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[2] 1 January 2016

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

WADE BRYAN BULLOCH, PETITIONER v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; NORTH CAROLINA HIGHWAY PATROL, RESPONDENT

No. COA12-115

(Filed 2 October 2012)

Administrative Law—State Personnel Commission—no just cause to dismiss petitioner

The trial court did not err by concluding that the State Personnel Commission (SPC) properly determined that defendant North Carolina Department of Crime Control and Public Safety (Department) did not have just cause to dismiss petitioner from his employment with the North Carolina Highway Patrol. The SPC's ultimate conclusion that the Department lacked just cause was not erroneous and the SPC's supporting findings of fact and conclusions of law were not erroneous.

Appeal by Respondent from decision and order entered 23 August 2011 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 15 August 2012.

The McGuinness Law Firm, by J. Michael McGuinness, for Petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Tamara S. Zmuda, for Respondent.

Richard C. Hendrix for Amicus Curiae North Carolina Troopers Association and Richard E. Mulvaney for Amicus Curiae National Troopers Coalition.

STEPHENS, Judge.

On 6 May 2005, Wade Bryan Bulloch, who at the time was a Line Sergeant with the North Carolina Highway Patrol (the "NCHP"), a division of the North Carolina Department of Crime Control and Public Safety (the "Department), was dismissed from his employment on grounds of unacceptable personal conduct. On 26 July 2005, Bulloch challenged his dismissal by filing with the Office of Administrative Hearings (the "OAH") a petition for a contested case hearing against the Department. Bulloch's case was heard in the OAH on 29 and 30 July 2009 and 4 August 2009[1] before Administrative Law Judge Beecher R. Gray ("ALJ Gray").

The evidence before ALJ Gray tended to show the following: Bulloch served with the NCHP from 1989 until his dismissal in 2005. During his tenure with the NCHP, Bulloch earned an exemplary service record and "always ha[d] been in good standing and [] never [] had any adverse action or punishment." Moreover, appraisals of Bulloch's job performance, which were admitted into evidence, "demonstrate[d] substantial and consistent very high conduct ratings."

In 1997, Bulloch was diagnosed with depression, and in 2003, with bipolar disorder. In early December 2004, Bulloch's physician took Bulloch off his medication for depression and thereafter prescribed lithium for Bulloch's bipolar condition. In the evening of 14 December 2004, Bulloch took his first recommended dosage of lithium. Later that night, when off duty, Bulloch consumed some alcohol and attended the NCHP Christmas party with his girlfriend. At the party, Bulloch consumed more alcohol before attempting to dance with his girlfriend. When his girlfriend resisted, Bulloch employed a "defensive tactic" "taught by the [NCHP]" and "moved [his girlfriend's] arm behind her back so as to bring her along with him." His girlfriend began to cry and indicated Bulloch was hurting her. Bulloch then "stopped his efforts at dancing," and he and his girlfriend left the party.

Upon leaving the party, Bulloch "became frustrated and very emotional," and his girlfriend told him that she was leaving him. At

1. There is no indication in the record on appeal regarding the cause for the nearly four-year period between the filing of Bulloch's petition with the OAH and Bulloch's hearing.

home, Bulloch "began to break down," "became suicidal[,] and took two [] sleeping pills." Bulloch retrieved his service weapon and threatened to kill himself in front of his girlfriend. When Bulloch's girlfriend left the room, Bulloch "placed [his service pistol] to his temple but then removed it and discharged one round into the floor of his bedroom." When his girlfriend returned to the bedroom, Bulloch told her he had taken the entire bottle of sleeping pills. Bulloch's girlfriend called 911, and Bulloch was transported to the hospital. Shortly thereafter, Bulloch was relieved of duty "for medical reasons."

After his hospitalization, Bulloch returned to limited duty and was set to undergo a "fitness-for-duty" medical examination, which had been requested by Dr. Thomas Griggs, the NCHP medical director, and ordered by NCHP Commander Colonel William Fletcher Clay, Jr. Before that examination was performed, however, Colonel Clay terminated Bulloch's employment.

Dr. Moira Artigues, an expert in the field of forensic psychiatry who conducted a forensic evaluation of Bulloch, testified at the hearing that Bulloch's behavior during the incident "had a medical basis" and was caused by "[b]ipolar [d]isorder and associated medications."

Based on the foregoing evidence, ALJ Gray concluded in a 15 January 2010 order that termination of Bulloch's employment for unacceptable personal conduct (1) "was based upon an incomplete investigation and decision-making process"; (2) "was violative of [NCHP's] own rules and order of [Colonel Clay]"; (3) "was arbitrary and capricious because it failed to consider a known, underlying medical condition"; and (4) "is not supported by substantial evidence constituting just cause." Thus, ALJ Gray decided that Bulloch was entitled to reinstatement.

Thereafter, in a decision and order dated 13 July 2010, the State Personnel Commission (the "SPC") adopted ALJ Gray's findings, conclusions, and decision and ordered that Bulloch be reinstated.

On 13 August 2010, the Department sought judicial review of the SPC's decision and order in Wake County Superior Court. On judicial review of an agency's final decision, a trial court may reverse or modify such a decision only if the trial court determines that the substantial rights of the party seeking review have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2009); *see also N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658-59, 599 S.E.2d 888, 894 (2004). In this case, after a 1 August 2011 hearing before the Honorable Howard E. Manning, Jr., the trial court reviewed the SPC's decision and order, concluded that the Department's rights were not prejudiced by any of the errors listed above, and affirmed the SPC's decision and order. From that order, the Department appeals to this Court.

On appeal from a trial court's review of a final agency decision, an appellate court's task is to examine the trial court's order for error of law by "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) determining whether the court did so properly." *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007). For errors alleged regarding violations of subsections 150B-51(b)(1) through (4), the appellate court engages in *de novo* review; for errors alleged regarding violations of subsections 150B-51(b)(5) or (6), the "whole record test" is appropriate. *Carroll*, 358 N.C. at 659-60, 599 S.E.2d at 895. The Department concedes that the trial court exercised the appropriate scope of review. Thus, our review of the trial court's decision is limited to whether the trial court erroneously applied that scope of review, *i.e.*, whether the court correctly concluded that the Department's rights were not prejudiced by any of the errors listed in section 150B-51(b).

The Department's overarching argument on appeal is that the trial court erred by concluding that the SPC properly determined that the Department did not have just cause to dismiss Bulloch from employment. The Department contends that the SPC's ultimate conclusion that the Department lacked just cause was itself erroneous and also that many of the SPC's supporting findings of fact and con-

clusions of law were erroneous such that the just cause conclusion should be reversed. For the following reasons, we are unpersuaded.

As recently held by this Court in *Warren v. N.C. Dep't of Crime Control & Pub. Saftey*, ___ N.C. App. ___, 726 S.E.2d 920 (2012), determining whether a State agency had just cause to discipline an employee requires three inquiries: (1) whether the employee engaged in the conduct the employer alleges; (2) whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the North Carolina Administrative Code; and (3) whether that unacceptable personal conduct amounted to just cause for the disciplinary action taken. *Id.* at ___, 726 S.E.2d at 925. As Bulloch admitted to his actions in this case, only the latter two inquiries are relevant to this appeal.

Regarding the second inquiry, the North Carolina Administrative Code provides that unacceptable personal conduct includes "the willful violation of a known or written work rule." 25 NCAC 1J .0614(I). The work rule violation that led to Bulloch's dismissal in this case was his allegedly willful violation of the NCHP's policy on unbecoming conduct, which forbids conduct that "tends to bring the [NCHP] into disrepute" or "reflects discredit upon any member(s) of the [NCHP]." The SPC concluded in its order, however, that Bulloch "did not do anything . . . to intentionally violate any [NCHP] policy" and "did not commit any willful unbecoming conduct." Accordingly, the SPC's order indicates that the Department's decision did not satisfy the second inquiry of the *Warren* just cause analysis.

The Department contends on appeal, however, that the SPC's conclusion on this issue was error because Bulloch's conduct was an intentional and willful violation of the NCHP's unbecoming conduct policy constituting unacceptable personal conduct. This alleged error, the Department urges, warrants reversal of the SPC's conclusion that the Department lacked just cause to dismiss Bulloch. We disagree.

In its argument on this issue, the Department focuses on Bulloch's voluntary intoxication and that intoxication's alleged impact on Bulloch's conduct. In addressing this argument, we first address the Department's related argument that the trial court erroneously concluded that the following finding by the SPC was supported by substantial evidence: "There is no significant evidence to support a conclusion that alcohol was a substantial proximate cause of the behavior of [] Bulloch." In that argument, the Department contends that "all the evidence, including the testimony of [Bulloch] and

[Dr. Artigues]," supports a finding contrary to the challenged finding. The Department further argues that the SPC erred as a matter of law in failing to conclude that alcohol was a substantial proximate cause. We are unpersuaded.

While the Department is correct that Dr. Artigues testified that use of alcohol was a factor in Bulloch's behavior, Dr. Artigues also testified that Bulloch's behavior was caused by a combination of alcohol, Bulloch's first dose of lithium, "hypomania," and his being "relatively unmedicated for his bipolar disorder." Dr. Artigues further testified that Bulloch's bipolar disorder and his emotional breakdown were very important causal factors of Bulloch's conduct, such that Dr. Artigues concluded that Bulloch's conduct "was a direct result of his medical illness." Moreover, Bulloch testified that he had previously consumed alcohol and never had similar behavioral problems. In our view, the foregoing testimony serves as substantial evidence — i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 598, 620 S.E.2d 14, 18 (2005) — to support the SPC's finding that while alcohol "may have played some role in [Bulloch's] behaviors," alcohol was not "a substantial proximate cause of the behavior." Accordingly, we conclude that the challenged finding of fact is supported by substantial evidence. For the same reasons, we hold that the SPC's failure to conclude that alcohol was a substantial proximate cause of Bulloch's behavior was not erroneous as a matter of law.

Because we agree with the SPC that Bulloch's intoxication was not a substantial proximate cause of Bulloch's conduct, we find less convincing the Department's argument that the voluntary nature of Bulloch's intoxication requires a conclusion that Bulloch's conduct was intentional and willful. As found by the SPC, compared with Bulloch's intoxication, the more important factors in Bulloch's conduct were his bipolar disorder and his first dose of lithium. Indeed, the evidence shows that Bulloch had "a great deal of difficulty" managing his emotions because of his bipolar disorder and that his first dose of lithium "gave him some *unexpected* psychoactive effects." (Emphasis added). Dr. Artigues testified that the "common side effects of lithium" — including mental confusion and a breakdown of emotions — were consistent with Bulloch's behavior and are more likely to occur from a first dosage. Further, Dr. Artigues testified that because Bulloch was "essentially between medications" at the time of the incident, he was at an increased risk of "an adverse

reaction from a new medication like lithium." The foregoing evidence, tending to show that Bulloch was not fully in control of his behavior due to his first dose of lithium and his bipolar disorder, serves as substantial evidence that Bulloch's behavior was not intentional, but rather was a result of his medical condition and the unexpected effects of his prescribed treatment.

Moreover, irrespective of the accuracy of the SPC's conclusion that Bulloch's conduct was not intentional and willful behavior that constituted unacceptable personal conduct, we cannot conclude that any error in these conclusions was prejudicial to the Department and warrants reversal of the SPC's conclusion that the Department lacked just cause to dismiss Bulloch. *Cf.* N.C. Gen. Stat. § 150B-51(b) (providing that a reviewing court may only reverse or modify a final agency decision where an erroneous finding or conclusion prejudices the substantial rights of an aggrieved party). As noted *supra*, under the three-part just cause analysis from *Warren*, even if an employee's conduct constitutes unacceptable personal conduct, it must still be determined whether that unacceptable personal conduct amounted to just cause for the disciplinary action taken because "not every instance of unacceptable personal conduct . . . provides just cause for discipline." *Warren*, ___ N.C. App. at ___, 726 S.E.2d at 925. Thus, were we to assume that Bulloch's conduct qualified as unacceptable personal conduct, it must *then* be determined whether that misconduct amounted to just cause for dismissal, which determination is to be made based upon an examination of the facts and circumstances of each individual case. *Id.*

According to our Supreme Court:

> Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case.

Id. at 669, 599 S.E.2d at 900-01 (internal quotation marks and citations omitted). In light of the facts and circumstances of a case, the "fundamental question" is whether the disciplinary action taken was "just." *Id.* at 669, 599 S.E.2d at 900. "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Id.*

In this case, to determine whether the Department's dismissal of Bulloch was just, the SPC took into account many factors, including

Bulloch's training and experience, whether his conduct was an isolated incident, the intentional nature of Bulloch's actions, any injury or medical condition that may have contributed to Bulloch's conduct, the effect of Bulloch's conduct on his colleagues, the likelihood of recurrence, the effect of the conduct on work performance, any extenuating, aggravating, or mitigating circumstances, the blameworthiness of Bulloch's motives, the fairness and completeness of the Department's investigation into Bulloch's conduct, selectivity of enforcement, and the proximate cause of Bulloch's conduct. The SPC "weighed and balanced" all of these factors and concluded that "the totality of all the pertinent factors militate in [] Bulloch's favor." The SPC further concluded that

> the [] evidence of record demonstrates that the off-duty conduct in issue followed and was proximately caused by [Bulloch's] [b]ipolar [d]isorder medical condition and his first ingestion of a prescribed medication, [l]ithium. This first ingestion of this new medicine, which combined with [Bulloch's] medical condition and some alcohol, proximately caused [Bulloch] to contemplate suicide, discharge a weapon into the floor at his home, and some related behaviors.

The SPC's findings indicate, however, that despite the existence of this causal medical condition, the Department did not obtain a fitness-for-duty examination, which "likely would have provided especially relevant evidence that was necessary for proper personnel decision [-]making consideration under *Carroll*." This failure to undertake a full medical examination, the SPC concluded, demonstrated the Department's "arbitrariness and irrationality in the consideration of [] Bulloch's rights." Indeed, the SPC's findings indicate that Colonel Clay was almost completely unaware of the effects of bipolar disorder and the side effects of lithium. As such, the SPC concluded that the Department "failed to properly consider substantial and highly relevant facts and circumstances." Ultimately, the SPC determined that the Department did not have just cause to dismiss Bulloch because (1) Bulloch's conduct, including his threatened suicide, was a "direct result of his underlying medical illness and the pharmacological effect of his first dosage of the psychoactive drug, [l]ithium"; and (2) the Department did not fully consider Bulloch's medical condition and, thus, did not fully and properly investigate the incident before determining whether discipline would be appropriate.

Upon judicial review, the trial court concluded that the SPC's conclusions and determination that just cause did not exist were not

erroneous as a matter of law. We agree. In our view, the forgoing conclusions are supported by the SPC's findings and are not erroneous as a matter of law. Moreover, we hold that these conclusions properly support the SPC's ultimate conclusion that the Department lacked just cause to dismiss Bulloch.

The evidence clearly shows that, but for the 14 December 2004 incident, Bulloch was an excellent employee of the NCHP. The evidence further shows that the cause of this single incident was a controllable — but at the time uncontrolled, through no fault of Bulloch — medical condition and the unexpected side effects of prescribed treatment. However, despite the ability of the Department to investigate these causes and their roles in the incident, Bulloch was dismissed from employment before an adequate investigation was completed and before Bulloch's supervisor, Colonel Clay, gained any sort of understanding of Bulloch's condition and treatment. Moreover, Bulloch's dismissal for hurting his girlfriend and attempting to hurt himself was in spite of far more lenient disciplinary action in previous cases where, according to evidence in this case, the NCHP (1) gave a trooper a five percent reduction in pay for "making 22 threatening phone calls to his ex[-]wife and threatening to kill her" and for attempting to initiate a traffic stop of his ex-wife without lawful reason; and (2) gave a trooper five days of suspension without pay for assaulting an ex-girlfriend by "grabbing, choking and striking her" and, on another occasion, "plac[ing] [a woman] in a bent wrist arm lock to the point it hurt." The forgoing evidence, in our view, is sufficient to support the determination that the Department did not have just cause to dismiss Bulloch for his conduct on 14 December 2004.

Nevertheless, the Department argues that the SPC's determination that just cause did not exist was improper because it was based on the erroneous findings and conclusions that "a fitness-for-duty evaluation was necessary or appropriate to resolve an issue in question."

Initially, it appears that the SPC considered the nonperformance of the fitness-for-duty evaluation for two separate reasons. First, the SPC considered the evaluation's nonperformance as evidence of lack of just cause for dismissing Bulloch in that it showed that the Department "failed to properly consider substantial and highly relevant facts and circumstances regarding [] Bulloch's medical history, his underlying medical and pharmacological conditions on [14 December 2004], [and] the effect those conditions exerted on his behavior on that night." Second, the SPC considered the nonperformance in support of "an alternative ground for not imposing formal

discipline where an agency fails to comply with its own policy." The Department's argument on this issue goes only to this second consideration. The Department contends that the fitness-for-duty evaluation is used only to determine whether an employee is medically capable of performing his duties. The Department goes on to argue that because Bulloch was dismissed due to his conduct on 14 December 2004—and thus would not be returning to his duties—the fitness-for-duty evaluation was unnecessary.

Assuming the Department's argument on this issue is correct and the failure to complete the fitness-for-duty evaluation was not a violation of agency policy, these findings do not warrant a reversal or modification of the SPC's decision and order. As noted *supra*, a reviewing court may only reverse or modify a final agency decision where an erroneous finding or conclusion *prejudices* the substantial rights of the appealing party. N.C. Gen. Stat. § 150B-51(b). In this case, the SPC's findings and conclusions regarding the Department's policy on performing fitness-for-duty evaluations support an *alternative* ground for reversing the Department's decision to terminate Bulloch's employment, *i.e.*, that the decision was "violative of [the Department's] own rules." Irrespective of the SPC's reversal based on the Department's violation of its own rules, the SPC, separately and in the alternative, reversed the Department's decision on grounds of lack of just cause "for the termination of [] Bulloch under [] unique and particular facts and circumstances." As discussed *supra*, this conclusion by the SPC that the Department lacked just cause to dismiss Bulloch was correct. Thus, we need not address the correctness of the alternative ground for reversal and any error with respect to that alternative ground cannot be prejudicial. *Cf. State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 357, 323 S.E.2d 294, 314 (1984) (holding that where a lower court's ruling is based on alternative grounds, a court on appeal need not address the second alternative ground where the appellate court determines that the first alternative ground was correct). Accordingly, the Department's argument is overruled.

The Department next argues that the SPC's application of the "rational nexus" test from *Eury v. N.C. Employment Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994), was erroneous and warrants reversal of the SPC's conclusion that the Department did not have just cause to terminate Bulloch's employment. We agree that application of the rational nexus test was erroneous, but we disagree that such error warrants reversal.

The rational nexus test, as enunciated in *Eury*, applies where an employee has been dismissed based upon an act of off-duty criminal conduct and requires the agency to "demonstrate that the dismissal is supported by the existence of a *rational nexus* between the type of [off-duty] criminal conduct committed [by the employee] and the potential adverse impact on the employee's future ability to perform for the agency." *Id.* at 611, 446 S.E.2d at 395-96 (emphasis in original). This burden on an agency is in addition to the burden on the agency to prove that there was just cause for dismissal of the employee. *See* N.C. Gen. Stat. § 126-35(d) (2011). However, in *Warren*, a decision filed nine months after the Department gave notice of appeal in this case, we stated that there was no "binding precedent applying the rational nexus test to non-criminal conduct" and "decline[d] to extend this test to non-criminal conduct." ___ N.C. App. at ___, 726 S.E.2d at 924. Accordingly, where an agency disciplines an employee based on off-duty non-criminal conduct, that agency is not required to prove the existence of a rational nexus between the employee's conduct and his future performance. *Id.*

Nevertheless, we cannot conclude that the SPC's application of the rational nexus test resulted in prejudice to the Department in this case. First, we note that in the SPC's decision and order, the rational nexus test was considered separately from, and in addition to, the SPC's determination of the nonexistence of just cause. In its designation of the issues before it, the SPC listed the first issue as "[w]hether [the Department has] proven that there was just cause to terminate [Bulloch's] employment," and it listed as a second, separate issue "[w]hether [the Department has] proven . . . *a rational nexus* between [Bulloch's] off-duty conduct and potential adverse impact on [Bulloch's] future ability to perform." Moreover, the SPC concluded separately in its decision and order that (1) the "totality of all the pertinent factors militate in [] Bulloch's favor and [] there was no adequate just cause for termination," and (2) "[the Department] failed to prove that there was a rational nexus." Thus, it appears from the decision and order that the SPC concluded the Department did not have just cause to dismiss Bulloch irrespective of the Department's ability to prove a rational nexus between Bulloch's conduct and his future performance.

Second, although under *Warren* the SPC may not require an agency to satisfy the burden of proving a rational nexus between off-duty non-criminal conduct and an employee's ability to perform, the SPC's consideration of factors relevant to the rational nexus analysis—

including the likelihood of recurrence, extenuating, aggravating, and mitigating circumstances, and the blameworthiness of the motives of the conduct, *Eury*, 115 N.C. App. at 611, 446 S.E.2d at 396—does not necessarily warrant a finding of prejudice. Indeed, as noted *supra*, just cause is "a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (internal quotation marks and citations omitted). Certainly, on examination of all the facts, circumstances, and equities of a case, consideration of additional factors shedding light on the employee's conduct is not improper. Thus, we conclude that, while the SPC improperly burdened the Department with proving a rational nexus in this case, that burden did not prejudice the Department because (1) the SPC considered the Department's burden to show just cause separately from its burden to prove a rational nexus and (2) because many of the factors relevant to that second burden were also relevant to the first. Accordingly, the Department's argument on this issue is overruled.

The Department next argues that, in analyzing factors to determine the existence of just cause, the SPC "erred as a matter of law in relying on the seven-factor test in *Enterprise Wire*." The Department contends that the SPC's consideration of factors listed in "*In re Enterprise Wire Co. & Enterprise Indep. Union*, 46 Lab. Arb. Rep. (BNA) 359 (Mar 28, 1966),"[2] was error because application of that decision "does not allow the agency to consider all relevant factors" and improperly requires "mechanical application of rules." We are unpersuaded.

Initially, we note that the SPC did not consider the factors from *Enterprise Wire* as exclusive and, indeed, considered many other factors beyond those listed in the case. Further, the SPC did not improperly conclude that it was bound by the *Enterprise Wire* decision as the Department suggests. Rather, the SPC simply noted that its previous decisions had recognized the *Enterprise Wire* factors and, in this case, used those factors "[i]n addition to the analysis and factors" from other North Carolina cases. There was no improper "mechanical application of rules" as the Department suggests. The Department's argument is overruled.

The Department next argues that the SPC improperly considered Bulloch's post-termination employment record, as well as his post-

2. As noted by the Department, *Enterprise Wire* is a labor arbitration decision not issued by an appellate court in this state and has no precedential value.

termination compliance with medical advice and "recovery from his aberrational behavior" in the just cause analysis. We agree. As correctly noted by the Department, evidence of Bulloch's subsequent employment record and conduct was not available to the Department at the time the decision to dismiss Bulloch was made. Thus, the SPC's consideration of that information in determining whether the Department could properly have dismissed Bulloch when they did was improper. However, we cannot conclude that the SPC's consideration of Bulloch's subsequent employment and conduct was prejudicial to the Department. We note initially that, although the Department did not have the information when Bulloch was dismissed, the fact that Bulloch ably continued his law enforcement career while appropriately dealing with his medical conditions confirms the SPC's findings regarding Dr. Artigues' testimony that people with bipolar disorder "can lead normal and productive lives, including holding jobs that are very stressful." Confirmation of these findings furthers the SPC's conclusion that the Department should have gained a fuller understanding of the cause of Bulloch's behavior before making the decision to dismiss him. Moreover, ignoring the findings and conclusions of the SPC regarding Bulloch's subsequent employment and conduct, we still conclude, in our *de novo* review of the SPC's determination of the Department's lack of just cause, that the remaining findings and conclusions discussed *supra* sufficiently support the SPC's just cause determination. Indeed, irrespective of Bulloch's subsequent employment and conduct, the evidence of the underlying medical cause for Bulloch's behavior, including his attempted suicide, and of the Department's failure to fully investigate that cause before dismissing Bulloch is sufficient to support the SPC's determination that the Department lacked just cause. As the pre-termination evidence in this case fully supports the SPC's just cause determination, we cannot conclude that a different result would have been obtained had the SPC ignored the post-termination evidence presented by Bulloch. Thus, the SPC's consideration of Bulloch's post-termination employment was not prejudicial error. The Department's argument is overruled.

The Department next argues that the SPC erred in finding Bulloch's "truthfulness and candor" about the 14 December 2004 incident as a mitigating factor in the just cause analysis. We disagree. Although the Department may be correct that Bulloch had a duty to be truthful in his communications with his employer, he certainly could have ignored that duty and impeded the Department's investi-

gation of his actions. Accordingly, we see no error in the SPC's consideration of Bulloch's truthfulness as a mitigating factor.

The Department next argues that the SPC erred in considering "some limited evidence of selective enforcement and disparate treatment in discipline by [the Department]" offered by Bulloch. The Department contends that this evidence was irrelevant to this case. We disagree. As noted by the SPC, the "limited evidence" included actions by NCHP employees that involved "improper intent," such as repeatedly threatening to kill and unlawfully pulling over an ex-wife, assaulting an ex-girlfriend and placing her "in a bent wrist arm lock to the point it hurt," and assaulting another trooper. The SPC considered these examples and noted that the NCHP employee was not terminated in each case. In our view, this evidence was relevant to this case and, thus, not improperly considered by the SPC. The Department's argument is overruled.

The Department next argues that several of the SPC's findings and conclusions regarding the existence of just cause are erroneous because they "indicate that [the Department] cannot dismiss [Bulloch] for his misconduct because it relates to his bipolar condition." This argument, however, misapprehends the SPC's determination. Rather than concluding that Bulloch's medical condition precludes his dismissal, the SPC concluded that (1) Bulloch's medical condition was a substantial cause of Bulloch's conduct, (2) Bulloch's first dose of a prescribed medication had unintended effects and substantially caused Bulloch's conduct, and (3) the Department's failure to fully investigate these causes showed an inadequate and irrational decision-making process. Nothing in the SPC's decision and order indicates that the mere existence of a medical condition precludes dismissal; however, the SPC is clear that such a condition ought to be fully taken into account before disciplinary action is taken. We agree, and, thus, overrule the Department's argument.

Finally, the Department contends that the SPC's conclusion that the Department "failed to consider all relevant factors in determining just cause for dismissal" is erroneous because Colonel Clay considered multiple factors, including "medical information regarding bipolar disease and depression," before dismissing Bulloch. However, as found by the SPC and undisputed by the Department, at the time of dismissal, Colonel Clay "could not tell whether [b]ipolar [d]isorder could cause certain types of human behaviors," "was not familiar with [l]ithium then or now," did not have a thorough understanding of

bipolar disorder, "reviewed" but did not read "in its entirety" a document from the National Institute of Mental Health on bipolar disorder brought to him after the incident, and "could not recall any discussions or communications at all with Dr. Griggs about the effects of [l]ithium on a patient who had been diagnosed with depression and [b]ipolar [d]isorder." In our view, the foregoing findings clearly support the SPC's conclusion that the underlying causes of Bulloch's conduct were not fully considered by the Department before termination. Accordingly, the Department's argument is overruled.

Based on the foregoing, we conclude that the SPC correctly determined that the Department did not have just cause to dismiss Bulloch. Therefore, we hold that the trial court's review of the SPC's decision and order was proper and that the trial court correctly affirmed the SPC's decision and order.

AFFIRMED.

Judges STEELMAN and THIGPEN concur.

BARBARA R. DUNCAN, PLAINTIFF-APPELLEE
v. JOHN H. DUNCAN, DEFENDANT-APPELLANT

No. COA12-399

(FILED 2 OCTOBER 2012)

Appeal and Error—interlocutory order—alimony—attorney fees—failure to argue substantial right

Defendant's appeal from an interlocutory order awarding alimony but reserving the issue of attorney fees was dismissed. Defendant failed to acknowledge the interlocutory nature of his appeal or argue that some substantial right would be affected absent immediate appeal.

Appeal by Defendant from the following orders and judgment entered in District Court, Macon County: order entered 15 October 2007 by Judge Monica Leslie; orders entered 31 March and 4 September 2008 by Judge Richard K. Walker; order entered 18 September 2009 and judgment entered 2 September 2010 by Judge

Steven J. Bryant; and orders entered 14 April 2011 and 18 January 2012 by Judge Richard K. Walker. Heard in the Court of Appeals 11 September 2012.

Siemens Family Law Group, by Jim Siemens; and Ruley Law Offices, by Douglas A. Ruley, for Plaintiff-Appellee.

Hyler & Lopez, by Stephen P. Agan and George B. Hyler, Jr., for Defendant-Appellant.

McGEE, Judge.

John H. Duncan (Defendant) and Barbara R. Duncan (Plaintiff) participated in a wedding ceremony presided over by Hawk Littlejohn (Littlejohn), a Cherokee medicine man, in October 1989. This traditional Cherokee ceremony lasted several days and culminated on 15 October 1989, whereupon the parties signed a marriage certificate that was then filed with the Macon County Register of Deeds. Plaintiff and Defendant believed they were lawfully married, and acted in all ways as husband and wife. In 2001, an estate planning attorney brought to Plaintiff's and Defendant's attention a possible problem with their 1989 wedding ceremony. As a precaution, on 14 October 2001, Plaintiff and Defendant "renewed" their vows at a ceremony at the First Presbyterian Church in Franklin, North Carolina.

Plaintiff filed an action for divorce on 27 June 2005. Defendant filed an answer and counterclaim on 8 July 2005, alleging that he and Plaintiff were not legally married until their 14 October 2001 ceremony. A hearing was conducted on 12 September 2006 to address the issue of whether the October 1989 wedding ceremony had resulted in a valid marriage. The trial court entered an order on 15 October 2007, concluding that the October 1989 ceremony had resulted in a valid marriage, and that Defendant was estopped from arguing that 15 October 1989 was not the date of marriage.

Defendant attempted to appeal from the trial court's 15 October 2007 order. However, this Court held that Defendant's appeal was an improper interlocutory appeal, and dismissed it. *Duncan v. Duncan*, 193 N.C. App. 752, 671 S.E.2d 71, 2008 WL 4911807 (2008) (unpublished opinion). The trial court subsequently entered additional orders and an equitable distribution judgment, from which Defendant now attempts to appeal.

The last order of the trial court, an "Order for Alimony," was entered 18 January 2012. In that alimony order, the trial court, *inter*

alia, ordered Defendant to pay Plaintiff alimony but, in its findings, held open the issue of attorney's fees, stating: "[T]he issue of attorney's fees must be reserved for further hearing . . . at which time the [c]ourt will receive[] evidence[.]"

The dispositive issue is the timeliness of Defendant's appeal. Because we hold that Defendant has improperly appealed from interlocutory orders, we dismiss.

> Previously, this Court has held that an appeal from an alimony order must be dismissed as interlocutory when there is still pending a claim for attorneys' fees. *See Webb v. Webb*, 196 N.C. App. 770, 774, 677 S.E.2d 462, 465 (2009). Our Supreme Court, however, in *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 202, 695 S.E.2d 442, 447 (2010), questioned *Webb*, which it described as following a case-by-case approach, and adopted a new rule for determining whether an appeal may proceed when the only remaining claim is one for attorneys' fees.

Lucas v. Lucas, ___ N.C. App. ___, ___, 706 S.E.2d 270, 273 (2011).

In *Bumpers v. Community Bank of N. Va.*, 196 N.C. App. 713, 675 S.E.2d 697 (2009) (*Bumpers I*), *rev'd in part*, 364 N.C. 195, 695 S.E.2d 442 (2010) (*Bumpers II*), this Court, in an action for unfair and deceptive trade practices, considered whether the trial court could certify an interlocutory order for immediate appeal when the issue of attorney's fees remained outstanding. Relevant facts underlying the *Bumpers I* and *Bumpers II* opinions were as follows:

> [T]he trial court entered summary judgment rulings on the issues of liability and damages. The only issue left for resolution by the trial court was the amount of attorney's fees to be awarded pursuant to N.C. Gen. Stat. § 75–16.1. The trial court certified defendant's appeal as immediately appealable pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Bumpers I, 196 N.C. App. at 716, 675 S.E.2d at 699.

"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." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). In *Bumpers I*, this Court stated:

> Because the trial court's order did not dispose of the entire case and left the matter of attorney's fees unresolved, it was an inter-

> locutory order. Interlocutory orders are "immediately appealable in only two instances: (1) if the trial court certifies that there is no just reason to delay the appeal pursuant to N.C. Gen. Stat. § 1A–1, Rule 54(b) or (2) when the challenged order affects a substantial right the appellant would lose without immediate review."

Bumpers I, 196 N.C. App. at 716, 675 S.E.2d at 699 (citations omitted). In *Bumpers I*, this Court determined that appellant had not argued that any substantial right would be affected—only that the trial court's Rule 54(b) certification entitled appellant to an immediate appeal. *Id.* at 717, 675 S.E.2d at 699. This Court reasoned: "[Rule 54(b)] contemplates the entry of a judgment as to fewer than all claims or parties. It does not contemplate the fragmentation of the claims themselves or provide for the immediate appeal of less than the entire claim." *Id.* at 717, 675 S.E.2d at 700 (citation omitted).

Our Supreme Court rejected the reasoning of *Bumpers I* and reversed, holding:

> In the instant case, there is no dispute that the superior court's 15 May 2008 order resolved all substantive issues of plaintiff's claims under section 75–1.1. Consequently, this order constituted a final judgment even though the superior court expressly reserved ruling on plaintiff's request for attorney fees. The superior court properly certified its 15 May 2008 order for immediate appeal under Rule 54(b) because that order was final as to plaintiff's claims under section 75–1.1.
>
> . . .
>
> A judgment ruling on all substantive issues of a claim under N.C.G.S. § 75–1.1 is final and appealable regardless of any unresolved request for attorney fees under N.C.G.S. § 75–16.1. In appropriate cases, such a final judgment may be certified for immediate appeal under Rule 54(b). Because the superior court's 15 May 2008 order ruled on all substantive issues of plaintiff's claims under N.C.G.S. § 75–1.1, the superior court properly certified that order for immediate appeal under Rule 54(b).

Bumpers II, 364 N.C. at 204, 695 S.E.2d at 448. This Court has demonstrated some uncertainty concerning the scope of the holding in *Bumpers II*. *See Lucas*, ___ N.C. App. at ___, 706 S.E.2d at 273-74; *Dafford v. JP Steakhouse LLC*, ___ N.C. App. ___, ___ n.3, 709 S.E.2d 402, 407 n.3 (2011); *Triad Women's Ctr., P.A. v. Rogers*, 207 N.C. App. 353, 357, 699 S.E.2d 657, 660 (2010); *see also Engell v. Bayside*

Realty, Inc., ___ N.C. App. ___, 711 S.E.2d 530 (2011) (unpublished opinion). We note that the language used in *Bumpers II* is specific: "[W]e adopt the bright-line rule that an unresolved claim for attorney fees under section 75–16.1 does not preclude finality of a judgment resolving all substantive issues of a claim under section 75–1.1." *Bumpers II*, 364 N.C. at 204, 695 S.E.2d at 448. The analysis in *Bumpers II*, however, seems to apply beyond section 75. We need not address the full applicability of *Bumpers II* to the facts in the present case because the trial court in the present case did not certify the order for immediate appeal, as required by *Bumpers II*.

There were only two issues before the trial court in *Bumpers I and II*, (1) the merits of plaintiff's unfair and deceptive trade practices claim and (2) the issue of attorney's fees. The trial court decided the unfair and deceptive trade practices claim, and left the attorney's fees claim for future consideration. In *Bumpers II*, our Supreme Court made clear that, because of the outstanding attorney's fees claim, the appeal before it was interlocutory but that the appeal was proper *because the trial court had certified the order for immediate appeal pursuant to Rule 54(b)*. *Bumpers II*, 364 N.C. at 204, 695 S.E.2d at 448.

In the present case, Defendant has failed to even acknowledge the interlocutory nature of his appeal, much less argue that some substantial right of his will be affected absent immediate appeal. Defendant cannot argue that this interlocutory appeal is properly before us pursuant to Rule 54(b) because the trial court did not certify its 18 January 2012 order for immediate appeal. Defendant's appeal from the interlocutory orders of the trial court is improper, and we dismiss.

Dismissed.

Judges BEASLEY and THIGPEN concur.

CHARLES DANIEL HILLARD, PLAINTIFF v. THI DEN HILLARD, DEFENDANT

No. COA12-353

(Filed 2 October 2012)

1. Jurisdiction—subject matter—equitable distribution—consent order—plaintiff not precluded from challenging

Plaintiff's consent to the terms of an amended equitable distribution consent order did not preclude him from challenging the validly of such order for lack of subject matter jurisdiction. A party cannot consent to subject matter jurisdiction and the issue of subject matter jurisdiction may be raised at any time.

2. Jurisdiction—subject matter—equitable distribution—consent order—law not federally preempted

The trial court did not lack subject matter jurisdiction to enter an amended equitable distribution consent order as this area of law was not federally preempted. Defendant neither directly nor indirectly sought to have the trial court treat plaintiff's disability benefits as divisible property.

3. Divorce—equitable distribution—consent order—retirement pay—voluntary election—disability benefits

Plaintiff remained financially responsible for compensating defendant in an amount equal to the share of retirement pay ordered as part of an equitable distribution consent order where plaintiff unilaterally made a voluntary election to waive retirement pay in favor of disability benefits.

Appeal by Charles Daniel Hillard from an order entered 9 December 2011 by Judge Marshall Bickett in Rowan County District Court. Heard in the Court of Appeals 29 August 2012.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James DeMay, attorney for plaintiff.

Milton Bays Shoaf, attorney for defendant.

ELMORE, Judge.

I. Background

Charles Daniel Hillard (plaintiff) commenced this action for divorce and equitable distribution against Thi Den Hillard (defend-

ant) on 24 August 1992. The parties' original order for equitable distribution (the order) was entered on 28 September 1994. The order provided that plaintiff's military retirement pay would be divided so as to award defendant one-half of plaintiff's retirement benefits that accumulated from the time of marriage to the date of separation. The order specified that the retirement pay was from the U.S. Army (1972-1977), with the National Guard (1979-1991), and with the Army Aviation Support Facility (11/1980-7/1991).

Defendant filed a Motion for Amendment of Judgment on 31 July 2008, and the order was amended by consent of the parties on 30 December 2008 (2008 amended order). The 2008 amended order was less specific in its language, providing only that defendant shall be entitled to 50% of plaintiff's military retirement points, which she may receive at the time plaintiff is entitled to receive such benefits.

Plaintiff turned sixty and became eligible to receive his military retirement pay. Thereafter, defendant applied for and was denied former spouse payments from the National Guard Pension Fund because the 2008 amended order failed to direct the National Guard Pension Fund to make a specific distribution to defendant.

In December 2002, Congress enacted 10 U.S.C. § 1413(a), which created Combat-Related Special Compensation (CRSC) as a tax-free disability benefit available to veterans who suffered a combat-related disability as a direct result of armed conflict, training exercises that simulate war, or instrumentalities of war. A CRSC-eligible veteran may elect to receive these tax-free disability benefits up to the amount of retirement pay that the veteran would otherwise receive. Plaintiff applied for and was granted CRSC disability benefits in the amount of $1,081.00 per month.

Defendant filed a second Motion for Amendment of Judgment on 30 July 2010, which came on for hearing on 10 November 2010. During the hearing or some point earlier, defendant learned that plaintiff had elected to receive CRSC disability benefits in lieu of retirement pay. As a result, the parties voluntarily entered into a second amended order on 13 December 2010 (2010 amended order). The 2010 amended order provided that plaintiff shall pay defendant directly 31.637% of plaintiff's monthly $1,081.00 payments that plaintiff would have received had plaintiff taken retirement pay instead of electing to take CRSC disability benefits. Plaintiff filed a Motion for Relief from Judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, which the trial court denied. Plaintiff now appeals.

II. Plaintiff's Subject Matter Jurisdiction

Plaintiff first argues that his consent to the terms of the 2010 amended order does not preclude him from challenging the validly of such order for lack of subject matter jurisdiction. We agree.

A motion for relief pursuant to Rule 60(b) "is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

Under Rule 60(b)(4), a court may relieve a party from a judgment if the judgment is void. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered. *See In re Brown*, 23 N.C. App. 109, 208 S.E.2d 282 (1974). Additionally, it is widely accepted "that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956). Furthermore, when it appears that the court may lack jurisdiction, any person adversely affected may contest subject matter jurisdiction "at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986).

It is well settled that a party cannot consent to subject matter jurisdiction. Therefore, the fact that plaintiff agreed to the terms and entry of the 2010 amended order does not preclude him from raising the issue of subject matter jurisdiction on appeal. Plaintiff was not required to object to jurisdiction at the time the order was entered; it may be raised at any time.

III. Trial Court's Subject Matter Jurisdiction

[2] As we have determined that plaintiff has not waived his right to contest subject matter jurisdiction, we will now address plaintiff's contention that the trial court lacked the subject matter jurisdiction to enter the 2010 amended consent order because this area of law is federally preempted. We disagree.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

Plaintiff contends that because military disability benefits, including CRSC, are not included within the definition of "disposable

retired or retainer pay" under USFSPA, these payments cannot be classified as marital property subject to distribution. *See Halstead v. Halstead*, 164 N.C. App. 543, 546, 596 S.E.2d 353, 355 (2004).

Plaintiff directs our attention to *Halstead*, where this Court reversed the trial court's decision to increase the percentage of the husband's retirement payable to the wife in order to account for the deduction in retirement pay as a result of the husband's election to receive disability benefits. *See Id.* at 543, 596 S.E.2d 353. Here, this Court found that "[d]isability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage." *Id.* at 547, 596 S.E.2d at 356. In *Halstead* the trial court did not direct the husband to pay the increase from his disability benefits. Similarly, the trial court in the case at hand did not direct plaintiff to pay defendant specifically from his CRSC disability pay. However, plaintiff argues that, regardless of whether the amended order specifies that plaintiff must pay defendant directly from his CRSC benefits, the result is the same—plaintiff ends up paying defendant a portion of his retirement that was waived due to his election to receive disability benefits, which is what *Halstead* forbid.

Plaintiff is correct in noting that federal law continues to preempt state law with regard to all military payments except "disposable retired or retainer pay" and that disability payments are treated as the retiree's separate property. *See* N.C. Gen. Stat. § 50-20(b)(1) (2012). However, disability payments may be treated as a distributional factor in a property settlement. *Bishop v. Bishop*, 113 N.C. App. 725, 734, 440 S.E.2d 591, 597 (1994); N.C. Gen. Stat. § 50-20(c)(1); *see also Clauson v. Clauson*, 831 P.2d 1257, 1263 (Alaska 1992). Furthermore, domestic relations are "preeminently matters of state law," and Congress "rarely intends to displace state authority in this area." *White v. White*, 152 N.C. App. 588, 593, 568 S.E.2d 283, 285 (2002) (citations and quotations omitted). Therefore, federal preemption in domestic relations law is only found in the rare instances where Congress has "positively required by direct enactment" that state law be preempted. *Id.*

Here, plaintiff's argument is misguided. The 2010 amended order in relevant part states

> 2. Plaintiff elected to take a portion of his military retirement as disability rather than retirement, which is *not divisible* to a former spouse. Therefore, no qualified domestic relations order is necessary. (emphasis added)

3. Beginning December 1, 2010, plaintiff will pay directly to defendant the portion of his retirement required by the previous order.

Defendant neither directly nor indirectly sought to have the trial court treat plaintiff's disability benefits as divisible property. In fact, the 2010 amended order specifically states that "[p]laintiff elected to take a portion of his military retirement as disability rather than retirement, which *is not divisible to a former spouse*[.]" (emphasis added). Defendant sought only to have the trial court amend the 2008 consent order to protect her interest in the retirement benefits that she was awarded in the original 1994 order. The 2010 amended order neither required plaintiff to compensate defendant from his disability pay nor did it classify the disability pay as marital property.

The case at hand is analogous to *White v. White*, *supra*. In *White*, this Court reversed a district court's determination that it lacked authority to amend a qualifying order to increase a former spouse's share of a military spouse's retirement pay to reflect a waiver of retirement pay in favor of disability benefits. *Id*. at 594, 568 S.E.2d at 286. This Court saw no reason why the trial court lacked authority to consider the defendant's request for modification of the order. *Id*. at 593, 568 S.E.2d 286.

In light of *White*, we conclude that the trial court had authority to modify the terms of the 2010 amended order. Accordingly, we affirm.

IV. Application of *McGee v. Carmine*

[3] Beyond deciding the jurisdictional issues presented by plaintiff, this Court will delve into the crux of the argument a bit further. While we have never directly considered whether a military spouse remains financially responsible for compensating his or her former spouse in an amount equal to the share of retirement pay ordered as part of a property division pursuant to a divorce judgment when a military spouse makes a voluntary post-judgment election to waive retirement pay in favor of disability benefits, the Michigan Court of Appeals has done so in *McGee v. Carmine*, 290 Mich. App. 551, 802 N.W. 2d 669 (2010). In *McGee*, the defendant was awarded 50% of the plaintiff's Navy disposable retirement pay as part of the property division pursuant to a divorce judgment incorporated by a qualified domestic relations order (QDRO). 290 Mich. App. at 553, 802 N.W. 2d at 670. Thereafter, the plaintiff elected to take CRSC disability benefits, which ended the plaintiff's receipt of retirement pay and terminated the defendant's right to payment as well. *Id*. at 553, 802 N.W. 2d at 671. The defendant moved to enforce the divorce judgment and the QDRO.

The Michigan Court of Appeals held that a military spouse remains financially responsible to compensate the former spouse

> in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of the divorce judgment's property division when the military spouse makes a unilateral and voluntary post-judgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment.

Id. at 553-54, 802 N.W. 2d at 671.

The Michigan Court of Appeals also concluded that a state court neither has authority to divide a military spouse's CRSC disability benefits, nor can a military spouse be ordered by a court to pay the former spouse directly out of CRSC disability funds. *Id.* The court held that compensation "can come from any source the military spouse chooses," including CRSC funds if desired. *Id.*

In the case at hand, plaintiff unilaterally elected to take part of his retirement pay as CRSC disability benefits. The 2010 amended order merely required plaintiff to compensate his former spouse according to the agreed terms in the previous consent orders and it did not specify the requisite source of payment. We find *McGee* to be persuasive authority and, in following *McGee*, we also conclude that plaintiff must compensate defendant according to the terms of the 2010 amended consent order; however, the funds may come from any source that plaintiff so chooses.

V. Conclusion

Plaintiff had proper jurisdiction to contest the trial court's subject matter jurisdiction. Additionally, the trial court had proper authority to enter the 2010 amended order. Plaintiff must abide by the terms of the 2010 amended order and compensate defendant according to the specified terms. Based on the foregoing, the orders of the trial court are affirmed.

Affirmed.

Judges CALABRIA and STEPHENS concur.

RICHARD HORNE AND WIFE, MEREDITH HORNE, PARKER HORNE, BY AND THROUGH HIS GAL, SCOTT W. HEINTZELMAN, PLAINTIFFS V. TOWN OF BLOWING ROCK D/B/A BLOWING ROCK PARK, DEFENDANT

No. COA12-196

(Filed 2 October 2012)

1. Appeal and Error—interlocutory order—appeal allowed—review denial of motion to dismiss

Although defendant's appeal from the trial court's denial of its motion to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), 12(b)(6), and 12(c) was interlocutory, the Court of Appeals allowed defendant's appeal and considered defendant's argument that the trial court erred either in denying its motion to dismiss under Rules 12(b)(6) or 12(c) or in denying summary judgment in its favor on the grounds of governmental immunity.

2. Pleadings—motion to dismiss converted to motion for summary judgment—additional documents considered—arguments of counsel considered

The trial court did not err in a negligence action by converting defendant's N.C.G.S. § 1A-1, Rule 12(c) motion to dismiss into a N.C.G.S. § 1A-1, Rule 56 motion for summary judgment where the trial court considered additional documents submitted by defendant, the moving party, as well as arguments presented by counsel.

