the statutory requirement that the discharge be willful [or] wanton.” The act that is proscribed by N.C.G.S. § 14-34.1 is not simply discharging a firearm into occupied property. It is “*willfully or wantonly*” discharging a firearm into occupied property, N.C.G.S. § 14-34.1 (emphasis added), and the State had the burden of proving this at trial.

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Specifically, Defendant argues that there was an insufficient “interrelationship” between the death of Ms. Reyes and Defendant’s shooting into the house to support his felony murder conviction in the present case. We disagree.

The elements of felony murder are (1) that a defendant, or someone with whom the defendant was acting in concert, committed or attempted to commit a predicate felony under N.C. Gen. Stat. § 14-17(a) (2013);<sup>4</sup> (2) that a killing occurred “in the perpetration or attempted perpetration” of that felony; and (3) that the killing was caused by the defendant or a co-felon. *See State v. Williams*, 185 N.C. App. 318, 329, 332, 648 S.E.2d 896, 904, 906 (2007). Regarding the second element, that the killing must occur “in the perpetration or attempted perpetration” of a predicate felony, *id.*, “[t]he law does not require that the homicide be committed to escape or to complete the underlying felony.” *State v. Terry*, 337 N.C. 615, 622, 447 S.E.2d 720, 723 (1994). Indeed, “there need not be a ‘causal relationship’ between the underlying felony and the homicide, only an ‘interrelationship.’” *Id.* at 622, 447 S.E.2d at 724. “[A]ll that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction.” *State v. Moore*, 339 N.C. 456, 462, 451 S.E.2d 232, 234 (1994) (citation and internal quotation marks omitted). Otherwise, there must be a “break in the chain of events leading from the initial felony to the act causing death” in order to render the felony murder rule inapplicable in a particular case. *Cf. id.* at 461, 451 S.E.2d at 234.

In *Moore*, the defendant assaulted his girlfriend at the home of her sister and her sister’s boyfriend. *Id.* at 460, 451 S.E.2d at 233. The defendant left the sister’s house but returned later in the day. *Id.* After the defendant’s girlfriend repeatedly refused to speak to him, the defendant began shooting into the sister’s house. *Id.* This prompted the sister’s boyfriend to go outside, confront the defendant, and exchange gunfire. *Id.* The sister’s boyfriend returned to the house – with serious gunshot wounds – and reloaded his gun, but he was unable to go back outside because the defendant continued to shoot into the house until police

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4. The predicate felonies under this section are “any arson, rape or a sex offense, robbery, kidnapping, burglary, or *other felony committed or attempted with the use of a deadly weapon*[.]” *Id.* (emphasis added). In order to support a felony murder conviction, these predicate felonies also must be committed with “a level of intent greater than culpable negligence,” regardless of “[w]hether [they are] ‘general intent,’ ‘specific intent,’ or ‘malice [type]’ crimes[.]” *Jones*, 353 N.C. at 167, 538 S.E.2d at 924. In the present case, the jury found that Defendant acted willfully, which “means [he acted with] something more than an intention to commit the offense.” *See Ramos*, 363 N.C. at 355, 678 S.E.2d at 226.

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arrived. *Id.* at 460, 451 S.E.2d at 234. The sister's boyfriend later died from his injuries, and the defendant was found guilty of felony murder at trial; the predicate felony was discharging a firearm into occupied property. *Id.* at 459, 451 S.E.2d at 233.

On appeal, the *Moore* defendant argued that the sister's boyfriend's going outside to confront him constituted a break in the chain of events between the defendant's firing into the house and the death of the sister's boyfriend. *Id.* at 461, 451 S.E.2d at 234. However, our Supreme Court held that the requirement under N.C.G.S. § 14-17(a), that the killing be committed in the perpetration of a predicate felony was "sufficiently broad to include the entire series of relevant events beginning with the original shooting into the house and continuing until the sirens were heard and the shooting ceased." *Id.* at 462, 451 S.E.2d at 235.

The present case is distinguishable from *Moore* to an extent, in that the *Moore* defendant shot into the house before and after his direct confrontation with the sister's boyfriend. *See id.* at 460, 451 S.E.2d at 233–34. In the present case, Defendant stopped shooting *into* the house once he forced his way through the front door and continued shooting *inside* the house. Defendant also argues that, once he was inside the house, Ms. Reyes attempted to take the gun from him and that this confrontation by Ms. Reyes constituted a break in the chain of events that led to her death. Even taking Defendant's account of the events as true, just as the *Moore* Court held that the sister's boyfriend "did not break the chain of events by going outside to defend his home," *id.* at 462, 451 S.E.2d at 235, Ms. Reyes did not break the chain of events by defending herself inside her home after Defendant continued his assault indoors. Therefore, Defendant's shooting into the house and Ms. Reyes' subsequent death inside the house "occur[red] in a time frame that can be perceived as a single transaction." *See id.* at 462, 451 S.E.2d at 234. The trial court did not err by allowing the discharging of a firearm into occupied property to serve as the predicate felony to Defendant's felony murder conviction.

#### V. The Trial Court Not Instructing the Jury On Voluntary Manslaughter

**[3]** Defendant contends the trial court erred by not providing the jury with an instruction on voluntary manslaughter as a lesser-included offense of first-degree murder by premeditation and deliberation. Specifically, Defendant argues that the jury should have received an instruction on voluntary manslaughter based on the theory of imperfect self-defense. We find no prejudicial error by the trial court.

A defendant is entitled to a charge on a lesser-included offense when there is some evidence in the record

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supporting the lesser offense. Conversely, [w]here the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser[-] included offense is required.

*State v. James*, 342 N.C. 589, 594, 466 S.E.2d 710, 713-14 (1996) (citations and internal quotation marks omitted). An instruction of voluntary manslaughter, based on the theory of imperfect self-defense, is appropriate where there is evidence that a defendant (1) believed it was necessary to kill the deceased in order to save himself from death or great bodily harm; (2) the belief was reasonable; and (3) although initially acting without murderous intent, the defendant was the original aggressor in the circumstance. *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 573 (1981).

In the present case, Defendant points out that the jury acquitted him of all charges requiring specific intent. This included convicting Defendant of misdemeanor breaking and entering, but acquitting Defendant of felony breaking and entering, which had the added element of entering the house with felonious intent. See generally N.C. Gen. Stat. § 14-54 (2013). Thus, Defendant maintains that the jury could reasonably have concluded that, although he was the original aggressor, Defendant entered the house without the felonious intent to seriously injure anyone inside,<sup>5</sup> and that it became reasonably necessary for him to defend himself – lethally – during the subsequent confrontation with Ms. Reyes inside the house. Assuming *arguendo* that this would support an instruction on voluntary manslaughter, the trial court's failure to give such an instruction did not amount to prejudicial error.

In *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976), the North Carolina Supreme Court held

[i]t is a well[-]established rule that when the law and evidence justify the use of the felony[ ]murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it.

Following *Swift*, “[t]he application of this standard . . . resulted in divergent lines of cases in the context of felony murder.” *State v. Millsaps*,

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5. When the jury was instructed on felony breaking and entering, the only felonious intent the jury was instructed to consider was whether Defendant intended to commit an assault with a deadly weapon inflicting serious injury when he entered the house.

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356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citations omitted). For example,

[i]n one group of cases, the Court has simply found that, applying the applicable evidentiary standard, the evidence did not support submission of a lesser-included offense. Another group of cases suggests that if any evidence is presented to negate first-degree murder, then the jury must be instructed on the lesser-included offenses supported by the evidence. Yet another group of cases holds or suggests *in dicta* that if the evidence supports a conviction based on felony murder, the failure to instruct on [lesser-included offenses] is not error or not prejudicial error.

*Id.* After examining each of these lines of cases, our Supreme Court in *Millsaps* articulated the following principles regarding felony murder.

(i) If the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder, the trial court must instruct on all lesser-included offenses supported by the evidence whether the State tries the case on both premeditation and deliberation and felony murder or only on felony murder. *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555. (ii) If the State tries the case on both premeditation and deliberation and felony murder and the evidence supports not only first-degree premeditated and deliberate murder but also second-degree murder, or another lesser offense included within premeditated and deliberate murder, the trial court must submit the lesser-included offenses within premeditated and deliberate murder irrespective of whether all the evidence would support felony murder. *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178; *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68; *see also State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (holding that the failure to submit second-degree murder and involuntary manslaughter was not prejudicial error where the trial court submitted premeditation and deliberation, voluntary manslaughter, and felony murder; and the jury did not find premeditation and deliberation). (iii) If the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder, the trial court is not required to instruct on the lesser offenses included within premeditated and deliberate murder if the case is

## STATE v. SURRETT

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submitted on felony murder only. *See State v. Covington*, 290 N.C. 313, 226 S.E.2d 629.

*Id.* at 565, 572 S.E.2d at 773-74. Pursuant to the second principle in *Millsaps*, the trial court erred if it submitted both felony murder and murder by premeditation and deliberation to the jury but did not instruct on voluntary manslaughter, *assuming arguendo* it was supported by the evidence. *See id.* However, because “[D]efendant was found guilty of murder in the first degree on the theory of felony murder and was found not guilty on the charge of first-degree murder [by] premeditation and deliberation, no prejudice resulted from the court’s failure to charge on voluntary manslaughter.” *See Wall*, 304 N.C. at 621, 286 S.E.2d at 75.<sup>6</sup>

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges BRYANT and STEELMAN concur.

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STATE OF NORTH CAROLINA

v.

DEXTER LEON SURRETT, DEFENDANT

No. COA14-1150

Filed 2 June 2015

**1. Sexual Offenders—registration—actual release date and not paper release date—consecutive prison terms calculated as single term**

The trial court did not err by failing to grant defendant’s motion to dismiss on the basis that the State failed to prove that he was required to register as a sex offender. It is defendant’s actual release date of 24 January 1999 that controls the sentencing outcome of the instant case, not the “on paper” release date of 24 September 1995. When a defendant is sentenced to consecutive prison terms, the sentences are to be calculated as a single term and the effective release date for purposes of parole eligibility and the like is the date on which a defendant is physically released from incarceration.

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6. Defendant also contends that he was entitled to an instruction on voluntary manslaughter under a “heat of passion” theory. For similar reasons, we find no prejudicial error by the trial court.

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**2. Sexual Offenders—registration—falsification of information—executed verification form required**

The trial court erred by failing to grant defendant's motion to dismiss on the basis that he falsified information for purposes of being charged with violating N.C.G.S. § 14-208.11. There was no evidence presented by the State that he willfully gave an address he knew to be false when he registered his address in Catawba County. The purpose of the statute cannot be extended to punish offenders for untruths they may tell law enforcement. An executed verification form is required before one can be charged with falsifying or forging the document.

Appeal by defendant from judgment entered 29 April 2014 by Judge Yvonne Mims Evans in Catawba County Superior Court. Heard in the Court of Appeals 7 April 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Laura Askins, for the State.*

*James W. Carter for defendant.*

ELMORE, Judge.

On 7 January 2013, Dexter Leon Surratt, Jr. (defendant) was indicted in 13 CRS 01017 for failing to change his address as a sex offender pursuant to N.C. Gen. Stat. § 14-208.11. On 20 May 2013, defendant was indicted in 13 CRS 51481 for falsification of information under N.C. Gen. Stat. § 14-208.11. Following a jury trial, defendant was found guilty of both charges on 29 April 2014. The trial court consolidated the offenses for sentencing and imposed an active sentence with a minimum term of eighteen months and a maximum term of thirty-one months imprisonment. On appeal, defendant argues that the trial court erred in failing to grant his motions to dismiss on the basis that the State failed to prove that (1) he was required to register as a sex offender, and (2) that he falsified information for purposes of being charged with violating N.C. Gen. Stat. § 14-208.11. After careful consideration, we hold that the trial court did not err in failing to grant defendant's motion to dismiss based on his contention that he was not required to register as a sex offender. However, we agree with defendant that the trial court erred in denying his motion to dismiss the charge of falsifying information. Accordingly, we vacate defendant's convictions, in part, and remand for a new sentencing hearing.

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**II. Background**

On 14 June 1994, defendant was convicted of the sexual offense of taking indecent liberties with a child. Defendant was sentenced to a three-year active sentence under the Fair Sentencing Act. After his release, defendant was required to register his address in the sheriff's office in the county in which he lived in order to be included in the sex offender registry. According to the sex offender registration records, defendant first registered as a sex offender on 24 January 1999.

On 7 September 2012, defendant registered a change in his address from 238 32nd Street Southwest to 1470 14th Avenue Northeast in Hickory (the address)—his father's residence. The SBI sent a certified verification letter to the address and requested that the postal service return it to the Catawba County Sheriff's Office if it could not be delivered. The letter was returned "undeliverable." Law enforcement made several unsuccessful attempts to contact defendant at the address. Specifically, on 17 November 2012, Officer James Mathis of the Hickory Police Department went to the address and spoke with defendant's sister, Tiara Rippy. Ms. Rippy informed Officer Mathis that defendant and his father had had an argument a month prior and that defendant's father banished defendant from the residence. Ms. Rippy testified that she visited the residence two or three times per week and on weekends and defendant was never present in the residence after the argument with his father.

Lieutenant Lynn Baker testified that he encountered defendant at the Sheriff's Office in February 2013. At that time, defendant maintained that he was residing at 1470 14th Avenue Northeast and claimed that he was mistakenly charged with failing to register a change in his address. Lieutenant Baker stated that defendant did not execute an address verification form, or any other forms, during the encounter.

Between 11 March and 15 March 2013, Deputy Tom Scarborough attempted to make contact with defendant at 147 14th Avenue Northeast. Upon visiting the address, Deputy Scarborough encountered defendant's father, Mr. Stanley Johnson. Deputy Scarborough provided Mr. Johnson with an address verification form. Mr. Johnson signed the form, marking that defendant did not reside at the residence. Mr. Johnson testified that he lived alone, but he admitted that defendant stayed with him for several weeks. Mr. Johnson recalled arguing with defendant and asking defendant to vacate the residence.

Defendant testified on his own behalf at trial. Defendant alleged that he moved into his father's residence in September 2012, at which



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time he registered 1470 14th Avenue Northeast as his address with the Sheriff's Office. Defendant stated that he continued to reside at that address with his father until March 2013. Defendant acknowledged that he and his father had argued, but he denied leaving the residence and residing elsewhere.

**II. Analysis****A. Sex Offender Registration Requirements**

[1] Defendant argues that the trial court erred in failing to grant his motion to dismiss because the State presented insufficient evidence that defendant was required to register as a sex offender. We disagree.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “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. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993).

In 1995, North Carolina enacted the Amy Jackson Law, N.C. Gen. Stat. § 14–208.5 (2003) *et seq.* (“Article 27A”), requiring individuals convicted of certain sex-related offenses to register their addresses and other information with law enforcement agencies. The stated purpose of the law [was] to curtail recidivism because sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and . . . protection of the public from sex offenders is of paramount governmental interest.

*State v. White*, 162 N.C. App. 183, 185, 590 S.E.2d 448, 450 (2004) (quoting N.C. Gen. Stat. § 14–208.5).

Article 27A applied to all offenders convicted of a sex offense on or after 1 January 1996 and to all offenders who were presently serving an active sentence. *Id. see also* 1995 N.C. Sess. Laws ch. 545, § 3. North Carolina codified the requirements for registration under N.C. Gen. Stat. § 14-208.7 (1996), which provided that a current resident of North Carolina must register within 10 days of release from a penal institution and maintain that registration for 10 years following his or her release from a penal institution. *Id.* (emphasis added). If no active term of imprisonment was imposed, registration was to be maintained for a period of 10 years following each conviction for a reportable offense. *Id.*

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The registration law was revised in 2006 to require that registration on the sex offender registry be maintained for a period of 10 years following the *date of the initial county registration*. N.C. Gen. Stat. § 14-208.7(a) (2006). This statute became effective on 1 December 2006. In *In re Hamilton*, this Court clarified that the 2006 amendment “plainly and explicitly” applied retroactively to those offenders presently serving time for a sexual offense. 220 N.C. App. 350, 355, 725 S.E.2d 393, 397 (2012) This Court held:

The General Assembly did not explicitly state that this amendment was to apply retroactively to persons already on the registry. However, reading section 14–208.7 *in pari materia* with section 14–208.12A, we must construe the abolition of the automatic termination provision as applying to persons for whom the period of registration would terminate on or after 1 December 2006.

*Id.* at 355-56, 725 S.E.2d at 397.

In 2008, the registration law was amended once more. The revision increased the registration period from ten to thirty years following the date of initial county registration, unless the defendant, after ten years of registration, successfully petitioned the court to shorten his or her registration period. N.C. Gen. Stat. § 14-208.7 (2008) as amended by 2008 N.C. Sess. Laws ch. 117 §. 8.

Here, defendant was convicted of failing to change his address as a sex offender under N.C Gen. Stat § 14.208.11. This charge stemmed from defendant’s 14 June 1994 conviction of taking indecent liberties with a child—a reportable offense. On appeal, defendant notes that the Amy Jackson Law was not in effect when defendant was convicted of the indecent liberties charge, and he argues that the State presented insufficient evidence at trial that he was required to register a change in his address on the basis that the sex offender registration program did not apply to him. More specifically, defendant contends that the State failed to prove that defendant was released from prison for a reportable offense on or after 1 January 1996.

Defendant is correct in that the record on appeal is devoid of defendant’s release date for the June 1994 indecent liberties conviction. Defendant was sentenced to three years imprisonment for the offense, but the record contains only the date on which defendant first registered as a sex offender, which was 24 January 1999. However, the fact that the release date is not part of the record does not automatically warrant

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the conclusion that defendant was not required to register when he was indicted in January 2013 for failing to change his address under N.C. Gen. Stat. § 14A-208.11.

Pursuant to the North Carolina Rules of Evidence, Rule 201, this Court elects to take judicial notice of defendant's release date for the indecent liberties conviction, which was 24 September 1995. We also take judicial notice of the fact that defendant was not actually released from incarceration on 24 September 1995. This date was merely defendant's "on paper" release date or "paper parole" date. Defendant remained incarcerated after being "released" from the indecent liberties conviction in order to serve a consecutive sentence resulting from a conviction for committing a crime against nature. Defendant was not physically released from prison and placed on parole until 24 January 1999. Again, the record shows that it was on this date that defendant first registered as a sex offender.

Upon review, this Court holds that it is defendant's actual release date of 24 January 1999 that controls the sentencing outcome of the instant case, not the "on paper" release date of 24 September 1995. In making such a determination, we look to N.C. Gen. Stat. § 15A-1354(b) (2013), which provides: "In determining the effect of consecutive sentences . . . the Division of Adult Correction of the Department of Public Safety must treat the defendant as though he has been committed for a single term[.]" ; *see also Robbins v. Freeman*, 127 N.C. App. 162, 164-65, 487 S.E.2d 771, 773, *review allowed, writ allowed*, 347 N.C. 270, 493 S.E.2d 746 (1997) *and aff'd*, 347 N.C. 664, 496 S.E.2d 375 (1998) (concluding that under N.C. Gen. Stat. § 15A-1354, an inmate serving consecutive sentences shall have the date of his parole eligibility calculated as if the inmate were serving a single term). Accordingly, when a defendant is sentenced to consecutive prison terms, the sentences are to be calculated as a single term and the effective release date for purposes of parole eligibility and the like is the date on which a defendant is physically released from incarceration.

In this case, the Amy Jackson Law was applicable to defendant because it took effect in January 1996 and applied to offenders who were then serving time for a reportable sexual offense. Defendant remained incarcerated until January 1999. Importantly, defendant was required to register as a sex offender when the 2008 amendment was passed. Again, the 2008 amendment increased the registration period from ten to thirty years following the date of initial county registration, unless after ten years of registration, the offender successfully petitioned the court to shorten the registration period. Just as this Court held that the 2006 amendment

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applied retroactively to those offenders who were required to register when the amendment took effect, this Court is of the opinion that the 2008 amendment likewise applies retroactively. *See Hamilton, supra*. Accordingly, defendant was required to maintain his registration for a period of thirty years from the date of his initial county registration in 1999.

We recognize that the 2008 amendment affords a sex offender the opportunity to petition the trial court to shorten his or her registration period after meeting the ten-year registration requirement. As such, defendant could have been granted an early release from the sex offender registry had he taken advantage of his right to petition for a lesser registration period. He elected not to do so. Further, this Court has recently held that when a person claims that he or she was never required to register in the first place, as defendant argues here, a declaratory judgment action is a more appropriate way of obtaining a ruling upon the registration requirement. *In re Bunch*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 742 S.E.2d 596, 599, *review denied*, 747 S.E.2d 541 (2013). In lieu of bringing a declaratory judgment action, it is unlikely that an offender can successfully petition this Court to find that he or she was never required to register provided the State objects to such argument. *See id.* (cautioning those who “seek to terminate registration as a sex offender under N.C. Gen. Stat. § 14-208.12A, for any reason other than fulfillment of the ten years of registration and other requirements of N.C. Gen. Stat. § 14-208.12A in the future will probably not succeed if the State does raise any objection or argument in opposition to the request”).

Given this, defendant should have considered filing a declaratory judgment action to raise the issue that is now before us on appeal. As it stands, we hold that the trial court did not err in denying defendant’s motion to dismiss. Defendant was required to register a change in his address at the time he was indicted for the crime charged. We overrule defendant’s argument.

**B. Falsification of Information**

[2] Defendant argues that the trial court erred by denying his motion to dismiss the charge of submitting information under false pretenses to the sex offender registry where there was no evidence presented by the State that he willfully gave an address he knew to be false when he registered his address in Catawba County. We agree.

Defendant was charged with submitting information under false pretenses in violation of N.C. Gen. Stat. § 14-208.11(a)(4), which is a

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crime that is subject to the North Carolina's Sex Offender Registration Act. According to N.C. Gen. Stat. § 14-208.9A(a)(1), each year on the anniversary of the person's initial registration date, and again six months later, the Division of Criminal Information is required to send a nonforwardable verification form to the registrant at the last reported address to verify his or her address. N.C. Gen. Stat. § 14-208.9A(a)(1) (2013). The form must be signed and must indicate "[w]hether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address." N.C. Gen. Stat. § 14-208.9A. The statute defendant was charged with violating, N.C. Gen. Stat. § 14-208.11, also provides, in part, that:

A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:

...

(4) Forges or submits under false pretenses the information or verification notices required under this Article.

N.C. Gen. Stat. § 14-208.11(a)(4) (2013).

The issue before this Court is whether defendant's oral verification to law enforcement that he continued to reside at his registered address warranted a charge of forging or falsifying information. On appeal, defendant admits that he told Lieutenant Baker in their February 2013 encounter at the Sheriff's Office that he continued to reside at 1470 14th Avenue Northeast. However, as defendant never executed a verification during the meeting or at any other time, he contends that it was error for the State to charge him with falsifying information under N.C. Gen. Stat. § 14-208.9A(a)(4). More specifically, defendant argues, "[t]he information [defendant] verbally provided to Lt. Baker was not required. It was not a verification form nor was it information for a verification form. Therefore it could not have qualified as a verification notice 'required' under Article 27A."

Alternatively, the State's position is that defendant is guilty of the charged crime because he willfully made a false statement to Lieutenant Baker at the Sheriff's Office in February 2013—stating that he continued to reside at 1470 14th Avenue Northeast. On appeal, the State argues:

Defendant did not live at 1470 14th Avenue Northeast at the time that he verified his address to Lt. Baker. The false information he provided led Deputy Scarborough to attempt to contact Defendant at the address multiple

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times, eventually resulting in a verification form signed by Mr. Johnson saying that defendant did not live at that address. Therefore, . . . [d]efendant provided false information for a verification notice.

The evidence in the instant case shows that defendant met with Lieutenant Baker of the Catawba County Sheriff's Department in February 2013, several months after being charged with failing to register a change of address. According to Lieutenant Baker, defendant verbally informed Lieutenant Baker that defendant was living at the address he had registered in September 2012. However, defendant neither filled out an address verification form during the encounter nor did he otherwise indicate in writing that he continued to reside at his registered address.

On 15 March 2013, in an attempt to verify defendant's address, Deputy Scarborough went to the address in search of defendant. Mr. Johnson, defendant's father, was at the residence and informed Deputy Scarborough that defendant did not reside there. Mr. Johnson executed an address verification form indicating such. At no time during February or March 2013 did defendant himself execute the address verification form.

In *State v. Pressley*, this Court held that "[t]he only rational reading of N.C. Gen. Stat. § 14-208.11 is that it criminalizes the provision of false or misleading information on *forms* submitted pursuant to the Act—regardless of when these forms are submitted." \_\_\_ N.C. App. \_\_\_, \_\_\_, 762 S.E.2d 374, 377 (2014), *review denied*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 763 S.E.2d 382 (2014) (emphasis added). In the instant case, the State was unable to present any evidence that defendant provided false or misleading information on a verification form. In fact, Lieutenant Baker admitted at trial that he never requested that defendant execute the verification form. Thus, there is no indication that defendant ever executed a verification form—and, more importantly, no evidence that defendant forged or submitted under false pretenses the verification notice required by N.C. Gen. Stat. § 14-208.9A.

Should we rule in favor of the State, this Court would be extending the scope of N.C. Gen. Stat. § 14-208.9A beyond its intended purpose such that a defendant could be charged with falsifying or forging information merely by telling a lie to an officer about his current address. Again, the intent of the statute is to insure that officers possess complete and accurate information as to the addresses of registered sex offenders. We cannot extend the purpose of the statute to punish offenders for untruths they may tell law enforcement. An executed verification form is required before one can be charged with falsifying or forging the document. Accordingly, we hold that the trial court erred in denying

**WILNER v. CEDARS OF CHAPEL HILL, LLC**

[241 N.C. App. 389 (2015)]

defendant's motion to dismiss this charge based on the State's failure to prove that defendant submitted under false pretenses the verification notice required under Article 27A.

No error, in part; vacated and remanded, in part; new sentencing hearing.

Judges GEER and DILLON concur.

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JONATHAN WILNER, ET. AL., AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS  
v.  
CEDARS OF CHAPEL HILL, LLC, ET. AL., DEFENDANTS

No. COA14-380

Filed 2 June 2015

**1. Contracts—condominium residents—continuing care retirement community—not unconscionable—no violation of prohibition against transfer fees—Marketable Title Act**

The trial court erred by finding the membership fee and overhead payments in an agreement between condominium residents and a continuing care retirement community unenforceable. The provisions of the agreement were not unconscionable and did not violate the prohibition against transfer fees in Chapter 39A or the provisions of the Marketable Title Act, Chapter 47B of the North Carolina General Statutes.

**2. Contracts—fees—covenants running with land—traditional contract law**

Where plaintiffs agreed to the payment of fees in a contract, the trial court erred in holding them unenforceable pursuant to an analysis of covenants running with the land. Under traditional contract law, parties that agree to contracts are bound by them.

**3. Injunctions—failure to describe particularity—acts being enjoined**

The trial court erred in entering an injunction without describing with particularity the acts being enjoined. The order granting summary judgment and the injunction were remanded to the trial court for a trial by jury.

## WILNER v. CEDARS OF CHAPEL HILL, LLC

[241 N.C. App. 389 (2015)]

Appeal by defendants from order entered 10 January 2014 by Judge William R. Pittman in Orange County Superior Court. Heard in the Court of Appeals 20 November 2014.

*Ragsdale Liggett PLLC, by Benjamin R. Kuhn, Amie C. Sivon, and R. Michael Pipkin, for plaintiff-appellees.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., Jennifer K. Van Zant, and D.J. O'Brien III, for defendant-appellants.*

*Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, and Barringer & Sasser, LLP, by Brent D. Barringer and Robert H. Sasser, III, for amici curiae The Cypress of Charlotte and The Cypress of Raleigh.*

STEELMAN, Judge.

Where the provisions of an agreement between condominium residents and a continuing care retirement community were not unconscionable, and did not violate the prohibition against transfer fees in Chapter 39A of the North Carolina General Statutes, or the provisions of the Marketable Title Act, Chapter 47B of the North Carolina General Statutes, the trial court erred in finding the agreements unenforceable. Where plaintiffs agreed to the payment of fees in a contract, the trial court erred in holding them unenforceable pursuant to an analysis of covenants running with the land. The trial court erred in entering an injunction without describing with particularity the acts being enjoined.

### I. Factual and Procedural Background

The Cedars of Chapel Hill, LLC (the Cedars) is a continuing care retirement community (CCRC) located in Chapel Hill, North Carolina. Residents at the Cedars purchase individual condominium units within the community, and pay an additional membership fee. This fee is calculated as ten percent of the gross purchase price of a housing unit, and is paid at closing as part of the purchase price. If a resident inherits the unit or receives it as a gift, the resident pays the fee, calculated as ten percent of the unit's fair market value. If the unit is resold, the ten percent fee is deducted from the gross sales price and paid at closing. The payment of this fee is clearly set forth in the membership agreement. Membership entitles residents to access to the common property of the Cedars, including a clubhouse and health center. Residents who become



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incapable of independent living may move into the health center, and remain eligible to use the facilities for the remainder of their lives.

In addition to the initial membership fee, members make monthly payments to the Cedars Club (the Club), which cover the cost of various amenities. These monthly payments include a payment to the Cedars for overhead expenses, which is described in the membership agreement, disclosure statements, declaration, and bylaws of the condominium association.

On 29 June 2011, Jonathan Wilner and Diane Wilner filed this lawsuit seeking: (1) a declaratory judgment that the covenants requiring membership and a membership fee, and requiring payment of an overhead fee, do not run with the land, and are therefore unenforceable; (2) a declaratory judgment that the preliminary membership fee is a “transfer fee” prohibited under N.C. Gen. Stat. § 39A-3; (3) a judgment that the preliminary membership fee violates the Marketable Title Act, N.C. Gen. Stat. § 47B; and (4) a temporary restraining order and preliminary injunction to prohibit the collection of the membership fee and overhead payment.<sup>1</sup> On 23 August 2011, the Wilners filed an amended complaint, joining as plaintiffs Edwin B. Hoel, Per Ole Hoel, and Linda Leekley (with Jonathan Wilner and Diane Wilner, plaintiffs). Plaintiffs’ amended complaint included additional factual allegations, and an additional cause of action for breach of the declaration and bylaws of the condominium association. On 7 November 2011, plaintiffs filed a motion for class certification. On 24 August 2012, the trial court granted plaintiffs’ motion to certify a class.<sup>2</sup>

The parties each filed motions for summary judgment. Plaintiffs’ summary judgment motion also included new language not previously used in their complaint, alleging that the membership agreements were unconscionable, and seeking a permanent injunction.

On 10 January 2014, the trial court granted summary judgment in favor of plaintiffs as to plaintiffs’ claims asserting that the covenants were unenforceable, that they violated Chapter 39A of the North Carolina General Statutes, and that they violated N.C. Gen. Stat. § 47B, the Real Property Marketable Title Act, and plaintiffs’ request for a temporary restraining order and preliminary injunction. The trial court

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1. Plaintiffs brought additional claims, but dismissed them two days before the hearing on their motion for class certification.

2. The class action is not the subject of this appeal.

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denied defendants' motions for summary judgment. This order did not address the unconscionability language contained in plaintiffs' motion for summary judgment.

Defendants appeal. On 28 January 2014, the trial court granted defendants' motion to stay judgment pending appeal, and certified its order to this Court pursuant to Rules 54 and 62 of the North Carolina Rules of Civil Procedure.

## II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

## III. Enforceability of Membership Agreement

[1] In their first argument, defendants contend that the trial court erred in ruling that the membership fee and overhead payments were unenforceable. We agree.

Because the order did not specify the basis by which the trial court held the fee and payments unenforceable, we examine in turn each of the various arguments made by plaintiffs at the summary judgment hearing before the trial court.

### A. Unconscionability

Plaintiffs alleged in their motion for summary judgment that the contracts they signed were unconscionable. In order to establish unconscionability, plaintiffs had to show both procedural unconscionability and substantive unconscionability. *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 80, 721 S.E.2d 712, 717 (2012).

Procedural unconscionability involves "bargaining naughtiness in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power." *Id.* at 81, 721 S.E.2d at 717 (quotations and citations omitted). Plaintiffs, raising this argument in their motion for summary judgment, contended that:

[T]he bargaining power between the Plaintiffs and Defendants . . . was unquestionably unequal in that the Plaintiffs as a whole are relatively unsophisticated in terms of the complex real estate and financial machinations

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at play while contracting with the Defendants who engaged counsel experienced in complex real property transactions and condominium governance to draft the covenant clauses requiring payment of the Challenged Fees, along with the numerous other documents such as Condo Bylaws, Membership Agreements, Purchase and Sale Agreements, Resale Purchase and Sale Agreements, Guarantees, Indemnities, each of which include detailed provisions as to the payment and collection of the Challenged Fees.

We find that these contentions were insufficient to establish procedural unconscionability. The contracts at issue were signed at a real estate closing, meaning that plaintiffs had counsel present. The contracts had detailed, bolded notes in the margins, explaining what each contract provision entailed. Plaintiffs did not allege that they were rushed through the process, nor that they were tricked or deprived of opportunity to speak with counsel or consider their options; plaintiffs alleged only that defendants were more sophisticated and drafted the contracts to their own benefit. This alone does not rise to the level of procedural unconscionability. We held in *Westmoreland* that “bargaining inequality alone generally cannot establish procedural unconscionability. Otherwise, procedural unconscionability would exist in most contracts between corporations and consumers.” *Id.*

Substantive unconscionability “refers to harsh, one-sided, and oppressive contract terms.” *Id.* at 84, 721 S.E.2d at 719 (quotations and citations omitted). The terms must be “so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.” *Brenner v. Little Red Sch. House Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981). Plaintiffs, in raising this issue, contended that the fees in question were “exorbitantly high,” that the documents at issue were “decidedly one-sided in favor of the Company,” and that plaintiffs lacked “ability . . . to negotiate any of the terms of the covenants and conditions in question in this case.” Plaintiffs further noted that the market for CCRCs in Chapel Hill is very small, leaving few alternatives.

Again, we find plaintiffs’ arguments unavailing. We recently held that “the times in which consumer contracts were anything other than adhesive are long past.” *Torrence v. Nationwide Budget Fin.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 753 S.E.2d 802, 812 (quoting *AT&T Mobility LLC v. Concepcion*, \_\_\_ U.S. \_\_\_, \_\_\_, 179 L.Ed.2d 742, 755 (2011)), *review denied, cert. denied*, \_\_\_ N.C. \_\_\_, 759 S.E.2d 88 (2014). The mere fact

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that plaintiffs lacked the ability to negotiate contract terms does not create substantive unconscionability, nor does the fact that defendants were among the only providers of CCRC facilities. We hold that plaintiffs did not adequately demonstrate unconscionability as a matter of law, and that a genuine issue of material fact existed as to unconscionability, which precluded summary judgment.

B. Transfer Fees

Plaintiffs also alleged that the membership fee constituted an unlawful transfer fee. Chapter 39A of the North Carolina General Statutes provides that a transfer fee violates North Carolina's public policy in favor of the alienability of real property "by impairing the marketability of title to the affected real property and constitutes an unreasonable restraint on alienation and transferability of property, regardless of the duration of the covenant or the amount of the transfer fee set forth in the covenant." N.C. Gen. Stat. § 39A-1(b) (2013). Chapter 39A defines a transfer fee as "a fee or charge payable upon the transfer of an interest in real property or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer." N.C. Gen. Stat. § 39A-2(2).

However, there exists an exception to the provisions in Chapter 39A. Chapter 58, Article 64 of the North Carolina General Statutes deals with CCRCs. According to N.C. Gen. Stat. § 58-64-85:

Facilities and providers licensed under this Article that also are subject to the provisions of the North Carolina Condominium Act under Chapter 47C of the General Statutes *shall not be subject to the provisions of Chapter 39A of the General Statutes*, provided that the facility's declaration of condominium does not require the payment of any fee or charge not otherwise provided for in a resident's contract for continuing care, or other separate contract for the provisions of membership or services.

N.C. Gen. Stat. § 58-64-85(b) (2013) (emphasis added). The specific provision of this statute overrules the general provision of Chapter 39A. Provided that the condominium declaration requires only fees outlined in other contracts signed by the resident, those fees are not barred by the provisions of Chapter 39A, even though they might otherwise be considered transfer fees.

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In the instant case, all fees, including the membership fee, were described in detail in contracts and agreements signed by all residents of the Cedars. Because the declaration required only those fees which were provided for in contracts signed by the residents, they are exempt from the provisions of Chapter 39A prohibiting transfer fees.

C. Marketable Title Act

Plaintiffs also alleged that the agreements at issue violate the Marketable Title Act. Chapter 47B of the North Carolina General Statutes codifies North Carolina policy in favor of quieting title when a person can demonstrate 30 years of continuous ownership of real property. *See* N.C. Gen. Stat. § 47B-1 *et seq* (2013).

The Marketable Title Act deals with actions to quiet title. In the instant case, there is no issue as to who owns the various units and common elements of the Cedars CCRC; these issues of ownership are explicitly detailed in the ownership agreements signed by the parties. The Act does not authorize a cause of action where, as here, parties are under a contractual obligation to pay fees pursuant to contract.

IV. Enforceability of Covenants

**[2]** In their second argument, defendants contend that the trial court erred in finding the challenged covenants unenforceable. We agree.

All purchasers of property at the Cedars are required to sign a membership agreement, a separate document that is part of the purchase and sale agreement, at the time of closing. This agreement provides that all residents must be members, that membership is non-transferable, and that the membership fee is included in and deducted from the purchase price of a unit. Plaintiffs, in their initial complaint, which was incorporated by reference in their amended complaint, contend that they represent all persons who purchase, sell, or own a Unit at the Cedars, all who enter into a membership agreement with the Cedars, and all who are currently or may in the future enter into a membership agreement with the Cedars. We note that any such plaintiff, including the named plaintiffs in the instant case, would have in common the fact that either they or their buyers would have signed the membership agreement providing for the deduction of membership fees from the purchase price of a unit.

Plaintiffs contend that the covenants at issue do not run with the land, and are therefore unenforceable against subsequent purchasers. In *Runyon v. Paley*, the seminal case on covenants running with the land in North Carolina, our Supreme Court held that a party seeking to

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enforce a covenant as one running with the land had to prove that the covenant in question “touches and concerns” the land, the existence of both horizontal and vertical privity of estate, and the intent of the original parties to create a covenant running with the land. 331 N.C. 293, 416 S.E.2d 177 (1992). Black’s Law Dictionary defines a covenant running with the land as “[a] covenant ultimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely.” Black’s Law Dictionary 421 (9th ed. 2009). It further notes that “[t]he most important consequence of a covenant running with the land is that its burden or benefit will thereby be imposed or conferred upon a subsequent owner of the property who never actually agreed to it. Running covenants thereby achieve the transfer of duties and rights in a way not permitted by traditional contract law.” *Id.* (quoting Roger Bernhardt, *Real Property in a Nutshell* 212 (3rd ed. 1993)). It is this feature, the fact that a covenant running with the land can bind subsequent owners who did not agree to it, that distinguishes this type of covenant from a traditional contract.

Despite plaintiffs’ contentions, the issue in this case is not one of a covenant running with the land. In the instant case, any potential buyer is required to sign a contract obligating himself to the payment of membership fees. As a result, this matter falls within the realm of traditional contract law, not the law of covenants running with the land. Under traditional contract law, parties that agree to contracts are bound by them. Plaintiffs, or their buyers, would be obligated to pay the membership fees, not because of some covenant running with the land, but because they signed a document agreeing to pay the membership fees. Plaintiffs’ contentions that the fees, once collected, need not be spent on improving or maintaining the physical facilities is irrelevant. Plaintiffs’ contentions that these fees do not touch and concern the land, and that the fees are therefore an unenforceable covenant running with the land, are without merit.

#### V. Entry of Injunction

[3] In their third argument, defendants contend that the trial court’s summary judgment order, which grants an injunction, violated Rule 65(d) of the North Carolina Rules of Civil Procedure. We agree.

Rule 65 of the North Carolina Rules of Civil Procedure provides, in relevant part:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall

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be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise.

N.C. R. Civ. P. 65(d). This requirement is explicit and unambiguous; a trial court may not issue an injunction or restraining order without providing specific terms, “in reasonable detail, . . . the act or acts enjoined or restrained[.]” In the instant case, the trial court entered a summary judgment order, granting summary judgment on four of plaintiff’s claims, including its motion for an injunction, with no further explanation given. Specifically, the trial court’s order as to plaintiffs’ claims stated:

Plaintiffs’ motion for partial summary judgment is, allowed as to Plaintiffs’ First, Third, Eighth and Tenth Claims for Relief as set forth in paragraphs numbered one through five in Plaintiff’s motion.

In their motion for summary judgment, plaintiffs alleged with respect to their tenth claim for relief:

Plaintiffs’ Tenth Claim for Relief for Permanent Injunction enjoining and stopping, forever, the Defendants’ past, present, and future efforts to implement and enforce certain affirmative covenants in the Declaration of Condominium of The Cedars of Chapel Hill requiring that Plaintiffs pay Defendants certain Challenged Fees, including but not limited to a Transfer Fee (aka the “Membership Fee”), the Corporate Overhead Payment Fee, and the Litigation Fee, in order that this Court may prevent the irreparable harm that the Plaintiffs have suffered, are suffering, and will continue in the future to suffer if a Permanent Injunction is not entered stopping the Defendants from collecting and enforcing their claimed right to such fees[.]

Plaintiffs’ motion for summary judgment sought an expansive injunction, and the trial court’s cursory handling of that issue did not meet the standard of “reasonable detail” concerning “the act or acts enjoined or restrained[.]” We hold that the trial court erred in granting an injunction in such a cursory manner.

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VI. Failure to Make Allegations Against Defendants

In their fourth argument, defendants contend that the trial court erred in entering its summary judgment order where plaintiffs had failed to make allegations against multiple defendants. Because we have held above that the trial court erred in entering summary judgment, we need not address this contention.

VII. Conclusion

We hold that the trial court erred in determining, as a matter of law, that the contracts at issue were unconscionable, and that they violated the provisions of Chapter 39A and the Marketable Title Act. We further hold that the trial court erred in finding the covenants unenforceable. The trial court also erred in entering its injunction in a cursory manner, in violation of Rule 65 of the North Carolina Rules of Civil Procedure. We vacate the order granting summary judgment and the injunction, and remand this matter to the trial court for a trial by jury.

VACATED AND REMANDED.

Judges GEER and STEPHENS concur.



## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JUNE 2015)

DEPT OF TRANSP. v. RIDDLE No. 14-980	Cumberland (12CVS3993) (12CVS4714)	Remanded
FRISCIA v. BANK OF AM., N.A. No. 14-1125	Mecklenburg (13CVS10670)	Affirmed
IN RE OSTEYEE-HOFFMAN No. 14-1287	Iredell (14SPC483)	Reversed
IN RE RIVERA No. 14-944	Mecklenburg (11SP8221)	Affirmed in Part, Reversed in Part and Remanded
LAWSON v. LAWSON No. 14-1224	Forsyth (12CVS8369)	AFFIRMED in part; VACATED AND REMANDED in part.
N.C. DEPT OF PUB. SAFETY v. TUCKER No. 14-1308	Beaufort (14CVS99)	Affirmed
POPE v. CITY OF ALBEMARLE No. 14-1140	Stanly (12CVS619)	Affirmed
ROSEBORO v. ROSEBORO No. 14-1084	Forsyth (12CVS7004)	Affirmed
SCHEERER v. FISHER No. 14-478	Haywood (08CVS11)	Reversed
STATE v. ANDREWS No. 14-1050	Edgecombe (12CRS50987)	No Error
STATE v. COLEMAN No. 14-1148	Alexander (13CRS243) (13CRS244)	Affirmed
STATE v. KING No. 14-923	Davidson (10CRS58426)	No Error
STATE v. LOWERY No. 14-1306	Gaston (13CRS62066)	Affirmed
STATE v. QUINONEZ No. 14-680	Mecklenburg (12CRS227341)	No Error

STATE v. ROBINSON  
No. 14-1311

Union  
(10CRS56379)

No Error

STATE v. SUTPHIN  
No. 15-106

Lincoln  
(12CRS51879-80)

NO ERROR; NO  
PREJUDICIAL  
ERROR

**FRAMPTON v. UNIV. OF N.C. AT CHAPEL HILL**

[241 N.C. App. 401 (2015)]

PAUL FRAMPTON, PETITIONER-PLAINTIFF APPELLANT

v.

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL,  
RESPONDENT-DEFENDANT-APPELLEE

No. COA14-1117

Filed 16 June 2015

**Administrative Law—judicial review of agency decision—tenured professor—unpaid leave prior to disciplinary proceedings**

A de novo review revealed the trial court erred in affirming the Board of Trustees' final agency decision upholding the placement of a tenured UNC professor on unpaid leave prior to the initiation of disciplinary proceedings. The trial court's order was reversed and remanded for the trial court to determine the date on which the professor's employment was terminated and to determine the amount of salary and benefits which were withheld and should be paid to the professor.

Appeal by plaintiff from order entered 9 May 2014 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 4 March 2015.

*Barry Nakell for petitioner-plaintiff-appellant.*

*Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for respondent-defendant-appellee.*

INMAN, Judge.

Petitioner-Plaintiff Paul Frampton ("Frampton") appeals the trial court's order affirming the University of North Carolina at Chapel Hill's ("UNC's" or "the University's") final agency decision regarding his faculty grievance. On appeal, Frampton argues that UNC's unilateral decision in February 2012 to place him on leave without pay instead of following its own tenure policies and UNC's refusal to reinstate Frampton's pay once it initiated formal disciplinary proceedings in April 2013 were: (1) contrary to law; (2) unsupported by substantial evidence; and (3) arbitrary and capricious.

This case requires this Court, as it required the trial court and the University, to resolve an unusual and controversial dispute that tests the University's responsibilities as an employer of tenured faculty and

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as a steward of public funds. After careful consideration and review of the record, we conclude that the University failed to properly apply its policies for the protection of tenured faculty.

We reverse the trial court's order and remand for further proceedings.

**Factual and Procedural Background**

The material facts from which this case arose are largely undisputed. Frampton was a nine-month tenured faculty member in the Department of Physics and Astronomy who had taught at UNC since January 1981. On 23 January 2012, Frampton was arrested at an airport in Argentina and charged with attempting to smuggle two kilograms of cocaine in his suitcase. Although Frampton was assigned to teach a physics course at UNC at that time, he had traveled to Argentina without notifying UNC and without making arrangements for another professor to cover the class. Ultimately, on or around 20 November 2012, Frampton was convicted of smuggling cocaine and sentenced to four years and eight months imprisonment in Argentina. UNC learned of Frampton's arrest on 26 January, over two weeks after the first scheduled class meeting of PHYS 832, a reading course on general relativity that Frampton was expected to teach during the spring of 2012. Frampton has, at all times, maintained that he is an innocent victim of an Internet scam involving an alleged romantic involvement with an Italian swimsuit model.

Within a week after learning of Frampton's arrest, UNC found qualified counsel in Argentina willing to meet with Frampton,<sup>1</sup> and made two representatives from UNC available to meet with the judge and attorney handling Frampton's case. During this time, UNC maintained its hope, consistent with Frampton's assurances, that Frampton's legal troubles would be resolved quickly and that Frampton would be exonerated. In light of those expectations, UNC indicated its desire for Frampton to resume his employment with UNC upon his return.

On 17 February 2012, Executive Vice Chancellor and Provost Bruce Carney ("Provost Carney") wrote a letter to Frampton informing him that, due to Frampton's continued absence from his duties, and with no progress having been made toward his release, UNC would be requiring him to take personal leave without pay until such time as Frampton could "reassume [his] duties as a faculty member." Instead of pursuing disciplinary action through the "Trustee Policies and Regulations Governing

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1. Frampton declined to retain the attorney identified by UNC, instead choosing to be represented by public defenders.

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Academic Tenure” (“the tenure policies”),<sup>2</sup> UNC treated Frampton as if he were rendered unavailable, using by analogy UNC’s Faculty Services Illness, Major Disability, and Parental Leave Policy (“the faculty leave policy”). The faculty leave policy states that, in cases of serious illness or major disability, a faculty member on nine months service “shall, upon his/her request, be granted up to sixty calendar days of paid leave in a fifty-two week period.” An award of leave or denial of leave may be granted by the department chair and may be appealed to the provost, who makes the “final decision.” Although Frampton received his full January and February pay and benefits, they were suspended on 1 March 2012. Thus, Frampton was paid for the first five weeks that he was imprisoned in Argentina.

The parties do not dispute that UNC could have initiated disciplinary proceedings against Frampton immediately upon learning of his arrest based on, among other reasons, failing to report for a scheduled class, traveling abroad without arranging to cover his job duties, and smuggling cocaine. These acts could fall within the scope of Section 603 of the Code of the University of North Carolina, which specifies permissible grounds for suspension (with or without pay), demotion, or discharge. The Code does not provide any presumption of innocence as a bar to action based upon alleged criminal behavior.

The tenure policies specify the procedural process for disciplinary actions regarding tenured faculty members. Initially, the provost notifies a faculty member in writing of the University’s intention to suspend, demote, or terminate the faculty member. After providing such notice, the chancellor may reassign the faculty member or suspend him with full pay. Suspension without pay, which can be a form of discipline as the ultimate result of the disciplinary process, is not an option at this early stage.

A faculty member who disagrees with the provost’s intended action can request a hearing before the faculty grievance hearing committee (“the Grievance Committee”), which then schedules a hearing. Following the hearing, the Grievance Committee makes a written recommendation to the chancellor as to what action UNC should take. The recommendation is advisory and not binding. The chancellor then issues his or her decision regarding what disciplinary action, if any, will

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2. The tenure policies were adopted by UNC’s Board of Trustees and approved by the Board of Governors in 1976 and have been amended several times. The policies contained in the record were last amended in 2009. The specific policies at issue in this lawsuit are in Section 3.

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be imposed on the faculty member. If the chancellor concurs in the Grievance Committee's recommendation that is favorable for the faculty member or otherwise reaches a decision favorable to the faculty member, his decision is final. However, if the chancellor declines to accept the Grievance Committee's favorable recommendation or concurs in a recommendation that is unfavorable, the faculty member may seek review of the decision by UNC's Board of Trustees.

The Board of Trustees' hearing on appeal from the chancellor's disciplinary decision is limited to determining whether the chancellor or the Grievance Committee "committed clear and material error in reaching the decision under review." Once the Board of Trustees makes its decision, the faculty member may appeal the decision to the Board of Governors of the entire North Carolina University system to determine whether the process or decision "had material procedural errors, was clearly erroneous, or was contrary to controlling law or policy."

### **I. UNC's Initial Decision to Place Frampton on Unpaid Personal Leave**

In this case, after the provost notified Frampton that he would be placed on unpaid personal leave, Frampton filed a grievance challenging the decision to the Grievance Committee. The Grievance Committee heard Frampton's appeal on 6 September 2012. Frampton could not attend but participated by telephone.

Frampton argued that he was able to fulfill his professional duties even though he was in an Argentinian prison.<sup>3</sup> He further argued that the tenure policies prohibited UNC from placing him on personal leave and withholding his salary and benefits.

Following the hearing, the Grievance Committee issued a recommendation but did not decide the merits of Frampton's contentions regarding his ability to fulfill his duties, citing conflicting evidence. The Grievance Committee limited its review to whether UNC's decision to place Frampton on unpaid personal leave was made in accordance with

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3. Frampton claimed that he had published six refereed papers in 2012 and had written two or three papers while in Devoto prison in Argentina and that his "rate of productivity is consistent with his rate before imprisonment." Frampton also alleged that he had continued to advise two Ph.D students with phone meetings at least once a week and, often, twice a week. Moreover, Frampton contended that he could have taught the physics class on general relativity as a reading class over the phone and that he could have participated in all necessary administrative hearings including faculty and committee meetings by speakerphone.

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University policies and procedures. The Grievance Committee issued its recommendation to Chancellor Holden Thorp (“Chancellor Thorp”) on or around 25 September 2012. The recommendation agreed with Frampton’s argument that the faculty leave policy could only be used when a faculty member specifically requests it, noting that “[n]othing in the [faculty leave] policy appears to preclude an administrator from initiating the discussion, but [the Grievance Committee] do[es] not believe the policy supports an administrator imposing leave without the faculty member’s assent.” The Grievance Committee concluded that UNC had, essentially, placed Frampton on unpaid leave for failing to perform his duties, a situation controlled by the tenure policies, in violation of the process required by those policies. Consequently, the Grievance Committee recommended Chancellor Thorp “revisit th[e] decision” involving Frampton’s employment status.

On 30 October 2012, after reviewing the Grievance Committee’s recommendation, Chancellor Thorp wrote Frampton to inform him of his decision. Chancellor Thorp disagreed with the Grievance Committee’s conclusion that UNC did not follow its policies. Chancellor Thorp acknowledged that the faculty leave policy did not specifically apply to Frampton’s situation, but explained that the policy was used “by analogy” given that Frampton was “unavailable” to perform his duties. Therefore, “the fact that [Frampton] did not consent to being placed on leave does not establish a policy violation.” Chancellor Thorp wrote that “personal leave” or “leave without pay” is “an established mechanism” that “has been employed at the University in a number of cases where faculty members are absent for personal or other reasons and will not be performing University duties, but neither they nor the University want to terminate their University employment.” Chancellor Thorp further noted:

[T]he Committee appears to have concluded that the University could respond to your incarceration and unavailability only by imposing disciplinary action or by doing nothing. I do not agree. Because your supervisors presumed that you were not guilty of the criminal charges against you until those charges had been proven in the Argentinian Courts, they reasonably concluded that it would be precipitous and unfair to take disciplinary action against you. That decision did not require the University to continue to pay you your salary under the circumstances presented. The University must be a good steward of public funds. We would violate the public’s trust if we paid you

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for work that you are not performing and I will not agree to do so.

Chancellor Thorp thus denied Frampton's grievance and left Frampton on unpaid leave "until such time as [Frampton] either return[ed] to work or [his] Chair and Dean request some modification of [his] employment status."

Meanwhile, on 20 November 2012, Frampton was found guilty of smuggling cocaine and sentenced to four years and eight months imprisonment in Argentina.

Frampton appealed Chancellor Thorp's decision to the Board of Trustees. Because Frampton's criminal conviction occurred after the chancellor's decision, it had no bearing on the Board of Trustees' review. On 28 March 2013, the Board of Trustees issued its decision. Because there was no "mandate[d] . . . specific appeal procedure" for an appeal from unpaid personal leave, the Board applied the standard it would have used under the tenure policies and reviewed the decision to determine whether Chancellor Thorp committed "clear and material error." In its findings, the Board noted that "there is not currently a policy that outlines a tenured faculty member's employment status when he or she is incarcerated in another country." Furthermore, the Board found that the language of the faculty leave policy "did not appear to prohibit the University from providing the leave to the benefit of a faculty member." The Board concluded that "[g]iven these unique circumstances," it would unanimously uphold Chancellor Thorp's decision and deny Frampton's request for reinstatement of his salary.

## **II. UNC's Decision to Withhold Frampton's Salary Pending Disciplinary Action**

On 23 April 2013, Provost Carney wrote Frampton to notify him that because of his criminal conviction for drug trafficking, "and the conduct that gave rise to that conviction," the University would begin formal disciplinary proceedings to terminate his employment. In his letter, Provost Carney reviewed evidence presented during Frampton's criminal trial, rejected Frampton's claims of innocence, and stated that Frampton's communications and conduct suggested that he knew or should have known that the suitcase he was carrying contained drugs or something of significant value that involved substantial risk. Carney noted that "[w]hile for many months [he] accepted [Frampton's] protestations of innocence, [Frampton's] conduct, as revealed by the evidence in the record and the circumstances of [his] arrest, trial, and conviction, has



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convinced [Carney] that disciplinary action [was] warranted.” The letter concluded that “your drug trafficking conviction and the conduct surrounding it have damaged the University’s reputation and violated the public trust.” Finally, the letter advised Frampton that he had 14 days to request a hearing before the Grievance Committee to appeal the termination and that “[t]he current terms of your employment remain in effect until further notice.”

Frampton filed, within the 14-day deadline, a request for hearing before the Grievance Committee (“the second grievance”). On 17 May 2013, Provost Carney submitted the matter to the Grievance Committee. On 31 July 2013, Frampton filed with the Grievance Committee a written “Objection to the Validity of the Proceedings,” contending that the University’s refusal to reinstate his pay once these formal proceedings began was an egregious violation of the tenure policies and precluded further disciplinary proceedings until that violation was corrected.

On 2 August 2013, the Grievance Committee concluded that, because Frampton’s appeal of the University’s earlier decision to place him on personal leave without pay was still pending in superior court, it had “no jurisdiction to decide the issue of whether or not Professor Frampton’s salary should have been suspended.”

In a letter dated 27 August 2013, the Grievance Committee co-chairs wrote to Frampton’s attorney further explaining its decision and noting that “[b]ecause the matters raised in [Frampton’s second grievance] have already been adjudicated conclusively within the University, [they] do not believe that Professor Frampton can demonstrate that he has suffered a ‘remedial injury,’ as required by [the tenure policies].” It is unclear from the record whether, following the 27 August letter, Frampton appealed the Grievance Committee’s decision to the Board of Trustees or whether Chancellor Thorp issued his own decision on the issue.

### III. Superior Court Proceedings

On or around 3 September 2013,<sup>4</sup> Frampton amended his petition for judicial review to challenge UNC’s denial of his claims for pay

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4. A copy of the amended petition for judicial review included in the record on appeal was file-stamped on 15 April 2014, after the trial court’s hearing. However, at the hearing, Frampton’s counsel contended that it had been filed with the trial court a few days after service on UNC, and UNC conceded that it had received a copy of the amended petition on 3 September 2013. In fact, UNC responded to the amended petition for review on 3 October 2013. UNC does not challenge the validity of Frampton’s contention that the amended petition was properly filed before the hearing nor does it advance any argument

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and benefits in Orange County Superior Court.<sup>5</sup> In the amended petition, Frampton argued that UNC violated its own policies, exceeded its jurisdiction or authority, acted erroneously, and acted capriciously or arbitrarily not only when the University placed him on personal leave without pay in February 2012 but also when it initiated formal disciplinary proceedings in April 2013 without reinstating his pay.

The matter came on for hearing on 9 April 2014 before Judge R. Allen Baddour. At the hearing, Frampton argued that there is “no evidence that any faculty member has been treated in the way that [Frampton] was ever treated.” In response, UNC provided a list of tenured faculty members who had been placed on personal leave without pay, including an assistant professor who took unpaid personal leave to address an issue with his immigration status. However, Frampton argued that UNC’s evidence failed to indicate whether the faculty members listed had actually requested personal leave or consented to it. Without this evidence, Frampton contended that there was no way of knowing whether UNC had ever before placed a faculty member on personal leave involuntarily; thus, there was no precedent for the University’s decision.

In contrast, UNC argued that Frampton’s incarceration abroad was a “novel situation” and that it did not want to initiate suspension or termination proceedings initially because it believed Frampton’s claims of innocence. Instead, UNC alleged that it looked to the faculty leave policy “for guidance” and continued to pay Frampton until 1 March, five weeks after Frampton was detained. As a result of the nondisciplinary personal leave, Frampton remained free to resume his employment once

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on appeal that Frampton’s failure to include a copy of the amended petition showing a file-stamp date in September 2013 prevents him from raising the arguments contained in that amended petition on appeal. Accordingly, we will not address any potential procedural insufficiencies of the amended petition and will, for purposes of this opinion, treat the amended petition as if it were properly filed in September 2013, before the trial court’s hearing. *See generally, Abbott v. N.C. Bd. of Nursing*, 177 N.C. App. 45, 48, 627 S.E.2d 482, 484 (2006) (“It is not the role of the appellate courts to create an appeal for an appellant.”).

5. In his amended petition, in addition to his claim for judicial review of the University’s final agency decision, Frampton also asserted claims for declaratory judgment, breach of contract, and writ of mandamus. However, the trial court granted UNC’s motion to dismiss these claims pursuant to Rules 12(b)(1), (2), and (6). Frampton did not appeal the trial court’s order granting UNC’s motion to dismiss. Therefore, Frampton has waived appellate review of those claims, and we do not address any arguments on those issues; only Frampton’s claim for judicial review of UNC’s actions is properly before us. *See Wilkerson v. Duke Univ.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 748 S.E.2d 154, 161 (2013) (concluding that, under Rule 28(b)(6), the plaintiff’s failure to include any argument challenging the trial court’s order granting summary judgment in favor of the defendants on the plaintiff’s claims for public stigmatization and negligence waives those issues on appeal).

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his legal situation in Argentina was resolved, with no disciplinary action pending. UNC further disagreed that the faculty leave policy requires the consent of the faculty member; instead, UNC characterized unpaid personal leave as, quoting Chancellor Thorp, an “established mechanism” to address Frampton’s situation even though it was “unprecedented” in that Frampton failed to request leave even though he knew that he would be unable to perform his duties while imprisoned in Argentina.

With regard to the refusal to reinstate Frampton’s pay once formal termination proceedings began, Frampton argued that once the University invoked the tenure policies, those policies clearly required that he be suspended with full pay while those proceedings went forward. UNC represented to the trial court that it was proceeding with “other administrative proceedings.” The status of the administrative proceedings on the second grievance at the time of the hearing is unclear from the record.<sup>6</sup>

On 9 May 2014, the trial court issued its order affirming UNC’s decision to place Frampton on unpaid leave and affirming UNC’s refusal to reinstate Frampton’s pay pending disciplinary proceedings.

Frampton timely appeals.

**Standard of Review**

“Where there is an appeal to this Court from a trial court’s order affirming an agency’s final decision, we must determine (1) the appropriate standard of review and, when applicable, (2) whether the trial court properly applied this standard.” *Krueger v. N.C. Criminal Justice Educ. & Training Standards Comm’n*, 198 N.C. App. 569, 575, 680 S.E.2d 216, 220 (2009) (internal quotation marks omitted). The trial court’s review of a final agency decision is governed by N.C. Gen. Stat. § 150B-51(b) (2013):

The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

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6. Although Frampton initially argued that he could still fulfill all of his professional duties, he does not contend on appeal that his subsequent termination was not supported by adequate grounds nor did he put forth any argument in his amended petition that UNC did not have grounds to terminate his employment once it initiated the disciplinary proceedings. Thus, the issue of whether the University had proper grounds to terminate him is not within the scope of his appeal. However, as explained below, it will be necessary for the trial court to determine the date Frampton’s employment was terminated because that date defines the duration of Frampton’s unpaid leave.

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- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

Review of an agency's final decision is based on the nature of the issues on appeal. *Nanny's Korner Care Ctr. v. N.C. Dep't of Health & Human Servs.*, \_\_ N.C. App. \_\_, \_\_, 758 S.E.2d 423, 427 (2014). The trial court's review of alleged errors listed in subsections (1) through (4) are examined under a *de novo* standard of review. N.C. Gen. Stat. § 150B-51(c). "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *Equity Solutions of the Carolinas, Inc. v. N.C. Dep't of State Treasurer*, \_\_ N.C. App. \_\_, \_\_, 754 S.E.2d 243, 248 (2014) (internal quotation marks omitted). Alleged errors listed in subsections (5) and (6) are reviewed using the whole record standard of review. N.C. Gen. Stat. § 150B-51(c). When applying the whole record test, "the trial court must examine all the record evidence in order to determine whether there is substantial evidence to support the agency's decision." *Equity Solutions*, \_\_ N.C. App. at \_\_, 754 S.E.2d at 248. However, the trial court "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Id.*

### Analysis

Frampton argues first that, by placing him on unpaid personal leave instead of initiating proceedings under the tenure policies, UNC violated its own rules and procedures because: (1) the faculty leave policy is available to the University only at the request of, or with the consent of, the faculty member; (2) there was no precedent for UNC's action; and (3) the tenure policies provide a clear and controlling procedure to address the circumstances of Frampton's situation. Because Frampton's situation fell within the scope of the tenure policies and because the plain language of the faculty leave policy prohibits UNC from unilaterally placing a faculty member on unpaid personal leave, we agree.

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As noted above, our review of this argument is whether, under a *de novo* review, the trial court erred in affirming the Board of Trustees' final agency decision upholding the placement of Frampton on unpaid leave prior to the initiation of disciplinary proceedings.

Generally, an agency's interpretation of its own policies is accorded some deference unless that interpretation is clearly inconsistent with the plain language of the policies. *Pamlico Marine Co. v. N.C. Dep't of Natural Res.*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986); *Morrell v. Flaherty*, 338 N.C. 230, 237-38, 449 S.E.2d 175, 180 (1994). This includes any policies or regulations addressing faculty members' employment. See *Simonel v. N.C. Sch. of Arts*, 119 N.C. App. 772, 775, 460 S.E.2d 194, 196 (1995). However,

If the *only* authority for the agency's interpretation of the law is the decision in that case, that interpretation may be viewed skeptically on judicial review. If the agency can show that the agency has consistently applied that interpretation of the law, if the agency's interpretation of the law is not simply a "because I said so" response to the contested case, then the agency's interpretation should be accorded the same deference to which the agency's construction of the law was entitled under prior law.

*Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681-82, 652 S.E.2d 251, 252-53 (2007) (quoting Brad Miller, *What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA*, 79 N.C. L. Rev. 1657, 1665-66 (2001)).

N.C. Gen. Stat. § 116-11(2) (2013) authorizes the Board of Governors to adopt policies and regulations for "all affairs," including faculty employment. Beginning in 1976, the Board of Governors adopted extensive policies governing academic tenure procedures and, later, policies affording tenured faculty members leave for various personal reasons not covered by FMLA or other tenure policies since tenured faculty do not accrue vacation or sick time. Under the tenure policies, which were last amended in 2009, UNC could have initiated disciplinary proceedings against Frampton for misconduct, including alleged criminal conduct, incompetence, and neglect of duty immediately upon learning that he was incarcerated in Argentina.

UNC asserts that "it would have been premature to make a decision about disciplinary action" when it first learned of Frampton's arrest and that "no specific rule or policy clearly addressed [Frampton's] situation. Our *de novo* review of the tenure policies leads us to a contrary

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conclusion. Section 3(a) of the tenure policies provides that disciplinary action, including suspension, can be initiated based on a faculty member's "neglect of duty, including, but not limited to, sustained failure to meet assigned classes or to perform other significant faculty professional obligations." While we agree with UNC that Frampton's situation where he was arrested in another country for alleged criminal behavior was certainly novel and unique, it does not fall outside the scope of the tenure policies. The tenure policies contemplate situations in which UNC would be authorized to begin disciplinary proceedings for someone who has been accused of criminal behavior and is unable to, for whatever reason, fulfill his professional duties including teaching and advising. Here, setting aside the bizarre circumstances surrounding Frampton's arrest, UNC was faced with a professor whom administrators believed could not, among other things, teach, advise students, or participate in his administrative obligations with any consistency. Frampton's initial contention that he could still fulfill all of his professional duties did not preclude UNC from taking disciplinary action, but merely would have set into action the grievance procedure provided for in the tenure policies. Therefore, the tenure policies clearly provided for resolution of Frampton's situation.

We do not find support in the record for UNC's position that its decision to impose unpaid personal leave in lieu of disciplinary action under the tenure policies was a "prior practice" that UNC has used in other employment situations. While the record does include evidence showing that other professors had been placed on unpaid personal leave, nothing in the record establishes that unpaid leave had ever before been imposed on a non-requesting, non-consenting faculty member.<sup>7</sup> Thus, we view UNC's actions with less deference than we might have had UNC produced evidence that this was a standard practice. *See Rainey*, 361 N.C. at 681-82, 652 S.E.2d at 252-53.

Moreover, we do not believe that UNC's application of the unpaid personal leave policy, even if it was only applied "by analogy," was proper. The faculty leave policy states that a faculty member on nine months service "shall, upon his/her request, be granted up to sixty calendar days of paid leave in a fifty-two week period" for serious illness

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7. At the hearing, UNC provided a redacted list of professors who had taken unpaid personal leave for non-medical reasons. However, the list failed to indicate whether any of those professors had—or had not—requested or consented to the leave. Without that information, the list provides no support for UNC's claim that placing professors on unpaid personal leave in lieu of disciplinary proceedings was an "established mechanism" that could also apply in Frampton's case.

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or majority disability. Frampton argues that the language “upon his/her request” indicates that this type of leave is only available for faculty members who request it. We agree based on this language as well as the structure of the unpaid leave policy. The phrase “upon his/her request” indicates that the faculty member’s request of or consent to being placed on paid or unpaid leave is a mandatory condition precedent to the application of this type of leave. While we can envision scenarios in which it would be more beneficial to place a tenured faculty member on unpaid personal leave without his or her consent in order to protect the faculty member’s reputation from the stigma associated with disciplinary actions—even if those proceedings result in a favorable outcome—we believe that the more reasoned interpretation of the unpaid leave policy could only support its application if the faculty member either requested it or consented to it. Moreover, the fact that there is no “mandated” appeal procedure for this type of leave suggests that, unlike the disciplinary proceedings which are imposed without consent, the unpaid personal leave policy is not intended to be unilaterally imposed upon a tenured professor given the procedural protections afforded to faculty members in all other situations.

Our interpretation of the unpaid leave policy does not preclude a tenured professor, confronted with alleged grounds for disciplinary action, to request unpaid leave in hopes of resolving problems and avoiding harsher consequences. Rather, it should be the choice of the tenured professor, and not UNC, as to whether the professor continues to be the subject of disciplinary proceedings or takes unpaid personal leave. In this case, the tenure policies required that Frampton be allowed this choice. If Frampton had chosen to oppose disciplinary action rather than request or consent to unpaid leave, his grievance hearing could have proceeded prior to his criminal trial, and his employment might have terminated prior to his criminal trial.

In seeking to persuade us that its decision to not initiate disciplinary proceedings was not a violation of policies, UNC contends that it only did so in an effort to “assist” Frampton to give him time to “exonerate himself” without suffering any professional harm. The record indeed supports UNC’s contention that its administrators initially believed that Frampton was innocent and hoped that his legal situation would be resolved in short order. However, we cannot, in our *de novo* review, affirm the trial court’s ruling based on UNC’s concern for Frampton’s well-being nor based on UNC’s own determination of what was in his best interest. Instead, we must decide based on the clear and unambiguous language of its policies.

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Here, the tenure policies provided recourse for UNC even in Frampton's unusual situation. The language of the unpaid personal leave does not support its application when it is not requested or consented to by the tenured faculty member. Even if that application was "by analogy," UNC violated its own policies when it first failed to initiate disciplinary proceedings but, instead, unilaterally placed Frampton on unpaid personal leave. Therefore, we must reverse the trial court's order upholding UNC's decision and hold that Frampton was entitled to be paid from the date he was placed on leave until the date his employment terminated.<sup>8</sup>

We cannot determine from the record when Frampton's employment was terminated. Therefore, we must remand this matter to the trial court to make that finding, as that date is essential to determining the time period during which Frampton was entitled to be paid. In his appellate brief, Frampton asks this Court to take judicial notice that he submitted his resignation/retirement for medical reasons on 21 April 2014. We cannot verify the date from the record on appeal. On remand, the trial court may verify this date from the administrative record of events which occurred after this appeal was taken and may, if deemed appropriate, take judicial notice of the date of Frampton's resignation or make any other finding regarding the termination date. In addition to finding when Frampton's employment was terminated, the trial court should make findings necessary to calculate a monetary damage amount based on the pay and benefits due to Frampton during the period between 1 March 2012, the date UNC stopped paying his salary and benefits, and the date Frampton's employment was terminated.

### Conclusion

Based on the foregoing reasons, we conclude that UNC violated its own policies when it placed Frampton on unpaid personal leave instead of initiating formal disciplinary proceedings in accordance with the tenure policies. Therefore, we must reverse the trial court's order and remand for the trial court to determine the date on which Frampton's employment was terminated and to determine the amount of salary and benefits which were withheld and should be paid to Frampton. Based

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8. In so holding, it is not necessary to address Frampton's argument that UNC's decision to place him on unpaid personal leave was arbitrary and capricious nor do we need to examine the issue of whether UNC should have reinstated his pay and benefits once it formally initiated disciplinary proceedings in April 2013.



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on this conclusion, it is not necessary to address Frampton's remaining arguments on appeal.

REVERSED AND REMANDED.

Judges ELMORE and GEER concur.

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MARK E. FUNDERBURK AND TERI F. FUNDERBURK, PLAINTIFFS

v.

JPMORGAN CHASE BANK, N.A., SHAPIRO AND INGLE, LLP, SUBSTITUTE TRUSTEE, AND  
TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA14-1258

Filed 16 June 2015

**Mortgages and Deeds of Trust—post-foreclosure lawsuit—commenced by plaintiff—barred by default**

The Court of Appeals affirmed the trial court's dismissal of plaintiffs' suit, which was commenced after defendants foreclosed on plaintiffs' rental properties, pursuant to Rule of Civil Procedure 12(b)(6). Plaintiffs' claims for breach of contract, negligent misrepresentation, tortious interference with contracts and business expectancy, and quantum meruit were barred by the determination of default made in the prior foreclosure proceedings.

Appeal by plaintiffs from order entered 21 May 2014 by Judge V. Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 8 April 2015.

*Tuggle Duggins, P.A., by Emma C. Merritt, for plaintiff-appellants.*

*Bell, Davis & Pitt, P.A., by Bradley C. Friesen and Andrew A. Freeman, for defendant-appellee.*

McCULLOUGH, Judge.