3. Immunity—governmental—factors determining immunity—not addressed or considered

The trial court did not err in a negligence case by denying summary judgment in defendant's favor on the basis of governmental immunity where all the relevant factors in determining the application of governmental immunity were not addressed by the parties and considered by the trial court.

Appeal by defendant from order entered 22 November 2011 by Judge R. Greg Horne in Watauga County District Court. Heard in the Court of Appeals 16 August 2012.

The Roberts Law Firm, P.A., by Scott W. Roberts, for plaintiff appellees.

Cranfill Sumner & Hartzog LLP, by Patrick H. Flanagan and Kelly Beth Smith, for defendant appellant.

McCULLOUGH, Judge.

The Town of Blowing Rock, d/b/a Blowing Rock Park ("defendant") appeals from an order of the trial court converting its Rule 12(c) motion to dismiss into a motion for summary judgment and denying its motion to dismiss plaintiffs' action on the basis of governmental immunity. We affirm.

I. Background

Blowing Rock Park is a municipal recreation area located in Blowing Rock, North Carolina, and is maintained by the Town of Blowing Rock. On 25 February 2011, plaintiffs filed a complaint against defendant alleging that on 20 June 2011, the minor plaintiff Parker Horne was walking through Blowing Rock Park when he "stepped into a drain hole that was completely obscured from his view by overgrown grass and grass clippings," which caused him to sustain injuries to his left ankle and other portions of his body. Plaintiffs asserted, *inter alia*, that defendant was negligent in failing to inspect the park's premises, failing to warn visitors of hidden perils or unsafe conditions, and failing to properly maintain the grass around the drain hole. Plaintiffs Richard and Meredith Horne, parents of the minor plaintiff, sought recovery for all medical bills incurred on behalf of the minor, and the minor plaintiff Parker Horne sought a money judgment for his pain and suffering.

In their complaint, plaintiffs alleged that defendant had "waived its immunity for the suit by the purchase of liability insurance." On 26 April 2011, defendant filed an answer and motion to dismiss pursuant to Rules 12(b)(1), 12(b)(6), and 12(c) of the North Carolina Rules of Civil Procedure. In its motion to dismiss, defendant asserted that it was entitled to governmental immunity, and therefore plaintiffs' claims were barred. In support of its motion to dismiss based on governmental immunity, defendant attached a copy of an endorsement clause contained in its insurance policy titled "Sovereign Immunity Non-Waiver Endorsement," as well as an affidavit from its insurance adjuster, Laurie Scheel ("Scheel"), attesting to the authenticity of the insurance policy and its endorsement clause. The endorsement clause at issue states that "[n]othing in this policy, coverage part or

coverage form waives sovereign immunity for any insured[,]" and that the policy provides "no coverage" for any claim or suit for which defendant would otherwise have no liability because of sovereign immunity.

On 19 September 2011, a hearing was held on defendant's motion to dismiss. On 22 November 2011, the trial court entered an order stating that "[b]ased on receipt of the affidavit [of Scheel], the court will treat Defendant's Rule 12(c) motion as a motion for summary judgment (Rule 56)." Based on its "review of the pleadings, the sole affidavit and exhibit tendered, and arguments of counsel[,]" the trial court granted partial summary judgment in favor of defendant as to plaintiffs' claim that defendant had waived its governmental immunity by the purchase of liability insurance. However, citing this Court's opinion in *Estate of Williams v. Pasquotank County*, ___ N.C. App. ___, 711 S.E.2d 450 (2011), *vacated and remanded*, ___ N.C. ___, ___ S.E.2d ___, No. 231PA11 (Aug. 24, 2012), the trial court found there remained genuine issues of material fact and denied the remainder of defendant's motion to dismiss. On 22 December 2011, defendant gave timely written notice of appeal to this Court from the trial court's order.

II. Appealability

[1] Because defendant appeals the trial court's denial of its motion to dismiss pursuant to Rules 12(b)(1), 12(b)(6) and 12(c), an interlocutory order, we must first address the issue of appealability. *See Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245 (2001) (noting that the denial of a motion to dismiss is interlocutory and ordinarily is not immediately appealable). Plaintiffs argue defendant's appeal should be dismissed as interlocutory, since defendant is admittedly appealing the trial court's denial of its motion to dismiss pursuant to Rule 12(b)(1), and this Court has expressly held that "the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable." *Id.* at 100, 545 S.E.2d at 246.

To the contrary, defendant argues that this Court has consistently allowed immediate appellate review of "orders denying dispositive motions grounded on the defense of governmental immunity," as they affect a substantial right. *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 (1996). Our review of relevant case law reveals defendant's assertion is correct in the context of appeals from orders denying a party's motion to dismiss under Rules 12(b)(2) (personal

jurisdiction), 12(b)(6) (failure to state a claim), and 12(c) (judgment on the pleadings), and for summary judgment under Rule 56(c). *See*, *e.g.*, *Transportation Servs. of N.C., Inc. v. Wake Cnty. Bd. of Educ.*, 198 N.C. App. 590, 593, 680 S.E.2d 223, 225 (2009) (allowing interlocutory review of trial court's denial of motion to dismiss under Rules 12(b)(2) and 12(b)(6)); *Davis v. Dibartolo*, 176 N.C. App. 142, 144, 625 S.E.2d 877, 879 (2006) ("The denial of a 12(b)(6) motion to dismiss for failure to state a claim is immediately appealable where the motion raises the defense of sovereign immunity."); *Hedrick*, 121 N.C. App. at 468, 466 S.E.2d at 283 (allowing interlocutory review of denial of Rule 12(c) motion for judgment on the pleadings asserting governmental immunity); *Owen v. Haywood Cnty.*, 205 N.C. App. 456, 458, 697 S.E.2d 357, 358-59 (denial of motion for summary judgment on grounds of governmental immunity is immediately appealable as affecting a substantial right), *disc. review denied*, 364 N.C. 615, 705 S.E.2d 361 (2010).

However, as plaintiffs correctly contend, this Court has expressly held that "the denial of a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is not immediately appealable, even where the defense of sovereign immunity is raised." *Davis*, 176 N.C. App. at 144-45, 625 S.E.2d at 880 (citing *Data Gen. Corp.*, 143 N.C. App. at 100, 545 S.E.2d at 246). In *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 677 S.E.2d 203 (2009), this Court reiterated this point in holding that "defendants' appeal from the denial of their Rule 12(b)(1) motion based on sovereign immunity is neither immediately appealable pursuant to N.C. Gen. Stat. § 1–277(b), nor affects a substantial right." *Id.* at 385, 677 S.E.2d at 207.

Here, defendant's motion to dismiss was asserted pursuant to Rules 12(b)(1), 12(b)(6), and 12(c). We may properly review the trial court's denial of defendant's motion to dismiss under Rule 12(b)(6) or Rule 12(c). However, in light of this Court's holdings in *Data Gen. Corp.*, *Davis*, and *Lewis*, an interlocutory review of the trial court's order denying defendant's motion to dismiss pursuant to Rule 12(b)(1) is not properly before this Court.

We note that in its brief, defendant first asserts that the trial court erred in denying its Rule 12(b)(1) motion to dismiss. Throughout its argument on the issue, however, defendant simply argues the trial court erred in denying its "motion to dismiss," without specifying under which Rule, and at times, defendant asserts the trial court erred in denying summary judgment in its favor on the grounds of governmental immunity. Given this Court's preference for reaching

the merits of an appeal, *see Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008), and in light of the trial court's order converting defendant's Rule 12(c) motion into a motion for summary judgment we will allow defendant's appeal and consider defendant's argument as contending the trial court erred either in denying its motion to dismiss under Rule 12(c) or in denying summary judgment in its favor on the grounds of governmental immunity.

III. Conversion of Motion to Dismiss Into Motion for Summary Judgment

[2] Defendant's first argument on appeal is that the trial court erred in converting its Rule 12(c) motion to dismiss into a Rule 56 motion for summary judgment. We disagree.

Rule 12(b) provides that a motion to dismiss for failure to state a claim under Rule 12(b)(6) "shall be treated as one for summary judgment and disposed of as provided in Rule 56" where "matters outside the pleading are presented to and not excluded by the court" in ruling on the motion. N.C. Gen. Stat. § 1A-1, Rule 12(b) (2011); *see also Data Gen. Corp.*, 143 N.C. App. at 102, 545 S.E.2d at 247. Rule 12(c) contains an identical provision, stating that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" N.C. Gen. Stat. § 1A-1, Rule 12(c) (2011).

> The general rules about which documents can be considered on a Rule 12(c) motion are as follows: if documents are attached to and incorporated within a complaint, they become part of the complaint. They may, therefore, be considered in connection with a Rule . . . 12(c) motion without converting it into a motion for summary judgment. A document attached to the moving party's pleading may not be considered in connection with a Rule 12(c) motion unless the non-moving party has made admissions regarding the document.

Estate of Means v. Scott Elec. Co., Inc., 207 N.C. App. 713, 717, 701 S.E.2d 294, 297 (2010) (ellipsis in original) (internal quotation marks and citations omitted).

Our case law has consistently treated submission of affidavits as a matter outside the pleadings. *See Town of Bladenboro v. McKeithan*, 44 N.C. App. 459, 460, 261 S.E.2d 260, 261 (1980) (treat-

ing motion for summary judgment as Rule 12(c) motion where the record "contains no affidavits"); *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984) (Rule 12(c) motion must be treated as summary judgment motion where record "contains affidavits"); *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 86, 548 S.E.2d 535, 540 (2001) (trial court's summary judgment order treated as order for judgment on pleadings under Rule 12(c) where record "contains no affidavits, answers to interrogatories, or transcripts of arguments by counsel"); *Lambert v. Cartwright*, 160 N.C. App. 73, 75-76, 584 S.E.2d 341, 343 (2003) (trial court properly considered pleadings and attached exhibits in ruling on Rule 12(c) motion, noting that "[n]o affidavits were submitted to the trial court, and no evidence was taken"). In addition to affidavits, in both *Minor* and *Groves*, this Court indicated that arguments by counsel are likewise considered "matters outside the pleadings." *Minor*, 70 N.C. App. at 78, 318 S.E.2d at 867; *Groves*, 144 N.C. App. at 86, 548 S.E.2d at 540.

Here, the trial court's order plainly indicates it considered the affidavit of Scheel submitted by defendant, the moving party, as well as "arguments of counsel." Defendant relies on *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 599 S.E.2d 410 (2004), for its contention that its attachments can be considered as incorporated into plaintiffs' complaint because plaintiffs alleged the existence of defendant's liability insurance policy and that such policy was the "subject of plaintiffs' complaint." *Eastway Wrecker* is inapposite, however, because in that case, the plaintiff incorporated the exhibits at issue into the complaint and expressly referenced those exhibits in the complaint. *Id.* at 642, 599 S.E.2d at 412. As we explained above, exhibits incorporated into a plaintiff's complaint are proper for consideration in ruling on a Rule 12(c) motion without converting the motion into a motion for summary judgment. Here, however, plaintiffs simply alleged that "[u]pon information and belief, [defendant] has waived its immunity for the suit by the purchase of liability insurance." Even if such an allegation could be considered an admission as to the existence of defendant's liability insurance policy, defendant did not simply attach a copy of the insurance policy as an exhibit to its answer. Rather, defendant attached only an endorsement that disputed plaintiffs' arguments concerning defendant's liability, in addition to the affidavit of its insurance adjuster. In light of its consideration of the additional documents submitted by defendant, the moving party, as well as arguments presented by counsel, the trial court did not err in converting defendant's Rule 12(c) motion into a motion for summary judgment.

IV. Applicability of Governmental Immunity

A. Standard of Review

[3] The standard of review for a trial court's ruling on a motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009).

> The entry of summary judgment is appropriate 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. All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion. Summary judgment is proper when an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense.

Owen, 205 N.C. App. at 458-59, 697 S.E.2d at 359 (internal quotation marks, citations, and ellipses omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56 (2011).

B. Governmental Immunity

Defendant's primary contention on appeal is whether the trial court erred in denying summary judgment in its favor on the basis of governmental immunity. Defendant argues the operation of a public park is a governmental function, thereby entitling it to governmental immunity from plaintiffs' action, because (1) the legislature has established that operation of a public park is a governmental function, (2) there is no evidence in the record showing that operation of the park at issue was a proprietary function, and (3) public policy favors a ruling that defendant's operation of a public park is a governmental function thereby triggering governmental immunity.

It is well-established that "generally a municipal corporation is immune to suit for negligence of its agents in the performance of its governmental functions. However, the rule is subject to this modification: A [municipality] may be liable if the injury occurs while the agents of the [municipality] are performing a proprietary rather than a governmental function." *Rich v. City of Goldsboro*, 282 N.C. 383, 385, 192 S.E.2d 824, 826 (1972). Our Supreme Court has explained

that a governmental function is an activity that is "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself[.]" *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). On the other hand, a proprietary function is an activity that is "commercial or chiefly for the private advantage of the compact community[.]" *Id.* Thus, our Supreme Court has held that "[w]hen a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers." *Id.* at 450-51, 73 S.E.2d at 293.

Our Supreme Court has recently announced that "the threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue." *Estate of Williams v. Pasquotank Cnty. Parks & Rec. Dep't*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, No. 231PA11, slip. op. at 9 (Aug. 24, 2012). Like the present case, the defendant in *Williams* asserted that N.C. Gen. Stat. § 160A-351, North Carolina's Recreation Enabling Law, is dispositive. *Id.* Section 160A-351 provides:

> The lack of adequate recreational programs and facilities is a menace to the morals, happiness, and welfare of the people of this State. Making available recreational opportunities for citizens of all ages is a subject of general interest and concern, and a function requiring appropriate action by both State and local government. The General Assembly therefore declares that the public good and the general welfare of the citizens of this State require adequate recreation programs, that *the creation, establishment, and operation of parks and recreation programs is a proper governmental function*, and that it is the policy of North Carolina to forever encourage, foster, and provide these facilities and programs for all its citizens.

N.C. Gen. Stat. § 160A-351 (2011) (emphasis added). In *Williams*, our Supreme Court noted this statute is "clearly relevant" to the question of whether the defendant's conduct in maintaining and operating a swimming area within a public park is a governmental or proprietary endeavor. *Williams*, ___ N.C. at ___, ___ S.E.2d at ___, No. 231PA11, slip. op. at 10. Nonetheless, our Supreme Court declined to hold that the statute is ultimately determinative of the issue. *Id.* Rather, our Supreme Court explained that "even if the operation of a parks and recreation program is a governmental function by statute, the ques-

tion remains whether the specific operation of the [swimming area] component of [the public recreation area], in this case and under these circumstances, is a governmental function." *Id.*

In *Williams*, our Supreme Court further recognized that "not every nuanced action that could occur in a park or other recreational facility has been designated as governmental or proprietary in nature by the legislature[,]" and stated that "[w]hen the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant." *Id.* at ___, ___ S.E.2d at ___, No. 231PA11, slip. op. at 11. These factors include whether the undertaking is one in which only a governmental agency could engage, whether the undertaking is traditionally one provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider. *Id.* at ___, ___ S.E.2d at ___, No. 231PA11, slip. op. at 11-12. Ultimately, "the proper designation of a particular action of a county or municipality is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case." *Id.* at ___, ___ S.E.2d at ___, No. 231PA11, slip. op. at 13.

In *Glenn v. City of Raleigh*, 246 N.C. 469, 98 S.E.2d 913 (1957), our Supreme Court considered a factual scenario similar to the present case. In *Glenn*, the minor plaintiff was severely injured when a rock thrown from a lawn mower struck him in the head while he was sitting at a table in a public park operated by the City of Raleigh. *Id.* at 470, 98 S.E.2d at 913-14. On appeal, our Supreme Court determined the City did not have governmental immunity from the plaintiff's action due to the income the City was deriving from the operation of the park, noting that "[i]n order to deprive a municipal corporation of the benefit of governmental immunity, . . . the act or function must involve special corporate benefit or pecuniary profit inuring to the municipality." *Id.* at 476-77, 98 S.E.2d at 918-19 (internal quotation marks and citation omitted).

Our Supreme Court later clarified that "[t]he holding in *Glenn* was based upon the fact [that] the evidence showed the city operated the park as a business enterprise rather than in the governmental capacity of providing recreation for its citizens." *Rich*, 282 N.C. at 387, 192 S.E.2d at 827. In *Rich*, our Supreme Court considered "whether Goldsboro is liable in damages for the negligent acts of its officers or agents in failing to inspect, discover defects, and keep in good repair the playground equipment in Herman Park, the city's pub-

lic playground." *Id.* at 385, 192 S.E.2d at 826. Considering the minimal income the City of Goldsboro derived from operation of its train ride within the park, our Supreme Court in *Rich* upheld summary judgment in favor of the City on the basis of governmental immunity. *Id.* at 387-88, 192 S.E.2d at 827. Thus, prior cases in this State reveal that a municipality's operation and maintenance of free public parks for the recreation of its citizens is traditionally a governmental function for which governmental immunity will ordinarily apply; but a municipality may waive such governmental immunity when revenue is derived either from the operation of the park itself or from the conduct of activities within the park, which can render the park's operation and maintenance a proprietary function. *See Hickman v. Fuqua*, 108 N.C. App. 80, 82-84, 442 S.E.2d 449, 451-52 (1992).

Here, defendant asserts there is no evidence in the record indicating it charged a fee for use of Blowing Rock Park or that the Town of Blowing Rock received a profit or derived substantial income from the operation of Blowing Rock Park. Plaintiffs contend that this assertion is precisely why the trial court correctly denied summary judgment and/or defendant's motion to dismiss, as such issues are material facts that cannot be ascertained from the record.

We agree with plaintiffs, given our Supreme Court's holdings in *Glenn* and *Rich*, which considered the relevant factors reiterated by our Supreme Court in *Williams*. None of these factors appear to be addressed by the record before us. In order for the trial court to grant summary judgment in favor of defendant, there must be no remaining issues of material fact. The burden is on the movant, here defendant, to "show that no material issue of fact exists and that he is clearly entitled to judgment." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). We recognize our statutes and case law, in addition to the case law of other jurisdictions, generally favor the application of governmental immunity in the operation and maintenance of public parks, particularly in cases where there is no income derived by the municipality in operating and maintaining the park. *See generally*, *Liability of municipal corporations for injuries due to conditions in parks*, 142 A.L.R. 1340 (1943). Here, however, as the trial court properly found, there remain issues of fact as to the revenue or income derived, if any, from defendant's operation of the park. We note that, although plaintiffs attempt to distinguish the particular activity of lawn maintenance from the general undertaking of operating the public park here, such distinction is meaningless, as lawn maintenance of a public park is an indispensable aspect of establishing and operating such park.

Although *Williams* indicates the trial court should consider the relevant factors outlined above in light of the facts alleged in the complaint, we note that in both *Glenn* and *Rich*, evidence of the income derived by the municipality in its operation of the park at issue came to light either through trial testimony, *see Glenn*, 246 N.C. at 471-72, 98 S.E.2d at 914-15, or through answers to interrogatories, *see Rich*, 282 N.C. at 384, 192 S.E.2d at 825, prior to the defendant's moving for summary judgment. Here, we note the factual allegations in plaintiffs' complaint do not address the factors to be considered by the trial court in making a determination on whether defendant's operation of Blowing Rock Park is a governmental or proprietary function. However, given the procedural posture in this case, in which the trial court converted defendant's motion to dismiss into a motion for summary judgment without taking further evidence, and the trial court's recognition that discovery is ongoing in this case, we conclude plaintiffs' failure to allege such relevant facts in their complaint is not dispositive. Rather, such facts could have, and can be, easily resolved through discovery and presented to the trial court with a subsequent motion for summary judgment. Nonetheless, under the present circumstances, summary judgment is not proper on this record, where all the relevant factors in determining the application of governmental immunity have not been addressed by the parties and considered by the trial court.

Finally, we note that, although plaintiffs briefly contend the endorsement contained in defendant's liability insurance policy violates statutory law, plaintiffs nonetheless state, twice, that such contention is "not an issue on appeal," and plaintiffs have not appealed from the trial court's grant of summary judgment in favor of defendant on the issue of whether defendant waived governmental immunity by the purchase of its liability insurance policy. Nonetheless, in light of this Court's discussion in *Owen v. Haywood County*, 205 N.C. App. 456, 459-61, 697 S.E.2d 357, 359-60, *disc. review denied*, 364 N.C. 615, 705 S.E.2d 361 (2010), and the line of cases discussed therein addressing this issue, the trial court did not err in granting summary judgment in favor of defendant on this issue.

V. Conclusion

The question of governmental immunity is a substantial right allowing for interlocutory appellate review, but only for denial of a motion to dismiss under Rules 12(b)(2), 12(b)(6), and 12(c), or a motion for summary judgment under Rule 56. We cannot review a trial court's order denying a motion to dismiss under Rule 12(b)(1).

Although defendant argues the trial court erred in denying its Rule 12(b)(1) motion, the trial court also denied its Rule 12(b)(6) and Rule 12(c) motions, as well as summary judgment, on the basis of governmental immunity, which we may review.

Given the trial court's consideration of defendant's attached exhibits, including an affidavit, as well as the arguments of counsel, the trial court did not err in converting defendant's Rule 12(c) motion into a motion for summary judgment. The trial court properly found there remain issues of fact as to the revenue or income derived, if any, from defendant's operation of the park. Accordingly, summary judgment is not proper on this record, and the trial court properly denied summary judgment in favor of defendant on the issue of governmental immunity.

Affirmed.

Judges CALABRIA and STROUD concur.

JOHN CONNER CONSTRUCTION, INC., R&G CONSTRUCTION COMPANY, AND EGGERS CONSTRUCTION COMPANY, INC., PLAINTIFFS V. GRANDFATHER HOLDING COMPANY, INC., AND MOUNTAIN COMMUNITY BANK, A BRANCH OF CARTER COUNTY BANK, DEFENDANTS

No. COA11-1228

(Filed 2 October 2012)

1. Liens—materialman's lien—factual basis for claim of lien—failed to mirror complaint

The trial court did not err in granting defendant's N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss where plaintiffs' claim for a statutory lien on real property for improvements made to real property by a contractor dealing directly with the owner contained material facts which failed to mirror the complaint to enforce the lien.

2. Appeal and Error—dispositive issue ruled upon—issue not addressed

The Court of Appeals did not address plaintiffs' argument that the trial court erred in dismissing plaintiffs' claims based on failure to join a necessary party because the Court's ruling on

defendant's N.C.G.S. § 1A-1, Rule 12(b)(6) motion made a resolution of the joinder appeal unnecessary.

HUNTER, JR., Robert N., Judge, dissenting.

Appeal by plaintiffs from order entered 15 February 2011 by Judge Marvin P. Pope, Jr. in Avery County Superior Court. Heard in the Court of Appeals 21 March 2012.

The Tricia Wilson Law Firm, PLLC, by Tricia L. Wilson and J. Thomas Dunn, Jr., for plaintiffs-appellants.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for defendant-appellee Mountain Community Bank.

BRYANT, Judge.

Where plaintiffs claim for a statutory lien on real property for improvements made to realty property by a contractor dealing directly with the owner contained material facts which failed to mirror the complaint to enforce the lien, we hold the trial court did not err in granting defendant's Rule 12(b)(6) Motion to Dismiss. Accordingly, we do not address plaintiffs' appeal that the trial court also erred in dismissing plaintiffs' claims based on failure to join a necessary party because our ruling on the Rule 12(b)(6) motion makes a resolution of the joinder appeal unnecessary.

Facts and Procedural History

Plaintiffs, John Conner Construction, Inc. ("JCC"), R & G Construction Company ("RGC"), and Eggers Construction Company ("ECC"), filed an amended complaint on 10 December 2010 against defendants, Grandfather Holding Company, LLC ("GHC") and Mountain Community Bank ("bank"), a branch of Carter County Bank. Mike Eggers ("Eggers") was President of ECC and vice-president of JCC and RGC.

Plaintiffs allege that from the spring of 2005 to January 2009, approximately 41.87 acres of land ("subject property") were improved by use of plaintiffs' labor and materials. The subject property is situated between Banner Elk and Linville, North Carolina and is located next to defendant bank. The subject property was owned by Wilmor Coporation ("Wilmor") in 2000 and shared a common driveway with defendant bank. In 2001, GHC expressed to Wilmor an

interest in purchasing and developing the subject property. In 2004, Wilmor agreed to sell the subject property to GHC and also sold a site that was adjacent to the subject property.

Plaintiffs also allege that in 2004 they and GHC reached an oral agreement ("agreement") where plaintiffs would furnish all labor and materials incident to the grading, clearing, road construction, and installation of utilities needed to develop the subject property. According to plaintiffs, due to a long-standing business relationship between Hugh Fields ("Fields") (the president of GHC) and Eggers, the numerous contracts that they had entered into over a twenty-five year span had "always been on a 'handshake basis.' " Plaintiffs began working on the subject property even before GHC purchased it from Wilmor in October 2005 for $5.15 million. The purchase price was financed by defendant bank. Defendant bank and GHC entered into a loan agreement ("loan agreement") where defendant bank would loan a total of $6.8 Million to GHC for the purchase and development of the subject property. On 5 October 2005, GHC signed the deed of trust in favor of defendant bank.

From the spring of 2005 until 14 January 2009, plaintiffs alleged that they furnished valuable labor and materials to the subject property. On 19 October 2007, plaintiff's business manager presented to Fields on behalf of GHC, a bill in the amount of $1,377,774.02, which represented the cost of labor and materials accrued over a four-year period. Fields attempted to pay plaintiffs' invoice but was informed by defendant bank that all but $262,000.00 of the loan balance had been expended. Thus, Fields made a partial payment to plaintiffs in the amount of $262,000.00, leaving a significant balance owing to plaintiffs. Plaintiffs allege that they have demanded payment of the unpaid balance but that GHC has failed and refused to pay.

On 24 November 2008, defendant bank began foreclosure proceedings on the subject property owned by GHC and defendant bank purchased the subject property at public auction for $4,000,000.00, where defendant bank was the only bidder. Plaintiffs allege that they timely filed a claim of lien against GHC in the amount of $1,774,119.84 on 16 January 2009. Plaintiffs allege that defendant bank is a successor in interest to GHC, and as such, defendant bank assumed title subject to plaintiffs' claim of lien for $1,774,119.84.

The 10 December 2010 amended complaint sought enforcement of plaintiffs' claim of lien and enforcement of plaintiffs' claim of lien as superior to any claim to the subject property or loan proceeds by

defendant bank. Additional claims for relief were also alleged against one or both defendants, based on theories of express contract, constructive trust, unfair and deceptive acts and practices, and unjust enrichment.

On 20 December 2010, defendant bank filed a motion to dismiss plaintiffs' complaint for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure based upon lack of an express contract between any of the plaintiffs and defendant bank, lack of a legal duty owed by defendant bank to any of the plaintiffs, and inability of plaintiffs to avail themselves of any equitable remedy vis-à-vis defendant bank. Defendant bank also moved to dismiss plaintiffs' complaint pursuant to Rule 12(b)(7) for failure to name a necessary party, Fields. Plaintiffs' claim of lien asserts they contracted with Fields for the furnishing of labor and materials. On 4 January 2011, plaintiffs filed a motion for judgment on the pleadings against defendant GHC.

On 15 February 2011, the trial court entered an order granting defendant bank's motion to dismiss the amended complaint pursuant to Rule 12(b)(6) and 12(b)(7), dismissing, in its entirety, all plaintiffs' claims against defendant bank and against the subject property described in the claim of lien, dismissing and discharging the claim of lien filed pursuant to N.C. Gen. Stat. § 44A-16(4), and granting plaintiffs' motion for judgment on the pleadings against defendant GHC.[1] From this order, plaintiffs appeal.

Plaintiffs present the following issues on appeal: whether the trial court erred (I) by dismissing plaintiffs' claims against defendant bank for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) and (II) by dismissing plaintiffs' complaint for failure to name a necessary party pursuant to Rule 12(b)(7).

First, plaintiffs argue the trial court erred by dismissing their claims against defendant bank for failure to state a claim upon which relief can be granted when their amended complaint alleged a valid claim of lien pursuant to sections 44A-8 through 44A-13 of the North Carolina General Statutes.

"The motion to dismiss under [Rule 12(b)(6)] tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the

1. The trial court also denied plaintiffs' motions to reject filings, motion for sanctions, and motion to compel.

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).

> Dismissal is proper "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the 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 the plaintiff's claim."

Ventriglia v. Deese, 194 N.C. App. 344, 347, 669 S.E.2d 817, 819 (2008) (citation omitted).

Accordingly, our Court "must construe the complaint liberally and 'should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.' This Court must conduct a *de novo* review of the pleadings[.]" *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003) (internal citations omitted).

Section 44A-8 of the North Carolina General Statutes provides that:

> Any person who performs or furnishes labor or . . . materials . . . pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on the real property to secure payment of all debts owing for labor done . . . or material furnished . . . pursuant to the contract.

N.C. Gen. Stat. § 44A-8 (2011). "Owner" is defined as a "person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made." N.C. Gen. Stat. § 44A-7(3) (2011). This Court has held that a person under contract to purchase property is an "owner" as contemplated by Section 44A-7(3), because they possess an equitable interest in the property. *See Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 324 S.E.2d 626 (1985).

After review of the amended complaint, we determine plaintiffs had no statutory right to file a claim of lien on the subject property. As a starting point, we note plaintiffs' amended complaint alleges no facts suggesting ECC ever filed a claim of lien pursuant to Section 44A-12 or a notice of claim of lien pursuant to Section 44A-17 et seq.

Therefore, we only consider whether the acts alleged in plaintiffs' complaint necessarily defeat the claim of lien asserted by JCC and RGC.

JCC and RGC's "Claim of Lien on Real Property" states that materials were first furnished on 14 May 2004. Plaintiffs' complaint states that formal contract negotiations did not begin between GHC and Wilmor, the prior owner of the property, until June of 2005. Because the allegations of the complaint are treated as admitted, plaintiffs' admissions plainly belie a claim of materialman's lien against GHC, since GHC did not have *any* interest, equitable or otherwise, in the property on 14 May 2004, when plaintiffs first furnished materials. Thus, regardless of the issue of whether the deed to the property and deed of trust were part of the "same transaction,[2]" JCC and RGC were not entitled to a materialman's lien, as they did not contract with the "owner" of the subject property. N.C.G.S. § 44A-8. We decline plaintiffs' implicit invitation to extend the holding of *Carolina Builders* to cases in which the party against whom a lien is sought was not yet under a contract for sale at the time an alleged contract for work/materials was entered into.

In their second argument, plaintiffs contend that the trial court erred in dismissing plaintiffs' equitable claims for relief where the evidence demonstrates that defendant bank has been unjustly enriched by $1.8 million from plaintiffs' improvements to the subject property. Plaintiffs base their argument solely on the Supreme Court's holding in *Embree Construction Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 411 S.E.2d 916 (1992).

The *Embree* plaintiff, a construction contractor, alleged that it had entered into a contract with Rafcor, Inc. ("Rafcor") to supply labor and materials for the construction of a restaurant. *Id.* at 489, 411 S.E.2d at 919. Rafcor entered into a construction loan agreement with United Carolina Bank (UCB) in which UCB was to advance Rafcor money to be used for the construction project. *Id.* Rafcor's note was secured by a deed of trust on the project. *Id.* The *Embree*

2. Although not dispositive here, the term "same transaction" comes from the doctrine of instantaneous seisin which "provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the title conveyed by the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others." *West Durham Lumber Co. v. Meadows*, 179 N.C. App. 347, 352, 635 S.E.2d 301, 304 (2006) (citation omitted). Here, plaintiffs' complaint alleges that the deed of trust signed in favor of defendant bank was recorded on 5 October 2005, the same day it was executed. However, the closing attorney re-recorded the same deed of trust on 30 March 2006 due to a defective notary acknowledgement on the 5 October 2005 deed of trust.

plaintiff alleged that although in the past, UCB had paid the plaintiff directly from Rafcor's construction loan, the plaintiff was owed a balance of over $140,000.00. Because UCB had received all the security for which it bargained with Rafcor, and because UCB had refused to pay the plaintiff money remaining in the loan fund to satisfy the balance owed, the plaintiff alleged that UCB was unjustly enriched. *Id.*

The North Carolina Supreme Court found that the materialman's lien was not an adequate remedy for the contractor because "Chapter 44A does not provide relief for the contractor or subcontractor, in privity of contract with only the insolvent owner, who seeks payment from construction loan funds held by the lender. Notably, however, Chapter 44A does not expressly bar equitable relief to this end." *Id.* at 492, 411 S.E.2d at 921 (citation omitted). The *Embree* Court held that the plaintiff was entitled to equitable relief via an equitable lien where the defendants had been unjustly enriched, having received the security for which they had bargained for but refusing to release the remaining construction loan funds to compensate the plaintiff.

Importantly, in footnote three of the opinion, the N.C. Supreme Court states that

> [t]his situation differs markedly from that in which the lender has disbursed all loan funds to the borrower, who diverts the funds to purposes other than paying contractors. *See* Lefcoe & Shaffer, *Construction Lending and the Equitable Lien*, 40 S.Cal.L.Rev. 444 (1967) (if funds disbursed once already, lender not unjustly enriched); Urban and Miles at 350 ("[T]here is justification for the [equitable lien] doctrine's application when the contractor has completed performance, the entire project itself is completed, and the lender forecloses, becoming the owner of the completed project seeking to retain undisbursed funds. But there is little justification for the doctrine's application when the lender has made a disbursement for all labor or materials furnished up through foreclosure without any knowledge of any unpaid claims, and funds are diverted from the project by the borrower. In that instance, application of the doctrine results in the inequity of the lender having to in effect pay twice for the same thing. Any application of the doctrine, therefore, should be restricted to obvious cases of unjust enrichment.").

Id. at 495-96, 411 S.E.2d at 922-23.

The distinguishing factor between *Embree* and the present case is the presence of remaining loan funds. In *Embree*, there was a result-

ing balance remaining in the loan fund, which UCB refused to disburse. Here, all of the loan funds have been disbursed, with the remaining $262,000.00 actually being disbursed to plaintiffs in partial payment of GHC's debt. Therefore, as noted in footnote three, there is "little justification for the doctrine's application" since there was no remaining balance of loan funds. We further conclude as a distinguishing factor from *Embree* that GHC was not an owner of the subject property when materials and labor were first furnished. Plaintiffs' argument is overruled.

As the Rule 12(b)(6) dismissal serves as an adequate basis for the trial court's order, we need not address the issue of whether the trial court erred in dismissing plaintiffs' claims based on failure to join a necessary party. The order of the trial court is affirmed.

Affirmed.

Judge BEASLEY concurs.

Judge HUNTER, JR., ROBERT N. dissents by separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

I dissent from the majority's opinion in the hope that our Supreme Court will clarify the answer to a question left unanswered by this Court's opinion in *Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 324 S.E.2d 626 (1985). Namely, does a "subsequently acquired interest . . . support a materialman's lien even if no enforceable interest existed when the contract was made or the work commenced"? *Id.* at 230, 324 S.E.2d at 630. Under the facts in this case, I would extend the holding of *Carolina Builders* to stand for the proposition that GHC should be considered an "owner" under N.C. Gen. Stat. §§ 44A-8 and 44A-7(3), because it directed Plaintiffs to begin work on the subject property, and then later acquired legal title.

As noted in the majority's opinion, our Court held in *Carolina Builders* that a person under contract to purchase property is an "owner" as contemplated by Section 44A-8, because they possess an "equitable interest." *Id.* at 231, 324 S.E.2d at 631. In *Carolina Builders*, the trial court reached the following conclusion of law:

> North Carolina General Statute 44A, Article 2, allows materialmen to [acquire] valid enforceable lien rights relating back in time to the first furnishing [of materials] under circumstances

> where the person or entity with whom he contracted did not at that time have legal title but later did acquire legal title.

Id. at 230, 324 S.E.2d at 630 (alterations in original).

In evaluating this interpretation of the statute, our Court noted the following:

> This conclusion appears tantamount to stating that any subsequently acquired interest will support a materialman's lien even if no enforceable interest existed when the contract was made or the work commenced. *While that may be an appropriate rule, it goes beyond the facts here and encompasses factual situations which are not before this Court.*

Id. (emphasis added) (footnote omitted) (citation omitted). Thus, the Court did not address the question presented by this case: namely, whether one who contracts for the provision of labor and materials who is not under an enforceable contract for sale, but who subsequently acquires title to the subject property, may subject such real property to a materialman's lien. I would answer this question in the affirmative, in light of the rationale of *Carolina Builders* and the purpose of the materialman's lien statute.

As the Court in *Carolina Builders* observed, "[t]he purpose of the materialman's lien statute is to protect the interest of the supplier in the materials it supplies; the materialman, rather than the mortgagee, should have the benefit of materials that go into the property and give it value." *Id.* at 229, 324 S.E.2d at 629. Thus, "as these statutes afford new remedies, they are liberally construed to effect the legislative purpose[.]" *Id.* at 234, 324 S.E.2d at 632 (quoting *Lemire v. McCollum*, 425 P.2d 755, 759 (Or. 1967)).

As an article cited by the Court in *Carolina Builders* explains, a narrow interpretation of the statute can produce an inequitable result in cases, such as this, which involve an "overeager purchaser":

> Some courts draw a distinction whereby they permit the lien to attach if the purchaser holds an equitable title under an enforceable executory contract, but deny the lien if the purchaser has only an unenforceable agreement to purchase that is later fully executed. This distinction can be criticized as overly technical since neither circumstance can be reasonably said to have influenced the parties' behavior. It should not be expected that, prior to contracting with a homebuilder, a laborer or supplier of mate-

> rials who is unversed in legal theories of ownership will undertake a costly and time-consuming title examination, or demand from a prospective employer or customer proof that he has equitable title to the building site. Instead, a more appropriate rule has been adopted by the courts of Oregon and Kansas: any subsequently acquired interest will support a materialman's lien even if no enforceable interest in the property existed when the contract was made or the work was commenced.

Julianne G. Douglass, *Materialmen's Liens in North Carolina: The Problem of the Overeager Purchaser*, 61 N.C. L. Rev. 926, 934 (1983) (footnotes omitted).

Thus, to hold that Plaintiffs in this case cannot make out a claim of lien because GHC did not have an enforceable contract for sale for the subject property at the time it requested Plaintiffs begin work, despite the fact that it subsequently acquired title consistent with all parties' expectations, in essence allows Defendants in this case to "feed an estoppel," and produces a result contrary to the remedial nature of the lien statute. This inequitable result is particularly troublesome given the mandate in our Constitution that "[t]he General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." N.C. Const. art. X, § 3.

Although in no way binding on this state's appellate courts, at least one federal court has observed that *Carolina Builders* "certainly [leaves] open the possibility that the same result might be reached even if the entity with whom the materialman contracted had no enforceable interest when the contract was made or the work commenced, *provided that such entity later acquires legal title." In re: Alexander Scott Group, Ltd.*, No. B-94-10704C-11D, 1995 WL 17800994, at *4 (Bankr. M.D.N.C. Aug. 1, 1995) (emphasis added). Our Supreme Court is ultimately the appropriate venue to address this possibility.

For the foregoing reasons, I respectfully dissent from the majority.

HARVEY WILSON JOHNSON, ET AL., PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF CULTURAL RESOURCES, ET AL., DEFENDANTS

No. COA12-173

(Filed 2 October 2012)

1. Bailments—revocable at any time—not converted to gift

The trial court did not err in an action involving the ownership of a collection of various manuscripts and documents (Collection) that belonged to plaintiffs' ancestor Colonel Charles E. Johnson (Johnson) by granting summary judgment to plaintiffs. The Collection was held by the North Carolina Department of Cultural Resources as a bailee, revocable at any moment by the bailor, Johnson, and no length of possession, under such bailment, could make the property belong to the bailee. The bailment did not convert to a gift upon Johnson's death.

2. Bailments—ability to recall bailment—fully devisable to heirs

The trial court did not err in an action involving the ownership of a collection of various manuscripts and documents (Collection) that belonged to plaintiffs' ancestor Colonel Charles E. Johnson (Johnson) by granting summary judgment to plaintiffs. Johnson's interest in the Collection, including his ability to recall the Collection under the express terms of the bailment, was fully devisable to his heirs.

3. Wills—provisions sufficient to convey interest—collection of manuscripts and documents

The trial court did not err in an action involving the ownership of a collection of various manuscripts and documents (Collection) that belonged to plaintiffs' ancestor Colonel Charles E. Johnson (Johnson) by granting summary judgment to plaintiffs. The provisions of Johnson's and his wife's wills were sufficient to convey their interests in the Collection to their descendants.

4. Statutes of Limitation and Repose—bailments—begins to run when bailee refuses to return bailment upon bailor's request

The trial court did not err in an action involving the ownership of a collection of various manuscripts and documents (Collection) that belonged to plaintiffs' ancestor Colonel Charles E. Johnson (Johnson) by granting summary judgment to plain-

tiffs. The transfer of the Collection to the North Carolina Department of Cultural Resources was pursuant to a bailment and the statute of limitations does not begin to run until the bailor demands return of the bailed property and the bailee refuses to return it. Plaintiffs filed their declaratory judgment well within the applicable statute of limitations.

5. Laches—no change in relations of parties—no prejudice—no claim until after demand

The trial court did not err in an action involving the ownership of a collection of various manuscripts and documents (Collection) that belonged to plaintiffs' ancestor Colonel Charles E. Johnson (Johnson) by granting summary judgment to plaintiffs. The facts presented by the State did not establish the defense of laches as there was no change in the relations of the parties, the State failed to demonstrate any prejudice which would justify the application of laches, and plaintiffs had no viable claim against the State until after the State refused to return the Collection upon plaintiff Harvey Johnson's demand in 2008.

Appeal by defendants from order entered 28 October 2011 by Judge Shannon Joseph in Wake County Superior Court. Heard in the Court of Appeals 16 August 2012.

Brady Morton, PLLC, by R. Daniel Brady and Travis K. Morton, for plaintiff-appellees.

Attorney General Roy Cooper, by Special Deputy Attorneys General L. McNeil Chestnut, Lars F. Nance, and Karen A. Blum, for defendant-appellants North Carolina Department of Cultural Resources and North Carolina State Archives.

Patricia Harris Holden, Charles Johnson Harriss, Jr., and Herbert S. Harriss, pro se, for defendant-appellees.

Burley B. Mitchell, Jr., Willis P. Whichard, and Robert F. Orr, for Friends of the Archives, Inc., amicus curiae.

CALABRIA, Judge.

The North Carolina Department of Cultural Resources ("the Department") and the North Carolina State Archives ("the Archives")(collectively "the State") appeal the trial court's order granting summary judgment to Harvey Wilson Johnson ("Harvey Johnson"), Sean Johnson, Bruce Charles Johnson, Sarah Johnson

Tuck, Mark Johnson, Richard M. Johnson, Virginia Fisk Johnson, and Grace Johnson McGoogan (collectively "plaintiffs"). The trial court ruled that plaintiffs were the owners of the Charles E. Johnson Collection ("the Collection"). We affirm.

I. Background

Colonel Charles E. Johnson ("Johnson") was a descendent of former United States Supreme Court Justice James Iredell, Sr. and former North Carolina Governor James Iredell, Jr. Johnson owned the Collection, which consisted of various manuscripts and documents that belonged to his ancestors. In 1910, Johnson loaned the Collection to the North Carolina Historical Commission ("the Historical Commission").

In a letter to R.D.W. Connor ("Connor"), Secretary of the Historical Commission, dated 21 December 1910, Johnson stated: "You will remember that my position in this is that I have loaned [the Collection] to the State with the right of recall and repossession at any time if I see fit." In a letter dated 23 December 1910, Connor replied to Johnson and stated that "[i]t is thoroughly understood by the North Carolina Historical Commission that the 'Charles E. Johnson Collection' of manuscripts deposited by you with the Commission, was deposited merely as a loan, subject to your recall at any time you may see fit."

Johnson died on 9 September 1923. He did not exercise his right to recall the Collection prior to his death. In his will, Johnson devised his entire estate to his wife, Mary Ellis Johnson ("Mrs. Johnson"), who he also named as his executrix. The Collection was not specifically mentioned in Johnson's will.

Mrs. Johnson died on 25 March 1925, before she had completed the administration of Johnson's estate. Mrs. Johnson's will did not specifically mention the Collection, but it included a residuary clause which encompassed any property not specifically bequeathed in the will. When Mrs. Johnson's estate was closed, the Collection was not listed as an asset in the administration documents.

In 2008, plaintiff Harvey Johnson, a descendent of Johnson, discovered the December 1910 correspondence between Johnson and Connor. On 16 June 2008, Harvey Johnson's attorney contacted the Department and claimed an ownership interest in the Collection. The Department refused to acknowledge Harvey's interest in the Collection and would not return it to him.

On 22 June 2010, plaintiffs, who are some of Johnson's descendants, filed a declaratory judgment action in Wake County Superior Court against the Department, the Archives, and six other descendants of Johnson. In its answer, the State asserted several affirmative defenses, including the statute of limitations and the doctrine of laches.

Plaintiffs and the State each filed motions for summary judgment. On 28 October 2011, the trial court entered an order which granted plaintiffs' motion and denied the State's motion. The State appeals.[1]

II. Standard of Review

Summary judgment shall be rendered 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 judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). We review a trial court's order granting summary judgment *de novo*. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

III. Effect of Johnson's Death

[1] The State argues that the trial court erred in granting summary judgment to plaintiffs because the Collection was a bailment which converted to a gift to the Department upon his death. We disagree.

"A bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee." *Flexlon Fabrics, Inc. v. Wicker Pick-Up & Delivery Service, Inc.*, 39 N.C. App. 443, 447, 250 S.E.2d 723, 726 (1979). "[T]he obligation to redeliver or deliver over the property at the termination of the bailment on demand is an essential part of every bailment contract." *Hanes v. Shapiro*, 168 N.C. 24, 31, 84 S.E. 33, 36 (1915). In the instant case, it is undisputed that when Johnson transferred the Collection to the Historical Commission, the transfer created a bailment, with Johnson retaining the right to recall the Collection at any time.

However, the State contends that, pursuant to our Supreme Court's decision in *Largent v. Berry*, 48 N.C. 531 (1856), it is the law in North Carolina that "the bailment terminated upon Col. Johnson's

1. Defendants Patricia Harriss Holden, Charles Johnson Harris, Jr., and Herbert S. Harriss joined plaintiffs' request that Johnson's heirs be declared the owners of the Collection. As a result, they are appellees in the instant appeal. The remaining three defendants, Bradford White Johnson, Kirby Harris Rigsby, and Margaret Harriss are not parties to this appeal.

death and ownership of the Collection vested in the Department at that time." In *Largent*, the defendant's father-in-law, Elijah Largent ("Largent") made a parol gift of a slave to the defendant. *Id.* at 531. Largent then became incompetent, and his guardian demanded that the defendant return the slave. *Id.* at 531-32. The defendant refused, and the guardian filed an action for conversion. *Id.* at 532. The *Largent* Court held that the guardian could not recover the slave under these facts, as he could not revoke a gift that had been given when Largent was competent. *Id.* Specifically, the Court reasoned:

> The parol gift made by [Largent] of the slave in question to the defendant, was, it is true, a mere bailment, which [Largent] might have terminated at any time during his life. The possession of the donee, though held subject to the reclamation of the donor, yet, so far conferred an inchoate right upon the donee, that it might become a complete title by the death of the donor intestate, and without having revoked the gift. Such is manifestly the effect of the proviso to sec. 17, ch. 37 Rev. Stat. This inchoate right was originated by the intention of the donor, exhibited by his putting the slave into the actual possession of the donee; and the title could be prevented from becoming perfect only by a change of that intention, manifested in a proper manner. . . . [Largent's] committee, after he became *non compos mentis*, had the charge of his person and of his estate, but not of his mind. The committee could no more revoke such a gift, made by a *lunatic*, than he could revoke a will made by him, during a lucid interval, or before he became *non compos mentis*.

Id.