Mark E. Funderburk and Teri F. Funderburk (together "plaintiffs") appeal the Rule 12(b)(6) dismissal of their case. For the following reasons, we affirm.

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I. Background

This appeal concerns the trial court's Rule 12(b)(6) dismissal of a suit initiated 8 October 2013 by plaintiffs against JPMorgan Chase Bank, N.A. ("Chase"), and substitute trustees Shapiro and Ingle, LLP ("S&I"), and Trustee Services of Carolina, LLC ("Trustee Services"). By order entered 10 April 2014 following the filing of plaintiffs' original complaint, answers by the substitute trustees, orders denying plaintiffs' motions for preliminary injunctions, and an answer and motion to dismiss by Chase, the trial court granted a motion by plaintiffs for leave to amend their complaint. Plaintiffs then filed an amended complaint and separate motions for ex parte, temporary and permanent injunctive relief on 10 April 2014.

As set forth in the amended complaint, plaintiffs purchased the following eight rental properties in Greensboro between 2002 and 2003: (1) 406 Andrews Street, (2) 2020 Martin Luther King, Jr. Drive, (3) 2018 Martin Luther King, Jr. Drive, (4) 2313 Phillips Avenue, (5) 603 East Florida Street, (6) 4002 Oak Grove Avenue, (7) 4004 Oak Grove Avenue, and (8) 608 East Lee Street (together the "properties"). Plaintiffs obtained mortgage loans in order to purchase the properties and, in return for the loans, executed promissory notes and deeds of trust for each property in favor of Washington Mutual Bank, FA, the original lender. Sometime thereafter, Chase acquired Washington Mutual Bank's interests and became the holder of the promissory notes and the beneficiary under the deeds of trust. S&I and Trustee Services were then named substitute trustees for the benefit of Chase.<sup>1</sup>

Sometime prior to July 2011, Chase attempted to foreclose on the 603 East Florida Street property and plaintiffs filed an action against Chase for wrongful foreclosure. That action was settled via an agreement whereby plaintiffs agreed to bring the mortgage current by paying \$4,800 to Chase in exchange for Chase's reinstatement of the mortgage. Plaintiffs then made the \$4,800 payment in accordance with the agreement and continued to make monthly payments on the eight properties near the end of each month.

Plaintiffs allege in the amended complaint that Chase failed to comply with the terms of the agreement in that Chase refused to accept payments on the eight properties. Specifically, plaintiffs tendered an online

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1. S&I later argued in its 7 May 2014 answer and motion to dismiss that it was never a substitute trustee with respect to any of the deeds of trust in controversy, but was the attorney for the substitute trustee in several matters.

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payment to Chase for the eight properties on 31 October 2011 and Chase refunded and re-deposited the mortgage payment electronically on 3 November 2011. Plaintiffs then tendered an online payment to Chase for the eight properties on 14 November 2011 and Chase refunded and re-deposited the mortgage payment electronically on 21 November 2011. Plaintiffs then stopped tendering payments in anticipation that the payments would be rejected.

After Chase refunded and re-deposited plaintiffs' mortgage payments on 3 and 21 November 2011, Chase initiated foreclosure proceedings on all eight properties. Between 4 June 2013 and 24 September 2013, foreclosure hearings were held in which the clerk entered orders authorizing foreclosure sales of all eight properties. Plaintiffs appealed the orders authorizing foreclosure sales of six of the properties. The other two properties were sold at foreclosure on 3 and 22 October 2013.

Plaintiffs further alleged in the amended complaint that since initiating the foreclosure proceedings, someone purporting to be an agent of Chase contacted tenants in the eight properties and instructed those tenants that plaintiffs no longer owned the properties and they must vacate the premises. Plaintiffs alleged they lost tenants and rental payments as a result.

Based on these allegations, plaintiffs asserted causes of action for breach of contract, promissory estoppel, negligent misrepresentation, tortious interference with contracts and business expectancy, and quantum meruit.

On 6 February 2014, plaintiffs' appeals of the six foreclosure orders came on for hearing in Guilford County Superior Court. Upon consideration of each case, the superior court entered orders authorizing the substitute trustee to proceed with the foreclosures of the properties. Plaintiffs did not appeal the orders and the remaining six properties were eventually sold at foreclosure.<sup>2</sup>

On 1 May 2014, Chase responded to plaintiffs' amended complaint by filing a motion to strike, motion to dismiss, and answer to amended complaint. Chase's motions, along with a motion to dismiss by S&I, came on for hearing in Guilford County Superior Court before the Honorable V. Bradford Long on 19 May 2014.

At the hearing, Chase clarified its position that "the claims are -- all depend upon a determination that the plaintiffs are not in default on the

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2. Plaintiffs make clear in their brief they do not seek reversal of the foreclosures.

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loans at issue, and a conclusive default determination has been made in the foreclosure proceedings.” Thus, Chase asserted there was a conclusive defect in each claim and the claims should be dismissed pursuant to Rule 12(b)(6). Chase further argued the issue of default could not be re-litigated and, therefore, the claims are barred by collateral estoppel. In support of its position, Chase presented numerous cases for the court’s consideration, many of which were unpublished.

In response, plaintiffs correctly emphasized the unpublished cases were not binding. Plaintiffs then argued the present case was not about stopping the foreclosures, but about damages they allegedly incurred. Nevertheless, plaintiffs continued to argue against default stating this is not a case where they “blew this off, weren’t making payments, were a year behind, six months behind. [Plaintiffs] were maybe a couple weeks behind, maybe, if that, and these payments were accepted over and over and over again.” Plaintiffs believed “a breach of contract did occur because payments were accepted and then after months then all of a sudden they weren’t accepted and then they were returned.” When the trial court reiterated that default had been determined in the prior foreclosure proceedings, plaintiffs responded that they would argue there was no default, but even assuming there was a default, the claims for breach of contract, tortious interference, and quantum meruit were still viable.

Upon consideration of the arguments and the case law presented by Chase, the superior court judge granted Chase’s Rule 12(b)(6) motion to dismiss the case. In so deciding, the trial court explained:

Gentlemen, it appears to me that each of these stays contingent upon there not being a default existing or the claims are barred by other principles, the promissory estoppel claims of defense, and that’s set out in each one of these cases, published or unpublished.

It’s a defense, it’s not a claim you can assert. The claims are by and large predicated on the fact that they cannot exist when a default is found and the foreclosure has proceeded to termination, and that’s what’s happened in this case, whether at the Superior Court level or the District Court level.

Two days later on 21 May 2014, the trial court entered an order memorializing its determination that “[t]he [a]mended [c]omplaint fails to state a claim upon which relief may be granted, and should be dismissed

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pursuant to Rule 12(b)(6).” In addition, the trial court granted Chase’s motion to strike plaintiffs’ motions for injunctive relief.

On 20 June 2014, plaintiffs filed notice of appeal from the 21 May 2014 order. Approximately three months later, plaintiffs filed a stipulation and notice of partial withdrawal of appeal in which plaintiffs withdrew their appeal as to S&I and Trustee Services. In doing so, plaintiffs acknowledged that the substitute trustees’ involvement in the matter was moot because the foreclosures of the deeds of trust were complete and were not challenged in this case. Furthermore, plaintiffs clarified that they “seek consideration by [this Court] only of the dismissal of [their] claims against [Chase] for breach of contract, promissory estoppel, negligent misrepresentation, tortious interference with contracts and business expectancy, and quantum meruit.”

## II. Discussion

On appeal, plaintiffs contend the trial court erred in granting defendant’s motion to dismiss the case pursuant to Rule 12(b)(6). In general,

[t]he motion to dismiss under [N.C. Gen. Stat. § 1A-1, Rule] 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

*Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

A complaint may be dismissed pursuant to Rule 12(b)(6) where (1) the complaint on its face reveals that no law supports a plaintiff’s claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff’s claim.

*Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, \_\_ N.C. App. \_\_, \_\_, 746 S.E.2d 13, 16 (2013) (quotation marks and citation omitted).

“If . . . matters outside the pleading are presented to and not excluded by the court, the motion [will ordinarily] be treated as one

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for summary judgment and disposed of as provided in Rule 56[.]” N.C. Gen. Stat. § 1A-1, Rule 12(b) (2013). Yet, as both parties acknowledge, in this case the trial court properly considered the final orders by the clerk and superior court judge in the foreclosure proceedings, which were attached to defendant’s motion to dismiss, without converting the Rule 12(b)(6) motion into a motion for summary judgment. *See Stocum v. Oakley*, 185 N.C. App. 56, 61, 648 S.E.2d 227, 232 (2007) (“Trial courts may properly take judicial notice of its own records in any prior or contemporary case when the matter noticed has relevance.”) (quotation marks and citation omitted). Plaintiffs, however, contend copies of the promissory notes and deeds of trust executed in connection with the mortgage loans, which were also attached to Chase’s motion to dismiss, were not considered by the trial court and should not be considered on appeal. We disagree.

[T]his Court has stated that a trial court’s consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party. This Court has further held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff’s complaint and to which the complaint specifically refers even though they are presented by the defendant.

*Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) (citations omitted). Thus, in addition to plaintiffs’ amended complaint and the final foreclosure orders, the promissory notes and deeds of trust specifically referred to in plaintiffs’ amended complaint and attached to Chase’s motion to dismiss are properly before this Court for review of whether the trial court erred in dismissing plaintiffs’ amended complaint for failure to state a claim upon which relief may be granted.

On appeal, plaintiffs first argue their claims are not barred by principles of res judicata or collateral estoppel. Specifically, plaintiffs contend the trial court’s ruling that plaintiffs’ claims are contingent on there not being a default is erroneous. Upon review, we disagree and hold plaintiffs’ claims are contingent on there not being a default, an issue plaintiffs are collaterally estopped from re-litigating in this case.

In *Phil Mechanic Constr. Co., Inc., v. Haywood*, 72 N.C. App 318, 325 S.E.2d 1 (1985), the plaintiffs filed suit to recover money owed on a debt secured by a deed of trust and to foreclosure on the deed of trust.

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72 N.C. App. at 319, 325 S.E.2d at 1. However, in a prior special proceeding before the Clerk of Superior Court to determine the validity of the debt secured by the deed of trust and the trustee's right to foreclose, the Clerk denied plaintiffs' request to proceed to foreclosure under the power of sale contained in the deed of trust upon finding that one of the defendants had no prior knowledge of the deed of trust and had not signed the deed of trust. *Id.* at 319, 325 S.E.2d at 1-2. Because plaintiffs did not appeal from the Clerk's decision, the trial court found the Clerk's order became final as to the issues and parties and dismissed plaintiffs' subsequent suit on grounds of *res judicata*. *Id.* at 319-20, 325 S.E.2d at 2. On appeal, this Court affirmed the dismissal, explaining that "when a mortgagee or trustee elects to proceed under [N.C. Gen. Stat. §] 45-21.1 et seq., issues decided thereunder as to the validity of the debt and the trustee's right to foreclose are *res judicata* and cannot be relitigated in an action for strict judicial foreclosure." *Id.* at 322, 325 S.E.2d at 3. For that reason, "[s]ince [the] plaintiffs did not perfect an appeal of the order of the Clerk of Superior Court, the clerk's order is binding and [the] plaintiffs [were] estopped from arguing those same issues in [a subsequent] case." *Id.*

As detailed in Chase's argument to the trial court in the present case, this Court has further addressed the preclusive effects of orders authorizing foreclosures on subsequent suits in a number of cases within the past year and a half, albeit in unpublished decisions. *See Petri v. Bank of America, N.A.*, \_ N.C. App. \_, 757 S.E.2d 524, COA 13-907 (4 Feb. 2014) (unpub.), available at 2014 WL 458095; *Friedman v. Bank of America, N.A.*, \_ N.C. App. \_, 758 S.E.2d 481, COA 13-483 (18 March 2014) (unpub.), available at 2014 WL 1042259; *Anderson v. Aurora Loan Servs., LLC*, \_ N.C. App. \_, 758 S.E.2d 903, COA 13-844 (15 April 2014) (unpub.), available at 2014 WL 1464298; *Armstrong v. Hutchens*, \_ N.C. App. \_, 763 S.E.2d 17, COA 13-1225 (1 July 2014) (unpub.), available at 2014 WL 2980261; *Mazzone v. Bank of America, N.A.*, \_ N.C. App. \_, 767 S.E.2d 705, COA 14-804 (2 December 2014) (unpub.), available at 2014 WL 6907563; *Jabez Consol. Holdings, Inc. v. Wells Fargo Bank, N.A.*, \_ N.C. App. \_, 768 S.E.2d 64, COA 14-552 (16 December 2014) (unpub.), available at 2014 WL 7149462; *Espey v. Select Portfolio Servs., Inc.*, \_ N.C. App. \_, \_ S.E.2d \_, COA 14-961 (7 April 2015) (unpub.), available at 2015 WL 1534068. In each of those cases, this Court affirmed the lower court's dismissal pursuant to Rule 12(b)(6) upon determining the plaintiffs were collaterally estopped from relitigating an issue decided in a prior foreclosure action that barred recovery in the plaintiffs' subsequent cases.

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Although unpublished decision are not binding, we find these recent decisions, in conjunction with *Phil Mechanic*, instructive in the present case.

This Court has explained that,

[u]nder the doctrine of collateral estoppel, or issue preclusion, “a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.” A party asserting collateral estoppel is required to show that “the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.”

*Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011) (citations omitted) (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996)). In a foreclosure under power of sale, the issues determined by the clerk before a foreclosure is authorized to proceed are:

the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) *default*, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in [N.C. Gen. Stat. §] 45-101(1b), or if the loan is a home loan under [N.C. Gen. Stat. §] 45-101(1b), that the pre-foreclosure notice under [N.C. Gen. Stat. §] 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by [N.C. Gen. Stat. §] 45-21.12A[.]

N.C. Gen. Stat. § 45-21.16(d) (2013) (emphasis added). “ ‘If the foreclosure action is appealed to the superior court for a *de novo* hearing, the inquiry before a judge of superior court is also limited to the same issues.’ ” *In re Hudson*, 182 N.C. App. 499, 502, 642 S.E.2d 485, 488 (2007) (quoting *Espinosa v. Martin*, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999)).



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In the present case, the orders of the clerk and superior court judge allowing foreclosure on the eight properties in the prior foreclosure proceedings are conclusive on the issue of default and other issues required to be determined under N.C. Gen. Stat. § 45-21.16(d), barring relitigation. Thus, our analysis begins with the premise that plaintiffs were in default and the foreclosures were proper.

The central issue now before this Court on appeal is whether the default determinations in the foreclosure orders are fatal to plaintiffs' claims in the present case. Plaintiffs contend they are not and argue the complaint states valid claims for breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, tortious interference with contracts and business expectancy, quantum meruit, and punitive damages. Plaintiffs assert these claims depend in large part on equitable principles which could not have been raised in the foreclosure proceedings before the clerk or superior court judge. Upon review, plaintiffs' arguments lack merit and we hold the default determinations in the foreclosure proceedings are fatal to plaintiffs' claims.

While it is true that “[e]quitable defenses to foreclosure . . . may not be raised in a hearing pursuant to [N.C. Gen. Stat.] § 45-21.16 or on appeal therefrom[,]” *In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 374-75, 432 S.E.2d 855, 859 (1993), equitable defenses to foreclosure may be raised in a separate action to enjoin the foreclosure prior to the time the rights of the parties become fixed. *See* N.C. Gen. Stat. § 45-21.34 (2013). In this case, plaintiffs sought to enjoin the foreclosures but did not appeal when the trial court denied those efforts. The rights of the parties then became fixed pursuant to N.C. Gen. Stat. § 45-21.29A.

In regards to specific claims, we hold plaintiffs' claims for breach of contract, negligent misrepresentation, tortious interference with contracts and business expectancy, and quantum meruit are barred by the final determinations as to the rights of the parties in the foreclosure proceedings. First, a review of the amended complaint shows that all damages alleged by plaintiffs stem from the foreclosures of the properties. Specifically, the damages alleged include loss of tenants and renters, loss of rental income, harm to plaintiffs' credit record resulting in increased interest rates and impairment in plaintiffs' ability to obtain new credit, and losses from upgrading and improving the properties. Where the foreclosures were conducted pursuant to orders by the clerk and superior court judge, we hold plaintiffs cannot recover damages resulting from the foreclosures of the properties. Second, a

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review of the promissory notes and deeds of trust reveal that the acts plaintiffs allege as the basis of their claims – Chase’s failure to reinstate a mortgage, Chase’s refusal of plaintiffs’ monthly mortgage payments, Chase’s foreclosure of the properties, and Chase’s communications with plaintiffs’ tenants and acceptance of rental payments – were permitted upon plaintiffs’ default. Thus, plaintiffs cannot complain of those acts. Specifically, the promissory notes provide that plaintiffs are in default if they do not pay the full amount of each monthly payment on the first day of each month. As conclusively determined in the foreclosure proceedings, and as evidenced by plaintiffs’ acknowledgement in the amended complaint that they did not make payments on the first day of each month, plaintiffs were in default. Upon default, the deeds of trust provide the trustee the right to foreclose on the properties under power of sale. Pursuant to the terms of the deeds of trust, all improvements to the properties were considered as part of the properties and governed by the security instruments. Furthermore, the deeds of trust allowed Chase to return plaintiffs’ payments if the payments were insufficient to bring the loan current, or to accept payments without a waiver of future rights. Thus, once plaintiffs had defaulted, Chase had the right to return plaintiffs’ payments and foreclose on the properties, including improvements. Moreover, the parties executed a family rider at the same time as the promissory notes and deeds of trust by which plaintiffs assigned to Chase all rents from the properties. Pursuant to the terms of the family rider, Chase was required to give notice to plaintiffs’ tenants before it could accept rental payments from the tenants upon default.

Considering the above, we hold the default determinations in the foreclosure proceedings defeat plaintiffs’ claims for breach of contract, negligent misrepresentation, tortious interference with contracts and business expectancy, and quantum meruit in the present suit.

On appeal, plaintiffs also argue the complaint stated valid claims for breach of the implied covenant of good faith and fair dealing and for punitive damages.<sup>3</sup> In regards to the good faith and fair dealing claim, although plaintiffs recognize they did not label the claim as a cause of action, plaintiffs assert the allegations in the amended complaint were sufficient to state the claim. *See Stanback*, 297 N.C. at 202, 254 S.E.2d at 625 (“[W]hen the allegations in the complaint give sufficient notice of

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3. Plaintiffs also asserted promissory estoppel as a cause of action in their amended complaint. Plaintiffs, however, have failed to raise any argument on appeal with respect to the validity of their promissory estoppel claim and therefore have abandoned the issue. *See* N.C. R. App. P. 28(a) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”).

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the wrong complained of an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory.”). Specifically, plaintiffs claim Chase made assurances it would accept, credit, and apply plaintiffs’ monthly payments properly. Yet, there is no indication that Chase acted in violation of the terms governing payments in the security instruments based on the allegations in the amended complaint concerning Chase’s management of plaintiffs’ monthly payments. Thus, we hold plaintiffs have not stated a valid claim for breach of the implied covenant of good faith associated with all contracts. In regard to plaintiffs’ claim for punitive damages, we note that a claim for punitive damages is not a stand-alone claim. A claim for punitive damages may succeed only if plaintiffs prove Chase was liable for compensatory damages and their injury was the result of fraud, malice, or willful or wanton conduct. N.C. Gen. Stat. § 1D-15(a) (2013). Because we hold the default determinations are fatal to plaintiffs’ other claims, plaintiffs’ claim for punitive damages also fails.

### III. Conclusion

Considering plaintiffs’ amended complaint in combination with the foreclosure orders, promissory notes, and deeds of trust, we hold the determinations of default by the clerk and superior court judge in the foreclosure proceedings are fatal to plaintiffs’ claims in the present case. Thus, we affirm the trial court’s dismissal of plaintiffs’ action pursuant to Rule 12(b)(6).

**AFFIRMED.**

Judges STEELMAN and STEPHENS concur.

## IN RE A.G.M.

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IN THE MATTER OF A.G.M. AND A.L.M.

No. COA14-1385

Filed 16 June 2015

**Termination of Parental Rights—burden of proof—failure to show grounds**

The trial court erred by terminating respondent mother's parental rights to her two children. The Department of Social Services failed in its burden of proving the existence of any ground for termination of respondent's parental rights pursuant to N.C.G.S. § 7B-1111. The 4 September 2014 order was reversed to the extent that it terminated respondent's parental rights to the children. The portions of the 4 September 2014 order not pertaining to respondent were not challenged and were not affected by the holdings in this opinion. The case was remanded to the trial court to exercise its continuing jurisdiction over this matter.

Appeal by Respondent-Mother from order entered 4 September 2014 by Judge Betty J. Brown in District Court, Guilford County. Heard in the Court of Appeals 26 May 2015.

*Mercedes O. Chut for Petitioner-Appellee Guilford County Department of Health and Human Services.*

*Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe, for Guardian ad Litem.*

*Mark Hayes for Respondent-Appellant Mother.*

McGEE, Chief Judge.

Respondent-Mother ("Respondent") appeals from the trial court's order terminating her parental rights to her minor children A.G.M. and A.L.M. ("the children"). With respect to the termination of Respondent's parental rights, we reverse and remand for further proceedings. In all other respects, we affirm.

The Guilford County Department of Health and Human Services ("DSS") purportedly obtained nonsecure custody of the children on 15 January 2011, after receiving a report that Respondent had been arrested, was using crack cocaine, and did not have an alternative

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childcare arrangement. Thereafter, the children were purportedly adjudicated neglected and dependent juveniles, and placed in foster care. After a series of review hearings, the trial court changed the children's permanent plan to adoption on 29 March 2012. Since the children were first taken into DSS's physical custody, Respondent spent the following periods of time incarcerated: 19 January 2011 to 24 April 2011, and 20 June 2011 to 25 January 2013. While incarcerated, Respondent participated in classes relating to substance abuse, anger management, domestic violence, preventing recidivism, and parent-child nurturing. Respondent also "pretty frequent[ly]" sent cards, letters, drawings and presents to the children while she was incarcerated. Sometime subsequent to Respondent's release from prison, she ceased sending things to the children after she was told the items were not being shown to the children, but were being kept in "life books" for the children in case it should be decided at some future date that the children could have those correspondences and items.

DSS filed petitions to terminate Respondent's parental rights. However, on 28 September 2012, Respondent's attorney filed a motion to dismiss the petitions for lack of subject matter jurisdiction because the children had previously been the subject of juvenile proceedings in Kentucky, and there was no evidence that Kentucky had terminated its jurisdiction as required by the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). DSS and the trial court apparently believed the proceedings in Kentucky had been closed by an order entered 22 September 2009. However, because Kentucky had not relinquished jurisdiction in those juvenile proceedings, the trial court in North Carolina lacked jurisdiction to address the matters before it. On 31 January 2013, DSS simultaneously dismissed the proceeding purportedly initiated in January 2011, and filed requests for nonsecure custody of the children based on the trial court's authority to exercise temporary emergency jurisdiction pursuant to N.C. Gen. Stat. § 50A-240. The trial court heard DSS's request on 31 January 2013, and entered an order on 25 February 2013 granting DSS temporary nonsecure custody of the children pursuant to its emergency temporary jurisdiction.

DSS filed new petitions on 28 March 2013, alleging that the children were neglected and dependent juveniles. The petitions alleged that the children had been in DSS custody since Respondent's arrest on 15 January 2011, both of the children's parents had histories of substance abuse, and both the children's presumptive father and Respondent's then current husband had committed acts of domestic violence against Respondent. It was further alleged in the petition that Respondent had

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been incarcerated from 19 January 2011 to 15 March 2011, and from 20 June 2011 until the date of the petition,<sup>1</sup> which limited her ability to meet the requirements deemed necessary for reunification by DSS; that she had failed to maintain contact with DSS or comply with the requirements of her DSS service agreement; and that she had a substantial history with social services in Kentucky.

The trial court in Kentucky entered valid orders transferring jurisdiction to North Carolina on 4 October 2013, though those orders were not filed in Guilford County until some later date. The trial court entered its first valid order adjudicating the children neglected and dependent juveniles on 10 December 2013, following a 7 November 2013 hearing on DSS's 28 March 2013 petitions for nonsecure custody.

The trial court ruled that the children were neglected, as defined by N.C. Gen. Stat. § 7B-101(15), because they “do not receive proper care, supervision or discipline from [their] parents;” that the children “have been abandoned by their parents;” and that they had “lived in an environment injurious to [their] welfare while in the home of their mother.” The trial court ruled that the children were dependent, as defined by N.C. Gen. Stat. § 7B-101(9), “in that [they] are in need of assistance or placement because [their] parents are unable to provide for their care or supervision and lack an appropriate alternative child care arrangement.” The trial court further ruled: “Since the filing of the Juvenile Petition[s], [DSS] has made reasonable efforts to achieve permanence for the juveniles and to eliminate placement.” The trial court denied Respondent visitation because “it has been years since the juveniles have seen [Respondent].” The trial court then ordered:

5. If [Respondent] desires visitation then she must make contact with the juvenile[s'] therapist . . . and DSS to determine if and when any visitation would be considered or appropriate given that the juveniles have not had any contact with the mother in a very long time.

6. [Respondent] is to engage in therapy with a therapist that has been pre-approved by [DSS]. The mother is to submit the therapist names and contact information to DSS for approval.

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1. This is incorrect as the petition was filed on 28 March 2013 and Respondent was released on 25 January 2013, prior to the filing of the petition. The exhibit attached to the petition, which included this information, was apparently drafted at least several months prior to the filing of the petition.

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. . . .

8. [DSS] has made and shall continue to make reasonable efforts to achieve permanence for the [children].

. . . .

10. This matter is to return to [c]ourt for a Dispositional/ Permanency Planning Hearing on December 5, 2013.

Ordered this 7th day of November, 2013; signed this the 9 day of December, 2013.

The trial court entered this adjudication order on 10 December 2013. By this adjudication order, the children were finally placed in the temporary custody of DSS pursuant to an adjudication of neglect and dependency entered by a North Carolina court with jurisdiction.

The trial court conducted a “Disposition and Permanency Planning Review Hearing” on 5 December 2013, less than one month following the 7 November 2013 adjudication hearing, and five days before entry and service of the adjudication order. Respondent was not present at that hearing. The trial court entered an order from the disposition and permanency planning hearing on 4 February 2014, nearly two months after having conducted the hearing. In its 4 February 2014 order from the 5 December 2013 disposition and permanency planning hearing, the trial court stated that, relevant to Respondent, “[t]he conditions that led to the juveniles’ coming into custody” were:

- [Respondent’s] criminal history and incarceration
- [Respondent’s] substance abuse
- Domestic violence between [Respondent] and her husband [the children’s stepfather]
- History of domestic violence between [Respondent] and [the presumptive father]
- Prior CPS history in Kentucky

The trial court found that: “After [Respondent’s] release from prison [on 25 January 2013], [DSS] sent [Respondent] a second full service agreement in July 2013 (the first full service agreement having been signed in June 2011). DSS sent [Respondent] a full service agreement again in October 2013[.]” The trial court then listed the components of the service agreements sent to Respondent by DSS, which included obtaining a mental health evaluation and following up as needed,

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domestic violence counseling, showing an ability to provide the children with a safe environment, maintaining safe and stable housing, parenting classes, individual counseling related to inappropriate sexual conduct in the presence of the children, stable employment, payment of fines and child support, developing a household budget, submitting to a drug and alcohol assessment and complying with recommendations, and submitting to random drug screens. The trial court found that Respondent had failed to comply with many of the provisions in the service agreement. The trial court also found: "It is most appropriate for termination of parental rights to be considered at this hearing as a result of the children having been in the custody of DSS for 31 months and the lack of permanence in their lives."

The trial court ruled that "[s]ince the filing of the Juvenile Petition[s], [DSS] has made reasonable efforts to achieve permanence for the juveniles and to eliminate the need for placement." The trial court changed the "permanent plan to . . . adoption with a concurrent plan of reunification with [Respondent]." The trial court ordered that DSS was "to continue to make reasonable efforts to reunify the juveniles with [Respondent,]" but that DSS was "to proceed with seeking termination of parental rights within sixty days of this hearing." The trial court ordered that, if Respondent desired reunification, she "shall sign and return the service agreement directly to [DSS] and engage in the service components of that service agreement[,]" and that if Respondent desired visitation she "must make contact with the juveniles' therapist . . . to schedule a session with [her] to explore if and when any visitation should be considered appropriate." Although the hearing was conducted on 5 December 2013, the order was not signed by the trial court until 3 February 2014, and was not entered until 4 February 2014. The certificate of service indicates that the disposition and permanency planning order was served on Respondent by depositing it with the United States Postal Service on 5 February 2014.

On 7 February 2014, two days after Respondent was served with the disposition and permanency planning order by mail, DSS filed a motion in the cause seeking termination of Respondent's parental rights. The motion alleged that Respondent's rights were subject to termination on the grounds of neglect, willfully leaving the children in placement outside the home for more than twelve months without making reasonable progress, willfully failing to pay a reasonable portion of the children's care for six months, dependency, and abandonment. The trial court conducted a hearing on the motion seeking termination on 12 and 13 May 2014.



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On 4 September 2014, more than three and a half months after the hearing, the trial court entered an order terminating Respondent's parental rights on the grounds of neglect, willfully leaving the children in foster care for more than twelve months, dependency, and abandonment. The trial court further concluded that termination would be in the children's best interests. Respondent timely appealed from the trial court's order terminating her parental rights.<sup>2</sup>

*Analysis*

Respondent argues that the trial court erred in terminating her parental rights. We agree.

The facts and procedural history of this case are unusual, and require us to dismiss certain evidence from our evaluation. "It is axiomatic that a trial court must have subject matter jurisdiction over a case to act in that case." *In re S.D.A., R.D.A., V.P.M., & J.L.M.*, 170 N.C. App. 354, 355, 612 S.E.2d 362, 363 (2005) (citation omitted).

Although the North Carolina Juvenile Code grants the district courts of North Carolina "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent[,]" N.C. Gen. Stat. § 7B-200(a) (2007), the jurisdictional requirements of the UCCJEA and the Parental Kidnapping Prevention Act . . . must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code.

*In re J.W.S.*, 194 N.C. App. 439, 446, 669 S.E.2d 850, 854 (2008) (citation omitted). It is undisputed in the present case that, pursuant to the requirements of the UCCJEA, the trial court had no jurisdiction to consider DSS's petition for nonsecure custody and to order that nonsecure custody of the children be granted to DSS on 15 January 2011. This is because the unresolved Kentucky custody order involving the children served to maintain exclusive jurisdiction in Kentucky. *See* N.C. Gen. Stat. § 50A-201 (2013); *In re J.W.S.*, 194 N.C. App. at 446, 669 S.E.2d at 854-55.

It was the continuing duty of DSS to make reasonable efforts to insure that there were no proceedings in another state "that could affect the current proceeding." N.C. Gen. Stat. § 50A-209(d) (2013). Absent jurisdiction, the trial court did not have the authority to order DSS to assume nonsecure custody of the children. *See In Re Ivey*, 156 N.C. App.

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2. The trial court also terminated the parental rights of the children's presumptive father. However, the father failed to attend the termination hearing and did not appeal the court's termination order.

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398, 401, 576 S.E.2d 386, 389 (2003). Therefore, “DSS was not an agency awarded custody of the minor children by a court of competent jurisdiction.” *In re S.E.P. & L.U.E.*, 184 N.C. App. 481, 488, 646 S.E.2d 617, 622 (2007); *see also In re S.W.*, 188 N.C. App. 165, 654 S.E.2d 831 (2008) (unpublished). When “the trial court never obtains subject matter jurisdiction over the case[,] all of its orders are void *ab initio*.” *In re N.T.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 769 S.E.2d 658, 660 (2015) (citations omitted).

What this means for the case before us is that DSS did not obtain legal custody of the children until the trial court entered its order granting DSS temporary emergency nonsecure custody pursuant to N.C. Gen. Stat. § 50A-204 on 25 February 2013. In addition, all orders of the trial court in this matter prior to the 25 February 2013 order were therefore void *ab initio*. Following entry of the emergency custody order, “the trial court was required to defer any further proceedings in the matter pending a response from [Kentucky] as to whether that state was willing to assume jurisdiction to resolve the issues[.]” *In re J.W.S.*, 194 N.C. App. at 452, 669 S.E.2d at 858 (citations and quotation marks omitted); *see also Matter of Van Kooten*, 126 N.C. App. 764, 770-71, 487 S.E.2d 160, 164 (1997) (once trial court exercises emergency jurisdiction it must defer any further proceedings until the state with original continuing jurisdiction decides to maintain or relinquish jurisdiction).

Pursuant to the 25 February 2013 emergency custody order, the trial court was without jurisdiction: (1) to order Respondent to do anything other than relinquish the children to the temporary custody of DSS; (2) to order DSS to do anything beyond what was necessary for DSS to take care of the children pursuant to the emergency custody order; and (3) to consider any other matters related to custody of the children. *Id.*; *see also* N.C. Gen. Stat. § 7B-904 (2013); *In re K.U.-S.G., D.L.L.G., & P.T.D.G.*, 208 N.C. App. 128, 131-32, 702 S.E.2d 103, 105-06 (2010).

*The Present Action*

DSS filed a new juvenile petition alleging the children were neglected and dependent on 28 March 2013. For over six months, the trial court lacked jurisdiction to consider this petition because Kentucky did not relinquish jurisdiction until 4 October 2013.

The first legitimate<sup>3</sup> adjudication order finding that the children were neglected and dependent was entered 10 December 2013. The trial court made the adjudicatory findings that the children

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3. This assumes the 28 March 2013 petition, filed before the trial court had jurisdiction, was proper once the trial court obtained jurisdiction.

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have been in the physical custody of [DSS] since January 15, 2011, a period of more than two consecutive years immediately preceding the filing of the Juvenile Petition in this matter. During that period of time, DSS offered service agreements and services to [Respondent] in an effort to assist [Respondent] in reunifying with the [children].”

Respondent was incarcerated from 19 January 2011 to 24 April 2011, and from 20 June 2011 to 25 January 2013. The trial court found that Respondent had engaged in inappropriate acts prior to her 19 January 2011 incarceration, had left Virginia following her 25 January 2013 release “in violation of her bond agreement[,]” had returned to Kentucky following her release from prison though the children were in North Carolina, had failed “to contact DSS within forty-eight hours after being released from prison . . . to advise DSS of her whereabouts[,]” and had failed “to maintain consistent contact with DSS up [to] the filing [of] the Juvenile Petition in this matter.” The trial court also found that Respondent had not sought drug treatment after she was released from prison in January 2013, though she had told a social worker in March 2011 that she would seek drug treatment upon release from prison. We note that, though no petition or motion seeking termination of Respondent’s parental rights had been filed, the trial court referred to the matter before it as “a termination of parental rights proceeding[.]”

While these findings were supported by the evidence, not all of them were relevant to the adjudication. Though the children had been in the physical custody of DSS since January 2011, this custody was based upon void orders of the trial court. DSS did not have legal custody of the children until 2013. Neither DSS nor the trial court had authority to order Respondent to comply with any service agreements in order for Respondent to regain custody of the children, because Respondent had never legally lost custody of the children. For the same reasons, any failure to contact DSS, or respond in any way to DSS’s requests prior to disposition – which of course occurred after the adjudication hearing – cannot be seen as violating any official order or agreement.

In the decretal portion of the adjudication order, the trial court stated that, if Respondent desired visitation with the children, Respondent was required to make contact with the children’s therapist in order to determine when or if that would be appropriate, and that Respondent was “to engage in therapy with a therapist that has been pre-approved by [DSS].” It is unclear from the order what the required therapy was supposed to address. It is also unclear pursuant to what authority the trial court

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ordered Respondent to engage in therapy. N.C. Gen. Stat. § 7B-904 states in relevant part:

*At the dispositional hearing or a subsequent hearing the court may determine whether the best interests of the juvenile require that the parent . . . undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent[.] If the court finds that the best interests of the juvenile require the parent . . . [to] undergo treatment, it may order that individual to comply with a plan of treatment approved by the court or condition legal custody or physical placement of the juvenile with the parent . . . upon that individual's compliance with the plan of treatment. The court may order the parent . . . to pay the cost of treatment ordered pursuant to this subsection.*

N.C. Gen. Stat. § 7B-904(c) (2013) (emphasis added).

In a 5 December 2013 “Disposition and Permanency Planning Review Hearing” conducted five days before entry of the 10 December 2013 adjudication order, the trial court for the first time set a permanent plan for the children. This was also the first permanency planning hearing in this matter.

Chapter 7B does not define “entry” of a termination of parental rights order, but does require that both adjudicatory and best interest orders in termination matters be “reduced to writing, signed, and *entered* no later than 30 days following the completion of the termination of parental rights hearing.” The plain language of these statutes establishes that a TPR order must be in written form to be “entered.” In addition, “[t]he Rules of Civil Procedure will . . . apply to fill procedural gaps where Chapter 7B requires, but does not identify, a specific procedure to be used in termination cases.” The Rules of Civil Procedure specifically provide that “a judgment is *entered* when it is reduced to writing, signed by the judge, and filed with the clerk of court.” N.C.R. Civ. P. 58 (emphasis added).

Further, section (a)(1) of Rule 52 of the North Carolina Rules of Civil Procedure provides: “In all actions tried

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upon the facts without a jury or with an advisory jury, the court shall find the facts specially *and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.*' Rule 52 applies to termination of parental rights orders."

*In re B.S.O., V.S.O., R.S.O., A.S.O., & Y.S.O.*, \_\_ N.C. App. \_\_, \_\_, 740 S.E.2d 483, 485 (2013) (citations omitted). The requirement that an order be "reduced to writing, signed, and entered no later than 30 days following the completion of the hearing" applies equally for adjudication of the initial juvenile petition, N.C. Gen. Stat. § 7B-807(b), the disposition order, N.C. Gen. Stat. § 7B-905(a), orders following review and permanency planning hearings, N.C. Gen. Stat. § 7B-906.1(h), and any order continuing nonsecure custody, N.C. Gen. Stat. § 7B-506(d). It is only upon entry of these orders that legal authority to act upon them is created. *See In re Thompson*, \_\_ N.C. App. \_\_, \_\_, 754 S.E.2d 168, 171-72 (2014). Furthermore, in certain instances where the trial court fails to adhere to the mandate in the Juvenile Code that an order be reduced to writing, signed, and entered (i.e. filed) within thirty days, the code provides the following:

If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

N.C. Gen. Stat. § 7B-807(b) (2013); *see also* N.C. Gen. Stat. § 7B-905(a); N.C. Gen. Stat. § 7B-906.1(h); N.C. Gen. Stat. § 7B-1109(e); N.C. Gen. Stat. § 7B-1110(a).

The disposition and permanency planning order resulting from the 5 December 2013 hearing was entered 4 February 2014. The permanent plan was "set as adoption with a concurrent plan of reunification with [Respondent]." In the same paragraph, the trial court stated that DSS was "to make reasonable efforts to reunify the juveniles with [Respondent]. [DSS] is to proceed with seeking termination of parental rights within sixty days of this hearing." We note that Respondent was served with this order approximately sixty days following the permanency planning hearing. In its 4 February 2013 order, the trial court for the first time

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acknowledged “[t]he conditions that led to the juveniles’ coming into custody [of DSS as including] the following:”

- [Respondent’s] criminal history and incarceration
- [Respondent’s] substance abuse
- Domestic violence between [Respondent] and her husband [the children’s stepfather]
- . . . .
- History of domestic violence between [Respondent] and [the presumptive father]
- Prior CPS history in Kentucky

The trial court found that, after Respondent was released from prison, DSS sent Respondent a “full service agreement” in July 2013, and that DSS again sent Respondent a “full service agreement” in October 2013. The service agreement would have required Respondent to submit to various psychiatric and substance abuse evaluations, and engage in various treatment and therapy programs related to domestic violence, substance abuse, and parenting; obtain and maintain appropriate housing and employment; and submit to random drug testing “upon request by DSS.” Respondent had not signed and returned the service agreement prior to the 5 December 2013 hearing. We note that neither the trial court nor DSS had the authority in this neglect and dependency proceeding to require Respondent to sign any service agreement or submit to any testing, evaluation, or therapy in relation to any custody determinations concerning the children prior to entry of the 4 February 2014 disposition and permanency planning order. N.C. Gen. Stat. § 7B-904; N.C. Gen. Stat. § 7B-406(b)(4); *Thompson*, \_\_ N.C. App. at \_\_, 754 S.E.2d at 171-72.

The trial court found that Respondent “was placed under an order to pay child support in the amount of \$50.00 per month effective February 1, 2013. However, [Respondent’s] income is \$2,220.00 per month and so the \$50.00 per month order does not equate to the appropriate child support guideline amount.” It is unclear under what authority Respondent was ordered to pay child support on 1 February 2013. It was at the 5 December 2013 disposition and permanency planning hearing that the trial court first obtained authority to order child support, N.C. Gen. Stat. § 7B-904(d), and only after entering the order on 4 February 2014, that any order of child support could go into effect. *Thompson*, \_\_ N.C. App. at \_\_, 754 S.E.2d at 171-72.

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Prior to entry of the 25 February 2013 order granting DSS emergency custody of the children, the children were in the physical, but not legal, custody of DSS. We are also unaware of any authority to order child support based upon emergency custody. *In re Van Kooten*, 126 N.C. App. at 769, 487 S.E.2d at 163 (citations omitted) (“The exercise of emergency jurisdiction, however, confers authority to enter temporary protective orders only[.]”).

N.C. Gen. Stat. § 7B-906.1 states in part:

(d) At each [permanency planning] hearing, the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Services which have been offered to reunite the juvenile with either parent whether or not the juvenile resided with the parent at the time of removal or the guardian or custodian from whom the child was removed.

....

(e) At any permanency planning hearing where the juvenile is not placed with a parent, the court shall additionally consider the following criteria and make written findings regarding those that are relevant:

....

(5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile.

N.C. Gen. Stat. § 7B-906.1 (2013). In response to the requirement of N.C. Gen. Stat. § 906.1(d)(1), the trial court included the following in its 4 February 2014 order:

a. [DSS] offered the following services to reunite the [children] with [Respondent] since removal:

- Three service agreements offered to [Respondent] since January 15, 2011

....

- Request to McLean County Kentucky Social Services for assistance in engaging [Respondent] in obtaining

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domestic violence, counseling, substance abuse and other services

- Team Decision Making Meetings
- Permanency Planning Meetings
- Home visits with foster parents and children
- . . . .
- Contact with parent’s attorneys
- . . . .
- Numerous attempts to contact both parents

“Removal” for purposes of our review occurred on 10 December 2013, after the trial court obtained jurisdiction and entered its adjudication order in response to the 28 March 2013 DSS petition. Nothing indicated above occurred after 10 December 2013 because the disposition and permanency planning hearing occurred on 5 December 2013. Based upon the above findings, the trial court concluded that DSS had “made reasonable efforts toward reunification and ha[d] made reasonable efforts towards permanence.” With respect to N.C. Gen. Stat. § 7B-906.1(e) (5), the trial court acknowledged: “This is the initial permanency planning review hearing where a permanent plan for the juveniles is being selected. As set forth above, DSS has been making reasonable efforts toward reunification.”

Three days following entry of the 4 February 2014 disposition and permanency planning order, DSS filed its 7 February 2014 motion seeking termination of Respondent’s parental rights. Termination hearings were held 12 and 13 May 2014. The trial court entered its order terminating Respondent’s parental rights on 4 September 2014, more than three and a half months after the hearings.

*Grounds for Termination*

The trial court terminated Respondent’s parental rights based upon N.C. Gen. Stat. § 7B-1111(a)(1), (2), (6), and (7), which grounds are:

- (1) The parent has . . . neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101.
- (2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months



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without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

....

(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]

N.C. Gen. Stat. § 7B-1111(a) (2013).

At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists. Review in the appellate courts is limited to determining whether clear, cogent, and convincing evidence was presented to support the findings of fact, and whether the findings of fact support the conclusions of law.

*In re O.J.R.*, \_\_ N.C. App. \_\_, \_\_, 769 S.E.2d 631, 634 (2015) (citations omitted).

Because, for purposes of this review, the children were not removed from Respondent more than twelve months prior to the termination hearing, N.C. Gen. Stat. § 7B-1111(a)(2) was not a valid ground for termination.

N.C. Gen. Stat. § 7B-1111(a)(6) is likewise improper. The trial court based this ground on Respondent's prior history of substance abuse.

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There is no evidence in the record that Respondent has abused any illegal substances since before her January 2011 incarceration; therefore, DSS failed in its burden of proving that substance abuse would prevent Respondent from providing for the proper care and supervision of the children. *Id.*

We also find insufficient evidence to support termination based upon neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Neglect is defined as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent . . . ; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2013).

In determining neglect, the court must consider "the fitness of the parent to care for the child *at the time of the termination proceeding.*" Although evidence of past neglect is admissible, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." This is especially true where the parent has not had custody of the child for quite some time.

*In re G.B.R.*, 220 N.C. App. 309, 316, 725 S.E.2d 387, 392 (2012) (citations omitted). The trial court based this ground primarily on events that occurred before 2011, including two relationships Respondent had with men who physically abused her; Respondent's failing to take proper precautions to prevent the children from seeing her engage in sexual acts with her then husband; Respondent's drug abuse and her criminal history. As stated above, there is no evidence of substance abuse since early 2011. We find that DSS presented insufficient evidence of a likelihood that Respondent would repeat her prior history of entering into abusive relationships, or engaging in sexual acts in front of the children.

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We recognize that, because Respondent had not been in close proximity to men for most of the period between January 2011 and the termination hearing, there was scant opportunity for DSS to make a determination concerning this issue. DSS also failed to demonstrate how Respondent's criminal history constituted neglect in this case. The trial court found:

[Respondent's] neglect of the [children] has been ongoing through the present as evidenced by the following: [Respondent's] failure to sign and return the full service agreement mailed to her after her release from prison; [Respondent's] failure to comply with the requirements of the service agreement developed for her; [Respondent's] refusal to answer the Social Worker's calls; [Respondent's] failure to maintain adequate contact with the Social Worker; [Respondent's] failure to participate in services targeted to address the issues that brought the [children] into custody; and [Respondent's] lack of stable housing. . . . Given that [Respondent] has failed to address the issues that brought the juveniles into custody, and given that she continues to demonstrate deficits in her parenting judgment and abilities, there is a likelihood of the repetition of neglect by [Respondent].

As discussed above, neither the trial court nor DSS had the jurisdiction or the authority to compel Respondent to sign any service agreement, nor require that Respondent comply with anything in any service agreement, until entry of the disposition order on 4 February 2014. N.C. Gen. Stat. § 7B-904. We hold that in this instance the three months between the entry of the disposition order and the termination hearing was insufficient to determine whether Respondent was likely to repeat any prior neglect of the children. This is particularly true in light of the fact that Respondent was not allowed any contact with the children during that time period, Respondent has not failed any drug tests, Respondent has maintained employment and housing, and there is no evidence that Respondent has engaged in any inappropriate or dangerous relationships with men.

While we agree that Respondent's efficiency apartment at the time of the termination hearing would not be appropriate housing for the children if Respondent continued to share the apartment with a man, DSS has failed to demonstrate how Respondent's living conditions were inappropriate or harmful to the children while the children were living with their foster parents, without any contact with Respondent, and while

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Respondent was without any legitimate expectation that she would obtain overnight visitation rights, much less custody of the children, in the immediately foreseeable future.

Finally, we hold there was not sufficient competent evidence to terminate Respondent's parental rights based upon a conclusion that Respondent "willfully abandoned the [children] for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7). The trial court found that Respondent "refused to cooperate with the Social Worker and did not make any significant effort toward achieving reunification." There was no legally recognizable plan for reunification in place until after the entry of the 4 February 2014 disposition order, and neither the trial court nor DSS could make any enforceable conditions on Respondent's behavior prior to 4 February 2014. DSS's motion for termination of Respondent's parental rights was filed on 7 February 2014. This three-day period is clearly inadequate to determine Respondent's compliance or lack of compliance with orders of the trial court or elements of any service agreement developed by DSS. It is also an insufficient amount of time in which to determine whether DSS's efforts toward reunification were reasonable, or whether DSS had made reasonable efforts to implement the permanent plan first set forth in the 4 February 2014 disposition and permanency planning order. Reasonable efforts means "[t]he diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-101(18) (2013).

We hold that DSS failed in its burden of proving that Respondent's conduct manifested "a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citation omitted). Respondent's payment of child support, regular contact with the children's guardian *ad litem*, apparent sobriety, steady employment, and at least minimal participation in these proceedings were sufficient, in this instance, to defeat DSS's allegation that Respondent had willfully abandoned the children as required by N.C. Gen. Stat. § 7B-1111(a)(7).

*Conclusion*

Because we hold that DSS has failed in its burden of proving the existence of any ground for termination of Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111, we reverse the 4 September 2014 order to the extent that it terminated Respondent's parental rights to the

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children. The portions of the 4 September 2014 order not pertaining to Respondent have not been challenged and are not affected by the holdings in this opinion. We remand to the trial court for it to exercise its continuing jurisdiction over this matter. DSS is, of course, free to file any appropriate petitions or motions in this matter as conditions warrant.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges STEPHENS and DAVIS concur.

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IN THE MATTER OF A.L.T. AND C.T.

No. COA14-1121

Filed 16 June 2015

**1. Child Abuse, Dependency, and Neglect—hearsay evidence—bench trial**

In a child abuse and neglect proceeding, the trial court did not err by allowing into evidence hearsay statements made by the child to a social worker and an aunt. The court in a bench trial is presumed to have disregarded any incompetent evidence, and here the court can be presumed to have disregarded the incompetent evidence during the adjudication because it made no findings pertaining to that evidence. The trial court was authorized to consider such evidence for purposes of disposition.

**2. Child Abuse, Dependency, and Neglect—findings not necessary for ultimate conclusion—not considered on appeal**

In a child abuse and neglect proceeding, challenges by the parents to findings that were not necessary to support the ultimate conclusions were not considered on appeal. Any error would not constitute reversible error.

**3. Child Abuse, Dependency, and Neglect—striking children—domestic violence**

The trial court properly characterized a father's actions as domestic violence where the father intentionally caused bodily injury to a minor child with whom he resided when he "popped" one daughter in the mouth, causing her to suffer a "busted" lip, and "popped" the other in the mouth, causing her to cry.

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**4. Child Abuse, Dependency, and Neglect—abuse—timing of father’s actions—consistent with evidence**

The evidence in a proceeding for child abuse and neglect about the timing of the father’s actions were consistent with the evidence.

**5. Child Abuse, Dependency, and Neglect—neglected juveniles—father aggressive and violent**

The trial court did not err by concluding that children were neglected juveniles where competent evidence supported the findings that the father engaged in aggressive and violent behaviors in the home, including punching the walls and striking the children.

**6. Child Abuse, Dependency, and Neglect—disposition order—return to parents’ home—not in best interest of juveniles**

The trial court’s disposition order in a neglected juvenile case was affirmed where the trial court made uncontested findings that the return of the juveniles to the parents’ home would be contrary to the juveniles’ welfare and best interest because issues still existed, the juveniles required more care and attention than the parents could provide, Social Services had made reasonable efforts to prevent or eliminate the need for the juveniles’ placement, which was the responsibility of Social Services, and Social Services was to provide or arrange for foster care or other placement.

Judge Inman concurring by separate opinion.

Judge Tyson dissenting by separate opinion.

Appeal by respondents from orders entered 21 May 2014 and 16 July 2014 by Judge J. Gary Dellinger in Caldwell County District Court. Heard in the Court of Appeals 20 April 2015.

*Lauren Vaughn for petitioner-appellee Caldwell County Department of Social Services.*

*Leslie Rawls for respondent-appellant father.*

*J. Thomas Diepenbrock for respondent-appellant mother.*

*Poyner Spruill LLP, by Daniel G. Cahill, for guardian ad litem.*

ELMORE, Judge.

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Respondent-father (“Father”) and respondent-mother (“Mother”) appeal from an adjudication order which adjudicated their children C.T. (“Clara”)<sup>1</sup> and A.L.T. (“Anna”) neglected juveniles, and a disposition order which continued custody of the children with the Caldwell County Department of Social Services (“CCDSS”).

Father and Mother (collectively “parents”) are the parents of Clara, born in June 2009, and Anna, born in April 2012. On 9 October 2013, CCDSS filed juvenile petitions alleging Clara was an abused and neglected juvenile and Anna was a neglected juvenile. CCDSS alleged that Clara disclosed to her paternal great aunt E.D. (“Aunt D”) and CCDSS social worker Aimee Fairchild (“Fairchild”) that she was being sexually abused by Father; that Clara disclosed to Fairchild that she had been “punched” by Father; that Father admitted backhanding Clara; and that Mother disclosed to relatives that domestic violence occurred between her and Father. The petitions further alleged that CCDSS records revealed that Father was a victim of sexual abuse by his own admission; that Father was substantiated as a perpetrator of sexual abuse upon his female cousin in 2003, when she was between 9 to 12 years of age and Father was between 12 and 15 years of age; and that there was no record that Father complied with CCDSS’s recommendation that he participate in a sexual abuse intervention service (“SAIS”) assessment. CCDSS took non-secure custody of the children.

Prior to the hearing on the petitions, the District Court (“the court” or “the trial court”) allowed CCDSS’s motion that Clara be allowed to testify by remote video equipment. CCDSS also filed a notice of intent to use hearsay statements Clara made to Aunt D and Fairchild. The court denied the motion, finding that the “best evidence is the juvenile’s live testimony[.]”

The adjudication hearing was held on 26 February 2014, 26 March 2014, and 22 April 2014. Clara testified that her father hit her in the mouth, but denied that he touched her inappropriately. Over the parents’ objections, Aunt D and Fairchild testified about statements Clara made to them regarding inappropriate touching by Father. The court also allowed, over the parents’ objections, Father’s cousin to testify about her sexual encounter with Father when they were children and former CCDSS investigator Shelley Triplett to testify about the 2003 investigation of events involving the Father’s illicit sexual acts. At the end of the

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1. The pseudonyms “Anna” and “Clara” are used throughout the remainder of this opinion for ease of reading and to protect the juveniles’ privacy.

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adjudication hearing, the parents renewed their objections to certain testimony and moved to dismiss the petitions. The court dismissed the abuse allegation.

By order filed 21 May 2014, the court adjudicated Clara and Anna neglected juveniles. In a separate disposition order, the court determined it was in the best interest of Clara and Anna to remain in CCDSS custody. The court ordered Father to comply with his case plan, which included completing a SAIS assessment, and denied visitation. The court ordered Mother to comply with her case plan and permitted visitation every other week. Parents appeal separately.

Both parents contend: (1) the trial court erred in allowing hearsay statements into evidence; (2) the trial court erred in allowing irrelevant testimony into evidence; (3) certain findings of fact are not supported by clear, cogent, and convincing evidence; and (4) the trial court failed to make sufficient findings of fact to support its determination that the children were neglected.

### I. Standard of Review

When reviewing an adjudication of neglect, we must determine whether the trial court's findings of fact are supported by clear and convincing evidence, and whether those findings of fact support the trial court's conclusions of law. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). If the trial court's findings of fact are supported by competent evidence, they are binding on appeal, even if there may be evidence to support contrary findings. *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). We review the trial court's conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

### II. Challenges to Testimony

**[1]** The parents argue that the trial court erred in allowing into evidence hearsay statements made by Clara to social worker Fairchild and to Aunt D. Before the hearing, the trial court denied CCDSS's motion to use Clara's hearsay statements regarding Father's inappropriate touching of Clara. At the hearing, Clara denied any such conduct and, over the parents' objections, the court allowed Aunt D and Fairchild to testify about Clara's statements about the alleged conduct.

"Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply" to the adjudication hearing. N.C. Gen. Stat. § 7B-804 (2013). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing,



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offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2013). This Court has acknowledged the “well-established supposition that the trial court in a bench trial is presumed to have disregarded any incompetent evidence.” *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) (quotation and citation marks omitted). After the trial court determines a juvenile is neglected, it “may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” N.C. Gen. Stat. § 7B-901 (2013).

Here, the court can be presumed to have disregarded the incompetent evidence because the court made no findings pertaining to the hearsay evidence in support of its adjudication of neglect and dismissed the sexual abuse allegation. The parents argue the trial court’s reliance on the hearsay evidence is shown by the court’s establishing a disposition that orders Father to obtain an SAIS and denies him visitation. However, the trial court was authorized to consider the hearsay evidence in its dispositional order. *Id.* Accordingly, this argument is without merit.

Parents also argue testimony from Father’s first cousin and from a former CCDSS social worker regarding Father’s prior sexual conduct should have been excluded as irrelevant.

We have stated the following regarding the relevancy of evidence:

Pursuant to the North Carolina Rules of Evidence, evidence is relevant if it has 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. While a trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard, such rulings are given great deference on appeal.

*In re E.P.*, 183 N.C. App. 301, 303-04, 645 S.E.2d 772, 773-74, *aff’d per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007) (citation and quotation marks omitted).

Parents contend the trial court erred in admitting evidence of prior sexual activity between Father and his cousin because the sole purpose was to show propensity. However, parents only link the alleged incompetent evidence to the trial court’s findings of fact in its dispositional order. As noted above, the trial court “may consider any evidence . . . necessary to determine the needs of [Clara and Anna] and the most appropriate disposition.” *See* N.C. Gen. Stat. § 7B-901. Because the trial

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court was authorized to consider such evidence for purposes of disposition, this argument is without merit.

## III. Adjudication of Neglect

## A. Challenges to Findings of Fact

**[2]** Parents contend that certain findings of fact made by the trial court are not supported by competent evidence. We disagree.

The trial court made the following pertinent findings of fact<sup>2</sup> to support its conclusion that the children were neglected:

26. Respondent father has engaged in at least one act of domestic violence toward the juvenile, [Clara]. The juvenile, [Clara], has been physically struck by Respondent father on at least one occasion wherein Respondent father popped [Clara] in the mouth leaving a mark on the juvenile's mouth which included a swollen and busted lip.

27. Respondent father has engaged in at least one act of domestic violence toward the juvenile, [Anna]. The juvenile, [Anna], has been physically struck by Respondent father on at least one occasion. The juvenile, [Clara], witnessed Respondent father strike [Anna].

28. The juvenile, [Clara], is fearful or scared that she will receive a whipping or spanking from Respondent father if she states anything that has happened while she resided with Respondent mother and Respondent father.

....

30. Respondent father has engaged in aggressive and violent behaviors in the home where the juveniles resided with him and Respondent mother. Respondent father engages in activities such as punching holes in walls and doors of his home, and throwing and breaking more than one cellular telephone when he is angry. On one occasion, Respondent father broke his hand from punching a wall in the family home. Respondent father has stated that when he gets angry or mad, he just has to hit something. These

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2. These findings are also set out in the trial court's disposition order as findings numbered 16, 18 and 20.

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activities have occurred in the home where Respondent father resides with Respondent mother and the juveniles prior to the juveniles being removed from the family home on October 8, 2013.

As an initial matter, we note that the parents challenge many of the trial court's other findings of fact as not being supported by competent evidence. However, we do not address all of these challenged findings of fact because they are unnecessary to support the ultimate conclusions, and any error in them would not constitute reversible error. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (“[W]e agree that some of [the challenged findings] are not supported by evidence in the record. When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error.”). Finding of fact 28 is not challenged by either parent and is deemed supported by competent evidence. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

**[3]** Parents challenge the first sentence of finding of fact 26, arguing that the court mischaracterized Father's single act of discipline as domestic violence. The rest of the finding is unchallenged and supported by the testimony of Clara and her parents. Clara testified that “[Father] popped me in the mouth” and that “he bust me in the lip.” Mother testified that Clara was “pitch[ing] a fit” about wanting a toy pictured on a cereal box, that Father tried to explain they could not get the toy, and that when Clara yelled at Mother, Father “popped like this with the back of his hand on her lip and it busted her lip.” Father testified that Clara “started getting even more belligerent with her mother and I loosely popped her with my fingertips.”

Noting that the term “domestic violence” is not defined in Chapter 7B of the North Carolina General Statutes, parents assert that Father's actions do not fit the definition of domestic violence in N.C. Gen. Stat. § 50B-1(a). That statute defines domestic violence as

one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship . . . :

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent

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serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or

(3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

N.C. Gen. Stat. § 50B-1(a) (2013). Here, Father intentionally caused bodily injury to a minor child with whom he resides pursuant to section (a)(1) when he struck Anna and hit Clara in the mouth, causing her to suffer a busted lip. Accordingly, the trial court properly characterized Father's actions as domestic violence.

Mother also challenges finding of fact 27 as being unsupported by competent evidence. However, Clara testified, "[Father] popped [Anna] in the mouth" and that Anna cried as a result.

**[4]** The parents next argue that finding of fact 30 implies that Father's behaviors were untreated and continued up until the time the children were removed from the home. Mother testified that she has seen Father "hit walls" and "bust[] a couple [of] cell phones" when he is angry since they were married in August 2009 and that the children were residing in the home when Father had engaged in these acts. Mother further testified that Father "takes [Effexor] for his anger issues" and has not broken anything since he has been on medication for the past year. When Father was asked what kind of activities he engaged in when he gets mad, Father replied, "punching some holes in some walls and I've destroyed cell phones." He further testified that he has been taking medication for his anger issues for more than a year and has "been fine ever since." Further, Aunt D testified that Father broke his hand after he hit a wall and that Father told her that when he gets mad, he has to hit something. Testimony shows that Father punched walls and broke cell phones while the children resided with the parents and that Father had not done so in the year prior to the hearing in April 2014. We do not find this evidence inconsistent with the trial court's finding that Father's actions occurred "prior to the juveniles being removed from the family home on October 8, 2013." Accordingly, parents' arguments are without merit.

#### B. Challenges to Conclusion of Neglect

**[5]** Finally, the parents contend the trial court erred in concluding that the children were neglected juveniles. We disagree.

"The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected or dependent." *In re J.S.*, 182 N.C.

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App. 79, 86, 641 S.E.2d 395, 399 (2007). As such, our Supreme Court has ruled that “[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.” *Matter of Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). Thus, our analysis upon review of this matter “is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile.” *In re J.S.*, 182 N.C. App. at 86, 641 S.E.2d at 399.

A “neglected juvenile” is defined in part as “[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent . . . or who lives in an environment injurious to the juvenile’s welfare[.]” N.C. Gen. Stat. § 7B-101(15) (2013). An adjudication of neglect requires “there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline.” *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (internal quotation marks omitted). “Section 7B-101(15) affords the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside.” *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (internal quotation marks omitted).

Here, competent evidence supports the trial court’s findings that: Clara and Anna resided in a home where Father had punched holes in walls when he was angry, Father engages in aggressive and violent behaviors in the home, Father “popped” Clara in the mouth causing a “busted lip[,]” Clara is scared of Father, Anna has been physically struck by Father on at least one occasion, Clara witnessed Father strike Anna, and Anna cried as a result of being struck. These findings show that Clara and Anna lived in an environment injurious to their welfare and that they were at a substantial risk of physical, mental, or emotional impairment. *See* N.C. Gen. Stat. § 7B-101(15). Thus, we hold the trial court properly concluded the children were neglected juveniles. Because we rule the trial court’s findings of fact support its legal conclusions that the juveniles were neglected, the lack of findings in the adjudication order regarding Mother’s fault or culpability in contributing to the adjudication of neglect is immaterial. *See Matter of Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

## IV. Disposition Order

**[6]** Mother also argues that the disposition order must be vacated. Mother specifically avers that because the trial court’s findings of fact

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do not support its legal conclusions that the juveniles were neglected, the adjudication order is erroneous, and thus, the ensuing disposition order is necessarily erroneous.

Because we have already ruled that the trial court's adjudication order was not in error, Mother's argument necessarily fails. Additionally:

(a) An order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order:

(1) Shall contain a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest;

(2) Shall contain specific findings as to whether a county department of social services has made reasonable efforts to either prevent the need for placement or eliminate the need for placement of the juvenile, unless the court has previously determined under subsection (b) of this section that such efforts are not required or shall cease;

(3) Shall contain findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines under subsection (b) of this section that such efforts are not required or shall cease;

(4) Shall specify that the juvenile's placement and care are the responsibility of the county department of social services and that the department is to provide or arrange for the foster care or other placement of the juvenile. After considering the department's recommendations, the court may order a specific placement the court finds to be in the juvenile's best interest[.]

N.C. Gen. Stat. § 7B-507 (2013).

In the case at bar, the trial court made uncontested findings that: the return of the juveniles to the parents' home would be contrary to the juveniles' welfare and best interest because the issues that led to CCDSS involvement still exist and the juveniles require more adequate care than

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parents can currently provide; CCDSS made reasonable efforts to prevent or eliminate the need for the juveniles' placement; CCDSS should continue to make reasonable efforts to prevent or eliminate the need for the juveniles' placement; the juveniles' placement and care are the responsibility of CCDSS; and CCDSS is to provide or arrange for the foster care or other placement of the juveniles. Accordingly, we affirm the trial court's disposition order. *See In re A.S.*, 181 N.C. App. 706, 711, 640 S.E.2d 817, 820 (2007) *aff'd*, 361 N.C. 686, 651 S.E.2d 883 (2007).

AFFIRMED.

Judge INMAN concurs by separate opinion.

Judge TYSON dissents by separate opinion.

INMAN, Judge, concurring.

I agree with the majority's conclusions affirming the trial court's adjudication and disposition of both Clara's and Anna's cases with respect to both parents. This case is nonetheless complicated by the array of evidence, some of it not admissible for consideration at adjudication but admissible at the disposition phase, and much of it related to acts committed years before the filing of the juvenile petitions. Accordingly, I write separately to address these issues.

### **Additional Factual and Procedural Background**

On 9 October 2013, CCDSS filed juvenile petitions alleging that Clara, then age 4, was an abused and neglected juvenile and that Anna, then age 18 months, was a neglected juvenile. In Clara's petition, in support of its allegation that Clara was sexually abused, CCDSS alleged the following: On 21 September 2013, CCDSS received a report alleging that Clara had been sexually abused by Father. The report claimed that Clara had disclosed sexual abuse on three separate occasions: (1) to her paternal great aunt Elizabeth Duncan ("Elizabeth"); (2) to a social worker during a home visit on 21 September 2013; and (3) during a forensic interview at the Robin's Nest, a center that offers counseling and therapeutic services for children, on 23 September 2013. In both juveniles' petitions, CCDSS alleged that Clara and Anna were neglected, reasserting the facts regarding Father's alleged sexual abuse and further alleging that Father had "popped [Clara] on the mouth." The petitions stated that "[r]elatives of [Father] have stated that [Mother] has disclosed domestic violence occurring between herself and [Father] on numerous

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occasions, including choking her and slapping her in the face.” The petitions alleged that Clara and Anna were neglected because, in their parents’ home, they did not receive proper care, supervision, or discipline and lived in an environment injurious to their welfare.

The trial court entered Orders for Nonsecure Custody on 9 October 2013 for both juveniles based on the allegations contained in the juvenile petitions.

The adjudication hearing was held on 26 February, 26 March, and 22 April 2014, approximately six months after the juveniles were removed from their parents’ home. The evidence presented included testimony by Clara that Father had “popped” her in the mouth and that Clara had reported to someone else that she saw Father hit Anna. Father and Mother admitted that Father hit Clara in the mouth on one occasion.

On 22 April, the trial court entered an order adjudicating both juveniles as neglected. The trial court dismissed the abuse allegations. In its order, the trial court made the following pertinent findings of fact:

24. The court finds that the facts set forth herein are true and sufficient to find that the juveniles are neglected juveniles pursuant to N.C.G.S. §7B-101(15) in that the juveniles do not receive proper care, supervision, or discipline from the juveniles’ parent, guardian, custodian, or caretaker and lives in an environment injurious to the juveniles’ welfare.

25. The court finds the facts are true as clear, cogent, and convincing evidence.

26. Respondent father has engaged in at least one act of domestic violence toward the juvenile, [Clara]. The juvenile, [Clara], has been physically struck by Respondent father on at least one occasion wherein Respondent father popped [Clara] in the mouth leaving a mark on the juvenile’s mouth which included a swollen and busted lip.

27. Respondent father has engaged in at least one act of domestic violence toward the juvenile, [Anna]. The juvenile, [Anna], has been physically struck by Respondent father on at least one occasion. The juvenile, [Clara], witnessed Respondent father strike [Anna].

28. The juvenile, [Clara], is fearful or scared that she will receive a whipping or spanking from Respondent father if she states anything that has happened while she resided with Respondent mother and Respondent father.



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29. Respondent father has problems controlling his anger. His angry temperament was noticed by Elizabeth Duncan when he was a child and his temper got worse as he got older. Respondent mother began noticing Respondent father's anger management issues after the juvenile, [Clara], was born.

30. Respondent father has engaged in aggressive and violent behaviors in the home where the juveniles resided with him and Respondent mother. Respondent father engages in activities such as punching holes in walls and doors of his home, and throwing and breaking more than one cellular telephone when he is angry. On one occasion, Respondent father broke his hand from punching a wall in the family home. Respondent father has stated that when he gets angry or mad, he just has to hit something. These activities have occurred in the home where Respondent father resides with Respondent mother and the juveniles prior to the juveniles being removed from the family home on October 8, 2013.

31. A variety of family members have observed the holes in the walls and doors of the family home including Dakota Duncan, Elizabeth Duncan, and William Woods. Mr. Woods assisted Respondent father in repairing at least one hole in the wall of the family home.

32. Respondent father has engaged in acts of domestic violence toward Respondent mother after their first child, [Clara], was born. When [Clara] was an infant, Respondent father choked Respondent mother. Family members have observed bruises on Respondent mother including a bruise on her side and a black eye. Respondent mother has stated to family members that Respondent father caused those bruises.

33. At the time the juveniles were removed from the family home, Respondent father had not been receiving consistent treatment and/or medication for his anger management issues.

Custody of the juveniles remained with CCDSS. The trial court allowed Mother to have weekly supervised visitation with Anna but suspended Mother's visits with Clara for 30 days. After 30 days, Mother was allowed

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to have weekly supervised visitation with Clara. The trial court continued the matter for disposition until 21 May 2014.

On 21 May 2014, the trial court entered its disposition order. In addition to the above referenced findings in the adjudication order, the disposition order contained additional findings indicating that Mother had begun parenting classes, domestic violence counseling, and mental health counseling. The order also indicated that Father had attended parenting classes, anger management group sessions, and had received mental health services. The trial court concluded that it was in the juveniles' best interests to have custody remain with CCDSS but that "[CCDSS] should make reasonable efforts to reunify the juveniles with" Mother and Father. The trial court also ordered Father to complete a sexual abuse intervention service (SAIS) assessment because, even though CCDSS had managed to provide payment for the evaluation, Father "refused to participate in the evaluation until ordered by the court." The trial court set a review hearing for 13 August 2014 pursuant to N.C. Gen. Stat. § 7B-906. Mother and Father appeal.

**Standard of Review**

This Court reviews an order in a juvenile neglect proceeding to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.M.*, 180 N.C. App. 539, 544, 638 S.E.2d 236, 239 (2006). "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." *In re W.V.*, 204 N.C. App. 290, 293, 693 S.E.2d 383, 386 (2010).

**Analysis**

In support of its conclusion that the trial court properly determined that Clara and Anna were neglected, the majority relies on the trial court's findings that Father had punched holes in the walls, Father had engaged in "aggressive and violent behaviors in the home," Father "popped" Clara in the mouth, Clara is scared of Father, and Clara witnessed Father strike Anna. Noting the lack of findings indicating Mother's culpability in these actions, the majority relies on *Matter of Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984), for the premise that

[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent. Therefore, the fact that the parent loves or is concerned

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about his child will not necessarily prevent the court from making a determination that the child is neglected.

I agree that, given the living circumstances at issue here – a nonviolent parent and children living with a violent parent – the trial court did not have to make any findings addressing Mother’s culpability in order to determine that Clara and Anna were neglected by both parents. However, the majority opinion does not address the fact that many of Father’s aggressive and violent actions, such as punching holes in the walls and destroying cell phones, occurred more than a year before the adjudication order, and that the history of domestic violence between the parents primarily occurred around the time when Clara was born.

### I. The History of Domestic Violence Between Mother and Father

With regard to the history of domestic violence between them, both parents contend, and even the trial court acknowledges, that the acts of domestic violence occurred prior to Anna’s birth, *i.e.*, at least two years before the filing of the petitions. They argue that because there was no evidence showing domestic violence at the time the petitions were filed, or at the time the matter came on for hearing, those past acts could not serve as a basis for an adjudication that their children were neglected.

This Court has held in an unpublished opinion that a past history of domestic violence can be considered when determining whether a juvenile is neglected. *See In re H.R.*, 2012 WL 5864525, \*4 (Nov. 20, 2012) (COA12-549) (unpublished). As this Court noted in *In re H.R.*, quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999), “the decision of the trial court [at the adjudicatory hearing] must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future neglect of a child based on the historical facts of the case.” Accordingly, “the trial court could consider events [of prior domestic violence] which occurred more than one year prior to the filing of the petition.” *Id.*

Here, the trial court found that

32. Respondent father has engaged in acts of domestic violence toward Respondent mother after their first child, [Clara], was born. When [Clara] was an infant, Respondent father choked Respondent mother. Family members have observed bruises on Respondent mother including a bruise on her side and a black eye. Respondent mother

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has stated to family members that Respondent father caused those bruises.