The State seizes on the *Largent* Court's use of the term "bailment" and attempts to apply the Court's discussion of the effects of Largent's death to the transfer at issue in that case to all bailments. However, the State's argument completely ignores the remainder of the opinion, which repeatedly refers to the transfer as a gift. The language of *Largent*, referring to the transfer as both a bailment and a gift, is consistent with the law which governed the specific transfer of a slave from a parent to a child at that time. As the Court explained in *Arnold v. Arnold*:

> Where an oral gift of a slave is made to a child, it may, or may not, according to an express provision of the act of 1806, be an advancement at the election of the parent at any time during his life, and, therefore, of necessity, the relation between them during that period is that of bailor and bailee[.]

35 N.C. 174, 178 (1851); *see also Hicks v. Forrest*, 41 N.C. 528, 531-32 (1850). In this context, it is clear that the *Largent* Court was only discussing the effect of the father-in-law's death because the transfer at issue was the transfer of a slave from a parent to a child. Contrary to the State's argument, *Largent* is inapplicable to bailments generally.

Instead, the well-established law in North Carolina is that when property is held pursuant to "a bailment, revocable at any moment by the bailor[,] . . . *no length of possession*, *under such a bailment*, *can make the [property] the property of the bailee.*" *Hill v. Hughes*, 18 N.C. 336, 338 (1835)(emphasis added). Moreover, "[a]n accepted principle in the law of bailments is that, in short phrase, the bailee is estopped to dispute or deny the bailor's title." *Herring v. Creech*, 241 N.C. 233, 237, 84 S.E.2d 886, 889 (1954). Under these principles, the State, as bailee, cannot claim ownership of the Collection by virtue of Johnson's death. This argument is overruled.

IV. Devisibility of Right to Recall

[2] The State argues that the trial court erred by granting plaintiffs' motion for summary judgment because Johnson's right to recall the Collection was not devisable. We disagree.

In support of its argument, the State cites *Woodard v. Chalk*, which recites the common law rule which permitted the disposition of personal property by will, but not by deed. 236 N.C. 190, 194, 72 S.E.2d 433, 435 (1952). This rule was in effect at the time Johnson loaned the Collection to the Historical Commission as well as at the time of his death. The State contends that since "Johnson did not create a future legal interest in the Collection by will, his descendants have no right to recall the Collection now."

However, the State's argument once again disregards important portions of the decision it cites. The *Woodard* Court traced the origins of the common law rule at issue. Originally, "[f]uture interests *other than those arising out of the law of bailments* were not permitted in the field of personal property." *Id.* at 193, 72 S.E.2d at 435 (citations omitted and emphasis added). Later, "the courts of England in the seventeenth century relaxed the rule by holding that a future interest in personal property could be created by will." *Id.* Thus, although North Carolina adhered to that common law rule at the time of *Woodard*, it is clear that that rule was never applied to bailments.

In the instant case, since the transfer by Johnson to the State constituted a bailment, the *Woodard* rule does not apply. Johnson's inter-

est in the Collection, including his ability to recall the Collection under the express terms of the bailment, was fully devisable to his heirs. This argument is overruled.

V. Estates of Johnson and Mrs. Johnson

[3] The State argues that the trial court erred in granting plaintiffs' motion for summary judgment because plaintiffs cannot establish title in the Collection through the estates of Johnson and Mrs. Johnson. We disagree.

The State notes that neither Johnson nor Mrs. Johnson listed the Collection in their wills and that the Collection was not listed in either of the Johnsons' respective estate administration documents. According to the State, this evidence demonstrates neither Johnson nor Mrs. Johnson believed they still possessed an interest in the Collection.

However, Johnson's will clearly bequeathed all of his property to his wife. In addition, Mrs. Johnson's will included a general residuary clause which distributed all of her property "whether real, personal, or mixed," which had not specifically been distributed in the remainder of her will. These provisions were sufficient for the Johnsons to convey their interests in the Collection to their descendants, regardless of whether they believed they maintained ownership in the Collection. *See Ireland v. Foust*, 56 N.C. 498, 501 (1857)("The presumption is that every one who makes a will intends to dispose of his whole estate, and one purpose of a general residuary clause is to dispose of such things as may have been forgotten or overlooked, or may be unknown."). The fact that the Collection was never mentioned in either the Johnsons' wills or their estate administration documents is immaterial. This argument is overruled.

VI. Statute of Limitations

[4] The State argues that the trial court erred by granting plaintiffs' motion for summary judgment and denying the State's motion for summary judgment because plaintiffs' claims were barred by the statute of limitations. We disagree.

In its brief, the State contends that plaintiffs should have brought their claim as an impeachment of the final accounting of Johnson and Mrs. Johnson's estate. The State is correct that, for such a claim, a ten year statute of limitations applied at the time the Johnsons' respective estates were administered. *See Woody v. Brooks*, 102 N.C. 334, 340, 9 S.E. 294, 296 (1889).

However, plaintiffs' claim cannot be accurately characterized as an impeachment of a final estate accounting. Instead, plaintiffs seek the return of property that was provided to the State as a bailment. The well-established rule in North Carolina is that, for transfers of property pursuant to a bailment, the statute of limitations will not begin to run until the bailor demands return of the bailed property and the bailee refuses to return it. In *Koonce v. Perry*, our Supreme Court stated that "while an abortive attempt to regain possession, as by demand and refusal, . . . will put the statute of limitations in action; yet, no length of possession under claim of title and use of the property as one's own will." 53 N.C. 58, 61 (1860). Similarly, in *Green v. Harris*, the Court stated:

> Now it has never been held, that the naked declaration of a bailee, that he claimed the property in his own right, without any change of the possession *and without any demand or wish to resume the possession by the bailor*, although such declaration might be public or made even to the bailor himself, would *instantly* terminate the bailment and immediately convert the possession into an adverse one, so as to set the statute of limitations in motion from the day of such declaration. The contrary we conceive to be settled law.

25 N.C. 210, 221 (1842)(emphasis added).

In the instant case, it is undisputed that no demand was made for the return of the Collection until 16 June 2008. Therefore, the statute of limitations began when the State refused this demand. Plaintiffs filed their declaratory judgment action on 22 June 2010, which was well within the applicable statute of limitations. Thus, plaintiffs' claims were timely filed. This argument is overruled.

VII. Laches

The State argues that the trial court erred by granting plaintiffs' motion for summary judgment and denying the State's motion for summary judgment because plaintiffs' claim was barred by laches. We disagree.

> In determining whether plaintiffs' suit is, at [the summary judgment] stage of the proceeding, barred by the doctrine of laches, we face a three-fold question: (1) Do the pleadings, affidavits and exhibits show any dispute as to the facts upon which defendants rely to show laches on the part of plaintiffs? (2) If not, do the undisputed facts, if true, establish plaintiffs' laches? (3) If

> so, is it appropriate that defendants' motion for summary judgment . . . be granted?

Taylor v. City of Raleigh, 290 N.C. 608, 621, 227 S.E.2d 576, 584 (1976).In the instant case, there is no dispute about the facts upon which the State relies to show laches. Thus, we must determine if these facts are sufficient to establish the State's affirmative defense.

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). In the instant case, the facts presented by the State do not establish the defense of laches.

A. Change in Relations of the Parties

The State first contends that there has been a change in the relations of the parties because the original bailor, Johnson, is deceased. However, that fact does not change the *relations between* the parties. The relationship between the parties regarding the Collection is still that of bailor and bailee. Plaintiffs have inherited the Collection from Johnson and his descendants, and possess the same rights in the Collection that Johnson possessed. Accordingly, there has been no change in the relations of the parties.

B. Reasonableness of the Delay and Prejudice

Next, the State asserts that plaintiffs' delay in demanding the return of the Collection has led to a loss of evidence which has prejudiced the State. Specifically, the State notes that the original individuals who were involved in the transfer of the Collection are no longer able to provide any evidence on the terms of the transfer or the manner in which the Collection would be treated upon Johnson's death. In support of its argument, the State cites *Stratton v. Royal Bank of Canada*, ___ N.C. App. ___, 712 S.E.2d 221 (2011).

In *Stratton*, the plaintiff's mother purchased stock in the Bank of Manteo in 1927. *Id.* at ___, 712 S.E.2d at 224. However, there was no documentary evidence demonstrating her ownership of the stock after 1933. *Id.* The plaintiff discovered the stock in 1982, after her mother's death. *Id.* at ___, 712 S.E.2d at 225. The plaintiff then conducted a preliminary investigation into the value of the stock, meeting with her stockbroker and several attorneys regarding the value of the stock. *Id.* These consultations occurred no later than 1987. *Id.* The plaintiff then waited approximately 20 years after she first investigated her claim before she instituted an action against the defendant Royal Bank of Canada ("RBC"), who would have been the successor in interest to the stock purchase after a series of mergers. *Id.* This Court found that RBC was prejudiced by the plaintiff's delay because there was no "living person who has material information concerning the Stock Certificate" and the plaintiff's delay "likely contributed to the lack of documentary evidence" regarding the stock. *Id.* at ___, 712 S.E.2d at 231.

In contrast to *Stratton*, in the instant case, there is clear documentary evidence to establish that Johnson loaned the Collection to the Historical Commission, which includes the terms Johnson stated were to apply to the loan. The correspondence between Johnson and Connor incontrovertibly demonstrates that Johnson was loaning the Collection to the Commission with the express right to recall and repossess the Collection at any time and that Conner understood the terms of the loan. Moreover, Johnson's will, also included in the record, plainly demonstrates that he intended for *all* of his property to be devised to his wife. These documents provided the State with ample evidence of the terms of the Collection's transfer and of Johnson's wishes on how the Collection should be treated upon his death.

The State also argues that it was prejudiced by spending "approximately $292,000 to conserve, restore, and publish the documents in the Collection." This spending is immaterial to the application of laches. "[T]he 'prejudice element' of the laches doctrine . . . refers to whether a defendant has been prejudiced in its ability to defend against the plaintiff's claims by the plaintiff's delay in filing suit." *Id.* at ___, 712 S.E.2d at 231. The expenditure of $292,000, which the State attributes to the Collection, had no impact on the State's ability to defend against plaintiffs' claim. In addition, it is a bailee's duty "to exercise ordinary care to protect the property bailed against damage and to return it in as good condition as it was when he received it."

Vincent v. Woody, 238 N.C. 118, 120, 76 S.E.2d 356, 358 (1953). The costs borne by the State are for actions which are consistent with this duty. Ultimately, the State has failed to demonstrate any prejudice which would justify the application of laches.

C. Knowledge of Grounds for Claim

Finally, the State argues that plaintiffs knew or should have known of their claim long before they brought their declaratory judgment action. The State again relies upon *Stratton*, which recognizes that constructive, rather than actual, knowledge of a claim can be used to establish laches. *See Stratton*, ___ N.C. App. at ___, 712 S.E.2d at 231. The State contends that Johnson's descendants had sufficient opportunity to discover evidence of their claim to the Collection and that, as a result, they should be charged with constructive knowledge of their claim.

However, it is immaterial whether Johnson's heirs had actual or constructive knowledge of their ownership interest in the Collection, either immediately after Johnson's death or in the ensuing decades. As previously noted, a bailor has no claim against a bailee until a demand is made for the bailed goods and is refused. *See Koonce*, 53 N.C. at 61. In the instant case, it is undisputed that Johnson's heirs did not demand the return of the Collection until 2008. Accordingly, the State had the right to continue to possess the Collection under the terms of the bailment until that time. Thus, Johnson's descendants could not have known that they had a claim against the State until it failed to honor its obligation as bailee to return the Collection after Harvey Johnson's demand. Once the State refused to return the Collection, plaintiffs pursued their claim in a timely manner.

The undisputed facts presented by the State do not support the application of laches to plaintiffs' claim for the return of the Collection. Consequently, the trial court properly denied the State's motion for summary judgment on this issue. This argument is overruled.

VIII. Conclusion

Johnson's transfer of the Collection to the Historical Commission created a bailment, which continued after his death. Ownership of the Collection, including the right to recall the Collection, properly passed to Johnson's descendants through his will, which bequeathed all of his property to Mrs. Johnson, and subsequently through the residuary clause included in Mrs. Johnson's will. Plaintiffs had no viable claim against the State until after the State refused to return

the Collection upon Harvey Johnson's demand in 2008. Plaintiffs timely pursued this claim, and thus, the claim was not barred by either the statute of limitations or the doctrine of laches. Consequently, the trial court properly granted plaintiffs' motion for summary judgment. The trial court's order is affirmed.

Affirmed.

Judges STROUD and McCULLOUGH concur.

FRANCISCO JAVIER LOPEZ REYNOSO AND MARIBEL MORALES JARDON, PLAINTIFFS V. MALLARD OIL COMPANY, DEFENDANT

No. COA11-1537

(Filed 2 October 2012)

Negligence—inspection of underground storage tanks—inherently dangerous activity—no breach of duty—justifiable reliance on subcontractor

The trial court did not err in granting summary judgment in favor of defendant employer (an oil company) in a negligence action. Even if the inspection of underground storage tanks was an inherently dangerous activity and defendant owed a nondelegable duty to plaintiffs, there was nothing in the record demonstrating defendant's breach of such duty and defendant justifiably relied on the expertise of its independent subcontractor.

Appeal by plaintiffs from order entered 20 July 2011 by Judge Benjamin G. Alford in Lenoir County Superior Court. Heard in the Court of Appeals 23 April 2012.

The Olive Law Firm, PA, by Juan A. Sanchez, for plaintiffs-appellants.

Sumrell, Sugg, Carmichael, Hicks & Hart, PA, by Scott C. Hart and Anakah D. Harrison, for defendant-appellee.

BRYANT, Judge.

Where an employer justifiably relied on the expertise of its independent subcontractor, the summary judgment order entered in favor of the employer is affirmed.

Facts and Procedural History

On 13 May 2010, plaintiffs Francisco Javier Lopez Reynoso ("Francisco") and Maribel Morales Jardon ("Maribel") (collectively "plaintiffs") filed a complaint against defendants Mallard Oil Company ("Mallard") and Harvey Enterprises, Inc. ("Harvey") alleging negligence.

Mallard, a wholly owned subsidiary of Harvey, owned and operated underground storage tanks ("UST") containing petroleum in Ernul, North Carolina. Part of defendant's primary business was the sale, transfer, and storage of petroleum products. Defendant subcontracted its duty to maintain, inspect, and clean the UST located on its property to Superior Testing Services, Inc. ("STS").

On 8 October 2008, STS sent a four man crew consisting of three technicians and a laborer, Francisco, to Mallard's project site. Prior to inspecting the UST, it was the responsibility of defendant to remove the fuel from the UST. It was then the responsibility of STS to physically enter the tanks and clean any remaining fuel from the tanks. After cleaning, STS would inspect the UST, a process that consisted of visually observing the coating condition, taking coating thickness and hardness readings, and taking metal thickness readings of the tank shell. However, prior to entering the UST, STS would test to make sure the fuel had been pumped out, then cut through concrete down to the tops of the UST, and unseal the tops of the UST. After the inspection, a process called grinding was used to remove epoxy from the lid of the tank in order to reattach the lid to the UST.

The next day, on 9 October 2008, the manhole lids were removed from the three gasoline tanks[1] and a purge–used to create air flow through the tank in order to remove dangerous vapors-was started on tank #1 at approximately 8:10 a.m. At 8:30 a.m., the volatile vapor reading in the tank was .2; the technicians entered the tank and by 9:15 a.m had cleaned the residual fuel and sludge. At 9:40 a.m., the STS crew entered tank #2 and cleaned that tank of residual fuel. Francisco was directed by his supervisor to grind down the opening on tank #1 in preparation for sealing it. Francisco alleged that an hour

1. Mallard's station had three manifolded unleaded gas tanks. These tanks are linked together, manifolded using a series of pipes for storage of a particular grade of fuel.

and fifteen minutes had passed since any technicians had visually inspected tank #1 or its volatile vapor meter. Francisco had completed three and a half sides when witnesses stated they heard a whoosh and observed a fire ball erupting out of tank #1. Francisco was severely burned and left with life-threatening injuries. Following the accident, members of the STS crew entered tank #1 and observed a spot of gasoline on the floor of the tank.

On 23 June 2011, defendants filed a motion for summary judgment. A hearing was held on 5 July 2011 where plaintiffs' counsel stipulated to summary judgment being entered as to defendant Harvey. The trial court then entered an order on 20 July 2011 granting Mallard's motion for summary judgment and dismissing plaintiffs' claims. The trial court's order stated the following:

> After considering the arguments of counsel, including the discovery materials, deposition transcripts, and pleadings and after reviewing pertinent case law and giving this matter full consideration, this Court concludes, as a matter of law, that the activity given [sic] rise to this claim was not inherently dangerous according to the evidence of record. Accordingly, this Court determines that there are no genuine issues as to any material fact and that Defendant Mallard Oil Company is, therefore, entitled to judgment as a matter of law.

From this order, plaintiffs appeal.

On appeal, plaintiffs argue the trial court erred in entering summary judgment in favor of Mallard (I) by failing to consider defendant's "independent legal obligation to ensure safety and compliance with APT 1361[;]" and (II) and concluding that the activity of cleaning and inspecting UST was not inherently dangerous.

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." *Blackwell v. Hatley*, 202 N.C. App. 208, 211, 688 S.E.2d 742, 745 (2010) (citation omitted). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d

829, 835 (2000) (citation omitted). When considering a motion for summary judgment, "[a]ll facts asserted by the [nonmoving] party are taken as true and their inferences must be viewed in the light most favorable to that party." *Nationwide Prop. & Cas. Ins. Co. v. Martinson*, ___ N.C. App. ___, ___, 701 S.E.2d 390, 393 (2010) (citation omitted).

I and II

Plaintiffs argue the trial court erred by granting summary judgment in favor of Mallard. Specifically, plaintiffs contend that state and federal regulations[2] identify "American Petroleum Institute (API) Standard 1631" as one of several acceptable industry standards that may be used by owners and operators of UST to comply with these regulations. Plaintiffs argue that "Mallard had an independent legal obligation to ensure safety and compliance with API 1631[,]" and therefore had a non-delegable duty and "breached its duty to keep [Francisco] safe and free of harm." Plaintiffs also contend that the trial court erred by failing to conclude that the activity of cleaning and inspecting UST was not inherently dangerous. Because plaintiffs' arguments are closely related, we will address them together.

The general rule is that one who employs an independent contractor is not liable for the independent contractor's acts. *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48 (2005) (citation omitted).

> However, if the work to be performed by the independent contractor is either (1) ultrahazardous or (2) inherently dangerous, and the employer either knows or should have known that the work is of that type, liability may attach despite the independent contractor status. This is because, in those two areas, the employer has a non-delegable duty for the safety of others.

Kinsey v. Spann, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000) (citations omitted).

Plaintiffs concede that although there is no authority establishing the cleaning and inspection of UST as an inherently dangerous activity, they argue that the necessary elements for what comprises an

2. Plaintiffs direct the Court to 40 CFR Part 280 entitled "Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks" and 15A Subchapter 2N of the North Carolina Administrative Code entitled "Underground Storage Tanks."

inherently dangerous activity are met. An "inherently dangerous activity" is defined

> as work to be done from which mischievous consequences will arise unless preventative measures are adopted, and that which has a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which later might take place on a job itself involving no inherent danger.

O'Carroll v. Roberts Indus. Contractors, Inc., 119 N.C. App. 140, 146, 457 S.E.2d 752, 756 (1995) (citation and quotations omitted). A successful inherently dangerous activity claim requires a showing of four elements: (1) the activity must be inherently dangerous; (2) at the time of injury, the employer either knew, or should have known, that the activity was inherently dangerous; (3) the employer failed to take the necessary precautions to control the attendant risks; and, (4) the failure by the employer proximately caused injury to plaintiff. *Kinsey*, 139 N.C. App. at 375, 533 S.E.2d at 492.

We find *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) to be instructive. The facts in *Woodson* are as follows: Pinnacle One Associates ("Pinnacle") was the developer of a construction project, and it retained the defendant Davidson & Jones, Inc. ("Davidson") as its general contractor. *Id.* at 334, 407 S.E.2d at 225. Davidson hired subcontractor Morris Rowland Utility ("Morris") to dig a sanitary sewer line. However, on 3 August 1985, workers from both Morris and Davidson were digging trenches to lay sewer lines. *Id.* Once at the site, the Davidson foreman refused to let his men work in the trenches because they were not sloped, shored, or braced and did not have a trench box as required as a safety precaution under the Occupational Safety and Health Act of North Carolina. *Id.* at 335, 407 S.E.2d at 225. Morris procured a trench box for the Davidson crew but did not acquire a trench box for its own crew. *Id.* Rowland's employee Thomas Sprouse ("Sprouse") died when a trench collapsed, completely burying him. *Id.* at 336, 407 S.E.2d at 226.

The plaintiff, Sprouse's estate, filed suit against Rowland, Rowland's president, Davidson, and Pinnacle. *Id.* at 336, 407 S.E.2d at 226. The trial court granted all defendants' motions for summary judgment and a divided panel of our Court of Apepals affirmed. However, in addressing the plaintiff's claims against Davidson and Pinnacle, that they each breached nondelegable duties of safety owed to the decedent, the Supreme Court reversed summary judgment in

favor of Davidson and affirmed summary judgment in favor of Pinnacle. The *Woodson* Court noted that

> [g]enerally, one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work. Plaintiff can recover neither from Davidson & Jones nor from Pinnacle One unless the circumstances surrounding the trench cave-in place her claim within an exception to this general rule.

Id. at 350, 407 S.E.2d at 234 (internal citation omitted). The plaintiff argued her action fell within the exception that the trenching project was an inherently dangerous activity and that "[Davidson and Pinnacle] failed to take adequate measures to correct [Rowland's] poor safety practices." *Id.*

The *Woodson* Court held that because Davidson "knew at all material times preceding the cave-in that [Rowland] was not following standard, regulatory safety procedures[,]" it could not "escape liability by merely relying on the legal ground that [Rowland] was an independent contractor." *Id.* at 356-57, 407 S.E.2d at 238. In regards to Pinnacle's liability, however, the *Woodson* Court made the following notable distinction:

> We need not decide whether [Pinnacle] . . . owed a nondelegable duty to plaintiff's intestate. Assuming that it did, we find nothing in the forecast of evidence to show that such a duty was breached by [Pinnacle.] There is nothing in the forecast indicating that [Pinnacle] or any of its representatives knew or should have known that [Davidson] had hired [Rowland], much less of the trenching activity in which plaintiff's intestate was engaged or the dangerous propensities of the particular trench in question. There is no forecast that [Pinnacle] had any knowledge or expertise regarding safety practices in the construction industry generally or in trenching particularly. . . . [Pinnacle] justifiably relied entirely on the expertise of its general contractor [Davidson.]

Id. at 357-58, 407 S.E.2d at 238.

Woodson confirms that

> [l]iability for injuries caused by such activities is not strict, but is based on negligence. The reason for imposing a negligence

> standard for liability resulting from inherently dangerous activities is that exercise of reasonable care can control the risk, and the responsible parties will not be held liable unless they have caused injury by failing to do so.

Id. at 351, 407 S.E.2d at 234-35 (internal citation omitted).

In the instant case, assuming *arguendo* that the inspection of UST was an inherently dangerous activity and thus Mallard owed a non-delegable duty to plaintiffs, we find nothing in the record establishing that such a duty was breached by Mallard. There is nothing in the record indicating that at the time of injury, Mallard knew or should have known of the potentially dangerous circumstances surrounding UST #1. Frank Famularo (Famularo), president of Mallard, testified that the only obligation Mallard had during the October 2008 inspection "was to remove the fuel from the [UST] prior to the [cleaning and] inspection [by STS]. There is no dispute that [Mallard] complied with this obligation." Famularo also testified to the following:

> At no time have employees of [Mallard] undertaken the task of inspecting [UST.] No [Mallard] employees have the required knowledge or expertise in the field of inspecting underground fuel storage tanks and, accordingly, are not aware of the safety practices associated therewith.
>
> . . .
>
> The knowledge, training and skill necessary to engage in the work involved in the tank inspection is so specialized and so specific that neither [STS] nor any of their employees receive directions from [Mallard] regarding the work to be done.

According to the record, no Mallard employees were present on 9 October 2008 or at any time during the inspection of the UST, no Mallard employees were involved in any supervisory capacity over STS' inspection of the UST, and no Mallard employees had any knowledge or expertise regarding safety practices in the UST inspection industry.

Further, although plaintiffs' complaint asserted that Mallard "failed to properly supervise its sub-contractor, STS, and to otherwise ensure that STS complied with the appropriate safety measures which would have prevented this accident and injury[,]" the president of STS, Don Lister (Lister), testified that STS employees do not take directions from owners of UST on how to execute the inspection process. Lister also testified that STS is one of very few companies

within the country providing specialized inspection services of UST. These inspections are undertaken by STS crews based on policies and procedures set out, created, and maintained by STS. Other than removing fuel from the UST, Mallard had no obligation or responsibility regarding the cleaning and inspection of the UST. Lister testified that Mallard complied with all of its obligations and responsibilities.

As previously stated and based on a *Woodson* analysis, assuming *arguendo* that the inspection of UST was an inherently dangerous activity and that Mallard owed a non-delegable duty to plaintiffs, we find nothing in the record demonstrating Mallard's breach of such duty. On the contrary, we find that Mallard justifiably relied on the expertise of STS. Even if Mallard should have known that the UST inspection was an inherently dangerous activity, there is no indication that Mallard failed to take precautions, and therefore, Mallard's actions or inaction could not have been the proximate cause of Francisco's injuries. *See Kinsey*, 139 N.C. App. at 375, 533 S.E.2d at 492. Therefore, we hold the trial court did not err in granting defendant Mallard's motion for summary judgment.

Affirmed

Chief Judge MARTIN and Judge MCCULLOUGH concur.

STATE OF NORTH CAROLINA v. KEITH ANTONIO BARNETT

No. COA12-269

(Filed 2 October 2012)

Sexual Offenders—failed to notify of change of address—subject matter jurisdiction—indictment insufficient—failed to specify all essential elements of charged offense

The trial court lacked subject matter jurisdiction in a case involving defendant's failure to notify the sheriff's office of his change of address as required for a registered sex offender under N.C.G.S. § 14-208.9. The indictment failed to specify that defendant was "a person required to register," an essential element of the charged offense. The trial court's judgment was arrested and defendant's conviction was vacated.

Appeal by Defendant from judgment and commitment entered 17 August 2011 by Judge Mark E. Powell in Gaston County Superior Court. Heard in the Court of Appeals 28 August 2012.

Roy Cooper, Attorney General, by J. Joy Strickland, Assistant Attorney General, for the State.

Harrington, Gilleland, Winstead, Feindel & Lucas, LLP, by Anna S. Lucas, for the Defendant.

THIGPEN, Judge.

Keith Antonio Barnett ("Defendant") appeals from a jury verdict finding him guilty of failing to notify the sheriff's office of change of address as required for a registered sex offender under N.C. Gen. Stat. § 14-208.9. The indictment in this case failed to specify that Defendant was "a person required to register," an essential element of the charged offense. This defect rendered the indictment insufficient to confer subject matter jurisdiction upon the trial court, and we must therefore arrest the trial court's judgment and vacate Defendant's conviction.

I. Factual & Procedural Background

The State's evidence at trial tended to show that Defendant was convicted of taking indecent liberties with a child in Gaston County in 1997. Said conviction is a "reportable offense" under N.C. Gen. Stat. § 14-208.6(4) and required Defendant to register as a sex offender with the Gaston County Sheriff's Office. Defendant initially registered as a sex offender on 15 February 2010, at which time Defendant acknowledged his duty to notify the sheriff's office of any change in his personal address "within three business days of establishing a residency in North Carolina" and "within three business days of being released from any jail[.]" Defendant listed his address as "554 South Boyd Street, Gastonia, North Carolina."

Defendant notified the sheriff's office of a change of address several times subsequent to his initial sex offender registration: on 15 March 2010, Defendant listed his new address as 210 South Chester Street; on 17 March 2010, Defendant listed his new address as 1112 North Ransom Street; and on 13 April 2010, Defendant changed his address to 607 West Fourth Avenue, Gastonia. Quentin Brown, a friend of Defendant, testified that Defendant lived with him at his residence located at 607 West Fourth Avenue for approximately one week in April 2010. Mr. Brown further testified that Defendant left his

residence when Defendant was arrested and jailed in April 2010 and that Defendant has not lived with him since that time.

Defendant was arrested on 15 April 2010 (on charges unrelated to this appeal) and remained in the Gaston County Jail until his release at approximately 7:27 p.m. on 3 June 2010. Because the sheriff's office was not open at that time, Defendant was unable to register his new address until the following day. On 4 June 2010, a Friday, Defendant registered his new address as 607 West Fourth Avenue, the same address that Defendant had represented as his personal address prior to his arrest and imprisonment. Defendant also met with Officer Jamie Terry ("officer Terry"), an officer of the State of North Carolina, that day and "reported that he was living at 607 West 4th Avenue, Gastonia, North Carolina." However, Officer Terry was unable to verify that Defendant lived at that address when she personally visited said address on five occasions—27 June 2010, 28 June 2010, twice on 29 June 2010, and 17 July 2010. On 19 July 2010, Officer Terry reported her inability to locate Defendant to Captain Darryl Griffin, the individual in charge of the Gaston County Sheriff's Department's Sex Offender Registration Program.

Defendant was arrested on 21 July 2010 and subsequently indicted on 2 August 2010 on the charge of failing to notify the sheriff's office of his change in address as required for a registered sex offender.[1] The matter came on for trial on 16 August 2011 in Gaston County Superior Court. On 17 August 2011, the jury returned a verdict finding Defendant guilty as charged. The trial court determined that Defendant was a prior record level V offender and sentenced Defendant within the presumptive range of 28 to 34 months imprisonment. Defendant appeals.

II. Analysis

Defendant contends the indictment in the instant case was insufficient to confer subject matter jurisdiction upon the trial court, as it failed to allege all of the essential elements of the charged offense. Specifically, Defendant contends the indictment failed to allege that he was a "person required to register," a prerequisite for the offense as described in N.C. Gen. Stat. § 14-208.9. Defendant insists this defect in the indictment was fatal to the trial court's jurisdiction and requires that we arrest judgment and vacate his conviction. We agree.

1. Defendant was also indicted for attaining habitual felon status, but that charge was dismissed by the trial court.

"It is well settled that 'a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.' " *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (citation omitted). Lack of jurisdiction in the trial court due to a fatally defective indictment requires " 'the appellate court . . . to arrest judgment or vacate any order entered without authority.' " *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (citation omitted). The issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal. *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004).

N.C. Gen. Stat. § 15A-924(a)(5) requires that an indictment set forth:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2011).

In order to be valid and thus confer jurisdiction upon the trial court, "[a]n indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). The indictment "is sufficient if it charges the offense in a plain, intelligible and explicit manner. . . ." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). "[I]ndictments need only allege the ultimate facts constituting each element of the criminal offense," *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995), and "[a]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense," *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987). " '[W]hile an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.' " *State v. Harris*, ___ N.C. App. ___, ___, 724 S.E.2d 633, 636 (2012) (citation omitted); *see also State v. Bowen*, 139 N.C. App. 18, 27, 533 S.E.2d 248, 254 (2000) ("The purpose of an indictment is to give a defendant notice of the crime for which he is being charged."). " 'The general rule in this State and

elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." *Harris*, ___ N.C. App. at ___, 724 S.E.2d at 636 (quoting *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953)).

N.C. Gen. Stat. § 14-208.9 provides, in pertinent part:

> (a) If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered.

N.C. Gen. Stat. § 14-208.9(a) (2011). The three essential elements of the offense described in N.C. Gen. Stat. § 14-208.9 are: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change. *See State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009), *superseded by statute on other grounds as recognized in State v. Moore*, ___ N.C. App. ___, 718 S.E.2d 737 (2011); *State v. Worley*, 198 N.C. App. 329, 334, 679 S.E.2d 857, 861 (2009).

Here, the indictment charged Defendant with violating N.C. Gen. Stat. § 14-208.9 and alleged as follows:

> The jurors for the State upon their oath present that on or about [8 June 2010] and in [Gaston County] the defendant named above unlawfully, willfully and feloniously did fail to provide written notice or notify the Gaston County Sheriff's Department within three business days after a change of address as required by the North Carolina General Statute 14-208.9.

While the indictment substantially tracks the statutory language set forth in N.C. Gen. Stat. § 14-208.9(a) with respect to the second and third elements of the offense, it makes no reference to the first essential element of the offense, *i.e.*, that Defendant be "a person required to register." The indictment does not allege that Defendant is a registered sex offender, nor any facts indicating why it would be a crime for Defendant to "fail to provide written notice or notify the Gaston County Sheriff's Department within three business days after a change of address." Moreover, the State's contention that the indictment language "as required by the North Carolina General Statute 14-208.9" was adequate to "put Defendant on notice of the charge[] and [] inform[] him with reasonable certainty the nature of the crime

charged" is unavailing, as "it is well established that '"[m]erely charging in general terms a breach of [a] statute and referring to it in the indictment is not sufficient"' to cure the failure to charge 'the essentials of the offense' in a plain, intelligible, and explicit manner." *State v. Billinger*, ___ N.C. App. ___, ___, 714 S.E.2d 201, 207 (2011) (alterations in original) (quoting *State v. Sossamon*, 259 N.C. 374, 376, 130 S.E.2d 638, 639 (1963) (in turn quoting *State v. Ballangee*, 191 N.C. 700, 702, 132 S.E. 795, 795 (1926))).

In two recent decisions, *State v. Harris*, ___ N.C. App. ___, 724 S.E.2d 633, and *State v. Herman*, ___ N.C. App. ___, 726 S.E.2d 863 (2012), this Court vacated sex offender-related convictions where the indictment failed to adequately allege all of the essential elements of offenses described under N.C. Gen. Stat. § 14-208.18 (2011). In both cases, we held that the indictment was fatally defective because it failed to sufficiently allege that the defendant had been previously convicted of the specific category of sex offense—an offense enumerated in Article 7A of Chapter 14 of our General Statutes or an offense involving a victim who was under sixteen years of age at the time of the offense ___ that subjected him to a charge under N.C. Gen. Stat. § 14-208.18. *Herman*, ___ N.C. App. at ___, 726 S.E.2d at 864-67. We agree with the State's contention that the present case is distinguishable from *Harris* and *Herman* in that the address registration requirements set forth in N.C. Gen. Stat. § 14-208.9 apply to *all* sex offenders, not just to a particular subclass of sex offenders. *See* N.C. Gen. Stat. § 14-208.9(a) (applying to all persons "required to register"). We cannot agree, however, with the State's assertion that the general application of a statute to registered sex offenders dispenses with the well-established requirement that an indictment set forth *all* of the essential elements of the charged offense.

Although outside the context of our sex offender registration regime, we find instructive our Supreme Court's ruling in *State v. J.N. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969). There, the court addressed a purported violation of then-existing N.C. Gen. Stat. § 153-266.6, which described a crime where

> [A] board of county commissioners adopt[ed] an ordinance regulating the subdivision of land as authorized [in N.C. Gen. Stat. § 153-266.6], [and] any person who, being the owner or agent of the owner of any land located within the platting jurisdiction granted to the county commissioners . . . transfers or sells such land by reference to a plat showing a subdivision of land before

> such plat [was] properly approved under such ordinance and recorded in the office of the appropriate register of deeds[.]"

Id. at 63, 170 S.E.2d at 915. The warrant at issue alleged that the defendant had "transfer[red] or s[old] certain property . . . by reference to a plat showing a sub-division of land before such plat had been properly approved . . . and recorded" and charged the defendant with "the committing of a misdemeanor in accordance with Section 153-266.6." *Id.* at 62, 170 S.E.2d at 914. However, the warrant failed to allege that the defendant was "the owner or agent of the owner of any land located within the platting jurisdiction granted to the county commissioners." *Id.* at 63, 170 S.E.2d at 915. Our Supreme Court stated the following in holding that the warrant was fatally defective because it failed to allege an essential element of the charged offense:

> The general allegation that defendant's conduct constituted a misdemeanor in violation of [N.C. Gen. Stat. § 153-266.6] is insufficient. The owner or agent of the owner of land within the 'platting jurisdiction' granted the county commissioners . . . is the only person subject to criminal prosecution for violation of [N.C. Gen. Stat. § 153-266.6]. . . . In short, the warrant is fatally defective on account of its failure to allege one of the essential elements of the criminal offense created and defined in [N.C. Gen. Stat. § 153-266.6], namely, that defendant was the owner or agent of the owner of land within the platting jurisdiction granted to the county commissioners. . . .

Id. at 65-66, 170 S.E.2d at 916-17.

Here, the indictment describes an offense applicable only to registered sex offenders, but fails to allege facts indicating that Defendant is "a person required to register." The general reference to Defendant's violation of N.C. Gen. Stat. § 14-208.9, which consists of multiple subsections and describes multiple offenses in addition to the offense for which Defendant was charged, is insufficient to cure this defect.[2] We accordingly conclude that the indictment failed to "allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996), and that "the State's failure to allege an essential element of the crime . . . render[ed] the

2. We also note that the indictment fails to specify subsection (a) of § 14-208.9 as the relevant statutory provision in the instant case, but that this omission in itself does not render the indictment invalid. *See State v. Overton*, 60 N.C. App. 1, 25, 298 S.E.2d 695, 709 (1982).

indictment in this case facially defective and deprived the trial court of jurisdiction to adjudicate the charge[,]" *Billinger*, ___ N.C. App. at ___, 714 S.E.2d at 207.

III. Conclusion

For the foregoing reasons, we hold that the indictment was insufficient to confer subject matter jurisdiction upon the trial court. The trial court's judgment is hereby arrested, and Defendant's conviction is "vacated without prejudice to the State's right to attempt to prosecute Defendant based upon a valid indictment." *Harris*, ___ N.C. App. at ___, 724 S.E.2d at 639.

VACATED.

Judges MCGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. AHNAIH-INEZ CAMERON, DEFENDANT

No. COA12-395

(Filed 2 October 2012)

1. Motor Vehicles—felonious speeding to flee and elude a law enforcement officer—sufficient evidence

The trial court did not err in denying defendant's motion to dismiss the charge of felonious speeding to flee and elude a law enforcement officer where the evidence demonstrated that defendant actually intended to operate a motor vehicle in order to elude law enforcement officers.

2. Motor Vehicles—felonious speeding to flee and elude a law enforcement officer—jury instructions—intent—no plain error

The trial court did not commit plain error in a felonious speeding to flee and elude a law enforcement officer case in its jury instruction. Even if its instruction on "intent" was erroneous, it did not rise to the level of plain error given the overwhelming evidence in the case.

3. Constitutional Law—effective assistance of counsel—felonious speeding to flee and elude a law enforcement officer—no different result

Defendant did not receive ineffective assistance of counsel in a felonious speeding to flee and elude a law enforcement officer case. Even assuming *arguendo* that defense counsel's representation was deficient and the jury instructions were in error, in light of defendant's own testimony, there was no reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.

Appeal by defendant from judgment entered on or about 14 September 2011 by Judge G. W. Abernathy in Superior Court, Durham County. Heard in the Court of Appeals 11 September 2012.

Attorney General Roy A. Cooper, III, by Assistant Attorney General James M. Stanley, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah Hall, for defendant-appellant.

STROUD, Judge.

Defendant appeals a judgment convicting her of felony fleeing/eluding arrest with a motor vehicle. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that on 2 February 2011, while on duty, Deputy Hayden Gould of the Durham County Sheriff's Department attempted to stop a vehicle that was moving quickly and had no license plate. Deputy Gould activated his siren and lights, but the vehicle did not stop. Eventually, defendant stopped the vehicle, but after speaking with Deputy Gould, she abruptly drove away. A "high-speed chase" ensued that included 10 to 15 law enforcement vehicles following defendant on various roads and through a red traffic signal. Eventually defendant's vehicle was "boxed" in by the law enforcement vehicles at a gas station. Defendant testified at her own trial that she "t[ook] off" from Deputy Gould, a male, because she wanted a female officer. After a trial by jury, defendant was found guilty of felonious speeding to flee and elude a law enforcement officer ("fleeing"). The trial court entered judgment on defendant's fleeing conviction. Defendant appeals.

II. Motion to Dismiss

[1] Defendant first contends that "the trial court erred in denying Ms. Cameron's motion to dismiss. All of the evidence, including the State's own evidence, conclusively established that Ms. Cameron did not act with the specific intent of fleeing to avoid arrest." (Original in all caps.)

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). N.C. Gen. Stat. § 20-141.5(a) provides that "[i]t shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." N.C. Gen. Stat. § 20-141.5(a) (2011). N.C. Gen. Stat. § 20-141.5(b) then lists circumstances which will elevate fleeing to a felony. *See* N.C. Gen. Stat. § 20-141.5(b) (2011).

Defendant challenges only her *intent* to elude. Defendant cites *State v. Woodard* which stated that "a defendant accused of violating N.C. Gen. Stat. § 20-141.5 must actually intend to operate a motor vehicle in order to elude law enforcement officers[.]" 146 N.C. App. 75, 80, 552 S.E.2d 650, 653, *disc. review allowed*, 354 N.C. 579, 559 S.E.2d 552, *disc. review allowed*, 355 N.C. 223, 559 S.E.2d 554 (2001), *disc. review improvidentently allowed*, 355 N.C. 489, 562 S.E.2d 420 (2002). Defendant argues that through her "exculpatory statements" "the evidence clearly establishes that the only reason Ms. Cameron fled from Deputy Gould was so that she could turn herself in to a female officer."

While defendant contends her statements are "exculpatory[,]" we do not agree since defendant's own statements confirm that she was intentionally operating the "motor vehicle in order to elude" the law enforcement officers who were chasing her. *Id.* The fact that defend-

ant preferred to be arrested by a female officer is irrelevant to determining whether defendant did in fact "intend to . . . elude[.]" *Id.; see* N.C. Gen. Stat. § 20-141.5. Defendant admittedly did intend to elude the law enforcement officers who were pursuing her, and there is no question that she "operate[d] a motor vehicle on a street, highway, or public vehicular area" and that the law enforcement officers chasing her were "in the lawful performance of [their] duties." N.C. Gen. Stat. § 20-141.5(a). The evidence demonstrates that defendant "actually intend[ed] to operate a motor vehicle in order to elude law enforcement officers[.]" *Woodard*, 146 N.C. App. at 80, 552 S.E.2d at 653. Accordingly, this argument is overruled.

III. Jury Instructions

Defendant next contends that "the trial court committed plain error when it erroneously instructed the jury" on intent. (Original in all caps.) The trial court originally instructed the jury on felonious fleeing pursuant to the pattern jury instructions. The jury began deliberations and then sent a note that read, "Please define point three, fleeing to avoid arrest. Like to see the sheet the judge read from or at least hear it again. Is intent important on this in speeding to elude? Finally, we need the outline of the law we must apply." The trial court told the jury, "[I]ntent is not part of the operating a motor vehicle to elude arrest charge." The trial court then again instructed the jury on felonious fleeing pursuant to the pattern jury instructions. Defendant did not object to any of the instructions.

As to plain error our Supreme Court recently clarified,

> We now . . . clarify how the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. 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 affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted). The Court in *Lawrence* went on to conclude that although the trial court had omit-

ted one of the elements of the crime at issue in its instruction to the jury, the error did not constitute plain error in light of the overwhelming evidence against the defendant, particularly as to that element. *See id.* at ___, 723 S.E.2d at 329-35.

Thus, even if we assume that the trial court's instructions were erroneous as to intent, the error does not rise to the level of plain error. *See id.* Defendant herself admitted to fleeing from law enforcement. While defendant's testimony focuses on the reason she was fleeing, her intent to flee is unquestionably established. This is not a case of a nervous motorist taking a moment longer than necessary to stop for an officer in order to pull into a well-lit or populated parking lot to stop instead of stopping on a dark or empty highway; here, not only did defendant intentionally drive away from Deputy Gould after stopping, she did so at a high rate of speed while committing traffic violations and seriously endangering herself, many law enforcement officers, and anyone else on the road along the way. Accordingly, we do not find plain error. *See id.* This argument is overruled.

IV. Ineffective Assistance of Counsel

[3] Lastly, defendant contends that she received ineffective assistance of counsel as her attorney did not correct the trial court regarding its mistake in the jury instructions.

> The United States Supreme Court has enunciated a two-part test for determining whether a defendant received ineffective assistance of counsel. Under the *Strickland* test, for assistance of counsel to be ineffective:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> This test was adopted by the North Carolina Supreme Court in *State v. Braswell*, 312 N.C. at 562, 324 S.E.2d at 248. The first element requires a showing that counsel made serious errors; and the latter requires a showing that, even if counsel made an unreasonable error, there is a reasonable probability that, but for

counsel's errors, there would have been a different result in the proceedings.

When counsel's performance is subjected to judicial scrutiny on appellate review, this Court must be highly deferential and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Defendant may rebut this presumption by specifically identifying those acts or omissions that are not the result of reasonable professional judgment and the court determining, in light of all the circumstances, the identified acts were outside the wide range of professionally competent assistance.

State v. Banks, ___ N.C. App. ___, ___, 706 S.E.2d 807, 820-21 (2011) (citations and quotation marks omitted). Even if we assume *arguendo* that defendant's "counsel's representation was deficient" and the jury instructions were in error, for the same reasons as noted above, in light of defendant's own testimony, we cannot conclude that "there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* This argument is overruled.

V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA v. KEVIN ANDREW POWELL

No. COA12-317

(Filed 2 October 2012)

1. Sentencing—prior record level—oral stipulation—prior record level worksheet—sufficient to support points and resulting prior record level

The trial court did not err in a murder case by sentencing defendant as a prior record level II offender. Defense counsel's oral stipulation to the existence of a prior out-of-state felony conviction, combined with the State's submission of a prior record

level worksheet, were sufficient to adequately support the trial court's decision about how many total points to award defendant and what his resulting prior record level was.

2. Evidence—objection to witness as expert—no objection to admission of testimony on grounds of accuracy—benefit of prior objection lost

The trial court did not err in a murder case by allowing a law enforcement officer to testify as an expert in Jamaican patois. While defendant objected to the witness being tendered as an expert witness initially, defendant never objected on grounds of accuracy to admission of the transcripts containing the witness's translations such that the content of the witness's expert translations ultimately came in without objection. Thus, the benefit of defendant's objection was lost.

3. Homicide—murder—sufficient evidence—elements of crime—defendant as perpetrator

The trial court erred in a murder case by denying defendant's motion to dismiss for insufficiency of the evidence. There was sufficient evidence of all elements of the crime charged including that defendant was the perpetrator.

4. Evidence—witness credibility—not vouched for by prosecutor—testimony why jury should believe witness

The trial court did not commit plain error in a murder case by allowing the prosecutor to vouch for the credibility of one of the State's witnesses. The prosecutor did not vouch for the witness's credibility but merely elicited testimony suggesting reasons why the jury should believe the testimony.

Appeal by Defendant from judgment entered 29 August 2011 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 September 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Jones McVay Law Firm PLLC, by Dianne Jones McVay, and Chiege O. Kalu Okwara, for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

Following his indictment on one charge of murder, Defendant Kevin Andrew Powell pled not guilty to the charge and was tried before a jury in Mecklenburg County Superior Court. The evidence presented at trial tended to show the following: On 10 March 2007, Latarshia Grant, the girlfriend of the victim, Jamarr Linell Flowers, dropped Flowers off at his home around 9:00 p.m. Grant returned to Flowers's home between 10:30 and 11:00 p.m. and noticed that "the wood off the door was gone." When she pushed through the door, Grant saw Flowers lying dead on the floor. Grant immediately called 911.

When law enforcement officers arrived, they observed that Flowers had been shot six times at close range. Law enforcement officers also found a mobile phone on the floor next to Flowers that did not belong to him. Through their investigation of the murder, law enforcement officers determined that the phone belonged to Defendant's employer and that the employer had given the phone to Defendant. Law enforcement officers later determined that Defendant received a call from his girlfriend at 10:40 p.m. and that the call was transmitted to Defendant's phone by a cell phone tower located less than one mile from Flowers's home.

Thereafter, Defendant was interviewed by law enforcement officers and admitted that the phone was his, but denied that he had been at the crime scene. After his interview, Defendant was arrested. At trial, State's witness Etoyi Blount testified that, while sharing a jail cell with Defendant and several other men following Defendant's arrest, Blount heard one of the men ask Defendant how police had "caught" Defendant for Flowers's murder:

> And [Defendant] had told him that – [Defendant] told him that the police had found his phone, or either he wouldn't be in jail if the police hadn't found his phone. And then the guy asked [Defendant], Well, how did the police get your phone? And [Defendant] said, I must have dropped it after I killed him.

Following the presentation of evidence, the trial court instructed the jury on both first- and second-degree murder. Thereafter, the jury returned a verdict of guilty of second-degree murder, and the trial court sentenced Defendant, as a Level II offender, to 189–236 months imprisonment. Defendant appeals.

Discussion

On appeal, Defendant makes four arguments: that the trial court erred in (1) sentencing him as a Record Level II offender; (2) allowing a law enforcement officer to testify as an expert in Jamaican patois; (3) denying his motion to dismiss for insufficiency of the evidence; and (4) allowing the prosecutor to vouch for the credibility of a State's witness. As discussed herein, we find no error.

I. Prior Record Level

[1] Defendant first argues that the trial court erred in sentencing him as a prior Record Level II offender where the State failed to produce sufficient evidence of his criminal history. Specifically, Defendant argues that his trial counsel's oral stipulation to the existence of a prior out-of-state felony conviction, combined with the State's submission of a prior record level worksheet, were not sufficient because neither Defendant nor his counsel had signed the worksheet. We disagree.

Although the relevant statute is clear and specific about the process for determining how a defendant's prior record level is calculated for sentencing purposes, conflation of the steps involved and imprecise language in some of our case law has led to occasional confusion on this issue. For this reason, we think it useful to provide a brief overview of the process before addressing Defendant's specific argument.

For purposes of sentencing, a trial court must (1) ascertain the type and number of the defendant's prior convictions, (2) calculate the sum of the points assigned for each conviction, and (3) based upon the defendant's total points, determine the defendant's prior record level. N.C. Gen. Stat. § 15A-1340.14 (2011). The existence of a prior conviction under the first step of this process requires a factual finding. *See* N.C. Gen. Stat. § 15A-1340.14(a) ("The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of *the offender's prior convictions that the court . . . finds to have been proved* in accordance with this section.") (emphasis added). Accordingly, the existence of a prior conviction may be established by, *inter alia*, "[s]tipulation of the parties." N.C. Gen. Stat. § 15A-1340.14(f)(1). Specifically, "[a] sentencing worksheet coupled with statements by counsel may constitute a stipulation to the existence of the prior convictions listed therein." *State v. Hinton*, 196 N.C. App. 750, 751, 675 S.E.2d 672, 673 (2011).

The trial court next determines the points assigned for each prior conviction, as provided in subsection b. N.C. Gen. Stat. § 15A-1340.14(b). Subsection b specifies the points to be assigned based on the class of felony or misdemeanor underlying each prior conviction. *Id.* For example, a single Class I felony conviction results in an assignment of two points. N.C. Gen. Stat. § 15A-1340.14(b)(4). For a prior conviction from other jurisdictions, the default classification is "as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony[.]" N.C. Gen. Stat. § 15A-1340.14(e) (also noting that the State or a defendant *may* attempt to show by a preponderance of the evidence that an out-of-state conviction is substantially similar to a different class of offense in this State).

While "the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court[,]" *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006), whether a prior out-of-state conviction exists and whether it is a felony are questions of fact. *See State v. Bohler*, 198 N.C. App. 631, 636-37, 681 S.E.2d 801, 805-06 (2009), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010). Accordingly,

> while the trial court may not accept a stipulation to the effect that a particular out-of-state conviction is "substantially similar" to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction.

Id. at 637-38, 681 S.E.2d at 806.

Under the third step of the process provided in section 15A-1340.14, the trial court uses its calculation from step two to assign the defendant a prior record level. N.C. Gen. Stat. § 15A-1340.14(a). For example, if the defendant has from one to four points, he shall be determined to have a prior record level of II. *See* N.C. Gen. Stat. § 15A-1340.14(c). This determination is a question of law. *State v. Wingate*, ___ N.C. App. ___, ___, 713 S.E.2d 188, 189 (2011). "Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *Id.* (citation and quotation marks omitted)

Accordingly, we review the ultimate determination of a defendant's prior record level *de novo*. *Id.* at ___, 713 S.E.2d at 190. "As a

result, the issue before the Court [on appeal] is simply whether the competent evidence in the record adequately supports the trial court's decision [about how many total points to award a defendant and what his resulting prior record level is]." *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804.

Here, the record reveals the following colloquy at sentencing:

> [The State]: Your Honor, the State would contend that the defendant is a prior record level [II]. He has a felony drug conviction from New York that he was convicted [of] on March 8th of 2004. If I may approach with the worksheet.
>
> The Court: Very well. [Defense counsel], does the defendant stipulate to a record level [II] *based on that conviction?*
>
> [Defense counsel]: Yes, we will, Your Honor.

(Emphasis added). The prior record level worksheet introduced during sentencing shows Defendant had one prior felony conviction from New York, which pursuant to the statutory default provision was labeled a Class I felony and assigned two points, resulting in a suggested prior record level of II.

On appeal, Defendant does not dispute the existence of his prior felony conviction in New York. Rather, he contends that his counsel's oral stipulation was ineffective because, since neither Defendant nor his counsel had signed the worksheet, "it is unknown from the record what defense counsel was stipulating to." We are not persuaded and conclude that, taken in context, the court's question, "does [D]efendant stipulate to a record level [II] based on that conviction[,]" can only be fairly read as asking whether Defendant stipulated to the existence of the out-of-state felony conviction, as well as to his ultimate prior record level resulting therefrom.[1] *Cf. State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961) ("While a stipulation need not follow any particular form, its terms must be definite and certain

1. Despite voluminous case law from this Court and from our Supreme Court and the plain language of section 15A-1340.14(a) that the ultimate determination of a defendant's prior record level is a question of law based upon questions of law and fact, to wit, the existence and type of a defendant's prior convictions and the calculation of points based thereupon, in *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005), our Supreme Court found that the "defendant stipulated to his prior record level pursuant to [N.C. Gen. Stat.] § 15A-1340.14(f)(1)[.]" *Id.* at 828, 616 S.E.2d at 917. We need not revisit this issue here, as even were Defendant's stipulation to his prior record level ineffective as being to a question of law, his stipulation to the existence of a prior out-of-state felony would remain and would suffice to support the court's prior record level determination.

in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them.") (quotation marks and citations omitted), *superseded on other grounds by statute*, N.C. Gen. Stat. § 20-179(a) (2009) (as recognized in *State v. Denning*, 316 N.C. 523, 525-26, 342 S.E.2d 855, 857 (1986)). Defendant cites no authority for the proposition that a defendant's explicit oral stipulation to the existence of an out-of-state felony conviction is ineffective if he has not signed the prior record level worksheet, and we know of none.

Because the worksheet and Defendant's stipulation constituted "competent evidence in the record adequately support[ing] the trial court's decision [about how many total points to award a defendant and what his resulting prior record level is,]" *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804, we overrule Defendant's argument.

II. Testimony Interpreting "Patois"

[2] Defendant next argues that the trial court erred in allowing a law enforcement officer to testify as an expert in Jamaican patois. We disagree.

This Court reviews a trial court's determination of whether a lay witness may testify to an opinion for abuse of discretion. *State v. Ziglar*, ___ N.C. App. ___, ___, 705 S.E.2d 417, 419, *disc. review denied*, 365 N.C. 200, 710 S.E.2d 30 (2011). We also review a trial court's determination whether to allow expert testimony for abuse of discretion. *State v. Brockett*, 185 N.C. App. 18, 28, 647 S.E.2d 628, 636, *disc. review denied*, 361 N.C. 697, 654 S.E.2d 483 (2007). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* at 21-22, 647 S.E.2d at 632 (citation and quotation marks omitted).

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2011).

> Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences. While a trial court should avoid unduly influencing the jury's ability to draw its own inferences, expert testimony is proper in most facets of human knowledge or experience.

Brockett, 185 N.C. App. at 28, 647 S.E.2d at 636 (citations and quotation marks omitted).

Because we find it instructive and factually on point, we believe a more detailed examination of the facts of *Brockett* is warranted here. In *Brockett*, a police detective was permitted to "interpret[]" recorded conversations between the defendant and his brother which included numerous gang-related slang terms. *Id.* at 29, 647 S.E.2d at 636. The defendant objected, noting there was no "clearly defined dictionary of street gang lingo, and I think that if some of these words are open to interpretation, then the wrong interpretation would be extremely damaging [to the defendant.]" *Id.* at 28-29, 647 S.E.2d at 636. The trial court stated that it would not let the State qualify the detective as an expert, but overruled the defendant's objection and permitted the detective to testify to his interpretations. *Id.*

On appeal, this Court rejected the defendant's argument that the trial court had erred in allowing the detective to offer opinion testimony:

> Although [the trial court] ruled that [it] would not allow the prosecutor to qualify [the detective] as an expert before the jury, [the court]'s statement that [the detective] has "training and skills that will aid the jury in interpreting this stuff[,]" and the fact that [the court] allowed [the detective] to offer opinion testimony, demonstrate that [the court] concluded that [the detective] was qualified to offer expert opinions on the meaning of slang terms. [The court]'s statement that [it] would not allow the prosecutor to "qualify [the detective] as an expert" indicates only that, to avoid any improper judicial influence on the weight to be given [the detective]'s testimony, [the court] did not want the jury to hear that [the detective] was testifying as an expert.

Id. at 30, 647 S.E.2d at 637 (citing *State v. Wise*, 326 N.C. 421, 431, 390 S.E.2d 142, 148, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990)). In *Wise*, our Supreme Court held that where a

> defendant interposed only general objections to the testimony which is the subject of [the appeal and] never requested a specific finding by the trial court as to the witness' qualifications as an expert . . . a finding that the witness is qualified as an expert is implicit in the trial court's ruling admitting the opinion testimony.

Id.

Here, at trial, Officer Christopher Wilson of the Charlotte-Mecklenburg County Police Department provided "translations" of phone calls Defendant made from the county jail after his arrest. During these calls, Defendant and other parties spoke in Jamaican patois. According to Wilson, patois is a form of "broken English" not taught in Jamaican schools but rather just "pick[ed] up as you go."[2]

The State did not explicitly offer Wilson as an expert witness. However, near the start of Wilson's testimony, defense counsel stated, "I'd object if this witness is going to be tendered as an expert witness[,]" an objection which the trial court "[o]verruled at this point." During Wilson's testimony, the State sought to introduce several transcripts of calls as State's exhibits 44—46. Defense counsel stated, "And, Your Honor, I do have a content objection on Number 44 before that's introduced into evidence." The court responded, "All right. Let's go ahead and proceed." After eliciting testimony from Wilson describing the transcripts as pages with two columns, the left being the actual content of the phone calls in patois and the right being Wilson's "translation" thereof into standard English, the State moved to introduce them. Defense counsel stated, "I would note my objection partially to 44, Your Honor." Copies of exhibits 44-46 were then published to the jury, and a recording of the phone call in State's exhibit 45 was played for the jury.

Our review of this portion of the transcript reveals that, while Defendant objected to any tender of Wilson as an expert witness in patois, Defendant did *not* object to admission of State's exhibits 45 or 46 (the transcripts containing Wilson's translations) at all, and made only a partial "content objection" to the remaining transcript.

During Wilson's brief testimony about the first recording played for the jury, Defendant made several general objections, none mentioning the accuracy of the transcripts and all of which the court overruled. Defense counsel then cross-examined Wilson about his knowledge of Jamaican patois. The State asked additional questions on this point on re-direct. Wilson testified that he was born in Jamaica, lived there for 22 years, was married to a Jamaican woman, and spoke Jamaican patois every day at home with his wife and in regular phone calls to his parents.

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2. "Patois" is defined, *inter alia*, as "a dialect other than the standard or literary dialect" and "illiterate or provincial speech[.]" Webster's Third New International Dictionary 1655 (2002).

The day after Wilson began his testimony, defense counsel informed the court:

> I met with my client after we closed yesterday, and he felt that the translations weren't accurate on these transcripts. And, so, that's why I objected to having someone who is not a certified translator basically act as a certified translator. My client told me that he thought especially a lot of the pronouns in the translations were done incorrectly. I called the interpreter from the public defender's office this morning, and he referred me to the person who handles it for the courts. I think there's a good chance we can get someone to look at this stuff over the weekend. But my client was adamant that he thinks there's major mistakes in some of these transcripts.

This comment cannot fairly be viewed as an objection, either to Wilson's testimony or to the transcripts previously admitted. Rather, it appears that the defense was considering whether to call its own expert in patois. The trial court responded:

> That matter is up for counsel to . . . attack the . . . witness's training or qualification or skills. The fact that anybody deems it to be inaccurate does not affect its admissibility, only its credibility. The witness can still testify. His testimony is admissible. Now, whether or not it's believable or not because of that is a matter for counsel to address either through cross-examination or other witnesses. But it doesn't affect its admissibility.

On re-cross, defense counsel asked Wilson additional questions about his use of patois, and Wilson again confirmed that he spoke the dialect every day with his wife and family.

In sum, the record reveals that: (1) as in *Brockett*, Defendant "never requested a specific finding by the trial court as to [Wilson's] qualifications as an expert[,]" and (2) accordingly, "a finding that [Wilson was] qualified as an expert is implicit in the trial court's ruling admitting [Wilson's] opinion testimony[.]" *Brockett*, 185 N.C. App. at 30, 647 S.E.2d at 637 (citation and quotation marks omitted). However, (3) while Defendant objected to Wilson being tendered as an expert witness initially, (4) he never objected on grounds of accuracy to admission of the transcripts containing Wilson's translations, such that (5) the content of Wilson's expert translations ultimately came in without objection. It is well-established that, "[w]here evidence is admitted over objection and the same evidence has been pre-

viously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). Accordingly, this argument is overruled.

III. Motion to Dismiss

[3] Defendant also argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence. Specifically, Defendant contends that there was insufficient evidence that Defendant was the perpetrator of the murder. We disagree.

> This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.
>
> In order for evidence to sustain a conviction it must be substantial. Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion.

State v. Trogdon, ___ N.C. App. ___, ___, 715 S.E.2d 635, 641-42 (2011) (citations and quotation marks omitted). "What constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury." *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975).

Here, the uncontradicted evidence established that Defendant's cell phone was found next to the victim, cell phone records showed that Defendant's cell phone was located within one mile of the murder scene at the approximate time of the murder, Defendant gave inconsistent statements about his whereabouts at the time of the murder, and a witness testified that after his arrest Defendant stated, "I must have dropped [my phone] after I killed him." Taken in the light most favorable to the State, giving the State the benefit of all reasonable inferences, and leaving for the jury any questions of witness credibility, this evidence was "adequate to convince a reasonable mind to accept a conclusion" that Defendant killed Flowers and thereafter dropped his cell phone at the scene. *See Trogdon*, ___ N.C. App. at ___, 715 S.E.2d at 642. Whether the evidence *proved* Defendant was the perpetrator was a question for the jury. *Miller*, 289 N.C. at 4, 220 S.E.2d at 574. Accordingly, the trial court did not err in

denying Defendant's motion to dismiss for insufficiency of the evidence. This argument is overruled.

IV. Statements of the Prosecutor

[4] Finally, Defendant argues that the trial court committed plain error in allowing the prosecutor to vouch for the credibility of State's witness Blount. We disagree.

Because Defendant did not object to the testimony in question at trial, we review only for plain error. Our Supreme Court has recently reaffirmed that

> the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. 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 affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted). "Our Supreme Court has recognized that while counsel may not personally vouch for the credibility of the State's witnesses or for his own credibility, counsel may give the jurors reasons why they should believe the State's evidence." *State v. Jordan*, 186 N.C. App. 576, 586, 651 S.E.2d 917, 923 (2007), *disc. review denied*, 362 N.C. 241, 660 S.E.2d 492 (2008). In *Jordan*, this Court held that the following statement by a prosecutor did not constitute vouching for a witness's credibility: "[W]e contend that the Sheriff is an honest man and he has told you what happened. He's not trying to convict somebody for something they didn't do. He wouldn't want to do that. He is the elected Sheriff of this county." *Id.*

Here, after establishing that, at the time of his testimony, Blount was serving a federal prison sentence in Georgia on a drug charge, the prosecutor and Blount engaged in the following exchange:

> Q[.] Prior to you speaking to the detective or the Assistant DA, were any promises made to you?
>
> A[.] No, they weren't.

Q[.] Were any statements made to you that this is what will happen in your case if you tell us what you heard about Kevin Powell?

A[.] No.

Q[.] And from 2007 to 2011, has anything been done regarding your sentence as it relates to this case?

A[.] No.

Q[.] Now, you've said you've been at Mecklenburg County Jail for about three weeks. About three weeks ago, did you and I meet at the police station?

A[.] Yeah.

Q[.] Was a detective inside that room with us?

A[.] Yes, there was.

Q[.] And when we met, did I make any promises to you as to what would happen regarding your case?

A[.] You told me that you couldn't make any promises.

Q[.] I told you that I couldn't make any promises?

A[.] Yes.

Q[.] And was that because I work in state court and—well, do you recall that conversation was about I work in state court; I have no influence or no control over what happens in the federal court?

A[.] Yeah.

Our review of this colloquy reveals that the prosecutor did not vouch for Blount's credibility, but merely elicited testimony suggesting reasons why the jury should believe Blount's testimony, to wit, that Blount was not receiving any leniency or favorable treatment in exchange for his testimony against Defendant. We find the exchange quite routine in this regard and certainly far less explicit than a statement that a witness was "an honest man" who "wouldn't want to do that [lie on the stand]." *See Jordan*, 186 N.C. App. at 586, 651 S.E.2d at 923. Accordingly, Defendant has failed to show any error by the

trial court in allowing this testimony, let alone plain error. This argument is overruled.

NO ERROR.

Judges CALABRIA and ELMORE concur.

BERTHA TURNER, ADMINISTRATOR FOR THE ESTATE OF CLINTON HARMON, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT AND KARIA HAWKINS, ADMINISTRATOR FOR THE ESTATE OF DAMIEN S. HAWKINS, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA11-1514

(Filed 2 October 2012)

1. Tort Claims Act—negligence—duty not breached

The Industrial Commission did not err in a Tort Claims Act case by finding that the North Carolina Department of Transportation did not breach its duty to plaintiffs to maintain SR 1422 in a safe condition. The Court of Appeals affirmed the opinions and awards of the full Commission denying plaintiffs' claim for benefits under the North Carolina Tort Claims Act.

2. Tort Claims Act—negligence—proximate cause—issue not reached

Where competent evidence supported the Industrial Commission's finding in a Tort Claims Act case that the North Carolina Department of Transportation did not breach its duty to maintain SR 1422 in a safe condition, the Court of Appeals did not need to reach the issue of proximate cause.

Appeal by plaintiffs from Opinions and Awards of the Full Commission entered 4 August 2011 by Commissioner Staci T. Meyer of the North Carolina Industrial Commission. Heard in the Court of Appeals 23 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Melody R. Hairston, for the North Carolina Department of Transportation.

Law Offices of Alvin L. Pittman, by Alvin L. Pittman, for plaintiff-appellants.

BRYANT, Judge.

Where the North Carolina Department of Transportation did not breach its duty to plaintiffs, we affirm the 4 August 2011 Opinions and Awards of the Full Commission denying plaintiffs' claim for benefits under the North Carolina Tort Claims Act.

Facts and Procedural History

Plaintiffs Karia Hawkins, Administrator of the Estate of Damien S. Hawkins, and Bertha Turner, Administrator of the Estate of Clinton Harmon, commenced separate actions against the North Carolina Department of Transportation ("DOT") by filing affidavits asserting a claim for damages under the Tort Claims Act with the Industrial Commission ("Commission") on 15 November 2005 and 1 December 2005, respectively. On 10 March 2006, DOT answered both affidavits and included motions to dismiss, affirmative defenses alleging intervening and superseding negligence and contributory negligence, and a counterclaim seeking "contribution and/or indemnification[] and set-off" as a result of the alleged negligence of Clinton Harmon ("Harmon").

On 20 October 2009, DOT filed motions for summary judgment. Plaintiffs responded by filing a motion for summary judgment and, alternatively, a motion for summary adjudication of issues. Deputy Commissioner Stephen T. Gheen denied the parties' cross-motions for summary judgment in an order filed 3 February 2010. The case was heard before Deputy Commissioner George T. Glenn II on 26 October 2010.

On 29 December 2004, at 7:15 p.m., Harmon, Jermaine Whitaker ("Whitaker"), and fourteen-year-old Damien Hawkins ("Hawkins") were traveling by car to a basketball tournament at Northampton-West High School. Harmon was the driver. Whitaker and Hawkins were passengers. Harmon was talking on his cell phone when he missed the correct turn. Harmon took a left turn onto SR 1422 (Van Warren Road), drove past the end of the road, and onto Thelma Boat Landing – where the road surface changed to gravel. When the car tires hit the gravel, Harmon applied the brakes, but despite this, the car traveled across the Thelma Boat Landing, over a rock barrier, and into Roanoke Rapids Lake ("Lake"). As it sank, Harmon, Whitaker, and Hawkins were each able to exit the vehicle; however,

Harmon and Hawkins drowned before they could reach the shore. Whitaker survived.

Deputy Commissioner Glenn filed a Decision and Order in each action on 26 January 2011 awarding $300,000.00 to the Estate of Clinton Harmon and $350,000.00 to the Estate of Damien S. Hawkins. DOT timely filed notices of appeal to the Full Commission ("the Commission") on 28 January 2011. The case was heard before the Commission on 10 June 2011. On 4 August 2011, Commissioner Staci T. Meyer filed an Opinion and Award for the Commission, reversing the Decision and Order of Deputy Commissioner Glenn as to each action, denying plaintiffs' claims for benefits under the Tort Claims Act. Commissioners Danny Lee McDonald and Christopher Scott concurred. Plaintiffs appeal.

On appeal, plaintiffs contend that the Commission erred in concluding they failed to prove DOT's negligence. More specifically, the issues plaintiffs raise[1] can be combined and addressed under the following two issues: whether the Commission erred in finding (I) DOT did not breach its duty to plaintiffs; and (II) plaintiffs failed to prove their injuries were proximately caused by a breach of duty by DOT.

"The [DOT] is subject to a suit to recover damages for death caused by its negligence only as is provided in the Tort Claims Act." *Drewry v. N.C. Dep't of Transp.*, 168 N.C. App. 332, 336, 607 S.E.2d 342, 346 (2005) (citation omitted). Under the Tort Claims Act,

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

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1. Plaintiffs raise six issues on appeal: whether the Commission erred in (1) making certain findings of fact; (2) premising its conclusions of law based on said findings of fact; (3) finding no evidence that DOT had notice of any condition that would have prompted an engineering study in relation to the lake or placement of warning signs; (4) concluding that DOT did not breach a duty owed to plaintiffs; (5) concluding that plaintiffs failed to prove negligence; and (6) finding DOT's failure to post warning signs on SR 1422 was not the proximate cause of plaintiffs' injuries.

N.C. Gen. Stat. § 143-291 (2011). The standard of review for an appeal from a decision of the Commission under the Tort Claims Act is "for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2011). Thus, "when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998) (citation omitted). We "[do] not have the right to weigh the evidence and decide the issue on the basis of its weight. [Our] duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Drewry*, 168 N.C. App. at 337, 607 S.E.2d at 346 (citation omitted).

"Under the [Tort Claims] Act, negligence is determined by the same rules as those applicable to private parties." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (citation omitted). "To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Id.* (citation omitted). Plaintiffs have the burden of proof. *Drewry*, 168 N.C. App. at 337, 607 S.E.2d at 346 (citing *Griffis v. Lazarovich*, 161 N.C. App. 434, 443, 588 S.E.2d 918, 924 (2003) (Negligence is not presumed from the "mere happening of an accident[.]")).

I

[1] Plaintiffs contend that the Commission erred in finding that DOT did not breach its duty to maintain SR 1422 in a safe condition. In support of their contention, plaintiffs argue that the Commission erred in making certain findings of fact and using those findings of fact to arrive at their conclusions of law. We disagree.

In order to find a breach of duty, there must be a duty owed. The DOT's duty is dictated by the North Carolina General Statutes, which provides that "[t]he general purpose of the [DOT] is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law." N.C. Gen. Stat. § 143B-346 (2011). The DOT does not dispute this duty, as

evidenced by its admission that the "[DOT], the Division of Traffic Engineers, and Andy Brown, in his capacity as an employee of the [DOT], had a duty to maintain SR 1422 in a safe condition, including the posting of appropriate signs." Instead, the DOT denies that it breached this duty. "The [DOT] is vested with broad discretion in carrying out its duties and the discretionary decisions it makes are not subject to judicial review 'unless their action is so clearly unreasonable as to amount to oppressive and manifest abuse.' " *Drewry*, 168 N.C. App. at 338, 607 S.E.2d at 346-47 (quoting *State Highway Comm'n v. Greensboro City Bd. of Education*, 265 N.C. 35, 48, 143 S.E.2d 87, 97 (1965)).

Plaintiffs contend that the DOT breached its duty by failing to place warning signs along SR 1422. Specifically, plaintiffs assign error to the Commission's findings of fact 12, 13, 14, 15, 17, 19, 20, 21, 22, and 23.[2] We will consider each of the Commission's challenged findings of fact.

Plaintiffs admit that the Commission's findings of fact 12, 13, 14, and 15 accurately reflect witness testimony. Nonetheless, plaintiffs argue that these findings of fact are not supported by competent evidence because the findings ignore that the DOT's duty to maintain the roads in a safe condition, including the posting of appropriate signs, is a trigger for safety studies. We disagree.

Findings of fact 13 and 14 state:

> 13. The [DOT] is required to follow the Manual on Uniform Traffic Control Devices (MUTCD) and additional policies and procedures in determining where road signage should be placed as required by N.C. Gen. Stat. § 136-30(a). Pursuant to the MUTCD, warning signs are to be out in place only after engineering studies have been conducted. The MUTCD states that warning signs should not be overused, because overuse can cause drivers to disregard them.
>
> 14. While the MUTCD and State law do not mandate when and [sic] engineering study should be conducted, the [DOT] follows its policy and procedure and conducts engineering studies as a result of specific triggering events. These triggering

2. Plaintiffs argue the Commission erred in making findings of fact 6, 7, and 8 because they are either misleading or irrelevant. However, we review the Commission's findings of fact only to determine if they are supported by competent evidence. Therefore, we do not address these particular findings.

> events include accident investigations where the facts indicate that road designs, signs, or other factors controlled by DOT may be implicated, patterns of traffic accidents based on the severity as determined by the Highway Safety Improvement Program, individuals' requests including those of law enforcement and those studies initiated by [DOT] when it has reason to believe a study is warranted.

In addition to prescribing the duty of the DOT, the North Carolina General Statutes incorporate the Manual on Uniform Traffic Control Devices ("MUTCD"). *See* N.C. Gen. Stat. § 136-30(a) (2011) ("The [DOT] may number and mark highways in the State highway system. All traffic signs and other traffic control devices placed on a highway in the State highway system must conform to the [MUTCD]."). DOT traffic engineers Andy Brown ("Brown") and Wallace Jernigan Jr. ("Jernigan") testified at the hearing before the Deputy Commissioner regarding the MUTCD and plaintiffs admit in their brief that the findings of fact accurately reflect the engineers' testimony. Nevertheless, we review the testimony of Brown and Jernigan.

At trial, Brown and Jernigan testified that the MUTCD provides a uniform standard by which DOT maintains roads controlled by the State, including how and when to post traffic signs. Brown and Jernigan also testified that an engineering study is to be conducted before traffic control devices, including warning signs, are posted. Jernigan stated that the MUTCD "recommends that discretion be used in the installation of warning signs because a [sic] overuse of warning signs could . . . lead to disrespect by drivers." Furthermore, their testimony provided that the DOT conducts engineering studies after certain triggering events. These triggering events include a pattern of crashes reported by the Highway Safety Improvement Program, after certain severe accidents, such as those resulting in fatalities, and when individuals, both citizens and law enforcement, make requests for an engineering study to be conducted.

Findings of fact 12 and 15 are similarly supported by testimony. These findings provide:

> 12. Following his investigation of this accident, Trooper Bullock forwarded a report to [DOT] indicating that warning signs needed to be placed on SR 1422 indicating that the roadway ended. Trooper Bullock testified that the purpose of the report, which is routinely done after accidents involving state property, was to request that [DOT] have their engineers look

> into whether signs should be placed along the road. The forwarding of this report by Trooper Bullock was the triggering factor for [DOT] to do an engineering study to determine whether additional safety improvements were needed including warning signs being placed on SR 1422.
>
> 15. There was a Nighttime Conditions Survey conducted by [DOT] in late 2003 to make certain that the signs already posted on SR 1422 were visible and in good repair. The study was not conducted in order to determine whether additional safety improvements were needed along a particular route from an engineering perspective.

Again, plaintiffs admit that these findings accurately reflect witness testimony. Finding of fact 12 concerns the report issued by Trooper Bullock regarding the accident in question. This report was not filed until after the accident and therefore is not relevant in determining whether the DOT should have performed an engineering study prior to the accident. In regards to finding of fact 15, Jernigan testified that the purpose of the 2003 Nighttime Conditions Survey was "to determine the maintenance condition of the signs that exist at that time. It's not a conduction of an engineering study to determine if additional safety improvements need to be completed." During the survey, "existing signs are reviewed for legibility and to make sure they're not damaged." Thus, findings of fact 12 and 15 are supported by the evidence.

Plaintiffs' primary challenge to findings of fact 12, 13, 14, and 15 is that the DOT's general duty to maintain the roads in a safe condition is a trigger to conduct safety studies. The record evidence does not support this contention. While it is true that the general duty of the DOT is to maintain the roads in a safe condition, the standard of care by which the DOT acts to fulfill this duty is outlined in the MUTCD and the DOT's policies. There is no evidence in the record that the DOT did not act in accordance with the MUTCD and their policies, as there is no evidence that the DOT was aware that an unsafe condition existed on SR 1422.

Plaintiffs argue that "[f]indings of [f]act 17 and 19 are not supported by competent evidence because the State had been on notice since 1961 of an unsafe condition on SR 1422." Findings of fact 17 and 19 state:

> 17. Before the filing of Trooper Bullock's report, there had never been any notice or report regarding unsafe conditions on

> SR 1422 to the [DOT] and there had never been a request that [DOT] examine the roadway or its signs due to concerns about the proximity of the lake or any lack of signs indicating that the road was a dead end road.
>
> 19. There is no evidence to find that any warning sign should have been posted on SR 1422 at the time of the accident to show that the absence of any particular sign caused or contributed to the accident. The evidence presented established that no such warning signs were required on SR 1422. [DOT] engineers Andy Brown and Lee Jernigan testified that while the MUTCD describes how "dead end" and "no outlet" signs should be placed if they are used, these signs are not required by the MUTCD or by the [DOT's] policies. In addition, there is no requirement that [DOT] post signs warning of lakes or other bodies of water near public highways.

There is evidence in the record to support these findings of fact.

In regard to finding of fact 17, testimony presented at trial revealed that no incidents occurred on SR 1422 before the accident in question that would have triggered an engineering study. Brown testified that there had not been any fatal accidents on SR 1422, the DOT had not received any requests for an engineering study to be performed prior to the accident in question, and there was not a pattern of crashes that would have triggered a recommendation by the highway safety program for an engineering study. Additionally, in regard to finding of fact 19, Brown and Jernigan both testified that "dead-end" and "no outlet" signs were not required. Jernigan further testified that signage is not required for roadways that are in proximity to bodies of water.

Plaintiffs assert that the fact that SR 1422 dead-ended in a boat landing is a dangerous condition. Plaintiffs argue that because the DOT has known since 1961 that SR 1422 dead-ended in a boat landing, the DOT was on notice of an unsafe condition. But, plaintiffs assume without supporting evidence that the dead-end itself is a dangerous condition.

For the proposition that the duty to maintain the roads in a safe condition carries with it the duty to investigate and identify hazardous conditions, plaintiffs cite *Phillips v. N.C. Dep't of Transp.*, 80 N.C. App. 135, 341 S.E.2d 339 (1986). In *Phillips*, our Court vacated the decision of the Commission and found that the failure of the DOT

and its employees to fix a "cavernous hole" that extended several feet below the roadway and was within the right of way of a State controlled highway was sufficient grounds to hold the DOT negligent. *Id.* In *Phillips*, DOT employees had been aware of the hole for thirty years and knew that numerous cars had been removed from the hole. *Id.* at 135-36, 341 S.E.2d at 339. "The record shows without dispute or contradiction that a condition dangerous to users of the highway had existed for many years without being corrected by those responsible for maintaining the highway." *Id.* at 138, 341 S.E.2d at 341.

Plaintiffs' reliance on *Phillips* is misplaced. Unlike in *Phillips*, plaintiffs here cannot show that DOT had notice of a dangerous or unsafe condition. And, because neither the proximity of SR 1422 to the lake nor the dead-end were conditions requiring signs pursuant to the MUTCD or DOT's policies, plaintiffs' assertions must fail.

Plaintiffs also challenge the following findings of fact:

> 20. Moreover, there is no evidence to establish that the proximity of the lake to the roadway amounted to a dangerous situation for the traveling public or that the condition required warning signs on SR 1422.
>
> 21. There is no evidence to show that there existed a condition that prompted any employee of [DOT] or anyone else traveling on SR 1422 to make a report to [DOT]. Consequently, there is no evidence that [DOT] had notice of any condition that would have prompted an engineering study, prior to the accident in this claim, in relation to the lake or placement of warning signs.
>
> 22. Plaintiff[s] [have] also alleged that [DOT] was negligent in failing to lower the speed limit on SR 1422. However, the speed limit is determined by N.C. Gen. Stat. § 20-141(a) and (b). While N.C. Gen. Stat. § 20-141(d) gives [DOT] the power to declare a different speed limit, the change must be based on an engineering study and traffic investigation. As there had never been circumstances that would have triggered the [DOT] to conduct such an engineering study, no study was conducted.

As stated, neither the MUTCD nor DOT's policies required the placement of warning signs on roads due to their proximity to a lake. Furthermore, the testimony of Brown and Jernigan revealed no incidents occurring on SR 1422 before the accident in question that would trigger an engineering study and no requests for an engineer-

ing study on SR 1422 were made until the accident in question. Therefore, the Commission did not err in making findings of fact 20 and 21.

Plaintiffs nevertheless argue that proximity of SR 1422 to the lake was a dangerous condition and the dead-end was a hidden danger which required a warning sign. In their brief to this Court, plaintiffs assert that "when a hazard might be obvious under some circumstances, warning signs are required when it is reasonably foreseeable the hazard may be blocked from view under certain circumstances." In support of their argument, plaintiffs cite *Pittman v. N.C. Dep't of Transp.*, 97 N.C. App. 658, 389 S.E.2d 275 (1990). In *Pittman*, the plaintiff sued the DOT for negligence after he collided with a DOT truck that was blocking a portion of a State highway while DOT employees were replacing speed limit signs along the road. 97 N.C. App. 658, 389 S.E.2d 275 (1990). It was noted that "[o]bstructing a well-traveled highway without properly warning approaching motorists is negligence," and where the flashing lights on the parked DOT truck were blocked from the plaintiff's view by the vehicle ahead of him, the danger was reasonably foreseeable. *Id.* at 660, 389 S.E.2d at 276. Our Court affirmed the decision of the Commission in *Pittman*, holding "the flashing light on defendant's truck was not a proper warning that [a] parked truck was in the highway because [the lights were] blocked from plaintiff's view by a vehicle ahead of him, as [the] defendant should have reasonably foreseen would be the case . . . ." *Id.*

Plaintiffs' reliance on *Pittman* is misplaced. In *Pittman*, the DOT was found negligent for *creating* a dangerous condition, then failing to properly warn drivers of the danger. Here, plaintiffs assert that DOT was negligent for failing to act. As previously stated, there is no evidence to establish that proximity to the lake or the dead-end at the boat landing were dangerous conditions requiring warning signs.

In regard to finding of fact 22 and whether DOT was negligent in failing to lower the speed limit on SR 1422 where the speed limit was not posted, General Statutes section 20-141(b) provides "it shall be unlawful to operate a vehicle in excess of . . . [f]ifty-five miles per hour outside municipal corporate limits." However, even then "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." N.C. Gen. Stat. § 20-141(a) (2011).

> Whenever the [DOT] determines *on the basis of an engineering and traffic investigation* that any speed allowed by subsection (b) is greater than is reasonable and safe under the conditions found to exist upon any part of a highway outside the corporate limits of a municipality or upon any part of a highway designated as part of the Interstate Highway System or any part of a controlled-access highway (either inside or outside the corporate limits of a municipality), the Department of Transportation shall determine and declare a reasonable and safe speed limit.

N.C. Gen. Stat. § 20-141(d)(1) (emphasis added). In this case, as has already been established, no events triggering an engineering and traffic investigation occurred prior to the accident in question. Thus, the Commission's finding of fact is supported by evidence in the record.

Because competent evidence supports the Commission's findings of fact, the findings are conclusive on appeal. *See Hassell v. Onslow County Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) ("[T]he Commission's findings of fact are conclusive on appeal when supported by competent evidence . . . ." (citation omitted)). Thus, the Commission's finding of fact 23 is conclusive: "Based upon the greater weight of the evidence, the Full Commission finds that [p]laintiff[s] [have] failed to prove that [DOT] breached any duty owed to Plaintiff[s]." Similarly, because the Commission's findings of fact are supported by competent evidence, the Commission did not err in basing its conclusions of law on said findings of fact.

II

[2] Plaintiffs also contend that they established that their injuries were proximately caused by DOT's failure to maintain SR 1422 in a safe condition by failing to post warning signs. However, because competent evidence supports the Commission's finding that the DOT did not breach its duty to maintain SR 1422 in a safe condition, we do not need to reach the issue of proximate cause.

Accordingly, we affirm the Opinions and Awards of the Full Commission.

Affirmed.

Judges STEPHENS and THIGPEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 10 OCTOBER 2012)

HARDY v. VANCE CNTY. BD. OF EDUC. No. 12-347	Vance (10CVS1037)	Affirmed
IN RE APPEAL OF VISSER No. 12-370	Property Tax Comm. (09PTC80)	Affirmed
IN RE B.M.A. No. 12-640	Henderson (10JT116)	Affirmed
IN RE C.M.S. No. 12-649	Beaufort (10J20-21)	Vacated and Remanded
IN RE D.W-S. No. 12-233	Wayne (11JB40)	Affirmed
IN RE G.J.M. No. 12-515	Cumberland (10JA473)	Affirmed
IN RE J.S.C. No. 12-486	Haywood (10JT108-109)	Affirmed
IN RE M.P. No. 12-363	Durham (09J244)	Affirmed
IN RE S.R.G. No. 12-232	Catawba (10JT246-247)	Affirmed
IN RE S.S.L. No. 12-152	Union (08JT69-71)	Affirmed
JOHNSON v. OPSITNICK No. 12-328	Wake (09CVS2069)	Dismissed
MCCOY v. CITY OF CHARLOTTE No. 12-219	Mecklenburg (11CVS10836)	Affirmed
MENDIETA v. WAVE ENERGY DRINK, LLC No. 12-386	Mecklenburg (11CVS5785)	Affirmed
PARKER v. FARLOW No. 12-144	Guilford (10CVS9677)	Reversed
ROCHELLE v. ROCHELLE No. 12-285	Orange (09CVD875)	Affirmed

RUIZ v. FRANKLIN CNTY. ANIMAL CONTROL No. 12-286	Franklin (11CVS307)	Vacated and remanded for entry of judgment for defendants.
SCHERMERHORN v. N.C. STATE HIGHWAY PATROL No. 12-316	Wake (11CVS2448)	Reversed
STATE EX REL N.C. DEP'T OF ENV'T & NATURAL RES. v. PHARR No. 11-1302	Hyde (09CVS11)	Affirmed
STATE v. EVANS No. 12-224	Wake (10CRS208186) (10CRS3428)	Dismissed in Part, No Error in Part
STATE v. JOHNSON No. 12-111	Onslow (09CRS52558)	No Error
STATE v. NIDIFFER No. 12-61	Guilford (11CRS24376)	No Error
STATE v. STEELE No. 12-162	Mecklenburg (10CRS56737) (10CRS56739)	No Error
STATE v. ALLEN No. 12-189	Wayne (10CRS55708)	No Error
STATE v. GRIFFIN No. 12-390	Pamlico (09CRS50007)	Vacated
STATE v. JOHNSON No. 12-324	Iredell (09CRS52519-20)	Dismissed in part; Vacated and Remanded in part
STATE v. JOLLY No. 12-163	Brunswick (09CRS52865) (11CRS3475)	No error in part; no prejudicial error in part
STATE v. RUBIO No. 12-109	Lee (07CR54680)	Reversed
STATE v. STIMPSON No. 12-176	Guilford (11CRS67126-30) (11CRS67132) (11CRS67138) (11CRS67141) (11CRS67145-46)	No Error

R. KENNETH BABB, AS PUBLIC ADMINISTRATOR CTA OF THE ESTATE OF JULIETTE K. MIRANDA; AND RICHARD BOADA, AS SUCCESSOR TRUSTEE OF THE JULIETTE K. MIRANDA REVOCABLE TRUST, PLAINTIFFS v. RICKEY ALLEN HOSKINS; LAURA D. TURNER; MARC W. INGERSOLL; AND INGERSOLL & HICKS, PLLC, DEFENDANTS

No. COA12-318

(Filed 16 October 2012)

1. Appeal and Error—interlocutory orders and appeals—dismissal of some but not all parties—substantial right

An order dismissing some but not all of the defendants from an action arising from the management of a trust was interlocutory but immediately appealable because it affected a substantial right. The claims arose from a common set of facts and the parties could otherwise be subject to inconsistent verdicts.

2. Statutes of Limitation and Repose—legal malpractice—breach of fiduciary duty—statute of repose

The trial court did not err when it granted the motion of the Ingersoll defendants to dismiss plaintiffs' claims for legal malpractice and breach of fiduciary duty arising from Ingersoll's failure to review documents and protect the trust. Ingersoll drafted three documents in 2006 and had no further relationship to the trustor or trustee until tax returns were prepared in 2008. There was no continuing professional duty from the creation of the documents (the tax returns created a new professional duty), so that these claims, filed in 2011, were beyond the four-year statute of repose.

3. Attorneys—malpractice—estate tax return—claim adequately stated—within statute of limitations

The trial court erred when it dismissed plaintiffs' legal malpractice claim against Ingersoll concerning the preparation of estate tax returns. Ingersoll had a duty to use reasonable care and diligence; viewing the allegations as true for the limited purpose of testing the adequacy of the complaint, plaintiffs sufficiently stated a claim for legal malpractice. The claim was brought within the three-year statute of limitations.

Appeal by plaintiffs from order entered 18 November 2011 by Judge Vance Bradford Long in Forsyth County Superior Court. Heard in the Court of Appeals 27 August 2012.

Craige Brawley Liipfert & Walker, LLP, by William W. Walker, for plaintiffs—appellants.

Boydoh & Hale, PLLC, by J. Scott Hale, for defendants—appellees.

MARTIN, Chief Judge.

Plaintiffs R. Kenneth Babb, Public Administrator CTA of the Estate of Juliette K. Miranda, and Richard Boada, successor trustee of the Juliette K. Miranda revocable trust, appeal from the trial court's order dismissing all of plaintiffs' claims against defendants Marc W. Ingersoll and Ingersoll & Hicks, PLLC.

In 1999, Juliette Miranda ("Ms. Miranda") created a revocable trust ("the Trust") into which she transferred the majority of her considerable assets. On 18 January 2006, Ms. Miranda gave her power of attorney to two friends, defendants Rickey Allen Hoskins ("Hoskins") and Laura D. Turner ("Turner"). On 25 January 2006, Ms. Miranda amended the Trust to appoint Hoskins and Turner as trustees. The amendment gave Hoskins and Turner authority to withdraw funds from the Trust. Plaintiffs allege that after being appointed attorneys-in-fact and trustees, Hoskins and Turner began making improper payments from the Trust that greatly reduced the Trust's value.

Defendant Marc Ingersoll ("Ingersoll") began providing legal services to Ms. Miranda in 2006. Ingersoll drafted three documents for Ms. Miranda, all of which were signed on 9 October 2006: (1) a complete restatement of the Trust; (2) a charitable remainder unitrust; and (3) a will. Ms. Miranda died in September 2007.

Federal and state estate tax returns were due in June 2008. Ingersoll and Hoskins prepared the tax returns in October 2008. Ingersoll filed the returns on 30 October 2008, with checks for federal and state taxes. Payment was stopped on the federal tax check to the IRS and the payment for state tax was in excess of the amount actually due. No steps were taken to seek a refund. In April 2009, the IRS began an audit in which it charged the estate with substantial penalties for failure to pay and for the bad check.

Plaintiffs commenced this action on 31 May 2011, asserting the following claims for relief against defendants: breach of fiduciary duty by each defendant; constructive fraud by Hoskins and Turner; imposition of a constructive trust against Hoskins and Turner; breach of duty as executor against Hoskins; and legal malpractice against the

Ingersoll defendants. In August 2011, the Ingersoll defendants moved to dismiss the complaint pursuant to N.C.G.S. § 1A-1, Rules 9, 12(b)(1) and (6). By order entered 18 November 2011, the trial judge granted the motion to dismiss. Plaintiffs moved that the trial court amend its order to include a certification pursuant to N.C.G.S. § 1A-1, Rule 54(b). Plaintiffs' motion was denied and thereafter, plaintiffs gave notice of appeal.

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[1] Our first duty is to determine whether the appeal is properly before us to review. The trial court's order dismisses all claims against the Ingersoll defendants but does not address plaintiffs' claims against defendants Hoskins and Turner. An order made during the pendency of an action, which does not determine the entire controversy between the parties, is interlocutory. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). This Court may review an interlocutory order only if: (1) the trial court has certified, pursuant to Rule 54 of the North Carolina Rules of Civil Procedure, that no just reason exists to delay review of its order, or (2) when the order deprives the appellant of a substantial right which would be lost if immediate review is not taken before a final determination of the case. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "A substantial right is affected when (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Estate of Redding v. Welborn*, 170 N.C. App. 324, 328, 612 S.E.2d 664, 668 (2005) (internal quotation marks omitted). In *Taylor v. Brinkman*, 108 N.C. App. 767, 425 S.E.2d 429, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 30 (1993), this Court concluded that the trial court's grant of summary judgment against one of two defendants was immediately appealable because a dismissal of the appeal "could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts . . . ." *Id.* at 770, 425 S.E.2d at 431. In that case, plaintiff sued defendant and defendant's father, alleging that defendant was negligent in her operation of the vehicle that struck and injured plaintiff, and that defendant's negligence could be imputed to defendant's father through the family purpose doctrine. *Id.* at 768, 425 S.E.2d at 430. This Court concluded a substantial right was affected because plaintiff had to attempt "to prove [defendant's] negligence in her case against [defendant's] father. If, at a later time, summary judgment in favor of [defendant] is reversed, [plaintiff] must again seek to prove

[defendant's] negligence in her action against [defendant]." *Id.* at 770, 425 S.E.2d at 431.

In the present case, the trial court entered final judgment for fewer than all defendants and did not include a certification that the case was appealable pursuant to Rule 54 of the North Carolina Rules of Civil Procedure. Therefore, plaintiffs must show that a substantial right has been affected such that immediate review is necessary. Like the plaintiff in Taylor, plaintiffs in this case seek relief against multiple defendants based on claims arising from a common set of facts. In their brief, plaintiffs argue that "[s]eparate trials of plaintiffs' claims against Hoskins/Turner and against the Ingersoll defendants create the possibility of inconsistent verdicts." Plaintiffs posit that a jury could find Hoskins and Turner not liable because they relied on the advice of Ingersoll, and if this Court reverses the dismissal of claims against Ingersoll, a jury could find Ingersoll not liable because he relied on information given to him by Hoskins and Turner. We agree with plaintiffs that the same factual issues would be present in both trials and that a successful appeal of the order here could subject the parties to inconsistent verdicts. We conclude therefore that the order affects a substantial right and is subject to immediate review. Therefore, we address the merits of plaintiffs' claim.