Both Mother and Father challenge this finding, arguing that the evidence as to the domestic violence was “controverted” given their denials at the hearing. However, the parents’ denials were contradicted by other competent evidence offered at the hearing, including testimony by Dakota Duncan (“Dakota”), a relative. Dakota testified that Mother told Dakota that Father had choked Mother when Clara was about one month old. This testimony is not hearsay, because it is as an admission of a party-opponent. N.C. Gen. Stat. § 8C-1, Rule 801(d); *In re Hayden*, 96 N.C. App. 77, 81, 384 S.E.2d 558, 561 (1989) (noting that a mother’s statements to social workers about the father’s conduct were admissions by her that the child was subject to conduct in her presence that could be found to be abusive and neglectful, and therefore, those statements were admissible). Dakota also testified that Father had punched holes in the walls in anger after Anna was born. Elizabeth, who is Father’s aunt, testified that she had seen bruises on Mother up until the time Anna was born and holes in the walls where Father had punched them.

Moreover, this past history of domestic violence must be considered in light of the undisputed evidence that Father has “popped” Clara on at least one occasion. Contrary to the dissenting opinion’s characterization of this incident as “discipline,” the trial court, which had the opportunity to consider the witnesses’ demeanor and credibility, found that it was domestic violence. *See generally In re M.J.G.*, \_\_ N.C. App. \_\_, \_\_, 759 S.E.2d 361, 366 (2014) (noting that in juvenile adjudication hearings, “the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate” and any conflicts in the evidence are resolved by the trial court); *Matter of Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (“[T]he trial court’s findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings.”).

Based on the foregoing circumstances found by the trial court and supported by the evidence, the trial court was not required to “hope for the best and await yet another act of domestic violence,” *In re Schoen*, 2003 WL 21790460, \*6 (Aug. 5, 2003) (COA02-406) (unpublished), before it considered Father’s past history of domestic violence in order to support a finding of neglect, even if that history occurred several years before the juvenile petitions were filed.

Finally, it is important to note that an order adjudicating and disposing the juveniles as “neglected” is not the same as an order terminating

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the parents' parental rights. See *Matter of Evans*, 81 N.C. App. 449, 452, 344 S.E.2d 325, 327 (1986) (“[T]he task at the temporary custody or removal stage is to determine whether the child is exposed to a substantial risk of physical injury because the parent is unable to provide adequate protection.”). The trial court ordered that both Mother and Father continue to receive counseling and support services to address the past domestic violence but was clear in its orders that reunification efforts be continued. Both Mother and Father will have further opportunities to present to the trial court evidence that they contend shows circumstances have changed sufficiently to reunify them with their children.

## II. The Adjudication and Disposition of Anna as Neglected

In support of its determination that Anna was neglected, the trial court, and the majority, rely on Father's past aggressive and violent acts in the home, Father “popping” Clara in the mouth, and Clara's testimony that she had witnessed Father hit Anna on one occasion. Father contends that Clara's ambivalent testimony regarding her report that Father had hit Anna does not rise to level of “convincing competent evidence.” *In re A.B.*, 179 N.C. App. 605, 610, 635 S.E.2d 11, 15 (2006). However, I do not believe it is necessary to address whether the trial court's finding that Clara saw Father hit Anna was supported by clear and convincing evidence given the other evidence presented at the hearing. See *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

N.C. Gen. Stat. § 7B-101(15) states that “[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.” This Court has held that “the fact of prior abuse [of another child in the home], standing alone, is not sufficient to support an adjudication of neglect. Instead, [we have] generally required the presence of other factors to suggest that the neglect or abuse will be repeated.” *In re J.C.B.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 757 S.E.2d 487, 489 (2014). Those “other factors” may include a history of domestic violence between the parents. See *In re C.M. & M.H.M.*, 198 N.C. App. 53, 66, 678 S.E.2d 794, 801–02 (2009) (affirming adjudication of neglect based upon prior abuse of another child who lived in the home and a history of domestic violence between the parents).

Here, while Father's admission to hitting Clara in the lip does not necessarily mandate an adjudication of neglect for Anna, the presence of “other factors”—specifically, the history of domestic violence between Father and Mother and evidence of Father's violent and aggressive acts—in addition to Father's act of domestic violence against Clara are

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sufficient to support a determination, on clear and convincing evidence, that Anna is also neglected based on the likelihood that the acts of violence perpetuated against Clara and Mother will be repeated against her.

Furthermore, although Mother was not directly responsible for the acts which led to the filing of the petitions, see *Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252, I believe that the trial court properly considered the history of domestic violence between Mother and Father in addition to the fact that Father hit Clara in adjudicating both juveniles as neglected by both parents.

### III. Disposition Order Requiring Father to Complete a Sexual Abuse Assessment.

Finally, I write separately to address more fully the trial court's disposition order requiring Father to participate in and complete the SAIS assessment. Father argues that this requirement was improper because it bears no relation to the adjudication of neglect and is based on inadmissible evidence regarding Father's sexual activity when he himself was a juvenile. The dissenting opinion asserts that this requirement in the disposition order shows that the trial court improperly relied upon inadmissible evidence for its adjudication of neglect.

N.C. Gen. Stat. § 7B-904(c) provides, in pertinent part, that

[a]t the dispositional hearing or a subsequent hearing the court may determine whether the best interests of the juvenile require that the parent . . . undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent.

Even though the trial court ultimately concluded that there was not sufficient clear and convincing evidence to adjudicate Clara as abused, the trial court properly considered, in the disposition phase of this matter, evidence that Father had engaged in inappropriate sexual activities with his younger cousin Cynthia in 2003, when he was around 12 years old and Cynthia was 9, and that he himself had been a child victim of sexual abuse. Specifically, according to the social worker who investigated the 2003 incidents, Father reported that he was the victim of sexual abuse by his uncle, who was eventually convicted of abusing several children, including Cynthia, his biological daughter. Although

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this evidence was arguably inadmissible in the adjudication hearing, N.C. Gen. Stat. § 7B-901 provides the trial court with wide discretion to consider, for purposes of disposition, any competent evidence, including evidence ordinarily prohibited by Rule 404. Additionally, although Clara in her testimony repeatedly denied that Father had sexually abused her, her report to three adults that Father had “tip-toed” into her room at night and “touched her pee-pee” unquestionably led to the removal of Clara and Anna from the home and involved Clara and her parents in a sexual abuse investigation. Clara reported to a social worker and later to a therapist that Father had touched her “pee-pee” on numerous occasions. Her reports were articulate and detailed. This hearsay evidence was not competent to support an adjudication of neglect, but, as noted by the majority, it was competent and entirely proper for the trial court’s consideration in disposition. N.C. Gen. Stat. § 7B-901 (2013).

Based on this evidence, the trial court was within its discretion to order Father participate in an SAIS assessment.

**Conclusion**

Based on the foregoing reasons, I also vote to affirm the trial court’s orders adjudicating and disposing the juveniles as neglected.

TYSON, Judge, dissenting.

The trial court’s findings of fact are not supported by clear, cogent and convincing evidence and are insufficient to support the court’s adjudication and conclusion that A.L.T. (“Anna”) and C.T. (“Clara”) were neglected juveniles by both parents under N.C. Gen. Stat. § 7B-101(15) (2013) or controlling precedents. I respectfully dissent from the majority’s opinion and would rule the trial court erred when it adjudicated the juveniles to be neglected.

**I. Standard of Review**

As stated in the majority’s opinion, our standard of review is “whether the trial court’s findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law.” *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations and internal quotations omitted). If the findings of fact are supported, we review *de novo* the trial court’s conclusions of law. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

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II. AnalysisA. Finding of Neglect

The trial court found Anna and Clara were neglected juveniles under N.C. Gen. Stat § 7B-101(15). The majority's opinion sets forth findings by the court, which purport to support its adjudication. The court's findings are minimal as to neglect; one act of physical discipline. Uncontroverted testimony indicated the act occurred after more moderate responses and discipline for Clara's poor behaviors had failed. We have held that spanking, which also leaves a bruise, is not neglect. *In re C.B.*, 180 N.C. App. 221, 636 S.E.2d 336 (2006), *aff'd*, 361 N.C. 345, 643 S.E.2d 587 (2007). There was only one uncorroborated act of physical discipline toward Anna.

Based on four-year-old Clara's testimony, the court found she was fearful of a spanking from her father. The court further found Father had difficulty controlling his anger, had punched a hole in a wall in the family home and, *prior to the removal of the children*, was not receiving consistent treatment for his anger.

Testimony showed that Father was taking Effexor medication to help manage his anger for close to a year prior to the adjudication. No evidence showed Father's anger resulted in the neglect of his children at the time of the adjudication or any probability of neglect in the future. The trial court must "consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect" at the time of the hearing or in the future. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

Father's brief cites a relevant quote from *In re Stumbo*:

[N]ot every act of negligence on the part of parents or other caregivers constitutes "neglect" under the law and results in a "neglected juvenile." Such a holding would subject every misstep of a care giver (sic) to the full impact of subchapter I of chapter 7B of the North Carolina General Statutes resulting in mandatory investigations . . . and the potential for petitions for removal of the child or children from their family for custodial purposes . . . and/or ultimate termination of parental rights . . . .

*In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255 (2003). An isolated act of physical discipline does not support a conclusion and adjudication of neglect. *In re C.B.*, *supra*.



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B. Hearsay Evidence

The North Carolina Rules of Evidence require matters and assertions the trial court admits and considers as relevant and material at the adjudication hearing to be otherwise admissible and not be subject to exclusion. N.C. Gen. Stat. § 7B-804 (2013) (“where the juvenile is alleged to be abused, neglected . . . the rules of evidence in civil cases shall apply”). Pure hearsay evidence by a four-year-old declarant, whose age carries a presumption of incompetency to testify, was admitted for the truth of the matter asserted. This hearsay was not admissible under any exception, and was improperly presented and considered in the adjudication regarding Father’s purported touching of Clara that she made to a social worker and Clara’s aunt. This allegation was denied in court by the declarant. The majority finds the court “can be presumed to have disregarded the incompetent evidence because the court made no findings pertaining to the hearsay evidence in support of its adjudication of neglect and dismissed the sexual abuse allegation.”

However, the trial court ordered Father to obtain a sexual assault intervention service (“SAIS”) as part of the dispositional plan after dismissing the allegations of abuse and entering the adjudication of neglect. This requirement is not reflective of an appropriate step to remedy conditions of neglect and clearly shows the trial court did not disregard the inadmissible hearsay in its adjudication.

*In re J. B.*, cited by the majority, is inapplicable in the present case. In *J.B.*, the trial court admitted into evidence prior disposition orders in the underlying juvenile court action. *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005). Respondent-mother complained the trial court was required to exclude the review orders, because they were based upon a lower evidentiary standard. *Id.* at 16, 616 S.E.2d at 273. This Court disagreed and recognized “that in a termination of parental rights proceeding, prior adjudications of abuse or neglect are admissible, but they are not determinative of the ultimate issue.” *Id.* (citing *In re Huff*, 140 N.C. App. 288, 300, 536 S.E.2d 838, 846 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)).

In *J.B.*, we noted the respondent-mother was unable to overcome the well-established supposition that the trial court in a bench trial “is presumed to have disregarded any incompetent evidence.” *Id.* (citation and quotation marks omitted). Judicial notice in a termination hearing of a prior order from the adjudication is entirely different from allowing inadmissible and inflammatory hearsay barred by the Rules of Evidence to be asserted and admitted at the adjudication hearing.

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The exclusion of such inadmissible and inflammatory hearsay is to prevent the petitioner from dragging allegations into the proceeding solely calculated to purport to show “the character of a person in order to show that he acted in conformity therewith.” N.C. R. Evid. Rules 404(b), 802 (2013). To allow and credit such inadmissible evidence at any stage opens wide the barn doors, and requires respondents to chase after the running horses, which the statute requires to be locked in the stable.

C. Prior Acts of Respondent-Father

The trial court, over objection, also allowed testimony of a consensual sexual encounter over ten years previously, between Father at age 11 or 12 and his cousin at age 9. This information was irrelevant and inflammatory and should have been excluded.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. R. Evid. 404(b).

Rule 404(b) “state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant.” *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)(emphasis original). Exclusion of evidence is required if its “only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *Id.*

Our Supreme Court stated, “[t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts.” *State v. Johnson*, 317 N.C. 417, 430, 347 S.E.2d 7, 15 (1986).

Here, as in *State v. Al-Bayyinah*, 356 N.C. 150, 567 S.E.2d 120 (2002), cited by Father, the prior “wrong, or act” is both dissimilar to the incident alleged in the petition and is remote in temporal proximity. “Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused.” *Id.* at 154, 567 S.E.2d at 122. “To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of both similarity and temporal proximity.” *Id.*, 567 S.E.2d at 123 (citations omitted).

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These actions occurred over ten years before and involved two pre-teens, as testified by the female cousin involved in the incident as “being curious,” rather than actions between an adult and a child, as alleged in the petition. It is difficult to see any other reason why petitioner asserted this evidence, other than an attempt to show propensity of Father’s character. Although the court dismissed the petitioner’s allegations of abuse for lack of evidence, the ruling does not show the trial court ignored these clearly inadmissible assertions.

D. Neglect as to Respondent-Mother

The stated purpose of Chapter 7B in the initial adjudication of neglect is “[t]o provide procedures for the hearing of juvenile cases that *assure fairness and equity* and that *protect the constitutional rights of juveniles and parents.*” N.C. Gen. Stat. § 7B-100(1) (2013) (emphasis supplied). The trial court’s findings of neglect all relate to alleged wrongdoing by Father. I find error in the trial court’s conclusion concerning Mother that the “juveniles do not receive proper care, supervision, or discipline from the juveniles’ parent, . . . and lives (sic) in an environment injurious to the juveniles’ welfare.”

DSS asserts the presence and allowance by Mother of Father’s physical discipline is sufficient to support her adjudication of neglect. I disagree. In *J.A.G.*, infant J.A.G. suffered a brain injury in the care of his father while the mother was away from home. *In re J.A.G.*, 172 N.C. App. 708, 617 S.E.2d 325 (2005). This Court held it was error to conclude that the mother failed to provide proper care and supervision and the child lived in an environment injurious to his health and welfare where there was evidence the child was previously developing appropriately, had not missed doctor’s appointments, and no evidence indicated the mother knew or reasonably should have known the father would harm J.A.G. *Id.* at 715-16, 617 S.E.2d at 331.

Here, Mother knew of Father’s prior bursts of anger issues. Mother testified she demanded Father to get help, and it took time to find a doctor approved by their insurance and for trials of several treatments to arrive at the correct medication. Mother’s action demonstrates a commitment to protect herself and her children, while supporting and maintaining her marriage to her spouse and the father of her children.

We all agree the trial court’s findings of fact regarding neglect were based on both inadmissible and controverted evidence. Mother testified that no domestic violence was aimed at her or the children by respondent father. Father acknowledged “popping” Clara in the mouth, but denied any other actions as alleged by petitioner.

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The incident of physical discipline found by the trial court does not reach the threshold of clear, cogent and convincing evidence required to support findings of facts to support an adjudication of neglect.

The majority and concurring opinions cite *In re T.M.*, as a basis for the trial court ignoring certain controverted findings as the challenged findings were not necessary to support the ultimate conclusion of neglect. *T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 236. However, under the admissible evidence in this case, there are not, as in *T.M.*, the “ample other findings of fact [to] support an adjudication of neglect” on behalf of Mother. *Id.* This precedent does not support the trial court’s adjudication and ultimate conclusion.

Finally, the majority and concurring opinions cite *In re Montgomery* to support an adjudication of neglect on behalf of Mother, where there was an absence of findings in the adjudication order to support the mother’s fault or culpability in contributing to the adjudication of neglect. In *Montgomery*, the trial court found the parents failed to send the children to school, failed to provide beds and adequate living space despite having resources to do so, the parents separated and provided no living place for the children, the mother was unstable, delusional and failed to take medicine to control her conditions, and the father had failed to pay reasonable portion of cost of caring for children. *Id.* at 112-13, 316 S.E.2d at 254.

Our Supreme Court reversed a Court of Appeals decision, which appeared to require petitioners “to establish a child’s intangible, non-economic needs were not being fulfilled” by the parents before parental rights could be terminated. *Id.* at 106, 316 S.E.2d at 250.

Where the evidence shows that a parent has failed or is unable to adequately provide for his child’s physical and economic needs, whether it be by reason of mental infirmity or by reason of willful conduct on the part of the parent, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected. In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent. Therefore, the fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected.

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*Id.* at 109, 316 S.E.2d at 252. *In re Montgomery* is not only inapplicable to the facts at bar, it highlights the standard and weight of evidence required of petitioner to prove neglect of Mother, in the dearth of any evidence or paucity of findings to support an adjudication. No incidents, acts or omissions by Mother support an adjudication of neglect. Seeking assistance for both her children and husband and working to maintain her marriage and parent their children is not neglect or abuse under the statute.

### III. Conclusion

For these reasons, I vote to reverse the trial court's adjudication of neglect and remand for entry of an order to support the parents and require DSS to make continued efforts to reunify these children with their parents.

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IN RE M.K. (I), M.K. (II), M.K. (III), AND M.K. (IV)

No. COA14-1153

Filed 16 June 2015

**1. Child Abuse, Dependency, and Neglect—adjudication—mere recitations of evidence—not sufficient**

The trial court's order in a child neglect proceeding must reflect an adjudication rather than mere one-sided recitations of allegations presented at the hearing.

**2. Child Abuse, Dependency, and Neglect—domestic violence—mother's bruising—characterization**

In a child neglect proceeding that involved domestic violence, the trial court's finding that the mother's bruising was severe was supported by the evidence. Although neither the social worker's testimony nor the police report used the term "severe," it was within the province of the trial court, as finder of fact, to draw reasonable inferences based on the evidence.

**3. Child Abuse, Dependency, and Neglect—domestic violence—supporting evidence—police report**

A finding in a child neglect proceeding involving domestic violence was supported by evidence received without objection in the form of the police report.

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**4. Child Abuse, Dependency, and Neglect—domestic violence—observation—reviewed as a conclusion**

In a child neglect proceeding involving domestic violence, a finding that the father contended was an observation rather than a finding was reviewed as a conclusion.

**5. Child Abuse, Dependency, and Neglect—domestic violence—knowledge of children about altercations**

In a child neglect proceeding involving domestic violence, ample evidence supported the trial court's finding that all four children knew about the arguments and physical altercations.

**6. Child Abuse, Dependency, and Neglect—domestic violence—impact on children**

The trial court did not act under a misapprehension of the law in a child neglect proceeding involving domestic violence where it found that domestic violence in the home impacts the children. It has been held that evidence of a child's continued exposure to domestic violence may constitute an environment injurious to the juvenile's welfare. The substantial findings of fact in this case sufficiently detailed the impacts of the father's domestic violence with the mother.

Judge INMAN concurring by separate opinion.

Appeal by respondent-father from order entered 10 July 2014 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 18 May 2015.

*Kathleen M. Arundell for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.*

*Edward Eldred for respondent-appellant father.*

*Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for guardian ad litem.*

TYSON, Judge.

Michael Kemp, Sr., ("Respondent-father") appeals from an order concluding that his four children, M.K.(I), M.K. (II), M.K. (III) and M.K. (IV) were neglected and the juveniles' best interests were to remain in the custody of the Mecklenburg County Department of Social Services,

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Youth and Family Services (“YFS”). At the time of the adjudication, the children were 17, 12, 8 and 7, respectively. We affirm.

### I. Background

YFS became involved with the Kemp family after receiving a Child Protective Services (“CPS”) referral on 10 August 2012, which alleged domestic violence by Respondent-father. The investigation revealed Respondent-father and the mother had a twenty-year history of domestic violence, the mother feared Respondent-father, and she never contacted law enforcement. Respondent-father admitted he had engaged in physical altercations with the mother. Some of the children had witnessed the domestic violence. M.K. (I), the oldest child, routinely intervened in the altercations. YFS recommended services, including domestic violence counseling, but the parents failed to schedule appointments.

YFS conducted an investigation into a second CPS referral regarding a domestic violence incident, which occurred on 29 September 2013. This incident led to the filing of a juvenile petition on 8 October 2013.

The petition alleged Respondent-father had slapped the mother in the face, pushed the mother, which caused her to fall onto a glass table, bruising both her arms. One of the children witnessed this incident. Law enforcement responded to the home. Respondent-father was arrested for assault on a female.

The mother secured a domestic violence protective order against Respondent-father, but it was dismissed after she failed to appear. The mother relied on Respondent-father for financial support, shelter, and transportation. According to the petition, the children believed Respondent-father might kill their mother one day. The mother reported that Respondent-father had threatened to kill her. On 8 October 2013, YFS also obtained nonsecure custody of the juveniles.

Prior to the filing of the petition, the mother was cooperative with YFS. However, Respondent-father, the mother, and the children disappeared after the petition was filed, and the nonsecure custody order was entered. Respondent-father was eventually served with a summons on 20 November 2013. The mother was served by publication.

Following a hearing, the trial court adjudicated the children neglected. As of the date of the hearing, YFS was still unable to locate the mother and all four children. At disposition, the trial court kept the children in the legal custody of YFS and ordered it to continue attempts to locate the children. The trial court entered a corresponding order on 10 July 2014. Respondent-father appeals.

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II. Standard of Review

“Allegations of neglect must be proven by clear and convincing evidence. In a non-jury neglect adjudication, the trial court’s findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings.” *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted). If competent evidence supports the findings, they are “binding on appeal.” *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003) (citations omitted). “The trial court’s conclusions of law are reviewable *de novo* on appeal.” *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

III. AnalysisA. Verbatim Recitation of DSS Petition

**[1]** Respondent-father challenges the trial court’s adjudication of neglect. He argues twelve of the trial court’s findings of fact are improper and cannot support the trial court’s adjudication of neglect. He asserts the “findings” are verbatim recitations of YFS’s allegations in the petition and not findings of fact. We have held that “[w]hen a trial court is required to make findings of fact, it must find the facts specially.” *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (internal citations and quotations omitted).

“Thus, the trial court must, through ‘processes of logical reasoning,’ based on the evidentiary facts before it, ‘find the ultimate facts essential to support the conclusions of law.’” *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (quoting *Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337). The findings “must be the ‘specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.’” *In re Anderson*, 151 N.C. App. 91, 97, 564 S.E.2d 599, 602 (2002) (citation omitted). As a result of the foregoing principles, this Court has repeatedly stated that “the trial court’s findings must consist of more than a recitation of the allegations” contained in the juvenile petition. *O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853.

Many of the trial court’s findings are verbatim recitations of YFS’s allegations in the petition. “[I]t is not the role of the trial court as fact finder to simply restate the testimony given.” *Id.* at 703, 596 S.E.2d at 854. Regurgitated allegations do not reflect a reconciliation and adjudication of all the evidence by the trial court to allow this Court to determine whether sufficient findings of fact are supported by clear, cogent



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and convincing evidence. Without adjudicated findings of fact this Court cannot conduct a meaningful review of the conclusions of law and “test the correctness of [the trial court’s] judgment.” *Appalachian Poster Adver. Co. v. Harrington*, 89 N.C. App 476, 480, 366 S.E.2d 705, 707 (1988).

Our Supreme Court has also long required a trial court’s findings to reflect a true reconciliation and adjudication of all facts in evidence to enable the appellate courts to review the trial court’s conclusions. *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

As stated by this Court, per Justice Exum, in *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980).

The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead “to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.” *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E.2d 26, 29 (1977); see, e.g., *Crosby v. Crosby*, 272 N.C. 235, 158 S.E.2d 77 (1967).

*Id.* at 452, 290 S.E.2d at 658.

We again caution the trial court that its order, upon which the trial judge’s signature appears and which we review, must reflect an adjudication, not mere one-sided recitations of allegations presented at the hearing. *In re J.W.*, \_\_ NC App \_\_, \_\_ S.E.2d \_\_, \_\_ (COA 14-927) (5 May 2015) (“[W]e will examine whether the record of the proceedings demonstrates that the trial court, through the processes of legal reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case.”).

Here, the order contains fifteen additional findings of fact which are not verbatim allegations and are properly considered. Of those fifteen, six are substantive findings of fact, which form the basis for the trial court’s adjudication of neglect. The trial court did recite verbatim some of the allegations from the petition, which this Court has strongly discouraged. See *O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853. Disregarding

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the verbatim allegations, the trial court found the ultimate facts to support its conclusions of law. The trial court heard evidence and made these findings of fact, through a process of logical reasoning, based on the evidentiary facts before it. *See id.*

The following substantive facts remain for this Court's consideration.

12. The altercation of September 29, 2013 was severe enough that the mother was injured with documented severe bruising to her forearm resulting from her being pushed onto a table. Following the altercation, the parties continued to argue loudly. [M.K. (I)] came into the room, got between the parents and convinced them to stop.
13. [M.K. (II)] was present during the altercation. He woke up, saw the mother being pushed and watched her fall onto the table. [M.K.(II)] was emotionally upset.  
.....
17. The domestic violence between the parents has occurred in front of the children for a long time. All parties agree the parents argue and typically stop when [M.K. (I)] asks them to do so. [M.K. (I)] typically breaks up the argument.  
.....
19. Once the petition and non-secure were entered, the parents were not located and the children disappeared.  
.....
24. The law is clear, if domestic violence is going on in a home, it impacts the children. It is neglect. The children were present during the last incident and [M.K. (I)] broke up the argument. There is evidence that domestic violence has been going on for a long time and the children know about it. This was clear from [M.K. (II)'s] statements and demeanor. [M.K. (I)] broke up the altercation and stated she was afraid the father might kill her mother.
25. A [seven or eight] year old need not be in the middle of a fight to be impacted by an injurious environment.

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It is fortunate the children didn't get into the middle of the altercation.

Of these six findings of fact, Respondent-father challenges all or portions of numbers 12, 13, 24, and 25. As a result, the remaining findings – numbers 17 and 19 – are presumed to be supported by competent evidence and are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). We address each challenged finding in turn.

B. Finding of Fact Number 12

[2] Respondent-father contends that finding of fact 12 is not supported by the evidence because no evidence showed the mother's bruising was "severe". YFS called social worker, Stephanie Brown, who investigated the 29 September 2013 incident. Ms. Brown testified that the mother met with her a few days after the incident and showed her bruises on both arms. Additionally, the police report from the 29 September 2013 incident was received into evidence without objection.

The report recites the mother sustained bruises from her fall after being pushed by Respondent-father. There is ample evidence in the record to support the trial court's finding. Although neither the testimony nor the report uses the term "severe," it was within the province of the trial court, as finder of fact, to draw reasonable inferences based on the evidence before it. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject."). Respondent-father's challenge to finding of fact 12 is overruled.

C. Finding of Fact Number 13

[3] Respondent-father contends finding of fact 13 is not supported by competent evidence, because no evidence showed that M.K. (I) saw his mother being pushed by Respondent-father. Respondent-father contends that evidence only supports a finding that M.K. (II) saw her fall. We disagree.

Respondent-father's contention is directly contradicted by the police report, which states that "[M.K. (I)] was in the victim's and the suspect's bedroom when the suspect pushed the victim. The [mother] fell down onto a table. As a result of the victim falling onto the table both of her arms have bruises." Finding of fact 13 is supported by evidence received without objection. Respondent-father's challenge to finding of fact 13 is overruled.

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D. Finding of Fact Number 25

**[4]** Respondent-father submits that finding of fact 25 is not really a finding of fact, but rather an observation by the trial court. He argues it cannot support the trial court's conclusion that the children were neglected.

It appears the trial court applied the evidence before it to the law pertaining to neglect. Implicit in number 25 is the trial court's finding that the youngest two children, M.K. (III) and M.K. (IV), did not witness the 29 September 2013 altercation. The trial court applied these facts to the law by finding that the youngest two children did not need to be "in the middle of a fight" to be subjected to an injurious environment. See N.C. Gen. Stat. § 7B-101(15) ("In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home."); *In re A.S.*, 190 N.C. App. 679, 690, 661 S.E.2d 313, 320 (2008), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009).

This Court looks beyond the "labels" assigned by the trial court when reviewing findings of fact and conclusions of law. See *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005) ("[I]f a finding of fact is essentially a conclusion of law it will be treated as a conclusion of law which is reviewable on appeal." (citations, internal quotation marks, ellipses, and brackets omitted)). To the extent that this finding would have been more appropriately categorized as a conclusion of law, we will review the finding as a conclusion. Respondent-father's argument is overruled.

E. Finding of Fact Number 24

**[5]** First, we address Respondent-father's challenge to the portion of finding of fact 24, which states that "[t]here is evidence that domestic violence has been going on for a long time and the children know about it." Respondent-father argues no evidence supports a finding that all four children knew of the domestic violence, only that M.K. (I) and M.K. (II) were aware of it.

This finding is supported by the police report entered into evidence without objection. The police report contains statements that all four children live in the home and that "[t]he suspect has been verbally abusive toward the victim in front of the children," and that "[t]he domestic violence in the home is effecting (sic) the children emotionally." The trial court also admitted a report from the 2012 CPS investigation. This report memorialized interviews YFS conducted with all four children.

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It shows that all of the children witnessed their parents engaging in domestic violence. Ample evidence supports the trial court's finding that all four children knew about the arguments and physical altercations.

**[6]** Respondent-father also challenges the first two sentences in finding of fact 24, which state, “[t]he law is clear, if domestic violence is going on in a home, it impacts the children. It is neglect.” Respondent-father argues these sentences are not findings of fact, but instead are expressions of the trial court's understanding of the law. Respondent-father contends no legal authority supports this proposition, and the trial court acted under a misapprehension of the law, which requires reversal.

Reversal is warranted where a trial court acts under a misapprehension of the law. Our Supreme Court has held that “where it appears that the judge below has ruled upon matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light.” *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960) (internal quotation omitted).

We have previously held that evidence of a child's continued exposure to domestic violence may constitute an environment injurious to the juvenile's welfare. Where the evidence clearly and convincingly shows such exposure negatively impacts the child, and places the child at risk, that evidence may support an adjudication of neglect. *See In re W.V.*, 204 N.C. App. 290, 294, 693 S.E.2d 383, 386 (2010); *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 780-81 (2009); *In re T.S.*, 178 N.C. App. 110, 113-14, 631 S.E.2d 19, 22-23 (2006), *aff'd per curiam*, 361 N.C. 231, 641 S.E.2d 302 (2007).

After reviewing the evidence of recurring violence over a long period of time, the trial court did not act under a misapprehension of the law. The remaining substantive findings of fact sufficiently detail the impacts Respondent-father's domestic violence with the mother had on his children.

The totality of the trial court's findings of fact demonstrate that the trial court was not acting under a misapprehension of the law. *See State v. Barlow*, 102 N.C. App. 71, 75, 401 S.E.2d 368, 370, *remanded for reconsideration on other grounds by* 328 N.C. 733, 404 S.E.2d 872, *amended by* 103 N.C. App. 276, 405 S.E.2d 372, *and reversed on other grounds by* 330 N.C. 133, 409 S.E.2d 906 (1991) (finding no error on the part of the trial court where “[d]espite language of the [trial court's] order, the record indicates that the trial court was not [acting] under any mistaken impression that it was required to rule a particular way as a matter of law”). To the extent that these findings are more appropriately

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reviewed as conclusions of law, we review them as such. *See M.R.D.C.*, 166 N.C. App. at 697, 603 S.E.2d at 893. Respondent-father's argument is overruled.

IV Conclusion

The trial court's evidentiary and adjudicatory findings of fact are supported by clear, cogent and convincing evidence. These findings support the trial court's conclusion that all four juveniles were neglected. The trial court's findings of fact detail a longstanding and abusive relationship between Respondent-father and the mother, as well as their impact on and potential harm to the juveniles. The trial court's adjudication of neglect by Respondent-father is affirmed.

AFFIRMED.

Judges ELMORE and INMAN concur.

Judge INMAN concurs in a separate opinion.

INMAN, Judge, concurring by separate opinion.

I concur but write separately because I believe the majority opinion's statement that "[r]egurgitated allegations do not reflect a reconciliation and adjudication of all the evidence by the trial court to allow this Court to determine whether sufficient findings of fact are supported by clear, cogent and convincing evidence" suggests that trial court findings which appear to be "cut and pasted" from the parties' pleading *per se* preclude meaningful appellate review or are otherwise *per se* deficient. This court's decision in *In re J.W. and K.M.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, (May 5, 2015) (No. COA14-927), cited by the majority, holds otherwise, for reasons explained in that decision as well as in *dicta* in *In re A.B.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 768 S.E.2d 573, 579 (2014).

**N.C. STATE BAR v. SCOTT**

[241 N.C. App. 477 (2015)]

THE NORTH CAROLINA STATE BAR, PLAINTIFF

v.

ROBERT L. SCOTT, ATTORNEY, DEFENDANT

No. COA14-1008

Filed 16 June 2015

**1. Appeal and Error—preservation of issues—no argument in brief—issue abandoned**

Defendant's appeal from an order denying a motion for reconsideration was deemed abandoned where defendant's brief did not present any arguments regarding the motion.

**2. Attorneys—discipline—state rules—federal regulations—priority**

Federal regulations did not take precedence over the North Carolina Rules of Professional conduct in a disciplinary proceeding against an attorney that arose from the disbursement of funds after a real estate closing where defendant was employed by an interstate law firm that served as the closing attorney for United States Department of Housing and Urban Development properties. Although defendant contended that the mistakes of his staff were controlled by federal contract requirements and that he did not personally violate the North Carolina Rules of Professional conduct, defendant was primarily responsible for supervising the staff. A North Carolina closing attorney must make sure that the proper procedures are in place for non-attorneys to perform their functions diligently and promptly.

**3. Attorneys—Disciplinary Committee—summary judgment—no necessity for findings**

Although defendant contended that the Disciplinary Committee of the N.C. State Bar erroneously denied his motion for findings of fact, summary judgment was granted in favor of the State Bar on alleged rule violations. There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact.

**4 Attorneys-disciplinary hearing—burden of proof**

The Disciplinary Hearing Committee of the N.C. State Bar did not improperly shift the burden of proof to defendant. Although defendant contended that the questions posed to him by members

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of the panel showed that the panel required him to prove that the attorney client relations in this case were different than that envisioned by the Rules, the members of the panel asked defendant questions in order to clarify his explanation of why he believed the North Carolina Rules of Professional Conduct did not apply to him in this situation.

**5. Attorney—discipline—censure—appropriate**

The Disciplinary Hearing Committee (DHC) of the N.C. State Bar properly considered the evidence that defendant had violated three provisions of the North Carolina Rules of Professional Conduct and properly found that censure was an appropriate discipline for defendant's conduct. The statutory scheme clearly indicated an intent to punish attorneys in an escalating fashion keyed to the harm or potential harm caused by their conduct and the need to protect the public. Defendant did not exercise the proper supervisory authority sufficient to ensure that the work of non-attorney employees was compatible with his professional obligations as the closing attorney and the DHC properly found that censure was an appropriate discipline for defendant's conduct.

Appeal by defendant from orders entered 28 October 2013 and 2 April 2014 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 20 January 2015.

*The North Carolina State Bar, by Counsel Katherine Jean and Deputy Counsel David R. Johnson, for plaintiff-appellee.*

*Robert Lee Scott, pro se defendant-appellant.*

CALABRIA, Judge.

Attorney Robert L. Scott ("defendant") appeals from an order granting partial summary judgment in favor of the North Carolina State Bar ("State Bar"), an order denying his motion for findings of fact, and an Order of Discipline issued by the Disciplinary Hearing Commission ("DHC") of the State Bar censuring him for his conduct. We affirm.

**I. Background**

Defendant graduated from Indiana University and was admitted to the Illinois bar in 1973. He practiced law in Illinois before being admitted to the North Carolina bar in 2005.



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In 2006, defendant was employed by the O'Brien Law Firm ("O'Brien" or "the Firm"), an interstate law firm that served as a real estate closing attorney for United States Department of Housing and Urban Development ("HUD") properties. Dennis O'Brien, the owner of the firm, is licensed to practice law in Ohio. Defendant was the Firm's North Carolina attorney, and his office was located in Greensboro, North Carolina. In September 2007, defendant signed an interstate law firm registration for the Firm as the managing attorney.

In 2008, Tammy McCrae-Coley ("McCrae-Coley") purchased a HUD property located at 728 Tucker Street in Burlington, North Carolina. The Firm represented both HUD and McCrae-Coley in the transaction. McCrae-Coley secured a loan from First Bank for the purchase of the property, which was secured by a deed of trust prepared by defendant. A HUD-1 settlement statement was prepared by O'Brien personnel, which showed that after the closing, McCrae-Coley's funds would be disbursed to pay \$162.50 for the lender's title insurance and \$404.45 for 2008 property taxes. The closing was held on 21 August 2008. Defendant did not attend the closing, but authorized a paralegal to conduct the closing and sign his name on the HUD-1 settlement statement.

In April 2009, First Bank notified McCrae-Coley that the title insurance company had not received payment for the lender's title insurance policy on the property. First Bank indicated that it had contacted O'Brien regarding the title insurance, but had been unable to get a response from the Firm. McCrae-Coley then repeatedly attempted to contact defendant's office, informing O'Brien that the title insurance company had not been paid and she "needed somebody to call [her] back to let [her] know what was going to happen." Despite assurances that her call would be returned with the pertinent information, McCrae-Coley's inquiries went unanswered until she had the opportunity to leave work and visit the Firm in person. By going to the Firm, the title insurance issue was resolved.

In December 2009, McCrae-Coley received a "Notice of Attachment and Garnishment" because the 2008 taxes on the property, plus the penalties, remained unpaid. McCrae-Coley paid a total of \$641.05 for the outstanding taxes, then submitted copies of the tax bill and receipts to O'Brien for reimbursement. Since the Firm never reimbursed or contacted her, McCrae-Coley filed grievances with the State Bar against Dennis O'Brien and defendant. On 30 March 2010, approximately thirty days after the grievance was filed and almost two years after the closing, the Firm issued a check to McCrae-Coley to reimburse her for the

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delinquent taxes and penalties she had paid to stop the garnishment of her salary.

The State Bar filed a complaint against defendant on 16 January 2013, alleging that defendant had violated Rules 1.3, 1.15-2(m), 1.4(a), and 5.2(a) of the North Carolina Rules of Professional Conduct (“NCRPC”). Defendant filed an answer on 12 February 2013. Defendant also filed a motion for summary judgment on 13 August 2013 and a “Motion for Findings of Fact Pursuant to Rule 52 of the Rules of Civil Procedure” on 18 October 2013. On 28 October 2013, after a hearing, the DHC granted partial summary judgment in favor of defendant, concluding that he was entitled to judgment in his favor on the issue of whether he violated Rule 5.2(a). However, the DHC granted summary judgment in favor of the State Bar on the remaining alleged rule violations, and denied defendant’s motion for findings of fact on the same date.

The DHC held another hearing in February 2014 to determine the only remaining issue regarding whether any discipline was appropriate. On 2 April 2014, the DHC entered an Order of Discipline, concluding that censure was the appropriate discipline for defendant’s conduct. Defendant appeals.

**[1]** As an initial matter, defendant’s notice of appeal indicates that he is appealing from the order of summary judgment, the order denying his motion for findings of fact, an order denying his motion for reconsideration, and the Order of Discipline. However, defendant’s brief does not present any arguments regarding the motion for reconsideration, and only presents arguments regarding the other orders. Therefore, defendant’s appeal regarding the motion for reconsideration is deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (2013) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

## II. Summary Judgment

**[2]** Defendant argues that he should not be held accountable for the simple mistakes of staff that were controlled by the requirements of a federal contract. According to defendant, because of the Firm’s “unique” nature as closing agent for HUD, federal regulations take precedence over the NCRPC. Specifically, defendant argues that to comport his conduct with the NCRPC would require “the abrogation of federal prerogatives or require the Defendant to quit his job.” We disagree.

“Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that

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‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law[,]” and may be rendered against the moving party. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). Additionally, Rule 52(a)(2) provides, in pertinent part, that “[f]indings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b).” N.C. Gen. Stat. § 1A-1, Rule 52(a)(2).

In its summary judgment order, the DHC concluded that defendant violated the following NCRPC:

- by failing to timely obtain the title insurance policy for the lender and by failing to timely pay the property taxes following the McCrae-Coley closing, defendant did not act with reasonable diligence in violation of Rule 1.3;
- by failing to timely pay the title insurance premium from the funds received at closing, defendant failed to promptly disburse entrusted funds on McCrae-Coley’s behalf in violation of Rule 1.15-2(m); and
- by failing to return McCrae-Coley’s numerous telephone calls concerning the failure to pay the title insurance premium, defendant failed to promptly reply to the reasonable requests for information by a client in violation of Rule 1.4(a).

Rule 1.3 of the NCRPC provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” N.C. Rev. R. Prof. Conduct 1.3 (2013). Rule 1.15-2(m) states that an attorney “shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled.” N.C. Rev. R. Prof. Conduct 1.15-2(m) (2013). Rule 1.4(a) concerns an attorney’s duty to keep a client informed, stating that an attorney “shall . . . keep the client reasonably informed about the status of the matter” and “promptly comply with reasonable requests for information[.]” N.C. Rev. R. Prof. Conduct 1.4(a)(3), (4) (2013). Comment 4 to Rule 1.4 states that

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[w]hen a client makes a reasonable request for information . . . paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected.

N.C. Rev. R. Prof. Conduct 1.4, Cmt. 4.

Defendant relies on *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962), to support his contention that the DHC's order concluding that he violated the NCRPC involved administrative duties of office staff that are not controlled by an attorney, and none of their duties involve actions requiring legal judgment. In *Pledger*, the defendant worked for a company engaged in the sale and construction of shell homes. *Id.* at 636, 127 S.E.2d at 338. The defendant solicited sales and prepared deeds of trust at the time of sales. *Id.* The defendant was also responsible for the execution, acknowledgement, and recordation of the deeds of trust. *Id.* According to the State's evidence, the defendant, and the staff under his supervision, had prepared deeds of trust, and the defendant was not licensed to practice law in North Carolina. *Id.* at 637, 127 S.E.2d at 339. Since the defendant in *Pledger* was not licensed to practice law in North Carolina, he was charged with the unauthorized practice of law. *Id.* at 635, 127 S.E.2d at 338.

Although the instant case is not a criminal prosecution for the unauthorized practice of law, *Pledger* explains the intent of N.C. Gen. Stat. § 84-4 was not "to make unlawful all activities of lay persons which come within the general definition of practicing law . . . its purpose is for the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare." *Id.* at 637, 127 S.E.2d at 339 (citations omitted).

According to the State Bar, *Pledger* offers no solace to defendant. *Pledger* held that a non-attorney employee of a business could prepare legal documents for transactions in which the employer had a primary interest without violating the unauthorized practice of law statutes. *Id.* However, the State Bar is correct that *Pledger* did not apply this non-attorney exception to preparing legal documents for others. In the instant case, *Pledger* may have allowed non-attorney employees of HUD to prepare a deed on behalf of HUD, but *Pledger* did not apply to O'Brien, which HUD hired as its outside law firm.

Nevertheless, defendant contends that the State Bar failed to present any specific evidence that he personally violated the NCRPC. However,

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the material facts of the matter are undisputed. Defendant, as the North Carolina attorney for the Firm representing McCrae-Coley at the closing, did not have sufficient supervisory authority over the non-attorney North Carolina employees to ensure that the work of the staff was compatible with defendant's obligations as a North Carolina attorney bound to abide by the NCRPC. Defendant is correct that non-attorneys can assist with real estate closings by performing title searches, preparing title policy applications, and paying taxes and title insurance premiums to the proper entities. However, a North Carolina closing attorney must make sure that the proper procedures are in place for non-attorneys to perform these functions diligently and promptly. When an attorney knows that these duties have not been performed diligently and promptly, the attorney is responsible for taking action to make sure that the non-attorneys promptly reply to the client's requests for information.

In the instant case, the HUD-1 statement indicated that the title insurance premium and property taxes were to be paid from the funds disbursed at the closing. Since defendant's firm failed to promptly pay both the title insurance premium and the property taxes from McCrae-Coley's entrusted funds at the closing and failed to promptly reply to McCrae-Coley's inquiries about the title insurance in a timely manner, defendant is responsible. The evidence, including defendant's own testimony, proves that both Rule 1.3 and Rule 1.15-2(m) were violated by not promptly disbursing McCrae-Coley's entrusted funds to the proper entities for payments for the title insurance and the property taxes. In addition, defendant violated Rule 1.4(a) by failing to keep McCrae-Coley reasonably informed about the status of the matter or timely responding to her requests for information or reimbursement. Defendant appeared to contend at the summary judgment hearing that since McCrae-Coley did not specifically request to speak to him when she attempted to resolve the problems she encountered, the problems were created and exacerbated by his administrative staff. Defendant contends that the problems in the McCrae-Coley matter arose from the conduct of administrative staff, and therefore he did not personally violate the NCRPC. Defendant is mistaken. As the attorney responsible for McCrae-Coley's closing, he was primarily responsible for supervising the staff. Additionally, while defendant contends that the State Bar did not present evidence to refute his denial of a violation, the undisputed facts support summary judgment in favor of the State Bar.

**[3]** Defendant also contends that the DHC erroneously denied his motion for findings of fact. However, "if findings of fact are necessary to resolve an issue, summary judgment is improper. . . . There is no

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necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact.” *Hodges v. Moore*, 205 N.C. App. 722, 723, 697 S.E.2d 406, 407 (2010) (citations omitted). In *Hodges*, the trial court granted the defendant’s motion for summary judgment and dismissed the plaintiff’s action. *Id.* In the instant case, although defendant was denied summary judgment on several alleged rule violations, the DHC granted summary judgment in favor of the State Bar on those alleged rule violations. Therefore, the DHC determined that there were no material issues of fact, that the State Bar was entitled to judgment as a matter of law, and that defendant was not. Accordingly, no findings of fact were required. Although defendant contends Rule 56(a) of the North Carolina Rules of Civil Procedure requires that the DHC “state on the record the reasons for granting or denying the motion,” there is no such provision in the North Carolina Rule. Instead, defendant appears to be referring to the Federal Rule 56(a). Additionally, defendant contends that the DHC “rush[ed] to judgment” and failed to consider his reply to the State Bar’s response to his motion for summary judgment. However, his reply does not present any new facts that the DHC had not already heard in defendant’s motion for summary judgment or at the hearing.

**[4]** Finally, defendant contends that the DHC improperly shifted the burden of proof. Specifically, defendant contends that the questions posed to him by members of the panel show that the panel required him “to prove that the attorney client relations between [McCrae-Coley] and The O’Brien Law Firm were different than that envisioned by the Rules.” Defendant is mistaken. The members of the panel asked defendant questions in order to clarify his explanation of why he believed the NCRPC did not apply to him in this situation.

In summary, defendant’s arguments appear to obscure a relatively simple issue: that although First Bank provided the funds for McCrae-Coley’s closing, and although McCrae-Coley understood that, upon completion of the closing, the funds would be disbursed to the title insurance company for the policy and to the county for the property taxes, her funds were not timely disbursed to the proper entities. In addition, defendant and his staff ignored her concerns when she contacted the Firm. As a member of the North Carolina Bar, defendant was obligated to conform his conduct to the NCRPC. The State Bar presented sufficient evidence regarding the alleged violations, and the basic material facts of the matter were undisputed. Although defendant disputed whether the actions constituted violations of the NCRPC, as a matter of law the DHC properly granted summary judgment in favor of the State Bar on the alleged violations of Rules 1.3, 1.15-2(m), and 1.4(a).

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III. Defendant's Discipline

[5] Defendant also argues that the standard advanced by the State Bar is ambiguous, and that the NCRPC should not solely control this situation. We disagree.

## Appeals from the DHC

are conducted under the ‘whole record test,’ which requires the reviewing court to determine if the DHC’s findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.] Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn.

*N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 309-310 (2003) (citations omitted). “[T]he statutory scheme set out in N.C.G.S. § 84-28 clearly evidences an intent to punish attorneys in an escalating fashion keyed to: (1) the harm or potential harm created by the attorney’s misconduct, *and* (2) a demonstrable need to protect the public.” *Id.* at 637-38, 576 S.E.2d at 313. The DHC shall issue “a censure in cases in which the respondent has violated one or more provisions of the Rules of Professional Conduct and the harm or potential harm caused by the respondent is significant and protection of the public requires more serious discipline.” 27 N.C.A.C. 1B § .0113(k)(1) (2013). The Rules of the North Carolina State Bar also set forth several specific factors for the DHC to consider in imposing discipline. *See* 27 N.C.A.C. 1B § .0114(w) (2013).

In the instant case, defendant approved his signature on the HUD-1 form, which indicated McCrae-Coley’s entrusted funds collected for title insurance and property taxes would be disbursed. The record also indicates that defendant had previously accepted an admonition for a similar situation where funds were not timely disbursed to the proper entities in another transaction.

In the Order of Discipline, the DHC made findings that, *inter alia*, defendant identified himself as the Firm’s North Carolina managing attorney on the Firm’s interstate law firm registration statement, and that each attorney listed on the statement agreed to govern his personal and professional conduct with respect to legal matters arising in

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North Carolina in accordance with the NCRPC. The DHC also found that the Firm was handling between 200-300 closings per month in North Carolina, and that defendant relied on non-attorney employees to perform title work, verify the taxes due, prepare the HUD-1 statements, secure and pay the title insurance, and perform post-closing reviews. Defendant did not exercise the proper supervisory authority sufficient to ensure that the work of the non-attorney employees was compatible with his professional obligations as the closing attorney.

The DHC then indicated that it had considered the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(1) and (2), and that no factors were present to warrant defendant's disbarment or suspension. However, the DHC found that factors enumerated in 27 N.C.A.C. 1B § .0113(k) and 27 N.C.A.C. 1B § .0114(w)(3) applied to the instant case, including, *inter alia*, that defendant had prior discipline for similar conduct and refused to acknowledge the wrongful nature of his conduct; that defendant provided full and free disclosure to the panel and had a cooperative attitude toward the proceedings; and that defendant was experienced in the practice of law. The DHC then concluded that defendant's conduct violated one or more provisions of the NCRPC, that the harm or potential harm caused by defendant was significant, and that protection of the public required more than an admonition or reprimand. The DHC then censured defendant for his conduct in the McCrae-Coley matter.

Although defendant contends that the NCRPC should not solely control the instant case, and that the State Bar failed to show that any violations of the NCRPC actually occurred, the evidence in the record contradicts his claims. The DHC heard all the evidence, including receiving defendant's deposition into evidence as well as hearing defendant's own testimony. The DHC also considered the factors prescribed by 27 N.C.A.C. § 1B in determining the type of discipline, if any, that was warranted by defendant's conduct. Therefore, the DHC properly considered the evidence that defendant had violated three provisions of the NCRPC, and properly found that censure was an appropriate discipline for defendant's conduct in the instant case.

#### IV. Conclusion

Although defendant contends that he was not subject to the NCRPC as an employee of the Firm serving as a real estate closing attorney for HUD, the facts of the instant case clearly indicate otherwise. Because there were no genuine issues of material fact in the instant case, the DHC properly granted partial summary judgment in favor of the State Bar. Additionally, the DHC properly considered all the evidence before



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finding and concluding that censure was the appropriate discipline for defendant's conduct. We affirm the DHC's Order of Discipline.

AFFIRMED.

Chief Judge McGEE and Judge McCULLOUGH concur.

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CARL MICHAEL NICKS, PLAINTIFF  
v.  
SALLY AGNER NICKS, DEFENDANT

No. COA14-848

Filed 16 June 2015

**1. Divorce—equitable distribution—assets owned by trust**

The trial court erred in an equitable distribution action by distributing to plaintiff a member-managed limited liability company (Entrust) that was owned by a trust but managed by plaintiff, where the trial court's findings did not support its conclusion that Entrust was marital property. The trust was never joined as a party to the action, but it is clear from the record that once the trust (which holds legal title to Entrust and the marital assets therein) is joined as a necessary party, defendant will have a strong claim for the imposition of a constructive trust.

**2. Divorce—alimony—findings—not sufficient**

The trial court abused its discretion by failing to make sufficient findings of fact to support its award of permanent alimony to defendant. There were competing facts that should have been weighed in reaching and explaining the decision on the duration of the alimony award. The action was remanded for further findings of fact.

**3. Divorce—alimony—reasonable living expenses—litigant's assertion**

The trial court abused its discretion in an alimony action by reducing defendant's purported reasonable monthly expenses. The trial court is not required to accept a litigant's assertion of living expenses at face value.

**4. Divorce—alimony—imputed income**

The trial court did not abuse its discretion in an alimony action by finding that defendant had the ability to earn an income as a

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physician on at least a part time basis. The trial court's findings were supported by competent evidence, but the trial court erred by imputing a gross monthly income to her absent any finding that she depressed her income in bad faith. The case was remanded.

**5. Divorce—alimony—tax ramifications**

The trial court erred as a matter of law in an alimony case by failing to account for the tax ramifications of its alimony award. Although plaintiff's CPA did not testify specifically about the tax ramifications of an alimony award of \$36,000.00 per year, her testimony regarding the hypothetical award amounts makes clear that the amount of the award Sally actually receives will be lower as a result of state and federal income taxes. While this evidence does not necessarily require the trial court to increase its alimony award, the statute requires the trial court to support its reasoning with specific findings of fact, and the case was remanded.

**6. Divorce—alimony—calculation—mathematical error**

The trial court erred in an alimony action by committing a basic mathematical error in calculating the award. The amount of the trial court's alimony award was not justified by competent evidence as reflected in the court's factual findings and was remanded.

**7. Child Custody and Support—support—imputed income—no finding of bad faith**

The trial court erred by denying defendant's motion for child support based on changed circumstances (the loss of her job and her decision to not seek employment so that she could stay with her child) without making a finding that she had deliberately suppressed her income or acted in bad faith. On remand, and on this record, the trial court could find competent evidence to support a determination in either direction without abusing its discretion so long as its conclusion is supported by sufficient factual findings.

**8. Divorce—alimony—postseparation support—findings—insufficient**

The trial court abused its discretion in an alimony action and erred as a matter of law by failing to include in its order findings of fact to support its dismissal of defendant's claim for postseparation support for the time period between the date of separation and the commencement of its alimony award. A trial judge has broad discretion in determining whether to make an award of postseparation support and what date it should take effect. An order awarding alimony can provide for the payment of an already-pending claim

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for postseparation support where warranted, but the court is also obligated to explain its reasoning through adequate factual findings.

**9. Divorce—equitable distribution—IRA—passive postseparation appreciation**

The trial court abused its discretion in an equitable distribution action by failing to classify, value, or distribute as divisible property the passive postseparation appreciation of plaintiff's IRA and the case was remanded. There was no evidence of any contributions to or active management of the account after the date of separation.

Cross-appeals from order and judgment entered 23 January 2014 by Judge Mark L. Killian in Catawba County District Court. Heard in the Court of Appeals 18 February 2015.

*Bell, Davis & Pitt, P.A., by Robin J. Stinson, for Plaintiff.*

*Jonathan McGirt for Defendant.*

STEPHENS, Judge.

Plaintiff Carl Michael Nicks (“Mike”) and Defendant Sally Agner Nicks (“Sally”) filed cross-appeals from the Catawba County District Court’s “Order/Judgment” in their action for, *inter alia*, equitable distribution. Mike argues that the trial court erred in classifying, valuing, and distributing certain assets to which neither party held legal title, and also contends that the court erred by awarding permanent alimony to Sally. Sally argues that the trial court erred by imputing income to her, resulting in a reduction of her alimony award, and by denying her motion to modify child support, without making any findings as to whether she had depressed her income in bad faith. Sally also contends that the trial court erred by failing to take into account the tax ramifications of its alimony award, by failing to classify and distribute as marital property the passive postseparation appreciation of Mike’s Schwab IRA, and by summarily denying her motion for postseparation support. After careful consideration, we affirm in part, vacate in part, and remand the trial court’s Order/Judgment for further findings and proceedings consistent with this opinion.

*I. Facts and Procedural History*

Mike and Sally were married on 1 May 1983, separated on 22 June 2009, and divorced on 31 March 2011. There were four children born

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of the marriage, one of whom, Darcy, was still a minor living with Sally at the time the trial court entered its Order/Judgment.

From 1990, when the parties moved to Hickory, until 2002, Mike was employed as an orthopedic surgeon at Hickory Orthopaedic Center, P.A. In 2002, Mike was diagnosed with severe obstructive sleep apnea, which prevented him from continuing to practice medicine. As a result, Mike applied for and began receiving disability insurance benefits in the amount of \$19,000.00 per month; these benefits will terminate when Mike reaches age 65. Mike's medical license expired in 2004.

Sally is a board-certified internist and rheumatologist and is currently licensed to practice as a physician in North Carolina. Sally was the primary caretaker of the parties' children during the marriage but practiced medicine on a part-time basis. In 1990, she started her own practice, Piedmont Rheumatology, where she worked for three days a week until 1997 when, after she unexpectedly became pregnant with the parties' fourth child, Darcy, she sold that practice to her partner at Mike's urging. Sally did not practice medicine between the years 1998 and 2008.

In 2003, Mike confessed to Sally that he had engaged in an extra-marital affair with a 21-year-old female employee at his workplace. Although this disclosure profoundly affected Sally, she decided to stay with Mike and their children. The last six years of the parties' marriage followed a tumultuous pattern whereby Mike would move out of the marital residence for weeks or months at a time, then the parties would reconcile. This pattern ended when the parties finally separated on 22 June 2009 after Mike moved out of the marital residence and told Sally, who did not want to separate, that he was no longer happy with their marriage and that she would have to work full-time. Sally had resumed practicing medicine on a part-time basis in 2008 at Appalachian Regional Medical Associates in Boone after Mike encouraged her to return to work because of concerns that his disability insurer might challenge his entitlement to benefits. Sally declined an offer of full-time employment at the Boone clinic but was able to earn up to \$8,250.00 per month as a result of her part-time employment there. However, in 2012, she was forced to cut back her work schedule in order to spend more time with, and provide more stability for, the parties' minor daughter, who had been experiencing severe emotional problems that required treatment through medication and counseling. In February 2013, the Boone clinic closed, leaving Sally unemployed. Since then, she has not applied for employment as a rheumatologist and does not plan on returning to work until the parties' minor daughter graduates from high school in 2016.

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On 4 September 2009, Mike filed a complaint for child custody, child support, and equitable distribution of marital property. On 9 November 2009, Sally filed her answer and counterclaim, asserting claims for child custody and child support, equitable distribution, postseparation support, and alimony. On 23 December 2009, Mike filed a verified reply. On 2 March 2010, an order granting Sally temporary child custody and temporary child support was entered by stipulation of the parties. On 12 April 2010, an amended order was entered to correct typographical errors contained in the original order. On 3 March 2011, an order granting Sally permanent child custody and permanent child support was entered by stipulation of the parties. On 8 December 2011, a trial on the parties' remaining claims commenced in Catawba County District Court. However, because the judge assigned to hear the case was appointed to the superior court before the trial concluded, a mistrial was declared on 14 December 2012. Consequently, this matter was not calendared for hearing until 29 July 2013, when a bench trial began in Catawba County District Court that continued over five days spanning the next six weeks until 9 September 2013.

The evidence introduced at trial tended to show that prior to their separation, at Mike's urging upon the advice and counsel of an attorney licensed in Georgia named Chris Riser, the parties began implementing an estate plan—consisting of a trust and three LLCs—in order to take advantage of tax loopholes and to protect assets in the event of lawsuits. On 4 January 2008, Mike's father, Buster Brown Nicks, established the CMN 2008 Trust ("the Trust"), an irrevocable trust with himself as grantor and Premier Trust, Inc., of Las Vegas, Nevada, as trustee. The Trust was established with a gift of \$10,000.00 from Mike's father and a 100% membership interest in Entrust, LLC ("Entrust"). Mike and Sally are the only beneficiaries of the Trust, from which they have each received annual payments of \$10,000.00 since its inception. Mike has the right to make withdrawals from the Trust and also has a lifetime power of appointment and the right to remove any trustee with or without just cause; in addition, he serves as the investment manager of the trust property.

Entrust is a manager-managed limited liability company incorporated in Delaware on or about 11 December 2007 by Buster Brown Nicks, who was initially its sole member. On 4 January 2008, his membership interest was transferred to the Trust. On 17 January 2008, Mike and Premier Trust, Inc., as trustee of the Trust, signed the operating agreement for Entrust. As provided by that agreement, Premier Trust, Inc., is the sole member of Entrust while Mike is the manager and has

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the right to decide whether to make distributions of profits and assets from Entrust.

During the marriage, the parties acquired several tracts of land amounting to roughly 125 acres in Catawba County. In December 2007, the parties conveyed this realty, without consideration, to Green Park LLC, a North Carolina Limited Liability Company (“Green Park”). The articles of organization for Green Park had been submitted to the North Carolina Secretary of State for filing roughly three weeks before this transaction. In its operating agreement, Mike is listed as the sole member-manager of Green Park. On 23 January 2008, the parties entered into an agreement to sell 100% of their interest in Green Park to Entrust. On 24 January 2008, the parties conveyed their interest in Green Park to Entrust for a purchase price of \$2,200,000.00 payable in accordance with the terms of a promissory note which bears interest at the rate of 5% compounded semi-annually, with annual payments of \$10,000.00 to both parties beginning on 31 January 2009 and full payment due on the maturity date of 31 January 2033. That same day, Mike transferred to Entrust marital property consisting of \$100,000.00 in cash and shares of stock in several companies as well as various mutual funds with an estimated value of \$560,000.00 at the time of transfer. In return, Entrust executed a promissory note for \$660,000.00 made payable to Mike.<sup>1</sup>

During the trial, Sally testified that she had expressed reservations about Mike’s proposed estate plan but ultimately went along with it,

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1. In addition to Green Park and Entrust, the Trust also includes Estat, LLC (“Estat”), which was created after the parties had separated. On 30 March 2010, Entrust entered into an operating agreement with Estat, a manager-managed limited liability company incorporated earlier that month in North Carolina with Mike as its manager. That same day, Estat issued a promissory note for \$300,000.00 with 4.5% annual interest, signed by Mike as its manager, with Estat as the borrower and Mike as the lender using funds he inherited from his father’s estate in February 2010. The note specified that Entrust would make payments on the note of \$5,000.00 per year to Mike as the lender with payment in full due on the maturity date of 31 January 2033. Also that same day, Estat purchased a house in Hickory for approximately \$658,000.00. Estat subsequently spent an additional \$100,000.00 to \$150,000.00 on improvements to the house, which Mike eventually occupied as his own residence before selling it for roughly \$940,000.00 two years later. Mike, acting for Estat, then used the proceeds from this sale to purchase a house in Mooresville for approximately \$960,000.00, which he purported to lease from Estat for \$3,000.00 per month although he later admitted that instead of writing checks for the rent, he bartered the value of the monthly rent payment by landscaping, remodeling, and decorating the house. On 23 May 2012, Entrust issued another promissory note, signed by Mike as manager with Entrust as borrower and Mike as lender, in the amount of \$100,000.00 at an annual interest rate of 3%. The note specified that Entrust would make payments to Mike as lender in annual installments of \$1,500.00, with full payment due on the maturity date of 31 January 2033.

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although she had direct involvement only in the transactions involving Green Park. As Sally explained,

during the time the transactions were being made, we discussed them. I had reservations about it. I was—it seemed very complicated and convoluted to me. I was concerned that I was putting myself in a very vulnerable situation, but Mike assured me that I wasn't going to lose anything, that I had everything to gain by doing this. I was concerned about not having access to our funds. And he said that the way it was set up, it was just all for our protection of our financial future. That we could get our funds back out. The trustee would protect us, if we didn't want to take the funds out. But that we could take them out, if we wanted to. That was what he told me.

Sally also testified that Mike “promised to keep me informed of what he was doing with the investments and give me a regular accounting” but never did so.

The trial court entered its Order/Judgment on 23 January 2014. In its findings of fact, the trial court determined that Entrust and the two promissory notes it executed on 24 January 2008 were marital property. The court further found that Entrust was worth \$3,046,071.27 as of the date of separation, based on calculations of the fair market value of the two promissory notes by Sally's expert witness Bryan W. Starnes, a certified public accountant in accreditation for business valuations. The court ultimately concluded that “an equal distribution of the net value of the marital property is equitable” but that “an in-kind distribution is not practicable in this matter” because

a substantial portion of the parties' marital property was transferred to [] the Trust and Entrust []. In exchange for the conveyance of marital property, unsecured promissory notes were delivered to the parties.

98. [Mike] has withdrawal rights and he serves as the investment manager of all of the [entities] under the umbrella of [] the Trust. [Mike] has the discretion to make distributions of assets from Entrust.

99. There are sufficient assets in the various [LLCs] from which [Mike] can access to pay a distributive award. Some of these assets include the real property owned by Entrust [], cash, shares of stock in various companies and mutual funds.

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100. The presumption in favor of an in-kind distribution has been rebutted and a distributive award will achieve equity between the parties.

The court therefore ordered that Entrust's assets be distributed to Mike and ordered that he pay Sally "a distributive award in the amount of \$1,546,352.11," with \$100,000.00 due within 90 days of the entry of the Order/Judgment followed by six annual installments of \$241,058.69 beginning on 1 January 2015 with interest accruing at the legal rate of eight percent.

The trial court's order also addressed Sally's claims for alimony, child support, and postseparation support. After finding that Sally has reasonable monthly expenses of \$11,228.00 and the ability to earn at least \$8,000.00 per month in gross income, the trial court imputed a gross monthly income of at least \$8,000.00 to Sally and concluded that "the circumstances render it necessary for [Mike] to pay [Sally] \$3,000.00 per month as permanent alimony." The court denied Sally's motion to modify child support based on its conclusion that "[t]here has not been a substantial change of circumstances of the parties since the entry of the previous Order of child support." The court also dismissed Sally's claim for postseparation support.

On 11 February 2014, Mike filed notice of appeal to this Court. On 18 February 2014, Sally filed notice of cross-appeal to this Court. On 19 February 2014, Mike filed a motion to stay execution of the trial court's Order/Judgment under N.C.R. Civ. P. 62(d) and section 1-289 of our General Statutes. On 29 March 2014, the trial court ordered that the amount of the undertaking required to stay execution of the Order/Judgment be set at \$2,000,000.00, based in part on its findings that Mike "exercises effective control over substantial assets originating from the parties' marital estate that are nominally held by a trust or a limited liability company" and that, "[c]onsidering the amount of the judgment and the financial resources available to [Mike], the amount of the undertaking provided hereinbelow is proper and reasonable for the security of [Sally] pending appeal."

## II. Analysis

### A. Classification, valuation, and distribution of Entrust

[1] Mike argues that the trial court erred in distributing Entrust to him because neither Entrust nor the Trust were owned by either of the parties on the date of separation. We agree.



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[T]he 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. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.

The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.

*Dechkovskaia v. Dechkovskaia*, \_\_ N.C. App. \_\_, \_\_, 754 S.E.2d 831, 834 (citation omitted), *disc. review denied*, 367 N.C. 506, 758 S.E.2d 870 (2014).

In the present case, Mike argues that the evidence in the record and the trial court's findings of fact clearly demonstrate that it is the Trust, rather than Mike himself, that owns a 100% interest in Entrust. He therefore argues that the trial court's findings of fact do not support its conclusion of law that Entrust is marital property.

"In an equitable distribution proceeding, only marital property is subject to distribution by the court." *Lawrence v. Lawrence*, 100 N.C. App. 1, 16, 394 S.E.2d 267, 274 (1990). "Marital property," as defined by section 50-20 of our General Statutes, "means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and *presently owned*. . . ." N.C. Gen. Stat. § 50-20(b)(1) (2013) (emphasis added). Here, the record indicates that on the date of separation, neither Mike nor Sally held legal title to either the Trust or Entrust.

This Court's prior holdings make clear that "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property." *Upchurch v. Upchurch*, 122 N.C. App. 172, 176-77, 468 S.E.2d

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61, 63-64 (holding the trial court lacked jurisdiction to order equitable distribution of a note “executed for the benefit of Husband ‘or’ Jack A. Upchurch” because Jack A. Upchurch was never joined as a party to the action), *disc. review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996); *see also Daetwyler v. Daetwyler*, 130 N.C. App. 246, 252, 502 S.E.2d 662, 666 (1998) (holding that the trial court lacked jurisdiction to order equitable distribution of certificates of deposit jointly titled in the names of the husband and his mother and sister, who were not named as parties to the action), *affirmed per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999); *Dechkovskaia*, \_\_ N.C. App. at \_\_, 754 S.E.2d at 835 (holding that the trial court lacked jurisdiction to order equitable distribution of two houses titled in the name of the parties’ minor child because the minor child was never made a party to the action). Here, the Trust—which holds legal title to Entrust—was never named as a party to this action. We therefore hold that the trial court lacked jurisdiction to order equitable distribution of Entrust. *See, e.g., Upchurch*, 122 N.C. App. at 176, 468 S.E.2d at 64 (“Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property.”) (citation omitted).

For her part, Sally argues that *Upchurch* and its progeny are distinguishable from the present facts because each of those cases involved an additional natural person with a *bona fide* legal or equitable interest in the subject property, whereas here, although neither party had any legal ownership interest in Entrust, both possessed an equitable ownership interest in most of the assets held therein. Sally argues further that the trial court properly applied the “instrumentality rule” in order to pierce the corporate veil and impose a constructive trust so as to validate Sally’s equitable interest in marital property Mike is attempting to conceal behind an elaborate shell-game of legal entities over which he exercises total control.

There are several reasons why Sally’s arguments fail. On the one hand, Sally’s argument that *Upchurch* should be limited to natural persons rests primarily on the fact that, in reaching its holding, the *Upchurch* Court quoted our Supreme Court’s prior decision in *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968), which recognized that “[w]hen a person is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence, such person is a necessary party to the action.” *Upchurch*, 122 N.C. App. at 176, 468 S.E.2d at 63 (quoting *Strickland*, 273 N.C. at 485, 160 S.E.2d at 316). However, Sally’s argument ignores the fact that this Court also based its holding in *Upchurch* on N.C.R. Civ. P. 19(b), which refers to “parties,” rather than

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“persons.” See N.C. Gen. Stat. § 1A-1, Rule 19(b) (2013). Moreover, this Court’s subsequent decisions in *Daetwyler* and *Dechkovskaia* focused not on *Upchurch*’s quotation of *Strickland* but instead on its recognition that when a third party holds legal title to allegedly marital property, it must be joined as a party to the action. In short, *Upchurch*’s application should not be limited to only natural persons holding legal title to property.

Furthermore, Sally’s veil-piercing argument is fatally undermined by our Supreme Court’s recent decision in *Green v. Freeman*, 367 N.C. 136, 749 S.E.2d 262 (2013), which recognized that “[t]he doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form.” *Id.* at 146, 749 S.E.2d at 271. In order to pierce the corporate veil, a party must satisfy three elements, including:

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

*Id.* at 145-46, 749 S.E.2d at 270. Here, Sally argues that Mike asserts sufficient dominance over Entrust to satisfy the “instrumentality rule,” but as our Supreme Court explained in *Green*, “sufficient evidence of domination and control establishes only the first element for liability. There must also be an underlying legal claim to which liability may attach.” *Id.* at 146, 749 S.E.2d at 271. Thus, because Sally has not asserted any claims against the Trust or Entrust for which Mike would be personally liable, her veil-piercing argument must fail.

Sally’s argument that the trial court’s Order/Judgment imposed a constructive trust also fails. As this Court recognized in *Upchurch*,

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

122 N.C. App. at 175, 468 S.E.2d at 63 (citations, internal quotation marks, and emphasis omitted). However, *Upchurch* made clear that a trial court can only impose a constructive trust over a third party that holds legal title to purportedly marital property if that third party is joined as a party to the action. *See id.* at 176, 468 S.E.2d at 64. *Upchurch* also explained that in an action for equitable distribution, this Court will not imply a constructive trust after the fact where the trial court's order does not include findings of fact to reflect its legal conclusion that one has been established by clear and convincing evidence. *Id.* ("In this case, the conclusions of the trial court are silent on whether Wife met her burden of showing a trust for the benefit of the marital estate with regard to the various bonds and notes. Even if such a conclusion is implied, the findings do not reflect that a trust was established by clear and convincing evidence."). Here, the Trust was never joined as a party to the action, and the trial court's Order/Judgment contains no findings to indicate that Sally proved by clear and convincing evidence that a constructive trust should be imposed or that the imposition of one was even considered as a remedy.

In light of these errors, Mike argues—and we agree—that the trial court's Order/Judgment distributing Entrust must be vacated and this case must be remanded.

Mike argues further that because this action has been pending for over five years and Sally has had ample opportunity to add the Trust as a party but failed to do so, we should remand with instructions that the trial court shall accept no further evidence regarding the Trust or its assets and instead recalculate and distribute the marital estate without including Entrust in its valuation. In support of this argument, Mike cites our prior decision in *Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752, *disc. review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997). In *Grasty*,

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this Court rejected the appellant's argument that the trial court erred by refusing to value the appellee's interest in a business in its equitable distribution order because the court found that the only evidence the appellant offered as to its value was "wholly incredible and without reasonable basis." *Id.* at 739, 482 S.E.2d at 754. While we agreed with that determination, we also held that the trial court erred by nevertheless distributing the business in its equitable distribution order, and therefore remanded the case with instructions "for the entry of a new equitable distribution judgment based on this record (without the taking of new evidence)." *Id.* at 740, 482 S.E.2d at 754.

Here, by contrast, Sally offered expert testimony as to the value of the promissory notes, which the trial court's Order/Judgment relied on as a proxy for its valuation of Entrust. Mike attempts to analogize this case to *Grasty* based on his argument that the trial court's valuation of Entrust was not supported by competent evidence. However, our decision to remand this case based on the failure to join the Trust as a necessary party necessarily vacates the trial court's valuation of Entrust, provides ample opportunity for a proper *de novo* valuation of Entrust once the Trust is properly joined as a necessary party, and obviates any need to address Mike's additional arguments that the trial court erred in: (1) its valuation of the promissory notes; (2) its determination that Mike had the means and ability to pay a distributive award of \$1,546,352.11; (3) its determination that the Trust had sufficient assets to satisfy the indebtedness on the promissory notes if they became immediately due and payable; and (4) its order that Mike pay the distributive award at the legal interest rate of eight percent. We therefore conclude that *Grasty's* rationale for restricting the trial court from taking any new evidence on remand is inapplicable here, and we consequently decline to offer such an instruction.

Finally, we note that in spite of the errors discussed *supra*, the majority of the trial court's findings of fact regarding the Trust, Entrust, and the control Mike exercises over them are amply supported by the evidence in the record. Further, we find wholly incredible and without reasonable basis Mike's argument that Entrust should not be distributed as marital property despite the trial court's well-supported factual findings that it is composed almost entirely of marital assets.<sup>2</sup> The trial

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2. For the sake of clarity, we note that not all the assets held by the Trust are marital property. For example, neither the original \$10,000.00 gift Buster Brown Nicks used to establish the Trust nor the funds that Mike inherited from his estate and used to finance Estat should be considered marital property on remand.

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court's findings that Mike engineered this elaborate scheme as an estate planning vehicle, effectively manages all the assets it conceals, and has the right to decide whether to make distributions of profits and assets from Entrust are similarly well supported. In short, it is clear from the record that once the Trust—which holds legal title to Entrust and the marital assets therein—is joined as a necessary party to this action, Sally will have a strong claim for the imposition of a constructive trust. We remand this issue to the trial court for further findings and proceedings consistent with this opinion.

*B. Alimony**(1) Duration of award*

**[2]** Mike argues that the trial court erred by failing to make sufficient findings of fact to support its award of permanent alimony to Sally. We agree.

It is settled that “[a] trial court’s decision on the amount of alimony to be awarded is reviewed for an abuse of discretion.” *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 420, 588 S.E.2d 517, 522 (2003). Furthermore,

[f]indings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case.

*Id.* (citation omitted). “Under N.C. Gen. Stat. § 50-16.3A(c) . . . , the trial court is also required to set forth the reasons for the amount of the alimony award, its duration, and manner of payment.” *Id.* at 421, 588 S.E.2d at 522. In *Fitzgerald*, we held that although the amount of the trial court’s alimony award was sufficiently supported by its ultimate findings of fact, remand was still required because the order failed to make any findings to support the alimony award’s duration. In subsequent decisions, “this Court has repeatedly held that an alimony order is inadequate when it contains no findings explaining the reason for the duration chosen.” *Lucas v. Lucas*, 209 N.C. App. 492, 502, 706 S.E.2d 270, 277 (2011); see also *Hartsell v. Hartsell*, 189 N.C. App. 65, 76, 657 S.E.2d 724, 731 (2008) (remanding where the trial court ordered alimony to continue until the defendant’s death or remarriage but “included no findings of fact at all to explain its rationale for the duration of the award”); *Squires v. Squires*, 178 N.C. App. 251, 264, 631 S.E.2d 156, 163 (2006) (remanding for further findings of fact concerning duration of alimony award where the trial

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court ordered alimony to “continue until the death of one of the parties, or plaintiff’s remarriage or cohabitation, but failed to make any finding about the reasons for this duration”).

In the present case, the trial court’s Order/Judgment included findings of fact that Mike has been disabled since 2002, that Mike’s medical license expired in 2004, and that Mike receives \$19,000.00 per month in disability insurance benefits that are set to expire when he reaches the age of 65. The Order/Judgment also included unchallenged factual findings that Mike committed marital misconduct and abandoned Sally “without just cause, excuse, or provocation.” These findings demonstrate that there are competing factors the court must weigh in reaching and *explaining* its decision on the duration of the alimony award. This the court here failed to do. We therefore remand the alimony award for further findings of fact regarding the reasons for its permanent duration.

(2) *Amount of award*

Sally contends that the trial court erred as a matter of law and abused its discretion in determining the amount of its alimony award. Sally makes three related arguments in support of her position.

(a) *Reasonable monthly expenses*

**[3]** Sally argues that the trial court abused its discretion by reducing her purported reasonable monthly expenses from \$13,179.00 per month to \$11,228.00 per month. We disagree.

This Court has long recognized that “[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves.” *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (citation omitted), *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982).

In the present case, Sally submitted an affidavit stating that her “actual expenses” were \$13,179.00 per month and that her “needed expenses” were \$12,978.00 per month. At trial, Sally testified that these expenses included a vacation and travel budget of \$800.00 per month including the *pro rata* costs of Darcy attending robotics camp and the cost of Sally and Darcy traveling to New Zealand, as well as admissions expenses of \$200.00 per month for Darcy to attend various events such as Cirque de Soleil, concerts at Charlotte Motor Speedway, and Spiderman the Musical. However, Sally concedes that both her “actual”

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and “needed” expense totals included expenses for Darcy that were already covered by the court’s prior award of child support. Further, in explaining the rationale for its determination that Sally’s reasonable monthly expenses should be reduced by \$1,750.00 to \$11,228.00, the trial court made clear that it found “the expenses as set forth on [Sally’s] affidavit to be reasonable except for the amounts listed for upkeep and maintenance on the home, monthly savings for Darcy, savings for vacation and savings for car.” Based on our review of the record and in light of our holding in *Whedon* that the trial judge is not required to accept a litigant’s assertion of living expenses at face value, we find no abuse of discretion here. This portion of the trial court’s order is affirmed.

*(b) Imputation of income*

**[4]** Sally argues no competent evidence supports the trial court’s finding of fact that she “has the ability to earn an income as a physician on at least a part-time basis.” We disagree.

In its Order/Judgment, the trial court found as facts that:

20. [Sally] is a licensed physician in North Carolina; she is a board-certified internist and rheumatologist. . .

21. . . . In June 2008, [Sally] resumed practicing medicine on a part-time basis at Appalachian Regional Medical Associates, a physician’s group in Boone, North Carolina.

...

26. [Sally] lost her part-time physician’s position on February 28, 2013 when the Boone clinic closed. [Sally] currently has no earnings from employment. Prior to losing her position at the Boone clinic, [Sally] was earning approximately \$8,250.00 per month in self-employment income. . . .

...

28. [Sally] was offered a full-time position at the Boone clinic before its closure. [Sally] declined the offer.

...

32. [Sally] does not plan on returning to work until Darcy graduates from high school. Darcy is in the tenth grade. [Sally] is not currently seeking employment. [Sally] has the ability to earn an income as a physician on at least



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a part-time basis. The [c]ourt further finds [Sally] has the ability to earn at least \$8,000.00 per month in gross income, based on her education, training, and professional experience.

33. The [c]ourt therefore imputes a gross monthly income of at least \$8,000.00 to [Sally]. [Sally] was earning approximately \$8,000.00 per month in gross income when the Order of child support was entered in March of 2011.

Our review of the record indicates that these findings are supported by competent evidence. However, Sally argues further that the trial court erred by imputing a gross monthly income of at least \$8,000.00 to her absent any findings of fact that she depressed her income in bad faith. We agree.

As this Court recognized in *Works v. Works*, 217 N.C. App. 345, 719 S.E.2d 218 (2011):

Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith. In the context of alimony, bad faith means that the spouse is not living up to income potential in order to avoid or frustrate the support obligation. Bad faith for the dependent spouse means shirking the duty of self-support[.] The trial court might also find bad faith, or the intent to avoid reasonable support obligations, from evidence that a spouse has refused to seek or to accept gainful employment; willfully refused to secure or take a job; deliberately not applied himself or herself to a business or employment; or intentionally depressed income to an artificial low.

217 N.C. App. at 347, 719 S.E.2d at 219 (citations, internal quotation marks, and brackets omitted). In *Works*, the trial court made factual findings that the appellant-wife's "work experience outside the home after the children were born was limited[] . . . [to] a series of minimum wage jobs intermittently in the years that followed" and that she otherwise had limited education and training and remained unemployed without recurring income in order to care for her minor children. *Id.* at 348, 719 S.E.2d at 219. However, despite those findings, the trial court reduced the appellant-wife's alimony award by \$1,256.00 per month based on its finding that she "has the ability to earn at least minimum wage." *Id.*

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On appeal, we held that the trial court had committed reversible error by failing to support its imputation of income to her with any findings that she had depressed her income in bad faith. *Id.* at 348, 719 S.E.2d at 219-20.

Similarly here, the trial court made no finding that Sally depressed her income in bad faith. Thus, here, as in *Works*, we must remand this matter to the trial court. In so holding, we do not intend to suggest, and are not suggesting, that the trial court is required on remand to find that Sally deliberately suppressed her income in bad faith. Although the evidence in the record may suggest that Sally has the capacity to earn up to \$8,000.00 per month, the Order/Judgment also included unchallenged factual findings that she lost her job due to the Boone clinic's closure and will not seek full-time employment until the parties' daughter Darcy graduates from high school, based on her concerns for Darcy's mental, emotional, and psychological well-being. Whatever conclusion the trial court reaches on this issue, our prior holding in *Works* makes clear that the court's conclusion must be supported by sufficient factual findings to explain the reasoning behind its determination of whether Sally "is not living up to [her] income potential in order to avoid or frustrate [her self-]support obligation." *Id.* at 347, 719 S.E.2d at 219; *see also Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002) (explaining that in determining whether the imputation of income to a party is appropriate, "[t]he dispositive issue is whether a party is motivated by a desire to avoid [her] reasonable support obligations."). Therefore, as in *Works*, we remand this issue "with instructions [to] determine whether [Sally] depressed her income in bad faith, or, if not, to determine the amount of [Mike's] monthly alimony obligation" without imputing \$8,000.00 monthly income to Sally. *Id.* at 348, 719 S.E.2d at 219-20.

*(c) Tax ramifications*

[5] Sally also argues that the trial court erred as a matter of law in failing to account for the tax ramifications of its alimony award. We agree.

Section 50-16.3A(b) of our General Statutes provides in pertinent part that, "[i]n determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including: . . . [t]he federal, State, and local tax ramifications of the alimony award[.]" N.C. Gen. Stat. § 50-16.3A(b)(14) (2013). The statute further mandates that "the court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor." *Id.* § 50-16.3A(c).

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Here, Sally presented testimony from Pamela Josie Matthews, a certified public accountant, to provide “insight into the tax burden that might be assessed against an alimony award.” Matthews testified about the state and federal tax ramifications on hypothetical annual alimony awards of \$155,000.00, \$120,000.00, \$90,000.00, and \$60,000.00; in each case, the tax ramifications amounted to a reduction of the alimony award. The trial court awarded annual alimony of \$36,000.00, but its order offers no findings regarding the tax consequences of that award. This is error. Although Matthews did not testify specifically about the tax ramifications of an alimony award of \$36,000.00 per year, her testimony regarding the hypothetical award amounts makes clear that the amount of the award Sally actually receives will be lower as a result of state and federal income taxes. While this evidence does not necessarily require the trial court to increase its alimony award, the statute requires the trial court to support its reasoning with specific findings of fact. We therefore remand this portion of the Order/Judgment with instructions for the trial court to provide specific findings to support its determination.

[6] Finally, Sally complains that the trial court committed basic mathematical errors in calculating her alimony award. Specifically, in purporting to reduce Sally’s reasonable monthly expenses of \$11,228.00 by \$8,000.00 in imputed income, the trial court somehow arrived at an alimony award of \$3,000.00 per month. As noted *supra*, although a trial court has broad discretion in determining the amount of alimony to be awarded, it must set forth the reasons for its determination in its factual findings. *See, e.g., Fitzgerald*, 161 N.C. App. at 421, 588 S.E.2d at 522. Thus, Sally is correct here that the amount of the trial court’s alimony award is not justified by competent evidence as reflected in the court’s factual findings. On remand, we instruct the trial court—regardless of whether it determines the amount of the alimony award should be \$3,000.00, or \$3,228.00, or anything above, below, or between those two figures—to amply support its determinations with sufficient factual findings.

*C. Modification of Child Support*

[7] Sally argues that the trial court erred in denying her motion to modify child support based on changed circumstances without making a finding of fact that she had deliberately depressed her income or acted in bad faith. We agree.

When this Court reviews a child support order,

our review is limited to a determination whether the trial court abused its discretion. Under this standard of review,

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the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.

*Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citations omitted).

In the present case, the trial court awarded child support to Sally in its 3 March 2011 order based in part on the parties' stipulation that Sally's income at that time was \$8,000.00 per month. By the time of the hearing on her motion to modify child support, Sally was unemployed due to the Boone clinic's closure and her choice not to seek employment. In its Order/Judgment, the trial court found as a fact that:

44. Since the [c]ourt has determined that [Sally] has the ability to earn a monthly income of at least the same amount as she was earning when the child support order was entered, the [c]ourt does not find a substantial and material change of circumstances regarding child support.

The trial court thus concluded that, "[t]here has not been a substantial change of circumstances of the parties since the entry of the previous Order of child support and [Sally's] motion to modify child support should be denied."

It is clear from the context of the Order/Judgment that the trial court reached this determination by imputing income of \$8,000.00 per month to Sally, just as it did with its alimony award. This Court's prior decisions demonstrate that it is within a trial court's discretion to impute income to a party and thereby lower the amount of a child support award based on that party's earning capacity. *See, e.g., Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006). However, "[b]efore the earnings capacity rule is imposed, it must be shown that [the party's] actions which reduced [her] income were not taken in good faith." *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997) (citations and internal quotation marks omitted). Thus, "[t]he trial court must find a deliberate depression of income or other bad faith in order to impute income." *Ludlam v. Miller*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 739 S.E.2d 555, 560 (2013) (citation and internal quotation marks omitted).

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The problem here is the same as the problem with the alimony award, insofar as the trial court failed to support its imputation of income to Sally with specific findings that she depressed her income in bad faith. Therefore, in accordance with our decision in *Ludlam*, “[w]e reverse this portion of the order and remand to the trial court” to determine whether “there has been deliberate depression of income or other bad faith.” *Id.* Here again, we do not intend to suggest, and are not suggesting, that on remand the trial court is required to find that Sally intentionally depressed her income in bad faith. Indeed, on this record, and in light of the factual findings discussed *supra* which neither party challenges and which are now consequently binding, we believe the trial court could find competent evidence to support a determination in either direction without abusing its discretion so long as its conclusion is supported by sufficient factual findings.

*D. Postseparation Support*

[8] Sally argues that the trial court abused its discretion and erred as a matter of law by failing to include findings of fact in the Order/Judgment to support its dismissal of her claim for postseparation support for the time period between the date of separation and the commencement of its alimony award. We agree.

Section 50-16.2A of our General Statutes provides that

[i]n ordering postseparation support, the court shall base its award on the financial needs of the parties, considering the parties’ accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party’s respective legal obligations to support any other persons.

N.C. Gen. Stat. § 50-16.2A(b) (2013). The statute further provides in pertinent part that “a dependent spouse is entitled to an award of postseparation support if, based on consideration of the [aforementioned] factors . . . , the court finds that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay.” *Id.* § 50-16.2A(c). Section 50-16.8 of our General Statutes provides in pertinent part that “[t]he court shall set forth the reasons for its award or denial of postseparation support, and if making an award, the reasons for its amount, duration, and manner of payment.” N.C. Gen. Stat. § 50-16.8 (2013).

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In the present case, the parties were separated on 22 June 2009 and Sally filed counterclaims for alimony and postseparation support on 9 November 2009. Due to the trial court's entry of multiple continuances and scheduling orders over the course of this litigation, Sally's claim for postseparation support was not heard until the trial began on 29 July 2013. In its Order/Judgment, the trial court found as a fact that, "[n]o hearing was held on [Sally's] post[separation] support claim prior to the trial of this action," but then concluded as a matter of law that "[Sally's] claim for post[separation] support is dismissed."

Sally contends that by failing to support its dismissal of her claim for postseparation support with specific factual findings as to the reasons for its determination, the trial court violated section 50-16.8. Sally argues further that the court's determination is unsupported by its award of alimony and its findings of fact that Sally is a dependent spouse in need of spousal support. Reasoning by analogy, Sally cites as support for her argument this Court's recognition in *Smallwood v. Smallwood* that "[t]he court may order the [alimony] award *effective from the date of separation* if the facts so warrant." \_\_ N.C. App. \_\_, \_\_, 742 S.E.2d 814, 824 (2013) (citation omitted).

We agree with Sally that the trial court erred by failing to provide any specific findings to "set forth the reasons for its . . . denial of postseparation support." N.C. Gen. Stat. § 50-16.8. Although that statute explicitly addresses the denial of postseparation support, N.C.R. Civ. P. 41(b) provides that an involuntary dismissal "operates as an adjudication upon the merits." N.C. Gen. Stat. § 1A-1, Rule 41(b). Furthermore, although section 50-16.1A(4)(b) provides that an obligation by a supporting spouse to pay postseparation support ceases upon "[t]he entry of an order awarding or denying alimony," *see* N.C. Gen. Stat. § 50-16.1A(4)(b) (2013), this does not necessarily mean that an order awarding alimony cannot also provide for the payment of an already-pending claim for postseparation support where warranted. To be clear, a trial judge has broad discretion in determining whether to make an award of postseparation support and what date it should take effect. Nevertheless, the court is also obligated to explain its reasoning for granting or denying such an award through adequate factual findings. We therefore remand this portion of the order for entry of additional findings.

*E. Passive postseparation appreciation of Mike's Schwab IRA*

[9] Finally, Sally argues that the trial court abused its discretion in failing to classify, value, or distribute as divisible property the passive

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postseparation appreciation of Mike's Schwab IRA from \$321,963.57 on the date of separation to \$386,473.22 as of 25 July 2013. We agree.

Our standard of review for alleged errors in a trial court's classification and valuation of divisible and marital property is well-settled:

[w]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*. We review the trial court's distribution of property for an abuse of discretion.

*Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (citations and internal quotation marks omitted). Section 50-20(b)(4)(a) of our General Statutes provides that divisible property includes

[a]ll appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

N.C. Gen. Stat. § 50-20(b)(4)(a) (2013). As this Court recognized in *Romulus*,

[u]nder the plain language of [section 50-20(b)(4)(a)], all appreciation and diminution in value of marital and divisible property is presumed to be divisible property unless the trial court finds that the change in value is attributable to the postseparation actions of one spouse. Where the trial court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption has not been rebutted and must control.

215 N.C. App. at 501, 715 S.E.2d at 313 (citation and emphasis omitted). In the present case, during the trial Mike presented evidence indicating that the value of his Schwab IRA had increased by \$64,509.65 between the date of separation and the week the trial began. However, no evidence was presented of any contributions to or active management of

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this account after the date of separation. In its Order/Judgment, the trial court valued Mike's Schwab IRA as marital property at its date of separation value and distributed it without accounting for the passive post-separation increase. This was clearly error.

Mike argues that the trial court's failure to distribute the passive postseparation increase was proper because although evidence was introduced as to his IRA's value nearly six months before the court's Order/Judgment, there was no evidence in the record of the IRA's value as of the date of distribution. In support of his argument, Mike cites section 50-21(b) of our General Statutes, which provides that,

[f]or purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties. Divisible property and divisible debt shall be valued as of the date of distribution.

N.C. Gen. Stat. § 50-21(b) (2013). However, as this Court has previously recognized, "there is inevitably some passage of time between the close of evidence in an equitable distribution case and the entry of judgment." *Wall v. Wall*, 140 N.C. App. 303, 314, 536 S.E.2d 647, 654 (2000). As the *Wall* Court explained, the determinative factor is whether the delay is prejudicial or *de minimis*:

In many cases, a delay in the entry of judgment for 30 or 60 days following trial would not be prejudicial because there would be little or no change in the situation of the parties or the values assigned to the items of property. In this case, however, there was a nineteen-month delay between the date of trial and the date of disposition. This was more than a *de minimis* delay, and requires that the trial court enter a new distribution order on remand. Where there is such an extensive delay, even though it be due to factors beyond the trial court's control, we believe it would be consistent with the goals of the Equitable Distribution Act that the trial court allow the parties to offer additional evidence as to any substantial changes in their respective conditions or post-trial changes, if any, in the value of items of marital property.

*Id.* This Court's subsequent decisions have made clear that we employ a "case-by-case inquiry as opposed to a bright line rule for determining



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whether the length of a delay is prejudicial.” *Britt v. Britt*, 168 N.C. App. 198, 202, 606 S.E.2d 910, 912 (2005). In *Britt*, we noted three factors that guide our analysis: (1) whether the delay was more than *de minimis*; (2) whether there were “potential changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order”; and (3) whether “potential changes in the relative circumstances of the parties warranted additional consideration by the trial court.” *Id.* at 202, 606 S.E.2d at 912-13.

In the present case, Mike makes no argument that circumstances changed between the end of the trial and entry of the Order/Judgment, nor does he identify any way that the delay resulted in any prejudice to him. Instead, Mike urges this Court to apply exactly the sort of bright line approach that *Wall* rejected. However, “[w]here 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.” *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citation omitted). Moreover, the delay here between the close of evidence and entry of judgment was 136 days, or roughly four and a half months, and since *Wall*, this Court has found no prejudice in longer delays than the one at issue here. *See, e.g., White v. Davis*, 163 N.C. App. 21, 26, 592 S.E.2d 265, 269, *disc. review denied*, 358 N.C. 739, 603 S.E.2d 127 (2004) (holding delay of seven months was not prejudicial). We therefore hold that the trial court erred in failing to classify, value, and distribute as divisible and marital property the \$64,509.65 in passive postseparation appreciation of Mike’s Schwab IRA and remand to the trial court for further action consistent with this opinion.

AFFIRMED in part, VACATED in part, and REMANDED.

Judges HUNTER, JR., and TYSON concur.

**SIMMONS v. WADDELL**

[241 N.C. App. 512 (2015)]

DONNA SIMMONS, PLAINTIFF

v.

KATHLEEN M. WADDELL, DEFENDANT

No. COA14-1214

Filed 16 June 2015

**1. Real Property—conveyance of easement—plain and unambiguous language**

In an appeal from the trial court's order quieting title to a thirty-foot strip of land, the Court of Appeals affirmed the trial court's conclusion that the 1983 deed at issue conveyed only an easement over the strip of land, not a fee simple interest. The plain and unambiguous language of the deed describing the metes and bounds being transferred and referring to the "roadway easement" supported the trial court's conclusion.

**2. Real Property—order reopening estate—judicial notice**

In an appeal from the trial court's order quieting title to a thirty-foot strip of land, the Court of Appeals granted plaintiff's motion to take judicial notice of a 2012 order reopening a previous owner's estate. The order was a matter of public record and not subject to reasonable dispute.

**3. Wills—conveyance of land—plain and unambiguous language**

In an appeal from the trial court's order quieting title to a thirty-foot strip of land, the Court of Appeals rejected defendant's argument that the conveyance of the land to plaintiff was ineffective. Under the plain and unambiguous language of the testator's will, the title to the land became vested in the sole devisee at the time of the testator's death.

Appeal by defendant from judgment entered 2 May 2014 by Judge Scott C. Etheridge in Moore County District Court. Heard in the Court of Appeals 7 April 2015.

*Law Office of Marsh Smith, P.A., by Marsh Smith, for plaintiff-appellee.*

*Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.*

INMAN, Judge.

**SIMMONS v. WADDELL**

[241 N.C. App. 512 (2015)]

Kathleen M. Waddell (“defendant”) appeals from judgment quieting title in favor of Donna Simmons (“plaintiff”), defendant’s neighbor, to a thirty-foot-wide strip of land known as the Driveway Corridor, located adjacent to their respective properties. In this case, the parties argue that rights to the Driveway Corridor were at varying times implied by necessity, created by deed, completely forgotten, and seemingly reclaimed. The issues on appeal pertain to the legal significance of the many conveyances of land comprising the Driveway Corridor and its surrounding parcels. Solving the legal puzzle also requires this Court to consider whether and in what manner the Driveway Corridor was bequeathed in a will executed by one of its series of owners.

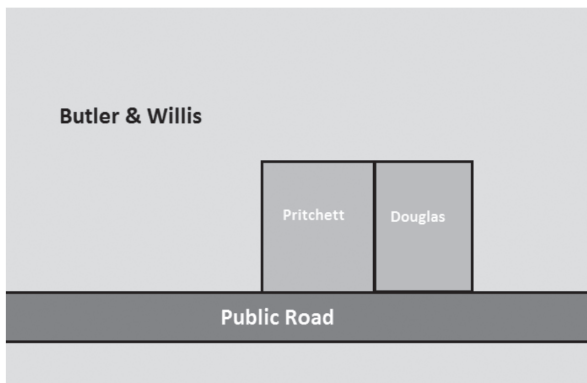
After careful review, we affirm the trial court’s order quieting title in favor of plaintiff.

**Factual and Procedural Background**

More than a half century ago, defendant’s and plaintiff’s properties were part of a single parcel consisting of 47.25 acres owned by Helen K. Butler and Lurline Willis (“Butler and Willis”) as tenants in common. In the late 1950s, Butler and Willis conveyed one tract within the parcel to James and Margaret Douglas and conveyed an adjacent tract to Jesse and Newell Pritchett (“the Pritchetts”). Each of these tracts abutted the public road. (Due to the difficulty in visualizing the complete title histories relevant to this case, we have included our own rudimentary visual aids to assist the reader.)<sup>1</sup>

In 1962 and 1963, Butler and Willis conveyed two additional adjacent parcels of land – separated from the public road by the Pritchett and Douglas tracts – to Ralph and Natalie Dodge (“the Dodge tract”).

1.



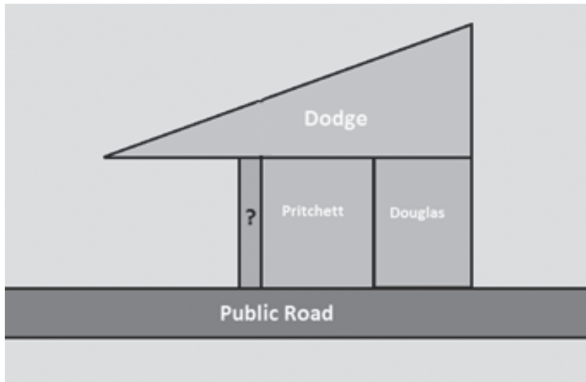
**SIMMONS v. WADDELL**

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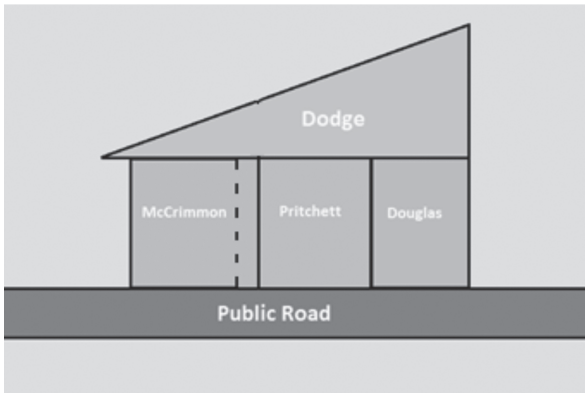
At that time, the Dodge tract was “landlocked,” meaning that it had no access to the public road.<sup>2</sup>

Also in 1963, Butler and Willis conveyed a parcel of land sharing a common border with both the Pritchett and Dodge tracts to Lawrence and Carolyn McCrimmon (“the McCrimmon tract”).<sup>3</sup> Included in the deed was a 30-foot roadway easement, hereinafter referred to as the Driveway Corridor, paralleling the Pritchett common line and connecting the Dodge tract to the public road. The deed specified that this easement was intended to be used for the joint benefit of the McCrimmons and the Dodges. This is the first documented appearance of the Driveway Corridor in a deed. Thus, as a result of the deed, the McCrimmons held title to the tract in fee simple, subject to the easement over the Driveway Corridor benefitting the Dodges.

2.



3.



**SIMMONS v. WADDELL**

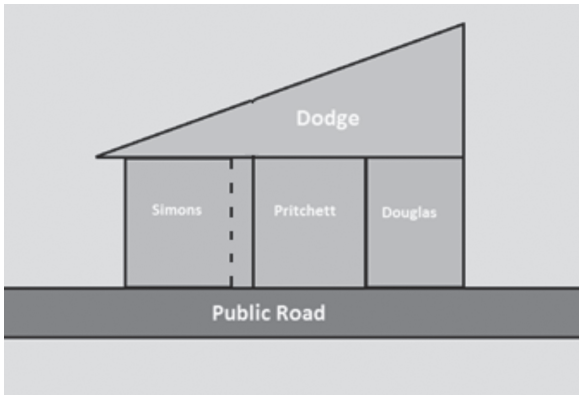
[241 N.C. App. 512 (2015)]

In 1966, the McCrimmons conveyed the entirety of their land to C.J. Simons (“Simons”), including the easement over the Driveway Corridor.<sup>4</sup>

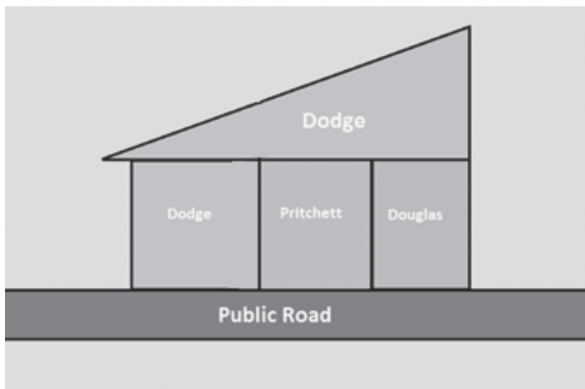
**The 1969 deed.**

In 1969, the executor of Simons’s estate conveyed Simons’s tract to the Dodges. Included in this deed, registered in book 318 page 59 of the Moore County registry (“the 1969 deed”), was language identical to that used in the prior deeds to create the easement for the Driveway Corridor. As a result, the Dodges owned, in addition to their initially landlocked parcels, the parcel sharing an eastern border with the Pritchett tract. The conveyance thus left the Dodges holding a fee simple interest in the Driveway Corridor.<sup>5</sup>

4.



5.



**SIMMONS v. WADDELL**

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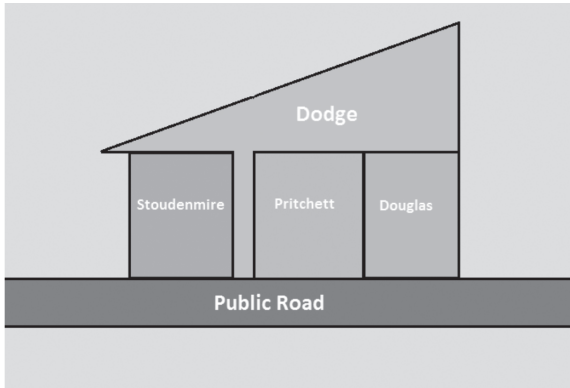
In 1970, the Dodges conveyed a portion of the former McCrimmon tract to Jack and Nell Stoudenmire. The deed specified that the Stoudenmire tract would only run *along* the western border of the Driveway Corridor. It is undisputed that the land comprising the Driveway Corridor itself was not conveyed to the Stoudenmires.<sup>6</sup>

In 1983, the Pritchetts conveyed their tract to plaintiff and plaintiff's husband. The language of this deed is not in dispute.

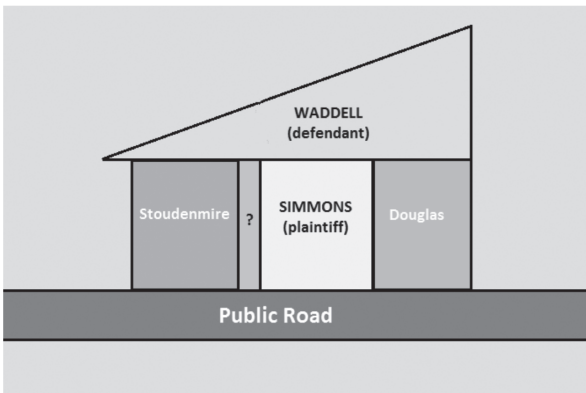
**The 1983 Waddell deed.**

Also in 1983, the Dodges conveyed their initial parcel to defendant's husband, Roger Waddell ("Dr. Waddell"). This deed was recorded in Book 500, page 542 of the Moore County registry ("the 1983 Waddell deed") and provided that the Dodges "also" conveyed their "interest in a roadway easement 30 feet wide, as spelled out in Deed recorded in Deed Book 318 at page 39 in the Moore County Registry [the 1969 deed]."<sup>7</sup>

6.



7.



**SIMMONS v. WADDELL**

[241 N.C. App. 512 (2015)]

For more than twenty years after the 1983 conveyance, defendant used the Driveway Corridor, running alongside plaintiff's property, for ingress and egress to her home. Dr. Waddell testified in deposition that he always considered the Driveway Corridor to be a "common easement" rather than an extension of their property. Defendant and her husband divorced in 2004, and as part of an equitable distribution settlement, defendant was left with title to the Waddell tract.

On 15 December 2011, plaintiff filed a complaint in Moore County District Court. Plaintiff initially sought injunctive relief to prevent defendant from blocking her access to the Driveway Corridor and a declaratory judgment that she has a prescriptive easement over the land from repeated use.

While preparing for trial, plaintiff's attorney contacted the personal representative of Natalie Dodge's estate, Rodney Guthrie ("Mr. Guthrie"). Plaintiff explained to Mr. Guthrie that he believed Mrs. Dodge had died seized of the Driveway Corridor, and he asked Mr. Guthrie reopen the estate, which had previously been settled shortly after her death in 1995. At the time Mrs. Dodge's will was probated, Mr. Guthrie had no knowledge that she owned any real property.

Based on this information, Mr. Guthrie petitioned the Clerk of Court to reopen the estate on 5 December 2012. On that same day, Mr. Guthrie obtained an order from the Moore County Clerk of Superior Court, by signature of an assistant clerk, reopening Mrs. Dodge's estate. He then conveyed the land comprising the Driveway Corridor to plaintiff for \$1,500.00, the proceeds of which he split evenly between Bible Alive Ministries, Inc. and Carolina Bible College of Fayetteville, Inc. ("the Dodge estate beneficiaries"), in accordance with Mrs. Dodge's will.

On 10 December 2012, the day that trial was set to begin, plaintiff moved for a continuance so that she could amend her complaint to include a claim of quiet title based on the recent conveyance from Mrs. Dodge's estate. The parties entered into a stipulated order continuing the trial date and agreeing to sever their claims and first proceed to trial solely on the issue of quieting title. The parties also stipulated that, regardless of the outcome, defendant would continue to have an easement over the Driveway Corridor to access the public road.

The non-jury trial commenced during the civil term of 24 February 2014 and was completed over a series of dates concluding on 20 March 2014. After considering witness testimony and other evidence, as well as the arguments by counsel and legal authorities submitted, the trial

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court on 2 May 2014 entered its order quieting title to the Driveway Corridor in favor of plaintiff.

At trial, plaintiff argued that: (1) the 1983 Waddell deed between the Dodges and Dr. Waddell only conveyed an easement in the Driveway Corridor, not ownership of the tract in fee simple; (2) because the Dodges previously owned the property as tenants by the entirety, Mrs. Dodge obtained full ownership of the Driveway Corridor upon her husband's death in 1984; (3) Mr. Guthrie obtained title to the Driveway Corridor by operation of Mrs. Dodge's will when she died in 1995; and (4) plaintiff holds title in the Driveway Corridor by virtue of the conveyance from Mr. Guthrie in 2012.

Defendant contended at trial that when the Dodges transferred their initial tract to her husband with the 1983 Waddell deed, they also conveyed the Driveway Corridor in fee simple. Therefore, defendant contended, because she had filed her interest in the land in 2004 as part of the equitable distribution settlement, her interest in the Driveway Corridor was superior to plaintiff's interest and rendered the conveyance from the Dodge estate to plaintiff a nullity. In the alternative, defendant argued that she obtained title to the Driveway Corridor via a quitclaim deed from the Dodge estate beneficiaries in 2011.

The trial court rejected defendant's arguments and quieted title in favor of plaintiff. In its ultimate findings, the trial court determined that the 1983 Waddell deed conveyed only an easement in the Driveway Corridor from the Dodges to Dr. Waddell, Mrs. Dodge retained ownership of the Driveway Corridor after her husband's death, and the conveyance of the Driveway Corridor from Mr. Guthrie to plaintiff was legally effective to pass title. Based on these findings, the trial court concluded that plaintiff met her burden of establishing a superior claim in the Driveway Corridor to defendant's and quieted title in her favor. Defendant filed timely notice of appeal.

**Standard of Review**

We review a judgment entered after a non-jury trial to determine "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) (internal quotation marks omitted). "Our review of the trial court's conclusions of law is *de novo*." *Johnson v. Bd. of Trs. Of Durham Tech. Cmt. College*, 157 N.C. App. 38, 47, 577 S.E.2d 670, 675 (2003). As explained in more detail below, the interpretation of



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documents, including deeds and wills, is generally an issue of law unless a document is ambiguous on its face and, as such, is also reviewable *de novo*.

### I. Legal Effect of the 1983 Waddell Deed

[1] Defendant first argues that the trial court erred by concluding that the conveyance in the 1983 Waddell deed transferred to Dr. Waddell only an easement over the Driveway Corridor rather than title in fee simple.<sup>8</sup> We disagree.<sup>9</sup>

With respect to this issue, defendant contends that the 1983 Waddell deed was ambiguous, and that any ambiguities in a deed must be interpreted in favor of the grantee. *See generally Reed v. Elmore*, 246 N.C. 221, 224, 98 S.E.2d 360, 362-63 (1957) (“[I]n resolution of doubt in interpretation the instrument must be construed most favorably to the grantee.”). Defendant argues that the 1983 Waddell deed, when interpreted in the grantee’s favor, transferred title to the Driveway Corridor to Dr. Waddell in fee simple and not, as the trial court concluded, as an easement. Because Dr. Waddell subsequently transferred his interest to defendant in their equitable distribution settlement, defendant claims that her title should have been determined by the trial court to be superior to plaintiff’s.

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8. Although the trial court labeled its determinations regarding the interpretation of the 1983 Waddell deed as “ultimate findings,” they are actually conclusions of law, because they were reached by “application of fixed rules of law.” *See Quick v. Quick*, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657-58 (1982) (noting that the “line of demarcation between ultimate facts and legal conclusions is not easily drawn”); *see also Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (“The labels ‘findings of fact’ and ‘conclusions of law’ employed by the trial court in a written order do not determine the nature of our review.”).

9. Defendant also argues that any easement over the Driveway Corridor held by the Dodges was extinguished by the doctrine of merger when they acquired the Simons tract via the 1969 deed. (See footnote 5.) *See also Patrick v. Jefferson Standard Life Ins. Co.*, 176 N.C. 660, 670, 97 S.E. 657, 661 (1918) (noting that “an owner of land cannot have an easement in his own estate in fee”). We need not delve into the doctrine of merger to resolve this case. Both plaintiff and defendant agree that the Dodges owned the Driveway Corridor in fee simple before executing the 1983 Waddell deed. By holding title to the Driveway Corridor in fee simple, the Dodges had the option of conveying that land to Dr. Waddell outright or transferring only an easement in the Driveway Corridor and retaining the fee simple interest subject to an easement. *See, e.g., Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (noting that an easement is a “right to make some use of land owned by another without taking a part thereof”). Therefore, regardless of the doctrine of merger, as fee simple successors in title to the Simons tract, which included a fee simple interest in the Driveway Corridor, the Dodges had the right to create an easement in that tract or a portion of it, independent of any easement they had previously enjoyed before the conveyance from the Simons estate.

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“An express easement in a deed, as in the instant case, is, of course, a contract.” *Williams v. Skinner*, 93 N.C. App. 665, 671, 379 S.E.2d 59, 63 (1989). “When courts are called upon to interpret deeds or other writings, they seek to ascertain the intent of the parties, and, when ascertained, that intent becomes the deed, will, or contract.” *Franklin v. Faulkner*, 248 N.C. 656, 659, 104 S.E.2d 841, 843 (1958). “The grantor’s intent must be understood as that expressed in the language of the deed[.]” *County of Moore v. Humane Soc’y of Moore County, Inc.*, 157 N.C. App. 293, 298, 578 S.E.2d 682, 685 (2003) (quotation omitted). “However, if the language is uncertain or ambiguous, the court may consider all the surrounding circumstances, including those existing when the document was drawn, . . . and the construction which the parties have placed on the language, so that the intention of the parties may be ascertained and given effect.” *Century Commc’ns, Inc. v. Hous. Auth. of City of Wilson*, 313 N.C. 143, 146, 326 S.E.2d 261, 264 (1985).

“A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court.” *Dept. of Transportation v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994). “If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury.” *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001). Ambiguity exists where the contract’s language is reasonably susceptible to either of the interpretations asserted by the parties. *Glover v. First Union Nat’l Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). Here, the trial court entered “Ultimate Findings,” including the determination that the Dodges conveyed merely an easement over the Driveway Corridor to Dr. Waddell, not title to the land in fee simple. The trial court’s reasoning is based solely on an analysis of the language in the 1983 Waddell deed and the map attached and incorporated in the deed by reference. Accordingly, this is a legal issue reviewable *de novo*.

The language of the 1983 Waddell deed is not uncertain or ambiguous, and it supports the trial court’s conclusion that it conveyed only an easement interest to Waddell. The 1983 Waddell deed provides the following:

That certain tract or parcel of land situated between the Ft. Bragg Reservation and Southern Pines, and lying on both sides of James Creek and Beginning at the concrete monument, common with Grantors, Will Pait and in the old Bowers line . . . . 409.68 feet from the beginning point of Grantors 4.04 acre tract which is also the center of SR 2098 and running thence along the old Bowers line

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crossing James Creek [ ] 869.72 feet to a concrete monument; thence crossing James Creek again [ ] 635.0 feet to an iron stake; thence with the rear line of Douglas [ ] 204.9 feet to an iron stake; thence [ ] 19.35 feet to an iron stake; thence along the Prichard [sic] line [ ] 286.1 feet to an iron stake; thence [ ] 61.01 feet to an iron stake; thence with the line of Stoudenmire 263.72 feet to a concrete monument; thence continuing [ ] along Pait's line 60.0 feet to the point of Beginning, containing 5.4 acres more or less, as described on a survey plat made by C.H. Bige and Associates, a parcel copy of which is attached to and made a part of this Deed.

*Also conveyed is Grantors [sic] interest in a roadway easement 30 feet wide, as spelled out in Deed recorded in Deed Book 318 at page 59 in the Moore County Registry.*

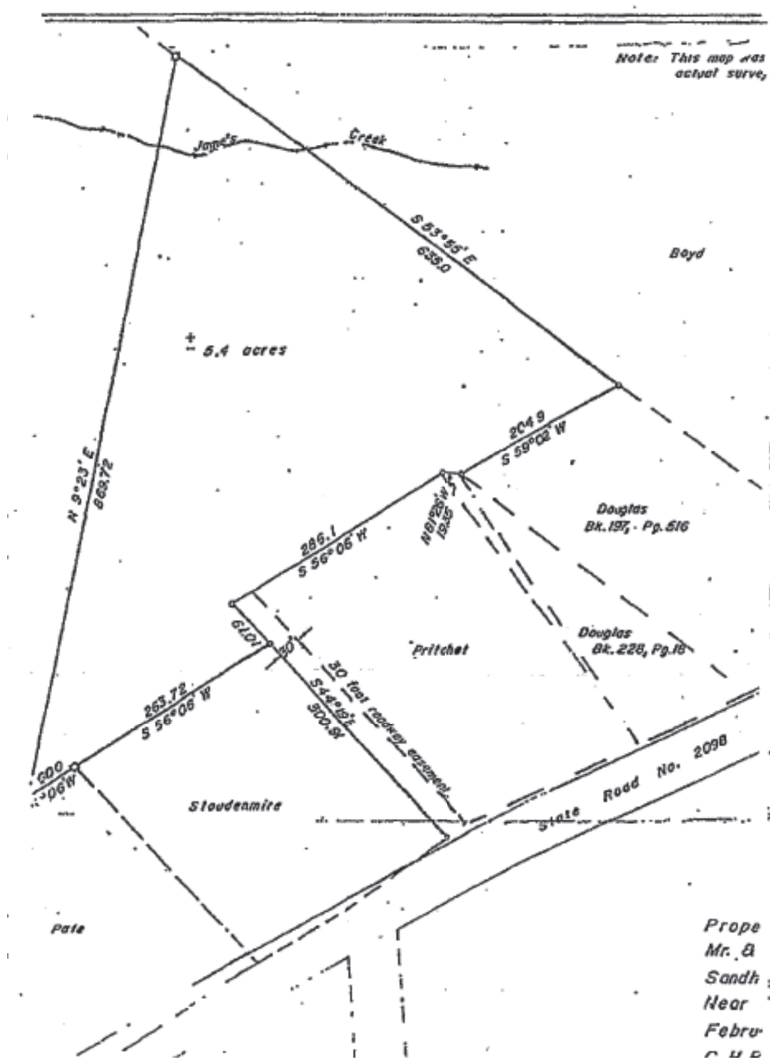
(Emphasis added).

The deed referenced in the conveyance language italicized above is the 1969 deed from the Simons estate to the Dodges, which described “a roadway easement 30 feet wide paralleling the Pritchett common line . . . which easement was established for the joint benefit of” the McCrimmons and the Dodges.

The survey plat made part of the 1983 Waddell deed appeared as follows:

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Defendant argues that the deed is ambiguous and that, construed in favor of the grantee, it conveyed a fee simple interest in the Driveway Corridor. We disagree, based on both the language of the deed and the survey plat made part of the deed.

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The holding in *Pearson v. Chambers*, 18 N.C. App. 403, 197 S.E.2d 42 (1973), is instructive here. In *Pearson*, this Court was tasked with determining whether a deed transferred merely an easement over a strip of land or title to the land in fee simple. *Id.* at 404, 197 S.E.2d at 43. The deed in question contained a granting clause with a metes and bounds description of a 37-acre tract of land, followed by a “Second Tract consisting of a right-of-way to the above tract[.]” *Id.* at 411, 197 S.E.2d at 44. This Court held:

It is entirely consistent with the granting clause, which clearly conveyed the thirty-seven-acre tract in fee, to interpret the additional language following the description of the thirty-seven-acre tract as conveying merely an easement appurtenant to said tract. Such an interpretation gives effect to the more usual connotation of the term ‘right-of-way’ as denoting an easement for passage over a described strip of land rather than as describing fee title to the strip. Certainly such an interpretation cannot be said to be irreconcilable with other portions of the deed which, by this interpretation, are still given full effect.

*Id.*

Like the deed in *Pearson*, the granting clause of the 1983 Waddell deed plainly conveys title to the upper 5.4 acre tract in fee simple. The metes and bounds description of the land in the first paragraph of the deed matches the boundary of the 5.4-acre upper tract depicted in the attached survey plat exactly. Nowhere in the metes and bounds description of the granting clause is any reference to or measurement of the Driveway Corridor. Further, the grantors specifically transferred their interest in a “roadway easement 30 feet wide, as spelled out in Deed recorded in Deed Book 318 at page 59 in the Moore County Registry.” Even more compelling than “the more usual connotation of the term ‘right-of-way’” in *Pearson*, the grantors specifically used the term “roadway easement” to describe what was being transferred. This easement is also reflected in the survey plat attached to the deed, which refers to the Driveway Corridor as a “30 foot roadway easement.”<sup>10</sup>

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10. Defendant also contends that the deed is ambiguous because the survey plat erroneously places the Driveway Corridor on the Pritchett tract. We are not persuaded that the survey plat is erroneous. The Driveway Corridor only appears to be on the Pritchett tract because the surveyor chose to place the dashed line indicating an easement along that common border. At the time the survey plat was drawn, the Driveway Corridor was no longer burdening any other larger pieces of land. Rather, it was the last remaining vestige of the Dodge tract. Regardless of where the surveyor chose to place dashed lines indicating

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We must, if possible without resorting to parol evidence, determine the grantors' intent based on the four corners of the deed. *See County of Moore*, 157 N.C. App. at 298, 578 S.E.2d at 685. The language used in the 1983 Waddell deed is plain and unambiguous. It directly references the metes and bounds description of the Driveway Corridor in the 1969 deed, specifically refers to this interest as a "roadway easement," and sets out that transfer in a paragraph separate from the clause granting title to the 5.4-acre tract in fee simple. The survey plat made part of the deed reflects this interpretation precisely. Given these facts, we affirm the trial court's conclusions that the grantors intended to convey only an easement over the Driveway Corridor, not title to that land in fee simple.

Even if we were to conclude that the 1983 Waddell deed is ambiguous, extrinsic evidence of the parties' intent points toward the same conclusion. Defendant herself averred that she believed she had only an "ingress and egress roadway easement" over the Driveway Corridor. Dr. Waddell testified in his deposition that he did not consider the Driveway Corridor to be "his"; he thought it was a "common easement." Prior to the institution of this litigation, defendant's own attorney conducted a thorough review of the title histories of the surrounding properties and concluded that: (1) the Driveway Corridor was on neither the Stoudenmire nor Pritchett tracts; (2) the property was still titled in the Dodges; and (3) defendant had only an easement over the Driveway Corridor.

In light of the plain and definite language of the deed, *Century Commc'ns, Inc.*, 313 N.C. at 146, 326 S.E.2d at 264, we affirm the trial court's conclusions that (1) the 1983 Waddell deed conveyed only an easement over the Driveway Corridor to Dr. Waddell, and (2) the Dodges retained ownership of the Driveway Corridor after that conveyance.<sup>11</sup>

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the easement, the survey plat accurately reflects that the Pritchett tract was not burdened by the Driveway Corridor. The plat shows that the middle southern border of the Waddell tract, running with both the Pritchett tract and the Driveway Corridor, is 285 feet. This is entirely consistent with the deed from the Pritchetts to plaintiff, showing that the northern border of their tract shared with the Waddell tract is 255 feet. That difference of 30 feet is the Driveway Corridor, as is reflected accurately in the survey plat. Therefore, we are not persuaded that the survey plat is inaccurate.

11. Defendant's argument that the trial court improperly substituted expert testimony for its own legal conclusions is without merit. Defendant not only failed to object to the admission of expert testimony on the legal effect of the deeds in this case, thus failing to preserve this issue for appellate review, *Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008), but she also called her own expert witness to testify to the same. Any error in the trial court's admission of the expert testimony was harmless to defendant, and we will not disturb the trial court's order on this ground. *See* N.C. Gen. Stat. § 1A-1, Rule 61 (2015).

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We must now address whether the purported transfer of the Driveway Corridor from Mr. Guthrie to plaintiff was legally effective.

## II. Existence of Order Reopening Mrs. Dodge's Estate

[2] Defendant's remaining arguments on appeal pertain to the legal effect of the purported transfer of the Driveway Corridor from Mrs. Dodge's personal representative, Mr. Guthrie, to plaintiff, more than a decade after Mrs. Dodge's death. Defendant first contends that because the record contains no indication that the order reopening Mrs. Dodge's estate was entered into evidence, the trial court's legal conclusion that Mr. Guthrie properly conveyed the Driveway Corridor to plaintiff was erroneous. We disagree.

This argument is premised on the assumption that either Mr. Guthrie never acquired an order reopening Mrs. Dodge's estate, or that the order was never presented to the trial court.<sup>12</sup> However, at the trial on 24 February 2014, the trial court took judicial notice of the entire contents of Mrs. Dodge's estate file. There is no reason to believe that the order reopening Mrs. Dodge's estate filed two years before the evidentiary hearing would not have been included in that estate file. Defendant's argument that plaintiff has failed to prove that specific order's existence in the judicially noticed estate file lacks merit. The only case defendant cites in support of this contention is *Waters v. N.C. Phosphate Corp.*, 50 N.C. App. 252, 273 S.E.2d 517 (1981), which is readily distinguishable. This Court in *Waters* held that the trial court erred in granting the defendant's motion for directed verdict where a prior judgment crucial to the defendant's case was not entered into evidence at trial, there was no indication that the trial court took judicial notice of the judgment, and the judgment was not before the Court on appeal. *Id.* at 257-58, 273 S.E.2d at 520-21. Here, unlike in *Waters*, the trial court took judicial notice of the entire contents of Mrs. Dodge's estate file, which, of course, should have included the previous order reopening her estate. Defendant's reliance on *Waters* is misplaced.

Furthermore, plaintiff filed both a supplement to the record in accordance with North Carolina Rule of Appellate Procedure 9(b)(5) (2015) containing the clerk of court's order filed on 5 December 2012 reopening Mrs. Dodge's estate and a motion for this Court to take judicial notice of

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12. For example, defendant contends that "[t]here is no order from the clerk reopening the Dodge Estate which would be required for the personal representative to subsequently transfer property out of the Dodge Estate."

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that order should we find the Rule 9(b)(5) supplement insufficient. The order states the following:

After considering the petition of the Personal Representative, Rodney A. Guthrie, the Court finds that it appears that real property of which Ms. Dodge died seized exists and that necessary acts remain unperformed in the Estate of Natalie Cashwell Dodge. The Court therefore finds that grounds exist under N.C. Gen. Stat. § 28A-23-5 justifying the reopening of said estate.

WHEREFORE it is ordered that the Estate of Natalie Cashwell Dodge should be and is hereby reopened. This the 5th day of December 2012.

Because the existence of the order reopening Mrs. Dodge's estate is a matter of public record and is not subject to reasonable dispute, we grant plaintiff's motion. *See State v. Thompson*, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998) ("This Court may take judicial notice of the public records of other courts within the state judicial system.").

**III. Effect of Mrs. Dodge's Will**

[3] Defendant's final argument on appeal is that the conveyance of the Driveway Corridor from Mr. Guthrie to plaintiff in 2012 was ineffective to transfer title to the property because defendant had received a quitclaim deed to the Driveway Corridor from the Dodge estate beneficiaries in 2011. Based on the quitclaim deed, defendant contends that even if Mrs. Dodge's estate was reopened in 2012, there was nothing for Mr. Guthrie to convey. We are unpersuaded.

"The interpretation of a will's language is a matter of law. When the parties place nothing before the court to prove the intention of the testator, other than the will itself, they are simply disputing the interpretation of the language which is a question of law." *Cummings v. Snyder*, 91 N.C. App. 565, 568, 372 S.E.2d 724, 725 (1988) (internal citations omitted). Because the application of Mrs. Dodge's will turns solely on its language, defendant's contentions present questions of law which we review *de novo*. *See Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009).

"The intent of the testator is the polar star that must guide the courts in the interpretation of a will." *Coppedge v. Coppedge*, 234 N.C. 173, 174, 66 S.E.2d 777, 778 (1951). "This intent is to be gathered from a consideration of the will from its four corners, and such intent should be given



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effect unless contrary to some rule of law or at variance with public policy.” *Id.* Finally, “[w]here the language employed by the testator is plain and its import is obvious, the judicial chore is light work; for in such event, the words of the testator must be taken to mean exactly what they say.” *McCain v. Womble*, 265 N.C. 640, 644, 144 S.E.2d 857, 860 (1965) (quotation marks and citation omitted).

The language of Mrs. Dodge’s will, like that of the deeds previously addressed in this case, is plain and unambiguous. The relevant portions provide:

ITEM FOUR: All the rest, residue and remainder of my estate, wherever situate, of which I may die seized or possessed, remaining after the payment of all my legal debts and funeral expenses and administrative expenses, I give, devise and bequeath to my Personal Representative, and direct that my Personal Representative shall administer and dispose of my said residuary estate in accordance with the terms and provisions set forth and contained in the next succeeding Item of this my Last Will and Testament.

ITEM FIVE: I direct my Personal Representative to divide my residuary estate into two (2) equal parts and to dispose of them as follows:

A. One (1) equal part to be delivered to the CAROLINA BIBLE COLLEGE, in Fayetteville, North Carolina, as an endowment, the principal of which shall be kept intact and only the income therefrom may be expended; and

B. One (1) equal part to be delivered to the BIBLE ALIVE MINISTRIES, in Fayetteville, North Carolina, as an endowment, the principal of which shall be kept intact and only the income therefrom may be expended.

Mrs. Dodge’s will also allowed Mr. Guthrie “in his sole and absolute discretion” to “sell, mortgage, lease, exchange or convey all or any part” of Mrs. Dodge’s estate, as well as providing him “the continuing absolute discretionary power to deal with any property, real or personal held in [Mrs. Dodge’s] estate.”

Defendant refers to the beneficiaries of Mrs. Dodge’s will as “devisees” in her brief on appeal. In so doing, she argues that N.C. Gen. Stat. § 28A-15-2(b) worked to vest title in the Driveway Corridor with the beneficiaries, relating back to Mrs. Dodge’s death. *See* N.C. Gen. Stat.

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§ 28A-15-2(b) (2013) (“[T]he title to real property of a decedent devised under a valid probated will becomes vested in the devisees and shall relate back to the decedent’s death[.]”). Therefore, defendant contends that the quitclaim deed executed in 2011 ostensibly transferring the Driveway Corridor from the beneficiaries to defendant should have been sufficient to quiet title in defendant’s name.

Defendant’s argument misconstrues the plain language of Mrs. Dodge’s will. Item Four explicitly states that any property of which Mrs. Dodge may die seized (here, the Driveway Corridor) is “give[n], *devise[d]* and bequeath[ed]” to Mr. Guthrie so that he may “administer and dispose of [] said residuary estate” in accordance with Item Five of the will. Thus, Mr. Guthrie was the sole devisee under Mrs. Dodge’s will. Contrary to defendant’s argument, section 28A-15-2(b) merely leads us conclude that title in the Driveway Corridor became vested in Mr. Guthrie at the time of Mrs. Dodge’s death, not that the beneficiaries had any right to transfer the Driveway Corridor to defendant in 2011. That quitclaim deed is without legal effect, because at the time it was executed, title in the Driveway Corridor was vested in Mr. Guthrie, not the beneficiaries.

Mr. Guthrie, after having been informed of Mrs. Dodge’s ownership interest in the Driveway Corridor by plaintiff’s attorney, promptly petitioned the clerk of court to reopen her estate, acquired an order from the clerk, and then conveyed the Driveway Corridor to plaintiff in exchange for \$1,500.00, which he split equally between beneficiaries identified by Mrs. Dodge in Item Five of her will. This transaction was completed in accordance with Mrs. Dodge’s intent as reflected by the clear language of her last will and testament, and it was undertaken in accordance with North Carolina law.

Defendant has offered no further argument attacking the legal validity of the transfer from Mr. Guthrie to plaintiff, other than to suggest that if defendant had known about this conveyance she would have offered more than \$1,500.00. However, defendant concedes that whether to provide notice of the reopening of Mrs. Dodge’s was a matter solely within the discretion of the clerk of court. *See* N.C. Gen. Stat. § 28A-23-5 (2013) (stating that the clerk of superior court may reopen an estate “without notice or upon such notice as the clerk of superior court may direct”). Although no notice to defendant was given, there is nothing to suggest that the lack of notice constituted an abuse of that discretion.

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**Conclusion**

Based on the foregoing analysis, we affirm the trial court's order quieting title to the Driveway Corridor in favor of plaintiff.

**AFFIRMED.**

Judges BRYANT and DAVIS concur.

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LORI DENNIS STANCILL, PLAINTIFF  
v.  
WILEY CHRISTOPHER STANCILL, DEFENDANT

No. COA14-1024

Filed 16 June 2015

**1. Domestic Violence—ex parte protective order—hearing not recorded**

The trial court erred by failing to record an ex parte domestic violence protective order hearing pursuant to N.C.G.S. § 7A-198(e), but defendant did not show that the error was prejudicial.

**2. Domestic Violence—ex parte protective order—fear of continued harassment—findings of fact**

It was not error for the trial court not to include specific findings of fact as to every element of fear of continued harassment as described in N.C.G.S. §§ 14-277.3A(b)(2) and 50B-1(a)(2) in its ex parte domestic violence protective order concluding that defendant had committed an act of domestic violence against plaintiff.

**3. Domestic Violence—ex parte protective order—surrender of firearms—findings of fact**

In its ex parte domestic violence protective order, the trial court did not err by ordering defendant to surrender all firearms, ammunition, and gun permits. Even though the hearing was not recorded, the allegations in plaintiff's complaint supported the trial court's finding that defendant had made threats to commit suicide.

**4. Domestic Violence—protective order—fear of continued harassment—findings of fact**

In its domestic violence protective order, the trial court did not err by concluding that defendant had committed an act of domestic

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violence against plaintiff. Competent evidence supported the trial court's finding that defendant placed plaintiff in fear of continued harassment that inflicted substantial emotional distress.

**5. Domestic Violence—protective order—surrender of firearms—no statutory findings**

In its domestic violence protective order (DVPO) directing defendant to surrender all firearms, ammunition, and gun permits, the trial court erred by failing to indicate what statutory findings under N.C.G.S. § 50B-3.1(a) supported its order. The Court of Appeals accordingly vacated this portion of the DVPO.

Appeal by defendant from order entered on 28 May 2014 by Judge W. Brian DeSoto and order entered on 6 June 2014 by Judge Lee F. Teague in District Court, Pitt County. Heard in the Court of Appeals on 3 February 2015.

*Teresa DeLoatch Bryant, for plaintiff-appellee.*

*Law Office of Cynthia A. Mills, by Cynthia A. Mills, for defendant-appellant.*

STROUD, Judge.

Wiley Christopher Stancill (“defendant”) appeals from an ex parte domestic violence protective order and a domestic violence protective order, in which the trial court found that he had committed an act of domestic violence against Lori Dennis Stancill (“plaintiff”). We affirm in part, vacate in part, and remand.

**I. Background**

In 1985, plaintiff and defendant married. From July 2007 to December 2007, plaintiff and defendant were separated but then reconciled and resumed living together. Plaintiff alleges that in 2007 or 2008, defendant confessed that he had tried to kill plaintiff during this period of separation. In July 2013, plaintiff and defendant separated again. In July or August 2013, defendant sent plaintiff a text message, which stated, “I am killing myself. I need you[.]” In April 2014, defendant texted plaintiff: “I invited you to come home time and time again. Take the wrath that comes.” In May 2014, defendant sent plaintiff several similar text messages.

On 28 May 2014, plaintiff filed a verified complaint alleging that defendant placed her in fear of imminent serious bodily injury and in

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fear of continued harassment that rises to such a level as to inflict substantial emotional distress. That day, a district court judge conducted an *ex parte* hearing and entered an *ex parte* domestic violence protective order (“*ex parte* DVPO”), in which the judge concluded that defendant had committed an act of domestic violence against plaintiff and ordered that defendant surrender all firearms, ammunition, and gun permits.

On 6 June 2014, a different district court judge conducted a hearing, in which both parties participated and presented testimony. That day, the judge entered a domestic violence protective order (“DVPO”), in which the judge found that defendant had committed an act of domestic violence against plaintiff and ordered that defendant surrender all firearms, ammunition, and gun permits. On 30 June 2014, defendant requested an audio recording of the *ex parte* DVPO hearing for the purpose of preparation of the transcript for appeal, but the trial court denied his request because no recording of the hearing had been made. On 30 June 2014, defendant gave timely notice of appeal.

## II. Standard of Review

We review both an *ex parte* DVPO and a DVPO to determine “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. Where there is competent evidence to support the trial court’s findings of fact, those findings are binding on appeal.” *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009). “While the trial court need not set forth the evidence in detail[,] it does need to make findings of ultimate fact which are supported by the evidence; the findings must identify the basis for the ‘act of domestic violence.’” *Kennedy v. Morgan*, 221 N.C. App. 219, 224, 726 S.E.2d 193, 196 (2012).

Where the trial court sits as the finder of fact, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court.

This Court can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.

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The trial court's findings turn in large part on the credibility of the witnesses, and must be given great deference by this Court.

*Brandon v. Brandon*, 132 N.C. App. 646, 651-52, 513 S.E.2d 589, 593 (1999) (citations, quotation marks, and brackets omitted). We review *de novo* issues of statutory interpretation. *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012). We review the two orders independently of one another. *Hensey*, 201 N.C. App. at 66, 685 S.E.2d at 548-49.

III. *Ex Parte DVPO*

With respect to the *ex parte* DVPO, defendant contends that the trial court erred in (1) failing to record the *ex parte* DVPO hearing; (2) failing to make specific findings of fact as to every element of fear of continued harassment, one of its grounds for concluding that defendant committed an act of domestic violence; and (3) ordering defendant to surrender all firearms, ammunition, and gun permits.

## A. Failure to Record

## i. Analysis

[1] Defendant contends that the trial court erred in failing to record the *ex parte* DVPO hearing. Relying on *Hensey*, plaintiff responds that the trial court did not need to record the hearing. *See id.* at 60, 685 S.E.2d at 545. But *Hensey* is distinguishable. There, the defendant-appellant contended that the trial court erred in failing to “hear any evidence, but instead based the *ex parte* DVPO only upon the verified complaint[.]” *Id.* at 59, 685 S.E.2d at 544. But the record in *Hensey* indicated that a hearing of some sort did in fact take place, and it did not show that the defendant had even requested a copy of a recording of the hearing. *See id.* at 60, 685 S.E.2d at 545. Although “we recognize[d] the possibility that no transcript of that hearing was available to the parties[.]” we followed the general rule that when the appellant fails to include in the appellate record the evidence necessary to review its issue, we do not presume error. *Id.*, 685 S.E.2d at 545. The issue of whether the *ex parte* DVPO hearing should have been recorded was not presented or addressed in *Hensey*. *Id.*, 685 S.E.2d at 545.

In contrast, here, defendant specifically requested a copy of an audio recording of the *ex parte* DVPO hearing, but his request was denied because the trial court made no such recording. We have previously held that

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while it is the appellant's responsibility to make sure that the record on appeal is complete and in proper form, where the appellant has done all that she can to do so, but those efforts fail because of some error on the part of our trial courts, it would be inequitable to simply conclude that the mere absence of the recordings indicates the failure of appellant to fulfill that responsibility.

*Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (citation, quotation marks, and brackets omitted), *disc. review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998).

Additionally, we distinguish this case from *In re L.B.* and *In re Clark*, where this Court held that, where a transcript is unavailable, the appellant had a duty "to compile a narration of the evidence, *i.e.*, reconstructing the testimony with the assistance of those persons present at the hearing." See *L.B.*, 184 N.C. App. 442, 452, 646 S.E.2d 411, 417 (2007); *Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003). Neither of those cases involved an *ex parte* hearing. There is practically no way that a defendant could reconstruct the testimony presented at an *ex parte* hearing in which he did not appear or participate. By requesting a copy of the recording for preparation of a transcript, defendant "has done all that [he] can" to ensure the record is complete. See *Coppley*, 128 N.C. App. at 663, 496 S.E.2d at 616. Accordingly, we must examine N.C. Gen. Stat. § 7A-198 to determine if the trial court erred in failing to record the *ex parte* DVPO hearing. See *id.*, 496 S.E.2d at 616.

N.C. Gen. Stat. § 7A-198 provides in pertinent part as follows:

(a) Court-reporting personnel shall be utilized, if available, for the reporting of civil trials in the district court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon request of the chief district judge.

....

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some other person designated by him to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, which may be transcribed, as required, by any person designated by the Administrative Office of the Courts. If stenotype,

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shorthand, or stenomask equipment is used, the original tapes, notes, discs, or other records are the property of the State, and the clerk shall keep them in his custody.

(d) Reporting of any trial may be waived by consent of the parties.

(e) Reporting will not be provided in trials before magistrates or in hearings to adjudicate and dispose of infractions in the district court.

....

(g) ...

In the event that the recording device in a civil trial conducted without a court reporter fails for any reason to provide a reasonably accurate record of the trial for purposes of appeal, then the trial judge shall grant a motion for a new trial made by a losing party whose request pursuant to this section to share the cost of a court reporter was not consented to by the opposing party.

N.C. Gen. Stat. § 7A-198 (2013). In evaluating whether the trial court should have recorded the *ex parte* DVPO hearing, we must determine whether the *ex parte* DVPO hearing constitutes a “civil trial” under N.C. Gen. Stat. § 7A-198.

In *Miller v. Miller*, this Court held that a hearing on a motion to modify a child custody order was a “civil trial” under N.C. Gen. Stat. § 7A-198. *Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988). In *Copley*, this Court held that a five-minute proceeding as to whether both parties agreed to a consent order was not a “civil trial” under N.C. Gen. Stat. § 7A-198. *Copley*, 128 N.C. App. at 662, 496 S.E.2d at 615. But in *Copley*, this Court also held that a later hearing on a motion to set aside the consent order pursuant to North Carolina Rule of Civil Procedure 60(b) was a “civil trial” which should have been recorded under N.C. Gen. Stat. § 7A-198. *Id.* at 663, 496 S.E.2d at 616.

A trial court may enter an *ex parte* DVPO to protect the plaintiff “if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the [plaintiff.]” N.C. Gen. Stat. § 50B-2(c)(1) (2013). The trial court must hold a hearing prior to issuing an *ex parte* DVPO. *Hensey*, 201 N.C. App. at 60, 685 S.E.2d at 545 (discussing N.C. Gen. Stat. § 50B-2(c)(6)). After receiving evidence, the trial court must make findings of fact and conclusions of law, although it



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may refer to the plaintiff's complaint. *See id.* at 64, 685 S.E.2d at 547. The trial court is required to receive evidence at this hearing; unlike a temporary restraining order under North Carolina Rule of Civil Procedure 65,<sup>1</sup> the *ex parte* DVPO cannot be issued based only upon a verified pleading or affidavit. *Id.* at 60, 685 S.E.2d at 545; *see also* N.C. Gen. Stat. § 1A-1, Rule 65. Because the trial court receives evidence at an *ex parte* DVPO hearing, we hold that an *ex parte* DVPO hearing is more analogous to a hearing on a motion to modify a child custody order, like the hearing in *Miller*, or a hearing on a Rule 60(b) motion to set aside a consent order, like the second hearing in *Coppley*, than a cursory five-minute proceeding as to whether both parties agree to a consent order, like the first hearing in *Coppley*. *See Miller*, 92 N.C. App. at 354, 374 S.E.2d at 469; *Coppley*, 128 N.C. App. at 662-63, 496 S.E.2d at 615-16.

In addition, the standard of review for an *ex parte* DVPO is for this Court to consider whether competent evidence supports the trial court's findings of fact and whether those findings support its conclusions of law. *Hensey*, 201 N.C. App. at 59, 685 S.E.2d at 544. We cannot review whether the evidence presented at an *ex parte* DVPO hearing supports the trial court's findings of fact if there is no recordation of that hearing. We thus hold that the *ex parte* DVPO hearing constitutes a "civil trial" under N.C. Gen. Stat. § 7A-198.

This interpretation is also supported by N.C. Gen. Stat. § 7A-198(e). N.C. Gen. Stat. § 7A-198(e) specifically excludes certain types of hearings from recordation: "Reporting will not be provided in trials before magistrates or in hearings to adjudicate and dispose of infractions in the district court." N.C. Gen. Stat. § 7A-198(e). Thus, the general rule is that reporting will be provided in civil trials before district court judges. *See id.* Here, a district court judge signed the *ex parte* DVPO. Accordingly, we find that N.C. Gen. Stat. § 7A-198(e) required that the *ex parte* DVPO hearing be recorded.

We recognize that "[t]he chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief *ex parte*." *Id.* § 50B-2(c1). But we note that an *ex parte* DVPO entered by a magistrate "shall expire and the magistrate shall schedule an *ex*

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1. Rule 65(b) specifically allows a temporary restraining order to be granted "only if (i) it clearly appears from specific facts shown *by affidavit or by verified complaint* that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (ii) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required." N.C. Gen. Stat. § 1A-1, Rule 65(b) (2013) (emphasis added).

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parte hearing before a district court judge by the end of the next day on which the district court is in session in the county in which the action was filed.” *Id.* The district court judge then must follow the *ex parte* DVPO procedures outlined in N.C. Gen. Stat. § 50B-2(c). *Id.* Chapter 50B makes a distinction between magistrates and district court judges in the procedure for issuing an *ex parte* DVPO, and this distinction fits in with the requirements of recordation under N.C. Gen. Stat. § 7A-198. Viewing N.C. Gen. Stat. § 7A-198(e) and N.C. Gen. Stat. § 50B-2(c1) in conjunction, an *ex parte* DVPO hearing before a magistrate need not be recorded, but an *ex parte* DVPO hearing before a district court judge must be recorded. *See id.* §§ 7A-198(e), 50B-2(c1). The interaction of these statutes supports our reading of the recordation requirements of N.C. Gen. Stat. § 7A-198. Accordingly, we hold that the trial court erred in failing to record the *ex parte* DVPO hearing.