[2] Plaintiffs contend the trial court erred when it granted the Ingersoll defendants' motion to dismiss the claims against them for legal malpractice and breach of fiduciary duty. In ruling on a motion to dismiss, "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), *disapproved of on other grounds by*, *Dickens v. Puryear*, 302 N.C. 437, 446-52, 276 S.E.2d 325, 332-35 (1981). "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). In ruling on the motion, the allegations of the complaint must be treated as true. *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

In the present case, plaintiffs first allege Ingersoll breached his fiduciary duty and committed legal malpractice when he failed to

review records related to the Trust and discover the wrongdoing committed by Hoskins and Turner and failed to take steps to protect the interests of Ms. Miranda. The statute of limitations in a case of legal malpractice is three years and the statute of repose is four years. N.C. Gen. Stat. § 1-15(c) (2011). A cause of action for legal malpractice accrues "at the time of the occurrence of the last act of the defendant giving rise to the cause of action." *Id.* The North Carolina Supreme Court considered what constitutes "the last act of the defendant giving rise to the cause of action" in *Hargett v. Holland*, 337 N.C. 651, 654-58, 447 S.E.2d 784, 787-89, *disc. review denied*, 338 N.C. 672, 453 S.E.2d 177 (1994). In that case, plaintiffs commenced a malpractice action against the attorney who drafted a will, alleging the attorney negligently drafted the will so that it did not properly effectuate the intent of the testator. *Id.* at 654, 447 S.E.2d at 787. The Court held plaintiffs' action was barred by the statute of limitations because the last act giving rise to the cause of action was the drafting of the will, which occurred more than four years before the suit was brought. *Id.* at 655-56, 447 S.E.2d at 788. The Court concluded that an arrangement between an attorney and his client for the drafting of a will "did not impose . . . a continuing duty thereafter to review or correct the will or prepare another will." *Id.* at 655, 447 S.E.2d at 788. The Court compared the situation to medical malpractice:

> Just as a physician's duty to the patient is determined by the particular medical undertaking for which he was engaged, an attorney's duty to a client is likewise determined by the nature of the services he agreed to perform. An attorney who is employed to draft a will and supervise its execution and who has no further contractual relationship with the testator with regard to the will has no continuing duty to the testator regarding the will after the will has been executed.

Id. at 656, 447 S.E.2d at 788; *see Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC*, ___ N.C. App. ___, ___, 710 S.E.2d 218, 226 (2011) (holding an attorney's renewed representation on the same matter as he previously advised does not create a continuing duty connecting the two representations so as to halt the running of the statute of limitations); *see also Ramboot, Inc. v. Lucas*, 181 N.C. App. 729, 735, 640 S.E.2d 845, 848 (concluding malpractice action for failure to rescind a settlement agreement was barred by the statutes of limitation and repose because the last act of the defendant giving rise to the cause of action occurred when plaintiffs signed the settlement agreement), *disc. review denied*, 361 N.C. 695, 652 S.E.2d 650 (2007); *Jordan v.*

Crew, 125 N.C. App. 712, 719, 482 S.E.2d 735, 738 (holding malpractice action for the negligent drafting of deeds was barred by the statutes of limitation and repose because the last act of the defendant giving rise to the cause of action was the delivery of the deeds), *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997).

Here, Ingersoll drafted a restatement of the Trust, along with two other documents, all of which were signed on 9 October 2006. Plaintiffs do not allege that Ingersoll had a further contractual relationship with Ms. Miranda or the Trust until 2008, when he was contacted by the trustees to prepare tax returns. Because the "nature of the services he agreed to perform" was solely limited to the drafting of three documents, *see Hargett*, 337 N.C. at 656, 447 S.E.2d at 788, we conclude that Ingersoll's professional duty to Ms. Miranda and the Trust ended upon completion of the Trust restatement on 9 October 2006, and, consistent with the above authority, Ingersoll owed no continuing fiduciary duty beyond that date; a new professional duty was created in 2008 when Ingersoll was retained to prepare the tax returns. Therefore, plaintiffs' claim for breach of fiduciary duty by Ingersoll for actions before 31 May 2007 was properly dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) because those actions are beyond the four year statute of repose provision contained in N.C.G.S. § 1-15(c).

Because no continuing duty to the Trust arose out of Ingersoll's drafting of the Trust restatement, we also conclude Ingersoll's last act giving rise to the claim for legal malpractice, as it relates to his alleged failure to review Trust records and protect the Trust, occurred when he drafted the Trust restatement on 9 October 2006. Therefore, plaintiffs' claim for legal malpractice relating to Ingersoll's alleged failure to review Trust records and protect the Trust, is barred by the four-year statute of repose provision contained in N.C.G.S. § 1-15(c), as it was brought on 31 May 2011, which is more than four years after the last act giving rise to the claim.

[3] Plaintiffs also contend Ingersoll committed legal malpractice by negligently preparing and filing the federal and state estate tax returns. In a negligence action, an attorney "is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence . . . ." *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954). In addition, the federal regulations govern-

ing the practice of attorneys before the IRS provide that "[a] practitioner must exercise due diligence . . . [i]n preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters . . . ." 31 C.F.R. § 10.22 (2011).

Plaintiffs allege Ingersoll had a duty to exercise reasonable care and diligence in the preparation and filing of the tax returns, and plaintiffs' allegations, taken as true, establish Ingersoll may have breached this duty, thereby causing penalties to be assessed against the Estate. Thus, viewing the allegations as true for the limited purpose of testing the adequacy of the complaint, we conclude plaintiffs have sufficiently stated a claim for legal malpractice against Ingersoll in his preparation of the estate tax returns. Because plaintiffs' claim was brought on 31 May 2011, which is within the three-year statute of limitations, we hold the trial court erred when it dismissed plaintiffs' legal malpractice claim, as it relates to the 2008 preparation of tax returns, against Ingersoll.

Affirmed in part, reversed in part, and remanded.

Judges GEER and STROUD concur.

GARY L. DAVIS, CPA, P.A., PLAINTIFF v. ANGELA W. HALL, DEFENDANT

NO. COA12-254

(FILED 16 OCTOBER 2012)

Venue—breach of covenant not to compete—waiver or objection to venue

The trial court did not abuse its discretion in a breach of covenant not to compete case by denying defendant's motion for change of venue. A portion of the employment agreement between plaintiff and defendant constituted a waiver of an objection to Guilford County as a proper venue and defendant agreed to the contract.

Appeal by Defendant from order entered 7 December 2011 by Judge A. Robinson Hassell in Guilford County Superior Court. Heard in the Court of Appeals 28 August 2012.

Carruthers & Roth, P.A., by Rachel S. Decker, for Plaintiff-Appellee.

Doran, Shelby, Pethel & Hudson, P.A., by Michael Doran, for Defendant-Appellant.

BEASLEY, Judge.

Angela W. Hall (Defendant) appeals from an order denying her Motion to Change Venue entered 7 December 2011. For the following reasons, we affirm.

Gary L. Davis, CPA, P.A. (Plaintiff) is a North Carolina corporation organized to provide accounting services. Its principal place of business is located in Rowan County, North Carolina. Defendant was previously employed by Plaintiff and is also a resident of Rowan County. Plaintiff's action, alleging breach of an employment agreement's covenant not to compete, was filed in Guilford County on 3 November 2011. The basis for Plaintiff's filing in Guilford County arises from a portion of the employment agreement between the parties:

> This Agreement shall be construed and enforced in accordance with and governed by the laws of the State of North Carolina. The Professional agrees that if any cause of action or claim for damages is brought by or on behalf of the Company against the Professional for breach of any of the covenants or promises of the Professional hereunder, the Professional will not assert as a defense or as a bar to such action or claim the absence or lack of personal jurisdiction over the Professional of any court selected by the Company, including, but not limited to, the Superior Court of Guilford County, North Carolina.

In lieu of an answer, Defendant filed her Motion to Change Venue on 8 November 2011. Defendant appeals the trial court's denial of this motion.

The issue on appeal is whether the above portion of the employment agreement constitutes a waiver of an objection to Guilford County as a proper venue. Defendant contends that Guilford County is not a proper venue and that the agreement does not even address venue but pertains solely to personal jurisdiction. We disagree.

"We employ the abuse-of-discretion standard to review a trial court's decision concerning clauses on venue selection. . . . Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could

not have been the result of a reasoned decision." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002) (citation omitted).

Defendant first contends that Guilford County is not a proper venue. An order denying a motion for change of venue, despite being interlocutory, is immediately appealable as it affects a substantial right where the venue is improper. *Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010). In North Carolina, venue is proper where either party resides. N.C. Gen. Stat. § 1-82 (2011). Domestic corporations, those formed under the laws of North Carolina, reside where the principal place of business is located. N.C. Gen. Stat. § 1-79(a)(1), (b)(1) (2011). Where venue is improper, a defendant must demand a change of venue in writing before the time to answer the complaint expires. N.C. Gen. Stat. § 1-83 (2011). Here, neither Plaintiff nor Defendant resides in Guilford County; both are residents of Rowan County, North Carolina. There is no evidence that any of the claims arose in Guilford County. Thus, absent an agreement to the contrary, Guilford County is not a proper venue to hear this case.

Defendant next argues that the employment agreement does not provide for venue in Guilford County. Defendant and Plaintiff both correctly assert that the clause in the employment agreement is not a forum selection clause. Our Supreme Court has previously recognized three distinct agreements used by contracting parties to clarify applicable law, jurisdiction, and venue: choice of law clauses, consent to jurisdiction clauses, and forum selection clauses. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 92–93, 414 S.E.2d 30, 33 (1992). Choice of law clauses specify which state's substantive laws will apply to any arising disputes. *Id.* Consent to jurisdiction clauses grant a particular state or court personal jurisdiction over those consenting to it, "authoriz[ing] that court or state to act against him." *Id.* at 93, 414 S.E.2d at 33 (citation omitted). "A third type, a true forum selection provision, goes one step further than a consent to jurisdiction provision. A forum selection provision designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship." *Id.* (citation omitted). In light of this precedent, this Court summarized the distinction: "[A] forum selection clause designates the venue, a consent to jurisdiction clause waives personal jurisdiction and venue, and a choice of law clause designates the law to be applied." *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 726–27, 556 S.E.2d 592, 596 (2001).

Forum selection clauses are recognized where there is some evidence of "the parties' intent to make jurisdiction exclusive." *Mark Grp.*, 151 N.C. App. at 568, 566 S.E.2d at 162. Language in the agreement such as "exclusive" or "sole" or "only" is suggestive of the parties' intent. *Id.* In the absence of such language, the clause is viewed as permissive, consistent with a consent to jurisdiction clause. *See id.*

The term "jurisdiction" in a consent to jurisdiction clause always and necessarily describes personal jurisdiction. This is because personal jurisdiction is the only type of jurisdiction to which the parties may consent; the court's subject matter jurisdiction, in contrast, cannot be waived. *Leach v. Railroad*, 65 N.C. 486, 487 (1871) ("Where it is a question of the jurisdiction of the Court over the subject matter, the consent of the parties cannot give jurisdiction."). Thus, parties need not specify that the jurisdiction waived in a consent to jurisdiction clause is "personal," as that much is implied and obvious. Inclusion of the word "personal" in this context is mere surplusage and does not detract from the provision's function as a consent to jurisdiction clause waiving both jurisdiction and venue.

Here, the agreement does not contain the necessary restrictive language to rise to the level of a forum selection clause. Instead, the agreement merely states "the Professional will not assert . . . lack of personal jurisdiction" with regard to *any* court chosen by Plaintiff. There is no agreement to consent to the exclusive jurisdiction of any one court. Thus, the agreement is permissive and is a consent to jurisdiction clause. Consequently, it serves to waive objections to both personal jurisdiction and venue. Because Defendant agreed to this consent to jurisdiction clause, the trial court was correct in finding Guilford County is a proper venue to hear this case. For the above stated reasons, we affirm.

Affirmed.

Judges MCGEE and THIGPEN concur.

IN THE MATTER OF COMPLAINTS AGAINST OFFICIALS OF KILL DEVIL HILLS POLICE DEPARTMENT

No. COA12-398

(Filed 16 October 2012)

1. Jurisdiction—subject matter—orders—no action filed—sua sponte

The trial court lacked jurisdiction to enter orders where there was no action filed by any person or body, other than the trial court itself. The trial court acted beyond its jurisdiction in issuing the orders, *sua sponte*, against petitioner.

2. Courts—inherent authority—orders—no action filed

The trial court lacked the inherent authority to enter an order where the trial court lacked jurisdiction because there was no action filed by any person or body, other than the trial court itself.

3. Constitutional Law—due process—orders—no notice or opportunity to be heard

The trial court's order deprived petitioner of its due process rights where the trial court, of its own volition, issued an order against petitioner, without providing notice or opportunity to be heard.

4. Courts—mandamus power— no authority—lack of jurisdiction—no hearing—attempt to compel action

The trial court lacked the authority to enter an order under its *mandamus* power where the court lacked jurisdiction, held no hearing upon proper notice, and attempted to compel a specific course of action, usurping control of petitioner's personnel decisions.

Appeal by petitioner from order entered 19 January 2012 by Judge Milton F. Fitch, Jr. in Dare County Superior Court. Heard in the Court of Appeals 12 September 2012.

Cranfill Sumner & Hartzog, LLP, by Dan M. Hartzog, Dan M. Hartzog, Jr., and Jaye E. Bingham-Hinch for appellant.

No appellee brief filed.

STEELMAN, Judge.

The trial court lacked jurisdiction to usurp the personnel policies of the Town of Kill Devil Hills. The order entered by the trial court was not within the scope of its inherent authority. The entry of the order without notice or hearing was a violation of due process. The entry of the order was beyond the scope of the trial court's mandamus authority.

I. Factual and Procedural History

The factual background in this case is derived from petitioner's Amended Petition for Writ of Supersedeas, dated 23 January 2012.

The son of the Honorable Jerry R. Tillett, Senior Resident Superior Court Judge for the First Judicial District, had an encounter with one or more Kill Devil Hills police officers. No charges were filed. Shortly thereafter, Judge Tillett expressed to Shawn Murphy, Assistant Town Manager of Kill Devil Hills ("Murphy"), and to the Kill Devil Hills Chief of Police, his concerns about the operation of the Kill Devil Hills Police Department. On 11 September 2011, Judge Tillett issued an order that certain personnel files, including those of Murphy and the Chief of Police, be delivered to his office ("first order"). There was no pending court action which gave rise to this order. After conferring with the Town Attorney, the Town Manager's office complied with the first order.

The Chief of Police requested a copy of the first order, and was informed that all copies were to be returned to Judge Tillett and none retained. Judge Tillett permitted one copy of the first order to be retained, provided that it was kept in a sealed envelope not to be opened without his permission.

In September 2011, the Town of Kill Devil Hills ("petitioner") was informed that the District Attorney would file a petition seeking the removal of the Chief of Police, and that the filing of this petition was "imminent." No petition was filed as of the filing of the Amended Petition for Writ of Supersedeas. In that same month, the Chief of Police was placed on non-disciplinary, paid suspension. During this leave, the Town reviewed his performance. On 23 December 2011, the Chief of Police was reinstated to active duty.

On 19 January 2012, the trial court entered an order in Dare County Superior Court, styled as "In the Matter of Complaints Against Officials of Kill Devil Hills Police Department" and a file number of 12-R-8 ("second order"). This order stated that "numerous complaints have been received alleging improper conduct and/or conduct preju-

dicial to the Administration of Justice against the Kill Devil Hills police chief and/or other Kill Devil Hills Town officers having supervisory authority over the Kill Devil Hills Police Department." It further stated that the first order of Judge Tillett "was not entirely complied with in a timely manner." (Emphasis in original)

The second order directed that "any Kill Devil Hills Department employee may present any complaint, grievance or appeal involving the Police Department or conduct, disciplinary action or employment to the Senior Resident Superior Court Judge [Judge Tillett]. . . [who will] address any complaint, grievance or appeal as legally appropriate." The order further required that "[a]ny petition or other filing addressing these issues made by the District Attorney or his staff shall be presented to the office of the Senior Resident Superior Court Judge of Judicial District One." Petitioner has not implemented the new policies set forth in the second order.

On 20 January 2012, petitioner filed notice of appeal. On 20 January 2012, petitioner filed a Petition for Writ of Mandamus or Prohibition, Petition for Writ of Supersedeas, Motion for Temporary Stay and for Additional Time to Brief the Issues. On 23 January 2012, petitioner filed an Amended Petition for Writ of Mandamus or Prohibition, Petition for Writ of Supersedeas, Motion for Temporary Stay and for Additional Time to Brief the Issues. We dismissed the 20 January motion as moot, and denied the 23 January Motion for Temporary Stay and Petition for Writ of Mandamus or Prohibition. On 13 February 2012 this Court granted the Amended Petition for Writ of Supersedeas.

II. Jurisdiction

Petitioner contends that the trial court lacked jurisdiction to enter the second order. We agree.

A. Standard of Review

"[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004) (citing *Harper v. City of Asheville*, 160 N.C. App. 209, 585 S.E.2d 240, 243 (2003)).

B. Analysis

"A court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy only when a party pre-

sents the controversy to it, and then, only if it is presented in the form of a proper pleading. Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question." *In re Transp. of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558 (1991) (citations omitted). Where no action or proceeding has been commenced and is not pending before the court, jurisdiction does not exist. *Id.* at 807-808, 403 S.E.2d at 558-559.

In the instant case, there was no action filed by any person or body, other than the trial court itself, which preceded the second order, or indeed which preceded the first order. There was no pending litigation or controversy. The trial court acted beyond its jurisdiction in issuing both orders, *sua sponte*, against petitioner.

III. Inherent Authority

[2] Petitioner next contends that the trial court lacked the authority to enter the second order under its "inherent authority." We agree.

"Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice *within the scope of their jurisdiction.*" *Id.* at 808, 403 S.E.2d at 559 (emphasis original).

In the instant case, the trial court's second order, citing *In re Alamance Cty. Court Facil.*, 329 N.C. 84, 100, 405 S.E.2d 125, 133 (1991), noted that "[t]he Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of justice and protect it from being destroyed." Nonetheless, this "inherent power" applies only to those actions that the court takes within the scope of its jurisdiction. As previously stated, the trial court lacked jurisdiction over this matter, due to the fact that it was not pending before the court. The trial court improperly exercised its "inherent power."

IV. Due Process

[3] Petitioner next contends that the trial court's order deprived petitioner of its due process right to notice and an opportunity to be heard. We agree.

"No procedure or practice of the courts . . ., even those exercised pursuant to their inherent powers, may abridge a person's substantive rights." *Alamance Cty. Court Facil.*, 329 N.C. at 107, 405 S.E.2d at 137. Further,

> [I]n order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to assert his defense, and he *must be a party to such proceeding.* [A]ny judgment which may be rendered in . . . [an] action will be wholly ineffectual as against [one] who is not a party to such action. The exercise of the court's inherent power to do what is reasonably necessary for the proper administration of justice must stop where constitutional guarantees of justice and fair play begin.

Id. at 107-108, 405 S.E.2d at 137-38 (citations omitted) (emphasis original). "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity." *Id.* at 108, 405 S.E.2d at 138 (citations omitted).

In *Alamance Cty. Court Facil.*, the superior court judge conducted a hearing "to make inquiry as to the adequacy of the [Alamance County] Court facilities[.]" *Id.* at 89, 405 S.E.2d at 126. He ordered five County Commissioners be served with notice of the proceedings, yet struck down their motions to dismiss, "stating that the movants were not parties to the action and thus were without standing." *Id.* at 89, 405 S.E.2d at 127. Our Supreme Court held that the superior court exercised "forbidden or ungranted power" that "is, in law, a nullity." *Id.* at 108, 405 S.E.2d at 138. The Court noted that

> A more reasonable, less intrusive procedure would have been for the court, in the exercise of its inherent power, to summon the commissioners under an order to show cause why a writ of mandamus should not issue, which order would call attention to their statutory duty and their apparent failure to perform that duty. If after hearing it was determined that the commissioners had indeed failed to perform their duty, as the court determined in the case before us, the court could order the commissioners to respond with a plan—perhaps in consultation with such judicial personnel as the senior resident superior court judge, the chief district court judge, the district attorney, the clerk, or other judicial officials with administrative authority—to submit to the court within a reasonable time. Such a directive would be a judicious use of the court's inherent power without either seizing the unexercised discretion of a political subdivision of the legislative branch or obtruding into the constitutional hegemony of that branch.

Id. at 106-107, 405 S.E.2d at 137. The Court concluded that "[b]ecause the commissioners were not parties to the action from which the order issued, they are not bound by its mandates." *Id.* at 108, 405 S.E.2d at 138.

In the instant case, no hearing was conducted, nor was any action commenced against petitioner. No notice was given to petitioner. The trial court, of its own volition, issued an order against petitioner, without providing notice or opportunity to be heard. The trial court's actions were therefore in violation of petitioner's due process rights, and were a nullity.

V. Mandamus Power

[4] Petitioner finally contends that the trial court lacked the authority to enter the second order under its mandamus power. We agree.

Writs of mandamus may be issued to order "officials to perform their constitutional or statutory duty." *Id.* at 104, 405 S.E.2d at 135. A writ of mandamus

> [I]s the proper remedy to compel public officials . . . to perform a purely ministerial duty imposed by law, where it is made to appear that the plaintiff, being without other adequate remedy, has a present, clear, legal right to the thing claimed and it is the duty of the respondents to render it to him.
>
> But as a general rule, the writ of *mandamus* may not be invoked to review or control the acts of public officers and boards in respect to matters requiring and depending upon the exercise of discretion. In such cases *mandamus* lies only to compel public officials to take action, but ordinarily it will not require them, in matters involving the exercise of discretion, to act in any particular way.

Hamlet Hosp. & Training Sch. For Nurses v. Joint Comm. On Standardization, 234 N.C. 673, 680, 68 S.E.2d 862, 867-868 (1952) (citations omitted). Under the mandamus power

> [A] court of competent jurisdiction may determine in a proper proceeding whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law. And it may compel action in good faith in accord with the law. But when the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abused his discretion, the court may

> not direct any particular course of action. It only decides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice. If the officer acted within the law and in good faith in the exercise of his best judgment, the court must decline to interfere even though it is convinced the official chose the wrong course of action. The right to err is one of the rights—and perhaps one of the weaknesses—of our democratic form of government.

Alamance Cty. Court Facil., 329 N.C. at 106, 405 S.E.2d at 136 (citation omitted).

In the instant case, the trial court did not comply with the procedures described above. The court lacked jurisdiction. The court held no hearing upon proper notice. And the court attempted to compel a specific course of action, usurping control of petitioner's personnel decisions. In doing so, it exceeded the scope of its mandamus power.

VI. Conclusion

For the foregoing reasons, the order of the trial court, captioned "In the Matter of Complaints Against Officials of Kill Devil Hills Police Department" with file number of 12-R-8, is vacated.

VACATED.

Judges HUNTER, Robert C., and BRYANT concur.

KIRKLAND'S STORES, INC., PLAINTIFF v. CLEVELAND GASTONIA, LLC, CLEVELAND GASTONIA II, LLC, SANDWICK GASTONIA, LLC, AND PANERA, LLC, DEFENDANTS

No. COA12-397

(Filed 16 October 2012)

1. Appeal and Error—interlocutory order and appeal—substantial right

Defendants' appeal from the denial of their motion to change venue affected a substantial right and was immediately appealable.

2. Venue—motion for change denied—interpretation and enforcement of lease—transitory

The trial court did not err by denying defendants' motions to change venue under N.C.G.S. § 1A-1, Rule 12(b)(3) and N.C.G.S. §§ 1-76 and 1-83. Because the principal object of plaintiff's action involved interpretation and enforcement of the lease, rather than termination of the lease, the case was transitory for venue purposes.

Appeal by defendants from order entered 21 December 2011 by Judge Lucy N. Inman in Wake County Superior Court. Heard in the Court of Appeals 13 September 2012.

Bailey & Dixon, L.L.P., by Adam N. Olls, Michael L. Weisel, and David S. Wisz, for plaintiff-appellee.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for defendant-appellants Cleveland Gastonia, LLC, Cleveland Gastonia II, LLC, and Sandwick Gastonia, LLC.

Horack, Talley, Pharr & Lowndes, P.A., by Keith B. Nichols and John W. Bowers, for defendant-appellant Panera, LLC.

HUNTER, JR., Robert N., Judge.

Defendants Cleveland Gastonia, LLC ("Cleveland Gastonia"), Cleveland Gastonia II, LLC ("Cleveland Gastonia II"), Sandwick Gastonia, LLC ("Sandwick Gastonia") and Panera, LLC ("Panera") (collectively, "Defendants") appeal the trial court's denial of their motions to change venue under Rule 12(b)(3) of the North Carolina Rules of Civil Procedure as well as N.C. Gen. Stat. §§ 1-76 and 1-83. Upon review, we affirm the decision of the trial court.

I. Facts & Procedural History

On or about 27 May 2004, Kirkland's Stores, Inc. ("Plaintiff") entered into a Standard Commercial Shopping Center Lease (the "Lease") with CK Cox-Franklin, LLC ("CK Cox-Franklin"). Under the terms of this agreement, Plaintiff leased for a five-year term approximately 5,254 square feet of commercial space in a shopping center (the "Shopping Center") then owned by CK Cox-Franklin in Gastonia. CK Cox-Franklin subsequently assigned its rights, title, and interest in the Lease and Shopping Center to Cleveland Gastonia, Cleveland Gastonia II, and Sandwick Gastonia (collectively, the "Landlord") as tenants in common. The Lease was later extended until 31 January 2015.

Plaintiff operates a home décor store in the Shopping Center. Because Plaintiff receives regular shipments of goods, Plaintiff negotiated for the Lease to provide that "[e]xcept as required by law, Landlord will take no action which materially or adversely affects Tenant's visibility or access" to the "Common Area," including "loading areas."

Defendant Panera operates a bakery-café in the Shopping Center. In late 2010 or early 2011, Defendant Panera approached Landlord about constructing and operating a drive-through window immediately behind its storefront. Because the planned drive-through window was within several feet of Plaintiff's freight access doors and loading area, a representative of Landlord notified Plaintiff of the planned construction several days before its commencement. Plaintiff objected to the construction of the drive-through window before its commencement.

Landlord and Panera completed construction of the drive-through window, and Plaintiff subsequently brought suit in Wake County Superior Court on 10 August 2011, claiming: (1) breach of contract; (2) declaratory judgment; (3) breach of duty of good faith and fair dealing; (4) breach of contract—third-party beneficiary; (5) tortious interference with contract; (6) private nuisance; and (7) injunctive relief. On 16 August 2011, Plaintiff filed a First Amended Complaint, adding to its original prayer for relief, *inter alia*, that:

> [i]n the alternative to the injunctive relief requested herein, . . . the Court enter a judgment declaring that Plaintiff is entitled to a declaratory judgment that Landlord's material and incurable breaches of the Lease excuse any further performance from Plaintiff thereunder and relieving Plaintiff of any further liability under the Lease[.]

Plaintiff further elaborated that the trial court should enter a judgment declaring that Landlord's breaches "entitl[e] Plaintiff to abandon its possession of the Premises[.]"

On 9 September 2011, Panera timely filed a Motion to Change Venue. On 14 September 2011, Cleveland Gastonia, Cleveland Gastonia II, and Sandwick Gastonia timely filed a Motion to Transfer Venue. In a 21 December 2011 Order, the Wake County Superior Court denied Defendants' motions to change venue. Defendants filed timely notice of appeal from the trial court's order denying their motions to change venue.

II. Jurisdiction & Standard of Review

This court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. § 7A-27(d) (2011). "Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). " '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 I*n re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Analysis

On appeal, Defendants argue the trial court erred by denying their motions to change venue. We disagree and affirm the trial court's ruling.

[1] Preliminarily, we note that although parties generally have "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), Defendants have an appeal of right under N.C. Gen. Stat. § 7A-27(d)(1) (2011) because they appeal from an "interlocutory order or judgment of a superior court or district court in a civil action or proceeding which . . . [a]ffects a substantial right[.]" As our Supreme Court has stated, "[a]lthough the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right. Its grant or denial is immediately appealable." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (internal citation omitted).

[2] Under N.C. Gen. Stat. § 1-76 (2011), actions for "[r]ecovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property" "must be tried in the county in which the subject of the action, or some part thereof, is situated[.]" On the other hand, N.C. Gen. Stat. § 1-82 (2011) prescribes that "[i]n all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside[.]"

To determine which statute applies to a given set of facts, our Supreme Court has succinctly stated that

> [t]he test is this: If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to

> land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action.

Thompson v. Horrell, 272 N.C. 503, 504-05, 158 S.E.2d 633, 634-35 (1968).

For purposes of venue, this Court has previously held that a party to a leasehold has "an estate or interest in real property." *Sample v. Towe Motor Co.*, 23 N.C. App. 742, 743, 209 S.E.2d 524, 525 (1974) (quotation marks omitted). "When a party brings an action that seeks to terminate [a vested estate or interest in real property] and will require the Court to determine the respective rights of the parties with respect to the leasehold interest, the action falls within the purview of N.C.G.S. § 1-76." *Snow v. Yates*, 99 N.C. App. 317, 320-21, 392 S.E.2d 767, 769 (1990) (alteration in original) (citation omitted) (quotation marks omitted). Thus, "[a] suit to terminate a lease is subject to the local venue requirement." *Id.* at 321, 392 S.E.2d at 769. " 'In determining whether the judgment sought by plaintiff would affect title to land, the court is limited to considering only the allegations of the complaint.' " *Id.* at 320, 392 S.E.2d at 769 (quoting *Pierce v. Associated Rest and Nursing Care, Inc.*, 90 N.C. App. 210, 212, 368 S.E.2d 41, 42 (1988)).

Conversely, a claim that merely seeks interpretation and enforcement of the terms of a lease, as opposed to termination of the lease, is transitory for venue purposes. *See Rose's Stores, Inc. v. Tarrytown Center, Inc.*, 270 N.C. 201, 206, 154 S.E.2d 320, 323-24 (1967). For instance, in *Rose's Stores*, the plaintiff sought a permanent injunction to prevent the defendants from violating the terms of a lease agreement. *Id.* at 202, 154 S.E.2d at 321. In that case, our Supreme Court reasoned that the right at issue was "a personal right and does not run with the land. Whatever the outcome of this action, the title to the land would not be affected." *Id.* at 206, 154 S.E.2d at 324. Because "[t]he complaint sounds of breach of contract and not for recovery of real property, or of an estate or interest therein," the court in *Rose's Stores* found venue to be transitory. *Id.* (citation omitted) (quotation marks omitted).

In the present case, Plaintiff's initial 10 August 2011 Complaint did not seek termination of the Lease, but rather enforcement of the terms of the Lease. However, on 16 August 2011, Plaintiff filed its First Amended Complaint, which added as an alternative claim for

relief that the trial court "excus[e] further performance from Plaintiff under the Lease, entitl[e] Plaintiff to abandon its possession of the Premises and reliev[e] Plaintiff of any further liability under the Lease[.]"

We now determine whether the addition of this alternative claim seeking termination of the Lease results in local venue for Plaintiff's entire suit. We conclude that because the principal object of Plaintiff's action involves interpretation and enforcement of the Lease, rather than termination of the Lease, the case is transitory for venue purposes.

Our Supreme Court has clarified that

> an action is not necessarily local because it incidentally involves the title to land or a right or interest therein, or because the judgment that may be rendered may settle the rights of the parties by way of estoppel. It is the *principal object* involved in the action which determines the question, and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone in personam against the parties, the action will be held to be local.

Id. at 206, 154 S.E.2d at 323 (emphasis added) (citation omitted) (quotation marks omitted); *see also McCrary Stone Service, Inc. v. Lyalls*, 77 N.C. App. 796, 799, 336 S.E.2d 103, 105 (1985) ("Here the *principal object* of plaintiff's action, as formulated in its complaint, is a judicial declaration as to whether it is obligated to make rental payments for rock quarried from land adjacent to leased premises. Such a declaration would not directly affect title to the land." (emphasis added)); *Gurganus v. Hedgepeth*, 46 N.C. App. 831, 832, 265 S.E.2d 922, 923 (1980) ("The *thrust* of plaintiffs' action is to have the court declare that they still hold a leasehold interest in the property, and such an action falls within G.S. 1-76." (emphasis added)). Thus, in the present case, we look for the "principal object" of Plaintiff's action.

Defendants rely on *Snow* and *Sample* to argue that when *any* of a plaintiff's claims involve title to or an interest in real property, venue is local. Nonetheless, although the courts in those cases found venue to be local, the primary goal of the claims in *Snow* and *Sample* was determination of the existence of a lease rather than interpretation of the terms of a lease. *See Snow*, 99 N.C. App. at 321, 392 S.E.2d at 769 ("[T]he 'principal object' of plaintiff's cause of action is a determination of leasehold estate or interest in real property."); *Sample*, 23 N.C. App. at 743, 309 S.E.2d at 525 ("Plaintiffs asked the Court to

order the lease terminated and enter a money judgment for damages."). Consequently, both *Snow* and *Sample* comport with the "principal object" test outlined in *Rose's Stores*.

Here, the principal object of Plaintiff's action is interpretation and enforcement of the Lease. Plaintiff's first Complaint did not even seek termination of the Lease, and its First Amended Complaint only sought termination of the Lease as an alternative to its original claims. Consequently, venue is transitory and the trial court did not err in denying Defendants' motions for change of venue.

IV. Conclusion

Because the principal object of Plaintiff's claims did not involve title to or an interest in real property, we conclude venue is transitory and the trial court appropriately denied Defendants' motions to change venue. The trial court's decision is

Affirmed.

Judges ERVIN and MCCULLOUGH concur.

MONTY S. POARCH, PETITIONER v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY, N.C. HIGHWAY PATROL, RESPONDENT

No. COA11-1501

(Filed 16 October 2012)

1. Public Officers and Employees—employment termination—North Carolina Highway Patrol—just cause

The trial court did not err in an employment termination case by determining that petitioner's employment with the North Carolina Highway Patrol was terminated for just cause where petitioner engaged in the alleged conduct constituting unacceptable personal conduct and where other Patrol officers had been terminated for similar misconduct.

2. Public Officers and Employees—employment termination—arbitrary and capricious—unacceptable personal conduct—just cause

The trial court did not err as a matter of law in an employment termination case by failing to address and correctly decide

petitioner's claim of arbitrary and capricious personnel actions. As petitioner committed the alleged acts of misconduct, the misconduct qualified as unacceptable personal conduct, and the misconduct amounted to just cause for termination, it followed that petitioner's termination was not arbitrary or capricious.

3. Public Officers and Employees—employment termination—findings of fact—supported by the evidence

The trial court did not err in an employment termination case by failing to credit petitioner with undisputed facts warranting relief and by adopting erroneous findings of fact that were not supported by substantial evidence. The contested findings of fact were supported by the evidence.

4. Public Officers and Employees—State Personnel Act—employment termination—adequate compensation

The trial court did not err in an employment termination case by finding that respondent North Carolina Highway Patrol's actions cured a violation of the State Personnel Act and that granting petitioner back pay for the violation was adequate compensation.

5. Public Officers and Employees—employment termination—just and equitable remedy

The trial court did not err in an employment termination case by failing to award a just and equitable remedy as the trial court did not err in the trial itself.

Appeal by petitioner from order entered 20 April 2011 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 16 August 2012.

The McGuinness Law Firm, by J. Michael McGuinness, for petitioner appellant.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for respondent appellee.

Richard C. Hendrix and Richard E. Mulvaney for the North Carolina Troopers Association and the National Troopers Coalition, amicus curiae.

McCULLOUGH, Judge.

Monty S. Poarch ("petitioner") appeals the superior court's decision to affirm his dismissal from the North Carolina Highway Patrol

(the "Patrol"), a division of the North Carolina Department of Crime Control and Public Safety ("respondent"). For the following reasons, we affirm.

I. Background

Petitioner was terminated from employment as a State Trooper in September 2003 for unacceptable personal conduct for allegedly violating the Patrol's policies prohibiting unbecoming conduct, nonconformance to laws, and neglect of duty. At the time of his dismissal, petitioner had been employed by the Patrol as a State Trooper for over 18 years, of which 16 years were spent in Alexander County.

Petitioner's termination arose as a result of a complaint filed 7 October 2002 by Ms. Donna Lynne Kirby ("Ms. Kirby"). In the complaint, Ms. Kirby alleged that petitioner unlawfully stopped her the morning of 22 September 2002 because she was ending their extramarital affair. In response to Ms. Kirby's complaint, the Patrol's Director of Internal Affairs, Captain C. E. Moody ("Capt. Moody"), initiated an internal investigation and assigned First Sergeant Ken Castelloe, now Captain Castelloe ("Capt. Castelloe"), to conduct the investigation.

Capt. Castelloe conducted interviews of Ms. Kirby and petitioner as part of the investigation. During Ms. Kirby's interview on 29 October 2002, Ms. Kirby described the alleged unlawful stop and further alleged that she and petitioner had engaged in an on-again, off-again extramarital affair spanning fifteen (15) years. Ms. Kirby alleged that during the affair she had sex with petitioner on numerous occasions while petitioner was on duty, including in every patrol vehicle petitioner was issued during their relationship and in the Alexander County Highway Patrol Office. Ms. Kirby also alleged that she traveled to various locations where petitioner was assigned to work in order to spend nights with him.

Petitioner contested the allegations in his interview on 15 November 2002. Petitioner denied unlawfully stopping Ms. Kirby on 22 September 2002 and refuted the extent of their sexual relationship. However, petitioner admitted having an on-again, off-again extramarital affair and to having sexual relations with Ms. Kirby in his patrol car, behind his patrol car, and in the Alexander County Highway Patrol office. Petitioner was never asked whether the sexual relations occurred while he was on duty, and petitioner further asserts that the sexual relationship occurred off duty. But, in each instance petitioner was in uniform.

Capt. Castelloe submitted the results of his investigation on 20 January 2003. After reviewing the investigation, Capt. Moody recommended by memorandum dated 28 July 2003 that petitioner's employment be terminated for unacceptable personal conduct. Major Munday, Director of Professional Standards, disagreed with Capt. Moody's dismissal recommendation and instead recommended that petitioner receive a ten-day suspension without pay. Major Munday's recommendation was forwarded to Colonel Holden ("Col. Holden").

Col. Holden considered a ten-day suspension without pay to be inappropriate and directed Capt. Moody to conduct a pre-dismissal conference. Petitioner was notified of the pre-dismissal conference on 4 August 2003. The pre-dismissal conference was held 11 August 2003. Following the pre-dismissal conference, petitioner submitted a letter to Col. Holden on 14 August 2003 requesting a meeting and received a reply by email the following day informing him that Col. Holden could not meet with him. However, after reviewing the transcript of the pre-dismissal conference, Col. Holden ordered a follow-up interview with petitioner to address concerns raised by the pre-dismissal conference. Capt. Castelloe conducted the follow-up interview on 3 September 2003.

On 4 September 2003, Col. Holden issued a memorandum to Major Munday instructing him to dismiss petitioner and prepared the Personnel Charge Sheets upon which petitioner was dismissed.

Petitioner appealed the decision internally. On 9 October 2003, the Employee Advisory Committee recommended the decision to terminate petitioner be reversed and that petitioner be reinstated with back pay and be given a ten-day suspension without pay. On 23 October 2003, Secretary Beatty declined the recommendation of the Employee Advisory Committee and affirmed petitioner's termination from the Patrol.

Petitioner timely filed a Petition for Contested Case Hearing with the Office of Administrative Hearings on 5 November 2003. Petitioner alleged that he was discharged without just cause, his discharge constituted disparate treatment, and false and misleading information was included in his personnel file in violation of N.C. Gen. Stat. § 126-25 (2003).

A Contested Case Hearing began 19 March 2007 and concluded 22 March 2007, Administrative Law Judge Melissa Lassiter (the "ALJ") presiding. On 17 September 2007, the ALJ issued her Decision finding

that petitioner had engaged in unacceptable personal conduct, but that respondent lacked just cause to terminate petitioner due to disparate treatment. As a result, the ALJ recommended that petitioner's termination from employment be reversed and that petitioner be reinstated and disciplined at a level less than dismissal.

The State Personnel Commission (the "SPC") considered the matter at its 13 December 2007 meeting and issued its Final Agency Decision on 7 February 2008. The SPC rejected the decision of the ALJ and affirmed petitioner's termination.

Petitioner filed a petition for review in Wake County Superior Court on 5 March 2008. On 20 April 2011, the superior court judge issued an Order adopting the findings of fact and conclusions of law of the SPC's Final Agency Decision with several additional conclusions of law. Petitioner now appeals from the superior court's Order.

II. Analysis

On appeal, petitioner raises the following issues: Whether the trial court erred in: (1) determining there was just cause for termination of petitioner's employment; (2) failing to address and correctly decide petitioner's claim of arbitrary and capricious personnel actions; (3) failing to credit petitioner with undisputed facts and adopting erroneous findings of fact; (4) finding that a violation of the State Personnel Act (the "SPA") was subsequently cured and petitioner was only entitled to limited back pay for the violation; and (6) failing to impose a just and equitable remedy.

Standard of Review

"When reviewing a superior court order concerning an agency decision, we examine the order for errors of law." *Warren v. Dep't of Crime Control & Pub. Safety*, ___ N.C. App. ___, ___, 726 S.E.2d 920, 922 (2012) (citing *ACT–UP Triangle v. Comm'n for Health Servs. of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *ACT-UP*, 345 N.C. at 706, 483 S.E.2d at 392 (internal quotation marks and citation omitted).

> In reviewing a final decision in a contested case in which an administrative law judge made a decision . . . and the agency does not adopt the administrative law judge's decision, the [superior] court shall review the official record, de novo, and shall make

> findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record.

N.C. Gen. Stat. § 150B-51(c) (2003).[1]

Just Cause for Termination

[1] Petitioner first contends that the superior court erred in determining that his employment was terminated for just cause. We disagree.

The SPA requires that just cause exist for the termination of a career State employee[2], such as petitioner. N.C. Gen. Stat. § 126-35. Under the North Carolina Administrative Code (the "Administrative Code"), there are two bases for termination of employees for just cause under N.C. Gen. Stat. § 126-35, unsatisfactory job performance and unacceptable personal conduct. 25 NCAC 1J.0604(b). In the present case, we address unacceptable personal conduct.

Our recent decision in *Warren*, ___ N.C. App. ___, 726 S.E.2d 920, requires a three-prong inquiry to determine whether just cause exists to terminate a career state employee for unacceptable personal conduct.

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."

Id. at ___, 726 S.E.2d at 925 (quoting *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)). We address each of these inquiries in order.

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1. Citations to N.C. Gen. Stat. refer to the statutes in effect at the time petitioner's employment with the Patrol was terminated.

2. A career State employee includes State employees who are in a permanent position appointment and have been continuously employed by the State and subject to the SPA for the immediate 24 preceding months. N.C. Gen. Stat. § 126-1.1.

As to the first inquiry, whether petitioner engaged in the alleged conduct, the Patrol alleged that petitioner engaged in a long-term extramarital affair and that, over the years, petitioner had sexual relations with Ms. Kirby in his assigned Patrol cars and in the Alexander County Highway Patrol Office while on duty. Although petitioner denied that his relationship with Ms. Kirby was a long-term extramarital affair, petitioner admitted to having an on-again, off-again extramarital affair with Ms. Kirby and admitted to specific instances of sexual relations with Ms. Kirby, including sex in a Patrol car, sex behind a Patrol car, and sex in a Patrol office.

The only dispute as to the alleged misconduct is whether the misconduct occurred when petitioner was on duty or off duty. Petitioner strongly contends that he was never on duty when he had sexual relations with Ms. Kirby. This contention is based on the Patrol's use of radio codes to check in for duty. On the other hand, respondent has presented evidence that a Patrol officer is "considered to be on duty when wearing the uniform . . . ." N.C. Highway Patrol Policy Manual, Directive P.1. Further, Capt. Castelloe testified that he understands the Patrol's policy to be that a Patrol officer is on duty when in uniform and using Patrol facilities because the Patrol officer is representing the Patrol.

After reviewing the record, we find the distinction between on duty and off duty based on the Patrol's radio codes to be of little significance in this case where petitioner was in uniform and the use of patrol facilities is so intertwined with the acts of misconduct. Furthermore, we find respondent's argument persuasive that if any member of the public would have witnessed petitioner's misconduct, where petitioner was in uniform and using patrol facilities, they would assume that petitioner was on duty to the detriment of the Patrol's reputation. Thus, in concluding the first inquiry, petitioner engaged in the alleged acts.

In regard to the second inquiry, whether petitioner's conduct falls within one of the categories of unacceptable personal conduct provided in the Administrative Code, unacceptable personal conduct is defined to include "conduct unbecoming a state employee that is detrimental to state service[.]" 25 NCAC 1J.0614(i)(5). In this case, we agree with the unchallenged findings of the ALJ, SPC, and superior court that petitioner's conduct is clearly conduct unbecoming of a state employee that is detrimental to state service. Here, "[p]etitioner failed to conduct himself in a manner to reflect most favorably on

the Highway Patrol, and in keeping with the high standards of professional law enforcement, and was a discredit to himself and the Patrol."

The determinative third inquiry in this case is "whether [petitioner's] misconduct amounted to just cause for the disciplinary action taken." *Warren*, ___ N.C. App. at ___, 726 S.E.2d at 925. In *Warren*, this Court noted that this inquiry accommodates the Supreme Court's flexibility and fairness requirements announced in *Carroll* through a balancing of the equities. *Id.* (referencing *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 ("Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case.") (internal quotation marks omitted).

Here, petitioner argues that his misconduct did not amount to just cause for termination as a result of the Patrol's selective enforcement of personnel policies and disparate treatment in discipline. We disagree.

Petitioner cites various examples of misconduct by Patrol officers for which the Patrol officers were disciplined at levels less than termination. In doing so, petitioner argues that principles of commensurate discipline must be applied in this case. After reviewing the record, we acknowledge and find it inexplicable that some Patrol officers were not terminated for similar misconduct, and in some instances more egregious, than that of petitioner. However, we will not shackle the Patrol to the worst personnel decisions that they have made.

A complete review of the record reveals that officers were terminated for misconduct similar to that of petitioner based on complaints filed around the time the complaint against petitioner was filed. We find it particularly relevant that Patrol Officer Silance was dismissed for an ongoing extramarital affair while on duty based on a complaint filed 30 August 2002, less than two months prior to the complaint filed against petitioner. Furthermore, numerous complaints were filed within the year following the complaint against petitioner that resulted in dismissal or resignation or retirement in lieu of an investigation or dismissal for sexual misconduct similar to that of petitioner. Therefore, the superior court did not err in affirming petitioner's termination for just cause where the superior court properly addressed petitioner's arguments of selective enforcement of personnel policies and disparate treatment in discipline as part of

the just cause analysis by adopting the SPC's finding that "[r]espondent failed to fire a few Troopers whose conduct was egregious enough to warrant dismissal. [But] [t]he preponderance of the evidence, demonstrates . . . that the Highway Patrol has . . . dismissed Troopers for engaging in on-duty sex."

Petitioner additionally argues that the Patrol's non-compliance with its own agency rules constitutes a lack of just cause and governmental arbitrariness such that petitioner's termination cannot stand. While petitioner is correct that the respondent must follow its own rules, *see U.S. v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down."), petitioner has failed to identify the rules that were not followed. Instead, petitioner, without providing evidence, makes seven general assertions that the Patrol's personnel rules were not followed.[3] Because petitioner has failed to argue which rules were not followed, we do not address the argument.