## ii. Prejudice

To prevail on appeal, defendant must demonstrate how the trial court’s failure to record the *ex parte* DVPO hearing prejudiced him. *See Copley*, 128 N.C. App. at 663, 496 S.E.2d at 616. Defendant first argues that the lack of a record prevents this Court from determining whether sufficient evidence supports the trial court’s findings of fact. Defendant specifically asserts that nothing in plaintiff’s verified complaint supports the trial court’s order that “defendant shall not assault, threaten, abuse, follow, harass . . . , or interfere with the plaintiff.” But this statement is a decretal provision, not a finding of fact. Moreover, none of the trial court’s findings of fact extend beyond the allegations in plaintiff’s verified complaint, which also incorporated her statement and defendant’s text messages. In this particular case, where the findings of fact did not go beyond the allegations of the plaintiff’s complaint, we hold that plaintiff’s verified complaint supported the trial court’s findings of fact and thus defendant cannot show that he was prejudiced by any other evidence which may have been presented at the *ex parte* DVPO hearing, at least as to the issuance of the order generally.

Defendant next argues that the lack of a record of the *ex parte* DVPO hearing was prejudicial because it prevented him from impeaching plaintiff with prior inconsistent statements during the DVPO hearing. But defendant requested a record of the *ex parte* DVPO hearing on 30 June 2014, a few weeks *after* the 6 June 2014 DVPO hearing. While it would be reasonable that a defendant may want to cross-examine a plaintiff as to any inconsistencies in her statements, the defendant would need to obtain the recording *before* the DVPO hearing to have the opportunity to do this. Where the defendant has not requested the

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recording prior to the DVPO hearing, we cannot assume prejudice from the unavailability of the recording for purposes of impeachment at the later hearing. And even if we were to assume *arguendo* that the trial judge who presided over the *ex parte* DVPO hearing may have been influenced by a statement that plaintiff made during that hearing which plaintiff did not repeat during the DVPO hearing, we hold that there still would be no prejudice here, since a different trial judge presided over the DVPO hearing. There is no possibility that the trial court relied for purposes of the DVPO upon his own recollection of the prior *ex parte* DVPO hearing.<sup>2</sup> Accordingly, we hold that defendant has failed to show prejudice under *Coppley* as to the issuance of the *ex parte* DVPO generally.<sup>3</sup> See *id.* at 663, 496 S.E.2d at 616.

Although defendant has failed to show prejudice in this case, we caution the trial courts that the correct practice is to record *ex parte* DVPO hearings pursuant to N.C. Gen. Stat. § 7A-198. We also realize that recording equipment available to the various district courts across the state varies, as do the normal practices of those courts, but N.C. Gen. Stat. § 7A-198 does require recordation of civil trials before district court judges. The *ex parte* DVPO may be short-lived, but it has a potentially long-lasting and serious impact on a defendant, whether or not a DVPO is later issued. See *Hensey*, 201 N.C. App. at 61, 685 S.E.2d at 545 (“An *ex parte* DVPO, although brief in duration, can have a tremendous effect upon a defendant. An *ex parte* DVPO requiring a defendant not to assault, threaten, abuse, follow, harass, or interfere with the plaintiff should not impose any particular hardship upon the defendant; however, the *ex parte* DVPO may also require a defendant to, *inter alia*, leave his or her home, stay away from his or her children, give up possession of a

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2. This happened in *Coppley*, where the order on appeal included a finding about the unrecorded hearing for entry of the consent order regarding the judge’s memory of that hearing, that “[t]he undersigned does not recall the defendant being emotionally distraught or mentally or physically impaired when she appeared before him for entry of the consent order on May 3, 1995.” See *id.* at 666, 496 S.E.2d at 617. But the order also noted that “Judge Honeycutt indicated he had no independent recollection of the parties appearing before him for the entry of the Consent Order and further indicated that should he have the same, he would consider recusal at that time.” *Id.*, 496 S.E.2d at 617-18. This Court concluded that “[o]ne who has no independent recollection of the parties appearing before him cannot then make a finding as to the mental or physical condition of one of the parties on that occasion. As this finding of fact is clearly in conflict with the evidence before us on appeal, it fails.” *Id.*, 496 S.E.2d at 618.

3. Below we will separately address the effect of the absence of a record as to one provision of the order, defendant’s surrender of firearms.

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motor vehicle, and surrender his or her firearms, ammunition, and gun permits to the sheriff. In addition, a defendant who knowingly violates a valid protective order, including an *ex parte* DVPO, may be charged with a class A1 misdemeanor or with various felonies for certain violations.” (quotation marks and ellipsis omitted)). Because a defendant has no opportunity to be present at the *ex parte* DVPO hearing, the only way to protect his rights as to that hearing and to have even the possibility of adequate appellate review of the *ex parte* proceedings and *ex parte* DVPO is to preserve a record of it.

## B. Findings of Fact

**[2]** Defendant contends that in the *ex parte* DVPO, the trial court erred in failing to include specific findings of fact as to every element of fear of continued harassment, as described in N.C. Gen. Stat. §§ 14-277.3A(b)(2), 50B-1(a)(2) (2013).<sup>4</sup> “While the trial court need not set forth the evidence in detail[,] it does need to make findings of ultimate fact which are supported by the evidence; the findings must identify the basis for the ‘act of domestic violence.’” *Kennedy*, 221 N.C. App. at 224, 726 S.E.2d at 196. “[U]ltimate facts . . . are determinative of the questions raised in the action and essential to support the conclusions of law reached. Ultimate facts are the final facts required to establish the plaintiff’s cause of action or the defendant’s defense.” *See id.*, 726 S.E.2d at 196. The trial court accomplished this task by referring to plaintiff’s statement and defendant’s text messages, which plaintiff attached to her complaint, and by making a finding of ultimate fact that defendant placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress, thereby identifying a basis for its conclusion of law that defendant committed an act of domestic violence.<sup>5</sup> *See* N.C. Gen. Stat. § 50B-1(a)(2). Accordingly, we hold that the trial court did not err in failing to include specific findings of fact as to every element of fear of continued harassment. *See Kennedy*, 221 N.C. App. at 224, 726 S.E.2d at 196.

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4. Defendant does not contend that insufficient evidence supports the trial court’s findings of fact in the *ex parte* DVPO but does contend that insufficient evidence supports the trial court’s findings of fact in the DVPO. We address this argument later in our discussion of the DVPO.

5. We recognize that the trial court’s determination that defendant placed plaintiff in fear of continued harassment appears to be closer to a conclusion of law than a finding of fact. But we treat this determination as a finding of ultimate fact in support of the trial court’s conclusion of law that defendant committed an act of domestic violence. *See id.* at 222, 726 S.E.2d at 195 (“[A] conclusion of law that an act of domestic violence has occurred required evidence and findings of the following: . . . the act or acts of defendant placed plaintiff . . . in fear of . . . continued harassment[.]”).

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## C. Surrender of Firearms

**[3]** Defendant contends that in the *ex parte* DVPO, the trial court erred in ordering defendant to surrender all firearms, ammunition, and gun permits. N.C. Gen. Stat. § 50B-3.1(a) discusses when a trial court may order a defendant to surrender all firearms:

Upon issuance of an emergency or *ex parte* order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:

- (1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.
- (2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.
- (3) Threats to commit suicide by the defendant.
- (4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

N.C. Gen. Stat. § 50B-3.1(a) (2013). Based upon subsection (a)(3), the trial court found that defendant had made a threat to commit suicide in support of its decision to order defendant's surrender of firearms. *See id.* Defendant contends that the lack of a record prevents this Court from reviewing the trial court's finding that defendant made a threat to commit suicide. As noted above, all we can review as to the *ex parte* DVPO hearing is the plaintiff's verified complaint and attached exhibits, and as to the issuance of the *ex parte* DVPO generally, defendant cannot show prejudice from the lack of recordation for the reasons noted above. Accordingly, we review whether plaintiff's verified complaint constitutes competent evidence to support the trial court's finding that defendant made a threat to commit suicide.

Defendant argues that plaintiff's allegations of suicide threats were based only upon a July or August 2013 text message, in which defendant states: "I am killing myself. I need you[.]" Plaintiff added a note next to the screenshot to clarify the text message's context and meaning, which states "suicide by alcohol[.]" Plaintiff's note indicates that she is

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alleging that defendant is committing suicide by alcohol. Defendant sent that text message almost one year before plaintiff filed her complaint in May 2014. While long-term excessive alcohol consumption is certainly unhealthy and potentially fatal, considering the context of the message and the timing nearly one year before plaintiff filed her complaint, we could agree that defendant's text message, standing alone, would not amount to evidence of a threat to commit suicide under N.C. Gen. Stat. § 50B-3.1(a). And although we do not have a transcript of the *ex parte* DVPO hearing, we note that at the full DVPO hearing, plaintiff explained her concern over defendant's long-term problems with alcoholism and her understanding of the text message in this context. In fact, as discussed in more detail below, the DVPO does not include a finding that defendant had threatened suicide.

But plaintiff's allegations of suicide threats included more than just the text message which could be interpreted in various ways. Plaintiff's complaint alleged that "defendant has made threats to commit suicide in that . . . several times [he] has taken a gun and driven off leaving [plaintiff] to believe he's planning to kill himself; more recently he says if [plaintiff] just wait[s] he'll die from alcoholism[.]" Although the complaint did not state specific dates for the "several times" that defendant took a gun and drove off, making plaintiff believe that he was planning suicide, this allegation, coupled with the detailed allegations of defendant's alcoholism, threats, and volatile behavior, would support the trial court's finding that defendant "made threats to commit suicide[.]" Defendant cannot demonstrate prejudice from the lack of a transcript on this issue, so we hold that the trial court properly ordered defendant to surrender all firearms, ammunition, and gun permits. *See id.*

## IV. DVPO

With respect to the DVPO, defendant contends that the trial court erred in (1) finding that defendant placed plaintiff in fear of imminent bodily injury; (2) finding that defendant placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress; (3) concluding that defendant committed an act of domestic violence against plaintiff; and (4) ordering that defendant surrender all firearms, ammunition, and gun permits. Because the trial court may issue the DVPO upon just one of the grounds listed in section 50B-1(a) and we hold that competent evidence supports the trial court's finding that defendant placed plaintiff in fear of continued harassment, we do not address whether competent evidence supports the trial court's finding that defendant placed plaintiff in fear of imminent bodily injury. *See id.* § 50B-1(a)(2).

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## A. Fear of Continued Harassment

**[4]** Defendant argues that competent evidence does not support the trial court’s finding of ultimate fact that defendant placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. N.C. Gen. Stat. § 50B-1(a) defines domestic violence as

the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party or a member of the aggrieved party’s family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or

(3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

*Id.* § 50B-1(a). N.C. Gen. Stat. § 14-277.3A(b)(2) defines “harassment” as “[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.” *Id.* § 14-277.3A(b)(2). N.C. Gen. Stat. § 14-277.3A(b)(4) defines “substantial emotional distress” as “[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.” *Id.* § 14-277.3A(b)(4). We apply a subjective test to determine if defendant placed plaintiff in fear of continued harassment and do not assess whether plaintiff’s “actual subjective fear is objectively reasonable under the circumstances.” *See Brandon*, 132 N.C. App. at 654-55, 513 S.E.2d at 595 (discussing N.C. Gen. Stat. § 50B-1(a)(2) in the context of fear of imminent serious bodily injury).

The trial court made the following findings of fact regarding the issue of plaintiff’s fear of continued harassment:

[Defendant] repeatedly texted [plaintiff] using language that based on the [plaintiff’s] prior dealings with the defendant and his statements to her about coming to kill her in the past would cause the plaintiff to be put in fear of imminent serious bodily injury as well as continued

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harassment. Defendant texted the plaintiff that [plaintiff's] actions have "caused a rage within me that I couldn't imagine. [It is going to] be ugly." Also, "[y]ou always knew I could be a son of a [b—]. You brought it out. I will be the worst son of a [b—] you could imagine. Don't expect anything else." Also, "[t]he wrath will be . . . immense. I will spend every dollar I have to get revenge." Also, "I love you but if you don't love me I go into defensive mode." Plaintiff has suffered substantial emotional distress in that she has been afraid to show houses as is required in her real estate work. Plaintiff has emailed defendant asking him to stop threatening her.

The text [messages] all came within 40 days of one another with several being . . . within 2 days.

Defendant specifically argues that competent evidence does not support the trial court's determination that defendant's communications tormented, terrorized, or terrified plaintiff. But plaintiff testified that because of defendant's April and May 2014 text messages, she feared that defendant was "coming to kill" her. She also testified that on 26 May 2014, while she was working as a real estate agent, she feared that defendant had hired someone to meet her at a house to kill her. The trial court found her to be credible. We give great deference to the trial court's assessment of a witness's credibility. *Id.* at 651-52, 513 S.E.2d at 593; *see also Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) ("[The trial court has the] opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." (quotation marks omitted)).

Defendant questions the reasonableness of plaintiff's fear. But given the statutory language of N.C. Gen. Stat. § 50B-1(a)(2), we examine only whether plaintiff was actually subjectively afraid and do not examine whether plaintiff's fear was objectively reasonable. *See Brandon*, 132 N.C. App. at 654-55, 513 S.E.2d at 595. Accordingly, we defer to the trial court's assessment of plaintiff's credibility and hold that competent evidence supports the trial court's determination that defendant's communications tormented, terrorized, or terrified plaintiff.

Defendant next argues that competent evidence does not support the trial court's determination that defendant's communications amounted to harassment. But defendant's text messages were knowing conduct directed at plaintiff, which served no legitimate purpose.



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See N.C. Gen. Stat. § 14-277.3A(b)(2). Defendant testified that in his text messages, he meant only that he was going to be aggressive in negotiating their property settlement. But we defer to the trial court's assessment of defendant's credibility and its resulting determination that defendant's text messages served no legitimate purpose. See *Brandon*, 132 N.C. App. at 651-52, 513 S.E.2d at 593; *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. Additionally, as discussed above, the trial court found that defendant's communications tormented, terrorized, or terrified plaintiff. Accordingly, we hold that defendant's text messages amounted to harassment. See N.C. Gen. Stat. § 14-277.3A(b)(2).

Defendant further contends that plaintiff neither alleged that defendant's communications caused her substantial emotional distress nor does competent evidence support the trial court's determination that defendant's communications caused her substantial emotional distress. N.C. Gen. Stat. § 14-277.3A(b)(4) defines "substantial emotional distress" as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." *Id.* § 14-277.3A(b)(4). In her complaint, plaintiff alleged that she feared defendant was "coming to kill" her. Additionally, as discussed above, plaintiff testified that she feared for her life, and the trial court found her to be credible and found that her fear was so great that she was afraid to show houses, which was required by her employment. A level of fear so great that a person cannot perform the tasks required by her employment would likely cause "substantial emotional distress." Deferring to the trial court on the issue of credibility, we hold that competent evidence supports the trial court's determination that defendant's text messages inflicted substantial emotional distress on plaintiff. See *Brandon*, 132 N.C. App. at 651-52, 513 S.E.2d at 593; *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

Defendant finally contends that in the DVPO, the trial court erred in failing to include specific findings of fact as to every element of fear of continued harassment, as described in N.C. Gen. Stat. §§ 14-277.3A(b)(2), 50B-1(a)(2). But as discussed above, the trial court need not make specific findings as to every evidentiary fact. See *Kennedy*, 221 N.C. App. at 224, 726 S.E.2d at 196 ("While the trial court need not set forth the evidence in detail[,] it does need to make findings of ultimate fact which are supported by the evidence; the findings must identify the basis for the 'act of domestic violence.'"). The trial court accomplished this task by making the findings of fact quoted above and by further finding that defendant placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. See *id.*, 726 S.E.2d at 196; N.C. Gen. Stat. § 50B-1(a)(2).

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In summary, we hold that competent evidence supports the trial court's finding that defendant placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. Contrary to defendant's assertion, we further hold that this finding supports the trial court's conclusion of law that defendant committed an act of domestic violence against plaintiff. *See* N.C. Gen. Stat. § 50B-1(a).

## B. Surrender of Firearms

**[5]** Defendant contends that in the DVPO, the trial court erred in ordering him to surrender all firearms, ammunition, and gun permits. As discussed above, the trial court may order defendant to surrender all firearms if the trial court finds any of the four factors listed in N.C. Gen. Stat. § 50B-3.1(a). This requirement applies to both an *ex parte* DVPO and a DVPO. *See State v. Poole*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 745 S.E.2d 26, 33 (“Section 50B-3.1 addresses not only orders entered after the ten-day hearing, but also emergency or *ex parte* orders.” (quotation marks omitted)), *appeal dismissed and disc. review denied*, 367 N.C. 255, 749 S.E.2d 885 (2013). In the DVPO, the trial court failed to check any of the boxes on the form that contained the statutory findings necessary to order the surrender of firearms. *See* N.C. Gen. Stat. § 50B-3.1(a). Accordingly, we hold that the trial court erred in ordering defendant to surrender all firearms, ammunition, and gun permits and thus vacate that portion of the DVPO. *See id.* § 50B-3.1(a).

## V. Conclusion

For the foregoing reasons, we affirm the *ex parte* DVPO. We affirm in part the DVPO but vacate the portion in which the trial court ordered defendant to surrender all firearms, ammunition, and gun permits. We also remand this case to the trial court for entry of the appropriate orders consistent with this opinion.<sup>6</sup>

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges BRYANT and HUNTER, JR. concur.

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6. We recognize that by the terms of the DVPO, it would have expired on 2 January 2015, but a DVPO is subject to extension under N.C. Gen. Stat. § 50B-3(b) (2013). Depending upon the situation on remand and any relief requested by either party, the trial court may take the appropriate action.

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[241 N.C. App. 545 (2015)]

STATE OF NORTH CAROLINA

v.

ROBERT BISHOP

No. COA14-1227

Filed 16 June 2015

**1. Constitutional Law—freedom of speech—cyber-bullying statute—failure to show overbroad**

The trial court did not err by convicting defendant of cyber-bullying under N.C.G.S. § 14-458.1(a)(1)(d) even though defendant contended that it was an unconstitutionally overbroad content-based criminalization of protected speech. The Cyber-bullying Statute prohibits conduct, not speech. Any effect the statute has on speech or expression is merely incidental. Defendant failed to carry his burden to show any real and substantial overbreadth of the Cyber-bullying Statute to invalidate it on First Amendment grounds.

**2. Appeal and Error—preservation of issues—failure to argue—writ of certiorari denied—lack of standing**

Defendant failed to preserve his argument that the Cyber-bullying Statute was unconstitutionally vague as applied to him. Defendant failed to argue both in his motion to dismiss and at the pretrial hearing. Further, he failed to carry his burden to show consideration of this argument on appeal was necessary to prevent “manifest injustice.” In its discretion, the Court of Appeals declined to invoke N.C. R. App. P. 2. Defendant lacked standing to challenge the Cyber-bullying Statute as unconstitutionally vague on its face.

**3. Appeal and Error—preservation of issues—failure to argue—writ of certiorari denied**

Defendant failed to preserve his argument that the State presented insufficient evidence to show he posted “private, personal, or sexual information” to support a conviction under the Cyber-bullying Statute by failing to argue this issue. The State presented ample evidence of the nature of defendant’s comments. The Court of Appeals declined to invoke N.C. R. App. P. 2 to suspend the rules and address the merits of this argument.

**4. Evidence—lay opinion testimony—cyberbullying screen shots**

The trial court did not abuse its discretion by permitting a detective to testify, over objection, concerning screen shots of anything

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that appeared to him to be evidence of cyber-bullying. The detective's lay opinion testimony regarding his investigative process was admissible under N.C.G.S. § 8A-1, Rule 701.

**5. Evidence—statements about Christianity—relevancy for cyber-bullying—intent—chain of events—failure to show prejudice**

The trial court did not err by admitting defendant's comments regarding Christianity. The comments were relevant to show defendant's intent, and to establish the chain of events which culminated in defendant's charge of cyber-bullying. In light of the other substantial evidence of guilt, defendant failed to carry his burden to show prejudice by the admission of these comments.

Appeal by defendant from judgment entered 5 February 2014 by Judge G. Wayne Abernathy in Alamance County Superior Court. Heard in the Court of Appeals 6 May 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.*

TYSON, Judge.

Robert Bishop ("Defendant") appeals from judgment entered after a jury convicted him of one count of cyber-bullying. We find no error in Defendant's conviction or the judgment entered thereon.

**I. Factual Background**

Dillion Price ("Dillion") was a sophomore at Southern Alamance High School in Alamance County, North Carolina during the 2011-2012 school year. In September 2011, Dillion's classmates began posting negative comments and pictures of him on his Facebook page. Dillion received notification on his cell phone after any Facebook comment was posted about him.

Defendant, one of Dillion's classmates, posted several comments about Dillion, which included posts calling him "homophobic" and "homosexual," and that he was "slamming someone on the open forum that is the internet." Defendant also stated "he never got the chance to slap [Dillion] down before Christmas break." Defendant made

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additional comments rife with vulgarity, discussed further in the State's evidence, below.

Late one night in December 2011, Dillion's mother found him crying, punching his pillow, beating himself in the head, and throwing things in his room. Dillion's mother confiscated his cell phone as punishment for being awake so late on a school night. After looking at his phone, Dillion's mother discovered the "derogatory comments," which had upset Dillion, and contacted local law enforcement. Dillion's mother brought several print-outs of the Facebook conversations to Alamance County Sheriff's Detective David Sykes ("Detective Sykes").

Detective Sykes began an investigation and used undercover Facebook profiles to search for posts and comments in which Dillion was mentioned. Detective Sykes testified "[w]henver [he] found anything that appeared to have been . . . cyber-bullying [he] took a screen shot of it."

Detective Sykes compiled a list of names during his investigation. He went to Southern Alamance High School to interview the students on his list on 7 February 2012. Defendant was one of the students he interviewed. Defendant admitted he recognized some of the Facebook comments as his posts.

On 9 February 2012, Defendant was arrested and charged with one count of cyber-bullying under N.C. Gen. Stat. § 14-458.1(a)(1)(d). The warrant alleged Defendant "unlawfully and willfully did use a computer network to, with the intent to intimidate and torment Dillion Price, a minor, post on the Internet private, personal and sexual information pertaining to the above named minor, to wit, commenting on Facebook about his sexual orientation and his intelligence."

Following a trial in Alamance County District Court, Defendant appealed to the superior court for a trial *de novo*. A jury trial was held in Alamance County Superior Court on 3 February 2014. Defendant exercised his constitutional right not to testify on his own behalf.

#### A. State's Evidence

The State introduced and published to the jury "screen shots" of three Facebook posts in which Defendant had commented. Detective Sykes also read those posts into evidence at trial. Each screen shot is discussed in turn.

The State's Exhibit 2 consisted of a screen shot Facebook post of a text message Dillion had accidentally sent to another classmate.

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Over thirty comments were added by various individuals in reference to the original post. Defendant added the following comments: (1) “This is excessively homoerotic in nature. Exquisite specimen;” (2) “Anyone who would be so defensive over Dillion can’t be too intelligent;” (3) “And you are equally pathetic for taking the internet so seriously;” and, (4) “There isn’t a fight. We’re slamming someone on the open forum that is the internet.”

The State’s Exhibit 3 contained another screen shot Facebook post of a text message exchanged between Dillion and a classmate. Several students commented they hated Dillion, and one asked, “Can we just kick his ass already?” Defendant commented, “I never got to slap him down before Christmas Break,” followed by a “sad face” emotion icon. Another student requested for someone to “tag” Dillion, in order for him to be notified of these posts. Defendant replied, “I’ll add him.”

The State’s Exhibit 4 was a third screen shot Facebook post of text messages exchanged between Dillion and a classmate. The original text message from the classmate included an altered picture of Dillion and his dog. Several students posted vulgar and derogatory comments in response, which insulted Dillion. Defendant posted comments, including: “I heard that his anus was permanently stressed from having awkwardly shaped penises in it” and stated that Dillion’s genitals were “probably a triangle.”

The jury’s verdict found Defendant guilty of one count of cyberbullying. The trial court imposed a suspended sentence of 30 days in the custody of the Alamance County Sheriff and placed Defendant on supervised probation for a period of 48 months. Defendant gave notice of appeal in open court.

## II. Issues

Defendant argues: (1) N.C. Gen. Stat. § 14-458.1(a)(1)(d) is an unconstitutionally overbroad criminalization of protected speech on its face; and, (2) N.C. Gen. Stat. § 14-458.1(a)(1)(d) is unconstitutionally vague on its face. He asserts the statute fails to provide adequate notice of the prohibited speech, lends itself to arbitrary enforcement, and chills protected speech. Defendant also argues N.C. Gen. Stat. § 14-458.1(a)(1)(d) is unconstitutionally vague as applied to him and asserts the statute failed to provide him with adequate notice that his speech was criminal.

Defendant additionally argues the trial court erred by: (1) denying his motion to dismiss for insufficient evidence; (2) permitting Detective Sykes to testify he took a screen shot whenever he came across what

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appeared to him to be an instance of cyber-bullying; and, (3) admitting into evidence Defendant's statements about Christianity.

III. AnalysisA. Overbreadth

[1] This case of first impression requires us to determine whether N.C. Gen. Stat. § 14-458.1(a)(1)(d) criminalizes protected speech under the First Amendment. Defendant argues N.C. Gen. Stat. § 14-458.1(a)(1)(d) is an unconstitutionally overbroad content-based criminalization of protected speech. Defendant asserts the statute criminalizes both the narrow categories of speech historically denied First Amendment protection, as well as a broad array of constitutionally protected speech. We disagree.

1. Standard of Review

This Court reviews the constitutionality of a statute *de novo*. *State v. Whitaker*, 201 N.C. App. 190, 192, 689 S.E.2d 395, 396 (2009), *aff'd*, 364 N.C. 404, 700 S.E.2d 215 (2010). However, “[w]hen examining the constitutional propriety of legislation, we presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality.” *State v. Mello*, 200 N.C. App. 561, 564, 684 S.E.2d 477, 479 (2009) (citation and internal quotation marks omitted), *aff'd*, 364 N.C. 421, 700 S.E.2d 224 (2010).

If a statute contains both constitutional and unconstitutional provisions, we sever the unconstitutional provision and uphold the constitutional provisions to the extent possible. *Fulton Corp. v. Faulkner*, 345 N.C. 419, 422, 481 S.E.2d 8, 10 (1997) (citations omitted). It is well-settled that “[t]he constitutional right of freedom of speech does not extend its immunity to conduct which violates a valid criminal statute. Neither does the protection of the First Amendment extend to every use and abuse of the spoken and written word.” *State v. Leigh*, 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971) (citations omitted).

2. Analysis

The First Amendment to the United States Constitution prohibits governmental restrictions of speech which are based upon its subject-matter or content. U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech”); *Ashcroft v. ACLU*, 535 U.S. 564, 573, 152 L. Ed. 2d. 771, 780 (2002).

An individual may challenge a statute as overbroad on First Amendment grounds, even if the statute is constitutionally applied to

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him. *United States v. Stevens*, 559 U.S. 460, 472-73, 176 L. Ed. 2d 435, 446-47 (2010). The “overbreadth doctrine” allows litigants to challenge a statute “not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 840 (1973).

A law is impermissibly overbroad “on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right.” *State v. Hines*, 122 N.C. App. 545, 552, 471 S.E.2d 109, 114 (1996) (citations and internal quotation marks omitted), *disc. review improvidently allowed*, 345 N.C. 627, 481 S.E.2d 85 (1997).

Where conduct, and not solely speech, is involved, “the overbreadth of [the] statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick*, 413 U.S. at 615, 37 L. Ed. 2d at 842. Neither “[m]ere potential for overbreadth” nor “hypothetical overbreadth” is sufficient to strike down an otherwise constitutional statute. *Hest. Techs, Inc. v. State ex rel. Perdue*, 366 N.C. 289, 301-02, 749 S.E.2d 429, 438 (2012), *cert. denied*, \_\_ U.S. \_\_, 187 L. Ed. 2d 34 (2013); *Cinema I Video, Inc. v. Thornburg*, 320 N.C. 485, 491, 358 S.E.2d 383, 385 (1987).

N.C. Gen. Stat. § 14-458.1 (“the Cyber-bullying Statute”) prohibits the use of a computer or computer network to “[p]ost or encourage others to post on the Internet private, personal or sexual information pertaining to a minor” with “the intent to intimidate or torment a minor.” N.C. Gen. Stat. § 14-458.1(a)(1)(d) (2013). At a pretrial hearing on Defendant’s motion to dismiss, the trial court determined the Cyber-bullying Statute “regulate[s] intentional conduct, not the content of speech.”

Whether the North Carolina Cyber-bullying Statute prohibits conduct, speech, or some combination of the two has not yet been addressed by our appellate courts. At the pretrial hearing on Defendant’s motion to dismiss, the State argued the Cyber-bullying Statute does not criminalize protected speech. The State contends this statute is analogous to the North Carolina Harassing Telephone Calls statute, which criminalizes making repeated telephone calls “for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number[.]” N.C. Gen. Stat. § 14-196(a)(3) (2013). This Court previously addressed the constitutionality of the Harassing Telephone Calls statute on First Amendment grounds.



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In *State v. Camp*, this Court determined N.C. Gen. Stat. § 14-196(a)(3) prohibited conduct, not speech, because it was directed at “using telephones to annoy, offend, terrify or harass others and not directed at prohibiting the communication of thoughts or ideas.” 59 N.C. App. 38, 42, 295 S.E.2d 766, 768, *appeal dismissed and disc. review denied*, 307 N.C. 271, 299 S.E.2d 216 (1982). This Court held “[t]his conduct is not protected by the First Amendment and, therefore, [N.C. Gen. Stat. §] 14-196(a)(3) which prohibits such unprotected conduct is not unconstitutionally overbroad.” *Id.* at 43, 295 S.E.2d at 769.

Defendant argues while the Harassing Telephone Calls statute is silent concerning the content of the telephone communications prohibited, the Cyber-bullying Statute prohibits the posting of “private, personal, or sexual information pertaining to a minor.” N.C. Gen. Stat. § 14-458(a)(1)(d). This argument overlooks precisely what the Cyber-bullying Statute punishes.

The United States Supreme Court held a regulation of speech which appears to be content-based on its face will be deemed content-neutral, if motivated by a permissible content-neutral purpose. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49, 89 L. Ed. 2d 29, 37-38 (1986). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 675 (1989) (“A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”).

The Cyber-bullying Statute punishes the *act* of posting or encouraging another to post on the Internet *with the intent* to intimidate or torment. Like the telephone, the Internet can also be used as an instrumentality for communication. However, its use for sharing thoughts and ideas does not prevent the Internet from also being used as a mechanism for individuals to engage in harassing or tormenting conduct. *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir.) (citation omitted) (“Harassment is not communication, although it may take the form of speech.”), *cert. denied*, 488 U.S. 984, 102 L. Ed. 2d 569 (1988).

In his brief, Defendant argues he was “prosecuted for the content of his Facebook comments.” The text of the Cyber-bullying Statute makes clear this assertion was not the case. Defendant could not have been convicted under the Cyber-bullying Statute absent proof by the State of the requisite *mens rea* to commit the crime of cyber-bullying.

It was not the content of Defendant’s Facebook comments that led to his conviction of cyber-bullying. Rather, his specific intent to use those comments and the Internet as instrumentalities to intimidate or

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torment Dillion resulted in a jury finding him guilty under the Cyber-bullying Statute.

The Cyber-bullying Statute is not directed at prohibiting the communication of thoughts or ideas via the Internet. It prohibits the intentional and specific conduct of intimidating or tormenting a minor. This conduct falls outside the purview of the First Amendment. *Camp*, 59 N.C. App. at 42, 295 S.E.2d at 768-69. *See also In re Clark*, 303 N.C. 592, 605, 281 S.E.2d 47, 56 (1981) (“A statute is not overbroad when it punishes, prohibits, or inhibits . . . conduct which is not constitutionally protected.”); *Leigh*, 278 N.C. at 250, 179 S.E.2d at 712 (“When a course of conduct has been otherwise properly declared illegal, there is no abridgement of freedom of speech because the illegal conduct is initiated or carried out by the spoken word.”).

To the extent the Cyber-bullying Statute touches upon or regulates some aspects of some speech, the burden on speech and expression is merely incidental. *See Hest Techs., Inc.*, 366 N.C. at 300, 749 S.E.2d at 437 (“[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”). “[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O’Brien*, 391 U.S. 367, 376, 20 L. Ed. 2d 672, 679-80 (1968).

Under *O’Brien*, regulation of conduct which incidentally burdens speech

is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377, 20 L. Ed. 2d at 680.

Here, the General Assembly made clear the intent of the Cyber-bullying Statute was to protect children from the harmful effects of bullying and harassment, and prevent disclosure of private, personal, or sexual information. *See Act of June 30, 2009, ch. 551, § 1, 2009 N.C. Sess. Laws 1510, 1510-1511; N.C. Gen. Stat. § 115C-407.15, et. seq.* The

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government has a substantial interest in the protection of children from the psychological and emotional harm of cyber-bullying.

In July 2014, the New York Court of Appeals issued an opinion examining a challenge to a cyber-bullying statute on First Amendment grounds. The Albany County statute defined “cyber-bullying” as

any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information . . . with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.

*People v. Marquan M.*, 19 N.E.3d 480, 484 (N.Y. 2014).

In a 5-2 opinion, the Albany County cyber-bullying statute was struck down. The County had conceded “the text of the statute [was] too broad and that certain aspects of its contents encroach[ed] on recognized areas of protected free speech,” which required it to be analyzed under a strict scrutiny standard. *Id.* at 86-87. The New York court held while the statute “was motivated by the laudable public purpose of shielding children from cyberbullying,” the language of the statute “embrac[ed] a wide array of applications that prohibit types of protected speech far beyond the cyberbullying of children.” *Id.* at 486, 488. The New York court held the Albany County cyber-bullying statute was unconstitutionally overbroad because

[o]n its face, the law covers communications aimed at adults, and fictitious or corporate entities, even though the county legislature justified passage of the provision based on the detrimental effects that cyberbullying has on school-aged children. . . . [T]he law includes every conceivable form of electronic communication, such as telephone conversations, a ham radio transmission or even a telegram.

*Id.* at 486.

The North Carolina Cyber-bullying Statute does not suffer the same fatal defects as the Albany County cyber-bullying statute. As explained above, any incidental restriction on speech in the North Carolina statute is no greater than necessary. The statute only prohibits disclosure

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of “private, personal, or sexual information pertaining to the minor” on the Internet with the specific intent to intimidate or torment a minor. The statute does not prohibit any other speech or communication on the Internet outside of this context.

The Cyber-bullying Statute serves purposes and regulates conduct entirely unrelated to speech. *See Thorne*, 846 F.2d at 244 (holding harassing telephone calls statute was not unconstitutionally overbroad because it sought to “protect citizens from harassment in an even-handed and neutral fashion” and was “not a censorial statute, directed at any group or viewpoint”).

Defendant has failed to meet his burden of showing real and substantial overbreadth in the statute. *Broadrick*, 413 U.S. at 615-16, 37 L. Ed. 2d at 842 (“[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.”). The Cyber-bullying Statute regulates volitional and malicious conduct. Any burdens it imposes on speech or expression are merely incidental. The First Amendment does not prohibit restrictions directed at conduct from imposing incidental burdens on speech. *Hest Techs., Inc.*, 366 N.C. at 303, 749 S.E.2d at 439. This argument is overruled.

### B. Void for Vagueness

**[2]** Defendant argues the Cyber-bullying Statute is unconstitutionally vague on its face. Defendant contends the statute (1) fails to give adequate notice of the criminal speech; (2) creates a risk the statute will be enforced in an arbitrary or discriminatory manner; and, (3) chills constitutionally protected speech.

Unlike the “overbreadth doctrine,” which creates an exception to the traditional standing requirement, a person whose conduct is clearly proscribed cannot challenge a statute for vagueness as applied to the conduct of others. *United States v. Williams*, 553 U.S. 285, 304, 170 L. Ed. 2d 650, 669 (2008); *Broadrick*, 413 U.S. at 612, 37 L. Ed. 2d at 840. “[A] party receiving fair warning, from the statute, of the criminality of his own conduct is not entitled to attack the statute on the ground that its language would not give fair warning with respect to other conduct.” *State v. Nesbitt*, 133 N.C. App. 420, 424, 515 S.E.2d 503, 506-07 (1999).

Defendant acknowledged at oral argument he failed to argue both in his motion to dismiss and at the pretrial hearing that the Cyber-bullying Statute was unconstitutionally vague as applied to him. A constitutional issue not raised and passed upon by the trial court below will not be

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considered for the first time on appeal. *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955). Because Defendant did not raise an “as-applied” argument at trial, it is not properly preserved as an argument before this Court on appeal.

In his brief and at oral argument, Defendant requested this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure “to prevent manifest injustice.” Under Rule 2, this Court may suspend the appellate rules in order “[t]o prevent manifest injustice to a party.” N.C.R. App. P. 2.

Our Supreme Court has addressed the appropriateness of invoking Rule 2 on many occasions. “Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances.*” *State v. Hart*, 361 N.C. 309, 315-316, 644 S.E.2d 201, 205 (2007) (citations and quotation marks omitted) (emphasis supplied). “[T]he exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, *which will necessarily be rare occasions.*” *Id.* at 316, 644 S.E.2d at 205 (citations and internal quotation marks omitted) (emphasis supplied).

Nothing in either the record or either party’s brief demonstrates “exceptional circumstances” sufficient to justify suspending or varying the rules in order to prevent “manifest injustice” to Defendant. *Id.* at 315, 644 S.E.2d at 205. Defendant posted several derogatory comments about Dillion, a minor, on Facebook. He did not attempt at trial to show he did not receive fair warning that his particular conduct was proscribed by the statute. Defendant failed to argue the Cyber-bullying Statute was unconstitutionally vague as applied to him. In the exercise of our discretion, we decline to invoke Rule 2 to reach the merits of Defendant’s unpreserved unconstitutional as-applied argument. This argument is dismissed.

Since we dismissed Defendant’s unpreserved “as-applied” challenge to the Cyber-bullying Statute, Defendant lacks standing to challenge the statute on the grounds that it is unconstitutionally vague on its face. This argument is also dismissed.

C. Defendant’s Motion to Dismiss for Insufficient Evidence

**[3]** Defendant argues the trial court erred by denying his motion to dismiss the charge at the close of all the evidence. He asserts insufficient evidence was presented to show he posted “private, personal, or

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sexual information” about Dillion. Defendant’s motion to dismiss was based upon other grounds. Defendant failed to preserve this argument for appeal.

1. Standard of Review

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime.

*State v. Cody*, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999) (citation and internal quotation marks omitted).

2. Analysis

It is well-settled that “[i]n order to preserve an issue for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” *State v. Gainey*, 355 N.C. 73, 97, 558 S.E.2d 463, 479, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). When a defendant moves to dismiss the charges against him, he preserves the argument only on the grounds asserted at trial. *See State v. Curry*, 203 N.C. App. 375, 384-85, 692 S.E.2d 129, 137-38 (concluding defendant had waived fatal variance argument on appeal where his motion to dismiss at trial was on the grounds of insufficient evidence), *appeal dismissed and disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010); *State v. Euceda-Valle*, 182 N.C. App. 268, 272, 641 S.E.2d 858, 862 (holding where “defendant presents a different theory to support his motion to dismiss than that he presented at trial, this assignment of error is waived”), *disc. review denied*, 361 N.C. 698, 652 S.E.2d 923 (2007).

At trial, Defendant moved to dismiss on the grounds that the State presented insufficient evidence of his intent to intimidate or torment Dillion. After inquiry by the court, counsel for Defendant stated he “d[id] n’t wish to be heard any further.”

Defendant now seeks for the first time on appeal to argue the trial court erred by denying his motion to dismiss on the basis that the State

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failed to present sufficient evidence Defendant's comments contained "private, personal, or sexual information" about Dillion. Defendant failed to make this argument in support of his motion to dismiss at trial. Because Defendant failed to properly preserve this issue, he has waived his right to appellate review. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount.").

At oral argument and in his brief, Defendant acknowledged trial counsel's failure to preserve this argument. Defendant again requests that this Court invoke Rule 2 to reach the merits of his argument. Again, Defendant failed to show or satisfy his burden of demonstrating "exceptional circumstances" sufficient to justify suspending or varying the appellate rules in order to prevent "manifest injustice" to Defendant. *Hart*, 361 N.C. at 315, 644 S.E.2d at 205.

The State presented substantial evidence of the precise nature of the comments Defendant posted on Dillion's Facebook page. The jury considered this evidence, after proper instructions from the trial court, and returned a verdict of guilty. In our discretion, we decline to invoke Rule 2. This argument is dismissed.

D. Detective Sykes' Testimony

**[4]** Defendant argues the trial court abused its discretion by permitting Detective Sykes to testify, over objection, concerning screen shots of anything that appeared to him to be evidence of cyber-bullying.

1. Standard of Review

We review the admissibility of lay opinion testimony for abuse of discretion. *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009). An abuse of discretion occurs when the trial court's decision "lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (citation and quotation marks omitted), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005).

2. Analysis

Defendant argues the admission of Detective Sykes' testimony that he captured a screen shot from his computer's display "[w]henever [he] found anything that appeared to have been . . . cyber-bullying" was inadmissible opinion testimony regarding Defendant's guilt. We disagree.

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Rule 701 of the Rules of Evidence provides lay witness testimony “in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2013).

Testimony elicited to assist the jury in understanding a law enforcement officer’s investigative process is admissible under Rule 701. *State v. O’Hanlan*, 153 N.C. App. 546, 562-63, 570 S.E.2d 751, 761-62 (2002) (holding detective’s testimony that he did not fully investigate rape with forensic analysis because victim survived and could identify defendant as her assailant was admissible under Rule 701 because (1) it was not offered as opinion on defendant’s guilt; and (2) it was helpful to provide fact-finder with a clear understanding of his investigative process), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397 (2004).

A law enforcement officer may not, however, give an opinion as to a defendant’s guilt or innocence. *See State v. Lawson*, 159 N.C. App. 534, 542, 583 S.E.2d 354, 360 (2003) (noting officer testimony regarding the circumstances of traffic stop and reason for defendant’s detention “was not invading the province of the jury as he was not commenting on the credibility of the witness”). Detective Sykes testified at trial as a lay witness. He provided the jury with information about what he found posted on Facebook concerning Dillion and Defendant, as well as the process of how he conducted his investigation.

When asked how he searched for comments concerning Dillion during his investigation, Detective Sykes explained he

went to the list of names that I had that I started with. I just started looking at their friends. Found some posts that were about Dillion. Then I went down the list and started looking at who had commented on it and I went to their page and looked at their page to see what they had said about Dillion. *Whenever I found anything that appeared to have been to me cyber-bullying I took a screen shot of it.*

The trial court overruled Defendant’s objection and motion to strike this testimony. Detective Sykes nevertheless rephrased his response and stated, “[i]f it appeared evidentiary, I took a screen shot of it.”

When viewed in context, Detective Sykes’ testimony was not proffered as an opinion of Defendant’s guilt. Detective Sykes’ testimony was rationally based on his perception, and was helpful in presenting to the jury a clear understanding of his investigative process. *O’Hanlan*, 153



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N.C. App. at 562-63, 570 S.E.2d at 761-72. His testimony was admissible under Rule 701. Defendant has failed to show the trial court abused its discretion in permitting Detective Sykes' testimony. This argument is overruled.

E. Defendant's Statements About Christianity

[5] Defendant argues the trial court erred by admitting his irrelevant statements about Christianity.

1. Standard of Review

"Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). Whether to admit or exclude evidence is a decision which rests within the trial court's discretion. *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007) (citation omitted), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d. 377 (2008). "[A] trial court's ruling will be reversed on appeal only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Kirby*, 206 N.C. App. at 457, 697 S.E.2d at 503 (citation and internal quotation marks omitted).

2. Analysis

Evidence is relevant if it has "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. Gen. Stat. § 8C-1, Rule 401 (2013). Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

Defendant argues the trial court erred by allowing the following two Facebook comments to be read by Detective Sykes and published to the jury:

I like how [Dillion's cousin] uses the phrase "you need Jesus" in a very offhand manner. What about the billions of people that don't believe in Jesus the way you do? Do they need Jesus?

....

That's nice, but I'd like to point out that there's no empirical evidence that your Jesus ever existed. Take your

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unfounded bulls—t out of here, the modern world can go without.

Defendant asserts the admission of these comments into evidence was irrelevant and highly inflammatory. We disagree.

Our Supreme Court held “evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.” *State v. Jones*, 336 N.C. 229, 243, 443 S.E.2d 48, 54 (citation and quotation marks omitted), *cert. denied*, 513 U.S. 1003, 130 L. Ed. 2d 423 (1994).

The State argues these statements were relevant because they established the *mens rea* element of the Cyber-bullying Statute. Defendant made these comments in response to Dillion’s cousin coming to his defense and posting: “[Y]ou need Jesus. That’s my cousin your [sic] talking about. . . . I don’t care what your issues are with him but you need to drop it.”

Defendant’s responses attacking Dillion’s cousin’s religion illustrated his desire to belittle or deter anyone from defending and standing up for Dillion. Defendant’s comments were relevant to show his intent to intimidate or torment Dillion.

Defendant’s comments about Christianity were also relevant to show the chain of events leading up to Dillion’s mother contacting law enforcement.

Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if . . . it forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

*State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (citation and internal quotation marks omitted).

Defendant argues the admission of his posts on Christianity created an opportunity for the jury to convict him on an improper, emotional basis. “[I]t is defendant’s burden to show prejudice from the admission of evidence. *State v. Oliver*, 210 N.C. App. 609, 615, 709 S.E.2d 503, 508 (citation omitted), *disc. review denied*, 365 N.C. 206, 710 S.E.2d 37 (2011). In order to show prejudice, a defendant must show that “a different result likely would have ensued had the evidence been excluded.” *Id.* (citation and quotation marks omitted).

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Substantial evidence was presented to support the jury's verdict and conviction of Defendant. The trial court weighed the probative value of this evidence against any prejudicial effect and properly ruled it was admissible. Defendant has failed to carry his burden to show "a different result likely would have ensued had the evidence been excluded." *Id.* (citation and quotation marks omitted). This argument is overruled.

IV. Conclusion

The Cyber-bullying Statute prohibits conduct, not speech. Any effect the statute has on speech or expression is merely incidental. Defendant has failed to carry his burden to show any real and substantial overbreadth of the Cyber-bullying Statute to invalidate it on First Amendment grounds.

Defendant failed to preserve his argument that the Cyber-bullying Statute was unconstitutionally vague as applied to him. Defendant has failed to carry his burden to show consideration of this argument on appeal is necessary to prevent "manifest injustice." In our discretion, we decline to invoke Appellate Rule 2. Defendant lacked standing to challenge the Cyber-bullying Statute as unconstitutionally vague on its face.

Defendant failed to preserve his argument that the State presented insufficient evidence to show he posted "private, personal, or sexual information" to support a conviction under the Cyber-bullying Statute. The State presented ample evidence of the nature of Defendant's comments. We decline to invoke Rule 2 to suspend the rules and address the merits of this argument.

Detective Sykes' lay opinion testimony regarding his investigative process was admissible under Rule 701. Defendant has failed to show the trial court abused its discretion.

Defendant's comments regarding Christianity were relevant to show his intent, and to establish the chain of events which culminated in Defendant's charge of cyber-bullying. In light of the other substantial evidence of guilt, Defendant failed to carry his burden to show prejudice by the admission of these comments.

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction by the jury or in the trial court's judgment entered thereon.

NO ERROR.

Judges GEER and STROUD concur.

**STATE v. CHAVEZ**

[241 N.C. App. 562 (2015)]

STATE OF NORTH CAROLINA

v.

DANIEL TEJEDA CHAVEZ

No. COA14-1152

Filed 16 June 2015

**Evidence—child sexual abuse—expert testimony**

There was no error, much less plain error, in a prosecution for statutory rape and other offenses where the trial court admitted the testimony of an expert in “child evaluation and evaluation of sexual or physical abuse.” The witness never testified that the victim was “in fact abused,” that the victim was “believable” or “credible,” or that the victim’s disclosure was “consistent with” her exam, despite a lack of physical evidence. The cases cited by the defendant were inapplicable to the facts of the present case, and defendant’s contention ignored the context in which the testimony was offered. Moreover, defendant made admissions on multiple occasions tending to show his guilt and the case did not hinge solely on the testimony of this witness.

Appeal by defendant from judgments entered 17 April 2014 by Judge W. David Lee in Davidson County Superior Court. Heard in the Court of Appeals 3 March 2015.

*Attorney General Roy Cooper, by Special Deputy Attorney General Lauren M. Clemmons, for the State.*

*Michael E. Casterline for defendant-appellant.*

McCULLOUGH, Judge.

Daniel Tejada Chavez (“defendant”) appeals from judgments entered upon his convictions for indecent liberties with a child (11 CRS 57861) in violation of N.C. Gen. Stat. § 14-202.1, statutory rape of a person 13, 14, or 15 years old (11 CRS 58157) in violation of N.C. Gen. Stat. § 14-27.7A(a), and statutory sex offense of a person 13, 14, or 15 years old (12 CRS 1837) in violation of N.C. Gen. Stat. § 14-27.7A(a). For the following reasons, we find no error.

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**I. Background**

On 2 April 2012, a Davidson County Grand Jury indicted defendant on the following three charges that occurred between 13 May 2009 and 15 November 2011: one count of indecent liberties with a child, one count of statutory rape of person 13, 14, or 15 years old, and one count of statutory sex offense of person 13, 14, or 15 years old. Defendant pled not guilty and his case came on for trial in Davidson County Superior Court before the Honorable W. David Lee on 14 April 2014.

At trial, the State's evidence tended to show the following: Defendant began a relationship with Amanda Balderas ("Amanda") around the year 2005. Shortly thereafter, Amanda, along with two of her daughters, Ava and Helen, moved into defendant's home in Thomasville, North Carolina.<sup>1</sup> At that time, Ava was seven years old and Helen was five years old. In 2007, defendant and Amanda gave birth to their own child, Lisa.

Ava's testimony revealed that when she was approximately ten or eleven years old, defendant began to "touch" her. Defendant began touching her leg and progressed to touching her breasts. Ava testified the touching "got worse" as she got older. When Ava was approximately thirteen or fourteen years old, defendant began touching her "everywhere," including her breasts, bottom, and vagina. The defendant would take Ava into his bedroom, undress her, and "play" with her vagina and breasts. Defendant put his hands inside and outside of Ava's vagina, and eventually engaged in sexual intercourse. Ava testified that the sexual intercourse "happened multiple times; I couldn't count." However, Ava told a forensic interviewer that defendant "had touched her body more than 50 times and had sex with her more than 30." Ava told defendant to stop "once or twice," but was reluctant to tell him to stop every time because she was scared of being hurt by defendant. Ava testified that she became "really depressed" from the things defendant was doing to her, and began "cutting" herself.

On 13 November 2011, Ava went to her grandmother's house after getting into an argument with Amanda and defendant. Two days later, when her grandmother encouraged Ava to go back home, Ava began crying. Her grandmother asked Ava why she did not want to return home and Ava "told her everything that was going on." Specifically, Ava told her grandmother she was "tired of being molested," "tired of being put down," and tired of being "treated like a maid or a toy." After telling her

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1. Pseudonyms are used to protect the identities of the minors.

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grandmother about the abuse, the police were called, and Ava was taken to the Thomasville Police Department.

Ava's grandmother then called Amanda and asked where she was. Amanda responded that she was grocery shopping with defendant and her other two daughters, Helen and Lisa. Amanda testified that when they exited the grocery store, they were surrounded by police officers. Officers told defendant to take the groceries home, but Amanda, Helen, and Lisa were escorted to the police station where Amanda was first made aware of Ava's sexual abuse allegations against defendant. One of the police officers told Amanda to go home and pack some clothes because she could no longer stay at defendant's house.

In the meantime, defendant took the groceries home and then drove to the police station where he was interviewed by Detective Foley and Corporal Truell for approximately 30 minutes. When Detective Foley explained to defendant that Ava had made some allegations against him, defendant responded that Ava "had been coming on to him." Detective Foley testified that during the interview, defendant admitted to performing oral sex on Ava "for about three minutes" three months earlier. Detective Foley transcribed defendant's confession in a printed document. Before leaving the police station, defendant read his statement aloud and then signed and initialed the document. Defendant was then taken home by Corporal Truell around midnight.

Amanda was already at the house when defendant got home. She testified that defendant was "furious" and they began to argue. Defendant told Amanda that Ava "came on to him," and "it was her fault." Defendant then admitted to giving Ava oral sex after he came out of the bathroom and Ava was lying naked on the bed. Amanda testified that defendant stated, "Get a butcher knife. Kill me now. I will get it from the kitchen, just go ahead." Amanda then left the house with some of her belongings after being there for approximately 30 to 45 minutes. Shortly thereafter, at approximately 2 a.m. on 16 November 2011, Corporal Truell returned to defendant's home with a warrant for defendant's arrest and arrested defendant for indecent liberties with a child.

On 22 November 2011, Ava was physically examined by Dr. Sarah Sinal ("Dr. Sinal"). Dr. Sinal testified as an expert in "child evaluation and evaluation of sexual or physical abuse." Dr. Sinal explained that she first obtained Ava's medical history from Ava's mother, which is when she was made aware that Ava had been "cutting herself." "Cutting behavior" was significant to Dr. Sinal because "cutting, unfortunately, is a very common behavior seen in children who have been abused and frequently sexually abused."

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Dr. Sinal then performed a genital examination of Ava. The exam revealed that Ava had less hymen tissue at the 6:00 o'clock position, but otherwise, examination of Ava's hymen was considered "normal." Dr. Sinal clarified that for a genital exam to be considered abnormal, the hymen tissue would have to be completely absent at the 6:00 position. Completely absent hymen tissue suggests a significant injury to the hymen, typically caused by a penetrating object, such as a penis. Dr. Sinal testified that Ava's normal exam was not surprising. She further testified that 95 percent of children examined for sexual abuse have normal exams, explaining that "it's more of a surprise when we do find something." Dr. Sinal opined that a normal exam with little to no signs of penetrating injury could be explained by the "stretchy" nature of the hymen tissue and its ability to heal quickly. For example, deep tears to the hymen can often heal within three to four months, while superficial tears can heal within a few days to a few weeks.

After the State presented its case, defendant's primary source of evidence came from his own testimony. Defendant testified that when he arrived at the police station on 15 November 2011, Detective Foley told him that he had been accused of having sex and oral sex with Ava. Defendant testified that he denied all sexual abuse allegations. In regard to the printed confession, defendant suggested he did not understand it and asked the officers for a translator. Defendant testified that officers told him they would "bring the polygraph machine and call immigration" if a translator had to be called. Defendant then signed the written statement and was taken home.

Defendant testified that he and Amanda talked for approximately ten minutes when he got home. Defendant further testified that he never admitted to performing oral sex on Ava, nor did he make any statement about getting a knife from the kitchen.

Defendant believes that Ava made up the sexual abuse allegations due to the behavioral problems Ava had with Amanda, along with the issues defendant had experienced with Ava's boyfriend. Defendant explained that Ava's boyfriend was transferred to a different school after defendant found sexual letters and inappropriate text messages exchanged between Ava and her boyfriend. Defendant testified that they "took everything away," including Ava's phone, nose ring, and allowance. Defendant further testified that Ava was "mad at the world" and resented Amanda and him.

The case was given to the jury on 17 April 2014. Later that afternoon, the jury returned verdicts finding defendant guilty of all charges. The

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trial court then entered judgments. In the first judgment, the trial court sentenced defendant to a term of 192 to 240 months for statutory rape. In the second judgment, the trial court consolidated the indecent liberties with a child and statutory sex offense convictions and sentenced defendant to a consecutive term of 192 to 240 months. In addition, upon release from imprisonment, defendant will be required to register as a sex offender, enroll in satellite-based monitoring, and will be subject to a permanent no contact order prohibiting contact with Ava. Defendant gave notice of appeal in open court.

## II. Discussion

On appeal, defendant raises issue with the following two portions of Dr. Sinal's testimony: First, Dr. Sinal testified about Ava's cutting behavior, noting that such behavior is very common among sexually abused children. Second, in regard to the results of Ava's genital examination, Dr. Sinal testified that she was not surprised that Ava's exam was normal. Dr. Sinal opined that 95 percent of children examined for sexual abuse have normal exams and it is more of a surprise when there is evidence of a penetrating injury. Defendant argues that the trial court erred in allowing these two portions of Dr. Sinal's testimony because absent any physical evidence of sexual abuse or of the cutting behavior, such testimony is irrelevant and constitutes impermissible bolstering of the victim's credibility. In other words, although Ava's medical exam revealed little to no evidence of sexual abuse, defendant contends Dr. Sinal's testimony suggested that the victim's allegations of sexual abuse were still believable. We disagree.

### Standard of Review

Defendant did not object to Dr. Sinal's testimony at trial. However, on appeal, defendant now contends the trial court plainly erred in allowing Dr. Sinal to testify about her results and opinions regarding the physical examination of the victim.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2015).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show



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that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted.)

Analysis

In support of his argument that the trial court erred in allowing Dr. Sinal's testimony, defendant cites multiple cases. All of defendant's cited cases, however, are inapplicable to the facts of the present case.

Defendant first cites *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001), in which this Court held that absent physical evidence of sexual abuse, expert testimony that such abuse had in fact occurred was inadmissible because it bolstered the veracity of complainant's testimony. *Grover*, 142 N.C. App. at 421, 543 S.E.2d at 185. Defendant compares the present case to *Grover*, arguing that although Dr. Sinal did not, *per se*, testify that Ava had been sexually abused, her testimony that the lack of physical evidence was not surprising amounted to a confirmation of Ava's allegations of sexual abuse.

Defendant is correct in that this Court has consistently held that where "experts [find] no clinical evidence that would support a diagnosis of sexual abuse," an expert may not testify that sexual abuse had in fact occurred because such an opinion "merely attest[s] to the truthfulness of the child witness," and is inadmissible. *Grover*, 142 N.C. App. at 413, 543 S.E.2d at 181 (quoting *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90 (1997)).

In the present case, however, Dr. Sinal never testified that sexual abuse had in fact occurred, nor did Dr. Sinal make a diagnosis or provide an opinion that Ava had been sexually abused. Dr. Sinal's testimony that the lack of physical evidence was not surprising cannot be equated with a statement that Ava had *in fact* been abused. Because Dr. Sinal did not testify that such abuse had in fact occurred, the present case is distinguishable and renders *Grover* inapplicable.

Defendant next cites *State v. Streater*, 197 N.C. App. 632, 678 S.E.2d 367 (2009), for the holding that where there is no physical evidence of penetration, the trial court errs by allowing a doctor to testify

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that findings from a physical examination are consistent with the victim's report of repeated penetration because the testimony amounts to improper opinion on the victim's credibility. Based on his interpretation of *Streater*, defendant contends the trial court erred in allowing Dr. Sinal's testimony in this case.

Upon review, we disagree with defendant's reliance on *Streater* for two reasons. First, defendant misconstrues *Streater*. In *Streater*, this Court indicated "[the doctor] could testify that the physical findings[, or lack thereof,] could be present even where there was repeated penetration, but it is the specific identification of defendant as perpetrator which crosses over the line into impermissible testimony." 197 N.C. App. at 642, 678 S.E.2d at 374. This Court then held "[t]he trial court therefore erred when it admitted [the doctor's] testimony that his findings were consistent with "the history that he received from the victim" of repeated anal penetration *by the defendant*. *Id.* (alteration in original omitted) (emphasis added). Second, unlike the doctor in *Streater*, Dr. Sinal never testified that Ava's normal physical exam: i.e., her lack of physical evidence to indicate a penetrating injury, was consistent or inconsistent with Ava's disclosure of penial penetration. Dr. Sinal simply testified that Ava's normal exam was not surprising and that 95 percent of children examined for sexual abuse have normal exams. Therefore, this case is distinguishable and *Streater* is inapplicable to the present facts.

Defendant also cites *State v. O'Connor*, 150 N.C. App. 710, 564 S.E.2d 296 (2002) and *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986), in which the defendants were granted new trials after the trial courts erred in allowing impermissible expert testimony. Specifically, a doctor testified in both cases, claiming the child's disclosure of sexual abuse was "credible" or "believable." *O'Connor*, 150 N.C. App. at 711, 564 S.E.2d at 297; *Aguallo*, 318 N.C. at 591, 350 S.E.2d at 77.

Again, defendant is correct that this Court has held that "testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). However, in the present case Dr. Sinal never opined, nor was she asked to opine, about the believability of Ava. Dr. Sinal never testified that Ava was a credible witness or that Ava's disclosure of abuse was believable, thus distinguishing the present case from *Aguallo* and *O'Connor*.

In addition, an expert witness is entitled to testify, "upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent

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therewith.” *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002). Therefore, testimony that cutting behavior is very common among sexually abused children or that 95 percent of children examined for sexual abuse have normal exams is permissible testimony.

Dr. Sinal never testified that Ava was “in fact abused”, that Ava was “believable” or “credible”, or that Ava’s disclosure was “consistent with” her normal exam, despite a lack of physical evidence. Therefore, the cases cited by the defendant are inapplicable to the facts of the present case.

Moreover, upon review of the record, it is clear to this Court that defendant only considers narrow portions of Dr. Sinal’s testimony and ignores the context in which the testimony was offered.

One of the underlying issues that Dr. Sinal explained to the jury was how the passing of time can be responsible for the lack of vaginal evidence indicative of sexual abuse. When Dr. Sinal testified that it is more surprising when a genital exam shows trauma to the hymen, she based this statement on the “stretchy” nature of the hymen and its ability to heal quickly. She testified that a “petechia under the mucus membrane can disappear as soon as 12 hours.” Deep tears to the hymen can heal within three or four months, and superficial tears can heal within a few days to a few weeks. Therefore, an examination of a child’s hymen whose rape occurred weeks or months prior to her exam is less likely to reveal evidence of sexual abuse.

Dr. Sinal performed Ava’s genital examination on 21 November 2011, almost a full week after the last possible occurrence of sexual abuse alleged in defendant’s indictment. Her testimony was relevant not only to help the jury understand the results of her examination, but also to demonstrate that a lack of physical evidence of sexual abuse does not preclude sexual abuse when there is a passing of time between the alleged incidents and the physical examination. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2013) (“ ‘Relevant evidence’ means 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.”).

Lastly, this case does not hinge solely on the testimony of Dr. Sinal. Defendant made admissions on multiple occasions tending to show his guilt. Thus, even assuming *arguendo* that Dr. Sinal’s testimony was error, given the overwhelming evidence against defendant, we hold the alleged error does not amount to plain error requiring a new trial.

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**III. Conclusion**

For the reasons discussed above, we hold the alleged error does not amount to error, much less plain error. Therefore, defendant is not entitled to a new trial.

NO ERROR.

Judges CALABRIA and DIETZ concur.

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STATE OF NORTH CAROLINA  
v.  
ARON HARPER, DEFENDANT

No. COA14-1182

Filed 16 June 2015

**1. Motor Vehicles—impaired driving—breathalyzer results—time for observation**

The results from an analysis of defendant's breath should have been admitted in a driving while impaired prosecution where the trial court found that the Department of Health and Human Services (DHHS) protocol was followed in performing the analysis and that the analyst held a permit issued by DHHS. The trial court's conclusion that the evidence should be suppressed appears to have been based on a mistaken belief that a chemical analysis is inadmissible unless the analyst indicates on the Analyst Affidavit form the time at which he or she began observing the subject driver. Here, the analyst failed to fill in that space on the form; however, the State presented the analyst's live testimony and the test ticket printouts recording defendant's blood alcohol concentration at .15.

**2. Appeal and Error—alternative bases for trial court order—reviewed on appeal**

Alternative legal bases offered in support of the superior court's order in an impaired driving prosecution were reviewed on appeal. Appellate Rule 28(c) expressly permits an appellee to raise in its brief an alternate basis in law in support of the order from which appeal is taken.

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**3. Motor Vehicles—impaired driving—observation period—restarted**

In an impaired driving prosecution, defendant's alternate argument that the trial court properly suppressed evidence of his blood alcohol level based on the analyst's failure to follow observation protocol failed where the analyst initiated a new observation period after the initial mouth alcohol reading.

**4. Constitutional Law—double jeopardy—license revocation—civil and criminal**

A driver's license revocation for impaired driving did not subject defendant to double jeopardy where he had already been subjected to a civil revocation for the same offense.

**5. Motor Vehicles—impaired driving—exclusion of blood alcohol level—no inherent authority**

The trial court did not have the inherent authority in an impaired driving prosecution to suppress evidence of defendant's blood alcohol concentration, as shown by a chemical analysis, where there was no legal basis for excluding it.

**6. Motor Vehicles—impaired driving—introduction of blood alcohol level—implied consent offense—no requirement of reasonable grounds to believe offense committed**

The State was not required in an impaired driving prosecution to show that there were reasonable grounds to believe defendant had committed an implied-consent offense before introducing evidence of his blood alcohol analysis. Under N.C.G.S. § 20-139.1, which governs chemical analysis and its admissibility in criminal prosecutions for driving while impaired, there is no requirement that the State demonstrate reasonable grounds to believe the defendant committed an implied-consent offense as a foundational prerequisite to the admissibility of breath test results obtained as the result of a traffic stop.

**7. Motor Vehicles—impaired driving—civil revocation of license—distinct from criminal prosecution—no right of appeal**

Issues in an impaired driving prosecution pertaining to the immediate civil revocation of defendant's license by the magistrate on the night of his arrest were not heard on an appeal from defendant's criminal conviction for impaired driving. Civil revocation and suspension or revocation from a criminal prosecution are separate

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and distinct. There is no right of appeal from civil revocation by the magistrate or by the Department of Motor Vehicles.

Appeal by State from order entered 5 June 2014 by Judge Alma Hinton in Pitt County Superior Court. Heard in the Court of Appeals 19 March 2015.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Christopher W. Brooks, for the State.*

*The Robinson Law Firm, P.A., by Leslie S. Robinson, for the Defendant.*

DILLON, Judge.

Aron Harper (“Defendant”) was arrested for driving while impaired. While at the police station, a chemical analysis of Defendant’s breath was performed indicating that he had a blood alcohol concentration in excess of the legal limit. Defendant was then escorted to a magistrate who entered a *civil* revocation order, temporarily revoking his drivers’ license for thirty (30) days.

Defendant was also *criminally* charged with driving while impaired. Defendant filed various motions in connection with this criminal charge, including a motion to suppress the results of the chemical analysis. A district court judge entered an order preliminarily determining that he would grant Defendant’s motion to suppress. After a *de novo* rehearing, a superior court judge entered an order affirming the district court’s preliminary determination, directing the district court to grant the motion to suppress, and remanding the case to the district court. The State filed a petition with this Court for *certiorari*, which was granted.

### I. Standard of Review

“Our review of a superior court’s order granting a motion to suppress is limited to 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. Osterhoudt*, 222 N.C. App. 620, 626, 731 S.E.2d 454, 458 (2012) (internal marks omitted). “Any unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. The trial court’s conclusions of law must be legally correct, reflecting a correct application of legal principles to the facts found.” *Id.* (internal marks and citation omitted).

## STATE v. HARPER

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## II. Analysis

## A. The Trial Court Erred In Its Reasoning

[1] In affirming the district court ruling, the superior court concluded that the breath results which indicated that Defendant's alcohol concentration was above the legal limit must be suppressed *because* the chemical analyst who performed the test failed to fill in one of the blanks on his "Affidavit & Revocation Report of Chemical Analyst" form (the "Analyst's Affidavit"). The State contends that the court erred in suppressing the results on this basis because the State also presented evidence in the form of the analyst's live testimony, wherein the analyst provided the information he inadvertently omitted in his Analyst's Affidavit. We agree.

"To prove guilt [for driving while impaired], the State need only show that [the] defendant had an alcohol concentration of .08 or more while driving a vehicle on a State highway." *State v. Arrington*, 215 N.C. App. 161, 165, 714 S.E.2d 777, 780 (2011).

Our General Assembly has provided that the State can prove that a defendant had an alcohol concentration above the legal limit through the results of a chemical analysis of the defendant's breath *if* (1) the analysis "is performed in accordance with the rules of the Department of Health and Human Services" ("DHHS"); and (2) the analyst has a permit from DHHS "authorizing the person to perform [the] test[.]" N.C. Gen. Stat. § 20-139.1(b) (2012). *See State v. Phillips*, 127 N.C. App. 391, 394, 489 S.E.2d 890, 892 (1997) ("Once the trial court determined that the chemical analysis of defendant's breath was valid, then the reading constituted reliable evidence").

In the present case, the trial court found that DHHS protocol was followed in performing the analysis and that the analyst held a permit issued by DHHS. These findings are supported by competent evidence, which included the Analyst Affidavit and the testimony of the analyst. Accordingly, the results from the analysis of Defendant's breath indicating an alcohol concentration in excess of the legal limit should have been admitted.

The trial court's conclusion that the evidence should be suppressed appears to have been based on a mistaken belief that a chemical analysis is inadmissible unless the analyst indicates *on the Analyst Affidavit form* the time he or she began observing the subject driver prior to taking said driver's breath samples. Though, here, the analyst checked the box on the form indicating that he had observed Defendant in compliance with

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DHHS protocol, he failed to fill in the space on the form indicating the time he began observing Defendant, leaving the space blank. In other words, there was no information *on the Analyst Affidavit* to indicate that the analyst observed Defendant for the requisite amount of time prior to collecting the breath samples. The trial court, therefore, apparently believed that it was required to suppress the results of Defendant's breath test because of this omission on the form, *even though* the State presented evidence in the form of the analyst's live testimony and the test ticket printouts on DHHS form 4082, produced by the Intoximeter, Model Intox, EC/ER II device used to conduct the chemical analysis, where Defendant's blood alcohol concentration was recorded at .15.

Defendant relies on our Supreme Court's decision in *Lee v. Gore*, 365 N.C. 227, 717 S.E.2d 356 (2011). However, that case is distinguishable. In *Lee*, the Supreme Court was interpreting the requirements of N.C. Gen. Stat. § 20-16.2, which empowers the Division of Motor Vehicles ("DMV") to revoke a license only upon receipt of a "properly executed affidavit." *Id.* at 233, 717 S.E.2d at 360-61. The Court held that DMV was without statutory authority to initiate a *civil* drivers' license revocation proceeding under N.C. Gen. Stat. § 20-16.2 unless the prerequisites to its authority to do so in subsection (c1) of the statute were first met. *Id.* Where the affiant omitted information that the driver had willfully refused to submit to a chemical analysis, as required by subsection (c1), the Court concluded that DMV lacked the authority to revoke the respondent's license. *Id.*

The present case, however, involves a *criminal* prosecution. Whereas N.C. Gen. Stat. § 20-16.2 conditions DMV's authority to initiate *civil* revocation proceedings on the existence of a "properly executed affidavit," a trial court in a criminal proceeding can certainly rely on other forms of evidence in addition to the affidavit of the analyst. Accordingly, Defendant's reliance on *Lee* is misplaced.

## B. Defendant's Alternate Grounds

[2] Defendant asserts alternate grounds in support of his position. Rule 28 of the North Carolina Rules of Appellate Procedure states that "an appellee may 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." N.C. R. App. P. 28(c). Thus, the issues an appellee may argue on appeal are not limited to those issues listed in the record on appeal. *See id.* Rule 28(c) expressly permits an appellee to raise in its brief an alternate basis in law in support of the order from



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which appeal is taken. *Id.* Accordingly, we review the alternative legal bases offered in support of the superior court's order.

**[3]** Defendant argues as an alternate basis that the trial court's motion to suppress was proper because – apart from the fact that the analyst did not properly fill out the Analyst's Affidavit form – the evidence showed that he did not follow DHHS protocol with respect to the observation period. *See* N.C. Gen. Stat. § 20-139.1(b)(1) (2012) (chemical analysis must be performed in accordance with DHHS regulations); 10A N.C.A.C. 41B.0101(6) (2012) (defining “observation period” as one “during which . . . the person . . . has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen.”). Specifically, Defendant contends that the analyst failed to restart the observation period when Defendant coughed up and cleared his throat, as required. Indeed, the evidence shows that a mouth alcohol reading was reflected in the analysis. However, the evidence also shows that the analyst did initiate a new observation period after this initial mouth alcohol reading, over two times the duration of the time required by DHHS protocol, before taking the two breath samples which form the basis of the evidence against Defendant. Accordingly, this argument is overruled.

**[4]** Defendant also argues as an alternate basis that the State's criminal prosecution is subjecting Defendant to double jeopardy because he has already been subject to a civil revocation for the same offense. However, we have already held that a license revocation resulting from a conviction for driving while impaired does not violate the constitutional guarantee against double jeopardy where the defendant's license has already been subject to immediate revocation under N.C. Gen. Stat. § 20-16.5. *State v. Hinchman*, 192 N.C. App. 657, 666, 666 S.E.2d 199, 204-05 (2008). Moreover, we have also held that a license revocation resulting from a conviction for driving while impaired does not violate the constitutional guarantee against double jeopardy where the defendant's license has also been subject to revocation under N.C. Gen. Stat. § 20-16.2 for the same conduct. *Ferguson v. Killens*, 129 N.C. App. 131, 139-40, 497 S.E.2d 722, 726-27 (1998). Accordingly, this argument is overruled.

**[5]** Defendant next argues as an alternate basis that the trial court had the inherent authority to suppress the test results based on the alleged defect in the Analyst's Affidavit form. However, N.C. Gen. Stat. § 20-139.1(a) provides that “a person's alcohol concentration . . . as shown by a chemical analysis is admissible” in a prosecution for an implied-consent offense, and our Supreme Court has recognized that the results of such analysis are “crucial to a conviction.” *State v. Smith*,

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312 N.C. 361, 374, 323 S.E.2d 316, 323 (1984). Therefore, we hold that the trial court did not have inherent authority to suppress this evidence where there was no legal basis for excluding it. Accordingly, this argument is overruled.

[6] Defendant next argues as an alternate basis that the trial court correctly concluded that the evidence should be suppressed because the State did not show that there were reasonable grounds to believe he had committed an implied-consent offense. However, as noted previously, the requirements of the civil drivers' license revocations authorized by N.C. Gen. Stat. §§ 20-16.2 and -16.5 are distinct from the procedures governing criminal prosecutions for implied-consent offenses. *See, e.g., Nicholson v. Killens*, 116 N.C. App. 473, 477, 448 S.E.2d 542, 544 (1994). Under N.C. Gen. Stat. § 20-139.1, which governs chemical analysis and its admissibility in *criminal* prosecutions for driving while impaired, there is no requirement that the State demonstrate that reasonable grounds existed to believe the defendant committed an implied-consent offense as a foundational prerequisite to the admissibility of breath test results obtained as the result of a traffic stop. Instead, "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's blood alcohol concentration." N.C. Gen. Stat. § 20-139.1(b) (2012). Therefore, we hold that the State was not required to show that there were reasonable grounds to believe Defendant had committed an implied-consent offense before introducing this evidence. Accordingly, this argument is overruled.

C. Defendant's Arguments Pertaining to the Immediate Civil Revocation Are Not Properly Before This Court

[7] Defendant makes a number of arguments which pertain to the immediate civil revocation of his license by the magistrate on the night of his arrest. For instance, he argues that the magistrate lacked the authority to revoke his license because of the omission in the Analyst's Affidavit, and that the revocation violated his procedural due process rights. However, as our Supreme Court has held, the civil revocation of a license and the suspension or revocation which results from a plea or finding of guilty in a criminal prosecution "are separate and distinct revocations." *Joyner v. Garrett*, 279 N.C. 226, 238, 182 S.E.2d 553, 561 (1971). Defendant's immediate civil revocation of his license by the magistrate is not appealable to this Court. N.C. Gen. Stat. § 20-16.5(g) (2012) ("The decision of the judicial official is final and may not be appealed"). There is no right to immediate appeal to our Court from Defendant's civil revocation by DMV either. *Id.* § 20-16.2(e) ("[T]he person whose license

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has been revoked has the right to file a petition in the superior court”); *Johnson v. Robertson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 742 S.E.2d 603, 607 (2013) (“[O]n appeal . . . , the superior court sits as an appellate court”). Rather, the only issues before this Court on issuance of the writ of *certiorari* pertain to the criminal charge against Defendant. Accordingly, we do not consider these arguments.

## III. Conclusion

We reverse the trial court’s conclusion that the breath results should be suppressed and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges STROUD and DAVIS concur.

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STATE OF NORTH CAROLINA

v.

AFIS ARTE HOLT

No. COA14-1290

Filed 16 June 2015

**Robbery—dangerous weapon—motion to dismiss—sufficiency of evidence—permissive inference for jury’s determination**

The trial court did not err by denying defendant’s motion to dismiss the charge of robbery with a dangerous weapon. There was a permissive inference for the jury’s determination as to whether the weapons used during the robbery were, in fact, dangerous.

Appeal by Defendant from judgment entered 20 March 2014 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 22 April 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Shawn R. Evans, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for Defendant.*

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STEPHENS, Judge.

Defendant Afis Arte Holt was convicted in Johnston County Superior Court on one count of robbery with a dangerous weapon and one count of felony conspiracy to commit first-degree burglary. Defendant appeals from the trial court's denial of his motion to dismiss the charge of robbery with a dangerous weapon. After diligent deliberation, we conclude that the trial court did not err in denying Defendant's motion to dismiss.

*I. Facts and Procedural History*

It was just before ten o'clock on the night of 4 April 2013 when the residents of 83 Hearth Lane in Smithfield heard a knock at their front door. Larry Dowd was in the master bedroom preparing for bed while his granddaughter, Jayahna Cook, age 14, watched television in the living room. Mr. Dowd's daughter Madina, age 15, was preparing to take a shower in the family bathroom down the hall, and his son Rahim, age 19, was in his own bedroom with the door closed.

When she heard someone knocking at the front door, Jayahna got up to answer it, saw Defendant and two other men wearing hooded sweat-shirts and masks to cover their faces, screamed "[h]e got a gun. He got a gun," and then ran to hide in the private bathroom that adjoins Mr. Dowd's master bedroom. Two of the men followed her, one of whom kicked down the bathroom door while the other demanded money from Mr. Dowd. When Mr. Dowd said he could not remember where he put his wallet, the men took him and Jayahna down the hallway to the family bathroom, the door to which had also been kicked down. There, they were held at gunpoint by a third man who told them to stand in the bathtub next to Madina, who had overheard the commotion and, unbeknownst to the intruders, already called 911 on her cell phone. Shortly thereafter, one of the men brought Rahim into the bathroom as well.

After a few minutes passed, Mr. Dowd told the men that he remembered where he had put his wallet and was taken back to his bedroom to retrieve it from a drawer. Upon discovering that the wallet contained \$145.00, a bank card, and the family's social security cards, one of the men told Mr. Dowd, "I know you've got more. Give me whatever else you have," and then struck Mr. Dowd in his face and side, resulting in minor injuries. The men then returned Mr. Dowd to the hallway bathroom where the children were still being held at gunpoint. Moments later, the men took Madina to look for more money in the living room, where they forced her down to her knees and held a gun to the back of her head.

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Around that time, Officer Ashley McLamb of the Wilson Mills Police Department arrived at the residence in response to Madina's 911 call. Upon his arrival, Officer McLamb looked inside through a window in the front door, saw a silhouette in the living room, smelled a strong odor of marijuana, and heard a thumping noise, followed by a voice asking, "Where is it?" Officer McLamb started to call for backup, then saw Madina open the front door and run outside, followed by a man wearing a hooded sweatshirt and a mask over his face holding what appeared to be a sledgehammer. Officer McLamb pushed Madina to safety and drew his sidearm, but before he could engage the man, he heard the sound of breaking glass and saw two other men jump from one of the home's front windows and land in the bushes below. After confirming with Mr. Dowd that there were no other intruders inside, Officer McLamb tried to chase one of the men but was knocked unconscious by a blow to the side of his head from an unknown object.

In the next few minutes, several more local law enforcement officers arrived on the scene. After tending to Officer McLamb's wounds, they interviewed Mr. Dowd and his family and searched their neighborhood subdivision for suspects and evidence. Defendant was apprehended and arrested approximately one hour later in a neighboring yard while attempting to flee the scene. Around the same time, officers nearby apprehended and arrested Daccarus Stanton and Jesse Price. All three men were unarmed.

On 20 May 2013, Defendant was indicted by a Johnston County grand jury on one count of first-degree burglary, one count of felony conspiracy to commit first-degree burglary, two counts of robbery with a dangerous weapon, four counts of first-degree kidnapping, and one count of assault on a law enforcement officer inflicting serious injury. Defendant's trial began in Johnston County Superior Court on 17 March 2014.

During the trial, each of the residents of 83 Hearth Lane testified that Defendant and his co-conspirators had been armed with guns, although their testimony varied as to how many weapons they each said they saw. Madina identified Defendant as the man who had held her family at gunpoint in the bathroom while the other two men searched the home. She testified that two of the men had handguns while the third man had a knife at one point but later picked up a small sledgehammer. Rahim testified that before he was taken into the family bathroom, one of the men entered his bedroom holding a small black handgun and forced him to sit or lie on his bed. On cross-examination, Rahim clarified that this was the only weapon he saw during the robbery. Jayahna testified that she

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started screaming after she answered the knock at the front door and saw “a guy standing there with a gun pointing at [her].” Jayahna testified further that she was led at gunpoint from the master bathroom to the family bathroom, where she was also held at gunpoint, and that in total, two of the three men were armed with handguns. Mr. Dowd testified that after Jayahna screamed and hid in the master bathroom, two men came into his bedroom and both were armed with handguns, one of which had “a five- to six-inch barrel” and “was a handgun that you hold in your hand, and it looked like it may have had a clip.” Mr. Dowd testified further that after being taken to the family bathroom, a third man held him—along with Madina, Rahim, and Jayahna—there at gunpoint. On cross-examination, when Defendant’s counsel sought to impeach Mr. Dowd’s testimony by noting that he had previously told prosecutors that only the two men who came into his bedroom were armed with handguns, Mr. Dowd responded that, “Well, I’m sure I told [the prosecutor] about when we was taken into the other bathroom and how the person there also had a handgun. Now, if I left that out, it wasn’t intentional.” In a similar vein, when Defendant’s counsel confronted Mr. Dowd with the fact that his initial statement to investigators at the scene shortly after the robbery only mentioned that one of the men had had a gun, Mr. Dowd stood by his testimony and explained that:

I distinctly remember all three of them having handguns. I didn’t mention it in this report. I don’t know why. I was really dazed and everything. I would have no reason not to mention it if it came to my mind, but I don’t know why it’s just one handgun mentioned in the report when I know [there were] at least three.

After presenting testimony from each of the victims, the State also introduced into evidence two items that were recovered from the scene on the night of the robbery. The first item was identified by Johnston County Sheriff’s Deputy Ronald Mazur as an unloaded Black Ops BB Pistol that investigators found in the bushes directly beneath the window where Officer McLamb saw two men jump after he first approached the residence. The second item was a pellet gun with a broken barrel and broken slide mechanism found lying in a neighboring yard approximately 400 to 475 feet away from the residence next to an abandoned black Nike shoe that investigators suspected came from one of the suspects. No evidence was introduced regarding fingerprints on, or ownership of, either gun, nor was any evidence offered as to operability, and neither the victims nor Defendant or his accomplices identified either gun as having been used during the robbery.

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Although Defendant did not testify at trial, the State introduced into evidence two post-arrest statements that he gave to Detective Jamey Snipes of the Johnston County Sheriff's Office. Detective Snipes testified that on the night of the crime, after being informed of and orally waiving his *Miranda* rights, Defendant told him that he had come along to 83 Hearth Lane with two other men because he had heard there were drugs and money in the house; that it was Defendant's job to serve as a lookout for the other two men; that Defendant spent most of the time trying to calm down the family in the bathroom; that Defendant was not armed with a gun during the robbery; that Defendant jumped out the front window after he realized the police had arrived; and that Defendant volunteered to "take the rap for everything" and would not name either of his two co-conspirators. Detective Snipes testified further that on 14 June 2013, after being informed of and waiving his Fifth and Sixth Amendment rights, Defendant gave him a second statement and explained that the girlfriend of one of the other men drove them to 83 Hearth Lane but did not know they planned on robbing anyone; that after knocking on the front door, the men were invited inside and negotiated a deal to purchase one ounce of marijuana; that one of the residents produced a bag of marijuana and Defendant snatched it away and told him to either "take a loss or get it back with muscles"; that Defendant was unarmed and did not recall the other two men bringing their own guns to the residence, but believed it was possible they might have done so, although he also stated that if any guns were involved, they came from inside the home; and that after the police arrived, Defendant jumped out the front window and then ran, hid, and "dumped" the ounce of marijuana in the woods nearby as he ran to avoid getting caught with drugs.

At the close of the State's evidence, Defendant's counsel moved to dismiss all the charges against him except for the burglary and conspiracy charges. The trial court granted Defendant's motion to dismiss the assault on a law enforcement officer charge, as well as two of the four first-degree kidnapping charges, and also stated that it would instruct the jury on second-degree kidnapping on the two remaining charges. As for the two charges of robbery with a dangerous weapon, Defendant argued that they should be dismissed because the State failed to produce any evidence that the BB pistol and the pellet gun found near the scene of the robbery were operable or capable of inflicting serious bodily injury or death. The trial court ultimately denied Defendant's motion to dismiss the robbery with a dangerous weapon charges, but did agree to provide an additional instruction for the jury on the lesser-included offense of common law robbery. Defendant declined to put on evidence but renewed his motions to dismiss the remaining charges, which the

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trial court denied. The case was submitted to the jury on 20 March 2014. That same day, the jury returned its verdict convicting Defendant on one count of robbery with a dangerous weapon and one count of conspiracy to commit first-degree burglary. The trial court sentenced Defendant to a term of 59 to 83 months imprisonment. On 25 March 2014, Defendant gave written notice of appeal to this Court.

*II. Analysis*

In his sole argument on appeal, Defendant contends that the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon. We disagree.

As this Court's prior decisions make clear, "[w]hen ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (citation omitted), *affirmed*, 301 N.C. 374, 271 S.E.2d 277 (1980). "All evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence and resolving in its favor any contradictions in the evidence." *State v. Worsley*, 336 N.C. 268, 274, 443 S.E.2d 68, 70-71 (1994) (citation omitted). Thus, a defendant's motion to dismiss "is properly denied if the evidence, when viewed in the above light, is such that a rational trier of fact could find beyond a reasonable doubt the existence of each element of the crime charged." *Id.* at 274, 443 S.E.2d at 71 (citation omitted). This Court reviews the trial court's denial of a motion to dismiss *de novo*. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

Our Supreme Court has explained that the offense of robbery with a dangerous weapon, as defined under section 14-87 of our General Statutes, "consists of the following essential elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Faison*, 330 N.C. 347, 358, 411 S.E.2d 143, 149 (1991) (citation omitted); *see also* N.C. Gen. Stat. § 14-87(a) (2013). Our case law makes clear that for purposes of section 14-87, a dangerous weapon is defined in the same way as a deadly weapon, which "is



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generally defined as any article, instrument or substance which is likely to produce death or great bodily harm.” *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981); *see also State v. Smallwood*, 78 N.C. App. 365, 368, 337 S.E.2d 143, 144 (1985) (“We note that *Sturdivant*, . . . involved the definition of ‘deadly’ as opposed to ‘dangerous,’ and analyzed ‘deadly’ in terms of potential for producing death or great bodily harm. We perceive no functional difference in the terms, however. [Under section 14-87], the ‘dangerous’ weapon or means must be one which endangers or threatens life.”) (citations omitted).

In the present case, Defendant argues that the trial court erred in denying his motion to dismiss because the State did not produce any evidence that the BB pistol and pellet gun found at the scene of the robbery were dangerous weapons capable of inflicting serious injury or death. In support of this argument, Defendant relies on our Supreme Court’s observation in *State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986), that as a general matter, “[i]noperative firearms, and cap, or toy, pistols are not dangerous weapons within the meaning of [section 14-87] because they cannot endanger or threaten life when used as firearms.” *Id.* at 122, 343 S.E.2d at 895. While acknowledging that North Carolina’s appellate courts have consistently found that BB pistols and pellet guns can be considered dangerous weapons when used in ways that do endanger human life, Defendant argues that the outcome here should be controlled by this Court’s prior decision in *State v. Fleming*, 148 N.C. App. 16, 557 S.E.2d 560 (2001), where we held that the trial court erred in denying the defendant’s motion to dismiss the charge of robbery with a dangerous weapon when the evidence showed that he committed two robberies using a BB gun and the State failed to introduce any evidence that the BB gun was capable of inflicting death or great bodily injury. *Id.* at 26, 557 S.E.2d at 566. Thus, Defendant argues that here, the uncontroverted evidence in the record is sufficient to support only a charge of common law robbery.

This argument is unavailing because it misconstrues both the evidence in the record and the rules our Supreme Court has established “to resolve sufficiency of evidence questions in armed robbery cases where the instrument used appears to be, but may not in fact be a dangerous weapon capable of endangering or threatening life.” *State v. Summey*, 109 N.C. App. 518, 528, 428 S.E.2d 245, 251 (1991). Under the framework our Supreme Court set up in *Allen*, the rules are as follows:

- (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim

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and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be. (2) If there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened. (3) If all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.

317 N.C. at 124-25, 343 S.E.2d at 897. In summarizing its holding, and the implications of the third category of the test it established, the *Allen* Court reiterated that "if other evidence shows conclusively that the weapon was not what it appeared to be, then the jury should not be permitted to find that it was what it appeared to be," and the trial court should only instruct the jury on the lesser-included offense of common law robbery. *Id.* at 125, 343 S.E.2d at 897.

This Court's subsequent decision in *Fleming* provides a useful illustration of the *Allen* test's third category. There, the defendant committed two successive robberies by brandishing what appeared to be a gun in his waistband; when he was apprehended moments later by police after the victims called 911 and described his vehicle, the defendant was carrying the exact amount of money stolen during the robberies, and the weapon, which was still in his waistband, turned out to be a BB gun. 148 N.C. App. at 18-19, 557 S.E.2d at 561-62. Thus, we held that, "[e]ven giving the State all reasonable inferences which may be drawn from the above-recited facts, it is clear [that] the weapon in question was, in fact, a BB gun," *id.* at 21-22, 557 S.E.2d at 564, and we ultimately concluded that "when a weapon such as a BB gun is determined to be the weapon used in a particular case, the record must contain evidence to support the jury's finding that the instrument was a dangerous weapon." *Id.* at 26, 557 S.E.2d at 566. Therefore, because there was no evidence that the weapon used to perpetrate the robberies was dangerous, we remanded the case for resentencing on the lesser-included offense of common law robbery. *Id.*

Defendant insists that here, as in *Fleming*, absent any showing by the State that the BB pistol and pellet gun found near the victims'

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residence were capable of inflicting death or serious injury, the evidence falls within the *Allen* test's third category. However, this argument ignores important distinctions between the facts at issue here and those in *Fleming*. Most notably, unlike in *Fleming*, where the weapon used to perpetrate the robbery was recovered from the defendant's direct physical possession, here there is no evidence that conclusively links either the BB pistol or the pellet gun to the robbery. Neither Defendant nor his co-conspirators were carrying any weapons when they were apprehended by police. Further, no evidence was offered regarding any fingerprints on, or ownership of, either gun, and neither the victims nor Defendant identified either of the guns as having been used during the robbery. Moreover, even assuming *arguendo* that both the BB pistol and the pellet gun could be conclusively linked to the robbery, Mr. Dowd testified that all three of the men who robbed his home were armed with handguns. Although Defendant's counsel attempted to impeach Mr. Dowd on this point, the trial court properly left the credibility of Mr. Dowd's testimony as a matter for the jury to resolve, and as such, it would have been permissible for a reasonable juror to infer that not all, if any, of the weapons used during the robbery had been recovered or accounted for. Indeed, if taken as true, Defendant's second post-arrest statement to Detective Snipes suggests that Defendant had the motivation and opportunity to "dump" the third weapon just like he claimed to have dumped the ounce of marijuana he purported to have stolen from the residence that investigators never recovered.

In light of the preceding analysis, we conclude that while there is "some evidence that the implement[s] used [were] not . . . firearm[s] or other dangerous weapon[s] which could have threatened or endangered the [lives] of the victim[s]," when considered collectively, the evidence does not conclusively demonstrate that each of the instruments used during the robbery "could not have been a firearm or other dangerous weapon." *Allen*, 316 N.C. at 124-25, 343 S.E.2d at 897 (emphasis added). We therefore conclude further that, despite Defendant's protestations to the contrary, this case falls within the *Allen* test's second category, which means that although the mandatory presumption of dangerousness attached to the *Allen* test's first category disappears, there remains a permissive inference for the jury's determination as to whether the weapons used during the robbery were, in fact, dangerous. Accordingly, we hold that the trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges STEELMAN and McCULLOUGH concur.

**STATE v. MACKEY**

[241 N.C. App. 586 (2015)]

STATE OF NORTH CAROLINA

v.

RASHAWN MACKEY, DEFENDANT

No. COA14-883

Filed 16 June 2015

**1. Constitutional Law—right to impartial jury—right to fair trial—failure to question jurors about jury note**

The trial court did not violate defendant's constitutional rights to an impartial jury and a fair trial in a first-degree murder and discharging a firearm into an occupied vehicle case by failing to question the jurors about a third jury note. No *Campbell* inquiry was required since the jury's safety concern did not arise from an "improper and prejudicial" matter. *State v. Campbell*, 340 N.C. 612 (1995). Further, no inquiry was required for the reference to the large number of people in the courtroom.

**2. Constitutional Law—right to present—failure to disclose jury note**

Although the trial court violated defendant's constitutional right to presence in a first-degree murder and discharging a firearm into an occupied vehicle case by failing to disclose a third jury note, it was not prejudicial error. The State showed that any error was harmless beyond a reasonable doubt.

**3. Jury—jury note—trial court not required to respond in particular way**

The trial court did not violate N.C.G.S. § 15A-1234 requiring a trial court to disclose every jury note to a defendant, to hear defendant in connection with every note, and to respond to every jury note in open court. Nothing in the statute required a trial judge to respond to a jury note in a particular way. Further, N.C.G.S. § 15A-1233(a) was inapplicable because in the pertinent jury note, the jury did not request a review of certain testimony or other evidence.

Appeal by defendant from judgments entered on 4 February 2014 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals on 16 March 2015.

*Attorney General Roy A. Cooper III, by Assistant Attorney General Jess D. Mekeel, for the State.*

## STATE v. MACKEY

[241 N.C. App. 586 (2015)]

*Brendan O'Donnell, for defendant-appellant.*

STROUD, Judge.

Rashawn Mackey (“defendant”) appeals from judgments entered on jury verdicts, in which the jury found him guilty of first-degree murder and discharging a firearm into an occupied vehicle. Defendant contends that the trial court violated (1) his constitutional rights to an impartial jury and a fair trial; (2) his constitutional right to presence; and (3) N.C. Gen. Stat. § 15A-1234 (2013). We hold that the trial court committed no prejudicial error.

## I. Background

On or about 13 January 2012, Mr. Anderson approached two female teenagers, Ms. Lewis and her friend, at a Charlotte bus stop.<sup>1</sup> Lewis and her friend were going to a party. Anderson offered to drive them, and they accepted. Before Anderson dropped them off, Lewis gave him her cell phone number.

On 15 January 2012, Lewis and three female teenage friends went to a party at defendant’s apartment, where they met defendant and four or five other male teenagers. Ms. Jones, one of Lewis’s friends, observed one of the men holding a handgun. During the party, the teenagers smoked marijuana and played a video game. After finishing work at 5:00 p.m., Anderson called Lewis to get directions to defendant’s apartment so that he could pick her up. Lewis did not know the directions, so she passed her cell phone to a few of the men, who then gave Anderson directions to a dead-end road in defendant’s apartment complex. Lewis overheard some of the men discussing robbing Anderson.

While it was dark outside, Lewis, Jones, and another female friend walked to the dead-end road to meet Anderson. Anderson soon arrived in his car. Lewis entered the car and sat in the passenger seat, while Jones spoke to Anderson through the driver’s side window.

Defendant and two other men then approached the car, and Lewis quickly got out of the car. One of the men nudged Jones out of their way. Defendant then pointed a gun at Anderson and told him to give him his money. Anderson was frightened and did not respond. Defendant then shot Anderson in the head, killing him.

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1. Names have been changed to protect the identity of the witnesses and the victim.

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On or about 30 January 2012, a grand jury indicted defendant for murder and discharging a firearm into an occupied vehicle. *See* N.C. Gen. Stat. §§ 14-17, -34.1 (2011). At the trial in January and February 2014, Mr. Smith, one of defendant's fellow jail inmates, testified that he and defendant had once been members of the same gang and that in January 2012, while they were in jail, defendant confessed to him that he had killed a man during a botched robbery. Smith also testified that in December 2013, defendant told him more details about the murder and gave him the names of potential witnesses whom he wanted to be persuaded to not testify. Smith testified that later that month, defendant told him to mark certain potential witnesses for execution and to threaten to mark one potential witness's mother and grandmother for execution. Smith further testified that on Sunday, 26 January 2014, defendant asked him to mark Jones for execution; Jones had begun testifying on Friday, 24 January 2014. Smith also testified that defendant had told him that two of his fellow gang members would be present in the courtroom to observe which witnesses testified. Smith finally testified that on Monday, 27 January 2014, while waiting in a holding cell at the courthouse, he overheard defendant telling a fellow gang member to mark Smith for execution, because Smith had agreed to testify against defendant.

In his own testimony, defendant denied that he had killed Anderson and testified that he was smoking a cigarette on the porch of his apartment when he heard the gunshot. Defendant also testified that he neither asked Smith to mark certain witnesses for execution nor did he speak to Smith about his case.

On 30 January 2014, during the trial, the jury sent its first note to the trial judge, in which it asked, "What is the expected length of the case at this point in time?" The trial judge did not disclose this note to defendant or his counsel, nor did it address the note on the record. In the late afternoon on Monday, 3 February 2014, the jury began its deliberations. Around 10:00 a.m. on Tuesday, 4 February 2014, the jury sent its second note to the trial judge, in which it requested the following pieces of evidence: the audio recording and transcript of a phone call between defendant and his mother, a letter written by one of defendant's fellow inmates, a transcript of defendant's interview with a police detective, and four notes which defendant gave to Smith listing the names of potential witnesses that he wanted to be intimidated or killed. The jury also requested the legal definitions of direct evidence and circumstantial evidence. The trial court disclosed this jury note to the parties and, without objection from either party, denied the jury's request for the transcript of defendant's interview with a police detective as it was

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never tendered or received into evidence, but granted the jury's remaining requests.

On 4 February 2014, during the jury's deliberations, the jury sent its third note to the trial judge.<sup>2</sup> The trial judge did not disclose this note to defendant or his counsel, nor did it address the note on the record. The third jury note reads as follows:

(1) Do we have any concern for our safety following the verdict? Based on previous witness gang [information] and large [number] of people in court during the trial[.]

Please do not bring this up in court[.]

(2) We need 12 letters—1 for each juror showing we have been here throughout this trial[.]

At 3:30 p.m. on Tuesday, 4 February 2014, the jury rendered its verdicts, in which it found defendant guilty of first-degree murder under the felony murder rule but not on the basis of premeditation and deliberation, and discharging a firearm into an occupied vehicle. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction and arrested judgment for the conviction of discharging a firearm into an occupied vehicle. Defendant gave notice of appeal in open court.

## II. Standard of Review

We review alleged violations of constitutional rights *de novo*. *State v. Ward*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 742 S.E.2d 550, 552 (2013). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Jones*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 767 S.E.2d 341, 344 (2014), *disc. review denied*, \_\_\_ N.C. \_\_\_, 771 S.E.2d 304 (2015).

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2. The State contends that the record is silent on whether the trial judge received this note, whether the jury sent this note before the verdict, and whether defendant was aware of this note at the time. But the record includes a narrative pursuant to North Carolina Rule of Appellate Procedure 9(c), which states: "During the trial, the jury sent out three notes to the court that were ultimately filed with the Superior Court Clerk and that appear in the Record on Appeal. Two of those notes—the first beginning, 'What is the expected length . . . ' (dated January 30, 2014; page 200 of the record), and the second beginning, 'Do we have any concern for our safety . . . ' (dated February 4, 2014; page 202 of the record)—were not brought to the attention of the defendant or his counsel during the trial, and the trial court did not address the notes on the record." N.C.R. App. P. 9(c). We note that the record unfortunately does not provide the exact time that the jury submitted this note.

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## III. Rights to an Impartial Jury and a Fair Trial

[1] Defendant contends that the trial court's failure to question the jurors about the third jury note violated his rights to an impartial jury and a fair trial under the Sixth and Fourteenth Amendments of the U.S. Constitution and article I, sections 19 and 23 of the North Carolina Constitution. *See* U.S. Const. amend. VI, XIV; N.C. Const. art. I, §§ 19, 23.

Every person charged with a crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in keeping with substantive and procedural due process requirements of the Fourteenth Amendment. It is the duty of both the court and the prosecuting attorney to see that this right is sustained.

*State v. Williams*, 362 N.C. 628, 638, 669 S.E.2d 290, 298 (2008).

[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

*Smith v. Phillips*, 455 U.S. 209, 217, 71 L. Ed. 2d 78, 86 (1982). “[W]hen there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial.” *State v. Campbell*, 340 N.C. 612, 634, 460 S.E.2d 144, 156 (1995) (brackets omitted), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 871 (1996).

In *Campbell*, during a recess at trial, the defendant broke a window and unsuccessfully attempted to escape from the courthouse. *Id.* at 633, 460 S.E.2d at 155. During the incident, a bailiff and a juror were in an adjacent room. *Id.*, 460 S.E.2d at 155. The bailiff heard the noise, looked out a window, saw some broken glass, and instructed the juror to remain inside the room. *Id.*, 460 S.E.2d at 155. The trial court conducted



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an individual inquiry of the juror and two other jurors to determine what they had observed and whether any of those observations could prevent them from being fair and impartial. *Id.* at 633-34, 460 S.E.2d at 155-56. The three jurors responded that they were aware only of a broken window and that “nothing had occurred that would impair their ability to be fair and impartial jurors.” *Id.* at 634, 460 S.E.2d at 156. The trial court then reunited the entire jury and asked if it had made any observations that could prevent a decision based solely on the evidence, and the entire jury indicated that it could be fair and impartial. *Id.* at 634, 460 S.E.2d at 155-56. The North Carolina Supreme Court held that the trial court’s inquiry was proper. *Id.* at 634, 460 S.E.2d at 156.

Similarly, in *State v. Hurst*, during *voir dire*, a prospective alternate juror stated that he had read a newspaper article concerning the defendant’s trial in the jury room. 360 N.C. 181, 186-87, 624 S.E.2d 309, 315-16, *cert. denied*, 549 U.S. 875, 166 L. Ed. 2d 131 (2006). The trial court conducted an inquiry to determine which jurors had been exposed to the article. *Id.* at 190, 624 S.E.2d at 317. The trial court determined that none of the deliberating jurors had been exposed to the article. *Id.*, 624 S.E.2d at 318. The North Carolina Supreme Court held that the defendant did not suffer prejudice, because “the trial court conducted an adequate inquiry and correctly concluded that . . . none of the deliberating jurors saw or read the article.” *Id.* at 191-92, 624 S.E.2d at 318.

Defendant specifically argues that the trial court erred in failing to conduct a *Campbell* inquiry. But *Campbell* and *Hurst* are distinguishable. Here, the jury was not potentially exposed to any extrinsic or “improper and prejudicial matters[.]” See *Campbell*, 340 N.C. at 634, 460 S.E.2d at 156. The third jury note indicates that the jurors’ concern for safety arose not from any extrinsic evidence but from (1) Smith’s testimony that defendant was targeting certain potential witnesses to be intimidated or killed and (2) the large number of people in the courtroom. First, the jury properly considered Smith’s testimony as it was admitted as evidence.<sup>3</sup> See *U.S. v. King*, 627 F.3d 641, 651 (7th Cir. 2010) (“[T]he jurors’ fears likely originated from the invocation of [the defendant’s]

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3. On appeal, defendant does not challenge the trial court’s decision to admit Smith’s testimony, although he did object to this evidence at trial and his objection was overruled. But in addressing the issue of prejudice, defendant does contend that, had the trial judge informed defendant of the jury note, he could have renewed his objection to Smith’s testimony under North Carolina Rule of Evidence 403 and moved to strike Smith’s testimony. See N.C. Gen. Stat. § 8C-1, Rule 403 (2013). We address this argument below in our discussion on prejudice.

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membership with [a gang]. As this evidence was part of and *intrinsic* to the trial, there was no cause for inquiry with the jurors.”). Second, the number of people in the courtroom is not an “improper and prejudicial” matter. *See Campbell*, 340 N.C. at 634, 460 S.E.2d at 156; *State v. Johnson*, 951 A.2d 1257, 1266 (Conn. 2008) (“[T]he mere presence of spectators in a public courtroom and the jury’s observation of them does not constitute juror misconduct or the consideration of extrinsic evidence.”); *U.S. v. Ford*, 761 F.3d 641, 655 (6th Cir. 2014) (holding that the trial court did not err in failing to question the jury when one juror expressed fear upon seeing the defendant in the courtroom, because her fear did not arise from an “extraneous influence”), *cert. denied*, \_\_\_ U.S. \_\_\_, 190 L. Ed. 2d 640 (2014). We also note that holding otherwise would conflict with defendant’s constitutional right to a public trial under the Sixth and Fourteenth Amendments of the U.S. Constitution and article I, section 18 of the North Carolina Constitution. *See State v. Callahan*, 102 N.C. App. 344, 346, 401 S.E.2d 793, 794 (1991); U.S. Const. amend. VI, XIV; N.C. Const. art. I, § 18. Because the jury’s safety concern did not arise from an “improper and prejudicial” matter, we hold that the trial court did not err in failing to conduct a *Campbell* inquiry. *See Campbell*, 340 N.C. at 634, 460 S.E.2d at 156.

Relying on *Holbrook v. Flynn*, defendant contends that the trial court erred in failing to question the jurors about the jury note, especially given its reference to the large number of people in the courtroom. *See* 475 U.S. 560, 565-66, 89 L. Ed. 2d 525, 532 (1986). But *Holbrook* is inapposite. There, during the defendant’s trial, four uniformed state troopers sat in the first row of the courtroom’s spectators’ section. *Id.* at 562, 89 L. Ed. 2d at 530. Although the Court noted in its background discussion that the trial judge had questioned the prospective jurors about the effect of the troopers’ presence, the Court did not suggest that such an inquiry was required. *Id.* at 565-66, 89 L. Ed. 2d at 532. Rather, the Court addressed the issue of whether the troopers’ presence “was so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial.” *Id.* at 570, 89 L. Ed. 2d at 535. The Court held that the troopers’ presence did not violate the defendant’s right to a fair trial. *Id.* at 572, 89 L. Ed. 2d at 537. The issue of whether the trial judge was required to question the jury about the troopers’ presence was not presented or addressed in *Holbrook*. We also note that the courtroom environment here was far less potentially prejudicial than the one in *Holbrook*. In addition, the trial judge was already well aware of the people in the courtroom as well as the testimony about defendant’s statement that two of his fellow gang members would be coming to watch the proceedings; the trial judge also had the opportunity to observe the

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jurors' reactions and demeanor during the entire trial. Accordingly, we hold that the trial court's failure to question the jury about the third jury note did not violate defendant's constitutional rights to an impartial jury and a fair trial.

## IV. Right to Presence

## A. Analysis

**[2]** Defendant next contends that the trial court's failure to disclose the third jury note violated his right to presence under the Sixth and Fourteenth Amendments of the U.S. Constitution and article I, sections 19 and 23 of the North Carolina Constitution. See U.S. Const. amend. VI, XIV; N.C. Const. art. I, §§ 19, 23.

Although the United State Supreme Court has stated that the confrontation clause of the federal constitution guarantees each criminal defendant the fundamental right to personal presence at *all critical stages* of the trial, our state constitutional right of confrontation has been interpreted as being broader in scope, guaranteeing the right of every accused to be present at *every stage* of his trial.

*State v. Badgett*, 361 N.C. 234, 248, 644 S.E.2d 206, 215, *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007).

The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution guarantees an accused the right to be present in person at every stage of his trial. This right to be present extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him.

....

The trial court errs when it communicates with a juror in the absence of the defendant. A defendant's actual presence in the courtroom can be negated by the court's cloistered conversations with jurors or prospective jurors. Such actions may prevent the defendant from participating in the proceeding, either personally or through counsel; and they deprive the defendant of any real knowledge of what transpired.

*State v. Jones*, 346 N.C. 704, 708-09, 487 S.E.2d 714, 717-18 (1997) (citations and quotation marks omitted). "It is well established under North

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Carolina law that *ex parte* communications between the trial court and the jury [are] prohibited.” *Callahan*, 102 N.C. App. at 346, 401 S.E.2d at 794. In *Jones*, the trial judge passed a note to an alternate juror without revealing its contents to the defendant or his counsel. *Jones*, 346 N.C. at 710, 487 S.E.2d at 718. The North Carolina Supreme Court held that “this action negated defendant’s presence in the courtroom and constituted a violation of his right to be present at all stages of his capital trial.” *Id.*, 487 S.E.2d at 718. Similarly, here, the trial court did not disclose the third jury note to defendant.

The State relies on *United States v. Gagnon* for the proposition that “[t]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right.” See 470 U.S. 522, 526, 84 L. Ed. 2d 486, 490 (1985) (per curiam) (brackets omitted). But *Gagnon* is inapposite, because our state constitutional right to presence is broader than the federal constitutional right to presence. See *Badgett*, 361 N.C. at 248, 644 S.E.2d at 215; *State v. Buchanan*, 330 N.C. 202, 217 n.1, 410 S.E.2d 832, 841 n.1 (1991) (citing the *ex parte* conversation in *Gagnon* as an example of a communication which would violate our state constitutional right to presence although it did not violate the federal constitutional right to presence). Following *Jones*, we hold that the trial court’s failure to disclose the third jury note violated defendant’s state constitutional right to presence. See *Jones*, 346 N.C. at 710, 487 S.E.2d at 718.

## B. Prejudice

We next examine whether the trial court’s error prejudiced defendant. “Once a violation of the right to be present is apparent, the State then has the burden to show that the violation was harmless beyond a reasonable doubt.” *Id.*, 487 S.E.2d at 718.

In *Jones*, the *ex parte* communication was “benign” and “did not relate in any way to defendant’s trial.” *Id.*, 487 S.E.2d at 718. The North Carolina Supreme Court held that the error was harmless beyond a reasonable doubt. *Id.*, 487 S.E.2d at 718. Similarly, in *State v. Golphin*, the trial court directed the clerk of court to meet privately with the jurors to provide logistical information to the jurors and to obtain the jurors’ telephone numbers. 352 N.C. 364, 418, 533 S.E.2d 168, 206 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). The North Carolina Supreme Court overruled the defendant’s assignment of error, because “the clerk limited any conversation to the logistics of jury service and any other administrative matters.” *Id.* at 419, 533 S.E.2d at 207. Similarly, in *Badgett*, the trial court directed the bailiff to remind the prospective

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jurors to not discuss the case with anyone and to not read any newspaper accounts of the case. *Badgett*, 361 N.C. at 252-53, 644 S.E.2d at 217. The North Carolina Supreme Court held that the trial court did not commit prejudicial error, because “the communications did not relate to defendant’s guilt or innocence, nor would defendant’s presence have been useful to his defense.” *Id.* at 254, 644 S.E.2d at 218 (quotation marks, brackets, and ellipsis omitted).

In contrast, in *State v. Payne*, the trial court gave admonitions to the jury in the jury room outside the presence of the defendant. 320 N.C. 138, 139-40, 357 S.E.2d 612, 612-13 (1987). The North Carolina Supreme Court held that the State could not show that the trial court’s error was harmless beyond a reasonable doubt, because no court reporter was present during the admonitions. *Id.* at 140, 357 S.E.2d at 613.

Relying on *Jones*, *Golphin*, and *Badgett*, the State contends that the entire jury note was “administrative and non-substantive.” See *Jones*, 346 N.C. at 710, 487 S.E.2d at 718; *Golphin*, 352 N.C. at 419, 533 S.E.2d at 207; *Badgett*, 361 N.C. at 254, 644 S.E.2d at 218. The State also points out the administrative nature of the second part of the note: “We need 12 letters—1 for each juror showing we have been here throughout this trial[.]” But the jury’s safety concern partially stemmed from Smith’s testimony so at least to some extent, the third jury note related to defendant’s trial. Accordingly, we hold that *Jones*, *Golphin*, and *Badgett* are not squarely on point. See *Jones*, 346 N.C. at 710, 487 S.E.2d at 718; *Golphin*, 352 N.C. at 419, 533 S.E.2d at 207; *Badgett*, 361 N.C. at 254, 644 S.E.2d at 218. We also distinguish *Payne* given that we do have a record of the jury note. See *Payne*, 320 N.C. at 140, 357 S.E.2d at 613.

One of the most salient facts about the jury’s third note is unfortunately not provided by our record: the exact time the jury submitted the note. The trial transcript does not mention the third jury note, but the record does demonstrate that it was “not brought to the attention of the defendant or his counsel during the trial, and the trial court did not address the note[] on the record.” The State argues that the third note was probably submitted simultaneously with the verdict or immediately thereafter, considering the content of the note, particularly the request for twelve notes to confirm the jurors’ service. We do know that the third note was submitted on the last day of deliberations, and we agree that it is highly probable that the note came with the verdict and that may be why it was not mentioned in the transcript. The jury requested that the trial judge not address the third note in open court, and if it had already rendered a verdict, the trial judge may have spoken to the jurors about

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their questions after their service was complete. But probability is not sufficient, and we cannot rule based upon speculation about what might have happened. The burden is upon the State to show that any violation of the defendant's constitutional right was harmless beyond a reasonable doubt, so we must assume for purposes of our analysis that the third note was submitted at some point prior to the completion of deliberations and at a time when the defendant could have had an opportunity to request that the trial court address the note in some manner. *See Jones*, 346 N.C. at 710, 487 S.E.2d at 718. We also note that the record states that the jury sent the third note "[d]uring the trial," suggesting that the jury sent the note during its deliberations.

Defendant contends that, had the trial court disclosed the third jury note, he could have renewed his objection to Smith's testimony under North Carolina Rule of Evidence 403 and moved to strike Smith's testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 403. The State responds that the trial court would have denied such a motion, because Smith's testimony was "highly probative of defendant's guilt."

Rule 403 provides: "Although relevant, evidence may 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." *Id.* (emphasis added).

While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial. The meaning of unfair prejudice in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, [on] an emotional one. . . .

. . . .

Generally, an attempt by a defendant to intimidate a witness to affect the witness's testimony is relevant and admissible to show the defendant's awareness of his guilt.

*State v. Rainey*, 198 N.C. App. 427, 433, 680 S.E.2d 760, 766 (citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 363 N.C. 661, 686 S.E.2d 903 (2009).

Smith testified that he and defendant had once been members of the same gang and that in January 2012, while they were in jail, defendant

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confessed to him that he had killed a man during a botched robbery. Smith also testified that in December 2013, defendant told him more details about the murder and gave him the names of potential witnesses whom he wanted to be persuaded to not testify. Smith testified that later that month, defendant told him to mark certain potential witnesses for execution and to threaten to mark one potential witness's mother and grandmother for execution. Smith further testified that on Sunday, 26 January 2014, defendant asked him to mark Jones for execution, who had begun testifying on Friday, 24 January 2014. Smith also testified that defendant had told him that two of his fellow gang members would be present in the courtroom to observe which witnesses testified. Smith finally testified that on Monday, 27 January 2014, while waiting in a holding cell at the courthouse, he overheard defendant telling a fellow gang member to mark Smith for execution, because Smith had agreed to testify against defendant.

Smith's testimony is highly probative of defendant's guilt. *Rainey*, 198 N.C. App. at 433, 680 S.E.2d at 766 ("Generally, an attempt by a defendant to intimidate a witness to affect the witness's testimony is relevant and admissible to show the defendant's awareness of his guilt."). Smith's testimony is also highly prejudicial to defendant, but we must examine whether that prejudice is necessarily unfair in that it has a tendency to suggest a decision on an improper basis. *See id.*, 680 S.E.2d at 766.

Defendant contends that the third note indicates that the jury was "frightened[.]" But the jury asked: "Do we have any concern for our safety following the verdict?" The jury's question indicates that the jury believed there might be a potential safety concern but wanted to know the trial judge's thoughts. We hold that the wording of the jury's question does not evince fear, but the awareness of a potential safety concern. This type of concern would probably arise in any case in which there is evidence of a murder, threats to potential witnesses, and potential gang involvement, and it is entirely reasonable for jurors to express this type of general concern.

Additionally, we examine the jury's question in context. First, the jury submitted this question as the first of two questions in its third note. The second part of the third note deals with a purely administrative matter. The jury had also submitted the second note during its deliberations which contained requests for certain pieces of evidence and certain legal definitions. The fact that the jury submitted several other requests in addition to the question at issue indicates that the jury was not prejudiced by fear. *See U.S. v. McAnderson*, 914 F.2d 934, 943 (7th

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Cir. 1990). In *McAnderson*, eight jurors sent a note to the trial judge, which included the following question: “Many of us use public transportation and walk 4-6 blocks from here to the depot. Due to the severe accusations and due to the fact that it will be getting dark earlier, is it possible to have someone take us to the depot at night?” *Id.* The federal appellate court observed: “The note itself does not indicate that the jury could not consider the issues before it impartially. Indeed, the question on which defendants base their objection is fourth on the list following questions about sequestration and other procedural matters. This hardly indicates a jury preoccupied with terror.” *Id.* The federal appellate court held that the note did not indicate that the jury was prejudiced by fear. *Id.* Similarly, here, the context of the note does not indicate that the jury was prejudiced by fear. *See id.*

Second, the jury spent almost a full day in its deliberations and requested several specific pieces of evidence and certain legal definitions. The jury rendered its verdicts a few hours after receiving most of the requested evidence and instructions.<sup>4</sup> Additionally, the jury found defendant guilty of first-degree murder under the felony murder rule but not on the basis of premeditation and deliberation. The jury’s attention to detail in its deliberations and verdicts indicates that it was not prejudiced by fear. *See State v. Newson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 767 S.E.2d 913, 920 n.1 (2015) (noting that the fact that “the jury asked to review, and did review, specific pieces of evidence before rendering its verdict” suggests a lack of juror prejudice); *U.S. v. Paccione*, 749 F. Supp. 476, 478 (S.D.N.Y. 1990) (“[I]t should be noted that the care and attention to detail exhibited by the jury both in the deliberation process and in the verdict itself contradicts any suggestion that the jury’s judgment was affected by fear of the defendants.”).

In summary, viewing the third jury note in context demonstrates that Smith’s testimony did not suggest decision on an improper, emotional basis, and the jury in fact did not make its decision on an improper, emotional basis. *See Rainey*, 198 N.C. App. at 433, 680 S.E.2d at 766. While Smith’s testimony was certainly prejudicial to defendant, the danger of *unfair* prejudice did not *substantially* outweigh its probative value. *See id.*, 680 S.E.2d at 766; N.C. Gen. Stat. § 8C-1, Rule 403. Accordingly, we hold that, had the trial court disclosed the jury note to defendant and had defendant renewed his objection under Rule 403, the trial court would

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4. The trial court did not allow the jury to consider the transcript of defendant’s interview with a police detective, which was requested in the second jury note, as it was never tendered or received into evidence.



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not have had any reason to change its ruling admitting Smith's testimony. Because the trial court would have overruled defendant's objection, the trial court also would have denied a motion to strike Smith's testimony.

Defendant also contends that, had the trial court disclosed the jury note, he could have requested that the trial court (1) conduct individual *voir dire* of the jury "to find which jurors in particular feared for their safety and the extent to which that fear influenced their deliberations"; (2) instruct the jury that "there was no evidence that [defendant] or any courtroom spectator intended to harm the jurors"; (3) instruct the jury to not consider the number of people in the courtroom for any purpose; and (4) instruct the jury "to set aside [its] fears, and that [it was] not to permit [its] fears to influence [its] evaluation of [defendant's] credibility or of his case." But as discussed above, the record indicates that Smith's testimony did not cause the jury to base its decision on fear or any other improper basis, and the jury in fact did not make its decision on an improper, emotional basis. Nor did the jury consider any improper extrinsic information. Accordingly, had defendant made these requests, the trial court could have properly denied all of them. *See U.S. v. Thornton*, 1 F.3d 149, 155-56 (3rd Cir. 1993) (holding that a trial judge "is usually well-aware of the ambience surrounding a criminal trial and the potential for juror apprehensions" and that in determining whether to question jurors about their safety concern, a trial judge is in a much better position than an appellate court to balance the probable harm resulting from the emphasis such action would place upon the jurors' safety concern against any potential prejudice resulting from the jurors' safety concern), *cert. denied*, 510 U.S. 982, 126 L. Ed. 2d 433 (1993). Similarly, had defendant made a motion for a mistrial, the trial court would not have erred in denying it. We therefore hold that the State has shown that the trial court's failure to disclose the jury note was harmless beyond a reasonable doubt. *See Jones*, 346 N.C. at 710, 487 S.E.2d at 718.

## V. Statutory Violation

[3] Defendant next contends that the trial court violated N.C. Gen. Stat. § 15A-1234. Defendant specifically asserts that this statute requires a trial court (1) to disclose every jury note to a defendant and to hear the defendant in connection with every note; and (2) to respond to every jury note in open court. N.C. Gen. Stat. § 15A-1234 provides:

(a) After the jury retires for deliberation, the judge may give appropriate additional instructions to:

(1) Respond to an inquiry of the jury made in open court; or

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- (2) Correct or withdraw an erroneous instruction;  
or
- (3) Clarify an ambiguous instruction; or
- (4) Instruct the jury on a point of law which should have been covered in the original instructions.

(b) At any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions.

(c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

(d) All additional instructions must be given in open court and must be made a part of the record.

N.C. Gen. Stat. § 15A-1234 (emphasis added). “Whether or not to give additional instructions rests within the sound discretion of the trial court and will not be overturned absent abuse of that discretion.” *State v. Bartlett*, 153 N.C. App. 680, 685, 571 S.E.2d 28, 31 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 679, 577 S.E.2d 892 (2003). “[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court’s instructions.” *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986).

As noted above, defendant argues that this statute requires a trial court (1) to disclose every jury note to a defendant and to hear the defendant in connection with every note and (2) to respond to every jury note in open court. Although we would agree that because of a defendant’s right to presence under article I, section 23 of the North Carolina Constitution, the trial court *should* disclose every jury note to a defendant, as discussed above, N.C. Gen. Stat. § 15A-1234 does not direct this disclosure. *See* N.C. Gen. Stat. § 15A-1234. This statute addresses the circumstances when a trial judge *may* give additional instructions to the jury after it has retired for deliberations; one of those circumstances is to “[r]espond to an inquiry of the jury made in open court[.]”

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*Id.* § 15A-1234(a)(1). But nothing in this statute *requires* a trial judge to respond to a jury note in a particular way. *See State v. Davis*, 167 N.C. App. 770, 773, 607 S.E.2d 5, 8 (2005) (“This statute *does not prevent* the judge from responding in open court to a written question from the jury.” (emphasis added) (discussing N.C. Gen. Stat. § 15A-1234)).

Defendant relies on *State v. King*, 342 N.C. 357, 365, 464 S.E.2d 288, 293 (1995). But *King* is inapposite. There, the defendant contended that the trial court erred in instructing the jury that any request or question must be “of the jury, not of a juror.” *Id.* at 363, 464 S.E.2d at 293. The defendant argued that “the jurors would have understood this instruction to [mistakenly] mean that no questions could be asked of the court absent a consensus among the twelve jurors that the question should be asked.” *Id.*, 464 S.E.2d at 293. The North Carolina Supreme Court agreed with the defendant and held:

[N.C. Gen. Stat. § 15A-1234(a)(1)] does not mandate that all twelve jurors agree that a question be asked before it can be brought before the court. Rather, this statute merely requires that all communications between the court and the jury be conducted in open court with all members of the jury present.

*Id.* at 365, 464 S.E.2d at 293. But the Court did not hold that N.C. Gen. Stat. § 15A-1234 requires a trial judge to respond to a jury note or to disclose a jury note to which he does not respond. *See id.*, 464 S.E.2d at 293.

Defendant also relies on *State v. Ashe*, 314 N.C. 28, 33-34, 331 S.E.2d 652, 656 (1985). But *Ashe* is also inapposite, as the Court there discussed N.C. Gen. Stat. § 15A-1233(a), not N.C. Gen. Stat. § 15A-1234. *Id.*, 331 S.E.2d at 656. We note that N.C. Gen. Stat. § 15A-1233(a) is inapplicable here, because, in the jury note at issue, the jury did not “request[] a review of certain testimony or other evidence[.]” *See* N.C. Gen. Stat. § 15A-1233(a) (2013). Accordingly, we hold that the trial court did not violate N.C. Gen. Stat. § 15A-1234.

## VI. Conclusion

For the foregoing reasons, we hold that the trial court did not commit prejudicial error.

NO ERROR.

Judges DILLON and DAVIS concur.

**STATE v. MARTIN**

[241 N.C. App. 602 (2015)]

STATE OF NORTH CAROLINA

v.

DAMMION LAMONT MARTIN, DEFENDANT

No. COA14-1179

Filed 16 June 2015

**1. Appeal and Error—preservation of issues—informal offer of proof**

The defendant in a prosecution for sexual offense with a student preserved his evidentiary issue for appeal with an informal offer of proof. While a formal offer of proof is the preferred practice, an informal offer of proof may be appropriate in certain situations. Precedents to the contrary were distinguished.

**2. Evidence—prior sexual conduct of victim—Rape Shield Statute exceptions—issues common to all trials**

In a prosecution for sexual offense with a student, the trial court erred by concluding that evidence of prior sexual behavior by the student was per se inadmissible where it went to motive. The Rape Shield Statute was not intended to be a barricade against evidence used to prove issues common to all trials: there should have been a determination of whether the evidence was, in fact, relevant to show motive for a false accusation and, if so, there should have been a balancing test of the probative and prejudicial value of the evidence. Here the trial court's failure to exercise its discretion was prejudicial on one conviction and not on the other.

Appeal by Defendant from judgments entered 2 May 2014 by Judge W. Douglas Parsons in Jones County Superior Court. Heard in the Court of Appeals 5 March 2015.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Sherri Horner Lawrence, for the State.*

*Jarvis John Edgerton, IV, for Defendant-appellant.*

DILLON, Judge.

Dammion Lamont Martin (“Defendant”) was convicted by a jury of two counts of sexual offense with a student. For the following reasons, we find no error with one of the convictions; however, with respect to the other conviction, we reverse and remand the matter for a new trial.

**STATE v. MARTIN**

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**I. Background**

Defendant worked as a substitute high school teacher. He was accused by a student of sexually assaulting her in 2006 at a school where he was working. He was accused by another student of sexually assaulting her in 2008 at the same school. Defendant was tried for both incidents in a single jury trial.

The State's evidence at trial tended to show as follows: The student involved in the 2008 incident, Katie<sup>1</sup>, testified that one afternoon after school as she was walking past the school's football field house, Sherman<sup>2</sup>, a student on the football team, playfully carried her into the boys' locker room. Two other football players were standing inside preparing for practice. Katie stated that she knew that she was not allowed in the boys' locker room, but that they were just standing and talking.

As they were standing and talking in the locker room, Defendant entered, questioned the boys about a girl being in the locker room, and told the boys to head to practice. After the boys had exited, Defendant told Katie to go with him to an adjacent classroom where he informed her that she could face suspension for being in the locker room. Defendant also indicated that the boys probably wanted Katie to perform oral sex on them, which Katie denied having occurred. Defendant then, however, asked Katie to perform oral sex on him. He locked the classroom door, approached Katie, and dropped his pants down, whereupon Katie performed oral sex on Defendant for about a minute, fearing that she would be suspended if she refused. Afterwards, Katie left the room, upset and crying.

The State's evidence further showed that Katie gave consistent accounts of the incident to the sheriff's department, the school principal, and an SBI agent.

Sherman also testified for the State, stating that Katie was just standing and talking to him and the other players when Defendant found them in the locker room, that Defendant questioned the players about a girl being in the locker room and that he told them to go to practice.

Regarding the 2006 incident, a student testified for the State that Defendant forced her to perform oral sex on him when they were alone in a classroom. She soon told a friend and the principal about the

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1. A pseudonym.

2. A pseudonym.

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incident but decided not to press charges at that time. However, years later upon hearing Katie's story on the news, she contacted the sheriff's department about what had happened to her.

Defendant testified on his own behalf, denying that he had any sexual contact with either student.

A jury acquitted Defendant of two counts of second-degree sexual offense, but found him guilty of two counts of sexual offense with a student. The trial court sentenced Defendant to two consecutive terms of 13 to 16 months of imprisonment. Defendant gave notice of appeal in open court.

## II. Analysis

This appeal concerns an evidentiary ruling of the trial court. Specifically, Defendant's counsel sought to introduce the testimonies of Defendant and two other witnesses as evidence to show that Katie was performing oral sex on the football players when Defendant entered the locker room on the day in question. He sought to introduce this evidence for the purpose of showing that Katie had a motive to falsely accuse Defendant of sexual assault. After conducting an *in camera* hearing (outside the presence of the jury) where Defendant's counsel made an offer of proof concerning the witnesses' proposed testimonies, the trial court ruled that the evidence was *per se* irrelevant because the evidence did not fit under any of the four exceptions provided in our Rape Shield Statute (Rule 412 of our Rules of Evidence), a statute which declares that other sexual behavior engaged in by the prosecuting witness generally to be irrelevant.

On appeal, Defendant argues that the trial court erred in its evidentiary ruling and that he was prejudiced by the error such that *both* his convictions should be reversed. The State, however, argues that (1) Defendant failed to preserve his appeal by failing to make a *sufficient* offer of proof at the *in camera* hearing and, (2) that, in any event, the trial court properly excluded the evidence under Rule 412.

For the reasons stated in subsection A below, we hold that Defendant's offer of proof was sufficient to preserve his appeal.

On the merits of the appeal, for the reasons stated in subsection B below, we hold that the trial court had discretion to admit the evidence since it was being offered to show motive and that the trial court erred by not exercising this discretion when concluding that the evidence was *per se* inadmissible.

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## A. Adequacy of Defendant's Offer of Proof

[1] Our Supreme Court has held that to preserve for appellate review the exclusion of evidence, “the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record.” *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010).

In the present case, Defendant’s counsel made an *informal* offer of proof; that is, he represented to the court the content of the testimonies his witnesses would provide. In contrast, a *formal* offer of proof is made when counsel calls the witnesses to provide their proposed testimonies at the hearing. The State argues that an offer of proof made informally is *per se* insufficient to preserve the appeal. We disagree.

Our Supreme Court has never held that a *formal* offer of proof is the only sufficient means to make an offer of proof: “We wish to make it clear that there may be instances where a witness need not be called and questioned in order to preserve appellate review of excluded evidence.” *State v. Simpson*, 314 N.C. 359, 372, 334 S.E.2d 53, 61 (1985). Rather, our Supreme Court has merely stated that a formal offer of proof is the *preferred* method and that the practice of making an informal offer of proof “should not be encouraged,” *State v. Willis*, 285 N.C. 195, 200, 204 S.E.2d 33, 36 (1974).

Our Court has recently held that an informal offer of proof may be sufficient in certain situations to “establish the essential content or substance of the excluded testimony.” *State v. Walston*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 747 S.E.2d 720, 724 (2013), *reversed on other grounds*, 367 N.C. 721, 766 S.E.2d 312 (2014).

Likewise, our statutes do not require that an offer of proof be made in any particular form. For instance, Rule 43(c) of our Rules of Civil Procedure merely requires that the record be made to show how the witnesses would have testified and allows the trial court to note for the record “the form in which [the offer of proof] was offered[.]” N.C. Gen. Stat. § 1A-1, Rule 43 (2013). Further, Rule 103 of our Rules of Evidence does not mandate that offers of proof be made in any particular manner, but rather provides that the trial court “*may* direct the making of an offer in question and answer form.” N.C. Gen. Stat. § 8C-1, Rule 103(b) (2013) (emphasis added).

Though a *formal* offer is the preferred method, there are reasons where a trial court may deem an informal offer to be appropriate. For example, an informal offer saves time and is cost-effective. Allowing an

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informal offer is more convenient for witnesses in that they would not have to appear unless the trial court ruled their testimonies to be admissible. However, an informal offer is only sufficient when the attorney making the offer demonstrates a “specific forecast of what the testimony would be[.]” rather than “merely [his] guess [as to] what the witnesses might say[.]” *Walston*, \_\_\_ N.C. at \_\_\_, 747 S.E.2d at 724. A “specific forecast” would typically include the substance of the testimony (as opposed to merely stating what he plans to ask the witness), the basis of the witness’ knowledge, the basis for the attorney’s knowledge about the testimony, and the attorney’s purpose in offering the evidence. The informal offer should be made with *particularity* and not be made in a summary or conclusory fashion.

Notwithstanding the attorney’s knowledge about the testimony, it remains in the trial court’s discretion whether to allow the offer to be made informally. *See* N.C. Gen. Stat. § 8C-1, Rule 103(b).<sup>3</sup> And where a trial court allows an informal offer of proof to be made, a reviewing court may still deem the offer insufficient to preserve an appeal.

In the present case, we hold that the offer of proof made by Defendant’s counsel is sufficient for this Court to conduct appellate review. It is apparent from the transcript of the hearing that counsel had interviewed each witness and therefore knew first-hand the content and substance of their testimonies and that he was unambiguous about how they would testify. It is equally apparent that the trial court clearly understood the nature and content of the testimonies and decided the evidentiary issue based on the offer of proof.

We are fully aware of the State’s argument that we are compelled by our decisions in *State v. Black*, 111 N.C. App. 284, 432 S.E.2d 710 (1993), and *State v. Cook*, 195 N.C. App. 230, 672 S.E.2d 25 (2009), to conclude that an informal offer of proof is *per se* insufficient in the context of a Rule 412 *in camera* hearing. However, we disagree.

The defense attorneys in *Black* and *Cook* each made an informal offer of proof during the *in camera* hearing regarding past sexual behavior of the complainant. Admittedly, there is language in each opinion

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3. The trial court should afford opposing counsel the opportunity to object to an offer of proof to be made informally. There is nothing in Rule 103(c) of our Rules of Evidence or Rule 43(c) of our Rules of Civil Procedure to indicate that a trial court *must* refuse to allow an offer be made informally when there is an objection to this form by opposing counsel. We do not reach this issue since the State’s counsel in the present case did not object to the *form* by which Defendant’s counsel made his offer.



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*which suggests* that an informal offer of proof is *per se* insufficient, arguably implying that an offer of proof requires an attorney to produce “evidence” upon which a court could rule but that an attorney’s assertions about how a witness would testify is not “evidence.” *Black*, 111 N.C. App. at 289, 432 S.E.2d at 714; *Cook*, 195 N.C. App. at 238, 672 S.E.2d at 30. However, we did not hold in those cases that the law regarding the *form* in which an offer of proof must be made is different in a Rule 412 hearing context. Further, we note that there is nothing in Rule 412 itself to suggest that an offer of proof made thereunder *must* be made formally. Indeed, there may be situations where a trial court may not want to require a witness to recount an episode involving sexual behavior *twice* during the course of a trial (once at the *in camera* hearing and again before the jury). Therefore, to the extent that *Black* and *Cook* could be read to provide a *per se* rule prohibiting an informal offer of proof, we hold that they conflict with our Supreme Court’s decisions disavowing a *per se* rule.

In any event, we find *Black* distinguishable from the present case. Here, Defendant’s counsel made an offer of proof regarding the testimonies of the witnesses he wanted to call. However, the defense counsel in *Black*, who received information about the complainant’s prior sexual behavior from a third party, sought to introduce this evidence during his *cross examination of the complainant*. *Black*, 111 N.C. App. at 289, 432 S.E.2d at 714 (sole issue at *in camera* hearing was whether the trial court would “allow [defense counsel] to question [the complainant] before the jury regarding her sexual relations with [certain other] men”). This difference is significant. In the present case, the offer of proof by Defendant’s counsel showed how his witnesses would testify and arguably how the evidence was relevant to show Katie’s motive to falsely accuse Defendant. However, in *Black*, the defense counsel’s offer of proof did not show how *the complainant* would answer on cross examination, especially where the complainant specifically testified at the hearing denying the prior sexual behavior. In *Black*, the only evidence before the court *as to how the complainant would answer* was her own testimony. This evidence that complainant did not engage in some prior incident of sexual behavior was not relevant to the trial, and the trial court ruled correctly in determining that the attorney’s informal offer about the testimony of another person was insufficient to allow him to cross-examine her.

*Cook* involved the same scenario and is, likewise, distinguishable from the present case for the same reason. *Cook*, 195 N.C. App. at 238, 672 S.E.2d at 31 (the *in camera* hearing “occurred during [the

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complainant's] cross-examination and related to whether defense counsel would be allowed to ask [the complainant] certain questions"). Admittedly, though, *Cook* went further than *Black*, which makes that case more difficult to distinguish. Specifically, *Cook* also held that the trial court correctly excluded *the male witness himself* from testifying about the prior encounter. *Id.* at 237-38, 672 S.E.2d at 30. In so holding, this Court reasoned that defense counsel's offer of proof characterizing the male witness' testimony was insufficient to preserve the appeal. *Id.* However, to the extent that this Court relied on this reasoning, we believe that it conflicts with decisions of our Supreme Court disavowing a *per se* rule regarding the sufficiency of informal offers of proof. Further, we note that this Court also provided an independent alternate basis in *Cook* for affirming the trial court's holding, namely that to the extent the informal offer was sufficient, the defendant's counsel failed to argue how the male witness' testimony was relevant. *Id.*

B. Evidence of the Complainant's Motive Was Not *Per se*  
Inadmissible Under the Rape Shield Statute

[2] Having concluded that Defendant has preserved his appeal, we reach the merits of his appeal.

At trial, Defendant sought to introduce his testimony and that of two other witnesses to show that Katie had a motive to falsely accuse him. However, this evidence would reveal a prior incident of sexual behavior in which Katie was involved, and, therefore, its introduction at trial is subject to our Rape Shield Statute, currently codified in N.C. Gen. Stat. § 8C-1, Rule 412 (2013). The Rape Shield Statute declares that evidence concerning other sexual behavior of the complainant (besides the behavior for which the defendant is indicted) is irrelevant *unless* it falls within one of four categories. N.C. Gen. Stat. 8C-1, Rule 412(b).

The Rape Shield Statute requires that before a witness is asked any question regarding other sexual behavior involving the complainant, the proponent must first make an offer of proof and argument at an *in camera* hearing so that the trial court can determine the admissibility of the evidence before any mention of it is made in the presence of the jury. N.C. Gen. Stat. § 8C-1, Rule 412(b).

In the present case, Defendant's counsel indicated that Defendant would testify that when he entered the locker room, he saw Katie sitting in front of the three football players as they were standing with their pants down to their ankles. Counsel also indicated that one of the football players in the locker room was a client of his on an unrelated matter

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and that this player would testify that Katie was performing oral sex on him and the players when Defendant entered the locker room.<sup>4</sup> During the hearing, Defendant's counsel conceded that this alleged sexual behavior between Katie and the football players did not fall within any of the four exceptions provided in the Rape Shield Statute. Nonetheless, he argued that the evidence should be admitted since it was relevant to show Katie's motive to falsely accuse Defendant, namely to hide from her father and others what she was really doing in the locker room that day. The trial court disagreed, essentially ruling that since the evidence did not fall within any of the four categories under the Rape Shield Statute, it was *per se* inadmissible.

On appeal, Defendant argues that the trial court erred by concluding that the evidence was *per se* irrelevant since it did not fall within one of the Rape Shield Statute's four exceptions and that it lacked discretion to consider the potential admissibility of the evidence. We agree.

Our Supreme Court has expressly held that the four exceptions set forth in the Rape Shield Statute do not provide "the sole gauge for determining whether evidence is admissible in rape cases." *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982). As our Supreme Court has explained, the Rape Shield Statute "define[s] those times when [other] sexual behavior of the complainant is relevant to issues raised in a rape trial and [is] not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes." *State v. Fortney*, 301 N.C. 31, 42, 269 S.E.2d 110, 116 (1980) (emphasis added). That is, "the [Rape Shield Statute] was not intended to act as a barricade against evidence which is used to prove issues common to all trials." *Younger*, 306 N.C. at 697, 295 S.E.2d at 456 (emphasis added). More recently, our Court has held that there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute. See *State v. Edmonds*, 212 N.C. App. 575, 580, 713 S.E.2d 111, 116 (2011) (noting that "[t]he lack of a specific basis under [the Rape Shield Statute] for admission of evidence does not end our analysis"); see also *State v. Bass*, 121 N.C. App. 306, 310-11, 465 S.E.2d 334, 336-37 (1995) (impeachment of complainant denying a sexual encounter based on her prior

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4. Defendant's counsel indicated that a third witness, a student at the school, would testify that she had been in the locker room on other occasions with Katie to perform oral sex on football players.

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inconsistent statement admitting the encounter had occurred); *State v. Fenn*, 94 N.C. App. 127, 132, 379 S.E.2d 715, 718 (1989) (State opens the door to impeachment evidence where complainant's testimony on direct denies past incidents of sexual behavior.<sup>5</sup>

In the present case, Defendant's defense was that he did not engage in any sexual behavior with Katie but that Katie fabricated the story to hide the fact that Defendant caught her performing oral sex on the football players in the locker room. Where the State's case in *any* criminal trial is based largely on the credibility of a prosecuting witness, evidence tending to show that the witness had a motive to falsely accuse the defendant is certainly relevant. The motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault.<sup>6</sup>

The trial court erred by concluding that the evidence was inadmissible *per se* because it did not fall within one of the four categories in the Rape Shield Statute. Here, the trial court should have looked beyond the four categories to determine whether the evidence was, in fact, relevant to show Katie's motive to falsely accuse Defendant and, if so, conducted a balancing test of the probative and prejudicial value of the evidence under Rule 403 or was otherwise inadmissible on some other basis (e.g., hearsay). See *State v. Edmonds*, 212 N.C. App. at 578, 713 S.E.2d at 115 (quoting N.C. Gen. Stat. § 8C-1, Rule 403 (2009)).

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5. In the present case, the State arguably "opened the door" to Defendant's evidence based on Katie's testimony on direct that she was only standing and talking in the locker room. Defendant's evidence may have been relevant to attack Katie's credibility by showing that she had given false testimony on direct. However, Defendant made no argument during the *in camera* hearing or in his brief on appeal that his evidence was admissible on this basis.

6. A defendant has the right under the Sixth Amendment of the Constitution to make his defense. See, e.g., *Olden v. Kentucky*, 488 U.S. 227, 102 L.Ed. 2d 513 (1988) (holding that a court's refusal to allow a defendant to introduce evidence revealing the prosecuting witness' sexual relationship with her boyfriend to show her motive to falsely accuse the defendant of rape violated the defendant's Sixth Amendment right to mount a defense). And there are certainly situations where a defendant should be entitled to offer evidence which may otherwise be excluded by our Rape Shield Statute, as our Supreme Court has indicated in *Younger, supra*. In these situations, a trial judge should strive to fashion a compromise. For example, where a defendant claims that the prosecuting witness is falsely accusing him of rape rather than admitting to her boyfriend that her encounter was consensual, the trial court may allow the defendant to introduce evidence of the prosecuting witness' dating relationship with her boyfriend without introducing details of their sexual relationship. See *State v. Harrell*, 2005 N.C. App. LEXIS 104 (N.C. Ct. App. Jan. 18, 2005) (unpublished).

## STATE v. MIMS

[241 N.C. App. 611 (2015)]

Having concluded that the trial court erred by failing to exercise its discretion, we hold that this error was prejudicial with respect to Defendant's conviction of the 2008 incident involving Katie. For this charge, the State's case was based almost entirely on Katie's testimony. There were no other eyewitnesses or any physical evidence proving the crime had occurred. If the jury heard the evidence, it is reasonably possible that one or more of them would have had a reasonable doubt as to the veracity of Katie's testimony.

Defendant, however, has failed to demonstrate in his brief how the error prejudiced him with regard to his conviction based on the 2006 incident. Defendant merely asserts that the error "impacted the jury's verdict," without explaining *how* it impacted the verdict. Accordingly, we find no error with respect to the conviction based on the 2006 incident.

## III. Conclusion

For the foregoing reasons, we find no error with respect to Defendant's conviction in 09 CRS 50133 arising from the 2006 incident; but we reverse Defendant's conviction in 09 CRS 50134 arising from the 2008 incident, remanding the matter for a new trial.

NO ERROR IN PART, REVERSE AND REMAND IN PART.

Judges STROUD and DAVIS concur.

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STATE OF NORTH CAROLINA, PLAINTIFF

v.

DONALD WAYNE MIMS, DEFENDANT

No. COA14-1333

Filed 16 June 2015

**1. Burglary and Unlawful Breaking or Entering—attempted—intent—evidence not sufficient**

The trial court did not err by denying defendant's motion to dismiss a charge of attempted first-degree burglary for insufficient evidence of intent where there was no evidence that defendant's attempt to break into a home was for a purpose other than to commit larceny.

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**2. Burglary and Unlawful Breaking or Entering—felonious breaking or entering—intent—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of attempted felonious breaking or entering for insufficient evidence. In ruling on defendant's motion for dismissal, the trial court could properly consider the evidence in light of *State v. McBryde*, 97 N.C. 393 (1887).

**3. Identification of Defendants—80% certainty—weight of evidence**

There was sufficient evidence of identity in a prosecution for breaking and entering where a witness identified defendant in a photo line-up to an 80% certainty. A witness's equivocation on the question of identity goes to the weight of the testimony rather than its competency.

Upon petition for *certiorari* from judgment entered 27 March 2013 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 3 June 2015.

*Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.*

*Attorney General Roy Cooper by Assistant Attorney General Katherine M. McCraw, for the State.*

STEELMAN, Judge.

Where there was no evidence that defendant had a non-criminal intent on either of the two occasions that he attempted to break into a dwelling, the trial court could properly infer that he had the intent to commit larceny, as set forth in *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887). The trial court did not err by denying defendant's motion to dismiss the charges against him for insufficient evidence.

**I. Factual and Procedural Background**

On 12 December 2011 Donald Wayne Mims (defendant) was indicted for the attempted first degree burglary of a duplex located in Raleigh, on 11 October 2011, and for possession of a stolen bicycle on the same date. On 13 December 2011 defendant was indicted for having attained the status of an habitual felon. On 6 February 2012 defendant was indicted for the 27 September 2011 attempted felonious breaking and entering at the same duplex. The charges against defendant came on for trial

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before a jury at the 26 March 2013 criminal session of Superior Court for Wake County.