For the reasons discussed, the superior court did not err in finding that just cause existed to support petitioner's termination from the Patrol where petitioner engaged in the alleged conduct constituting unacceptable personal conduct and where other Patrol officers have been terminated for similar misconduct.

Arbitrary and Capricious Personnel Actions

[2] Petitioner also contends that the superior court erred as a matter of law in failing to address and correctly decide his claim of arbitrary and capricious personnel actions. We disagree.

After determining that petitioner committed the alleged acts of misconduct, that the misconduct qualifies as unacceptable personal conduct, and that the misconduct amounted to just cause for termination, it follows that petitioner's termination was not arbitrary or capricious. Further, we find that the SPC's Conclusions of Law 12 and

3. Petitioner's claims include: (1) the pre-disciplinary conference was biased, defective and incomplete; (2) the Internal Affairs investigator, Capt. Moody, prejudged the merits of the dispute; (3) the Internal Affairs investigator refused to correct serious mistakes thus allowing corrupted documents to taint the inquiry; (4) the internal investigation was incomplete, inadequate, and untimely; (5) the agency's initial ten-day suspension was arbitrarily revoked without due process; (6) petitioner was not provided with notice of his appellate rights from termination; and (7) the Patrol's own disciplinary policy was violated by the condoned disparate treatment.

16, adopted by the superior court, specifically address petitioner's claim of arbitrary and capricious personnel actions. These conclusions state:

> 12. In this case, the preponderance of the evidence established that the punishment imposed was within the range of punishment imposed in other cases involving similar conduct. Additionally, the conduct of Petitioner, a sworn law enforcement officer, was particularly egregious such that any reasonable officer could expect to be dismissed. Accordingly, *Respondent did not act arbitrarily or capriciously* when it dismissed Petitioner.
>
> * * * *
>
> 16. While there might have been mistakes made during the internal process within the agency, *these mistakes do not amount to an arbitrariness that would undermine the agency's ultimate decision to dismiss Petitioner.*

(Emphasis added.)

Findings of Fact

[3] Petitioner's third contention is that the superior court erred in failing to credit petitioner with undisputed facts warranting relief and by adopting erroneous findings of fact that are not supported by substantial evidence.[4] We disagree.

A review of the record reveals that the contested findings of fact, which were adopted by the superior court, are supported by the evidence. Furthermore, we find the explanations accompanying the findings of fact and modified findings of fact to be instructive.

Violation of SPA and Back Pay

[4] Petitioner further contends that the superior court erred in finding that respondent's actions cured a violation of the SPA and that granting petitioner limited back pay from 11 August 2003 to 23 October 2003 for the violation was inadequate compensation. We disagree.

We first address respondent's argument that there was no violation of the SPA. The Administrative Code provides that the purpose of a pre-dismissal conference is "to review the recommendation for dismissal with the affected employee and to listen to and to consider any information put forth by the employee, in order to insure that a

4. Petitioner specifically contends that findings of fact 5, 29, 30, 32, 60, 65, 71, 73, 74, 75, 78, 79, 80, 81, 82, 83, and 87 were not supported by substantial evidence.

dismissal decision is sound and not based on misinformation or mistake." 25 NCAC 1J.0613(4)(d). In conducting the pre-dismissal conference,

> the Supervisor shall give the employee oral or written notice of the recommendation for dismissal, including specific reasons for the proposed dismissal and a summary of the information supporting that recommendation. The employee shall have an opportunity to respond to the proposed dismissal, to refute information supporting the recommended dismissal action and to offer information or arguments in support of the employee's position. *Every effort shall be made by the Supervisor or the designated management representative to assure that the employee has had a full opportunity to set forth any available information in opposition to the recommendation to dismiss prior to the end of the conference."*

25 NCAC 1J.0613(4)(e) (emphasis added).

A review of petitioner's pre-dismissal conference transcript reveals no obvious violations of the SPA. Petitioner was notified of the pre-dismissal conference on 4 August 2003. The pre-dismissal conference was held on 11 August 2003 with Capt. Moody presiding as the designated management representative. At the pre-dismissal conference, Capt. Moody informed petitioner of the dismissal recommendation and evidence in support of dismissal and offered petitioner the opportunity to refute the evidence against him. Petitioner was not limited in presenting his case; however, during the pre-dismissal conference, Capt. Moody silently read the Bible.

As a result of Capt. Moody reading the Bible, petitioner contends that the pre-dismissal conference was biased and that he was effectively denied a meaningful opportunity to present his case. We are reluctant to agree with petitioner's argument. As was made clear to petitioner during the conference, Capt. Moody was not the decision maker in the case. Capt. Moody was only present to gather evidence presented by petitioner and to pass along the evidence to Col. Holden, who was the final decision maker. Thus, it is unclear how any bias Capt. Moody held would impact the ultimate decision.

Nevertheless, because the statute specifically provides that "[e]very effort shall be made by the Supervisor or the designated management representative to assure that the employee has had a full opportunity to set forth any available information in opposition to the recommendation to dismiss prior to the end of the conference[,]" we

agree with the superior court that the asserted bias by Capt. Moody constitutes a violation of the SPA.

Having found a violation, petitioner argues that the superior court erred in concluding that the bias in the pre-dismissal conference was cured by allowing the Employee Advisory Committee (the "EAC") to consider the matter. In support of his argument, petitioner contends that the EAC has no authority to take action and could only make a recommendation to Secretary Beatty. Further, petitioner contends the review by the EAC does not cure the bias because it is a limited review process where no transcript is prepared, no evidentiary record is developed, witnesses cannot testify, and counsel may not appear.

In comparison, the rules for the EAC are very similar to the rules governing pre-dismissal conferences. *See* 25 NCAC 1J.0613(4) (Providing that attendance at a pre-dismissal conference is limited to the employee and person conducting the conference and prohibiting the employee from calling witnesses and prohibiting attorneys from attending.) Therefore, where the purpose of the pre-dismissal conference was to allow petitioner to present his case and where petitioner was given the chance to present his case to the EAC after a pre-dismissal conference and follow-up interview, the purpose of the pre-dismissal conference was satisfied and the superior court did not err in concluding that the procedural error was cured.

Concerning the superior court's award of limited back pay, petitioner further argues that, although back pay is the traditional remedy for violations of the SPA under the Administrative Code, the superior court erred in applying the back pay formula. We disagree.

Petitioner relies on 25 NCAC 1B.0421, concerning back pay in general, in asserting his argument. This reliance is misplaced. In this case, 25 NCAC 1B.0432(c) is instructive as it specifically concerns remedies for procedural violations. This section of the Administrative Code provides:

> Failure to conduct a pre-dismissal conference shall be deemed a procedural violation. Further, the remedy for this violation shall require that the employee be granted back pay from the date of the dismissal until a date determined appropriate by the commission in light of the purpose of pre-dismissal conferences. Reinstatement shall not be a remedy for lack of a pre-dismissal conference.

25 NCAC 1B.0432(c). Where the SPC has discretion to determine back pay when there is a failure to conduct a pre-dismissal conference, we cannot find that the court lacks discretion to determine back pay when there is an error in the pre-dismissal conference that was later cured. As a result, the superior court had discretion to determine the amount of back pay to be awarded petitioner in light of the purpose of the pre-dismissal conference.

Just and Equitable Remedy

[5] Petitioner's final contention is that the superior court erred in failing to award a just and equitable remedy. Having determined that the superior court committed no error, the superior court did not err in failing to impose a just and equitable remedy. Furthermore, where the record indicates that the inaccuracies in the reported admissions by petitioner did not influence the respondent's decision to terminate petitioner, the superior court's order that petitioner is entitled to have any inaccurate statements regarding his admissions removed from his personnel file is just and equitable.

III. Conclusion

For the reasons set forth above, we affirm the Order of the superior court.

Affirmed.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. PATRICIA ANN BLACK, DEFENDANT

No. COA11-1342

(Filed 16 October 2012)

1. Appeal and Error—plain error review—not cumulative

Under plain error review, each of the challenged parts of an expert's testimony was reviewed separately; the plain error rule is not applied cumulatively.

2. Evidence—expert testimony—opinion on victim's credibility

There was no plain error in a prosecution for various sexual offenses where an expert social worker testified that she thought the victim was telling the truth and the trial court immediately struck the testimony from the record and instructed the jury to disregard it. Such action was sufficient to alleviate any prejudice.

3. Evidence—expert opinion—credibility of victim—not material

There was no plain error in a prosecution for various sexual offenses where an expert social worker essentially asserted that the victim was a sexually abused child even though the State presented no physical evidence of physical abuse. The expert's opinion that the abuse occurred and that the victim was believable was not material considering other evidence and contentions that the expert told the victim what to say while treating her. It was unlikely that the jury would have reached a different result without the challenged evidence.

4. Constitutional Law—effective assistance of counsel

Defendant did not establish sufficient prejudice for an ineffective assistance of counsel claim where there was insufficient evidence of prejudice for plain error.

5. Evidence—testimony about prior DSS hearing—explanation following cross-examination

There was no plain error in a prosecution for various sexual offenses in admitting testimony from a social worker about a prior hearing on a neglect and sexual abuse petition by DSS involving one of the victims in this prosecution. Prior to the challenged testimony, defendant cross-examined two other victims about their testimony at the the Department of Social Services (DSS) hearing and it was not improper for the State to ask the DSS social worker to explain what that prior hearing was and why it took place.

6. Evidence—admissions—not extrinsic impeachment evidence

There was no plain error in a prosecution for various sexual offenses in admitting statements made by defendant to a social worker because the testimony constituted admissions admissible as substantive evidence rather than extrinsic impeachment evidence.

Appeal by defendant from judgments entered 17 May 2011 by Judge Richard D. Boner in Lincoln County Superior Court. Heard in the Court of Appeals 5 April 2012.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Mark Montgomery for defendant-appellant.

GEER, Judge.

Defendant Patricia Ann Black appeals from judgments entered on her convictions of various sex offenses involving three alleged victims. On appeal, she primarily contends that the trial court committed plain error in allowing one of the State's expert witnesses to give testimony improperly vouching for the credibility of one of the prosecuting witnesses. Although we agree that admission of certain portions of the testimony was error, we hold that defendant has failed to demonstrate sufficient prejudice to establish plain error.

Facts

The State's evidence tended to show the following facts. Defendant and her husband, Jimmy Black, were the parents of two children, "Deborah" and "John."[1] Deborah is mentally retarded with an IQ of about 60. Deborah testified that when she was 12 years old, her father had sexual intercourse with her. Deborah told defendant what had happened, but her mother did nothing. Mr. Black had sexual intercourse with her again when she was 14 years old. In addition, on another occasion, Mr. Black watched Deborah take a shower even though she asked him to leave. Defendant and Mr. Black told Deborah not to tell anyone what Mr. Black had done, or they would go to jail.

Defendant shaved Deborah's pubic hair until sometime after she turned 14 years old. Defendant claimed that the shaving took place until Deborah was 11 or 12 because Deborah was taking growth hormones that caused very thick pubic hair. The doctor's records, however, showed that the growth hormones were stopped when Deborah was eight years old, and other relatives confirmed that defendant was still shaving Deborah when she was 14. Additionally, defendant gave Deborah a purple vibrator to use to masturbate and told others that Deborah had been masturbating since she was seven or eight years old.

1. Throughout this opinion, the pseudonyms "Deborah," "John," "Mary," and "Sarah" are used to protect the identities of minor witnesses and for ease of reading.

Deborah confided to her cousin Mary about what her father had done. Mary and Deborah went to school together. Deborah told Mary: " 'My daddy's been touching me with his stuff.' " When Mary told defendant and Mr. Black what Deborah had said, they told Mary it was not true, and, then, according to Mary, they "got on [Deborah] for saying that it was."

From mid-2007 to August 2008, Mary spent 150 to 200 nights with Deborah's family. On Mary's 13th birthday, in July 2007, Mary spent the night at the Black family's house. After the other children had gone to bed, defendant and Mr. Black asked Mary to have sex with the two of them. Although she initially refused, Mr. Black threatened her, and she agreed.

Defendant, Mr. Black, and Mary went to the Blacks' bedroom where defendant touched Mary's breasts and inserted two fingers in Mary's vagina. Mr. Black engaged in sexual intercourse with both defendant and Mary. On subsequent occasions, Mary smoked marijuana and drank beer with defendant and Mr. Black. They also gave Mary Xanax, which she identified as a blue pill. Mary would wake up in the morning between them unable to remember what had happened. Deborah confirmed that when she got up, she sometimes saw Mary sleeping with defendant.

A third girl, Sarah, who was also 13, went to middle school with Deborah. Sarah spent the night at the Blacks' home two or three times. During the first visit, defendant and Mr. Black asked her if she was bisexual, and she said "[y]es." On her second visit, defendant and Mr. Black gave her alcohol to drink and a blue pill. She later got up after everyone had gone to bed and found Mr. Black watching pornography in the living room. After Mr. Black threatened to kill Sarah, she agreed to have sex with him. He took her behind the kitchen counter, told her to take her pants off, and engaged in sexual intercourse with her.

In addition, defendant took a shower with Sarah and, afterwards, Sarah had a "threesome" with defendant and Mr. Black, during which defendant touched Sarah's vagina with her tongue and Mr. Black had sexual intercourse with Sarah. Subsequently, defendant and Mr. Black got angry when Sarah said she would not engage in the sexual conduct anymore, and they would not let her see Deborah.

The Department of Social Services ("DSS") initiated an investigation in August 2008 when it received a report that Sarah had made allegations against defendant and Mr. Black. Sandra Huneycutt, a DSS

social worker, and Jim Etters, a detective with the Lincoln County Sheriff's Department, interviewed Sarah. Later, Sarah was interviewed on videotape at the Child Advocacy Center.

After questioning Sarah, Ms. Huneycutt and Detective Etters went to the Blacks' home. When they arrived, defendant, Mr. Black, John, Deborah, and Mary were all there. Defendant, Deborah, and Mary were all wearing matching tank tops from "Hooters." Defendant and Mr. Black were told that DSS had received a report involving the two of them. Before defendant and Mr. Black heard any details of the report, defendant told them that she suspected that Sarah had made the allegations, and defendant then called Sarah a "whore and . . . a slut." When asked about her drug use, defendant indicated she had a prescription for Xanax, which is a blue pill.

After Mr. Black was arrested, Ms. Huneycutt interviewed Mary. Mary told Ms. Huneycutt about what had happened to her and also that Deborah had confided in her about sexual incidents with her father. Mary had not previously reported the incidents to anyone because Mr. Black had threatened that she would come up missing. She later told her father (Mr. Black's cousin) about what had happened, but did not tell him all the details because he had a temper.

Ms. Huneycutt then went back to the Blacks' house and talked to them again about Deborah. They denied that anything had occurred, but cooperated in finding another place for Deborah and John to stay. Deborah and John went to stay with their paternal grandmother, Betty Black. The grandmother subsequently told Ms. Huneycutt that she did not believe Deborah's story and that Deborah could no longer stay with her. Deborah then went to stay with Kathy Black, her paternal great-aunt, for two months. She returned to her grandmother for six months, but was placed in foster care in May 2009.

In September 2008, Deborah began seeing Nadia Antoszyk, a licensed clinical social worker. During therapy, Deborah used dolls to show what had happened to her. Deborah expressed love for her parents and missed them. She was sad about being cut off from her family and felt blamed for her parents being in jail. Her grandmother told Deborah often that she did not believe Deborah, she discouraged Deborah from talking to Ms. Antoszyk, and threatened Deborah that she would be removed, making Deborah anxious and conflicted by loyalty to her family. Deborah had imaginary friends and characteristics consistent with child abuse—anger, social withdrawal, frequent masturbation, and behavior that was sexually provocative.

Once Deborah was in a foster home and new school, her anxiety level and ability to pay attention improved. The number of imaginary friends she had decreased, and Deborah did not mention them as often. While Deborah had recanted at times and said she had lied, once she was in a foster home, she did not make any other statements suggesting that she had lied about her parents.

Defendant was indicted for first degree statutory rape/sex offense with a 14 year old, felony child abuse for aiding and abetting Mr. Black in engaging in sexual intercourse with Deborah, felony child abuse inflicting serious injury, incest with a 14 year old for aiding and abetting Mr. Black in engaging in carnal intercourse with Deborah, and indecent liberties with a child by aiding and abetting Mr. Black.

Defendant was also indicted with regard to Mary for conspiracy to commit incest with a 13, 14, or 15 year old, conspiracy to commit statutory rape/sexual offense with a 13, 14, or 15 year old, statutory rape/sexual offense of a 13, 14, or 15 year old by aiding and abetting Mr. Black in engaging in vaginal intercourse with Mary, statutory rape/sexual offense with a 13, 14, or 15 year old for engaging in a sexual act with Mary, indecent liberties with a child, and first degree kidnapping.

For offenses against Sarah, defendant was indicted for conspiracy to commit statutory rape/sexual offense with a 13, 14, or 15 year old, two counts of statutory rape/sexual offense with a 13, 14, or 15 year old by aiding and abetting Mr. Black to engage in a sexual act with Sarah, two counts of statutory rape/sexual offense with a 13, 14, or 15 year old for engaging in a sexual act with Sarah, indecent liberties with a child, and first degree kidnapping.

At trial, defendant testified on her own behalf and denied the allegations. She also presented evidence that tended to show that Deborah stood up in church on one occasion and, while crying, said that she had lied and told her parents that she was sorry. Defendant presented other evidence that Deborah told a cousin that her mother did not do anything and that Nadia Antoszyk was trying to put words in her mouth. John testified that he had seen Ms. Antoszyk several times, but stopped because she called his family "dysfunctional" and tried to put words in his mouth, making him angry. Defendant also presented evidence that Deborah told her grandmother that she hated meeting with Ms. Antoszyk and that Ms. Antoszyk would make her say things she did not want to say. According to defendant's wit-

nesses, Deborah told her grandmother, including in a family therapy session, that she had lied and put her mother and father in jail. In addition, defendant presented evidence that Deborah had said that the devil raped her and that Deborah hit her grandmother and shoved her into a bookcase.

Defendant pointed out differences in Mary's and Sarah's testimony at trial from their testimony during a DSS proceeding. Defendant elicited testimony that Sarah was living in a group home for out-of-control behavior and missing school. Defendant also presented evidence that Deborah was not allowed to see Sarah anymore because Deborah had told them that Sarah was showing her breasts on the internet and wanted Deborah to do that too. In addition, when defendant had Sarah kicked out of a pool, Sarah threatened, "Bitch, I will put you both in jail."

Defendant was convicted of three counts of aiding and abetting statutory rape, two counts of conspiracy to commit statutory rape, two counts of first degree sexual offense, two counts of first degree kidnaping, three counts of taking indecent liberties with children, and two counts of felony child abuse. The trial court arrested judgment on the two counts of first degree kidnapping and sentenced defendant for second degree kidnapping. The trial court also arrested judgment as to one count of felony child abuse and dismissed the incest of a child charge. Defendant timely appealed to this Court from the judgments imposed based on the convictions.

I

[1] Defendant first contends on appeal that the trial court committed plain error in admitting certain portions of the testimony of the State's expert witness, Nadia Antoszyk. Defendant argues that Ms. Antoszyk improperly vouched for Deborah's credibility.

As our Supreme Court has observed:

> the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. 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 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).

With respect to expert witness testimony in sex offense cases, our Supreme Court has held:

> In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (internal citations omitted).

In this case, social worker Nadia Antoszyk was allowed to testify as an expert in the field of diagnosing and treating mental health disorders and child and family therapy. Because we are reviewing for plain error, we consider separately each part of Ms. Antoszyk's testimony that defendant challenges. *See State v. Dean*, 196 N.C. App. 180, 194, 674 S.E.2d 453, 463 (2009) ("[T]he plain error rule may not be applied on a cumulative basis, but rather a defendant must show that each individual error rises to the level of plain error.").

[2] Defendant first points to Ms. Antoszyk's testimony that "I do not think that she is lying. I think it truly, truly happened." The trial court, on its own motion, struck the testimony from the record and instructed the jury to disregard the offending statements. As our Supreme Court has observed, "[i]f an unresponsive answer produces irrelevant or incompetent evidence, the evidence should be stricken and withdrawn from the jury." *State v. Keen*, 309 N.C. 158, 162, 305 S.E.2d 535, 537 (1983). Such action is sufficient to alleviate any prejudice suffered by defendant. *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987) ("Furthermore, although [the expert medical witness] was permitted to testify as to her diagnosis of physical and sexual abuse of the victim, this testimony was later struck and the jury instructed to disregard it. Thus, any error with respect to that testimony was harmless."). Therefore, defendant has failed to show plain error as to this testimony.

[3] Defendant more persuasively challenges subsequent testimony of Ms. Antoszyk. In response to a question about Deborah's treatment, Ms. Antoszyk answered in part: "For a child, that means . . . being able to, um, come to terms with all the issues that are consistent with someone that has been sexually abused." In addition, Ms. Antoszyk testified on multiple occasions regarding her conclusion that the sexual abuse experienced by Deborah started at a young age, perhaps age seven, and continued until she was removed from the home by DSS.

Further, when asked why Deborah had lashed out at her grandmother, she explained that the behavior was "part of a history of a child that goes through sexual abuse." With respect to her concerns about the adequacy of the grandmother's caregiving, Ms. Antoszyk testified: "She had every opportunity to get the education and the information to become an informed parent about a child that is sexually abused." And, when asked if it was reasonable for the grandmother to have some doubt as to Deborah's story given Deborah's recanting on multiple occasions, Ms. Antoszyk responded: "With me, there was no uncertainty."

In *State v. Towe*, 365 N.C. 56, 60, 732 S.E.2d 564, 566, (2012), our Supreme Court reviewed the admission of expert testimony in a sex offense trial that " 'approximately 70 to 75 percent of the children who have been sexually abused have no abnormal findings, meaning that the exams are either completely normal or very non-specific findings, such as redness' " and that the expert would place the victim in that category of children despite the absence of physical evidence of sexual abuse. The Court noted that "the only bases for [the expert's] conclusory assertion that the victim had been sexually abused were the victim's history as relayed to [the expert] by the victim's mother and the victim's statements to [another testifying expert] that were observed by [the expert]." *Id.* at 62, 732 S.E.2d at 568, 2012.

The Court concluded that the evidence relied upon by the expert was, under *Stancil*, "standing alone . . . insufficient to support an expert opinion that a child was sexually abused." *Id.* Consequently, the expert's "testimony was improper when she stated that the victim

fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse." *Id.*

We cannot meaningfully distinguish the testimony of Ms. Antoszyk we have quoted above from the testimony found improper by the Supreme Court in *Towe*. Each time, Ms. Antoszyk effectively asserted that Deborah was a sexually abused child even though the State had presented no physical evidence of abuse. The testimony was, therefore, improperly admitted.[2] The question remains, however, whether the admission of the testimony rises to the level of plain error.

In *Towe*, the Supreme Court, when finding plain error, pointed out that because the only direct evidence against the defendant was the victim's testimony, the "case turned on the credibility of the victim." *Id.* at 63, 732 S.E.2d at 568. After noting that the victim's statements regarding the incidents at issue were not "entirely consistent," the Court reviewed the State's extensive examination regarding the expert's credentials. *Id.* The Court then concluded: "In light of [the expert's] unquestioned stature in the fields of pediatric medicine and child sexual abuse, and her expert opinion that, even absent physical symptoms, the victim had been sexually abused, we are satisfied that [the expert's] testimony stilled any doubts the jury might have had about the victim's credibility or defendant's culpability, and thus had a probable impact on the jury's finding that defendant is guilty." *Id.* at 64, 732 S.E.2d at 569.

Here, although Deborah, who is mentally retarded, recanted her accusations at times prior to being removed from the influence of her family and placed in foster care, her testimony at trial was consistent with her pre-trial reports of sexual abuse. The State also presented other circumstantial evidence corroborating her allegations, including defendant's providing Deborah as a child with a vibrator, defendant's admission that Deborah started masturbating at age seven or eight, and defendant's shaving Deborah's pubic hair. The State countered defendant's explanation offered at trial for that behavior with defendant's admissions to DSS employees, contrary testimony from other defense witnesses, and Deborah's medical records.

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2. Defendant has also cited other testimony that we believe does not vouch for Deborah's credibility, but rather falls in line with permissible testimony that Deborah exhibited symptoms or characteristics consistent with the profiles of sexually abused children.

In addition, Deborah did not provide the only direct evidence against defendant. Mary and Sarah also testified regarding defendant's participation in sex offenses committed against them. While some details of their descriptions of what occurred varied over time, their descriptions of the sex offenses remained essentially consistent, and the two girls testified to very similar experiences. Further, Ms. Antoszyk did not examine or treat either Mary or Sarah, and her testimony did not vouch for their credibility.

Of equal importance is the difference in how the expert in this case was treated at trial compared to the expert in *Towe*. The *Towe* expert appeared—without dispute by the defense—as a universally-recognized expert in child sex abuse consulted regularly by other doctors and health care providers. Here, the heart of the defense's case as to the charges involving Deborah was that Ms. Antoszyk had "put words in" Deborah's mouth.

Defendant presented witnesses who testified that Deborah specifically told them that Ms. Antoszyk was putting words in her mouth and trying to get her to say things she did not want to say. In addition, Deborah's brother testified that he stopped going to see Ms. Antoszyk because she was trying to put words in his mouth. Defendant also presented the director of a program providing services to people with special needs who testified about how Ms. Antoszyk had upset Deborah and her brother by telling them their family was "dysfunctional."

Defendant combined this evidence with witnesses testifying that Deborah publicly stated that she had lied about her parents and testimony from a teacher and a counselor that Deborah had never mentioned anything to them. Further, when questioning Ms. Antoszyk, defense counsel suggested that it was her intention to have Deborah removed completely from the Black family: "But you wanted her removed from the Black family entirely from about the very beginning, didn't you?"

In sum, the defense presented a direct assault on Ms. Antoszyk's role in the case. Ms. Antoszyk's insistence that Deborah was sexually abused and believable was immaterial to the defense because the defense was contending that Ms. Antoszyk was the moving force behind Deborah's accusations by telling Deborah what to say. Given this vigorous defense, when combined with the direct evidence from Mary and Sarah and the corroborating evidence as to Deborah's allegations, we cannot conclude that the jury would probably have

reached a different verdict in the absence of Ms. Antoszyk's improper testimony. Defendant has, therefore, failed to demonstrate plain error.

[4] Although defendant also argues that she was denied effective assistance of counsel when her attorney failed to object to Ms. Antoszyk's testimony, because defendant failed to show sufficient prejudice for plain error, she also failed to establish prejudice for purposes of her ineffective assistance of counsel claim. *State v. Phillips*, 365 N.C. 103, 147-48, 711 S.E.2d 122, 153 (2011) (holding that trial court's error was harmless and, therefore, defense counsel's action did not constitute ineffective assistance), *cert. denied*, ___ U.S. ___, 182 L. Ed. 2d 176, 132 S. Ct. 1541 (2012).

II

[5] Defendant next contends that the trial court committed plain error in admitting the following testimony from Ms. Huneycutt, the DSS social worker:

> Q. Tell me about court—last year in court. What—what kind of court was there last year? What was the purpose of that court?
>
> A. . . . [I]n May of 2009, it was determined that [Deborah] did need to come into custody of Lincoln County DSS. So at that point in time, there was an adjudication for the court, for DSS court.
>
> Q. Which . . . had to do with what?
>
> A. Which had to do—. . . the petition was filed, . . . that [Deborah] was neglected, sexually abused and a dependent.

Defendant argues that this testimony should have been excluded under *State v. Martinez*, 212 N.C. App. 661, 664, 711 S.E.2d 787, 789 (2011) (holding that trial court improperly admitted testimony by DSS social worker that DSS had substantiated claim that sex offense occurred), and *State v. Giddens*, 199 N.C. App. 115, 122, 681 S.E.2d 504, 508 (2009) (finding plain error when child protective services investigator testified that agency's investigation uncovered evidence indicating that alleged abuse and neglect did occur), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010).

It is, however, well established that "[w]here 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) (emphasis added). Here, before Ms. Huneycutt testified, defendant, when cross-examining both Mary and Sarah, had established that they had testified previously in a 2009 DSS hearing and asked about their prior testimony, pointing out inconsistencies.

It was not improper, given this cross-examination, for the State to ask the DSS social worker to explain what that 2009 hearing was and why it took place. Accordingly, the admission of Ms. Huneycutt's testimony was not plain error.

III

[6] Finally, defendant contends that the trial court committed plain error by allowing the prosecutor to use extrinsic evidence to impeach defendant with prior inconsistent statements on collateral matters. On cross-examination, defendant denied that she had told anyone (1) that Deborah began masturbating at an early age, (2) that she had given Deborah a vibrator, or (3) that she had taught Deborah how to masturbate. The State called Ms. Huneycutt in rebuttal to testify that defendant had told her that Deborah had started masturbating at age seven or eight and that defendant had said that she gave Deborah a vibrator to use in the privacy of her room.

In support of her contention, defendant relies upon *State v. Williams*, 322 N.C. 452, 368 S.E.2d 624 (1988), in which the defendant's brother had testified on behalf of the defendant. During cross-examination by the State, the brother denied telling his probation officer that the defendant had admitted the crime. *Id.* at 453, 368 S.E.2d at 625. On rebuttal, the State called the brother's probation officer and a second witness to testify that the brother had in fact told the officer that the defendant admitted the crime. *Id.* at 454, 368 S.E.2d at 625.

Our Supreme Court held that

> [the brother's] testimony concerning what he did or did not tell his probation officer was collateral to the issues in the case; therefore, it was improper to impeach him on this point by offering the testimony of [other witnesses]. [The witnesses'] testimony was not offered to prove that defendant had, in fact, made the alleged statements to [the brother]. Rather, the testimony was offered solely to contradict [the brother's] testimony that he had not told [the probation officer] that defendant made these statements. While the *substance* of those

> statements and whether defendant made them would be material, whether [the brother] had *told* anyone about defendant's statements is clearly collateral.

Id. at 456, 368 S.E.2d at 626.

Williams addresses impeachment. Under the hearsay rule, N.C.R. Evid. 801, an out-of-court statement is inadmissible if offered for the truth of the matter asserted. However, as the Court acknowledged in *Williams*, a witness may be impeached by confronting him with prior out-of-court statements inconsistent with his trial testimony. *Williams*, 322 N.C. at 455, 368 S.E.2d at 626. It is well established that "[p]rior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. Even so, such prior inconsistent statements are admissible for the purpose of impeachment." *State v. Mack*, 282 N.C. 334, 339-40, 193 S.E.2d 71, 75 (1972) (internal citations omitted).

This case does not, however, involve prior inconsistent statements admitted solely to impeach the witness. Instead, defendant's prior statements to Ms. Huneycutt were admissible as substantive evidence. Rule 801(d) of the Rules of Evidence provides: "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity . . . ." Therefore, defendant's statements to Ms. Huneycutt constituted admissions that were admissible as substantive evidence, and *Williams* does not apply. The trial court properly admitted Ms. Huneycutt's rebuttal testimony.

No error.

Judges ELMORE and THIGPEN concur.

STATE OF NORTH CAROLINA v. WALTER HAYES GRAHAM

No. COA12-258

(Filed 16 October 2012)

1. Appeal and Error—plain error—testimony elicited by defendant

There was no plain error in a prosecution arising from the sexual abuse of a child in the admission of an emergency room

doctor's testimony about the victim's credibility. Defendant both elicited the testimony and failed to object to its admission and may not claim plain error.

2. Confessions and Incriminating Statements—voluntariness—no plain error

There was no plain error in the trial court's findings and conclusions concerning the voluntariness of defendant's confession where the court found that defendant was not in custody and *Miranda* warnings were not required; that defendant was coherent, unimpaired, and gave reasonable answers to the questions; and that the interview lasted one hour.

3. Confessions and Incriminating Statements—voluntariness—false hope of leniency

There was no plain error in the admission of defendant's confession even though defendant contended that the confession was involuntary because he was induced to confess by false hope of leniency. There was no direct promise to defendant that he would receive a lesser charge or no charge should he confess.

4. Confessions and Incriminating Statements—voluntariness—friendship with officer—shared racial background

There was no plain error in the admission of a confession that defendant contended was involuntary in that it was induced by a shared racial background and friendship with an officer. Defendant did not show that the officer's reference to race was coercive and a mere reference to friendship is not enough to show plain error, especially where the friendship lacked intimacy.

5. Confessions and Incriminating Statements—voluntariness—questions about religious belief

There was no plain error in the admission of a confession which defendant contended was involuntary in that it was induced by questions regarding whether defendant went to church or believed in God. There was no indication that defendant's will was affected, the line of questioning was brief and did not directly elicit defendant's admission, and there was no indication of a change in defendant's demeanor.

6. Confessions and Incriminating Statements—voluntariness—deception—no plain error

There was no plain error in the admission of defendant's confession even though he contended that it was involuntary in that

it was obtained through deceptive statements regarding the polygraph and DNA. Deception is not dispositive where the confession is otherwise voluntary; such statements generally do not affect the reliability of the confession.

7. Evidence—prior misconduct—door opened on direct examination

In a prosecution for sexual offenses against a child, defendant's statements on direct examination opened the door for the State to inquire on cross-examination about a prior Michigan investigation for similar misconduct.

8. Confessions and Incriminating Statements—admission—statement of other misconduct—intent and identity—not unduly prejudicial

Defendant's statement in a prosecution arising from sexual offenses against a child that he touched five to ten other boys was an admission under N.C.G.S. § 8C-1, Rules 801(d)(A) and 404(b) for the purpose of showing defendant's identity as the perpetrator and his intent. There was nothing in the record suggesting that the trial court abused its discretion in allowing this evidence under N.C.G.S. § 8C-1, Rule 403.

Appeal by Defendant from judgment entered 13 May 2011 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 28 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

BEASLEY, Judge.

Walter Hayes Graham (Defendant) appeals from judgment entered on his conviction for one count of taking indecent liberties with a child, one count of simple assault for acts committed upon a juvenile, and two counts of first-degree sexual offense for acts committed upon a child. For the following reasons, we find no error.

On 27 March 2009, two twelve-year-old boys, J.C.[1] and B.L. spent the night at Defendant's house. Defendant was a youth basketball

1. To protect the privacy of the minor children, their initials are used in this opinion.

coach and intended to take the boys to a basketball game the following morning. This was J.C.'s second time spending the night at Defendant's house; B.L. had spent the night numerous times over the past year or two. Defendant slept on the floor between the two boys that night.

Around midnight, J.C.'s mother awoke to J.C. banging on the door of their home wearing nothing but his underwear and holding his other belongings. J.C. told his mother that before he had fallen asleep, Defendant pulled him close, reached under his boxer shorts, touched him "on his private area" twice and licked his ear. J.C. got up, collected his belongings from the back room, and went to the bathroom. He turned the faucet on, pretending that he was washing his hands, then jumped out of the window. J.C. took his bike from the backyard and rode straight home.

J.C.'s mother immediately called 911. Before police arrived, Defendant appeared in his truck with B.L. J.C.'s mother informed Defendant that she had called the police and told B.L. to come in the house. Defendant left and B.L. entered the house, whereupon he immediately started to cry. J.C.'s mother called B.L.'s parents to inform them of Defendant's actions and they picked him up.

That same night, J.C. went to the emergency room. J.C. told a nurse of Defendant's actions. J.C. was examined by a doctor and a swab sample was taken from his ear for DNA evidence, which later indicated that Defendant could not be eliminated as the source of the other previously identified DNA. B.L. eventually disclosed, upon medical examination, that Defendant had engaged in sexual acts with him, specifically that Defendant touched his "wiener" with his hand and his mouth, and on more than one occasion, had "put his wiener in his back private where he pooped".

Prior to trial, Defendant made a Motion to Suppress his confession and a motion *in limine* to prohibit any reference to prior bad acts of Defendant, specifically a previous investigation in Michigan, each of which the trial court denied. Defendant did not object to the admission of the confession at trial.

Defendant's trial began on 9 May 2011. Defendant testified on his own behalf, denying any inappropriate behavior. The jury convicted Defendant on all counts.

[1] Defendant first argues that the trial court erred by allowing the emergency room doctor who examined B.L. to testify as to B.L.'s credibility. We disagree.

Where a defendant failed to object to the admission of evidence at trial, on appeal, the admission will be reviewed for plain error. *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983). The error must be "so basic, prejudicial, and lacking in its elements that justice was not done." *State v. Prevatte*, 356 N.C. 178, 258, 570 S.E.2d 440, 484 (2002). Plain error review places "the burden . . . on the defendant to show that absent the error the jury probably would have reached a different verdict." *State v. Bellamy*, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667 (2003)(internal quotation marks and citations omitted).

We reject Defendant's argument that the emergency room doctor's testimony as to B.L.'s credibility is plain error, as the evidence that Defendant now objects to was elicited on his own cross-examination of the expert witness. "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Fraley*, 202 N.C. App. 457, 465, 688 S.E.2d 778, 785, *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010)(citations omitted). Here, Defendant both elicited the testimony and failed to object to its admission. As such, Defendant may not claim plain error resulted from this testimony.

[2] Defendant next argues that the trial court erred by admitting Defendant's confession into evidence because it was involuntary and that his repeated denial of his guilt shows his will not to confess was eventually overborne. We disagree.

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)(internal quotation marks and citations omitted). The trial court's conclusions of law from those facts are fully reviewable where the issue has been preserved for appeal. *See State v. Pruitt*, 286 N.C. 442, 454, 212 S.E.2d 92, 100 (1975). Without such preservation, we review the trial court's conclusions of law for plain error. *See Black*, 308 N.C. at 740-41, 303 S.E.2d at 806-07.

It is clear that a confession involuntarily obtained is a violation of a defendant's due process rights under the Fourteenth Amendment. *State v. Bordeaux*, 207 N.C. App. 645, 647, 701 S.E.2d 272, 274 (2010)(citations omitted). Rather, a defendant must freely choose to

make a confession, voluntarily and with understanding. *Id.* (citations omitted). In determining whether a confession was voluntary, we review the totality of the circumstances. *Id.* (citations omitted). Courts consider several factors, including

> whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. at 648, 701 S.E.2d at 274 (internal quotation marks omitted).

Detectives Clark and Baggerly of the Concord Police Department were assigned to the case. On 7 April 2009, Detective Clark went to Defendant's home. Detective Clark knew Defendant from working security at the gym where Defendant coached; they initially met in 2005 or 2006. After briefly speaking with Defendant about his knowledge of the complaint, Detective Clark asked Defendant to come to the police station to answer some questions. Defendant agreed and voluntarily drove himself to the station. At the station, Defendant was not given *Miranda* warnings and agreed to provide a DNA sample.

Here, there is sufficient evidence on the record to support the trial court's findings, and thus we are bound by them. The trial court found that Defendant was not in custody, as he came to the station voluntarily, he was not restrained, he was informed of his right to leave at any time, he was informed he was not under arrest, and he was informed that he would be going home after the interview, which he did. Consequently, the trial court found the interview did not require *Miranda* warnings. The trial court also found that the Defendant was "coherent," not "sleepy," not "intoxicated or impaired," Defendant "understood all of the questions," "is obviously intelligent," and "gave reasonable answers to the questions presented." The record also clearly supports the finding that the interview lasted "exactly one hour." All of these findings support the conclusion that the confession was voluntary. Nonetheless, Defendant raises six circumstances which he claims show the involuntary nature of his confession and we address each below.

[3] First, Defendant contends that he was given a false hope of leniency if he was to confess and that additional charges would stem from continued investigation of other children.

Defendant points to the officers' offers to "help" Defendant "deal with" his "problem." Our Supreme Court has held "an improper inducement must promise relief from the criminal charge to which the confession relates, and not merely provide the defendant with a collateral advantage." *State v. Gainey*, 355 N.C. 73, 84, 558 S.E.2d 463, 471 (2002). Further, this Court has previously found a confession voluntary where there is no indication that specific preferential treatment will be given for cooperation, but the defendant is merely told that he could "help himself out by cooperating" and that cooperation would be relayed to the district attorney and the court. *State v. Houston*, 169 N.C. App. 367, 374, 610 S.E.2d 777, 783 (2005).

Similarly, here, there was no direct promise to Defendant that he would receive a lesser or no charge should he confess. Several times throughout the confession, the officers told Defendant, as Detective Clark testified, that they could not make him any promises as to the outcome, but could only inform the District Attorney that he cooperated. Defendant's assignment of error is overruled.

[4] Defendant next contends that the involuntary nature of the confession is evidenced by Detective Clark's reliance on his friendship with Defendant and their shared racial background. Defendant refers to a statement by Detective Clark in which he appealed to Defendant, "brother to brother", to tell the truth. The trial court did not make specific findings on this point. It did find that Detective Clark knew Defendant from various community athletic events. Defendant fails to show that the Detective's inference as to Defendant's race was coercive. This argument is overruled.

Detective Clark also repeatedly referred to Defendant as his friend and relied on this friendship to encourage truthfulness. Immediately prior to Defendant's admission that he touched J.C., Detective Clark stated:

> But I can say, hey, look, yeah, this is my friend. Yeah, he made a mistake. Yeah, he said this happened, whatever, and I'm right here on the side of him. Or I'm going to have to stand on the other side of the fence with everybody else, one of the two.

Defendant replied "I don't want you to stand on the other side of the fence. I've been knowing you for years." Defendant then asked what he needed to do and Detective Clark told him he should tell what happened; to this, Defendant replied "I did touch him." The mere reference to a friendship alone is not enough to constitute plain error, especially where that friendship lacks intimacy such as here where

Detective Clark did not even know Defendant's real name. This argument is overruled.

[5] Defendant contends that Detective Baggerly's questions regarding whether he went to church or believed in God renders his confession involuntary. We disagree.

Defendant argues that Detective Baggerly established Defendant's belief in God and then asked "You can sit here and look me in the eye knowing that you believe in God and tell me that you didn't do anything wrong that night?" In support of his argument, Defendant cites two cases in which courts found a confession involuntary on the ground of invocation of religious beliefs. *People v. Montano*, 226 Cal. App. 3d 914, 935, 277 Cal. Rptr. 327, 337 (1991)(finding use of a suspect's religious beliefs to obtain a confession rendered a confession involuntary); *Carley v. State*, 739 So.2d 1046, 1053 (Miss. App. 1999)(finding that religious references may be a factor which makes a confession involuntary). However, we do not find these cases analogous to this case.

The United States Supreme Court has held that questioning a suspect with regard to his or her religious beliefs does not necessarily make a subsequent confession involuntary. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2263, 176 L. Ed. 2d 1098, *reh'g denied*, ___ U.S. ___, 177 L. Ed. 2d 1123 (2010). Instead, the Supreme Court held that the totality of the circumstances should inform the determination of voluntariness. *Id*. We are also inclined to follow the logic of other state courts holding that "[a]ppeals to religion do not render confessions involuntary unless they lead to the suspect's will being overborne." *State v. Newell*, 132 P.3d 833, 844 (Ariz. 2006)(citations omitted). Here, there is no indication that Defendant's will was affected by this line of questioning, as it was brief, did not directly elicit his admission, and there is no indication of a change in his demeanor.

[6] Defendant lastly argues that his confession was involuntarily obtained through deception, as evidenced by the detectives telling Defendant that he failed the polygraph and that the DNA test incriminated him.

While Defendant is correct that our Supreme Court has held that police deception is relevant to a consideration of voluntariness, it has also held that such deception is not dispositive where a confession is otherwise voluntary. *State v. Jackson*, 308 N.C. 549, 582, 304 S.E.2d 134, 152 (1983). "False statements by officers concerning evidence, as contrasted with threats or promises, have been tolerated in confes-

sion cases generally, because such statements do not affect the reliability of the confession." *Id.* Defendant's argument is overruled.

[7] Lastly, Defendant argues the trial court erred in allowing Defendant's statement that he was investigated in Michigan for similar sexual misconduct decades prior to this investigation and that, in addition to J.C. and B.L., Defendant admitted to touching five to ten other boys. We disagree.

Our Supreme Court has recently clarified the standard of review for questions relating to evidence admitted under Rules 404(b) and 403 of the North Carolina Rules of Evidence. *See State v. Beckelheimer*, ___ N.C. ___, 726 S.E.2d 156, 158-59 (2012).

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

Id. at ___, 726 S.E.2d at 159. While we recognize these clear standards, we need not apply them in this case. First, with regard to the Michigan investigation, Defendant's argument is moot. Second, Defendant's argument as to the admission of touching five to ten other boys is reviewed under plain error due to Defendant's failure to object.

While the trial court denied Defendant's motion *in limine* to suppress the evidence of the prior investigation in Michigan, the jury *only* became aware of this admission during the cross-examination of Defendant. "[E]vidence which would otherwise be inadmissible may be permissible on cross-examination to correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom." *State v. Braxton*, 352 N.C. 158, 193, 531 S.E.2d 428, 448 (2000) (internal quotation marks omitted). On direct examination, Defendant stated that he had "never been in trouble before" and that he had no interaction with any type of police outside of his association with Detective Clark and playing community basketball with officers. These two statements "opened the door" for the State to inquire as to the Michigan investigation. It was not error to allow this evidence.

[8] Defendant did not object during trial or in his motion *in limine* to the admission of his statement that he touched five to ten other boys. As such, we review for plain error. *Black*, 308 N.C. at 740-41, 303 S.E.2d at 806–07.

"North Carolina's appellate courts have been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b), such as establishing the defendant's identity as the perpetrator of the crime charged." *State v. Bidgood*, 144 N.C. App. 267, 271, 550 S.E.2d 198, 201 (2001)(internal quotation marks and citations omitted). Where evidence is admitted under Rule 404(b), it must establish similarity of facts and have a "temporal proximity" to the crime charged. *Id.* at 271, 550 S.E.2d at 202. Evidence meeting the above requirements may still be excluded if it is more prejudicial than probative. N.C. Gen. Stat. §8C-1, Rule 403 (2011). Such exclusion is left to the trial court's discretion. *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990).

Here, Defendant's statement that he touched five to ten other boys is an admission under Rule 801(d)(A) and Rule 404(b) for the purpose of showing Defendant's identity as the perpetrator and his intent. The facts are similar to those *sub judice*, as Defendant was charged with touching both J.C. and B.L., who were both young boys at the time. Defendant himself connects the acts as a continuous pattern in his confession, stating "I have a problem with touching young boys, and I have had this problem since I was young." There is nothing in the record to suggest that the trial court abused its discretion in allowing this evidence under Rule 403. We therefore find no error.

No Error.

Judges MCGEE and THIGPEN concur.

STATE OF NORTH CAROLINA v. ROMIDS A. MILES

No. COA12-323

(Filed 16 October 2012)

1. Firearms and Other Weapons—discharging firearm into occupied dwelling—motion to dismiss—sufficiency of evidence—porch as part of dwelling

The trial court did not err by denying defendant's motion to dismiss the charge of discharging a firearm into an occupied dwelling. The porch is a part of the dwelling for purposes of N.C.G.S. § 14-34.1, and there was substantial evidence that the porch was occupied.

2. Firearms and Other Weapons—possession of firearm by felon—stipulation to prior felony conviction—no abuse of discretion when limited to plain error review

The trial court did not err by admitting into evidence the substance of defendant's stipulation concerning a prior felony conviction to support the charge of possession of a firearm by a felon. It could not be concluded that the trial court abused its discretion when review was limited to plain error.

Appeal by defendant from judgments entered 15 September 2011 by Judge Robert H. Hobgood in Vance County Superior Court. Heard in the Court of Appeals 13 September 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

Robert W. Ewing for defendant appellant.

McCULLOUGH, Judge.

Romids A. Miles ("defendant") appeals from his convictions for discharging a firearm into an occupied dwelling and possession of a firearm by a felon on the grounds that the trial court erred in denying his motion to dismiss the charge of discharging a firearm into an occupied dwelling and admitting into evidence the substance of his stipulation concerning a prior felony conviction to support the charge of possession of a firearm by a felon. For the following reasons, we find no error.

I. Background

On 16 July 2010, at approximately 4:30 p.m., Clara Durham ("Ms. Durham") was on her porch with her son, granddaughter, and great-grandson when gunshots were heard nearby and her grandson, Shawn Stamper ("Mr. Stamper"), came running toward her house. Defendant followed Mr. Stamper in pursuit, firing at him.