Maria Flores (Flores) and Mr. Amet Gonzales (Gonzales) testified for the State. In September and October of 2011, Flores lived in the duplex with her husband, children, and Gonzales, who rented a room at the back of the unit. On 27 September 2011 Gonzales returned from work at around 2:00 p.m. and lay down to take a nap. Between 2:00 and 3:00 p.m., he heard a knock at the back door. He thought it might be Flores, and opened the door of his room, which opened onto a fenced back yard. He saw an unknown African-American man in the yard, and shouted "Police!" The man jumped over the back fence and ran away. Gonzales noticed that the screen on the back window, which was previously secured to the window frame, was now lying in the yard. Raleigh Police Officer Jose Delasierra was dispatched to the duplex in response to Gonzales's phone call to 911, and confirmed that the screen was lying on the ground. At a later date Raleigh Detective Isaac Perez administered a photo lineup to Gonzales. When Gonzales was shown defendant's picture, he "immediately identified" the photo as the person he had seen on 27 September 2011. Detective Perez asked Gonzales to rate the certainty of his identification on a scale of one to ten, and he characterized it as an "eight."

About 4:00 a.m. on 11 October 2011, Flores heard a knock at the front door. A few minutes later she heard the sound of someone tampering with the lock, and saw the door knob moving inside the house. She looked out a window and saw an African-American man leaving on a bicycle. Flores called 911 and after the police arrived, she went outside and saw that the door knob was loose and that the door frame, which had been intact, was damaged.

In the fall of 2011, Richard Jones (Jones) lived next door to Flores. He worked at a warehouse from 4:00 a.m. until 2:00 p.m., and on 11 October 2011 he got up at 3:00 a.m. to get ready for work. When he walked outside at around 3:30 a.m., Jones saw an unknown person on Flores's porch "messing with" the door knob. Jones described the man as a clean shaven black male who was carrying a backpack. When the man looked up and saw Jones, he inquired whether he could ask Jones a few questions, but Jones said "No, you need to keep it moving." While Jones watched, the man went to several other houses on the street and fiddled with the door knobs, before entering another dwelling. Jones called 911 and showed the police the house that the man had entered. As officers approached the house, the man rode off on a bicycle which Jones testified belonged to a neighbor.

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Officer Adam White was dispatched to the Flores duplex on 11 October 2011, where he spoke with Jones, who indicated that the man was at a dwelling down the street from Flores. Officer White saw the man attempting to ride away on a bicycle, and ordered him to stop. Defendant complied and gave Officer White permission to search his person and a backpack that he was carrying. Inside the backpack, Officer White found a watch, sunglasses, a shirt, and a video game. Officer White took defendant into custody. At the close of the State's evidence, the State announced that it would not proceed on the charge of possession of stolen property because the owner of the bicycle was not available.

Defendant did not present evidence. On 27 March 2013 the jury returned verdicts finding defendant guilty of attempted first degree burglary and attempted felonious breaking or entering. Defendant pled guilty to his status as an habitual felon. The trial court determined that defendant was a prior record level of VI for purposes of sentencing. The trial court found the existence of the mitigating factor that defendant suffered from "a mental condition that was insufficient to constitute a defense but significantly reduced [his] culpability for the offense." The trial court imposed a consolidated, mitigated range, sentence of 100 to 129 months imprisonment.

Defendant did not give notice of appeal, but subsequently petitioned for a writ of *certiorari*. On 10 December 2013 this Court granted defendant's petition for writ of *certiorari*, allowing him to pursue a belated appeal.

## II. Legal Analysis

### A. Standard of Review

In the sole issue raised on appeal, defendant argues that the trial court erred by denying his motion to dismiss the charges against him for insufficiency of the evidence. "The trial court's denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. On consideration of a motion to dismiss, the court need only determine whether there is substantial evidence of each essential element of the offense charged and of the defendant's being the perpetrator of the offense." *State v. Lee*, 213 N.C. App. 392, 398, 713 S.E.2d 174, 179 (2011) (citations omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. . . . [I]f there is substantial evidence—whether direct, circumstantial, or both—to



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support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.’” *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citations and quotation marks omitted)). “The trial court is ‘not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant’s motion to dismiss.’ Also, contradictions and inconsistencies do not warrant dismissal; the trial court is not to be concerned with the weight of the evidence. Ultimately, the question for the court is whether a reasonable inference of defendant’s guilt may be drawn from the circumstances.” *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (quoting *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990)).

B. Attempted First Degree Burglary

[1] “The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein.” *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996) (citing N.C. Gen. Stat. § 14-51). “The elements of attempt are an intent to commit the substantive offense and an overt act which goes beyond mere preparation but falls short of the completed offense.” *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003). In this case, defendant’s argument is limited to whether there was sufficient evidence of his intent to commit larceny. Because defendant does not challenge the sufficiency of the evidence of any other element of the offense, we limit our review to this issue. See *State v. Davis*, 198 N.C. App. 146, 151, 678 S.E.2d 709, 713-14 (2009).

This issue is controlled by the case of *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887), and subsequent cases that have interpreted it. In *McBryde*, the defendant was discovered in the house of another at 2:00 a.m. On appeal, the defendant argued that the State had failed to produce evidence that at the time he entered the house he had the intent to commit larceny. Our Supreme Court held:

The intelligent mind will take cognizance of the fact that people do not usually enter the dwellings of others in the night-time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone,

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in the night-time, accompanied by flight when discovered, is some evidence of guilt, and, in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent.

. . . [O]ur law will not permit juries to draw any inference to the prejudice of a prisoner from the fact that he does not himself go upon the stand as a witness in his own behalf, but there was no explanatory fact or circumstance from any source to show any intent not criminal, and the facts and circumstances proven are sufficient to outweigh the legal presumption of innocence, and put him upon his defense.

*McBryde*, 97 N.C. at 396-97, 1 S.E. at 927-28. Although *McBryde* is a case from the 19th Century, it continues to be followed by our appellate courts. For example, in *State v. Lucas*, \_\_ N.C. App. \_\_, 758 S.E.2d 672 (2014), this Court held, citing *McBryde*, that a “ ‘fundamental theory’ in the context of both burglary and breaking or entering is that absent ‘evidence of other intent or explanation for breaking and entering . . . the usual object or purpose of burglarizing a dwelling house at night is theft.’ ” *Lucas*, \_\_ N.C. App. at \_\_, 758 S.E.2d at 678 (quoting *State v. Hedrick*, 289 N.C. 232, 236, 221 S.E.2d 350, 353 (1976) (citation and quotation marks omitted), and citing *McBryde*). In this case, as in *McBryde*, there was no evidence that defendant’s attempt to break into Flores’s home was for a purpose other than to commit larceny, and we hold that the trial court did not err by denying defendant’s motions for dismissal.

In arguing for a contrary result, defendant directs our attention to evidence that (1) defendant asked Jones if he could ask him some questions; (2) when Jones told defendant to “keep moving” he “did not flee” but went to the doors of several other houses on the street and tried their door knobs; (3) when the police arrived, defendant rode away on a bicycle; however, when Officer White ordered defendant to stop, he complied, and gave permission for Officer White to search his person and backpack; and (4) the State did not present evidence that items in defendant’s backpack were stolen. Defendant speculates that this evidence “raises the inference that his purpose was to seek some kind of assistance, that he was looking for something or somebody, a purpose other than an intent to commit larceny which precludes application of the *McBryde* inference.” We disagree.

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First, defendant fails to articulate a logical connection between the cited evidence and an inference that defendant needed “some kind of assistance” or was searching for someone. Significantly, when defendant spoke with Jones, he did not indicate in any way that he was lost or needed assistance: he did not say that he was injured or that his car had broken down, or inquire whether a specific person lived on the street. Moreover, defendant does not explain how the evidence that he went from door to door at 4:00 a.m., trying the door knob of each dwelling, would be evidence of a non-criminal purpose, and does not cite any authority in support of this position. We note that in *Lucas*, we discussed a witness’s testimony that characterized the defendants’ actions in moving from house to house late at night as “casing the neighborhood.” The witness testified that “it’s just not normal activity for someone to be walking from house to house to see if it’s occupied or not.” *Lucas*, \_\_ N.C. App. at \_\_, 758 S.E.2d at 678. We agree, and hold that this behavior was not evidence of a non-criminal purpose.

As to the fact that defendant complied with Officer White’s order to stop, and that he was not in possession of stolen goods at the time of his arrest, defendant fails to explain how this evidence tends to show that defendant had a non-criminal reason for attempting to break into Flores’s dwelling. This evidence does not preclude application of the *McBryde* inference.

Defendant also cites several cases in which our appellate courts have held that where there was evidence that the defendant’s entry into the dwelling of another was for a purpose other than larceny, the State could not rely on the *McBryde* presumption to establish the defendant’s larcenous intent. However, these cases are easily distinguishable, since in each case there was testimony from witnesses that tended to show a specific non-criminal explanation for the defendant’s behavior. In *In re Mitchell*, 87 N.C. App. 164, 359 S.E.2d 809 (1987), the State offered testimony from the victim of a break-in that the juvenile respondent had told him she entered the house because she was being chased. In *State v. Moore*, 62 N.C. App. 431, 303 S.E.2d 230 (1983), the defendant testified that he had been forced at knife-point to enter the house.

However, in *State v. Simpson*, 303 N.C. 439, 449, 279 S.E.2d 542, 548 (1981), our Supreme Court rejected the defendant’s argument that there was insufficient evidence of felonious intent:

The only direct evidence of defendant’s intent in entering the dwelling is contained in his 12 April 1976 confession to law enforcement officers, in which he stated that after

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entering the dwelling, he immediately went to sleep on the floor. We note that defendant never claimed that his intent in entering the dwelling was to find a place to sleep; he merely stated that he in fact went to sleep after entering. It is well established that in the absence of proof to the contrary, a reasonable inference of felonious intent may be drawn from the fact that an individual broke and entered the dwelling of another in the night.

(citing *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976), and *McBryde*) (emphasis added). We hold that the instant case is more similar to *Simpson* in that there was no evidence showing that defendant had a non-felonious intent in attempting to break into Flores's dwelling.

This argument is without merit.

C. Evidence of Attempted Felony Breaking or Entering

[2] Defendant argues next that the trial court erred by denying his motion to dismiss the charge of attempted felonious breaking or entering on 27 September 2011. He contends that there was insufficient evidence either that he had the intent to commit larceny, or of his identity as the person who Gonzales saw in the yard. We disagree.

Defendant concedes that the *McBryde* inference, discussed above, may be applied to an attempted breaking or entering that occurs during daylight hours. “[T]his Court has previously applied the [*McBryde*] inference to breakings and enterings during the daytime.” *State v. Roberts*, 135 N.C. App. 690, 697, 522 S.E.2d 130, 134 (1999), *disc. rev. denied*, 351 N.C. 367, 543 S.E.2d 142 (2000). Defendant does not challenge the sufficiency of the evidence of defendant's attempted breaking or entering, and does not argue that there was any evidence of a non-felonious purpose. Therefore, in ruling on defendant's motion for dismissal, the trial court could properly consider the evidence in light of *McBryde*.

[3] As to the evidence of defendant's identity as the perpetrator, defendant argues that Gonzales did not identify him in court, and that he had told Officer Perez that he was only 80% sure that the photo of defendant was the person he had seen in the yard. We note that Gonzales testified that when he was shown the photo lineup he was able to identify the person he had seen on 27 September 2011, and that when he was asked how he recognized the photograph, he testified that “I see him again here when I was standing in front of him at the time.” In addition, it is well-established that “a witness's equivocation on the question of identity does not render the testimony incompetent, but goes only to

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its weight.” *State v. Pridgen*, 313 N.C. 80, 86, 326 S.E.2d 618, 623 (1985) (citations omitted). This argument is without merit.

**III. Conclusion**

The trial court did not err by denying defendant’s motion to dismiss the charges against him.

NO ERROR.

Judges HUNTER, JR. and DAVIS concur.

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STATE OF NORTH CAROLINA  
v.  
ARTIE STEVENSON SMITH, JR.

No. COA14-1314

Filed 16 June 2015

**1. Attorneys—appointed—withdrawal of representation—client demand of unethical conduct**

The trial court did not abuse its discretion by permitting appointed defense counsel’s request to withdraw his representation pursuant to Rule of Professional Conduct 1.16(a), Comment 3, on the sixth day of defendant’s trial for bribery. As Comment 3 recognizes, a “lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient” to permit withdrawal.

**2. Attorneys—appointed—withdrawal of representation—substitute counsel**

The trial court did not err when it did not appoint substitute counsel for defendant after his appointed counsel withdrew pursuant to Rule of Professional Conduct 1.16(a), Comment 3. Appointment of substitute counsel is required only when representation by the original appointed counsel would deprive the defendant of his right to effective assistance of counsel. Appointed counsel’s unwillingness to engage in unprofessional conduct does not meet this standard.

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**3. Attorneys—effective assistance of counsel—new counsel—limited time to prepare**

The Court of Appeals rejected defendant's argument that his trial counsel, who entered the case on the seventh day after defendant's appointed counsel withdrew, was ineffective because he requested only a four-hour recess to meet with defendant and prepare. Most of the trial work had already been completed by the original counsel; new counsel had already discussed the case with the original counsel; defendant's theory of the case was simple and straightforward; and the record demonstrated that new counsel had sufficient understanding of the case.

Appeal by Defendant from judgments entered 21 May 2014 by Judge Hugh B. Lewis in Cleveland County Superior Court. Heard in the Court of Appeals 6 May 2015.

*Attorney General Roy Cooper, by Special Deputy Attorney General Charles G. Whitehead, for the State.*

*Tin Fulton Walker & Owen, PLLC, by Noell P. Tin, for Defendant.*

STEPHENS, Judge.

This appeal concerns the proper procedure a trial court should follow when appointed counsel for an indigent criminal defendant moves during trial for mandatory withdrawal of his representation pursuant to Rule 1.16(a) of the North Carolina Rules of Professional Conduct. We hold that a trial court does not abuse its discretion in permitting withdrawal where appointed counsel cites Comment 3 to Rule 1.16 as grounds for withdrawal and that the court is not required to appoint substitute counsel in such circumstances.

*Factual and Procedural Background*

Defendant Artie Stevenson Smith, Jr., was indicted on eight counts of offering bribes pursuant to N.C. Gen. Stat. § 14-218 (2013). Those charges arose from Smith's operation of "sweepstakes" or video poker gambling machines in various locations. The evidence at trial tended to show the following:

Lieutenant Bryan Gordon of the Cleveland County Sheriff's Department met Smith in early 2011 while inspecting sweepstakes machines Smith was operating. On 22 March 2011, Gordon was called to a meeting between Smith and Gordon's captain at the sheriff's station.

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Gordon was asked to escort Smith out of the station. Smith returned to the sheriff's station the following day and met with Gordon again. On 29 March 2011, Smith called Gordon to request a "voluntary video poker inspection" at South Post Grill the next day. Gordon asked Sergeant Rodney Fitch to accompany him on the inspection, but had no intention of conducting any type of "sting" or undercover operation into bribery. Gordon described the inspection as a "waste of time" because the sweepstakes machines were all unplugged, turned to face the walls, and lacked any software installations. The next meeting between Gordon and Smith took place on 31 March 2011, by which time Gordon had come to believe that Smith was trying to manipulate or trick him. As a result of this intuition, Gordon recorded the meeting, at which Smith sought informant status in exchange for being able to continue to operate his sweepstakes machines. Gordon and Fitch told Smith such an exchange would be illegal and felt convinced that Smith was attempting to bribe them. After Gordon consulted his superiors and the FBI about Smith's behavior, an undercover investigation was initiated with Fitch taking a lead role. Fitch and Smith met multiple times from April to August 2011, with Smith ultimately giving Fitch money totaling almost \$15,000.00 during more than a half dozen "money drops." Law enforcement officers recorded all but one of the money drops on video with audio. Smith was subsequently indicted on eight counts of bribery.

On 9 November 2012, Defendant was found indigent and attorney Robert E. Campbell was appointed to represent him. The matter came on for trial at the 12 May 2014 session of Cleveland County Superior Court. Smith's theory of the case was that he had been entrapped by Fitch. On 12 May, when Campbell informed the trial court that Smith planned to admit that he had paid money to Fitch, the trial court discussed the possible consequences of admitting to this element of bribery. Smith confirmed that he understood the risk and affirmed that it was his sole decision to rely on an entrapment defense. Campbell forecast Smith's entrapment theory during his opening argument.

At trial, the money drop videos were admitted and published to the jury without objection. Among other witnesses for the State, Gordon and Fitch testified in detail about their interactions with Smith. On the afternoon of Friday, 16 May 2014, the State closed its case-in-chief, and Campbell moved to dismiss all charges against Smith. The trial court denied that motion and recessed for the weekend. Campbell informed the court that he and Smith would use the weekend to decide whether to present a case for the defense.

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When court resumed on Monday morning, 19 May 2014, the following exchange occurred:

THE COURT: Mr. Campbell?

MR. CAMPBELL: Yes, sir.

THE COURT: Based on your email, I assume that you still have a motion before this Court?

MR. CAMPBELL: That's correct. I gave the copy to the clerk. I think she has placed it up on your bench. That would be my motion to withdraw pursuant to Rule 1.16 (a) that withdrawal is mandatory as professional considerations require. I think that's required by comment number 3 in Rule 1.16. And I would ask the [c]ourt for permission to withdraw.

My client has indicated that he would be prepared to call one witness. And then he would ask to be able to resume tomorrow with the rest of his case.

THE COURT: Is he going to have retained counsel by then or is he going to represent himself?

MR. CAMPBELL: I would let him speak to that, if that's appropriate.

MR. SMITH: I'm going to make an attempt to retain counsel, Your Honor. If I am unable to, I will represent myself.

THE COURT: If you will have a seat. Let me hear from the [S]tate's table relating to the motion to withdraw at this point.

[THE STATE]: Thank you, Your Honor. I would ask the [c]ourt to deny the motion. I don't think that Mr. Campbell's motion and what it alleges gives the Court enough to make findings on this issue. And I understand it's a delicate issue but I do have case law from the 11th Circuit that says simply stating ethical considerations is not enough for the [c]ourt to make findings. And indeed, we are five days into a jury trial. And this is not a criticism of Mr. Campbell. I understand he's in a difficult position. But I don't think this is enough to give the [c]ourt reason to grant a motion to withdraw at this point.



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If the [c]ourt — you know, there are issues of what to do next with counsel. There are cases that say the [c]ourt cannot make a defendant choose between the right to testify and the right to counsel. So I think I would like to pass up some case law for the [c]ourt before the [c]ourt makes its decision, if indeed the [c]ourt would like to look at that case law.

I think there are other options here. Not knowing exactly what the reasons are, there are reasons to believe it has to do with testimony. If there are issues with testimony, I think there are solutions to that such as a narrative testimony without direct examination.

I would ask the [c]ourt to consider having a — I would ask the [c]ourt to consider removing everyone from the courtroom except for the judge, Your Honor, the court reporter, the defendant and his attorney to question about the issues related to potential testimony, the right to an attorney. And specifically I'd ask the [c]ourt to look at Rule 3.3 of the North Carolina Professional Rules of Conduct and comment 9.

I think comment 9 is very important as it relates to this potential problem and what Mr. Campbell's duty is as it relates to the testimony, potential testimony, of the defendant in this case and whether or not he can put him up and what he should do based on reasonable belief versus what he knows.

So I would ask the [c]ourt to look at Rule 3.3 and comment 9. The [S]tate would certainly prefer to continue this case and finish this case with Mr. Campbell as the attorney as it has been for the past five days. I think that would be the best solution to this issue. And that is said with a look forward to potential issues of appeal if Mr. Smith were to represent himself as opposed to having Mr. Campbell.

Because there is a Hobson's choice here between Mr. Smith testifying and Mr. Smith having an attorney. And the courts have ruled at times that there can't be a choice between those things. So I think there are other solutions here that I would urge the [c]ourt to at least consider. And as I've said, I do have some case law from [the] 8th Circuit, the

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11th Circuit, as well as a North Carolina Court of Appeals case. If the [c]ourt would like copies of those cases, I'd be happy to pass them up.

THE COURT: I'll be glad to take a look at your cases. Anything else from the [S]tate?

[THE STATE]: No, sir.

THE COURT: Final response from defense counsel?

MR. CAMPBELL: Just briefly, Your Honor, I would refer to comment 3 under Rule 1.16.

THE COURT: The [c]ourt believes that in this matter[,] 296 NC 638 cited in 1979, the [c]ourt will allow Mr. Campbell to withdraw at this time. Defendant has requested a continuance until tomorrow morning to be present with counsel. At that time we will address further options.

We will reconvene at 9:30 in the morning. At that time if the defendant does not have counsel present, I will quiz him as to whether or not he wishes to move forward on his own. And if he so chooses to represent himself and determine based on the questions that are designed by the Supreme Court of North Carolina whether or not he is capable of doing so and I will make further decisions at that time related to any other steps the [c]ourt needs to take.

I see no reason not to accept Mr. Campbell's motion to withdraw at this time. Sir, you are allowed to leave the case. Thank you very much.

The trial court allowed the motion and continued the case to allow Smith time to obtain private counsel.

At 9:30 a.m. on Tuesday, 20 May 2014, Larry G. Simonds, Jr., made a general appearance for Smith. Campbell also appeared and informed the court that he had discussed Smith's case with Simonds and given Simonds his case file and a copy of his planned closing argument. Simonds suggested altering the proposed verdict sheets to clarify the issue of entrapment, which he confirmed would be Smith's defense. The State countered that the jury instructions should be sufficient to explain entrapment and the court reserved any decision on the matter until a later time. Simonds requested and received a continuance until 2:00 that

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afternoon to prepare, and a room was made available for him to meet with Smith.

When court resumed that afternoon, the defense called two witnesses, including Smith. As forecast, Smith admitted giving money to Fitch, but stated that Fitch had been the one to suggest an exchange of money for Fitch's assistance. Smith claimed that he felt intimidated and threatened by Fitch and believed he had no choice but to cooperate with this "crooked cop." Smith admitted to all of the events depicted in the videos, but explained that he had been "scared" and "afraid" of Fitch and had only given him money "to have him go away" and not for any "special treatment." At the close of the evidence, the jury deliberated for less than two hours before returning verdicts finding Smith guilty on all eight bribery charges. The trial court consolidated two of the convictions for sentencing and imposed seven consecutive sentences totaling 175-210 months imprisonment. From those judgments, Smith appeals.

*Discussion*

On appeal, Smith brings forward three arguments: that the trial court erred by (1) allowing Smith's trial counsel to withdraw on the sixth day of trial and (2) failing to appoint substitute counsel for Smith thereafter, and (3) that the private substitute counsel Smith retained was presumptively ineffective based upon the amount of time he had to review Smith's case before proceeding with the trial. We find no error in the trial court's actions and conclude that Smith has failed to establish that he received ineffective assistance from Simonds.

*I. Withdrawal of appointed counsel*

**[1]** Smith first argues that the trial court abused its discretion by permitting Campbell to withdraw on the sixth day of trial. We disagree.

Our State's Criminal Procedure Act provides that a trial "court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause." N.C. Gen. Stat. § 15A-144 (2013). The decision whether to permit withdrawal of counsel is left to the trial court's discretion. *State v. McGee*, 60 N.C. App. 658, 662, 299 S.E.2d 796, 798 (1983). Appellate courts "will not second-guess a trial court's exercise of its discretion absent evidence of abuse." *Buford v. Gen. Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

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Here, Campbell's written motion to withdraw cited Rule 1.16(a) and asserted:

1. The withdrawal of counsel is mandatory as professional considerations require termination of the representation.
2. Continued representation is not permitted by the rules of professional conduct.
3. The undersigned counsel has engaged in the practice of law for over 21 years and tried numerous criminal jury trials from misdemeanor offenses to several capital murder cases. The undersigned counsel is keenly aware of his ethical obligations and conditions of representation for clients charged with criminal offenses.

Campbell's oral motion before the court was limited to an assertion that "withdrawal is mandatory as professional considerations require. I think that's required by comment number 3 in Rule 1.16." Rule 1.16(a) provides:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of law or the Rules of Professional Conduct;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

N.C. Rules of Prof'l Conduct R. 1.16(a) (2013). In turn, Comment 3 to Rule 1.16 is listed under the heading "Mandatory Withdrawal" and provides:

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. *Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's*

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*statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.* Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

*Id.* cmt. 3 (emphasis added).

We first note that, in light of the direction provided by Comment 3, the course of action suggested by the State as the “best solution” to the conflict facing Campbell, to wit, an in camera discussion among Campbell, Smith, and the court, would not have been a workable procedure for the trial court to follow. At most, perhaps, the trial court could have asked Campbell whether he had considered the distinction discussed in Comment 2 to Rule 1.16. *See id.* cmt. 2 (“A lawyer ordinarily must decline or withdraw from representation if the client *demand*s that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. *The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct*; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.”) (emphasis added).

However, we may not consider the correctness of the court’s ruling *de novo* or second guess its exercise of discretion. *See Buford*, 339 N.C. at 406, 51 S.E.2d at 298. Rather, we are limited to a determination of whether the court’s decision was “manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.” *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527 (citation omitted). Here, the trial court heard Campbell’s assertion of the need for his mandatory withdrawal with specific reference to Comment 3 to Rule 1.16 and also heard the State’s arguments for either denying the motion to withdraw or undertaking a specific line of inquiry before ruling. In light of Comment 3’s recognition that a “lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient” to permit withdrawal, we cannot conclude that the trial court’s decision to accept Campbell’s assertion that his withdrawal was mandatory in light of his professional considerations was an abuse of discretion. Accordingly, this argument is overruled.

*II. Failure to appoint substitute counsel*

[2] Smith next argues that the trial court erred in failing to appoint substitute counsel for Smith after allowing Campbell’s mandatory withdrawal pursuant to Rule 1.16(a). We disagree.

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[241 N.C. App. 619 (2015)]

Once a criminal defendant is determined to be indigent, “it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.” N.C. Gen. Stat. § 7A-450(b) (2013). Further,

[o]nce counsel has been appointed to represent an indigent defendant, the appointment of substitute counsel at the request of either the defendant or the original counsel is constitutionally required *only* when it appears that representation by original counsel could deprive [the] defendant of his right to effective assistance of counsel. Substitute counsel is required and must be appointed when [the] defendant shows good cause, such as a conflict of interest or a complete breakdown in communications.

*State v. Nelson*, 76 N.C. App. 371, 372-73, 333 S.E.2d 499, 500-01 (1985) (citations omitted; emphasis added), *modified and affirmed*, 316 N.C. 350, 341 S.E.2d 561 (1986). In other words, “[a] trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of [the] defendant’s right to effective assistance of counsel, that is, *when the initial appointment has not afforded [the] defendant his constitutional right to counsel.*” *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980) (citations omitted; emphasis added).

Here, Campbell’s representation did not fail to afford Smith his constitutional right to counsel nor did Smith show good cause for the appointment of substitute counsel. Nothing in the record suggests a complete breakdown in communications or a conflict of interest between Campbell and Smith. Indeed, there was no indication that Campbell’s work was in any way deficient. Rather, Campbell’s withdrawal was caused by Smith himself demanding that Campbell engage in unprofessional conduct. The constitutional right to effective assistance of counsel does not encompass a right to have appointed counsel who is willing to engage in unprofessional conduct.<sup>1</sup> Thus, Smith was simply not entitled to the appointment of substitute counsel.<sup>2</sup> As a result, the trial court

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1. We emphasize that absolutely nothing in the record on appeal or in the arguments of either party suggests that Smith’s private substitute counsel, Simonds, acted in any manner contrary to the Rules of Professional Conduct.

2. In turn, we must reject the State’s characterization of Smith’s response to the choice presented to him by the trial court as a waiver of his right to appointed counsel by retaining private counsel. Simply put, because Smith was not entitled to substitute

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did not err in failing to offer Smith substitute appointed counsel, and, accordingly, we overrule this argument.

*III. Ineffective assistance of counsel*

[3] Smith next argues that Simonds was presumptively ineffective because he entered the case on the seventh day of trial and requested only a four-hour recess to meet with Smith and prepare. We disagree.

Generally,

[t]o prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). As Smith acknowledges, the United States Supreme Court has emphasized that

[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct

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appointed counsel in the circumstances presented in this case, there was no right for Smith to waive. The election Smith made was not between substitute appointed counsel and private counsel. As noted *supra*, the trial court gave Smith *only* the options of private counsel and no counsel at all.

## STATE v. SMITH

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falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

*Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694-95 (1984) (citations and internal quotation marks omitted). However, Smith cites cases in which appellate courts have held that the presumption of effective assistance does not apply where counsel fails to obtain a reasonable understanding of the facts of a case or to conduct reasonable investigations as needed. See, e.g., *Kimmelman v. Morrison*, 477 U.S. 365, 91 L. Ed. 2d 305 (1986); *United States v. Cronin*, 466 U.S. 648, 80 L. Ed. 2d 657 (1984); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), cert. denied, 503 U.S. 952, 117 L. Ed. 2d 652 (1992). Here, Smith contends that Simonds could not have adequately prepared for the remainder of trial during the approximately four hours between his general appearance on Tuesday morning and the resumption of trial after lunch the same day. Therefore, Smith argues that the presumption of effectiveness does not apply here and that we must hold that Simonds was instead presumptively ineffective. Alternatively, Smith suggests that Simonds' performance was deficient in that he failed to request a longer or an additional continuance to further prepare for the remainder of trial. We are not persuaded by either argument.

Smith cites *State v. Rogers*, 352 N.C. 119, 529 S.E.2d 671 (2000), as an example of a case where a new trial was granted based on insufficient time to prepare. We find *Rogers* easily distinguishable on multiple points. There, the defendant faced charges of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into occupied property in connection with a violent altercation at a nightclub and a related assault the following day. *Id.* at 119-22, 529 S.E.2d at 672-73. After his private counsel had been permitted to withdraw, the defendant was appointed counsel thirty-four days before trial. *Id.* at 122-23, 529 S.E.2d at 674. Appointed counsel reviewed the case file and learned that the defendant's previous counsel had not interviewed any of the numerous witnesses to the attack and sought funds to hire a private investigator to locate the witnesses. *Id.* at 122, 529 S.E.2d at 674. The trial court allowed the motion for funds just over two weeks before the trial date. *Id.* Eleven days before trial, the defendant's appointed attorneys moved for a continuance and

argued strenuously that they had not had enough time to prepare the case and would not be able to proceed . . . as scheduled. The private investigator hired by [the]



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defendant just the week before had not had time to report any results at the time of the hearing. Further, [one attorney] had not previously acted as lead counsel in a capital case, and [the other attorney] had never participated in a capital case. [The d]efendant's counsel also noted that they were being required to prepare, in effect, for two trials: the guilt/innocence phase and, if necessary, a capital sentencing proceeding. [The d]efendant's counsel also argued that a previous motion for a jury questionnaire had been allowed by the court and that they had not been able to prepare one that could be returned by prospective jurors prior to the commencement of the term of court.

*Id.* at 123, 529 S.E.2d at 674. The trial court denied the motion for a continuance, trial proceeded, and the defendant was convicted and sentenced to death. *Id.* at 119-23, 529 S.E.2d at 672-74. Our Supreme Court granted the defendant a new trial, and noted that, “[t]aking into account the unique factual circumstances of this case, we hold the presumption of ineffective assistance of counsel is applicable here.” *Id.* at 126, 529 S.E.2d at 676.

In contrast, in this case, Smith, with the assistance of Campbell, had formed a theory of the case and prepared fully to present it to the jury. All of the State's witnesses had been cross-examined. Campbell has already given Simonds the case file and discussed the case with him before Simonds made his general appearance on Tuesday morning.<sup>3</sup> Simonds then requested until the afternoon to discuss the case for the defense, namely, testimony from Smith and his only other defense witness, an attorney who had worked for Smith previously and who testified briefly to an incident in which Smith had reported Fitch's alleged threats and offers to take money for looking the other way regarding Smith's illegal sweepstakes machines. There were no witnesses left to be located or interviewed, no jury questionnaires to be prepared, no trial strategy to formulate, and no cross-examination to be prepared. Further, Smith's theory of the case was simple and straightforward: he admitted to giving Fitch the money, but argued that it was a case of entrapment. On

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3. On Tuesday morning, Campbell informed the trial court: “Your Honor, I spoke with substitute counsel last night on the phone. This morning I have provided them [sic] with my closing argument, the trial transcripts, two trial transcripts, which I believe is Officer Hamrick and Officer Fitch and Lieutenant Gordon.” Campbell continued: “And I've also provided them with one of the interview summaries from April 8th . . . I also have my complete file which is in the car which I will make available to him. And I'm about to go to the car to retrieve more documents to provide to substitute counsel.”

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Tuesday morning, Simonds requested a four-hour continuance, but told the trial court, “I am ready to go forward if necessary at this moment.” Simonds’ command of the case is further illustrated in the exchange he had with the trial court *before* the four-hour break:

THE COURT: So that will be — does defense counsel have any idea as to the length of their case in chief at this point?

MR. SIMONDS: We would not be more than two hours. We have two witnesses, including Mr. Smith.

THE COURT: During your period of time between now and 2 o’clock — first let me ask this. Have you had a chance to go over these jury instructions at this point in time?

MR. SIMONDS: I have read through the first three pages of the jury instructions, yes.

....

MR. SIMONDS: To that end, Your Honor, there was some discussion as to guilty, not guilty[,] and not guilty by reason of entrapment according to Mr. Campbell. I don’t know if he made a formal motion to add that to the —

THE COURT: He had not. We had had a bench discussion.

MR. SIMONDS: I would like to raise that motion, if I may, at this point to add that on in the interest of brevity.

THE COURT: Do you wish to be heard on that?

MR. SIMONDS: Certainly. I believe that in this case entrapment is the major issue in the case. And that if the jury believes that there was persuasion, coercion[,] and that Mr. Smith didn’t act from his free will that the option should be given to the jury to find Mr. Smith not guilty by reason of entrapment.

THE COURT: Response?

[THE STATE]: Your Honor, I would object. I think the instructions are abundantly clear that the court has provided. I think within those instructions the defense of entrapment is explained. And it is explained to the jury that if they believe that entrapment occurred they should find him not guilty. And I think it is, as a result, to add that

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additional block. The [S]tate believes guilty or not guilty is appropriate.

MR. SIMONDS: Your Honor, I would just add that to save confusion of the jury it may be in their best interest to have that added on.

THE COURT: Do you have any case law that indicates that's the way a jury form should be laid out in this matter?

MR. SIMONDS: Not at this time. I can come to that conclusion at 2 o'clock.

THE COURT: I'll hold that open until 2 o'clock.

MR. SIMONDS: Thank you, Your Honor. Your Honor, I don't know the courtroom rules. I need to send a text to a staff member so they [sic] can start researching that issue.

THE COURT: If you will give me a few minutes to dismiss the jury you will have free rein of the courtroom.

When court reconvened at 2:00 p.m., Simonds delivered copies of the case law he had researched in support of his instruction request. We conclude that this exchange reveals that Simonds, even before the continuance was granted, had a strong understanding of Smith's trial strategy, the pertinent legal issues, and the relevant law. In sum, "the unique factual circumstances" of *Rogers* which made the presumption of ineffective assistance of counsel applicable, see *id.* at 126, 529 S.E.2d at 676, are not present in Smith's case.

We likewise reject Smith's suggestion that Simonds' performance was deficient in that he failed to request a longer or an additional continuance to further prepare. As noted *supra*, Simonds both claimed and appeared to be prepared to proceed even without the four-hour continuance. Smith notes that Simonds told the trial court "I don't know the courtroom rules." However, read in context, Simonds was plainly asking the court whether he could "send a text to a staff member" about researching the case law on the instruction motion just discussed. Smith cites no example of any decision Simonds made or action he took or failed to take when the trial resumed which could be considered deficient. See *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (citation omitted).

Moreover, Smith admitted giving thousands of dollars to Fitch and relied solely on his defense of entrapment. Therefore, the only issue before the jury was the relative credibility of Smith versus the law enforcement witnesses for the State. Simonds did not cross-examine the

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State's witnesses, and Smith makes no complaint about Simonds' direct examination of Smith or of the other defense witness, or of Simonds' closing argument. Thus, even if, *arguendo*, Smith could show some deficient preparation by Simonds, Smith has utterly failed to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.* This argument is overruled.

NO ERROR.

Judges STEELMAN and McCULLOUGH concur.

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MARY MCDONALD WARREN, PLAINTIFF  
v.  
MICHAEL THOMAS WARREN, DEFENDANT

No. COA14-982

Filed 16 June 2015

**Divorce—equitable distribution—student loan debt**

In an equitable distribution action, the trial court did not abuse its discretion by classifying as marital debt the student loans incurred by plaintiff-wife for her graduate school program. The loan debt was incurred during the course of the marriage, for the benefit of the family, and both parties enjoyed the benefits of the loan funds and plaintiff's graduate degree.

Appeal by defendant from order entered 5 May 2014 by Judge Amy Sigmon Walker in Catawba County District Court. Heard in the Court of Appeals 17 February 2015.

*Wesley E. Starnes, for plaintiff-appellee.*

*W. Wallace Respess, Jr., for defendant-appellant.*

CALABRIA, Judge.

Michael Thomas Warren ("defendant") appeals from an order classifying the student loans of Mary McDonald Warren ("plaintiff") as marital debt. We affirm.

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[241 N.C. App. 634 (2015)]

Plaintiff and defendant (collectively, “the parties”) were married on 4 July 2000, and lived together as husband and wife until they separated on 26 March 2011. The trial court granted the parties an absolute divorce on 2 May 2013. There were two children born of the marriage who lived with the parties. Plaintiff has two other children from a previous marriage who also lived with the parties during the marriage.

Plaintiff worked as a teacher when the parties first married. The parties agreed that plaintiff would stop working so she could take care of the home while the children were young. When the children grew older, the parties agreed that plaintiff would return to school to earn a degree so she could increase her income for the benefit of the family. In the fall of 2006, plaintiff enrolled at Lenoir-Rhyne University (“Lenoir-Rhyne”), where her tuition totaled \$31,665.00. While in school, plaintiff incurred student loans for a total of \$88,429.08. The funds from the student loans not only paid her tuition, textbooks, and school supplies, but also paid the family’s living expenses. Although plaintiff deposited the student loan funds into her own separate account, both parties had separate checking accounts in their own names and both paid family expenses. Plaintiff graduated from Lenoir-Rhyne in the spring of 2009 with a Master’s of Science in occupational therapy.

After plaintiff graduated in 2009, she secured employment as an occupational therapist, initially earning \$34.08 per hour. She worked approximately thirty hours a week, earning a weekly income of around \$1,224.00. In January of 2010 she began working as a contract occupational therapist, earning approximately \$60.00 per hour. On 26 March 2011, the parties separated. At that time, plaintiff earned approximately \$65,000.00 per year, and defendant earned approximately \$100,000.00 per year.

On 5 April 2011, plaintiff filed a complaint for, *inter alia*, an equitable distribution of marital property, and requested an unequal division. On 5 March 2014, the parties entered into a pre-trial order. In the pre-trial order, plaintiff alleged that she had incurred two student loan debts of \$72,500.00 and \$9,577.47, and both loans constituted marital debt. Additionally, plaintiff contended that since the date of separation she had maintained current payments for the student loan debt to the best of her abilities, but that she had recently been unable to make payments toward the student loans since she paid an unequal share on the parties’ other marital debts without the benefit of a reciprocal amount of marital assets. Defendant contended that the student loans were plaintiff’s separate debt.

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After a hearing, the trial court entered an order on 5 May 2014 concluding that the student loans amounted to \$88,429.08, and that the loans were incurred during the course of the marriage and for the benefit of the marriage. The trial court then classified the \$88,427.08 of student loan debt as marital debt. Defendant appeals.

Defendant's primary argument on appeal is that the trial court erred in classifying plaintiff's student loans as marital debt. Specifically, defendant contends that the trial court erred in its classification because plaintiff "utterly failed" to prove that the debt she incurred in student loans was for the joint benefit of the marital unit. We disagree.

As an initial matter, defendant argues that because a degree is classified as separate property, the debt acquired to pursue a Master's of Science in occupational therapy should be separate property. However, defendant failed to raise this argument at the trial court level. Therefore, we decline to address this argument. See *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) ("[I]ssues and theories of a case not raised below will not be considered on appeal.").

The trial court's equitable distribution judgment "will not be disturbed absent a clear abuse of [the court's] discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citation omitted). "Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion." *Id.* (citations omitted). Furthermore, the trial court's determination "as to whether property is marital or separate . . . will not be disturbed on appeal if there is competent evidence to support the findings." *Riggs v. Riggs*, 124 N.C. App. 647, 649, 478 S.E.2d 211, 212 (1996) (citation omitted).

"In equitable distribution actions the trial court is required to classify, value and distribute, if marital, the debts of the parties to the marriage." *Pott v. Pott*, 126 N.C. App. 285, 288, 484 S.E.2d 822, 825 (1997) (internal citation and quotations omitted). This Court has long held that a marital debt "is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994), *disc. review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994) (citations omitted). Additionally, the party claiming that the debt is marital bears the burden of proving both the value of the debt on the date of

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separation and proving that the debt was incurred for the joint benefit of both parties. *Pott*, 126 N.C. App. at 288, 484 S.E.2d at 825.

In the instant case, it is undisputed that the loans were incurred between 2006 and 2009. During that time, the parties were married, then separated on 26 March 2011. The parties are not disputing the value of the debt on the date of separation. Accordingly, the issue before us is whether plaintiff satisfied her burden of proving that the student loans were incurred for the joint benefit of the marriage.

Although our Courts have not specifically defined what constitutes a joint benefit in the context of marital debt, this Court has never required evidence that the marital unit actually benefited from the debt incurred. Instead, our Courts have required that the debt must have been *incurred* for the joint benefit of the parties. *Riggs*, 124 N.C. App. at 652, 478 S.E.2d at 214.

In *Baldwin v. Baldwin*, \_\_ N.C. App. \_\_, 757 S.E.2d 527 (2014) (unpublished), although the plaintiff's student loans were incurred during the marriage, the plaintiff presented no evidence that the loans benefited the defendant, and also testified that her master's degree did not help her obtain employment or increase her earning capacity. *Id.* This Court concluded that "[t]here was no evidence presented at the hearing that any of this money benefitted Defendant in any manner." *Id.* Thus, because there was no evidence that the defendant also benefited from the plaintiff's student loans, the loans could not be classified as marital debt. *Id.*

Other jurisdictions have similarly discussed student loan debt in the context of marital debt by determining whether the student loan debt was incurred for the joint benefit of both parties. *See, e.g., In re Marriage of Speirs*, 956 P.2d 622, 624 (Colo. App. 1997) (holding that while degrees do not constitute tangible property that can be divided, classifying student loans incurred during marriage as marital debt is proper when both marital partners may expect to share in the rewards of the education); *McConathy v. McConathy*, 632 So.2d 1200, 1206-07 (La. App. 2 Cir. 1994) (student loan incurred for husband's education was properly classified as community debt because part of the loan contributed to the family's living expenses and the spouses expected to benefit from the husband's higher education); *Hicks v. Hicks*, 969 S.W.2d 840, 846-47 (Mo. App. W.D. 1998) (concluding that wife's student loans were marital debt because the loan funds were not only used to pay wife's tuition, but were also used to buy groceries and pay bills and childcare costs). We find these cases to be persuasive. Therefore, in order for the court to classify

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student loan debt as marital debt, the parties must present evidence regarding whether the marriage lasted long enough after incurring the debt and receiving a degree for the married couple to substantially enjoy the benefits of the degree or higher earnings.

Defendant relies on *Baldwin* to support his argument that plaintiff's student loans should be classified as separate, and not marital, debt. However, *Baldwin* is distinguishable from the instant case. In *Baldwin*, the determinative factor was the lack of evidence presented and lack of findings by the trial court that the defendant benefited from the student loans. *Baldwin*, \_\_\_ N.C. App. at \_\_\_, 757 S.E.2d at 527.

In the instant case, there was evidence presented at the hearing that any additional funds plaintiff received from the student loans were used to pay the family living expenses. Specifically, both parties testified that they had agreed plaintiff would return to school to obtain her occupational therapy degree, and both were aware student loans were required to accomplish this goal. Plaintiff also testified that in addition to her educational expenses, the loans were used for general living expenses such as groceries, the children's extracurricular activities, family medical expenses, clothing for the family, cleaning supplies for the home, and gas for transportation. Additionally, defendant concedes that the marriage benefited from plaintiff's increased earning capacity for a period of twenty months. The trial court found that both parties agreed plaintiff would return to school in order to earn a professional degree that would allow her to earn more money for the family. Although the trial court found that plaintiff used the student loan proceeds for tuition, textbooks, and school supplies, the trial court also found that plaintiff did in fact pay for family expenses with the funds from the student loans and that the loans benefited both parties.

Defendant contends that the student loan debt should have been classified as separate debt because plaintiff's student loan funds were kept in her own separate bank account. However, "[t]he fact that the debt is in the name of one or both of the spouses is not determinative of the proper classification." *Atkins v. Atkins*, 102 N.C. App. 199, 208, 401 S.E.2d 784, 789 (1991) (citation omitted). The trial court found that plaintiff used the student loan funds to pay family expenses, regardless of the fact that the funds from the loans were deposited in her own separate account. Additionally, the student loans were still originally incurred with the intent that they would benefit the marital unit, and ultimately did benefit the marital unit, as the trial court found that plaintiff was able to secure employment and increase her earning capacity after obtaining her professional degree.



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Since the student loan debt was incurred during the marriage, plaintiff presented substantial evidence demonstrating that the loan funds were used to benefit the family as well as satisfy her educational expenses. In addition, the marriage lasted long enough for the parties to substantially enjoy the benefits of plaintiff's newly-earned degree. Therefore, plaintiff satisfied her burden of proving that the debt was incurred for the joint benefit of both parties.

Defendant also argues in the alternative that if the student loans were properly classified as marital debt, this Court should then "apportion the student loans during the period of time that the marriage benefited from the plaintiff's increased earning capacity." However, defendant failed to raise any issue for an unequal distribution of the student loan debt in the pre-trial order. Therefore, defendant may not raise this issue on appeal. *See Westminster Homes*, 354 N.C. at 309, 554 S.E.2d at 641.

Plaintiff presented ample evidence that the \$88,429.08 of student loan debt incurred during the marriage not only provided for her educational expenses, but also benefited the marriage. The trial court made specific findings regarding the use of the student loans, and defendant concedes that the marriage benefited from plaintiff's increased earning capacity for a period of twenty months. Therefore, the trial court did not abuse its discretion in classifying plaintiff's student loan debt as marital debt. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges McCULLOUGH and DIETZ concur.

**WELLS v. CITY OF WILMINGTON**

[241 N.C. App. 640 (2015)]

GLENN WELLS, *et al.*, PLAINTIFFS  
v.  
CITY OF WILMINGTON, NORTH CAROLINA, *et al.*, DEFENDANTS  
v.  
SOTHERLY HOTELS, INC., *et al.*, INTERVENORS<sup>1</sup>

No. COA14-1367

Filed 16 June 2015

**1. Cities and Towns—consent judgment—sale of land for hotel site**

The trial court did not err by concluding that a Consent Judgment entered by the City of Wilmington and plaintiffs, prohibiting the use of public funds to subsidize a privately owned hotel as part of the City's plans for a downtown convention center, did not apply to the sale of land for the hotel site. The Consent Judgment did not reference land for the hotel site, and the Court of Appeals declined to read "something more" into its plain language.

**2. Cities and Towns—consent judgment—sale of land for hotel site**

The trial court did not err by concluding that a Purchase and Development Agreement between the City of Wilmington and Harmony Hospitality, Inc. did not violate the Consent Judgment entered by the City of Wilmington and plaintiffs, prohibiting the use of public funds to subsidize a privately owned hotel as part of the City's plans for a downtown convention center. The trial court's finding that the City would make a profit from the sale of the land was supported by competent evidence.

**3. Cities and Towns—consent judgment—sale of land for hotel site—fair market value**

The trial court did not err by concluding that the City of Wilmington acted within its authority pursuant to N.C.G.S. § 158-7.1(d) when it set the fair market value of a hotel site it was selling to a private developer. The Court of Appeals rejected the

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1. The caption for this opinion reflects the fact that this appeal arises from a Motion in the Cause filed by Plaintiff Wells and Intervenor to have the City of Wilmington held in contempt for allegedly violating the Consent Judgment that resulted from a lawsuit filed in 2005 by Plaintiff Wells along with three Wilmington hotel operators who are not parties to the present case.

**WELLS v. CITY OF WILMINGTON**

[241 N.C. App. 640 (2015)]

premise of plaintiffs' argument—that the trial court erred by rejecting a 2013 appraisal, which was based on incorrect extraordinary assumptions.

**4. Cities and Towns—consent judgment—sale of land for hotel site—parking garage**

The trial court did not err by concluding that the Garage Parking License Agreement between the City of Wilmington and Harmony Hospitality, Inc. did not violate the Consent Judgment entered by the City of Wilmington and plaintiffs, prohibiting the use of public funds to subsidize a privately owned hotel as part of the City's plans for a downtown convention center. In accordance with the Consent Judgment, the parking garage was available to all users on the same terms, conditions, and prices, and the Agreement would not amount to a subsidy for Harmony Hospitality.

Appeal by Plaintiff Glenn Wells and Intervenors from order entered 10 June 2014 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 22 April 2015.

*Everett Gaskins Hancock LLP, by E.D. Gaskins, Jr., and Jason N. Tuttle, for Plaintiff Wells.*

*Marshall, Williams & Gorham, LLP, by Matthew B. Davis, for Intervenors.*

*Parker Poe Adams & Bernstein LLP, by Anthony Fox and Charles C. Meeker, for Defendant City of Wilmington.*

STEPHENS, Judge.

Plaintiff Glenn Wells (“Wells”), a Wilmington resident and taxpayer, and Intervenors Sotherly Hotels, Inc., and Capitol Hotel Associates, L.P., L.L.P.,<sup>2</sup> (collectively, “Appellants”) argue that the trial court erred in denying their Motion in the Cause to hold the City of Wilmington (“Wilmington”) in contempt for allegedly violating the 2006 Consent

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2. Although the trial court's Order Denying Motion in the Cause refers to the second intervening party as “Capitol Hotel Associates, L.P., L.L.P.,” throughout this opinion we adopt the spelling provided in Capitol's motion to intervene, to wit, “Capitol Hotel Associates, L.P., L.L.P.”

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Judgment Wilmington entered into with Wells prohibiting the use of public funds to subsidize a privately owned hotel as part of Wilmington's broader plan to build a convention center complex in downtown Wilmington. Appellants contend that the trial court erred in its conclusion that the land for the hotel site was beyond the scope of the Consent Judgment. Appellants also argue that the trial court erred in concluding that Wilmington's plan to sell the hotel site to a private developer does not subsidize or underwrite the hotel; that Wilmington properly used its authority under section 158-7.1(d) of our General Statutes in setting the hotel site's fair market value; and that Wilmington's proposed Garage Parking License Agreement does not violate the Consent Judgment. After careful consideration, we affirm the trial court's order.

*I. Facts and Procedural History*

For more than 15 years, Wilmington has been working to build a downtown convention center complex including a convention center, parking deck, and hotel. In 2005, citing North Carolina's Local Development statute, N.C. Gen. Stat. § 158-7.1, Wilmington passed a resolution to authorize the purchase of a 7.8-acre tract of land for \$3,803,500.00 to serve as the site for this complex. The hotel was to occupy 33,000 square feet of this tract, and the cost of the land for the hotel's *pro rata* share of the larger tract's acquisition cost was \$311,539.00.

On 13 October 2005, Wells and three local hotel operators filed suit in New Hanover County Superior Court seeking a declaratory judgment against Wilmington, New Hanover County, and the New Hanover County Tourism Development Authority. Wells and the hotel operators asserted that Wilmington's planned use of occupancy tax proceeds was improper and amounted to an unconstitutional conveyance of public funds as gifts and benefits to the private developer that Wilmington had entered into an agreement with to develop, construct, and operate the convention center, parking deck, and hotel. This lawsuit was resolved by a Consent Judgment Resolving All Claims ("Consent Judgment") entered on 8 August 2006 by New Hanover County Superior Court Judge Paul L. Jones. The Consent Judgment provided in pertinent part that:

Any plans by [Wilmington] to construct a public convention center with adjacent parking facilities ("the Convention Center") in conjunction with an adjoining privately owned hotel ("the Hotel") (collectively "Convention Center Project") within the area now designated as "Downtown Wilmington" . . . shall conform to the following requirements:

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. . .

(b) All Convention Center facilities and parking shall be available to all users on the same terms, conditions and prices pursuant to policies, procedures and price schedules established and monitored by the City of Wilmington.

(c) No public funds of any nature shall be used to acquire, build, equip, operate or otherwise underwrite or subsidize the Hotel or its operations (including shared facilities) except as permitted in paragraph (d) below. . . .

Since 2006, Wilmington has issued four Requests for Qualifications (“RFQ”) in an effort to secure a developer to build and operate the hotel. Each of these RFQs provided that any potential developer must pay fair market value for the hotel site and either expressly stated that Wilmington would not contribute any funding to the hotel’s construction or subsidize the hotel in any way, or else included the Consent Judgment as an attachment. In 2007, Wilmington obtained a Summary Appraisal Report from Ingram & Company, Inc., which concluded that the fair market value of the hotel site as of 12 October 2007 was \$475,000.00, equivalent to roughly \$17.54 per square foot. By November 2010, Wilmington had completed construction of the convention center and adjacent parking garage but had been unable to reach an agreement with any private developer to construct and operate the hotel.

On 7 February 2012, in conjunction with its fourth RFQ, Wilmington’s City Council passed a Resolution Authorizing the Execution of a Memorandum of Understanding with Harmony Hospitality, Inc. (“Harmony”), which provided for “the eventual sale of City-owned real property adjacent to the Downtown Convention Center for the construction of a privately funded hotel.” On 4 February 2014, after two years of negotiating with Harmony, Wilmington’s City Council passed a Resolution Approving the Sale of Land Pursuant to the Terms of a Purchase and Development Agreement (“the Resolution”). That agreement provided that Wilmington would convey the hotel site to Harmony for a purchase price of \$578,820.00, which the Resolution found

pursuant to North Carolina General Statutes Section 158-7.1(d), . . . reflects the value of the Property in consideration of the probable average hourly wage to be paid, the fair market value of the interest and the covenants, conditions and restrictions imposed on the Property, the prospective tax revenues from the Hotel to be constructed

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on the Property, prospective sales tax revenues to be generated in and around the City, as well as any other prospective tax revenues and income coming to the City over the next ten (10) years as a result of the conveyance[.]

The Resolution concluded that “[t]he fair market value of the Property when subject to the covenants, conditions and restrictions of the City is \$578,820.00” and that “[t]he conveyance complies with NCGS Section 158-7.1 and the Consent Judgment.” On 5 February 2014, Wilmington entered into a Purchase and Development Agreement with Harmony, which provided that the hotel would be eight stories in height and have 186 guest room suites and 6,000 square feet of conference and banquet spaces, as well as a full-service restaurant and lounge. As an attachment to that agreement, the parties also negotiated a Garage Parking License Agreement, under which Wilmington agreed to reserve 250 parking spaces on the first three floors of the parking deck that adjoins the Convention Center for Harmony’s use for an initial 30-year term, with options to renew for two additional 10-year terms, for \$300,000.00 per year for the first five years with escalations in rates thereafter.

In September 2013, during the course of its negotiations with Harmony and as part of its normal practices, Wilmington received a second Summary Appraisal Report (“the 2013 Appraisal”) of the hotel site by Ingram & Company, Inc. The 2013 Appraisal was undertaken by Hector Ingram and concluded that the hotel site’s fair market value as of 25 September 2013 was \$1,320,000.00, subject to the Extraordinary Assumption “that the subject tract is not adversely affected by any easements or agreements, other than the one restricting its use to a hotel.” Ingram’s 2013 Appraisal also cautioned that “it should be noted that the City has had great difficulty in locating a developer to build a hotel on the subject site[,] pointing, in my opinion, to the marginal feasibility of the overall project.” In any event, Wilmington did not use this 2013 Appraisal in its ongoing negotiations with Harmony, which had begun and were proceeding based on the fourth RFQ and the previous fair market valuation of the hotel site at \$475,000.00.

On 28 February 2014, after Wilmington had announced its Purchase and Development Agreement with Harmony, Wells filed a motion in New Hanover County Superior Court to show cause why Wilmington should not be held in contempt for its alleged failure to comply with the Consent Judgment. On 12 March 2014, Sotherly Hotels, Inc., and Capitol Hotel Associates, L.P., L.L.P., moved to intervene in this matter. The Intervenor owners own and operate the Hilton Wilmington Riverside hotel in downtown Wilmington, and although they were never parties to

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Wells' original lawsuit or the resulting Consent Judgment, they object to both the amount Wilmington will receive for the sale of the hotel site and the Garage Parking License Agreement it entered into with Harmony. The trial court entered an order permitting their intervention on 14 April 2014, and the parties thereafter entered into a consent scheduling order and conducted discovery on an expedited basis.

During discovery, Ingram was deposed by Wells and the Intervenors, and also provided an affidavit for Wilmington, regarding the validity of his 2013 Appraisal. Ingram explained that his Extraordinary Assumption that "the subject tract is not adversely affected by any easements or agreements, other than the one restricting its use to a hotel" was "a key part of my Report," and that "[i]f the facts turn out to be different than the Extraordinary Assumption, that could affect my opinion in value." Ingram also stated that he did not attempt "to analyze or value the Purchase and Development Agreement itself" because "[t]hat is beyond my expertise," and that, when he undertook his 2013 Appraisal, he

did not have cost estimates as to (a) non-standard configurations of the [hotel] due to the land configurations, (b) zero-lot line costs, (c) fire and structural costs due to the eight-story height, (d) construction costs associated with Brownsfields' [sic] issues, (e) vehicular access over the Chamber of Commerce property, [and] (f) the Fire Department required access to [the] riverwalk. If I had known these items, and their associated above normal costs, I would likely have adjusted for them in my valuation analysis.

Finally, Ingram explained that, "[b]ecause this site is so awkward to develop because of the shape of it and the size of it and the under-performing Convention Center, I still think that this is a very marginally feasible project, and I would not put my money into it."

The matter came on for hearing before Judge Paul L. Jones on 29 May 2014. On 10 June 2014, the trial court entered an Order Denying Motion in the Cause ("the Order"). In its Order, the trial court found as facts that:

- the land for the hotel site was not discussed during the negotiations that resulted in the Consent Judgment because it "had already been acquired by Wilmington and had not been purchased with room occupancy taxes";

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- Wilmington had originally purchased the land for the hotel site for \$311,539.00 and sought to sell it to Harmony for \$578,820.00 at a profit of \$267,521.00<sup>3</sup>;
- although the land for the hotel site “currently generates no revenue for Wilmington, not even property taxes,” under the Purchase and Development Agreement, the city stood to receive direct net revenues of \$6,483,347.00 from occupancy taxes, parking revenues, and property taxes over the next ten years with additional revenues to follow;
- in light of the site’s “size, configuration, restrictions and agreements which are in place,” the costs of developing and building a hotel on the land were more than \$2,300,000.00 higher than the normal expenses associated with building a hotel in a typical urban location;
- as stated in his affidavit dated 14 May 2014 regarding his 2013 Appraisal, Ingram did not review the Purchase and Development Agreement or the additional construction costs associated with the hotel site when he undertook his 2013 Appraisal because those matters were beyond his expertise, but this information certainly would have affected his valuation if he had considered it and, in any event, Ingram believed that the hotel project was marginally feasible; and
- the same rates and terms that Wilmington and Harmony negotiated in their Garage Parking License Agreement would be “available to other members of the public in Wilmington, including Intervenors.”

Based on these findings, the trial court concluded as a matter of law that:

- the Consent Judgment “does not place restrictions on the sale of the land for the hotel because the ‘Hotel’ was defined as planned to be constructed in conjunction with the Convention Center and an adjacent parking facility,” which means that “[t]he land for the hotel is

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3. Based on our review, it appears that the trial court erred slightly in its calculations of the profits that Wilmington will realize from this sale, given that the difference between the purchase price Harmony will pay for the land and the price Wilmington originally paid for it actually amounts to \$267,281.00. While this error has no effect on our analysis, for the sake of mathematical accuracy we utilize the correct total throughout this opinion.



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not included in the definition of the ‘Hotel’ or the scope of the Consent Judgment”;

- given the \$267,281.00 profit Wilmington stands to make on the sale of the land for the hotel site under the Purchase and Development Agreement, as well as roughly \$6,483,347.00 in expected future revenues, Wilmington is not subsidizing or underwriting the hotel;
- Wilmington acted within its authority under section 158-7.1(d) of our General Statutes when it set the land’s fair market value price at \$578,820.00;
- the Extraordinary Assumptions on which Ingram based his 2013 Appraisal “have turned out not to be correct”; and
- the Garage Parking License Agreement complies with the Consent Judgment and does not subsidize or underwrite the hotel.

Given these findings of fact and conclusions of law, the trial court denied Wells’ and the Intervenors’ Motion in the Cause. On 20 June 2014, Wells gave notice of appeal to this Court. On 27 June 2014, the Intervenors also gave notice of appeal to this Court.

*II. Analysis**A. Scope of Consent Judgment*

**[1]** Appellants argue first that the trial court erred in its conclusion of law that the Consent Judgment does not apply to the land for the hotel site. We disagree.

As this Court has previously recognized, when reviewing a trial court’s interpretation of a consent judgment,

[t]he general rule is that a consent judgment is the contract of the parties entered upon the record with the sanction of the court. The consent judgment is a contractual agreement and its meaning is to be gathered from the terms used therein, and the judgment should not be extended beyond the clear import of such terms. However, to interpret the nature and import of the consent judgment more precisely, courts are not bound by the four corners of the instrument itself. The agreement, usually reflecting the intricate course of events surrounding the particular

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litigation, also should be interpreted in the light of the controversy and the purposes intended to be accomplished by it.

Where the plain language of a consent judgment is clear, the original intention of the parties is inferred from its words. The trial court's determination of original intent is a question of fact. On appeal, a trial court's findings of fact have the force of a jury verdict and are conclusive if supported by competent evidence. The trial court's determination of whether the language in a consent judgment is ambiguous, however, is a question of law and therefore our review of that determination is *de novo*.

*Handy Sanitary Dist. v. Badin Shores Resort Owners Ass'n, Inc.*, \_\_ N.C. App. \_\_, \_\_, 737 S.E.2d 795, 798 (2013) (citation omitted). In the present case, Appellants contend that the Consent Judgment's plain language unambiguously provides a broad prohibition against "any plan" by Wilmington to use public funds to underwrite or subsidize the hotel and therefore applies to all future proposed hotel-related transactions. Appellants argue further that Wilmington's implicit and explicit references to the Consent Judgment in its RFQs and other public disclosures pertaining to the Convention Center project confirm this interpretation.

Appellants' argument fails for these reasons. First, as a general matter, it is well established in North Carolina that restrictions on the alienation or sale of real property "are strictly construed in favor of the free use of land whenever strict construction does not contradict the plain and obvious purpose of the contracting parties." *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 555, 633 S.E.2d 78, 85 (2006) (citations and emphasis omitted). Here, the Consent Judgment's express terms do not restrict or even reference the land for the hotel site. Instead, the Consent Judgment's plain language defines its scope as applying to "[a]ny plans . . . to construct a public Convention Center with adjacent parking facilities ('the Convention Center') in conjunction with an adjoining privately owned hotel ('the Hotel') (collectively 'Convention Center Project') within . . . Downtown Wilmington," and prohibits Wilmington from using "public funds of any nature . . . to acquire, build, equip, operate or otherwise underwrite or subsidize the Hotel or its operations[.]" The omission of any reference to the land for the hotel site is unsurprising in light of the trial court's unchallenged findings of fact that "the land for the hotel site was not discussed" when the Consent Judgment was negotiated because "[t]he land was not part of the dispute in the prior lawsuit[.]" Indeed, Wilmington had already purchased

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the land before Wells filed his original lawsuit, which was aimed at preventing Wilmington from spending room occupancy tax revenues to assist a private developer in constructing a hotel in conjunction with the Convention Center, and we construe the Consent Judgment's plain language accordingly. Although Appellants urge this Court to expand the Consent Judgment's scope beyond its express terms to cover the land for the hotel and all future proposed hotel-related transactions, our prior decisions demonstrate that when a consent judgment's plain language is clear, we infer the parties' intentions from its words rather than from additional terms that one party subsequently seeks to add. *See, e.g., Handy Sanitary Dist.*, \_\_ N.C. App. at \_\_, 737 S.E.2d at 798; *see also Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (declining appellants' request to read "something more" into a consent judgment's unambiguous terms because "[w]e are governed by the plain words of the consent judgment"). Consequently, we hold that the trial court did not err in concluding that the sale of the land is beyond the Consent Judgment's scope.

*B. Wilmington's agreement with Harmony does not underwrite or subsidize the hotel*

[2] Appellants argue next that the trial court erred in its conclusions that "Wilmington is not subsidizing or underwriting the hotel development" and that the Purchase and Development Agreement does not violate the terms of the Consent Judgment. We disagree.

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." *Pegg v. Jones*, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007) (citations and internal quotation marks omitted), *affirmed per curiam*, 362 N.C. 343, 661 S.E.2d 732 (2008). When the trial court's factual findings are supported by competent evidence, they are considered conclusive. *See id.* We review the trial court's conclusions of law *de novo*. *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

In the present case, Appellants contend that the trial court's conclusions are premised on findings of fact that are not supported by competent evidence. Specifically, Appellants argue that the trial court's finding that Wilmington stood to make a profit of \$267,281.00 by selling the land for the hotel site to Harmony for \$578,820.00 after purchasing it for \$311,539.00 is fatally undermined by Ingram's 2013 Appraisal of the land's fair market value at \$1,320,000.00. Thus, Appellants argue that

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the proposed sale price under the Purchase and Development Agreement amounts to a subsidy from Wilmington to Harmony of \$741,180.00, which flagrantly violates the Consent Judgment's unambiguous prohibition against using any public funds to underwrite or subsidize the hotel.

Appellants acknowledge that their argument on this point depends on the accuracy of Ingram's 2013 Appraisal, which Ingram himself subsequently admitted did not factor in the terms of the Purchase and Development Agreement or the additional \$2,300,000.00 in construction costs associated with the hotel site due to its small size and awkward shape. Appellants nevertheless argue that the trial court erred in rejecting Ingram's 2013 Appraisal, which the court concluded "relates only to the hotel land and not the other benefits to Wilmington from the Purchase and Development Agreement" and "is based on certain Extraordinary Assumptions, which have turned out not to be correct." In support of this argument, Appellants assert that the trial court's conclusion of law does not explicitly identify which Extraordinary Assumption proved incorrect and they also highlight selective quotations from Ingram's 2013 Appraisal that, when read out of context, appear to undermine the trial court's findings that Ingram's fair market valuation would have been different if he had considered the Agreement's terms and the additional construction costs associated with the hotel site.

We find these arguments wholly unpersuasive. On the one hand, although Appellants are technically correct that the trial court's conclusion does not explicitly state which of Ingram's Extraordinary Assumptions were incorrect, its factual findings—which are based on Ingram's subsequent deposition and affidavit—make absolutely clear that the Extraordinary Assumption in question was that "the subject tract is not adversely [a]ffected by any easements or agreements, other than the one restricting its use to a hotel." Similarly, while Appellants are technically correct that portions of Ingram's 2013 Appraisal identify the same concerns that the trial court cited in its factual findings to support its legal conclusion that Ingram's Extraordinary Assumption proved incorrect, this does not mean, as Appellants imply, that the trial court erred. Appellants' argument here fundamentally misconstrues the function of an Extraordinary Assumption. As Ingram's 2013 Appraisal makes clear:

An extraordinary assumption is an assumption, directly related to a specific assignment, which if found to be false, could alter the appraiser's opinions or conclusions. Extraordinary assumptions presume as fact otherwise uncertain information about physical, legal, or economic

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characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about integrity of data used in the analysis.

Essentially then, although Ingram's 2013 Appraisal did indeed note concerns about feasibility, restrictions on the land, and potentially higher than ordinary construction costs due to the hotel site's condition, Ingram's Extraordinary Assumption served as a disclaimer to caution readers that these concerns exist but were not taken into account in calculating the hotel site's fair market value. Moreover, in his affidavit, Ingram confirmed that his Extraordinary Assumption regarding the adverse effects of easements and agreements was a key part of his report, that he did not analyze or value the Purchase and Development Agreement itself, that he did not factor in the additional construction costs associated with the hotel site, and that he believed the project was so marginally feasible he would not put his own money into it.

We conclude that Ingram's deposition and affidavit constitute competent evidence that supports the trial court's factual findings, which in turn support its legal conclusions that Ingram's 2013 Appraisal "related only to the hotel land" and that the Extraordinary Assumption on which Ingram's 2013 Appraisal was based was incorrect. We therefore have no trouble in concluding further that the trial court did not err in rejecting Ingram's 2013 Appraisal. Thus, given that Wilmington is selling the land for \$578,820.00 and stands to make a profit on its original purchase of \$267,281.00, we hold that the trial court did not err in concluding that the Purchase and Development Agreement does not violate the Consent Judgment because Wilmington is not subsidizing or underwriting the hotel.

*C. Fair market value under section 158-7.1(d)*

[3] Appellants argue next that the trial court erred in concluding that Wilmington had the authority under section 158-7.1(d) of our General Statutes to set the fair market value of the hotel site at \$578,820.00 in light of "the obligations placed on [Harmony] under the Purchase and Development Agreement as well as greater than normal costs to develop this site." We disagree.

We review questions of statutory interpretation *de novo*. See, e.g., *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008).

Section 158-7.1(d) of our General Statutes provides that a local government "shall determine . . . the fair market value" of the property it

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seeks to convey, while subsection (d2) allows a local government to take prospective revenues into account when “arriving at the amount of consideration that it receives” for that property. N.C. Gen. Stat. § 158-7.1(d), (d2) (2013). Here, as the trial court noted in its findings of fact, Wilmington’s City Council passed a Resolution stating that the sale price of \$578,820.00

reflects the fair market value of that real property interest given the covenants, conditions, and restrictions imposed, the prospective tax revenues from the hotel to be constructed, prospective sales tax revenue to be generated for Wilmington as well as other prospective tax revenues and income coming to Wilmington over the next ten years as a result of the conveyance.

Appellants object that the City Council’s Resolution improperly conflated the hotel site’s fair market value with the consideration Wilmington will receive in order to artificially lower the hotel site’s value to match Harmony’s offer. However, this entire argument presupposes that the hotel site’s fair market value is \$1,320,000.00 and that the trial court erred in rejecting Ingram’s 2013 Appraisal. As the preceding discussion makes clear, Appellants’ premise is erroneous, which means this argument is without merit. Accordingly, we hold that the trial court did not err in its conclusion that Wilmington acted within its authority under section 158-7.1(d).

*D. The Garage Parking License Agreement does not violate the Consent Judgment*

**[4]** Finally, Appellants argue that the trial court erred in concluding that the Garage Parking License Agreement complies with section (b) of the Consent Judgment and does not underwrite or subsidize the hotel as prohibited by section (c). We disagree.

Section (b) of the Consent Judgment provides that “[a]ll Convention Center facilities and parking shall be available to all users on the same terms, conditions and prices pursuant to policies, procedures and price schedules established and monitored by the City of Wilmington.” In its Order, the trial court found as facts that “[t]he hotel will license reserved parking spaces on the same terms, conditions, and prices pursuant to policies, procedures and price schedules established and monitored by Wilmington, that are available to other members of the public in Wilmington, including Intervenors,” and that “[t]he bulk long-term term and rates are available to other users in Wilmington at the decks owned by Wilmington including the Convention Center deck.”

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Appellants nevertheless object that the Garage Parking License Agreement violates section (b) of the Consent Judgment because it will leave inadequate capacity for other users, such as the Intervenor, to provide guaranteed convention center parking to their guests. This argument fails, however, because nothing in section (b), or any other part of the Consent Judgment, requires Wilmington to make “guaranteed convention center parking” available to other area hotels, nor does its plain language bar Wilmington from entering into this type of parking arrangement so long as the terms, conditions, and prices are the same as those available to the general public. Moreover, the trial court’s findings of fact on this issue are supported by competent evidence, including an affidavit dated 21 May 2014 from Wilmington’s Finance Director Debra H. Mack, who stated that under the Garage Parking License Agreement, which is for an initial term of 30 years with options for two 10-year extensions, Wilmington will reserve 250 spaces for Harmony’s use in the parking garage that adjoins the Convention Center “on the same basis and terms that are available to other members of the public in Wilmington. The same rental rate is available for the Water Street Deck across the street from the Hilton, so that the Hilton is getting the exact same treatment as what [Harmony] will have.” We therefore conclude that the trial court did not err in its conclusion that the Garage Parking License Agreement does not violate section (b) of the Consent Judgment.