When Mr. Stamper reached Ms. Durham's house, he ran behind the house and reemerged on the other side, returning fire away from the house at defendant. At this point, defendant fired back towards Ms. Durham's house at Mr. Stamper three times. Ms. Durham testified that two of the bullets struck the house. As defendant fired towards the house at Mr. Stamper, Ms. Durham and the rest of her family on the porch attempted to escape the gunfire by entering the house through the front door. Once everyone on the porch was inside, the police were called. The police responded and detained defendant.

On 3 January 2011, a Vance County Grand Jury indicted defendant on one charge of discharging a weapon into occupied property in violation of N.C. Gen. Stat. § 14-34.1(b). On 8 August 2011, a Vance County Grand Jury returned a second bill of indictment charging defendant with possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. The case came on for trial during the 12 September 2011 Criminal Session of Vance County Superior Court before the Honorable Robert H. Hobgood, Judge Presiding.

On 15 September 2011, the jury found defendant guilty of discharging a firearm into an occupied dwelling and possession of a firearm after having been convicted of a felony. The trial judge entered judgments sentencing defendant to two consecutive sentences totaling a minimum of 130 to a maximum of 165 months. Defendant appeals.

II. Analysis

[1] On appeal, defendant first contends that the trial court erred by denying his motion to dismiss the charge of discharging a weapon into occupied property. 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.' "

State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994)).

"The elements of discharging a firearm into occupied property are '(1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied.' " *State v. Dubose*, 208 N.C. App. 406, 409-10, 702 S.E.2d 330, 333 (2010) (quoting *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995)); *see also* N.C. Gen. Stat. § 14-34.1 (2011).

> There is no requirement that the defendant have a specific intent to fire *into* the occupied building, only that he . . . (1) intentionally discharged the firearm *at* the occupied building with the bullet(s) entering the occupied building, or (2) intentionally discharged the firearm at a person with the bullet(s) entering an occupied building[.]

State v. Byrd, 132 N.C. App. 220, 222, 510 S.E.2d 410, 412 (1999) (citations omitted). In this case, defendant specifically contends that there was no substantial evidence that the property was occupied when the firearm was discharged.

The evidence presented at trial tended to show that Ms. Durham and her family were on the front porch of her residence when defendant discharged the firearm toward the house at Mr. Stamper. When the firearm was discharged, Ms. Durham and her family tried to escape the gunfire by entering the house through the front door. However, at the time defendant discharged the firearm, there was no one inside the house.

In asserting there is no substantial evidence that the property was occupied, defendant contends that a porch is not a building for purposes of N.C. Gen. Stat. § 14-34.1. To support his argument, defendant cites *State v. Gamble*, 56 N.C. App. 55, 286 S.E.2d 804 (1982). In *Gamble*, we defined a building as " 'a constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and

serving as a dwelling . . . or other useful structure—distinguished from structures not designed for occupancy[.]' " *Id.* at 58, 286 S.E.2d at 806 (quoting Webster's Third New International Dictionary 292 (1968 ed.). In applying the definition of "building" in that case, we dismissed the indictments against a defendant for breaking or entering on the grounds that the fenced-in area around a business was not a building within the meaning of N.C. Gen. Stat. § 14-54. *Id.* at 59, 286 S.E.2d at 806.

Defendant now urges the Court to narrowly construe the definition of "building" based on *Gamble* and to apply this construction in the present case to conclude that Ms. Durham's porch is not a building because it is not fully enclosed by walls. We decline to accept defendant's argument.

First, the porch fits the definition of a "building" in all respects except that it is not fully enclosed by walls. In the case before us, the porch was attached to the dwelling and shared a common wall. Additionally, the porch was covered by the same roof as the house and was designed to stand permanently. Furthermore, the porch is used for many of the same activities for which the inside of a dwelling is used and is therefore distinguishable from a fenced-in area around a business in that the porch outside a dwelling is a useful structure designed for occupancy.

Second, N.C. Gen. Stat. § 14-34.1 is much broader then N.C. Gen. Stat. § 14-54. N.C. Gen. Stat. § 14-54 applies only to breaking or entering into buildings, defined to include "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C. Gen. Stat. § 14-54(c). On the other hand, N.C. Gen. Stat. § 14-34.1 applies to discharging a firearm into occupied property, including "into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure . . . ." N.C. Gen. Stat. § 14-34.1(a). Therefore, in addition to a building, a porch may be classified as a structure, erection, or enclosure within the meaning of the statute.

Third, "[t]he purpose of N.C.G.S. § 14-34.1 is to protect occupants of the building, vehicle or other property described in the statute." *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988). In light of the purpose of the statute, we struggle to find any reason why the porch should not be considered part of the dwelling in this case.

Thus, we conclude that the porch is a part of the dwelling for purposes of N.C. Gen. Stat. § 14-34.1 and the trial court did not err in denying defendant's motion to dismiss the charge of discharging a firearm into an occupied dwelling where there is substantial evidence that the porch was occupied.

[2] On appeal, defendant also contends that the trial court plainly erred by admitting into evidence the substance of his stipulation concerning a prior felony conviction in order to prove the charge of possession of a firearm by a felon. We disagree.

Generally, we review the trial court's admission of evidence under N.C. Gen. Stat. § 8C-1, Rule 403, for an abuse of discretion. *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). However, defendant must preserve the issue for appeal by raising a timely objection at trial. *See State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) ("In order to preserve a question 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."); *see also* N.C.R. App. P. 10(a)(1). As is the case here, where there is no objection to the admission of the evidence at trial, we are limited to a review for plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007).

Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Here, the stipulation was admitted as evidence of defendant's guilt of possession of a firearm by a felon. In order to convict defendant of possession of a firearm by a felon, the State need only prove that "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235,

647 S.E.2d 679, 686 (2007); *see also* N.C. Gen. Stat. § 14-415.1(a) (2011). In proving that defendant was previously convicted of a felony, "records of prior convictions . . . shall be admissible in evidence[.]" N.C. Gen. Stat. § 14-415.1(b) (2011).

In this case, on 12 September 2011, defendant stipulated that he was convicted of felony possession of cocaine in Vance County on 28 September 2001 with an offense date of 12 January 2001.

Despite authorization in N.C. Gen. Stat. § 14-415.1(b), defendant contends that the trial court erred in reading his stipulation to a prior felony conviction for possession of cocaine to the jury for purposes of proving defendant was previously convicted of a felony. Defendant specifically argues that reading the stipulation, as opposed to simply stipulating that defendant had been convicted of a prior felony, was an abuse of discretion under Rule 403.

Under Rule 403 the trial court has discretion to exclude evidence if the probative value of the evidence is substantially outweighed by unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2011). However, as stated *supra*, defendant failed to preserve the issue for appeal and "[our] Supreme Court has specifically refused to apply the plain error standard of review 'to issues which fall within the realm of the trial court's discretion[.]' " *State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (quoting *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000)). Therefore, we cannot conclude that the trial court abused its discretion in admitting the nature of defendant's prior felony conviction where we are limited to a review for plain error.

III. Conclusion

For the reasons discussed above, the trial court did not err in denying defendant's motion to dismiss the charge of discharging a firearm into an occupied dwelling and admitting into evidence the nature of defendant's prior felony conviction.

No error.

Judges HUNTER, JR. (Robert N.) and ERVIN concur.

STATE OF NORTH CAROLINA v. CHIEGE OKWARA

No. COA12-330

(Filed 16 October 2012)

1. Contempt—criminal contempt—willful violation of Rape Shield Statute

The trial court did not err in a criminal contempt case by finding defendant, the defense attorney in a rape case, guilty of criminal contempt. Defendant's question of the prosecuting witness about a possible prior instance of rape between the witness and her cousin, without first addressing the relevance and admissibility of that question during an *in camera* hearing, constituted competent evidence to support the trial court's finding that defendant violated the Rape Shield Statute. Further, the trial court's conclusion that defendant was willfully and grossly negligent was supported by the findings, which were supported by competent evidence.

2. Appeal and Error—preservation of issues—failure to file notice of appeal

Defendant failed to preserve for appellate review her challenge to the decision of Judge Bridges to deny her motion to recuse Judge Ervin where defendant failed to file a notice of appeal from that order. Defendant's argument was dismissed.

3. Appeal and Error—preservation of issues—failure to file notice of appeal

Defendant failed to preserve for appellate review her challenge to a show cause order where defendant failed to file a notice of appeal from that order. Defendant's argument was dismissed.

Appeal by Defendant from order entered 6 May 2011 and judgment entered 11 August 2011 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals on 26 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Parker, for the State.

Turrentine Law Firm, PLLC, by Karlene S. Turrentine, for Defendant.

STEPHENS, Judge.

Procedural History and Factual Background

Defendant Chiege Okwara ("Ms. Okwara") appeals the order of the Honorable Robert C. Ervin, Superior Court Judge presiding, which found her in contempt of court for willfully disobeying a court order and the judgment subsequently entered by Judge Ervin, imposing censure for her contempt. Judge Ervin's decision followed an exchange during the 13 December 2010 criminal session of Mecklenburg County Superior Court, occurring between Ms. Okwara, who was serving as court-appointed defense counsel for Mr. Latron Marquay Hoover ("Mr. Hoover"), and the prosecuting witness in that matter, Ms. Latasha Ward ("Ms. Ward").

Mr. Hoover had been charged with the rape of Ms. Ward and, in anticipation of his court appearance, Ms. Okwara filed a 17 March 2010 motion for a private, *in camera* hearing for the purpose of "determin[ing] the admissibility of evidence . . . of the sexual behavior of [Ms. Ward]." In support of that request, Ms. Okwara cited to the North Carolina General Statutes, sections 8C-1, Rule 412, and 15A-952(f). The hearing occurred on Monday, 13 December 2010, at which time Ms. Okwara questioned Ms. Ward about her sexual relationship with Mr. Hoover. At the end of the hearing, Judge Ervin informed Ms. Okwara that she was permitted "to question [Ms. Ward] as to whether she [had] engaged in any sexual behaviour [sic] with the defendant during cross-examination of the State's case." Ms. Okwara responded with the statement: "I guess as far as the—that's fine. That impeachment evidence will come in on cross-examination."

Two days later, 15 December 2010, during her cross-examination of Ms. Ward, Ms. Okwara asked: "Do you remember telling [the prosecutor] you had been raped by your cousin when you were fifteen?" The prosecutor objected to the question, the objection was sustained, Ms. Ward answered "Yes," and the court instructed the jury to disregard her answer. After the court took its morning recess, the prosecutor requested that Ms. Okwara be held in contempt of court for her question concerning a sexual encounter between Ms. Ward and her cousin, in violation of both Rule 412 of the North Carolina Rules of Evidence ("the Rape Shield Statute" or "the Statute") and Judge Ervin's order. Ms. Okwara denied intentionally violating the rule and stated that she intended the question solely for impeachment purposes. At that point, the court recessed and took the matter under advisement in order to clarify its understanding of the record.

On 8 February 2011, in response to the exchange between Ms. Okwara and Ms. Ward, Judge Ervin issued an order to show cause, mandating that Ms. Okwara appear before him to determine whether she should be held in criminal contempt. On 9 March 2011, Ms. Okwara responded to the show cause order with a motion to recuse Judge Ervin from conducting the proceedings. Five days later, on 14 March 2011, following a hearing, that motion was denied by the Honorable Forrest D. Bridges ("Judge Bridges"), who found that there was "no indication whatsoever of lack of objectivity" on the part of Judge Ervin. Ms. Okwara then appeared before Judge Ervin on 8 April 2011 for the mandated contempt hearing. On 6 May 2011, Judge Ervin issued an order finding that Ms. Okwara was guilty of contempt of court because of (1) her "willful disobedience of a court's lawful order or directive or its execution" and (2) the "willful and grossly negligent failure of an officer of the court to perform her duties in an official transaction."

Judge Ervin then scheduled an additional hearing for the purpose of determining punishment. After that hearing, in its 11 August 2011 judgment, the court determined that Ms. Okwara should be censured for (1) her "willful disobedience of a court's lawful order or directive or its execution" and (2) the "willful and grossly negligent failure by an officer of the court to perform her duties in an official transaction." Ms. Okwara appeals both the order and final judgment.

Standard of Review

In a contempt proceeding, we review the determination of a trial court by asking "whether there is competent evidence to support the [court's] findings of fact and whether the findings support the conclusions of law." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (internal quotation marks and citations omitted). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Id.* (citing *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 394 (1966)).

Discussion

[1] Ms. Okwara raises three issues in her brief on appeal.[1] In the first, she contends that her question to Ms. Ward did not violate the

1. In addition to these three issues, Ms. Okwara lists in her brief numerous "Assignments of Error." Assignments of Error are no longer recognized by the North

Rape Shield Statute or, in the alternative, that Ms. Okwara should not be found in contempt of court because she did not violate the Statute willfully. Ms. Okwara also contends in this first issue that her question was proper because it sought evidence that was "extremely relevant and pertinent, of high probative value, and . . . admissible no matter what the underlying charges were against Mr. Hoover." Thus, Ms. Okwara initially argues, "the trial court's findings and conclusions are unsupported by *any* evidence and its orders of contempt and censure must be overturned." We disagree.

The North Carolina Rape Shield Statute, Rule 412 of the North Carolina Rules of Evidence, states that in trials resulting from charges of rape or a sex offense "no reference to [sexual] behavior may be made in the presence of the jury and no evidence of this behavior may be introduced at any time during the trial" unless the court determines in an *in camera* hearing that such a reference is relevant. N.C. Gen. Stat. § 8C-412(d) (2011). If the proponent of sexual behavior evidence desires to produce that evidence, she or he must apply for an *in camera* hearing either prior to or during the trial. *Id.* In addition, the sexual behavior of the complainant (here, Ms. Ward) is considered irrelevant to the case unless that behavior:

> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C. Gen. Stat. § 8C-412(b).

Carolina Rules of Appellate Procedure. Thus, pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure, we will only address those arguments that are specifically discussed in Ms. Okwara's brief. N.C.R. App. P. 28(a)("Issues not presented and discussed in a party's brief are deemed abandoned.").

In this case, Ms. Okwara did not petition the trial court for an *in camera* hearing on the admissibility of the question at issue. She now argues that her question was proper despite that failure because of the high probative value of the evidence sought by the question and because it may have referred to a false accusation, as opposed to a true memory, on the part of Ms. Ward. We need not address the merit of those arguments here. In either circumstance, Ms. Okwara's failure to initially address the question in an *in camera* hearing, before asking that question in front of the jury, violates the plain language of the Statute. When evidence refers to the sexual behavior of the complainant in a case resulting from a charge of rape or a sex offense, then an *in camera* hearing is required. In this case, Ms. Okwara asked Ms. Ward about a possible prior instance of rape between Ms. Ward —the complainant—and her cousin, without first addressing the relevance and admissibility of that question during an *in camera* hearing. This constitutes competent evidence to support the trial court's finding that Ms. Okwara violated the Rape Shield Statute, and we affirm that decision.

In the alternative, Ms. Okwara argues that she did not intentionally violate the Rape Shield Statute and, thus, should not be found guilty of criminal contempt. We again disagree.

In order to be found guilty of criminal contempt, an individual must act willfully or with gross negligence. *See* N.C. Gen. Stat. § 5A-11(a) (2011). In the context of contempt proceedings, this Court has previously defined a willful act as one "done deliberately and purposefully in violation of law, and without authority, justification, or excuse." *State v. Phair*, 193 N.C. App. 591, 594, 668 S.E.2d 110, 112 (2008) (internal quotation marks and citations omitted). Gross negligence has been interpreted in contempt proceedings to imply "recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others." *State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987) (citing *State v. Boyd*, 61 N.C. App. 238, 300 S.E.2d 578 (1983)).

In its 6 May 2011 order, determining that Ms. Okwara's actions were willful or grossly negligent, the trial court made a number of findings that we find persuasive and supported by competent evidence in this matter. First, the court highlighted the exchange between Ms. Okwara and Judge Ervin at the conclusion of the 13 December 2010 voir dire hearing. During that hearing, requested by Ms. Okwara pursuant to the terms of the Rape Shield Statute, the court informed her that it "would be inclined having heard the evi-

dence to permit the defense to question [Ms. Ward] as to whether she has engaged in any sexual behaviour [sic] with the defendant during cross-examination of the State's case." When the court asked Ms. Okwara if she sought any evidence beyond this, she responded "I guess as far as the—that's fine."

Second, despite the above exchange, the trial court noted in its 6 May 2011 order that Ms. Okwara never "sought to explain her failure to comply with [Rule 412]" or even address her violation of the Rule, even though she asked Ms. Ward about a possible sexual relationship with her cousin in front of the jury and in violation of the Statute. Rather, Ms. Okwara maintained the position that "the question she asked sought to elicit admissible evidence."

Third, the trial court determined that the 13 December 2010 exchange between Judge Ervin and Ms. Okwara, which occurred at the conclusion of the voir dire hearing, constituted a "directive or instruction of the court to the defendant," which the defendant had disobeyed by asking a clearly impermissible question under the Statute. Thus, the trial court determined that Ms. Okwara had "failed to comply with the requirements of [the Rape Shield Statute] in that she made reference to sexual behavior in the presence of the jury prior to obtaining a determination of the relevance of that evidence" and, because of that, failed as an officer of the court to perform her duties. That failure, the court noted, would be sufficient to constitute criminal contempt if it were found to be willful or grossly negligent.

Fourth, on the subject of willfulness or gross negligence, the court acknowledged the North Carolina Pattern Jury Instructions on intent, which state that:

> Intent is a mental attitude 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.

N.C. Pattern Jury Instructions, Crim. § 120.10 (2012); *see also State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) ("Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred."). In support of its inference that Ms. Okwara "was certainly aware of the provision of [the Rape Shield Statute]," the trial court specified that "[Ms. Okwara] had filed a motion pursuant to [the Rape Shield Statute] ear-

lier in the proceedings . . . and had participated in a voir dire hearing that resulted from her earlier motion."[2]

Fifth, the court found as a substantive point that Ms. Okwara "certainly had knowledge of the requirements of [the Rape Shield Statute]," noting that she had "yet to recognize her obligation to comply with the provisions of [the Rape Shield Statute] or her failure to do so" and concluding that, together, these findings were sufficient evidence for the court to determine that Ms. Okwara "has manifested that she acted knowingly and of a stubborn purpose. . . . [and her] conduct was willfully contemptuous." As a result, the court determined Ms. Okwara had "demonstrated carelessness reflecting a thoughtless disregard for the consequences and a heedless indifference to Ms. Ward's rights in this instance" and, thus, "[Ms. Okwara] is guilty of criminal contempt for the grossly negligent failure to perform her duties as an officer of the court in an official transaction."

The record before this Court establishes that these findings are supported by competent evidence and, when taken together, are sufficient to justify the trial court's conclusion. Therefore, we affirm the trial court's determination that Ms. Okwara's violation of the Statute was willful and grossly negligent and, thus, that she is guilty of criminal contempt of court.

[2] In the second issue Ms. Okwara raises in her brief, she makes three additional sub-arguments.[3] Ms. Okwara argues that the trial court abused its discretion and committed plain and reversible error:[4] (1) in failing to recuse itself from the contempt proceedings;

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2. The trial court also observed that:

> The defendant's conduct and subsequent arguments in this litigation ignore the Court's role in safeguarding [the victim's interests under the Statute] and instead demonstrate an attitude that the defendant herself as counsel for Mr. Hoover was entitled to determine whether the question at issue should be asked without necessity for an in camera hearing.

3. Though Defendant-Appellant refers to a fourth point in the heading of her argument for the second issue—that the trial court erred in determining that it had given Ms. Okwara sufficient notice of her peril—she does not discuss that point in the contents of her brief. Thus, pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure, that argument is deemed abandoned, and we will not address it here. N.C.R. App. P. 28(a)("Issues not presented and discussed in a party's brief are deemed abandoned.").

4. As is discussed in the *Standard of Review* section, *supra*, the standard of review in contempt proceedings is not abuse of discretion or plain error. Rather, we ask whether a trial court's findings of fact were based on competent evidence sufficient to support the court's conclusions of law.

(2)(a) in finding that there was no evidence of lack of objectivity on the part of Judge Ervin, (b) by determining that the show cause order should not be returned before a judge other than Judge Ervin, and (c) by denying Ms. Okwara's motion to recuse Judge Ervin; and (3) in finding that Ms. Okwara proved her willful intent to disobey the court by defending herself.

Because neither Ms. Okwara nor her trial counsel ("Mr. Osho") challenged the decision of Judge Bridges either at the end of the 10 March 2011 recusal hearing or in her notice of appeal, we lack jurisdiction to review these arguments. "A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions[.]" N.C. Gen. Stat. § 5A-17 (2011). In criminal cases, the appellant must either (1) "give[] oral notice of appeal at trial, or (2) fil[e] notice of appeal with the clerk of superior court[.]" N.C.R. App. P. 4(a). In the latter circumstance, the appellant's notice of appeal must "designate the judgment or order from which appeal is taken[.]" N.C.R. App. P. 4(b).

In this case, we find no evidence that Ms. Okwara sought to appeal the 10 March 2011 order of Judge Bridges denying her motion for recusal of Judge Ervin. Nowhere in the transcript of that hearing did Mr. Osho give oral notice of his intent to appeal the decision of Judge Bridges. In addition, when asked by Judge Bridges about whether he would prefer to have Judge Ervin or another judge decide the case, Mr. Osho commented, "It doesn't matter to me. Whatever the Court's ruling is, we comply with that ruling." Lastly, Ms. Okwara did not request that this Court review the trial court's 10 March 2011 decision in her written notice of appeal. Instead, Ms. Okwara only requested that this Court review "the Contempt Order entered by the Honorable Judge Robert C. Ervin . . . entered . . . on May 6, 2011, as well as the Final Judgment which censured and /or recommended that the defendant be censured as a result of the aforementioned criminal contempt conviction[.]"

"[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005); *see also Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364–65 (2008) ("It is axiomatic that courts of law must have their power properly invoked by an interested party. . . . The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act

in a particular case."). Thus, we dismiss Ms. Okwara's arguments concerning the results of the recusal hearing on 10 March 2011 for lack of jurisdiction.

[3] In the third issue Ms. Okwara raises in her brief, she argues that "this Court must reverse the [trial court's] Show Cause Order entered February 8, 2011," because that order was entered by Judge Ervin "while he was neither residing in nor assigned to Mecklenburg County, without Defendant's agreement," and, thus, the "order is 'null and void and of no legal effect.' " In this circumstance, again, we do not have jurisdiction to address Ms. Okwara's argument. There is no evidence in any of the transcripts that either Ms. Okwara or Mr. Osho orally sought to appeal the validity of Judge Ervin's show cause order. In addition, the show cause order is not mentioned in Ms. Okwara's 15 August 2011 notice of appeal. Thus, pursuant to North Carolina Rules of Appellate Procedure 4(a)–(b), this issue is likewise dismissed for lack of jurisdiction.

Lastly, it should be noted that the issue of censure is not directly addressed in the contents of Ms. Okwara's brief, despite the fact that she requested review of that order in her notice of appeal. Though censure is broadly referenced on a number of occasions in the brief, which asserts that the 11 August 2011 censure judgment should be overturned, it discusses neither the merits of Judge Ervin's judgment nor whether a different punishment would have been more appropriate. Thus, pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure, this issue is deemed abandoned, and we will not address it here. N.C.R. App. P. 28(a).

Accordingly, the trial court's 6 May 2011 order and 11 August 2011 judgment are affirmed.

AFFIRMED in part; DISMISSED in part.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. CARL STEVEN PASOUR

No. COA12-190

(Filed 16 October 2012)

Search and Seizure—curtilage of house—reasonable expectation of privacy—marijuana plants

The trial court erred by denying defendant's motion to suppress marijuana plants seized from his backyard in a prosecution for possession of marijuana and for maintaining a dwelling for the possession of controlled substances. The determinative issue was whether the homeowner had a reasonable expectation of privacy in the area of curtilage the officers entered when they first viewed the contraband material. There was no indication that the plants were visible from the front of the house or from the road; all visitor traffic appeared to be kept to the front door and traffic to the rear was discouraged by a posted sign; an officer who heard a noise was not able to identify when in time he heard it, what the noise sounded like, where it came from, or even if it sounded like a person moving around; and the trial court found only that the officers went to the back of the house as "standard procedure" "to observe anyone leaving the house" and for officer safety.

Appeal by Defendant from judgment entered 16 November 2011 by Judge F. Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 23 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

J. Edward Yeager, Jr., for Defendant.

BEASLEY, Judge.

Carl Steven Pasour (Defendant) appeals from the trial court's denial of his motion to suppress evidence and dismiss the charges against him. For the following reasons, we reverse.

On 15 August 2010, the Gaston County Police Department received a call that a subject living at 248 Loray Farm Road had marijuana plants growing with his tomato plants at the residence. Three officers went to that address and knocked on the residence's front and side doors but received no response. Two of the officers pro-

ceeded to the back of the residence while one stayed at the front door to see if anyone would come to the door. In the backyard, the officers discovered various plants, including marijuana plants. The plants were seized and wrapped in an emergency blanket for transportation to police headquarters for processing. Defendant was arrested that same day for possession of more than one and one-half ounces of marijuana. On 3 January 2011, Defendant was indicted for that offense and the additional offense of maintaining a dwelling for keeping and/or selling a controlled substance.

On 14 July 2011, Defendant filed a motion to suppress all evidence seized from his home and property, and further to dismiss all charges against him. On 21 September 2011, Defendant's motion was denied by the trial court. On 15 November 2011, Defendant thereafter pled guilty pursuant to the *Alford* decision to both charges. Defendant was sentenced to six to eight months imprisonment which was suspended. Defendant was placed on supervised probation for thirty months. Defendant gave notice of appeal in open court.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress the evidence seized in the warrantless search of his property. We agree.

"The Fourth Amendment to the United States Constitution protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *State v. Rhodes*, 151 N.C. App. 208, 213, 565 S.E.2d 266, 269 (2002) (internal quotation marks omitted). " '[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967)). One such exception is the plain view doctrine, under which a seizure is lawful "when the officer was in a place where he had a right to be when the evidence was discovered and when it is immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause." *State v. Mickey*, 347 N.C. 508, 516, 495 S.E.2d 669, 674 (1998) (citations omitted).

Defendant argues that the officers were not in a place that they had the right to be when they went to his backyard. This Court has held that "[e]ntrance onto private property for the purpose of a general inquiry or interview is proper[,]" and as such "officers are enti-

tled to go to a door to inquire about a matter; they are not trespassers under these circumstances." *State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 600-01 (1979) (citations omitted). Defendant acknowledges this well-settled law, but argues that there was no justification for the officers to go into his backyard after receiving no answer to their repeated knocks at his front and side doors. We agree.

We first note that Defendant fails to challenge any of the trial court's findings of fact.

> Where an appellant fails to assign error to the trial court's findings of fact, the findings are presumed to be correct. Our review, therefore, is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment.

Okwara v. Dillard Dep't Stores, Inc., 136 N.C. App. 587, 591-92, 525 S.E.2d 481, 484 (2000) (internal quotations and citations omitted). Here, the trial court concluded as a matter of law that when one of the officers, Officer Bolick, noticed the marijuana plants, they were in plain view and as such the seizure of the marijuana plants was "not unlawful or unconstitutional or prohibited by North Carolina law." This conclusion is not supported by the trial court's factual findings. To support its conclusion, the trial court found that Officer Bolick noticed "what was immediately apparent to him" as marijuana plants behind the residence, when he "had not yet walked around the back left corner of the residence." However, in order for the plain view exception to apply, "the officer [must] be lawfully located in a place from which the object can be plainly seen," and thus may "not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California*, 496 U.S. 128, 136-37, 110 L. Ed. 2d 112 (1990). This finding does not support an assertion that Officer Bolick was in a place he was permitted to be when he saw the plants, regardless of whether it was the back corner, the back yard or the side yard.

Although this issue has not been directly addressed by this Court or our state Supreme Court, it has been considered by the federal appeals court in this jurisdiction and those cases are instructive here. In *Alvarez v. Montgomery County*, 147 F.3d 354, 356 (4th Cir. 1998), the Fourth Circuit held that "[t]he Fourth Amendment does not prohibit police, attempting to speak with a homeowner, from entering the backyard when circumstances indicate they might find him there[.]" In reaching this holding, the Fourth Circuit noted that other

circuits have found that an officer's warrantless entry into a backyard is not necessarily a violation of the Fourth Amendment. *See id.* at 358. However, the Fourth Circuit later clarified that where officers have no reason to believe that entering a homeowner's backyard will produce a different result than knocking on the home's front door, the Fourth Amendment is violated. *Pena v. Porter*, 316 Fed. Appx. 303, 314 (4th Cir. 2009).

In *Pena*, the officers approached Pena's trailer to "knock and talk", and when Pena did not answer at the front door, they went further onto Pena's property to knock at a back door. *Id.* The Fourth Circuit held that the officers had no reason to expect that a knock at the back door would be heard by an occupant when there was no response at the front door, especially given that the officers had not witnessed anyone enter the trailer, there were no lights on inside to indicate anyone was home, there was no sign directing people to the rear of the trailer, nor where there any noises coming from the rear of the trailer to indicate the presence of someone back there. *Id.* Based on the foregoing, the Fourth Circuit concluded that "[t]he officers' conduct in this case violated the Fourth Amendment." *Id.*

In carefully examining this precedent, our own precedent, and case law from around the country, we find that the determinative issue is whether or not the homeowner had a reasonable expectation of privacy in the area of curtilage the officers entered when they first viewed the contraband material. *See, e.g.*, *State v. Rhodes*, 151 N.C. App. 208, 214, 565 S.E.2d 266, 270 (2002) (finding the determinative issue to be whether the defendant manifested a reasonable expectation of privacy in his garbage); *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993) (finding a backyard is not protected where there is no reasonable expectation of privacy because the back of the house is used as the principal entrance of the dwelling); *Hobson v. United States*, 226 F.2d 890 (8th Cir. 1955) (finding police violated the Fourth Amendment rights of a homeowner when they went to her home without an arrest warrant for a narcotics violation and one officer positioned himself in the backyard while the others went to the front door). "In North Carolina, 'curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.' " *Rhodes*, 151 N.C. App. at 214, 565 S.E.2d at 270 (2002) (quoting *State v. Frizelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955)). Further, while not dispositive, a homeowner's intent to keep others out and thus evidence of his or her expectation of privacy in an area may be demon-

strated by the presence of "no trespassing" signs. *See*, *e.g.*, *Edens v. Kennedy*, 112 Fed. Appx. 870 (4th Cir. 2004) (noting that the presence of "no trespass" signs may be one factor in the consideration of whether a homeowner has a reasonable expectation of privacy or not in a particular area).

Here, the officers were within the curtilage of the home when they viewed the plants, regardless of whether they were in the back or side yards. *See Rhodes*, 151 N.C. App. at 214, 565 S.E.2d at 270 (2002). There is no indication from the record that the plants were visible from the front or from the road. The trial court found that there was a "no trespassing" sign that was "plainly visible" on the side of the residence where the officers walked. Even though the officers claim they did not see the sign, such a sign is evidence of the homeowner's intent that the side and back of the home were not open to the public. Unlike in *Garcia*, there is no evidence here to suggest that there was a path of any kind or anything else to suggest a visitor's use of the rear door; instead, all visitor traffic appeared to be kept to the front door and traffic to the rear was discouraged as a result of the posted sign. *See Garcia*, 997 F.2d at 1279–80.

Further, similar to the circumstances in *Pena*, there is no evidence in the record that suggests that the officers had reason to believe that knocking at Defendant's back door would produce a response after knocking multiple times at his front and side doors had not. At the suppression hearing, the officers' testified that they went into Defendant's backyard as part of "standard procedure" to see if anyone was in the backyard or in the residence. The State argues that one of the police officers heard a sound within the dwelling, and as such, it was reasonable to believe that there was someone home who was simply unaware of the officers' presence, and so the officers were justified in entering the backyard. The officers admit that they never saw anyone come out of the house, nor did they hear noises coming from the *back* of the house. It is also unclear from the hearing transcript as to whether the officers started around back before or after they became aware that the officer knocking at the door had even heard a noise, as one testified that they started back after the initial knock and the other testified they started back after their fellow officer heard a noise. The officer that heard the noise was not able to identify when in time he heard it, what the noise sounded like, where it came from, or even if it sounded like a person moving around. Furthermore, the trial court made no finding of fact on this point; instead it only found that the officers went around back

as was "standard procedure" "to observe anyone leaving the house" and for officer safety. Neither this finding nor the underlying facts is sufficient to support the officers' movement toward the back of the house.

Given the circumstances of this case, there was no justification for the officers to enter Defendant's backyard and so their actions were violative of the Fourth Amendment. Accordingly, we reverse the trial court's denial of Defendant's motion to suppress.

Reversed.

Judges HUNTER, Robert C. and GEER concur.

STATE OF NORTH CAROLINA v. ROBERT LEE-EDWARD PATTERSON

No. COA12-356

(Filed 16 October 2012)

1. Appeal and Error—preservation of issues—failure to object at trial—court's failure to exercise discretion at sentencing

Defendant was entitled to appeal a sentence that he contended resulted from the judge's failure to exercise discretion even though defendant did not object at trial.

2. Costs—applicable statute—effective date

The amended version of N.C.G.S. § 7A-304(a), effective 1 July 2011, governed the imposition of court costs against a defendant sentenced on 17 August 2011 for failure to report a change of address as a sex offender.

3. Costs—court's discretion—failure to exercise

A judgment that assessed court costs against a sex offender who did not register his change of address was remanded where the trial court erroneously stated that it had no discretion. The holding is limited to those cases in which the record indicates that the trial court misunderstood the law.

4. Costs—amount—in excess of statutory limit

In an appeal remanded on other grounds, it was noted that the costs assessed against defendant exceeded the statutorily

permissible total and must be limited on remand, if awarded, to amounts authorized by N.C.G.S. § 7A-304.

Appeal by defendant from judgment entered 17 August 2011 by Judge Michael J. O'Fogludha in Alamance County Superior Court. Heard in the Court of Appeals 12 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Don Willey, for defendant-appellant.

CALABRIA, Judge.

Robert Lee-Edward Patterson ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of failure to report his change of address as a sex offender. We remand for resentencing.

I. Background

On 1 March 2011, Lieutenant Kenneth Evans ("Lt. Evans") of the Alamance County Sheriff's Office ("the Sheriff's Office") went to 3320 Woods Chapel Road in Graham, North Carolina, to serve defendant with legal documents. When Lt. Evans arrived, defendant's father answered the door and informed him that defendant no longer resided at that address. Although the address was registered to defendant in the Sheriff Office's sex offender registry, he had not resided there since Christmas of 2010.

Defendant was subsequently arrested and indicted for failure to report his change of address as a sex offender. On 17 August 2011, defendant was tried by a jury in Alamance County Superior Court. The jury returned a verdict finding defendant guilty that same day.

The trial court sentenced defendant to a minimum of 22 months to a maximum of 27 months in the North Carolina Department of Correction. In addition, the trial court ordered defendant to pay $1,954.50 in court costs. The court stated that "I have no discretion but to charge court costs and I'll impose that as a civil judgment." Defendant appeals.

II. Imposition of Court Costs

Defendant argues that the trial court erred by failing to exercise its discretion when ordering defendant to pay court costs. We agree.

[1] While defendant did not specifically object to the imposition of court costs at trial, N.C. Gen. Stat. § 15A-1446(d)(18) (2011) permits

a defendant to seek appellate review of his sentence without objection 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." Consequently, we address the merits of defendant's arguments.

A. Governing Version of N.C. Gen. Stat. § 7A-304(a)

[2] The imposition of court costs is governed by N.C. Gen. Stat. § 7A-304 (2011). Initially, we note that both defendant and the State contend that a previous version of this statute applies to defendant's case. Prior to 1 July 2011, N.C. Gen. Stat. § 7A-304 stated, in relevant part:

> In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides, and that no costs may be assessed when a case is dismissed.

N.C. Gen. Stat. § 7A-304(a) (2009). Under this version of the statute, a defendant who received an active sentence was only assessed court costs when the trial court specifically assessed them in the defendant's judgment.

In 2011, N.C. Gen. Stat. § 7A-304(a) was amended to its current form. *See* 2011 N.C. Sess. Law 145 § 15.10.(a). The amended statute states:

> In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected. No costs may be assessed when a case is dismissed. Costs under this section may not be waived unless the judge makes a written finding of just cause to grant such a waiver.

N.C. Gen. Stat. § 7A-304(a) (2011). Under this amended version of the statute, the trial court is no longer required to specifically assess court costs in the judgment of a defendant who receives an active sentence. Instead, a defendant who receives an active sentence is now required to be assessed court costs unless the trial court specifically makes a written finding of just cause to waive these costs. This

version of the statute became "effective July 1, 2011." 2011 N.C. Sess. Law 145 § 32.6.

In the instant case, defendant's trial occurred on 17 August 2011, and the trial court entered judgment that same day. Consequently, the new version of N.C. Gen. Stat. § 7A-304(a), which went into effect on 1 July 2011, several weeks prior to defendant's judgment, is the version of the statute which governs that judgment.

B. Imposition of Court Costs

[3] Defendant argues that the trial court was acting under a misapprehension of the law when it assessed court costs in the instant case. Specifically, defendant contends that the trial court incorrectly told defendant that it had "no discretion but to charge court costs and I'll impose that as a civil judgment." Defendant is correct. While the amended version of N.C. Gen. Stat. § 7A-304(a) presumes the assessment of court costs against a defendant who receives an active sentence, the imposition of court costs is not mandated by the statute. Rather, the statute includes a limited exception under which the trial court is permitted to waive court costs upon a finding of just cause. The trial court's statement to defendant suggests that it was unaware of the possibility of a just cause waiver.

In *State v. Brooks*, the trial court erroneously sentenced the defendant to consecutive sentences because it believed that that sentence was required by statute. 105 N.C. App. 413, 416, 413 S.E.2d 312, 314 (1992). This Court vacated the judgment and remanded for resentencing, holding that "[w]here it appears the court believed consecutive sentences were required when in fact such sentencing was merely discretionary, the imposition of consecutive sentences is erroneous." *Id.* at 416-17, 413 S.E.2d at 314.

In the instant case, the trial court's statement to defendant reflects an erroneous belief that the imposition of court costs against defendant was mandatory, such that the court had no discretion but to assess those costs. To the contrary, the statute provides the trial court with limited discretion to waive court costs upon a finding of just cause. Accordingly, under the reasoning of *Brooks*, we vacate the portion of defendant's judgment assessing court costs and remand for resentencing.

In reaching this disposition, we do not intend to suggest that a trial court is required to make an affirmative finding on the record that just cause does *not* exist in order to assess court costs. As previ-

ously noted, under N.C. Gen. Stat. § 7A-304(a), a judgment is presumed to assess court costs unless the trial court makes a specific written finding of just cause to waive the costs. Our holding is limited to those cases, such as the instant case, in which the record indicates that the trial court misunderstood the applicable law. On remand, the trial court is free to either reassess court costs or waive the costs with a finding of just cause.

C. Amount of Court Costs

[4] Defendant also argues that the amount of court costs ordered by the trial court was not authorized by statute. Since this issue may reoccur on remand, we briefly address it.

N.C. Gen. Stat. § 7A-304 (2011) provides an exclusive list of court costs which may be assessed against criminal defendants after conviction. In the instant case, the trial court assessed costs of $1,954.50. It is not clear from the record how this precise amount was reached. However, the amount of costs assessed significantly exceeds the total amount of permissible costs pursuant to N.C. Gen. Stat. § 7A-304. If the trial court assesses court costs against defendant when he is resentenced, the amount of the costs must be limited to those authorized by N.C. Gen. Stat. § 7A-304.

III. Conclusion

The amended version of N.C. Gen. Stat. § 7A-304(a), effective 1 July 2011, governs the imposition of court costs against defendant. The trial court erroneously stated that it had no discretion but to assess court costs against defendant under that statute. As a result, we must vacate the portion of defendant's judgment which assessed court costs and remand for resentencing on that issue. If the trial court reassesses court costs on resentencing, those costs must be limited to the amounts authorized by N.C. Gen. Stat. § 7A-304.

Remanded for resentencing.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. EDWARD EUGENE POOLE, JR.

No. COA11-21-2

(Filed 16 October 2012)

1. Constitutional Law—right to confrontation—nontestifying analyst's lab report—possession of controlled substance in local confinement facility—no plain error

The trial court did not commit plain error by erroneously admitting a lab report and an agent's testimony identifying an exhibit as cocaine based on a nontestifying analyst's report. Because defendant was charged only with having been in possession of a controlled substance in a local confinement facility, defendant's own statement that he had "a piece of dope" established that the substance was a controlled substance.

2. Constitutional Law—effective assistance of counsel—claim dismissed without prejudice

Defendant's claim of ineffective assistance of counsel was dismissed without prejudice to his ability to file a motion for appropriate relief in the trial court.

Appeal by Defendant from judgment entered 6 April 2010 by Judge Jack W. Jenkins in Superior Court, Carteret County. This case was originally heard in the Court of Appeals on 16 August 2011, and an unpublished opinion was issued 20 September 2011, *State v. Poole*, ___ N.C. App. ___, 716 S.E.2d 268 (2011). Upon discretionary review granted by the Supreme Court and by order dated 23 August 2012 the Supreme Court vacated this Court's decision and remanded the case to the Court of Appeals for reconsideration in light of the Supreme Court's decisions in *State v. Nabors*, 365 N.C. 306 (2011), and *State v. Lawrence*, ___ N.C. ___ (2012).

Attorney General Roy Cooper, by Assistant Attorney General Janette S. Nelson, for the State.

Paul Y.K. Castle for Defendant.

McGEE, Judge.

Edward Eugene Poole, Jr. (Defendant) was convicted on 6 April 2010 of possession of a controlled substance in a local confinement facility and of having attained the status of an habitual felon. The trial

court sentenced Defendant to 120 to 153 months in prison. Defendant appealed to this Court, and this Court filed an opinion 20 September 2011 granting Defendant a new trial. *State v. Poole*, ___ N.C. App. ___, 716 S.E.2d 268 (2011) (*Poole I*). The State filed a petition for writ of supersedeas and a petition for discretionary review, which motions the Supreme Court granted in an order dated 23 August 2012. The Supreme Court vacated the decision of this Court in *Poole I* and remanded to this Court for reconsideration in light of the Supreme Court's decisions in *State v. Nabors*, 365 N.C. 306, 718 S.E.2d 623 (2011), and *State v. Lawrence*, ___ N.C. ___, 723 S.E.2d 326 (2012).

Facts

The evidence at trial tended to show that Defendant was employed as a tree cutter by Travis Sanderson (Mr. Sanderson). Defendant testified to the following. Defendant had a falling out with Mr. Sanderson and was fired by him. Defendant called Mr. Sanderson a few days later and asked to be paid for work he had performed. Mr. Sanderson told Defendant that when he found more work, he would "get back" to Defendant. Mr. Sanderson later called Defendant and told Defendant that he had "picked up" a girl and that the girl wanted Mr. Sanderson to get her some drugs. Defendant was a recovering drug addict, did not want to purchase drugs for Mr. Sanderson, and initially refused to do so. Mr. Sanderson called Defendant several more times and eventually approached Defendant in person.

Mr. Sanderson promised to employ Defendant on a large tree-cutting job, but only if Defendant obtained drugs for him. Defendant agreed. At trial, Mr. Sanderson testified that he had contacted law enforcement officers in order to work as an informant to arrange a drug transaction with Defendant as a target. Mr. Sanderson admitted he made up the story about a woman seeking drugs.

Mr. Sanderson's drug deal with Defendant occurred on 6 October 2008 in the parking lot of a fast-food restaurant. Mr. Sanderson met with Defendant and gave him $300.00 to buy the drugs. Defendant drove away and returned several hours later with a bag he said contained the drugs. Defendant got into Mr. Sanderson's truck and put the bag in the center console. Defendant testified that Mr. Sanderson retrieved the bag, handed Defendant a piece of the substance contained in the bag, and got out of his truck waving the bag. Defendant realized he was about to be arrested and put the piece Mr. Sanderson had given him in his mouth. Defendant was arrested by police officers

working with Mr. Sanderson. Mr. Sanderson turned the bag containing the rest of the drugs over to the officers.

Defendant testified at trial that, while he was sitting on the ground during the arrest, he told police officers three times that Mr. Sanderson had given him "evidence." Defendant had his first appearance on 7 October 2008, and told the district court judge that he had a piece of evidence that Mr. Sanderson had given him and that he wanted to give it to his lawyer. The district court judge told the bailiff to take Defendant to speak with his lawyer, but the bailiff instead returned Defendant to the detention facility. Defendant then got the attention of a jailer, who took him to Lieutenant Ivey Eubanks (Lt. Eubanks). Defendant gave the substance to Lt. Eubanks.

Defendant was charged with possession with the intent to sell or distribute cocaine, selling and distributing cocaine, and possession of a controlled substance in a local confinement facility. Defendant filed notice of his intent to raise the defense of entrapment.

At trial, the State presented the testimony of Special Agent Nancy Gregory (Agent Gregory) of the North Carolina State Bureau of Investigation (SBI), who testified as to the results of a lab test performed on the substance that had been in Defendant's possession. Agent Gregory testified that Special Agent Brittany Dewell (Agent Dewell), performed a chemical analysis of the substance in the bag which Mr. Sanderson retained and gave to the police officers. Agent Gregory testified that the substance in the bag was crack cocaine. Agent Gregory also testified that the substance in Defendant's possession while Defendant was in the jail was "a separate case analyzed by a different chemist at the laboratory." Agent Gregory did not identify that chemist, nor did she state that she had reviewed that chemist's work. The record on appeal shows that this lab report was prepared by Agent Amanda Howell (Agent Howell). However, Agent Gregory testified that the item retrieved from Defendant was also a cocaine-based substance. Defendant did not object to Agent Gregory's testimony. The item retrieved from Defendant was admitted into evidence as the State's Exhibit 3-A (Exhibit 3-A), and the bag containing Exhibit 3-A was admitted as State's Exhibit 3 (Exhibit 3).

The trial court instructed the jury on the defense of entrapment with respect to the charges of possession with the intent to sell or distribute (PWISD) and selling and distributing a controlled substance. However, the trial court instructed the jury that the defense of entrapment did not apply to the charge of possession of a controlled

substance in a local confinement facility. The jury found Defendant not guilty of PWISD and not guilty of selling and distributing a controlled substance. The jury found Defendant guilty of possession of a controlled substance in a local confinement facility.

Analysis

[1] Defendant first argues:

> The trial court committed plain error in admitting the testimony of SBI Agent Nancy Gregory in regard to an alleged controlled substance . . . and also admitting the laboratory report on which Agent Gregory relied in her testimony . . . because the laboratory report at issue had been prepared by a non-testifying SBI agent and Agent Gregory testified solely based on the laboratory report prepared by the non-testifying agent, in violation of . . . Defendant's right to confrontation guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution."

In light of our Supreme Court's decisions in *State v. Nabors*, 365 N.C. 306, 718 S.E.2d 623 (2011) and *State v. Lawrence*, ___ N.C. ___, 723 S.E.2d 326 (2012), we disagree.

At trial, Defendant failed to object to the admission of Agent Gregory's testimony identifying Exhibits 3 and 3-A as a schedule II, cocaine-based substance, and to the lab report upon which Agent Gregory's testimony was based. Defendant argues, however, that the trial court's admission of Agent Gregory's testimony and the lab report was plain error.

> 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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007).

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

Lawrence, ___ N.C. at ___, 723 S.E.2d at 334 (citations omitted).

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citations omitted). "[F]orensic analyses qualify as 'testimonial' statements, and forensic analysts are 'witnesses' to which the Confrontation Clause applies." *Id.* at 452, 681 S.E.2d at 304-05 (citation omitted). This bar to the admission into evidence of forensic analyses performed by non-testifying analysts, whom a defendant has not had a prior opportunity to cross-examine, applies to in-court testimony as well as to documents containing forensic analyses, such as lab reports. *Id.* at 451-52, 681 S.E.2d at 304.