Appellants also argue that the trial court erred in concluding that the Garage Parking License Agreement “does not subsidize [or] underwrite the planned hotel given the escalating rates to be charged during its 30-year term.” By Appellants’ logic, the agreement violates section (c) of the Consent Judgment because it amounts to a subsidy for Harmony insofar as it will save approximately \$3,750,000.00 by not having to build its own parking garage. Appellants argue further that although the trial court found as a fact that under the agreement “Wilmington is guaranteed to receive \$300,000.00 a year for the first five years, with escalations in rates thereafter,” this rate still amounts to a subsidy for Harmony because if it had to borrow \$3,750,000.00 over a 10-year term at 5% interest in order to construct its own parking garage, it would have to pay at least \$125,000.00 more in debt-servicing expenses than it must pay Wilmington annually under the agreement.

We are not persuaded. Although section (c) of the Consent Judgment broadly prohibits Wilmington from using public funds “to acquire, build, equip, operate or otherwise underwrite or subsidize the Hotel or its operations,” its plain language neither references nor restricts the Convention Center’s parking deck. It is important to remember here,

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as Appellants once again urge this Court to expand section (c) beyond its express terms, that the purpose of the original lawsuit, and the aim of the resulting Consent Judgment, was to prevent Wilmington from spending room occupancy tax revenues or other public funds to help construct a private hotel. Nothing in the Consent Judgment provides any support for the notion that it was drafted for the benefit of parties like these Intervenors, who were never joined in the original action but would presumably stand to benefit from not having to compete with another hotel in Downtown Wilmington if the city could somehow be blocked from ever reaching any deal to sell the hotel site. Nevertheless, the Consent Judgment's plain language makes clear that this was not the parties' intent. We therefore hold that the trial court did not err in concluding that the Garage Parking License Agreement does not violate section (c) of the Consent Judgment's prohibition against Wilmington subsidizing the hotel. Accordingly, the trial court's order is

**AFFIRMED.**

Judges STEELMAN and McCULLOUGH concur.



## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JUNE 2015)

CROSBY v. SELECT PORTFOLIO SERVICING, INC. No. 14-1388	Dare (11CVS1054)	Affirmed
DAVIS v. McCOY No. 15-104	Robeson (13CVS3012)	Affirmed
EST. OF TIPTON v. HIGH POINT UNIV. No. 14-1286	Guilford (14CVS4190)	Affirmed
GREEN-HAYES v. HANDCRAFTED HOMES, LLC No. 14-904	Vance (14CVS25)	Affirmed
GRIFFIN v. REICHARD No. 14-687	New Hanover (13CVD3807)	Affirmed in Part and Reversed in Part
GRIFFITH v. HOVIS No. 14-1411	Columbus (13CVS1332)	Affirmed
HASSELL v. HASSELL No. 14-862	Washington (12CVD141)	Affirmed in part; reversed and remanded in part
IN RE C.J. No. 14-1109	Mecklenburg (13JB574)	Affirmed
IN RE A.D.F. No. 14-1415	Guilford (12JT18-20) (98JT730)	Affirmed
IN RE A.E. No. 15-8	Onslow (11JA176)	Affirmed
IN RE A.G.A. No. 15-110	Dare (10JT48) (10JT49)	Affirmed
IN RE A.L.P. No. 14-1123	Davidson (13JA72) (13JA73)	Affirmed
IN RE A.L.T. No. 14-1208	Yadkin (14JA27)	Reversed

IN RE A.M.B. No. 14-1225	Mecklenburg (10J534) (10J585)	Affirmed
IN RE A.P. No. 15-123	Durham (13JA84-88)	Affirmed
IN RE E.B. No. 14-1276	Alleghany (10JA18)	Affirmed
IN RE M.L.B. No. 14-1384	Yancey (13J11-13)	Affirmed
IN RE N.A.F. No. 14-1342	Guilford (12JT84)	Affirmed
KING v. PENDER CNTY. No. 14-1336	Pender (12CVS794)	Reversed and Remanded
LEONARD v. TRANSYLVANIA CNTY. DEP'T OF SOC. SERVS. No. 14-1091	Transylvania (12CVS99)	Affirmed
MILLER v. MILLER No. 14-793	Onslow (10CVD2553)	Affirmed
MKT. AM., INC. v. LIN No. 14-1317	Guilford (13CVS8157)	Affirmed
SHEPPARD v. WINSTON-SALEM/ FORSYTH CNTY. BD. OF EDUC. No. 14-1318	Forsyth (13CVS7378)	Dismissed
STATE v. BELCHER No. 15-31	Martin (12CRS51235)	Dismissed
STATE v. DENNY No. 14-875	Rockingham (12CRS52739)	No error at trial, reversed and remanded for resentencing.
STATE v. DRAUGHN No. 14-1295	Edgecombe (13CRS51085-87) (13CRS51091) (13CRS51094)	Arrested in part and remanded for resentencing

STATE v. FAISON No. 14-1237	Wake (12CRS201475-77) (12CRS6991)	No error in part; vacated and remanded in part
STATE v. FARROW No. 14-1189	Durham (92CRS5131-55)	Affirmed
STATE v. FEATHERSTONE No. 14-1407	Alamance (05CRS61772-73)	Vacated and Remanded
STATE v. FOWLER No. 14-1205	Columbus (12CRS54049)	No Error
STATE v. FURR No. 14-1004	Cleveland (13CRS1806) (13CRS52604)	No Error
STATE v. GOODWIN No. 15-151	Orange (13CRS53408-09)	Vacated and Remanded
STATE v. MARKHAM No. 14-1331	Lincoln (12CRS54140)	No Error
STATE v. QUINTANA No. 14-1080	Randolph (11CRS52111)	No Error
STATE v. REAVES No. 14-1055	Columbus (13CRS50034)	Affirmed in part, vacated and remanded in part
STATE v. REYNOLDS No. 14-1019	Surry (13CRS50435) (13CRS815)	Vacated
STATE v. SHAW No. 14-1323	Catawba (12CRS7438-39)	Reversed and Remanded
STATE v. SMITH No. 14-1299	Lincoln (07CRS53412) (12CRS53920)	Reversed and Remanded
STATE v. SMITH No. 15-68	Alamance (13CRS52498) (13CRS52545)	Affirmed
STATE v. SPIKES No. 14-1362	Cleveland (13CRS50711)	No Error

STATE v. VALES  
No. 15-32

Mecklenburg  
(12CRS205069)  
(12CRS205070)  
(12CRS205072)  
(12CRS205075)

No error in part;  
dismissed without  
prejudice in part

STATE v. WALKER  
No. 14-1259

Granville  
(11CRS51492)

No Prejudicial Error

WHEELER v. PARSONS  
No. 14-1240

Wilkes  
(13CVD203)

Vacated and Remanded

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## ADMINISTRATIVE LAW

**Judicial review of agency decision—tenured professor—unpaid leave prior to disciplinary proceedings**—A de novo review revealed the trial court erred in affirming the Board of Trustees' final agency decision upholding the placement of a tenured UNC professor on unpaid leave prior to the initiation of disciplinary proceedings. The trial court's order was reversed and remanded for the trial court to determine the date on which the professor's employment was terminated and to determine the amount of salary and benefits which were withheld and should be paid to the professor. **Frampton v. Univ. of N.C. at Chapel Hill, 401.**

**Petition for judicial review—North Carolina Innovations Waiver—personal care services**—The superior court did not err by affirming the Administrative Law Judge's final decision denying petitioner personal care services in excess of the maximum allowed under the North Carolina Innovations Waiver policy because substantial evidence in the record supported the court's finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. Any purported risk of institutionalization was caused by petitioner's failure to take advantage of the 24 hour support exception that would keep her in the home. **Short v. N.C. Dep't of Health & Human Servs., 338.**

## APPEAL AND ERROR

**Alleged Rule 403 error—discretionary ruling—not subject to plain error review**—In defendant's appeal from his convictions for common law robbery, conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status, the Court of Appeals dismissed his argument that the trial court committed plain error under Rule of Evidence 403 by admitting a videotaped police interview of his co-perpetrator. Rulings subject to the trial court's discretion are not subject to plain error review. **State v. Duffie, 88.**

**Alternative bases for trial court order—reviewed on appeal**—Alternative legal bases offered in support of the superior court's order in an impaired driving prosecution were reviewed on appeal. Appellate Rule 28(c) expressly permits an appellee to raise in its brief an alternate basis in law in support of the order from which appeal is taken. **State v. Harper, 570.**

**Improper sentence—already served—dismissed as moot**—The Court of Appeals dismissed as moot defendant's argument that the trial court improperly changed his sentence in response to his notice of appeal. Defendant had already served his term of imprisonment and did not argue that any collateral legal consequences may result from his sentence. **State v. Godbey, 114.**

**Interlocutory orders and appeals—cross-claims pending—failure to show affected substantial right**—Defendant's appeal from the trial court's order granting summary judgment in favor of plaintiff bank in an action seeking to enforce a guaranty agreement was from an interlocutory order and was thus dismissed. The trial court's 16 April 2014 order failed to confer jurisdiction upon the Court of Appeals to review the trial court's 5 June 2012 order. Cross-claims between some of the parties were still pending; and defendant Lynch failed to show that the 5 June 2012 order affected a substantial right. Further, the 5 June 2012 order did not contain a Rule 54(b) certification. **Branch Banking & Tr. Co. v. Peacock Farm, Inc., 213.**

**Interlocutory orders and appeals—defamation action—right of free speech—substantial right**—An appeal in a defamation action was properly before the Court of Appeals even though the trial court's order denying defendants' motion



**APPEAL AND ERROR—Continued**

for summary judgment was interlocutory. Immediate appeal is available from an interlocutory order which affects a substantial right. A misapplication of the actual malice standard when considering a motion for summary judgment would have a chilling effect on a defendant's right to free speech and implicated a substantial right. **Desmond v. News & Observer Publ'g Co., 10.**

**Interlocutory orders and appeals—derivative action—some claims dismissed**—There was appellate jurisdiction in an action involving a derivative action by members of a property owner's association where claims remained pending, the trial court did not certify its orders for immediate appeal, and there was the potential for multiple trials on the same issues. **Anderson v. Seascope at Holden Plantation, LLC, 191.**

**Interlocutory orders and appeals—failure to establish grounds for appellate review—reply brief too late**—The Court of Appeals dismissed defendants' appeal of the trial court's order that granted plaintiffs' motion on the pleadings as to three of the plaintiffs but denied the motion as to the fourth plaintiff in a suit by shareholders seeking to inspect corporate records. The trial court did not certify the judgment for appellate review, and defendants' principal appellant brief failed both to state the grounds for appellate review and to address the interlocutory nature of their appeal. The Court of Appeals would not permit defendants to establish grounds for appellate review in their reply brief. Defendants' appeal was dismissed. **Larsen v. Black Diamond French Truffles, Inc., 74.**

**Interlocutory orders and appeals—failure to establish grounds for appellate review—reply brief too late**—The Court of Appeals dismissed defendants' appeal of the trial court's order that granted plaintiffs' motion on the pleadings as to three of the plaintiffs but denied the motion as to the fourth plaintiff in a suit by shareholders seeking to inspect corporate records. The trial court did not certify the judgment for appellate review, and defendants' principal appellant brief failed both to state the grounds for appellate review and to address the interlocutory nature of their appeal. The Court would not permit defendants to establish grounds for appellate review in their reply brief. Defendants' appeal was dismissed. **Larsen v. Susan Rice Truffle Prods. LLC, 79.**

**Interlocutory orders and appeals—remaining claims—certification under Rule 54(b)**—Although the trial court's order granting partial summary judgment in favor of Young's Truck Center, Inc. was interlocutory since it did not dispose of all the claims asserted by the parties, the trial court certified the order for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b). **Malone v. Barnette, 274.**

**Interlocutory orders and appeals—substantial right**—Defendant's interlocutory appeal in an equitable distribution action could be heard by the Court of Appeals where the appeal involved a preliminary injunction that concerned a business that was marital property. There was a business plan devised by plaintiff that would involve the company spending all of the money in its operating account to implement a new product. Defendant, an owner of the company, had a substantial right affected when the trial court exerted significant control over the company. **Campbell v. Campbell, 227.**

**Mootness—determined at time of rendition**—In a domestic action in which an absolute divorce was granted, an issue involving a divorce from bed and board was moot. The determination of mootness is made at the time of rendition, not entry of judgment. **Oltmanns v. Oltmanns, 326.**

**APPEAL AND ERROR—Continued**

**Mootness—order to produce records**—An appeal was dismissed as moot where the trial court allowed plaintiff to inspect and copy defendant's membership list and other corporate records. Defendant had already complied with the trial court's order and it was difficult to discern how any relief would remedy the alleged errors. Neither the public interest exception nor the "capable of repetition yet evading review" exception applied here. **130 of Chatham, LLC v. Rutherford Elec. Membership Corp., 1.**

**Preservation of issues—failure to argue**—Petitioner's argument that the superior court erred by affirming the Administrative Law Judge's (ALJ) final decision, including the 84 hour per week service limit, by denying petitioner's rights to maintain her level of services under her CAP-MR/DD budget was dismissed because it was not preserved for appellate review. Petitioner did not advance the argument before the ALJ, in her petition for judicial review, or in her brief to the superior court. As such, the CAP-MR/DD budget argument was not properly before the superior court or the Court of Appeals for review. **Short v. N.C. Dep't of Health & Human Servs., 338.**

**Preservation of issues—failure to argue—writ of certiorari denied**—Defendant failed to preserve his argument that the State presented insufficient evidence to show he posted "private, personal, or sexual information" to support a conviction under the Cyber-bullying Statute by failing to argue this issue. The State presented ample evidence of the nature of defendant's comments. The Court of Appeals declined to invoke N.C. R. App. P. 2 to suspend the rules and address the merits of this argument. **State v. Bishop, 545.**

**Preservation of issues—failure to argue—writ of certiorari denied—lack of standing**—Defendant failed to preserve his argument that the Cyber-bullying Statute was unconstitutionally vague as applied to him. Defendant failed to argue both in his motion to dismiss and at the pretrial hearing. Further, he failed to carry his burden to show consideration of this argument on appeal was necessary to prevent "manifest injustice." In its discretion, the Court of Appeals declined to invoke N.C. R. App. P. 2. Defendant lacked standing to challenge the Cyber-bullying Statute as unconstitutionally vague on its face. **State v. Bishop, 545.**

**Preservation of issues—failure to renew objection**—Although defendant appealed from the denial of a pretrial motion to suppress evidence and from judgments entered upon his convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and possession of drug paraphernalia, as well as his subsequent guilty plea to habitual felon status, he failed to preserve the error based on a failure to renew his objection. Thus, the appeal was dismissed. **State v. Hargett, 121.**

**Preservation of issues—informal offer of proof**—The defendant in a prosecution for sexual offense with a student preserved his evidentiary issue for appeal with an informal offer of proof. While a formal offer of proof is the preferred practice, an informal offer of proof may be appropriate in certain situations. Precedents to the contrary were distinguished. **State v. Martin, 602.**

**Preservation of issues—no argument in brief—issue abandoned**—Defendant's appeal from an order denying a motion for reconsideration was deemed abandoned where defendant's brief did not present any arguments regarding the motion. **N.C. State Bar v. Scott, 477.**

## ATTORNEYS

**Appointed—withdrawal of representation—client demand of unethical conduct**—The trial court did not abuse its discretion by permitting appointed defense counsel's request to withdraw his representation pursuant to Rule of Professional Conduct 1.16(a), Comment 3, on the sixth day of defendant's trial for bribery. As Comment 3 recognizes, a "lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient" to permit withdrawal. **State v. Smith, 619.**

**Appointed—withdrawal of representation—substitute counsel**—The trial court did not err when it did not appoint substitute counsel for defendant after his appointed counsel withdrew pursuant to Rule of Professional Conduct 1.16(a), Comment 3. Appointment of substitute counsel is required only when representation by the original appointed counsel would deprive the defendant of his right to effective assistance of counsel. Appointed counsel's unwillingness to engage in unprofessional conduct does not meet this standard. **State v. Smith, 619.**

**Disciplinary Committee—summary judgment—no necessity for findings**—Although defendant contended that the Disciplinary Committee of the N.C. State Bar erroneously denied his motion for findings of fact, summary judgment was granted in favor of the State Bar on alleged rule violations. There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact. **N.C. State Bar v. Scott, 477.**

**Disciplinary hearing—burden of proof**—The Disciplinary Hearing Committee of the N.C. State Bar did not improperly shift the burden of proof to defendant. Although defendant contended that the questions posed to him by members of the panel showed that the panel required him to prove that the attorney client relations in this case were different than that envisioned by the Rules, the members of the panel asked defendant questions in order to clarify his explanation of why he believed the North Carolina Rules of Professional Conduct did not apply to him in this situation. **N.C. State Bar v. Scott, 477.**

**Discipline—censure—appropriate**—The Disciplinary Hearing Committee (DHC) of the N.C. State Bar properly considered the evidence that defendant had violated three provisions of the North Carolina Rules of Professional Conduct and properly found that censure was an appropriate discipline for defendant's conduct. The statutory scheme clearly indicated an intent to punish attorneys in an escalating fashion keyed to the harm or potential harm caused by their conduct and the need to protect the public. Defendant did not exercise the proper supervisory authority sufficient to ensure that the work of non-attorney employees was compatible with his professional obligations as the closing attorney and the DHC properly found that censure was an appropriate discipline for defendant's conduct. **N.C. State Bar v. Scott, 477.**

**Discipline—state rules—federal regulations—priority**—Federal regulations did not take precedence over the North Carolina Rules of Professional conduct in a disciplinary proceeding against an attorney that arose from the disbursement of funds after a real estate closing where defendant was employed by an interstate law firm that served as the closing attorney for United States Department of Housing and Urban Development properties. Although defendant contended that the mistakes of his staff were controlled by federal contract requirements and that he did not personally violate the North Carolina Rules of Professional conduct, defendant was primarily responsible for supervising the staff. A North Carolina closing attorney must make sure that the proper procedures are in place for non-attorneys to perform their functions diligently and promptly. **N.C. State Bar v. Scott, 477.**

**ATTORNEYS—Continued**

**Effective assistance of counsel—new counsel—limited time to prepare**—The Court of Appeals rejected defendant's argument that his trial counsel, who entered the case on the seventh day after defendant's appointed counsel withdrew, was ineffective because he requested only a four-hour recess to meet with defendant and prepare. Most of the trial work had already been completed by the original counsel; new counsel had already discussed the case with the original counsel; defendant's theory of the case was simple and straightforward; and the record demonstrated that new counsel had sufficient understanding of the case. **State v. Smith, 619.**

**BURGLARY AND UNLAWFUL BREAKING OR ENTERING**

**Attempted—intent—evidence not sufficient**—The trial court did not err by denying defendant's motion to dismiss a charge of attempted first-degree burglary for insufficient evidence of intent where there was no evidence that defendant's attempt to break into a home was for a purpose other than to commit larceny. **State v. Mims, 611.**

**Felonious breaking or entering—intent—sufficiency of evidence**—The trial court did not err by denying defendant's motion to dismiss the charge of attempted felonious breaking or entering for insufficient evidence. In ruling on defendant's motion for dismissal, the trial court could properly consider the evidence in light of *State v. McBryde*, 97 N.C. 393 (1887). **State v. Mims, 611.**

**CHILD ABUSE, DEPENDENCY, AND NEGLECT**

**Abuse—timing of father's actions—consistent with evidence**—The evidence in a proceeding for child abuse and neglect about the timing of the father's actions were consistent with the evidence. **In re A.L.T., 443.**

**Adjudication—mere recitations of evidence—not sufficient**—The trial court's order in a child neglect proceeding must reflect an adjudication rather than mere one-sided recitations of allegations presented at the hearing. **In re M.K., 467.**

**Disposition order—return to parents' home—not in best interest of juveniles**—The trial court's disposition order in a neglected juvenile case was affirmed where the trial court made uncontested findings that the return of the juveniles to the parents' home would be contrary to the juveniles' welfare and best interest because issues still existed, the juveniles required more care and attention than the parents could provide, Social Services had made reasonable efforts to prevent or eliminate the need for the juveniles' placement, which was the responsibility of Social Services, and Social Services was to provide or arrange for foster care or other placement. **In re A.L.T., 443.**

**Domestic violence—impact on children**—The trial court did not act under a misapprehension of the law in a child neglect proceeding involving domestic violence where it found that domestic violence in the home impacts the children. It has been held that evidence of a child's continued exposure to domestic violence may constitute an environment injurious to the juvenile's welfare. The substantial findings of fact in this case sufficiently detailed the impacts of the father's domestic violence with the mother. **In re M.K., 467.**

**Domestic violence—knowledge of children about altercations**—In a child neglect proceeding involving domestic violence, ample evidence supported the trial court's finding that all four children knew about the arguments and physical altercations. **In re M.K., 467.**

**CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued**

**Domestic violence—mother's bruising—characterization**—In a child neglect proceeding that involved domestic violence, the trial court's finding that the mother's bruising was severe was supported by the evidence. Although neither the social worker's testimony nor the police report used the term "severe," it was within the province of the trial court, as finder of fact, to draw reasonable inferences based on the evidence. **In re M.K., 467.**

**Domestic violence—observation—reviewed as a conclusion**—In a child neglect proceeding involving domestic violence, a finding that the father contended was an observation rather than a finding was reviewed as a conclusion. **In re M.K., 467.**

**Domestic violence—supporting evidence—police report**—A finding in a child neglect proceeding involving domestic violence was supported by evidence received without objection in the form of the police report. **In re M.K., 467.**

**Findings not necessary for ultimate conclusion—not considered on appeal**—In a child abuse and neglect proceeding, challenges by the parents to findings that were not necessary to support the ultimate conclusions were not considered on appeal. Any error would not constitute reversible error. **In re A.L.T., 443.**

**Findings of fact—same wording as juvenile petition—sufficiency of evidence**—The trial court did not err in a child neglect and custody case by its findings of fact that allegedly "regurgitated" the same wording used in the juvenile petition. It is not *per se* reversible error for a trial court's findings of fact to mirror the wording of a party's pleading. The Court of Appeals concluded the record of the proceedings demonstrated that the trial court, through processes of logical reasoning based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. **In re J.W., 44.**

**Hearsay evidence—bench trial**—In a child abuse and neglect proceeding, the trial court did not err by allowing into evidence hearsay statements made by the child to a social worker and an aunt. The court in a bench trial is presumed to have disregarded any incompetent evidence, and here the court can be presumed to have disregarded the incompetent evidence during the adjudication because it made no findings pertaining to that evidence. The trial court was authorized to consider such evidence for purposes of disposition. **In re A.L.T., 443.**

**Neglected juveniles—father aggressive and violent**—The trial court did not err by concluding that children were neglected juveniles where competent evidence supported the findings that the father engaged in aggressive and violent behaviors in the home, including punching the walls and striking the children. **In re A.L.T., 443.**

**Striking children—domestic violence**—The trial court properly characterized a father's actions as domestic violence where the father intentionally caused bodily injury to a minor child with whom he resided when he "popped" one daughter in the mouth, causing her to suffer a "busted" lip, and "popped" the other in the mouth, causing her to cry. **In re A.L.T., 443.**

**Support—imputed income—no finding of bad faith**—The trial court erred by denying defendant's motion for child support based on changed circumstances (the loss of her job and her decision to not seek employment so that she could stay with her child) without making a finding that she had deliberately suppressed her income or acted in bad faith. On remand, and on this record, the trial court could find competent evidence to support a determination in either direction without abusing its discretion so long as its conclusion is supported by sufficient factual findings. **Nicks v. Nicks, 487.**

## CHILD CUSTODY AND SUPPORT

**Award of child custody to defendant—plaintiff's active role**—The trial court acted within its discretion in awarding primary child custody to defendant, as supported by its findings of fact, despite making findings that plaintiff maintains an active role in the lives of the minor children. **Oltmanns v. Oltmanns, 326.**

**Effective date of permanent award—not modified**—The trial court did not abuse its discretion in its award of child support by choosing not to modify the effective date of the permanent award based on the evidence before it. **Oltmanns v. Oltmanns, 326.**

**Failure to return custody to parent after completion of case plan—conditions leading to removal still existed**—The trial court did not abuse its discretion in a child neglect and custody case by failing to return the children to respondent mother's custody even though she completed her case plan and had the financial means to provide for the children. The trial court found that respondent behaved inappropriately at several visits with the children and that respondent appeared to be under the influence of drugs or alcohol during one of the visits. The court also found that respondent "has been unable to consistently care for herself or any of her children" and that the conditions leading to the removal of the children continued to exist. **In re J.W., 44.**

**Non-secure custody—Department of Social Services**—The trial court did not err in a child neglect case by awarding the Department of Social Services (DSS) non-secure custody of the juveniles at the dispositional hearing even though respondent mother contended that the statute did not provide for non-secure custody. Respondent did not provide any reason why the children should have been placed in secure custody, and there was none. **In re J.W., 44.**

**Marital property—houses—post-separation depreciation**—The trial court did not err in a child support action by classifying the post-separation depreciation of two houses as marital property. Plaintiff argued that the trial court failed to make any findings of fact as to why the depreciation of the two homes constituted divisible property, but plaintiff failed to cite any case law which supported his assertion. **Oltmanns v. Oltmanns, 326.**

**Negative income level of party—supported by evidence**—The trial court acted within its discretion in a child support case by setting defendant's negative income level at \$1,063.18 per month, as this figure was supported by the evidence. **Oltmanns v. Oltmanns, 326.**

**Parent-time right of first refusal—not addressed**—The question in a domestic action of whether the trial court improperly denied each party's request for a parent-time right of first refusal was not addressed where the appellate court was not provided with supporting guidance as to how or why the trial court was required to make such a finding. Moreover, the trial court noted orally that it would not entertain a parent-time right of first refusal as being in the best interests of the minor and it was within the discretion of the court not to include such a provision in its order. **Oltmanns v. Oltmanns, 326.**

**Plaintiff's monthly gross income—over-assessed trivial amount**—The trial court erred in its award of child support where it over-assessed plaintiff's monthly gross income by \$4.00. Although the difference was trivial and did not change the trial court's determination of child support, the case was remanded for correction of the error. **Oltmanns v. Oltmanns, 326.**

**CHILD CUSTODY AND SUPPORT—Continued**

**Support—imputed income—no finding of bad faith**—The trial court erred by denying defendant's motion for child support based on changed circumstances (the loss of her job and her decision to not seek employment so that she could stay with her child) without making a finding that she had deliberately suppressed her income or acted in bad faith. On remand, and on this record, the trial court could find competent evidence to support a determination in either direction without abusing its discretion so long as its conclusion is supported by sufficient factual findings. **Nicks v. Nicks, 487.**

**Travel restrictions—passports**—The trial court did not err in a child custody action in the travel restrictions on the children, including maintenance of their passports. Both parties requested the passport arrangement. **Oltmanns v. Oltmanns, 326.**

**Uneven allocation of support—mortgages and maintenance expenses of marital home and vacation home**—The plaintiff's contention in a child support case that the trial court erred by not making an even 50/50 allocation as to child support was without merit. Defendant's evidence showed that defendant incurred significantly higher monthly expenses than plaintiff due to defendant having to pay the mortgages and maintenance expenses on the marital home and the vacation home. It was appropriate for the trial court to consider defendant's increased expenses relating to the two homes in determining its award of child support. **Oltmanns v. Oltmanns, 326.**

**CHILD VISITATION**

**Visitation plan—frequency and length of visits**—The trial court did not err in a child neglect and custody case in its child visitation order even though respondent mother contended that the visitation plan allegedly did not include the frequency and length of visits as required by N.C.G.S. § 7B-905.1. However, the two orders complied with the statutory mandate in setting respondent's visitation. **In re J.W., 44.**

**CITIES AND TOWNS**

**Consent judgment—sale of land for hotel site**—The trial court did not err by concluding that a Consent Judgment entered by the City of Wilmington and plaintiffs, prohibiting the use of public funds to subsidize a privately owned hotel as part of the City's plans for a downtown convention center, did not apply to the sale of land for the hotel site. The Consent Judgment did not reference land for the hotel site, and the Court of Appeals declined to read "something more" into its plain language. **Wells v. City of Wilmington, 640.**

**Consent judgment—sale of land for hotel site**—The trial court did not err by concluding that a Purchase and Development Agreement between the City of Wilmington and Harmony Hospitality, Inc. did not violate the Consent Judgment entered by the City of Wilmington and plaintiffs, prohibiting the use of public funds to subsidize a privately owned hotel as part of the City's plans for a downtown convention center. The trial court's finding that the City would make a profit from the sale of the land was supported by competent evidence. **Wells v. City of Wilmington, 640.**

**Consent judgment—sale of land for hotel site—fair market value**—The trial court did not err by concluding that the City of Wilmington acted within its authority pursuant to N.C.G.S. § 158-7.1(d) when it set the fair market value of a hotel site

**CITIES AND TOWNS—Continued**

it was selling to a private developer. The Court of Appeals rejected the premise of plaintiffs' argument—that the trial court erred by rejecting a 2013 appraisal, which was based on incorrect extraordinary assumptions. **Wells v. City of Wilmington, 640.**

**Consent judgment—sale of land for hotel site—parking garage**—The trial court did not err by concluding that the Garage Parking License Agreement between the City of Wilmington and Harmony Hospitality, Inc. did not violate the Consent Judgment entered by the City of Wilmington and plaintiffs, prohibiting the use of public funds to subsidize a privately owned hotel as part of the City's plans for a downtown convention center. In accordance with the Consent Judgment, the parking garage was available to all users on the same terms, conditions, and prices, and the Agreement would not amount to a subsidy for Harmony Hospitality. **Wells v. City of Wilmington, 640.**

**CIVIL PROCEDURE**

**Rule 41 dismissal—statute of limitations**—Orders to dismiss entered after a second voluntary dismissal in a foreclosure action were void. Rule 41 of the North Carolina Rules of Civil Procedure permits an additional year to refile until the expiration of the ten-year statute of limitations for a foreclosure action. Petitioners' actions were timely filed and the effect of the second voluntary dismissal was such that any subsequent orders were without legal effect. **In re Foreclosure by Rogers Townsend & Thomas, PC, 247.**

**Rule 41—statute of limitations**—N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) provides that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim. This provision is commonly referred to as the "two dismissal" rule, but Rule 41 itself does not bar a subsequent action. It is the doctrine of res judicata that bars subsequent actions based on the same claim or claims. **In re Foreclosure by Rogers Townsend & Thomas, PC, 247.**

**CONSPIRACY**

**To commit robbery—jury instructions—definition of "firearm"**—The trial court did not commit plain error by incorrectly defining "firearm" in its jury instructions on conspiracy to commit robbery with a dangerous weapon. Even though the co-perpetrator testified that he used a BB gun to commit the robberies, proof that a dangerous weapon was actually used to commit a robbery was not required to establish conspiracy to commit robbery with a dangerous weapon. **State v. Duffie, 88.**

**CONSTITUTIONAL LAW**

**Double jeopardy—license revocation—civil and criminal**—A driver's license revocation for impaired driving did not subject defendant to double jeopardy where he had already been subjected to a civil revocation for the same offense. **State v. Harper, 570.**

**Effective assistance of counsel—failure to preserve appeal—failure to show prejudice**—Defendant's motion for appropriate relief based on ineffective assistance of counsel was denied based on failure to show prejudice. Even if defense counsel properly preserved defendant's right to appellate review of the trial court's



**CONSTITUTIONAL LAW—Continued**

denial of his motion to suppress or properly raised a plain error argument in his opening brief, defendant would not have prevailed. **State v. Hargett, 121.**

**Freedom of speech—cyber-bullying statute—failure to show overbroad—**The trial court did not err by convicting defendant of cyber-bullying under N.C.G.S. § 14-458.1(a)(1)(d) even though defendant contended that it was an unconstitutionally overbroad content-based criminalization of protected speech. The Cyber-bullying Statute prohibits conduct, not speech. Any effect the statute has on speech or expression is merely incidental. Defendant failed to carry his burden to show any real and substantial overbreadth of the Cyber-bullying Statute to invalidate it on First Amendment grounds. **State v. Bishop, 545.**

**Right to impartial jury—right to fair trial—failure to question jurors about jury note—**The trial court did not violate defendant's constitutional rights to an impartial jury and a fair trial in a first-degree murder and discharging a firearm into an occupied vehicle case by failing to question the jurors about a third jury note. No *Campbell* inquiry was required since the jury's safety concern did not arise from an "improper and prejudicial" matter. *State v. Campbell*, 340 N.C. 612 (1995). Further, no inquiry was required for the reference to the large number of people in the courtroom. **State v. Mackey, 586.**

**Right to present—failure to disclose jury note—**Although the trial court violated defendant's constitutional right to presence in a first-degree murder and discharging a firearm into an occupied vehicle case by failing to disclose a third jury note, it was not prejudicial error. The State showed that any error was harmless beyond a reasonable doubt. **State v. Mackey, 586.**

**CONTRACTS**

**Condominium residents—continuing care retirement community—not unconscionable—no violation of prohibition against transfer fees—Marketable Title Act—**The trial court erred by finding the membership fee and overhead payments in an agreement between condominium residents and a continuing care retirement community unenforceable. The provisions of the agreement were not unconscionable and did not violate the prohibition against transfer fees in Chapter 39A or the provisions of the Marketable Title Act, Chapter 47B of the North Carolina General Statutes. **Wilner v. Cedars of Chapel Hill, LLC, 389.**

**Fees—covenants running with land—traditional contract law—**Where plaintiffs agreed to the payment of fees in a contract, the trial court erred in holding them unenforceable pursuant to an analysis of covenants running with the land. Under traditional contract law, parties that agree to contracts are bound by them. **Wilner v. Cedars of Chapel Hill, LLC, 389.**

**CORPORATIONS**

**Derivative claims—property owners association and members—claim initiated by POA—members lacked standing—**In an action in which property owners and, eventually, the property owners association (POA) asserted the same claims against third parties, the decision to initiate litigation against the third parties was a valid act of the Executive Board for the POA under the By-Laws and taken in a Special Meeting at which two directors constituted a quorum and the majority of disinterested directors. The "real party in interest" for the derivative claims brought

**CORPORATIONS—Continued**

by plaintiffs was the POA. The requirement that a shareholder exhaust all intra-corporate remedies and make a demand on the corporation in order to acquire standing, unless such demand would be futile, was consistent with the principle that standing will not be conferred to the shareholder if the corporation chooses to assert claims for itself. Because the POA elected to bring its own claims against the third parties, it must be concluded that plaintiffs did not have standing to bring those same claims on the POA's behalf. **Anderson v. Seascope at Holden Plantation, LLC, 191.**

**COSTS**

**Interests—Rule 41(d)**—The trial court erred by awarding interest on costs incurred by defendants in the first of two medical malpractice actions filed from the same event. N.C.G.S. § 1A-1, Rule 41(d) did not allow the trial court to award interest on the costs assessed. **Fintchre v. Duke Univ., 232.**

**Jail fees—daily rate—improper version of statute used**—The trial court erred in a drugs case by calculating the amount of jail fees assessed against defendant by using the daily rate provided in the revised version of N.C.G.S. § 7A-313 (2013). That version was inapplicable to defendant because it did not become effective until after defendant had completed his pretrial confinement. The case was remanded for recalculation of jail fees using the correct daily rate of \$5.00 per diem and for the limited purpose of subtracting \$1,760.00 from the amount of costs assessed against defendant. **State v. Fennell, 108.**

**CRIMINAL LAW**

**Motion to dismiss—granted after jury verdict—violation of statute**—The trial court erred in defendant's trial for driving while impaired by granting defendant's motion to dismiss after the jury returned its guilty verdict, in violation of N.C.G.S. § 15A-1227(c). Because the trial court would have ruled in defendant's favor if it had ruled at the proper time, the trial court's error was prejudicial. The Court of Appeals dismissed the State's appeal. **State v. Kiselev, 144.**

**DIVORCE**

**Alimony—calculation—mathematical error**—The trial court erred in an alimony action by committing a basic mathematical error in calculating the award. The amount of the trial court's alimony award was not justified by competent evidence as reflected in the court's factual findings and was remanded. **Nicks v. Nicks, 487.**

**Alimony—findings—not sufficient**—The trial court abused its discretion by failing to make sufficient findings of fact to support its award of permanent alimony to defendant. There were competing facts that should have been weighed in reaching and explaining the decision on the duration of the alimony award. The action was remanded for further findings of fact. **Nicks v. Nicks, 487.**

**Alimony—imputed income**—The trial court did not abuse its discretion in an alimony action by finding that defendant had the ability to earn an income as a physician on at least a part time basis. The trial court's findings were supported by competent evidence, but the trial court erred by imputing a gross monthly income to her absent any finding that she depressed her income in bad faith. The case was remanded. **Nicks v. Nicks, 487.**

**DIVORCE—Continued**

**Alimony—postseparation support—findings—insufficient**—The trial court abused its discretion in an alimony action and erred as a matter of law by failing to include in its order findings of fact to support its dismissal of defendant's claim for postseparation support for the time period between the date of separation and the commencement of its alimony award. A trial judge has broad discretion in determining whether to make an award of postseparation support and what date it should take effect. An order awarding alimony can provide for the payment of an already-pending claim for postseparation support where warranted, but the court is also obligated to explain its reasoning through adequate factual findings. **Nicks v. Nicks, 487.**

**Alimony—reasonable living expenses—litigant's assertion**—The trial court abused its discretion in an alimony action by reducing defendant's purported reasonable monthly expenses. The trial court is not required to accept a litigant's assertion of living expenses at face value. **Nicks v. Nicks, 487.**

**Alimony—tax ramifications**—The trial court erred as a matter of law in an alimony case by failing to account for the tax ramifications of its alimony award. Although plaintiff's CPA did not testify specifically about the tax ramifications of an alimony award of \$36,000.00 per year, her testimony regarding the hypothetical award amounts makes clear that the amount of the award Sally actually receives will be lower as a result of state and federal income taxes. While this evidence does not necessarily require the trial court to increase its alimony award, the statute requires the trial court to support its reasoning with specific findings of fact, and the case was remanded. **Nicks v. Nicks, 487.**

**Equitable distribution—assets owned by trust**—The trial court erred in an equitable distribution action by distributing to plaintiff a member-managed limited liability company (Entrust) that was owned by a trust but managed by plaintiff, where the trial court's findings did not support its conclusion that Entrust was marital property. The trust was never joined as a party to the action, but it is clear from the record that once the trust (which holds legal title to Entrust and the marital assets therein) is joined as a necessary party, defendant will have a strong claim for the imposition of a constructive trust. **Nicks v. Nicks, 487.**

**Equitable distribution—corporation owned by husband and wife—corporation not a party to action**—The trial court in an equitable distribution action did not have the authority to order that certain actions be taken by a corporation owned by the parties where the corporation was not a party to the action. The courts are not free to completely ignore the existence of a legal entity. **Campbell v. Campbell, 227.**

**Equitable distribution—IRA—passive postseparation appreciation**—The trial court abused its discretion in an equitable distribution action by failing to classify, value, or distribute as divisible property the passive postseparation appreciation of plaintiff's IRA and the case was remanded. There was no evidence of any contributions to or active management of the account after the date of separation. **Nicks v. Nicks, 487.**

**Equitable distribution—student loan debt**—In an equitable distribution action, the trial court did not abuse its discretion by classifying as marital debt the student loans incurred by plaintiff-wife for her graduate school program. The loan debt was incurred during the course of the marriage, for the benefit of the family, and both parties enjoyed the benefits of the loan funds and plaintiff's graduate degree. **Warren v. Warren, 634.**

## DOMESTIC VIOLENCE

**Ex parte protective order—fear of continued harassment—findings of fact—** It was not error for the trial court not to include specific findings of fact as to every element of fear of continued harassment as described in N.C.G.S. §§ 14-277.3A(b) (2) and 50B-1(a)(2) in its ex parte domestic violence protective order concluding that defendant had committed an act of domestic violence against plaintiff. **Stancill v. Stancill, 529.**

**Ex parte protective order—hearing not recorded—**The trial court erred by failing to record an ex parte domestic violence protective order hearing pursuant to N.C.G.S. § 7A-198(e), but defendant did not show that the error was prejudicial. **Stancill v. Stancill, 529.**

**Ex parte protective order—surrender of firearms—findings of fact—**In its ex parte domestic violence protective order, the trial court did not err by ordering defendant to surrender all firearms, ammunition, and gun permits. Even though the hearing was not recorded, the allegations in plaintiff's complaint supported the trial court's finding that defendant had made threats to commit suicide. **Stancill v. Stancill, 529.**

**Protective order—fear of continued harassment—findings of fact—**In its domestic violence protective order, the trial court did not err by concluding that defendant had committed an act of domestic violence against plaintiff. Competent evidence supported the trial court's finding that defendant placed plaintiff in fear of continued harassment that inflicted substantial emotional distress. **Stancill v. Stancill, 529.**

**Protective order—surrender of firearms—no statutory findings—**In its domestic violence protective order (DVPO) directing defendant to surrender all firearms, ammunition, and gun permits, the trial court erred by failing to indicate what statutory findings under N.C.G.S. § 50B-3.1(a) supported its order. The Court of Appeals accordingly vacated this portion of the DVPO. **Stancill v. Stancill, 529.**

## EVIDENCE

**Child sexual abuse—expert testimony—**There was no error, much less plain error, in a prosecution for statutory rape and other offenses where the trial court admitted the testimony of an expert in "child evaluation and evaluation of sexual or physical abuse." The witness never testified that the victim was "in fact abused," that the victim was "believable" or "credible," or that the victim's disclosure was "consistent with" her exam, despite a lack of physical evidence. The cases cited by the defendant were inapplicable to the facts of the present case, and defendant's contention ignored the context in which the testimony was offered. Moreover, defendant made admissions on multiple occasions tending to show his guilt and the case did not hinge solely on the testimony of this witness. **State v. Chavez, 562.**

**Corroboration—additional statements—substantially consistent—**In defendant's appeal from his convictions for common law robbery, conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status, the trial court did not commit plain error by admitting a videotaped police interview of his co-perpetrator for corroborative purposes. The co-perpetrator's statements in the video were consistent with his statements at trial, and the additional information contained in the video interview did not render the video inadmissible. **State v. Duffie, 88.**

**EVIDENCE—Continued**

**Hearsay—out-of-court statement—nonprejudicial**—The trial court did not err in a first-degree murder case by admitting an out-of-court statement made by Scott through the testimony of Boyce. Assuming *arguendo* that the trial court erred by allowing Boyce to testify about a purported hearsay statement made by Scott or by refusing to instruct the jury on the lesser included offense of second-degree murder, any such error was nonprejudicial. Boyce's testimony alone that he saw defendant pull out a gun renders the admission of Scott's out-of-court statement to defendant as non-prejudicial. **State v. Hicks, 345.**

**Lay opinion testimony—cyberbullying screen shots**—The trial court did not abuse its discretion by permitting a detective to testify, over objection, concerning screen shots of anything that appeared to him to be evidence of cyber-bullying. The detective's lay opinion testimony regarding his investigative process was admissible under N.C.G.S. § 8A-1, Rule 701. **State v. Bishop, 545.**

**Of prior criminal complaint—door opened on direct examination**—In defendant's trial for assault on a female, the trial court did not err by admitting evidence that defendant's criminal complaint against another man for assault had been dismissed. Defendant opened the door to cross-examination on this subject when he testified about it in his direct testimony. **State v. Godbey, 114.**

**Prior sexual conduct of victim—Rape Shield Statute exceptions—issues common to all trials**—In a prosecution for sexual offense with a student, the trial court erred by concluding that evidence of prior sexual behavior by the student was per se inadmissible where it went to motive. The Rape Shield Statute was not intended to be a barricade against evidence used to prove issues common to all trials: there should have been a determination of whether the evidence was, in fact, relevant to show motive for a false accusation and, if so, there should have been a balancing test of the probative and prejudicial value of the evidence. Here the trial court's failure to exercise its discretion was prejudicial on one conviction and not on the other. **State v. Martin, 602.**

**Statements about Christianity—relevancy for cyber-bullying—intent—chain of events—failure to show prejudice**—The trial court did not err by admitting defendant's comments regarding Christianity. The comments were relevant to show defendant's intent, and to establish the chain of events which culminated in defendant's charge of cyber-bullying. In light of the other substantial evidence of guilt, defendant failed to carry his burden to show prejudice by the admission of these comments. **State v. Bishop, 545.**

**Unrelated charges—untimely objection—no prejudice**—The trial court did not err in a robbery with a dangerous weapon and common-law robbery case by admitting evidence of unrelated charges and denying defendant's motion for a mistrial. Defendant's objection to this evidence was untimely. Even if defendant offered a timely objection, the admission of the evidence did not prejudice defendant's case. **State v. Jones, 132.**

**FIREARMS AND OTHER WEAPONS**

**Discharging a firearm into occupied property—diminished capacity instruction**—The trial court did not err by declining to give a diminished capacity instruction on defendant's charge for discharging a firearm into occupied property. The "willful" element did not subject the offense to the diminished capacity instruction. **State v. Maldonado, 370.**

**FRAUD**

**Constructive—claim against property owners association board members—properly dismissed**—A complaint failed to state a valid claim of constructive fraud against the dismissed property owners association (POA) Board members where it alleged that the POA knew or should have known of a defective bulkhead at least two years after the dismissed Executive Board members had stepped down from the board. There was similarly no allegation that the dismissed Executive Board members knew about the developers' installation of the perforated pipe. **Anderson v. Seascape at Holden Plantation, LLC, 191.**

**HOMICIDE**

**Second-degree murder—voluntary manslaughter—motion to dismiss—sufficiency of evidence**—The trial court did not err in a voluntary manslaughter case by denying defendant's motion to dismiss the charges of second-degree murder and its lesser-included offense, voluntary manslaughter. Based on the circumstantial evidence presented and viewed in the light most favorable to the State, it was reasonable for the jury to infer that defendant intentionally struck the victim with her car. **State v. English, 98.**

**Felony murder—discharging a firearm into occupied property—single transaction**—In defendant's trial resulting in his conviction for felony murder, the trial court did not err by allowing the offense of discharging a firearm into occupied property to serve as the predicate felony for the felony murder conviction. The shooting and the resulting death occurred in a time frame in which they could be perceived as a single transaction. **State v. Maldonado, 370.**

**Felony murder—jury instruction—no prejudicial error**—In defendant's trial resulting in his conviction for felony murder, there was no prejudicial error in the trial court's failure to instruct the jury on voluntary manslaughter as a lesser-included offense of first-degree murder by premeditation and deliberation. The jury found defendant not guilty of first-degree murder by premeditation and deliberation. **State v. Maldonado, 370.**

**First-degree murder—denial of request for instruction on lesser included offense—second-degree murder**—The trial court did not err by denying defendant's request for an instruction on the lesser included offense of second-degree murder. The evidence showed that defendant acted with premeditation and deliberation and there was no evidence in the record to suggest a lack thereof. Further, defendant cannot show a reasonable possibility that had the second-degree murder instruction been given, a different result would have been reached at trial. **State v. Hicks, 345.**

**First-degree murder—failure to disclose felony murder theory—not required**—The trial court did not abuse its discretion in a first-degree murder case by refusing to require the State to disclose its felony murder theory before the jury was empaneled. When the State's indictment language sufficiently charges a defendant with first degree murder, it is not required to elect between theories of prosecution prior to trial. The State's legal theories are not "factual information" subject to inclusion in a bill of particulars, and no legal mandate requires the State to disclose the legal theory it intends to prove at trial. Further, defendant failed to establish that he could not adequately prepare his defense without knowledge of the State's legal theory. **State v. Hicks, 345.**

**HOMICIDE—Continued**

**First-degree murder—felony murder rule—motion to dismiss—discharging firearm into occupied property**—The trial court did not err by denying defendant's motion to dismiss the first-degree murder charge under the felony murder rule for insufficient evidence. The State presented sufficient evidence to support the felony charge of discharging a firearm into occupied property even though there was conflicting evidence as to whether defendant fired the shots from inside or outside the vehicle. Contradictions and discrepancies do not warrant dismissal of the case and are for the jury to resolve. **State v. Hicks, 345.**

**First-degree murder—motion to dismiss—premeditation and deliberation**—The trial court did not err by denying defendant's motion to dismiss the first-degree murder charge based upon alleged insufficient evidence of premeditation and deliberation. In the light most favorable to the State, the State presented sufficient evidence to put the issue of premeditation and deliberation before the jury. **State v. Hicks, 345.**

**INDEMNIFICATION**

**Contractual indemnification—no per se prohibition—past negligence conduct**—The trial court did not err by entering partial summary judgment in favor of Young's Truck Center, Inc. as to its cross-claims for contractual indemnification. There are no North Carolina cases expressly articulating a **per se** prohibition against indemnity contracts that hold an indemnitee harmless from its past negligent conduct. Further, the indemnity provision between reflected an arms-length bargained-for contractual agreement between two commercial entities which prevented public confusion about who was financially responsible if accidents occurred by specifically identifying the party bearing financial responsibility for claims arising out of injuries occurring during the lease term that resulted from the maintenance or operation of the truck. **Malone v. Barnette, 274.**

**IDENTIFICATION OF DEFENDANTS**

**80% certainty—weight of evidence**—There was sufficient evidence of identity in a prosecution for breaking and entering where a witness identified defendant in a photo line-up to an 80% certainty. A witness's equivocation on the question of identity goes to the weight of the testimony rather than its competency. **State v. Mims, 611.**

**INJUNCTIONS**

**Failure to describe particularity—acts being enjoined**—The trial court erred in entering an injunction without describing with particularity the acts being enjoined. The order granting summary judgment and the injunction were remanded to the trial court for a trial by jury. **Wilner v. Cedars of Chapel Hill, LLC, 389.**

**JURISDICTION**

**Standing—derivative claims—property owners association**—The trial court did not err by concluding the plaintiffs lacked standing to bring derivative claims against third parties or by denying plaintiffs' motion to dismiss a property owners association (POA) intervenor complaint. All of plaintiffs' claims were derivative pursuant to N.C.G.S. § 55A-7-40 in the North Carolina Nonprofit Corporation

**JURISDICTION—Continued**

Act. Although the POA contended that plaintiffs failed to comply with the pleading requirements of N.C.G.S. § 55A-7-40(b), there was no need to resolve the issue because a prior decision rendered it the law of the case that the POA had the right to intervene in this litigation. The POA did so by filing an intervenor complaint alleging substantially the same claims against the third parties that plaintiffs brought derivatively. **Anderson v. Seascape at Holden Plantation, LLC, 191.**

**Standing—derivative claims—property owners association and members bringing same claims**—No prior North Carolina appellate court decision has applied the principles of standing where both a corporation and its shareholders attempted to bring the same claims against third parties. The determination must be (1) whether the steps taken by the property owners association (POA) to institute the litigation were valid and (2) what legal effect the POA's filing of the intervenor complaint had on plaintiffs' derivative action. **Anderson v. Seascape at Holden Plantation, LLC, 191.**

**JURY**

**Jury note—trial court not required to respond in particular way**—The trial court did not violate N.C.G.S. § 15A-1234 requiring a trial court to disclose every jury note to a defendant, to hear defendant in connection with every note, and to respond to every jury note in open court. Nothing in the statute required a trial judge to respond to a jury note in a particular way. Further, N.C.G.S. § 15A-1233(a) was inapplicable because in the pertinent jury note, the jury did not request a review of certain testimony or other evidence. **State v. Mackey, 586.**

**JUVENILES**

**Guardianship—guardian's understanding and resources—evidence not sufficient**—The trial court's determination that legal guardianship of respondent-mother's child should be granted to Ms. Smith, a third party, was remanded for further proceedings. The trial court's finding that Ms. Smith was aware of the legal significance of her appointment as legal guardian of the juvenile was supported by the evidence, as Ms. Smith was present in court and the trial court directly addressed her at the hearing. However, there was insufficient evidence in the record to support a determination that Ms. Smith would have adequate resources to care appropriately for the juvenile. Ms. Smith's unsworn affirmative answer to the trial court's inquiry as to whether she had the financial and emotional ability to support the child and provide for its needs alone was not sufficient. The trial court has the responsibility to make an independent determination, based upon facts in the particular case. **In re P.A., 53.**

**Guardianship—fundamentally fair procedures—cross-examination—prior neglect adjudication**—Respondent-mother's right to fundamentally fair procedures in a guardianship proceeding for her child was not violated by a Department of Social Services (DSS) attorney's cross-examination of her concerning a prior adjudication of neglect that was overturned on appeal. Examined in context, the questions were not improper in any way. The questions related not to the legal conclusions of the prior adjudication but to facts as to prior events in the long history of DSS's involvement with respondent's children. **In re P.A., 53.**

**Guardianship—fundamentally fair procedures—scrutiny of guardian and mother**—In a guardianship proceeding for respondent-mother's child, respondent



**JUVENILES—Continued**

contended that the hearing lacked fundamentally fair procedures in that the trial court subjected her to closer scrutiny than it did Ms. Smith, an unrelated person who was to be the guardian. Respondent's arguments were in substance directed at the trial court's weighing of the evidence and determination of the credibility of the witnesses. While it is true that some of the evidence could be viewed as respondent suggested, the appellate court cannot reweigh the evidence or credibility as determined by the trial court. **In re P.A., 53.**

**Guardianship—further review waived by trial court—requisite findings not made**—In a guardianship proceeding vacated and remanded on other grounds, the trial court erred by not making the requisite findings before waiving further review hearings. **In re P.A., 53.**

**LANDLORD AND TENANT**

**Residential Rental Agreements Act—no working smoke or carbon monoxide alarms—not uninhabitable**—In a summary ejection action on a residential lease, the trial court erred by granting defendant tenant's counterclaim for rent abatement under the Residential Rental Agreements Act (RRAA). The trial court's conclusion that plaintiff landlord violated the RRAA by failing to provide working smoke and carbon monoxide alarms was unsupported by the findings of facts. Such violations alone would not render a rental uninhabitable. The trial court's judgment awarding plaintiff trebled rent abatement and attorney fees was reversed. **Stikeleather Realty & Invs. Co. v. Broadway, 152.**

**LIBEL AND SLANDER**

**Newspaper article—expert opinions—genuine issues of fact**—The trial court in a defamation action properly denied defendants' motion for summary judgment as to certain statements about expert opinions in a newspaper article about firearms analysis in a first-degree murder trial. There were genuine issues of material fact as to whether defendants accurately reported the opinions and statements of the independent experts whom they consulted and about whether the reporter acted with actual malice. **Desmond v. News & Observer Publ'g Co., 10.**

**Newspaper article—firearms analyst—criticism of firearm analysis generally**—The trial court should have granted summary judgment in favor of defendants as to a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work. Experts differ on the reliability of firearm and toolmark analysis, so a statement that experts could not provide a probability of error was not incorrect. In addition, the statement was not directly of or concerning plaintiff herself, but more of a criticism of firearm and toolmark analysis generally. **Desmond v. News & Observer Publ'g Co., 10.**

**Newspaper article—firearms analyst—scribbled notes**—In a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work, a statement that plaintiff "scribbled" her notes did not tend to disgrace or degrade her. The statement was neither libelous per se nor libelous per quod and the trial court should have granted summary judgment in favor of defendants as to that statement. **Desmond v. News & Observer Publ'g Co., 10.**

**Newspaper article—firearms analyst—statements of another expert**—The trial court should have granted summary judgment in favor of defendants in a

**LIBEL AND SLANDER—Continued**

defamation action brought by an SBI firearms analyst concerning a newspaper report about her work. There was no genuine issue as to the factual accuracy of statements. **Desmond v. News & Observer Publ'g Co., 10.**

**Newspaper article—firearms analyst—testimony in underlying trial—**In a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work, certain statements and conclusions about bullet fragments in plaintiff's testimony in the underlying criminal action were substantially accurate and thus not actionable. **Desmond v. News & Observer Publ'g Co., 10.**

**MEDICAL MALPRACTICE**

**Rule 9(j)—second complaint—motion to amend—**A trial court order granting defendants' motion to dismiss pursuant to Rule 9(j) was affirmed where the trial court denied plaintiff's motion to amend her second complaint in order that it comply with N.C. Gen. Stat. § 1A-1, Rule 9(j). Granting plaintiff's motion to amend her second complaint would have been futile where she failed to file a complaint with a valid Rule 9(j) certification within the statute of limitations. **Fintchre v. Duke Univ., 232.**

**MORTGAGES AND DEEDS OF TRUST**

**Foreclosure—N.C.G.S. § 45-21.16(d) criteria—insufficient findings of fact—**In its order allowing petitioner's foreclosure on certain real property to proceed, the superior court failed to make sufficient findings of fact pursuant to Rule of Civil Procedure 52(a)(1) regarding whether the six criteria of N.C.G.S. § 45-21.16(d) had been satisfied. The case was reversed and remanded with instructions to conduct a de novo hearing followed by entry of an order setting out specific findings of fact on the N.C.G.S. § 45-21.16(d) criteria. **In re Foreclosure of Garvey, 260.**

**Foreclosure—power of sale—special proceeding—**Rule 41 of the North Carolina Rules of Civil Procedure applied to non-judicial foreclosures. A foreclosure under power of sale is a type of special proceeding to which the Rules of Civil Procedure apply. **In re Foreclosure by Rogers Townsend & Thomas, PC, 247.**

**Foreclosure—two voluntary dismissals—res judicata—equity—**In a foreclosure where petitioners had twice taken voluntary dismissals, and the issue arose as to whether the Superior Court had jurisdiction to dismiss the action, the dispositive issue was whether each failure to make a payment by a borrower under the terms of a promissory note and deed of trust constituted a separate default, or period of default, such that any successive acceleration and foreclosure actions on the same note and deed of trust involved claims based upon different transactions or occurrences, thus exempting them from the two dismissal rule in Rule 41(a). While the issue had not been addressed in N.C., there was persuasive reasoning from Florida. The two dismissal rule is based on res judicata, but the unique nature of the mortgage obligations and the continuing relationship of the parties as well as equity required that res judicata not be applied so strictly as to prevent lenders from being able to challenge multiple defaults. **In re Foreclosure by Rogers Townsend & Thomas, PC, 247.**

**Foreclosure—two voluntary dismissals—res judicata not a bar—different acts of default—**In a foreclosure action with two voluntary dismissals, the two dismissal rule of Rule 41(a) did not apply and res judicata did not bar a third power

**MORTGAGES AND DEEDS OF TRUST—Continued**

of sale foreclosure action. The claims of default and the particular facts at issue in each action differed, and, as a result of the voluntary dismissals, the claims of acceleration and the alleged acts of default were never adjudicated on their merits. Furthermore, the lender had not lost its right to enforce the note and deed of trust merely because its previous two foreclosure actions were dismissed without prejudice. **In re Foreclosure by Rogers Townsend & Thomas, PC, 247.**

**Post-foreclosure lawsuit—commenced by plaintiff—barred by default—**The Court of Appeals affirmed the trial court's dismissal of plaintiffs' suit, which was commenced after defendants foreclosed on plaintiffs' rental properties, pursuant to Rule of Civil Procedure 12(b)(6). Plaintiffs' claims for breach of contract, negligent misrepresentation, tortious interference with contracts and business expectancy, and quantum meruit were barred by the determination of default made in the prior foreclosure proceedings. **Funderburk v. JPMorgan Chase Bank, N.A., 415.**

**MOTOR VEHICLES**

**Impaired driving—breathalyzer results—time for observation—**The results from an analysis of defendant's breath should have been admitted in a driving while impaired prosecution where the trial court found that the Department of Health and Human Services (DHHS) protocol was followed in performing the analysis and that the analyst held a permit issued by DHHS. The trial court's conclusion that the evidence should be suppressed appears to have been based on a mistaken belief that a chemical analysis is inadmissible unless the analyst indicates on the Analyst Affidavit form the time at which he or she began observing the subject driver. Here, the analyst failed to fill in that space on the form; however, the State presented the analyst's live testimony and the test ticket printouts recording defendant's blood alcohol concentration at .15. **State v. Harper, 570.**

**Impaired driving—civil revocation of license—distinct from criminal prosecution—no right of appeal—**Issues in an impaired driving prosecution pertaining to the immediate civil revocation of defendant's license by the magistrate on the night of his arrest were not heard on an appeal from defendant's criminal conviction for impaired driving. Civil revocation and suspension or revocation from a criminal prosecution are separate and distinct. There is no right of appeal from civil revocation by the magistrate or by the Department of Motor Vehicles. **State v. Harper, 570.**

**Impaired driving—exclusion of blood alcohol level—no inherent authority—**The trial court did not have the inherent authority in an impaired driving prosecution to suppress evidence of defendant's blood alcohol concentration, as shown by a chemical analysis, where there was no legal basis for excluding it. **State v. Harper, 570.**

**Impaired driving—introduction of blood alcohol level—implied consent offense—no requirement of reasonable grounds to believe offense committed—**The State was not required in an impaired driving prosecution to show that there were reasonable grounds to believe defendant had committed an implied-consent offense before introducing evidence of his blood alcohol analysis. Under N.C.G.S. § 20-139.1, which governs chemical analysis and its admissibility in criminal prosecutions for driving while impaired, there is no requirement that the State demonstrate reasonable grounds to believe the defendant committed an implied-consent offense as a foundational prerequisite to the admissibility of breath test results obtained as the result of a traffic stop. **State v. Harper, 570.**

**MOTOR VEHICLES—Continued**

**Impaired driving—observation period—restarted**—In an impaired driving prosecution, defendant's alternate argument that the trial court properly suppressed evidence of his blood alcohol level based on the analyst's failure to follow observation protocol failed where the analyst initiated a new observation period after the initial mouth alcohol reading. **State v. Harper, 570.**

**PLEADINGS**

**Failure to use correct name—findings**—Findings of fact regarding the name of Duke University Health System, Inc. in plaintiff's two complaints were supported by competent evidence in the record and the trial court did not err by concluding that plaintiff failed to name Duke University Health System, Inc. as a defendant. **Fintchre v. Duke Univ., 232.**

**PROCESS AND SERVICE**

**Petition for judicial review—denial of unemployment benefits—service of notice**—Actual delivery was required for service of a petition for judicial review of a decision by the Division of Employment Security that petitioner was disqualified from receiving unemployment insurance benefits. The language in N.C.G.S. § 96-15(h) closely mirrored the language in N.C.G.S. § 1A-1, Rule 4(j) and required actual delivery to achieve service on petitioner's former employer. The service requirements are jurisdictional. **Isenberg v. N.C. Dep't of Commerce, 68.**

**REAL PROPERTY**

**Conveyance of easement—plain and unambiguous language**—In an appeal from the trial court's order quieting title to a thirty-foot strip of land, the Court of Appeals affirmed the trial court's conclusion that the 1983 deed at issue conveyed only an easement over the strip of land, not a fee simple interest. The plain and unambiguous language of the deed describing the metes and bounds being transferred and referring to the "roadway easement" supported the trial court's conclusion. **Simmons v. Waddell, 512.**

**Order reopening estate—judicial notice**—In an appeal from the trial court's order quieting title to a thirty-foot strip of land, the Court of Appeals granted plaintiff's motion to take judicial notice of a 2012 order reopening a previous owner's estate. The order was a matter of public record and not subject to reasonable dispute. **Simmons v. Waddell, 512.**

**ROBBERY**

**Common law—motion to dismiss—sufficiency of evidence**—The trial court did not err by denying defendant's motion to dismiss the common law robbery charge. Viewing the evidence in the light most favorable to the State, there was substantial evidence to support the charge when the victim fled the mobile home as a result of violence or fear and items were taken from her presence upon her fleeing to find help. **State v. Jones, 132.**

**Dangerous weapon—motion to dismiss—sufficiency of evidence—permissive inference for jury's determination**—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon. There was a permissive inference for the jury's determination as to whether the weapons used during the robbery were, in fact, dangerous. **State v. Holt, 577.**

**SCHOOLS AND EDUCATION**

**Repeal of teacher career status law—contract right not yet vested—no standing**—In plaintiffs’ challenge to the repeal of the law governing the employment and career status of public school teachers, the trial court did not err by denying summary judgment to plaintiff Link based on a lack of standing. As a probationary teacher, Link had not yet acquired a vested contractual right to career status protections. *N.C. Ass’n of Educators, Inc. v. State of N.C.*, 284.

**Repeal of teacher career status law—motion to strike portions of affidavits—any error harmless**—In plaintiffs’ challenge to the repeal of the law governing the employment and career status of public school teachers, the trial court did not err by declining to strike certain portions of plaintiffs’ affidavits as not based on the affiants’ personal knowledge. Even assuming that the challenged portions should have been excluded, any failure to strike was harmless. The trial court’s findings of fact were supported by the forecasted evidence. *N.C. Ass’n of Educators, Inc. v. State of N.C.*, 284.

**Repeal of teacher career status law—vested contractual right—Contract Clause violated**—The trial court did not err by concluding that the prospective and retroactive repeal of the law governing the employment and career status of public school teachers (Career Status Law) violated the Contract Clause of the United States Constitution for plaintiff teachers who had already earned career status. The Career Status Law created contractual obligations; the State’s actions substantially impaired those contractual obligations; and the impairment was not reasonable and necessary to serve an important public purpose. *N.C. Ass’n of Educators, Inc. v. State of N.C.*, 284.

**Repeal of teacher career status law—vested contractual right—Law of the Land Clause violated**—The trial court did not err by concluding that the prospective and retroactive repeal of the law governing the employment and career status of public school teachers (Career Status Law) violated the Law of the Land Clause of the North Carolina Constitution for plaintiff teachers who had already earned career status. The repeal of the Career Status Law abrogated plaintiffs’ contracted-for and vested career status protections and constituted an unconstitutional taking of property without just compensation. *N.C. Ass’n of Educators, Inc. v. State of N.C.*, 284.

**SEARCH AND SEIZURE**

**Seizure of license and registration—no reasonable suspicion—violation of Fourth Amendment**—Defendant was seized in violation of the Fourth Amendment when a police officer, with no reasonable suspicion, took defendant’s vehicle registration and driver’s license to his patrol vehicle to conduct a check on his computer. The trial court erred by denying defendant’s motion to suppress. *State v. Leak*, 359.

**SENTENCING**

**Habitual felon—misapprehension of sentencing statute—remanded**—The trial court erred by sentencing defendant as a habitual felon to three consecutive sentences for his three common law robbery convictions. This sentencing was based on the trial court’s misapprehension that N.C.G.S § 14-7.6 “requires consecutive sentences on habitual felon judgments.” The Court of Appeals remanded the case for resentencing to allow the trial court to exercise its discretion in determining whether defendant’s sentences should run consecutively or concurrently. *State v. Duffie*, 88.

**SEXUAL OFFENDERS**

**Registration—actual release date and not paper release date—consecutive prison terms calculated as single term**—The trial court did not err by failing to grant defendant's motion to dismiss on the basis that the State failed to prove that he was required to register as a sex offender. It is defendant's actual release date of 24 January 1999 that controls the sentencing outcome of the instant case, not the "on paper" release date of 24 September 1995. When a defendant is sentenced to consecutive prison terms, the sentences are to be calculated as a single term and the effective release date for purposes of parole eligibility and the like is the date on which a defendant is physically released from incarceration. **State v. Surratt, 380.**

**Registration—falsification of information—executed verification form required**—The trial court erred by failing to grant defendant's motion to dismiss on the basis that he falsified information for purposes of being charged with violating N.C.G.S. § 14-208.11. There was no evidence presented by the State that he willfully gave an address he knew to be false when he registered his address in Catawba County. The purpose of the statute cannot be extended to punish offenders for untruths they may tell law enforcement. An executed verification form is required before one can be charged with falsifying or forging the document. **State v. Surratt, 380.**

**STATUTES OF LIMITATION AND REPOSE**

**Derivative claims—property owners association**—In an action involving derivative claims against third parties by the members of a property owners association (POA), the statute of limitations was an insurmountable bar to recovery against five Executive Board members and plaintiffs failed to raise arguments on appeal relating to the dismissal of any of the other claims against the Executive Board members or any claims against the Executive Board as an entity. **Anderson v. Seascape at Holden Plantation, LLC, 191.**

**Equally applicable statutes of limitations—longer limitations period governs**—The trial court did not err by granting summary judgment in favor of plaintiff in an action for recovery of property taxes paid by plaintiff on defendant's behalf. Pursuant to North Carolina's choice of law rules, the Court applied North Carolina's procedural rules and Virginia's substantive law. Because two statutes of limitations were equally applicable in this case, the longer limitations period of ten years governed. **Martin Marietta Materials, Inc. v. Bondhu, LLC, 81.**

**TAXES**

**Religious exemption—new church building**—A church was properly denied a tax exemption for the year in which a building was constructed where the building was not certified for occupancy until 16 March of that year. Even though the building was roofed and had an outside wall by 1 January, the determination of the tax exemption is based on whether the building is wholly and exclusively used for religious purposes, not on the existence of a building. **In re Vienna Baptist Church, 268.**

**Religious exemption—unfinished building—used for retreats**—The use of a partially completed building for spiritual retreats such as campouts was not sufficient to qualify the building for a tax exemption where the certificate of occupancy was not issued until 16 March of that year. **In re Vienna Baptist Church, 268.**

**TERMINATION OF PARENTAL RIGHTS**

**Burden of proof—failure to show grounds**—The trial court erred by terminating respondent mother’s parental rights to her two children. The Department of Social Services failed in its burden of proving the existence of any ground for termination of respondent’s parental rights pursuant to N.C.G.S. § 7B-1111. The 4 September 2014 order was reversed to the extent that it terminated respondent’s parental rights to the children. The portions of the 4 September 2014 order not pertaining to respondent were not challenged and were not affected by the holdings in this opinion. The case was remanded to the trial court to exercise its continuing jurisdiction over this matter. **In re A.G.M., 426.**

**Father’s termination—finding on every option—not required**—The district court’s decision to terminate respondent-father’s parental rights was supported by the findings of fact on each of the dispositional factors set forth in N.C.G.S. § 7B-1111(a)(1)-(5). The trial court is not required to make findings of fact on all the evidence presented or to state every option it considered in arriving at its disposition under N.C.G.S. § 7B-1110. **In re D.L.W., 32.**

**Lack of progress toward correcting conditions—employment and transportation—evidence not sufficient**—The trial court erred in a termination of parental rights case by concluding that respondent-mother’s lack of stable employment and transportation showed a lack of reasonable progress towards “correcting those conditions which led to the removal of the juveniles without making a finding of willfulness. Moreover, the court’s findings must acknowledge the statutory mandate that no parental rights shall be terminated for the sole reason of the parent’s poverty. No evidence showed the respondent-mother’s failure to prepare a budget caused or perpetuated the neglect of the children or the conditions that led to the children being removed from her custody, and this was not a statutorily enumerated course of conduct. **In re D.L.W., 32.**

**Mother ordered to submit a budget—no statutory authority**—The district court exceeded its authority in a termination of parental rights proceeding under N.C.G.S. § 7B-904(d1)(3) by ordering respondent-mother, after a review hearing, to submit to DSS a budgeting plan. **In re D.L.W., 32.**

**Mother’s social phobia—not statutorily authorized—not cause of deficiencies with child**—A trial court may not order a parent to undergo any course of conduct not provided for in N.C.G.S. § 7B-904. The district court in a termination of parental rights hearing had no authority under N.C.G.S. § 7B-904 to order respondent-mother to make reasonable progress to comply with requirements that she obtain treatment for “social phobia” as recommended by her mental health assessment. The juveniles were removed from respondents’ care due to domestic violence between respondents and respondents’ lack of housing, and respondents’ failure to provide the juveniles with sufficient food, nutrition, and hygiene. No evidence in the record or finding suggests that respondent-mother’s “social phobia” led or contributed to these deficiencies. **In re D.L.W., 32.**

**Neglect of children—findings not sufficient**—None of the findings in a termination of parental rights case supported a conclusion that respondent-mother “neglected” her children under N.C.G.S. § 7B-1111(a)(1). The findings addressed respondent-mother’s interactions and relationship with DSS and respondent-father rather than respondent-mother’s relationship or care, visitation, or support or lack thereof of her children. **In re D.L.W., 32.**

**WILLS**

**Conveyance of land—plain and unambiguous language**—In an appeal from the trial court's order quieting title to a thirty-foot strip of land, the Court of Appeals rejected defendant's argument that the conveyance of the land to plaintiff was ineffective. Under the plain and unambiguous language of the testator's will, the title to the land became vested in the sole devisee at the time of the testator's death. **Simmons v. Waddell, 512.**

**WITNESSES**

**Denial of motion to sequester—no basis for request—no prejudice**—The trial court did not abuse its discretion in a robbery with a dangerous weapon and common-law robbery case by denying defendant's motion to sequester the victims. Defendant failed to provide a basis for his request. Further, defendant failed to show prejudice. **State v. Jones, 132.**

**WORKERS' COMPENSATION**

**Attorney fees—law of the case**—A November 2008 opinion and award in a workers' compensation case did not deny plaintiff's attorneys' request for attorney fees. Defendants' contention that the Industrial Commission's sub silentio reversed the deputy commissioner's award of fees was not tenable and was inconsistent with controlling authority. Defendants bore the burden to appeal that opinion and award to the Court of Appeals. When they failed to do so, the deputy commissioner's approval of an attorney fee became the law of the case. On remand, since the Commission denied plaintiff's motion under a misapprehension of law regarding the effect of its 2008 opinion and award, the Commission must reconsider its ruling on that motion. **Adcox v. Clarkson Bros. Constr. Co., 178.**

**Subject matter jurisdiction—last act of employment contract**—The Industrial Commission lacked subject-matter jurisdiction over plaintiff employee's workers' compensation claim. Plaintiff's contract of employment was not made in North Carolina. The last act of the employment contract took place in Mississippi. Thus, the opinion and award was vacated. **Taylor v. Howard Transp., Inc., 165.**