In *State v. Brewington*, 204 N.C. App. 68, 78, 693 S.E.2d 182, 189 (2010), this Court stated a four-part test for determining whether forensic analysis evidence runs afoul of the Confrontation Clause. Under the four-part test, our Court must:

> (1) determine whether the [evidence] at issue is testimonial; (2) if the [evidence] is testimonial, ascertain whether the declarant was unavailable at trial and defendant was given a prior opportunity to cross-examine the declarant; (3) if the defendant was not afforded the opportunity to cross-examine the unavailable declarant, decide whether the testifying expert was offering an independent opinion or merely summarizing another non-testifying expert's report or analysis; and (4) if the testifying expert summarized another non-testifying expert's report or analysis, determine whether the admission of the [evidence] through another testifying expert is reversible error.

Id. Applying this test, the *Brewington* Court found that a lab report prepared by a non-testifying analyst was inadmissible because the defendant did not have a prior opportunity to cross-examine the non-testifying analyst. *Id.* at 78-79, 693 S.E.2d at 189. This Court further found that it was "clear from the testimony of [the testifying analyst] that she had no part in conducting any testing of the [alleged controlled] substance, nor did she conduct any independent analysis of *the substance*." *Id.* at 80, 693 S.E.2d at 190. Accordingly, this Court determined that the testifying analyst in *Brewington*:

> merely reviewed the reported findings of [the non-testifying agent], and testified that if [the non-testifying agent] followed procedures, and if [the non-testifying agent] did not make any mistakes, and if [the non-testifying agent] did not deliberately falsify or alter the findings, then [the testifying agent] "would have come to the same conclusion that she did."

Id. Because the defendant had not been afforded the opportunity to cross-examine the non-testifying analyst, the *Brewington* Court held that the admission into evidence of the testifying analyst's testimony also violated the Confrontation Clause. *Id.*

This Court applied *Brewington*'s four-part test in *State v. Williams*, 208 N.C. App. 422, 702 S.E.2d 233 (2010). In *Williams*, we determined that the testimony of a chemist identifying a substance as cocaine-based was inadmissible. The *Williams* decision focused on (1) the fact that the chemist's testimony was based upon an inadmissible lab report prepared by a different non-testifying chemist; and (2) that the testifying chemist did not personally perform any tests or witness any tests being performed on the alleged cocaine-based substance. *Id.* at 427-28, 702 S.E.2d at 237-38. In reaching its holding, the *Williams* Court noted that, in *State v. Hough*, 202 N.C. App. 674, 690 S.E.2d 285 (2010), this Court reached a different conclusion where a forensic chemist's testimony "was substantively the same as the testimony given by the expert" in both *Brewington* and *Williams*. *Id.* at 427, 702 S.E.2d at 237. However, the *Williams* Court concluded that "*Brewington* correctly emphasizes the importance of cross-examination as a tool to expose, among other things, the care (or lack thereof) with which a chemist conducted tests on a substance." *Id.*

In the present case, Defendant argues that both Exhibits 3 and 3-A, as well as the testimony of Agent Gregory based upon the same lab report, were inadmissible. The lab report prepared by Agent Howell was a forensic analysis prepared for the prosecution of a criminal charge and was therefore "testimonial" evidence. *Locklear* at 452, 681 S.E.2d at 304-05 (citation omitted). Agent Howell was unavailable to testify at trial because she "was not released from a subpoena from another county[.]" The State has failed to show that Defendant was given a prior opportunity to cross-examine Agent Howell. Accordingly, the admission into evidence of the lab report violated Defendant's confrontation right. *See id.* at 452, 681 S.E.2d at 305.

Defendant also argues that Agent Gregory's testimony, based upon the inadmissible lab report, was likewise inadmissible. In the present case, Agent Gregory testified concerning her review of a forensic analysis performed by another agent in connection with the prosecution of a criminal charge; Agent Gregory's testimony was therefore "testimonial." Agent Gregory's testimony was based upon the lab report prepared by Agent Howell, and as noted above, the State has failed to show that Defendant was given a prior opportunity to cross-examine Agent Howell. We must therefore determine whether Agent Gregory "was offering an independent opinion or merely summarizing another non-testifying expert's report or analysis[.]" *Brewington*, 204 N.C. App. at 78, 693 S.E.2d at 189.

Agent Gregory testified that Exhibit 3-A was analyzed by a chemist, other than herself, in the SBI laboratory. Although Agent Gregory testified that she reviewed "the case file . . . before it was published to the officers," the record contains no indication that Agent Gregory personally performed or witnessed any tests performed on Exhibit 3-A. Notably, Agent Gregory testified that she was called in at 11:00 a.m. on the day of trial to serve as a "substitute analyst" in place of Agent Howell, who had originally been subpoenaed to testify in Defendant's case. As in *Williams*, we find the following facts to be decisive: there is no indication in the record that Agent Gregory performed any tests on Exhibit 3-A, nor is there any indication that Agent Gregory was present when Agent Howell performed tests on Exhibit 3A. *See Williams*, 208 N.C. App. at 427-28, 702 S.E.2d at 237-38. We therefore conclude that Agent Gregory was "merely summarizing another non-testifying expert's report or analysis[,]" *Brewington*, 204 N.C. App. at 78, 693 S.E.2d at 189, and that the admission of Agent Gregory's testimony was error.

Finally, we must determine "whether the admission of the [evidence] through another testifying expert is reversible error." *Id.* Defendant argues that the erroneous admission of the lab report and Agent Gregory's testimony identifying Exhibit 3-A as cocaine constituted plain error because, without the admission of that evidence, the State would have failed to meet its burden of proving every element of the offense—possession of a controlled substance in a local confinement facility—beyond a reasonable doubt. Defendant specifically argues that, without the improperly admitted evidence, the State failed to prove that Exhibit 3-A was a controlled substance. We disagree.

The offense of possession of a controlled substance in a local confinement facility requires proof that a defendant was in possession of a controlled substance. *See* N.C. Gen. Stat. § 90-95(a)(3) and (e)(9) (2009). As explained above, in *Williams*, 208 N.C. App. at 427-28, 702 S.E.2d at 237-38, this Court held that expert testimony identifying evidence as cocaine was admitted in error. The *Williams* Court then determined that, other than the improperly admitted evidence, the only proof offered to show the identity of the substance was the testimony of two police officers who identified the substance as "crack cocaine" and a statement by the defendant admitting that the substance was cocaine. *Id.* at 428, 702 S.E.2d at 238. The *Williams* Court concluded that the "testimony of defendant and police officers alone, despite both officers' credentials and experience, [wa]s insufficient to show that the substance possessed was cocaine. The State must still present evidence as to the chemical makeup of the substance." *Id.* (citations omitted).

The Supreme Court addressed this issue in *Nabors*. In *Nabors*, the State presented lay testimony as evidence of the defendant's possession of cocaine, but did not present expert testimony as to the chemical analysis of the substance. *Nabors*, 365 N.C. at 311-12, 718 S.E.2d at 626. This Court concluded that the State's evidence was insufficient to prove an essential element of the crime because of the absence of expert testimony " 'to establish the identity of the controlled substance beyond a reasonable doubt.' " *State v. Nabors*, 207 N.C. App. 463, 472, 700 S.E.2d 153, 159 (2010) (citation and brackets omitted).

The Supreme Court reversed this Court's decision on the grounds that, "while the State has the burden of proving every element of the charge beyond a reasonable doubt, when a defense witness's testimony characterizes a putative controlled substance as a controlled substance, the defendant cannot on appeal escape the consequences of the testimony[.]" *Nabors*, 365 N.C. at 313, 718 S.E.2d at 627. The Supreme Court ultimately held that "the testimony of defendant's witness, which identified as cocaine the items sold to the undercover operative, provided evidence of a controlled substance sufficient to withstand defendant's motion to dismiss." *Id.* The Supreme Court further noted that, "[a]ssuming arguendo that admission of the lay testimony was error, defendant cannot satisfy his burden of showing plain error inasmuch as his own evidence established that the substance sold was cocaine." *Id.*

Our reading of *Williams* and *Nabors* compels us to conclude that a defendant's statement that he was in possession of a certain controlled substance is sufficient to satisfy the State's burden of proving that element of the offense. However, we note that in *Nabors*, the defense witness' testimony arose in the following exchange during his direct examination:

"Q. Did you have cocaine?

A. Yes, sir."

Nabors, 365 N.C. at 309, 718 S.E.2d at 625.

In the present case, Defendant testified that he had a "piece of dope . . . in the jail[.]" Defendant also answered affirmatively when he was asked on cross-examination: "You had the drugs in your pocket in the jail[?]" Martin Jones (Officer Jones), of the Detention Division, Carteret County Sheriff's Office, testified that he observed Lt. Eubanks retrieve a "[y]ellowish rock-like substance" from Defendant's pocket, and Lt. Eubanks similarly testified that he retrieved a "yellowish in color, rock type" substance that was consistent with being crack cocaine. The statements of Defendant, Officer Jones, and Lt. Eubanks were the only proof offered as to the identity of Exhibit 3-A, other than the improperly admitted lab report and testimony of Agent Gregory.

In *Nabors*, the Supreme Court instructed that "when *a defense witness's* testimony characterizes a putative controlled substance as a controlled substance, the defendant cannot on appeal escape the consequences of the testimony[.]" *Nabors*, 365 N.C. at 313, 718 S.E.2d at 627 (emphasis added). We must therefore determine whether Defendant's own statement that he had "a piece of dope" amounted to a "characteriz[ation of] a putative controlled substance as a controlled substance" for the purposes of satisfying the State's burden of proof.

We are unable to find any evidence in the record offered by the defense regarding a definition of the term "dope." Black's Law Dictionary's complete definition of "dope" is as follows: "1. A thick liquid used esp. for medicinal purposes. 2. *Slang*. A drug, esp. a narcotic." Black's Law Dictionary 563 (9th ed. 2009). Nonetheless, it is clear from the context of this case that Defendant was referring to the item he placed in his mouth during his arrest. In the context of this case, including Defendant's having agreed to purchase "drugs" for Mr.

Sanderson, however reluctantly, it is clear that Defendant was referring to some illicit substance.

While Defendant's testimony concerning his having been in possession of "dope" or "drugs" does not in any way indicate what type of "dope" or "drugs" he was in possession of or indicate what schedule of controlled substance was involved, we hold that it does clearly provide evidence of Defendant's having been in possession of a controlled substance. Because Defendant was charged only with having been in possession of a controlled substance in a local confinement facility, we conclude Defendant's "own evidence established that the substance was" a controlled substance. *Nabors*, 365 N.C. at 313, 718 S.E.2d at 627. We therefore conclude that Defendant has not "satisfied his burden of showing plain error" arising from the erroneous admission of the lab report and Agent Gregory's testimony identifying Exhibit 3-A as cocaine. *Id.*

Ineffective Assistance of Counsel

[2] Defendant also argues that he received ineffective assistance of counsel. "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." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citation omitted). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Id.* (citation and quotation marks omitted). "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." *Id.* (citations and quotation marks omitted).

In the present case, Defendant argues that his trial counsel's failure to object to the admission of the lab report and Agent Gregory's identification testimony constituted ineffective assistance of counsel. As stated above, Defendant must show that his trial counsel's failure to object prejudiced him. *Id.* In light of *Nabors*, which was decided after Defendant's trial, and after our Court's first opinion in this matter, a determination of whether Defendant was prejudiced by his trial counsel's failure to object will involve an analysis of the evidence offered by defense witnesses concerning the identity of the controlled substance and his counsel's trial strategy. Defendant has not made any arguments in his original brief concerning that aspect of this case.

> It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation omitted). We therefore dismiss Defendant's claim for ineffective assistance of counsel without prejudice to his ability to file a motion for appropriate relief in the trial court.

No plain error in part, dismissed in part.

Judges ERVIN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. DONUATTE MARQUISE WILKERSON

No. COA12-175

(Filed 16 October 2012)

1. Evidence—authentication—text message—substantial circumstantial evidence—defendant was sender

The trial court did not err in a felonious larceny after breaking and entering and felonious possession of stolen goods case by admitting the text message from defendant's cell phone. The State presented substantial circumstantial evidence tending to show that defendant was the sender of the text message at issue.

2. Probation and Parole—extended sentence—supported by the findings—imposition of punishment allowed

The trial court did not err in a felonious larceny after breaking and entering and felonious possession of stolen goods case by placing defendant on probation for sixty months. The trial court supported its rationale with evidence of phone calls and a text message which it found raised the seriousness of the offense.

Further, even if the trial court sought to impose punishment with the extended probation period, it was not contrary to our laws or to the purpose of our criminal justice system.

Appeal by Defendant from judgment entered 26 October 2011 by Judge Michael E. Beale in Hoke County Superior Court. Heard in the Court of Appeals 28 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Benjamin J. Kull, for the State.

William B. Gibson, for Defendant.

BEASLEY, Judge.

Donuatte Marquise Wilkerson (Defendant) appeals from judgment entered on his convictions for felonious larceny after breaking and entering and felonious possession of stolen goods. For the following reasons, we find no error.

On 28 August 2009, the victim, John Dintelmann reported a break-in at his home in Hoke County to police. He reported that a 52-inch flat screen Samsung television, some laptop computers, a desktop computer, a keyboard, speakers, a Wii game, several DVDs, a laundry basket, jewelry, and some change had been stolen from his home.

Earlier that same day, Phyllis Bethea, Mr. Dintelmann's neighbor who lived three houses down, observed a light-colored, "older model," large-sized car driving slowly up and down the street. She watched the car pass her house three times within five to ten minutes. Ms. Bethea testified that, initially, the driver was alone in the car and was on his cell phone. However, when the car passed her house again coming from the direction of Mr. Dintelmann's home, she observed more than one person in the car. She found the car suspicious and called police to report it. Ms. Bethea provided the police with two possible license plate numbers to the car. One of the plate numbers was registered to Defendant's car, a white, 1996 Lincoln Town Car.

The next day, Detective Sergeant Donald Schwab of the Hoke County Sheriff's Office went to Defendant's home and spoke with Defendant. Defendant's white 1996 Lincoln Town Car was parked at the residence, and Sergeant Schwab asked Defendant for his consent to search the car. Defendant consented, unlocked the car and opened the trunk. The trunk contained a laundry basket filled with several

"computer items" that matched the description of the stolen property. Sergeant Schwab seized this property and two cell phones from Defendant's pocket. One of the cell phones, a Nokia, was Defendant's and was serviced by T-Mobile.

At trial, the State presented testimony from Antoinette Moore, a T-Mobile Wireless records custodian. Ms. Moore provided "call details records" for Defendant's Nokia phone. She testified that a number of calls were made from or received by Defendant's phone on the day of the crime, starting at 10:56 a.m. and concluding at 1:24 p.m. Ms. Moore explained the process involved in transmitting cellular signals: calls made or received in a given area will be transmitted through the closest cell tower that is not busy. She provided the times, length, and tower locations of each call. Sergeant Schwab then testified that he visited each cell tower and plotted their locations on a map according to the time the call was received by the tower. The calls began and ended in Cumberland County, where Defendant resides, following a path to and from Hoke County with the calls hitting towers 1.5 and 1.7 miles from the victim's home in Hoke County.

Ms. Moore also testified that a text message was sent from Defendant's phone at 10:45 a.m. Pacific Daylight Time, based on T-Mobile records housed in Seattle, Washington. Sergeant Schwab testified that he searched the phone after seizing it and found a text message in the "sent" folder to a number labeled "work." On the phone itself, the message was time stamped at 2:45 p.m. on 28 August 2009, the day of the crime. It read, "I got a 64 inch flat Samsung."

During trial, in anticipation of the text message evidence and outside the presence of the jury, Defense counsel objected to its admission on the grounds that it could not be properly authenticated. The court heard from both parties and, before ruling, noted that the objection by Defense counsel was a motion *in limine*. Before ruling the message was admissible, the court required that the State first present evidence showing that the phone was in Defendant's possession, Defendant claimed the phone was his, Defendant's car was seen on the victim's street around the time of the crime, the phone records tend to establish a path of travel to the victim's residence and back to Defendant's residence, and a large Samsung flat screen television was stolen.

The jury found Defendant guilty of felonious larceny after breaking and/or entering, guilty of possession of stolen goods, and not guilty of felonious breaking and/or entering. The trial court arrested

judgment on the larceny conviction and sentenced Defendant to imprisonment for a period of six to eight months on the possession conviction, with sixty days active and the remainder suspended. The trial court also ordered five years of probation "in light of evicence [sic] in this case appears to be much more serious than a normal break/enter because of phone calls & text messages during the time of the crime."

[1] Defendant first argues that the trial court erred by admitting the text message from Defendant's cell phone as it was not properly authenticated under Rule 901 of the North Carolina Rules of Evidence with respect to who sent the message or at what time it was sent. N.C. Gen. Stat. § 8C-1, Rule 901(a) (2011). After careful review of all of the evidence on the record, we find no error.

A motion *in limine* "can be made in order to prevent the jury from ever hearing the potentially prejudicial evidence thus obviating the necessity for an instruction during trial to disregard that evidence if it comes in and is prejudicial." *State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980). "The decision of whether to grant . . . a motion [*in limine*] rests in the sound discretion of the trial judge." *State v. Hightower*, 340 N.C. 735, 746-47, 459 S.E.2d 739, 745 (1995). This Court has previously applied this standard of review to an appeal from a denied motion *in limine* based on admissibility of text messages under Rule 901 of the North Carolina Rules of Evidence. *State v. Taylor*, 178 N.C. App. 395, 412-15, 632 S.E.2d 218, 230-31 (2006). As the trial court here made clear that it was considering Defendant's objection as a motion *in limine*, we review Defendant's appeal for an abuse of discretion. "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).

Under Rule 901 "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a). The rule also provides a nonexclusive list of methods of acceptable authentication, including testimony from a knowledgeable witness "that a matter is what it is claimed to be[;]" "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances[;]" and "[e]vidence describing a process or system used to produce a result and showing that

the process or system produces an accurate result." N.C. Gen. Stat. § 8C-1, Rule 901(b)(1), (4), (9).

Defendant cites *Taylor*, in support of his assertion that because he was not specifically named as the sender in any of the texts, the authentication was not proper. However, Defendant misunderstands our ruling in *Taylor*. In *Taylor*, we affirmed the trial court's denial of the defendant's motion *in limine* to exclude text messages where expert witnesses testified as to the process employed in sending and receiving text messages and where circumstances indicated that the victim was the sender by identifying the victim twice by his first name and identifying the vehicle he would be driving. *Taylor*, 178 N.C. App. at 412-15, 632 S.E.2d at 230-31. Here, Defendant attempts to rely on the fact that the exact same identifying circumstances, largely his name, were not present in this case. Yet, this is not what *Taylor* requires. Relying on the language of Rule 901, we found "[t]he text messages contain[ed] sufficient circumstantial evidence that tends to show the victim was the person who sent and received them." *Id.* at 414, 632 S.E.2d at 230. Thus, the fact that the defendant was identified by name was merely a *circumstance* that satisfied the statute, not a specific requirement in and of itself.

Here, the State presented substantial circumstantial evidence tending to show that Defendant was the sender of the text message at issue. Defendant's car was seen driving up and down the victim's street on the day of the crime in a manner such that an eyewitness found the car suspicious and called police. The eyewitness provided a license plate number and a description of the car that both matched Defendant's car, and she testified that the driver appeared to be using a cell phone. The morning after the crime, the car was found parked in front of Defendant's home and some of the stolen property was found in the trunk. The phone was found on Defendant's person the following morning. Around the time of the crime, multiple calls were made from and received by Defendant's cell phone. The message itself referenced an item that was stolen: a large, flat-screen Samsung television. Further, similar to *Taylor*, by referencing the cell towers used to transmit the calls, expert witnesses established the time of the calls placed, the process employed, and a path of transit tracking the phone from the area of Defendant's home to the area of the victim's home and back.

Defendant argues that inconsistencies in the timing of the message resulting from the difference in time zones between where the

messages were sent and where the records were stored and time stamped negates the authenticity of the message. However, such issues in witness credibility are for the trial court to weigh in making its determination of authenticity and we see nothing in these facts to indicate this was done abusively. From the circumstances and testimony provided above, which the trial court carefully weighed, it is reasonable to find that Defendant was the sender of the text message. Consequently, we find the trial court did not abuse its discretion in denying Defendant's motion *in limine* to exclude the text message.

[2] Defendant next argues that the trial court erred by placing Defendant on probation for sixty months without making findings adequate to support the decision. We disagree.

"Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, ___ N.C. App. ___, ___, 708 S.E.2d 719, 721 (2011) (citations omitted). By statute, the maximum length of probation that the trial court may impose is thirty-six months "[u]nless the court makes specific findings that longer or shorter periods of probation are necessary." N.C. Gen. Stat. § 15A-1343.2(d) (2011). If such findings are made, the probation may extend up to five years (sixty months). *Id*. Yet the statute merely requires a finding that a longer term is needed; it does not require detailed rationale. *See State v. Mucci*, 163 N.C. App. 615, 625, 594 S.E.2d 411, 418 (2004)("[W]e must remand this case for re-sentencing in order for the trial court to either impose a probation term consistent with the statute or to make the appropriate finding of fact *that a longer probationary period is necessary*." (emphasis added and citation omitted)); *State v. Cardwell*, 133 N.C. App. 496, 509, 516 S.E.2d 388, 397 (1999)("The trial court may either reduce Defendant's probation to the statutory period or may enter *a finding that the longer period is necessary.*" (emphasis added)).

Here, the trial court went beyond the statutory requirement. It supported its rationale with the evidence of the phone calls and text message which it found raised the seriousness of the offense: "Prob length 60 mths in light of evicence [sic] in this case appears to be much more serious than a normal break/enter because of phone calls & text messages during the time of the crime." As such, we find no error.

Under this same argument, Defendant also contends that the extended probation was inappropriately imposed as a form of punishment rather than for reformation. However, this claim is without

merit. As the State correctly points out, the North Carolina General Statutes provide several purposes behind criminal sentencing, including "punishment commensurate with the injury . . . caused" among them. N.C. Gen. Stat. § 15A-1340.12 (2011). Thus, even if Defendant is correct that the trial court sought to impose punishment, this is not contrary to our laws or to the purpose of our criminal justice system.

No Error.

Judges MCGEE and THIGPEN concur.

CHARLES LESTER THORPE AND MARY LOUISE THORPE, ADMINISTRATORS OF THE ESTATE OF CHARLES LEAMON THORPE, PLAINTIFFS v. TJM OCEAN ISLE PARTNERS LLC; COASTAL STRUCTURES CORPORATION; COASTAL CAROLINA CONSTRUCTION AND DEVELOPMENT INC.; UNIDENTIFIED VESSEL, DEFENDANTS

No. COA12-99-2

(Filed 16 October 2012)

Wrongful Death—inherently dangerous activity—contributory negligence—no admiralty jurisdiction

The trial court did not err in a wrongful death case by granting defendants' motions for summary judgment on all claims. While the facts presented some indicia of inherently dangerous activity from the combination of construction work, water, and electricity, plaintiffs' claims were barred as a matter of law under the doctrine of contributory negligence. Decedent knew about the regulatory violations and the associated danger, but proceeded with his work anyway. Further, plaintiff's claims did not fall within admiralty jurisdiction.

Appeal by Plaintiffs from order entered 28 September 2011 by Judge Robert F. Floyd in Brunswick County Superior Court. Heard in the Court of Appeals 5 June 2012. Petition for Rehearing granted 6 September 2012.

Hodges & Coxe, PC, by Bradley A. Coxe, for Plaintiff-appellants.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Justin K. Humphries and Andrew J. Hanley, for Defendant-appellee TJM Ocean Isle Partners LLC.

Cranfill Sumner & Hartzog LLP, by Colleen N. Shea, Melody J. Jolly, and Carolyn C. Pratt, for Defendant-appellee Coastal Structures Corporation.

Williams Mullen, by Rebecca A. Scherrer and H. Mark Hamlet, for Defendant-appellee Coastal Carolina Construction and Development, Inc.

HUNTER, JR., Robert N., Judge.

This is a wrongful death action arising from the electrocution of Charles Leamon Thorpe ("Thorpe") while he was building a pier in Ocean Isle Beach, North Carolina. The administrators of Thorpe's estate, Charles Lester Thorpe and Mary Louise Thorpe ("Plaintiffs"), appeal from the trial court's order granting summary judgment in favor of all defendants. An opinion affirming the trial court's order was filed by this Court on 7 August 2012. Plaintiffs filed a Petition for Rehearing, which was granted on 6 September 2012. Upon reexamination, we affirm the trial court's order, but we modify the originally filed opinion. This opinion supersedes the previous opinion filed 7 August 2012.

I. Factual & Procedural Background

In late 2006, Defendant TJM Ocean Isle Partners LLC ("TJM") purchased the Pelican Point Marina in Ocean Isle Beach, with the intent to refurbish and expand the marina facilities and to reopen the marina as the Ocean Isle Marina & Yacht Club ("Ocean Isle"). Part of the expansion plan consisted of adding floating docks to the marina. Access to one of these docks required installation of a ramp, which would run from the end of a newly built wooden pier down to the dock below. TJM retained Defendant Coastal Structures Corporation ("Coastal Structures") to build the pier and install the ramp, and Coastal Structures, in turn, subcontracted with Coastal Carolina Construction and Development, Inc. ("Coastal Carolina") to build the pier.

During the week of 13 June 2008, Coastal Structures informed Coastal Carolina's owner, Jeremy Ridenhour ("Ridenhour"), that the pier needed to be built by the end of the week. TJM was eager to provide dock access to its customers at Ocean Isle during the summer boating season. Ridenhour was busy with another project, however, so he referred Coastal Structures to his longtime friend, Charles Leamon Thorpe ("Thorpe") d/b/a Buck's Construction.

Thorpe arrived at Ocean Isle on the morning of 13 June 2008 with four employees.[1] When Thorpe's employees inquired where they could obtain power for their tools, they were told[2] to use an outlet in the Sailfish Building, one of the marina's two boat storage buildings. One of Thorpe's employees went to plug an extension cord into the outlet and observed there was no Ground Fault Circuit Interrupter ("GFCI") protection. Another member of Thorpe's crew confirmed the outlet was not GFCI protected and reported this to Thorpe. Thorpe responded by telling his crew to "get to work."

That afternoon, Thorpe decided cross-braces needed to be installed between two of the pier's wooden uprights. Thorpe asked one of his crew to install the cross-braces, but the crewman refused, citing the dangers of drilling so close to the water. Thorpe himself began the task, which required predrilling pilot holes into the wooden uprights. The lower holes were in close proximity to the water line, requiring Thorpe to sit on the edge of the floating dock with his legs dangling inches above the water. Recognizing the danger of the situation, one of Thorpe's employees urged Thorpe to hold off on the work until the next morning when the tide would be lower. Another worker observed Thorpe working and warned him "he couldn't be more dangerous if he was standing in the water."

Plaintiffs allege that a few minutes later, while Thorpe was drilling the lower holes, a twenty-six-foot Bayliner boat passed by the marina at an excessive rate of speed,[3] causing a large wake. The wake washed over the drill in Thorpe's hands, subjecting Thorpe to an electric shock. Because the drill was not connected to a GFCI-protected outlet, the power to the drill did not automatically shut off. The continuing shock contracted Thorpe's muscles, freezing his grip on the drill and pulling him into the water. From the water, Thorpe yelled "unplug me." One of Thorpe's crew unplugged the drill and pulled him out of the water. Thorpe was administered CPR and transported to Brunswick Community Hospital, where he was pronounced dead at 3:32 p.m. The official cause of death was described as electrocution caused by an electric drill coming into contact with the water.

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1. Coastal Structures and Coastal Carolina dispute who actually contracted with Thorpe to perform the work at the marina.

2. It is unclear from the record whether an employee of TJM or of Coastal Structures told Thorpe's employees where to obtain power for their tools.

3. Plaintiffs claim the boat's speed was excessive in light of the no-wake signs flanking either side of the marina.

On 10 March 2010, Plaintiffs filed a complaint in Brunswick County Superior Court, alleging claims of negligence and wrongful death and naming TJM, Coastal Structures, and Coastal Carolina (together, "Defendants") as defendants. Plaintiffs' complaint additionally named an Unidentified Vessel (the boat that allegedly caused the wake) as a defendant, but this vessel was never identified and consequently was never a party to Plaintiffs' suit. Plaintiffs' complaint originally cited the saving-to-suitors clause in 28 U.S.C. § 1333 as the source of the trial court's jurisdiction over their claims. Pursuant to an order entered 11 June 2010, Plaintiffs amended their complaint to include N.C. Gen. Stat. § 7A-240 as an alternative source of the trial court's jurisdiction.

Each defendant timely filed an answer, denying liability on all claims. Each defendant also filed cross-claims against the other defendants for indemnification and contribution. In addition, Defendant Coastal Carolina filed third-party claims for indemnification and contribution against Charles Lester Thorpe, Thorpe's father and one of the administrators of Thorpe's estate, for allegedly providing the drill that contributed to Thorpe's death.

Following discovery, each defendant moved for summary judgment on all claims. At or about this time, the Guardian Ad Litem representing Thorpe's minor son moved to intervene in the case pursuant to N.C. Gen. Stat. § 1A-1, Rule 24. These matters came on for hearing in Brunswick County Superior Court on 27 September 2011, Judge Robert F. Floyd presiding. By order entered 28 September 2011, the trial court granted summary judgment in favor of all defendants on all claims. The order dismissed without prejudice the Guardian Ad Litem's motion to intervene, Defendants' cross-claims, and Coastal Carolina's third-party claim as moot. Plaintiffs timely filed notice of appeal with this Court on 5 October 2011.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011), as Plaintiffs appeal from a final order of the superior court as a matter of right.

III. Analysis

Plaintiffs contend the trial court erred in granting Defendants' motions for summary judgment on all claims. We disagree, and we affirm the trial court's ruling.

"This Court reviews orders granting summary judgment de novo." *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007). When moving for summary judgment, the movant has the burden to show "(1) an essential element of the non-movant's claim is nonexistent, (2) the non-movant cannot produce evidence to support an essential element of his claim, or (3) the non-movant cannot surmount an affirmative defense which would bar his claim." *Taylor v. Ashburn*, 112 N.C. App. 604, 606-07, 436 S.E.2d 276, 278 (1993). "Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *Lilley v. Blue Ridge Elec. Membership Corp.*, 133 N.C. App. 256, 258, 515 S.E.2d 483, 485 (1999). "A court ruling upon a motion for summary judgment must view all the evidence in the light most favorable to the non-movant, accepting all its asserted facts as true, and drawing all reasonable inferences in its favor." *Id.*

Plaintiffs contend the trial court erred in granting Defendants' motions for summary judgment because Defendants violated their nondelegable duty of care to provide a safe workplace. Plaintiffs recognize the general rule that neither a general contractor nor a land-owner who hires a general contractor owes a duty to a subcontractor's employees, *see Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991), but argue this case falls within an exception to the general rule because the subcontracted work was inherently dangerous, *see id.* at 356, 407 S.E.2d at 238 (recognizing the "inherently dangerous" exception). In the alternative, Plaintiffs argue Defendants violated their duty of ordinary care to Thorpe under a theory of common law premises liability. While we note that the facts in the instant case present some indicia of inherently dangerous activity—for instance, the combination of construction work, water, and electricity—we need not reach the issue of Defendants' duty of care, as we hold Plaintiffs' claims are barred as a matter of law under the doctrine of contributory negligence.

Under North Carolina law, a plaintiff is completely barred from recovering for any injury proximately caused by the plaintiff's contributory negligence. *Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 401, 549 S.E.2d 867, 869 (2001). Federal admiralty law, on the other hand, applies the doctrine of comparative negligence, according to which a plaintiff's negligence reduces the plaintiff's recovery in direct proportion to the plaintiff's fault. *Pope & Talbot, Inc. v. Hawn*, 346

U.S. 406, 409 (1953). Plaintiffs contend this is an admiralty case requiring application of comparative negligence, not contributory negligence. We conclude the doctrine of contributory negligence applies because Plaintiff's claim does not fall within admiralty jurisdiction.

"The [federal] district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (2006). The saving-to-suitors clause "allows state courts to entertain *in personam* maritime causes of action," subject to the condition that any remedy provided be consistent with federal maritime standards. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222–23 (1986).

In determining whether admiralty jurisdiction is appropriate in this case, we apply the test set out in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). The first prong of the *Grubart* analysis asks whether the tort occurred on navigable waters or whether the injury suffered on land was caused by a vessel on navigable waters. *Id.* at 534. This is known as the "location test." *See id.* The second step of the analysis, known as the "connection test," raises two issues. First, we must determine if the incident had a "potentially disruptive impact on maritime commerce[.]" *Id.* (quoting *Sisson v. Ruby*, 497 U.S. 358, 364 n.2 (1990)). If so, we then evaluate whether the activity giving rise to the incident had a "substantial relationship to traditional maritime activity." *Id.* A party seeking to invoke federal admiralty jurisdiction pursuant to the savings-to-suitors clause over a tort claim must satisfy both the location and connection tests. *Id.*

We determine Plaintiffs' claims cannot survive the first half of the *Grubart* analysis, "the location test." The tort at issue in this case did not occur on navigable waters, as "it has been uniformly held that piers, docks, wharves and similar structures extending over navigable waters are extensions of land, though their use and purpose be maritime." *Hastings v. Mann*, 340 F.2d 910, 911 (4th Cir.), *cert. denied*, 380 U.S. 963 (1965). Thus, Plaintiffs' claims are not cognizable in admiralty unless the injury was caused by a vessel on navigable waters. *Id.*

Plaintiffs acknowledge that the "caused by a vessel" portion of *Grubart*'s location test stems from the language of the Admiralty Jurisdiction Extension Act of 1948, 46 U.S.C. § 30101 (2006). In *Pryor v. Am. President Lines*, the 4th Circuit explained that:

> Congress passed the Act "specifically to overrule or circumvent" a line of Supreme Court cases holding that maritime law did not extend to torts culminating in injury on land even when a ship on navigable waters was clearly the proximate cause. There is no indication in the legislative history that Congress intended to go further and extend maritime law to land-based torts where a ship is not at fault, *but supplies only a fortuitous but-for connection with an injury.*

Pryor, 520 F.2d 974, 979 (4th Cir. 1975) (citing *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209, 209 n.8 (1971)) (emphasis added).

Accordingly, the court in *Pryor* held "that *a ship or its appurtenances must proximately cause an injury* on shore to invoke the Admiralty Extension Act and the application of maritime law." *Id.* (emphasis added). Our Court has concurred in this assessment. *See Wolfe v. Wilmington Shipyard, Inc.*, 135 N.C. App. 661, 666–67, 522 S.E.2d 306, 310 (1999) (citing *Pryor* and holding a plaintiff's claim not subject to admiralty jurisdiction where the injury occurred on land and was caused by neither the ship itself nor its appurtenances).

Plaintiffs allege the injury in this case occurred while Thorpe was standing on a dock, when wake from a passing vessel washed over his drill. Plaintiffs contend this fact is sufficient to invoke admiralty jurisdiction. However, wake from a vessel can only be considered "appurtenant" to that vessel in the loosest sense of the word. Therefore, it cannot be said that the injury in this case was "caused by a vessel on navigable waters," in that neither the ship itself, nor its appurtenances, proximately caused an injury on land. Ultimately, the facts of this case suggest the potential existence of a "land-based tort[ ] where a ship is not at fault, but supplies only a fortuitous but-for connection with an injury." *Pryor*, 520 F.2d at 979. Therefore, Plaintiffs' claim is not cognizable in admiralty, and the law of North Carolina contributory negligence applies.

We then turn to the issue of whether Thorpe's conduct in the instant case bars Plaintiffs' recovery as a matter of law. As previously stated, under North Carolina law, a defendant can raise the plaintiff's contributory negligence as an affirmative defense to bar the plaintiff's claim in its entirety. *Sawyer*, 144 N.C. App. at 401, 549 S.E.2d at 869. To prove a plaintiff's contributory negligence, the defendant must demonstrate (1) that the plaintiff failed to act with due care and (2) such failure proximately caused the injury. *Shelton v. Steelcase*, 197 N.C. App. 404, 424, 677 S.E.2d 485, 499 (2009). Where the plaintiff is

injured by an unsafe condition, "[t]he doctrine of contributory negligence will preclude a defendant's liability if the [plaintiff] actually knew of the unsafe condition or if a hazard should have been obvious to a reasonable person." *Allsup v. McVille, Inc.*, 139 N.C. App. 415, 416, 533 S.E.2d 823, 824 (2000), *aff'd*, 353 N.C. 359, 543 S.E.2d 476 (2001) (per curiam). Because a reasonable care standard is used to determine a plaintiff's negligence, the question of contributory negligence is ordinarily one for the jury. *Sawyer*, 144 N.C. App. at 401, 549 S.E.2d at 869-70. However, " '[w]here the evidence is uncontroverted that a party failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of the injury,' summary judgment is appropriate." *Id.* at 401, 549 S.E.2d at 870 (citation omitted).

Here, the evidence is uncontroverted that Thorpe was aware that the drill he was using was plugged into an outlet that lacked GFCI protection. Thorpe was alerted to this fact but responded simply by telling his employees to "get to work." At least two people warned Thorpe about the danger he was exposing himself to by drilling so close to the surface of the water. One of his employees suggested that he come back in morning, when the tide was low. Another worker noticed Thorpe sitting on the deck and warned him about the danger.

Plaintiffs argue that Thorpe was not negligent because he could *assume* the electrical outlet he was using was GFCI protected, as required by the North Carolina Electrical Code. *See* N.C. Electrical Code §§ 555.19(B)(1), 590.6(A) (2008) (requiring GFCI protection on electrical receptacles in boathouses and when a receptacle is temporarily used for construction). For this proposition, Plaintiffs cite *Shelton*, where this Court held that " 'one is not required to anticipate the negligence of others; *in the absence of anything which gives or should give notice to the contrary*, one is entitled to assume and to act on the assumption that others will exercise ordinary care for their own or others' safety.' " 197 N.C. App. at 425, 677 S.E.2d at 500 (emphasis added) (quoting *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 469, 279 S.E.2d 559, 563 (1981)). Plaintiffs' reliance on *Shelton* is misplaced because *Shelton* speaks in terms of an assumption in the absence of notice. Thorpe was aware the outlet he was using had no GFCI protection. Once he was aware of that, he could no longer assume there was GFCI protection because the North Carolina Electrical Code or any other regulations required it.

We note that this Court's ruling in *Sawyer* supports our conclusion. In *Sawyer*, the plaintiff was installing acoustic ceiling tiles in a

grocery store when the wheels of the rolling scaffolding he was standing on slipped into an open hole in the floor, causing the scaffold to collapse and throwing him to the ground. 144 N.C. App. at 400, 549 S.E.2d at 869. The hole was one of many left open by another independent contractor on site. *Id.* Before his fall, the plaintiff noticed the holes and talked to the general contractor's supervisor about them. *Id*. The plaintiff even attempted to cover the holes, but when he was unable to find anything to use as a cover, he went forward installing the tiles, with the wheels of his scaffolding unlocked and mere inches from a hole. *Id*. at 400, 549 S.E.2d at 869. The plaintiff argued that the independent contractor violated OSHA regulations by leaving the holes uncovered. *Id*. at 400–01, 549 S.E.2d at 869. Although this Court agreed with the plaintiff that the independent contractor may have violated OSHA regulations, thereby providing sufficient evidence to survive summary judgment on the issue of the independent contractor's negligence, we nevertheless held the plaintiff's contributory negligence could be determined as a matter of law, and his claims were barred. *Id*. at 401-02, 549 S.E.2d at 869–70.

Like the plaintiff in *Sawyer*, Thorpe knew about the regulatory violations and the associated danger but proceeded with his work. We accordingly conclude that even if Defendants owed Thorpe a duty of care, Thorpe's contributory negligence barred Plaintiffs' claims as a matter of law. We hold the trial court did not err in granting Defendants' motions for summary judgment on all claims.

IV. Conclusion

For the foregoing reasons, the trial court's order is

AFFIRMED.

Chief Judge Martin and Judge Elmore concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 OCTOBER 2012)

AFFORDABLE HOUS. GRP. OF N.C., INC. v. TOWN OF MOORESVILLE No. 12-435	Iredell (11CVS1274)	Affirmed
BOBBITT v. EIZENGA No. 12-464	Davie (10CVD13)	Vacated and Remanded
DERIAN v. DERIAN No. 12-113	Orange (03CVD925)	Affirmed
FIELDS v. CITY OF GOLDSBORO No. 12-402	Wayne (10CVS2430)	Affirmed in part; dismissed in part
HOMESHIELD VINYL SIDING & WINDOWS, INC. v. PARKER & ORLEANS HOMEBUILDERS, INC. No. 11-1465	Wake (10CVS7754)	Vacated
HUDGINS v. RLB MGMT., INC. No. 12-218	Mitchell (08CVS271)	Affirmed
IN RE BRIGHT'S CREEK LOT 71, LLC No. 12-69	Polk (11SP80)	Affirmed
IN RE R.D. No. 12-437	Alamance (11JB85)	Affirmed in Part; Reversed and Remanded in Part.
IN RE RICHARDSON No. 12-376	Granville (11SPC3017)	Reversed
MCKYER v. MCKYER No. 11-1476	Mecklenburg (00CVD9237)	Affirmed
METTS v. METTS No. 12-426	New Hanover (08CVD1829)	Affirmed
SMITH v. SMITH No. 11-1381	Vance (10CVS239)	Dismissed
STATE v. ALMOGADED No. 12-220	Wayne (09CRS54072)	No Error

STATE v. ANDERSON No. 12-332	Wilson (10CRS54299)	No Error
STATE v. BARNHILL No. 12-264	Randolph (09CRS56732)	Dismissed
STATE v. BOYD No. 12-75	Scotland (09CRS53274) (10CRS439) (11CRS224)	No Error
STATE v. CAPPS No. 12-312	Moore (09CRS54948)	No Error
STATE v. CUNNINGHAM No. 12-23	Mecklenburg (09CRS225452) (10CRS64271)	No Error
STATE v. DAWSON No. 12-314	Lenoir (09CRS54123-24) (09CRS54149-50) (09CRS54153) (09CRS54171-72) (09CRS54402) (11CRS1073) (11CRS897-899)	No Error
STATE v. DOUGLAS No. 12-261	Mecklenburg (11CRS12431) (11CRS200440)	No Error
STATE v. FARROW No. 12-174	Durham (08CRS44888)	No Error
STATE v. GLOVER No. 12-411	Mecklenburg (10CRS235005) (10CRS235007)	No Error as to Trial. Remanded for Re-sentencing.
STATE v. HARVEY No. 12-82	Sampson (10CRS52009)	No Error
STATE v. HUBBARD No. 11-1577	Onslow (07CRS53167)	No Error
STATE v. KEEVER No. 12-342	Mecklenburg (08CRS227700-06) (08CRS227712-16) (08CRS227720-27)	No Error

STATE v. KELLY No. 12-141	Mecklenburg (09CRS205977)	No Error
STATE v. LEJEUNE No. 12-208	Cumberland (07CRS68729) (09CRS50434)	Affirmed
STATE v. MCMILLIAN No. 12-225	Hoke (09CRS52570)	No Error
STATE v. MCRAE No. 12-180	Cumberland (06CRS64034)	No prejudicial error in part, no error in part.
STATE v. MULLIS No. 12-192	Stanly (08CRS51241)	No Prejudicial Error
STATE v. NEFF No. 12-108	Buncombe (10CRS51797-801) (10CRS51804-805) (10CRS700213)	Affirmed
STATE v. PATTERSON No. 12-404	Cleveland (04CRS54090)	Affirmed
STATE v. SMITH No. 12-280	Moore (09CRS50880-83) (09CRS50892-93) (10CRS474)	Affirmed in part; Reversed and remanded in part
STATE v. SMITH No. 12-311	Mecklenburg (10CRS254349) (11CRS9421)	Appeal Dismissed; petition for writ of certiorari Granted; Reversed and Remanded
STATE v. VASQUEZ No. 12-346	Robeson (09CRS55921) (09CRS55922)	No prejudicial error
VC3, INC. v. VANGUARD WIRELESS TECHS., LLC No. 12-441	Mecklenburg (11CVS1495)	Dismissed
VEITIA v. MULSHINE BUILDERS LLC No. 12-309	Watauga (10CVS794)	Dismissed in part, affirmed in part.

BRADEN v. LOWE

[223 N.C. App. 213 (2012)]

MARION S. BRADEN, ADMINISTRATRIX OF THE ESTATE OF GREGORY ALAN BRADEN, M.D., DECEASED, PLAINTIFF-APPELLANT v. STEPHAN B. LOWE, M.D.; ORTHOPAEDIC SPECIALISTS OF THE CAROLINAS, P.A.; NOVANT HEALTH, INC.; FORSYTH MEMORIAL HOSPITAL, INC.; NOVANT HEALTH; FORSYTH MEDICAL CENTER; CAROLINA MEDICORP ENTERPRISES, INC.; PIEDMONT MEDICAL SPECIALISTS, P.L.L.C.; AND RICHARD S. MARX, M.D., DEFENDANTS-APPELLEES.

No. COA12-211

(Filed 6 November 2012)

Medical Malpractice—Rule 9(j) certification—expert qualifications—reasonable expectation

The trial court erred by granting defendants' motion to dismiss in a medical malpractice action. Plaintiff could have reasonably expected Dr. Alleyne to qualify as an expert for purposes of N.C.G.S. § 1A-1, Rule 9(j).

Appeal by Plaintiff from judgment entered 21 July 2011 by Judge John O. Craig in Superior Court, Forsyth County. Heard in the Court of Appeals 25 September 2012.

Cozen O'Connor, by Kimberly Sullivan and Christopher C. Fallon, Jr., for Plaintiff-Appellant.

Carruthers & Roth, P.A., by Norman F. Klick, Jr. and Robert N. Young, for Defendants-Appellees Stephan B. Lowe, M.D. and Orthopaedic Specialists of the Carolinas, P.A.

McGEE, Judge.

Marion S. Braden, Administratrix of the Estate of Gregory Alan Braden, M.D., (Plaintiff) filed a complaint on 3 August 2009 against Stephan B. Lowe, M.D. (Dr. Lowe); Orthopaedic Specialists Of The Carolinas, P.A. (OSC); Novant Health, Inc.; Forsyth Memorial Hospital, Inc.; Novant Health; Forsyth Medical Center; Carolina Medicorp Enterprises, Inc.; Piedmont Medical Specialists, P.L.L.C.; and Richard S. Marx, M.D. Plaintiff's complaint set forth causes of action for negligence, wrongful death, and *res ipsa loquitur* arising from treatment Gregory Alan Braden, M.D. (Dr. Braden) received during December 2004 and early 2005. Pursuant to N.C. Gen. Stat. § 1A-1, Rules 9(j) and 12, Dr. Lowe and OSC (together, Defendants) filed a motion to dismiss Plaintiff's complaint on 18 April 2011. The trial court granted Defendants' motion to dismiss by order entered 21

July 2011. Plaintiff filed a voluntary dismissal with prejudice on 4 August 2011, dismissing her claims against Novant Health, Inc.; Forsyth Memorial Hospital, Inc.; Novant Health; Forsyth Medical Center; Carolina Medicorp Enterprises, Inc.; Piedmont Medical Specialists, P.L.L.C.; and Richard S. Marx, M.D. Plaintiff appeals.

I. Facts

Plaintiff's complaint alleged the following: Dr. Braden suffered from diabetes, gout, and cellulitis, which affected his extremities. As a result of his condition, Dr. Braden sought treatment from Defendants on 2 December 2004. Dr. Lowe performed an incision and drainage procedure on Dr. Braden's left great toe. Dr. Braden's toe became infected and Dr. Braden was later diagnosed with a MRSA staph infection. Dr. Braden was placed on six weeks of intravenous antibiotic treatment on 7 January 2005. On 15 January 2005, Dr. Lowe amputated Dr. Braden's left great toe, which had grown worse as a result of the infection.

In his pre-operative and post-operative orders regarding the amputation of Dr. Braden's toe, Dr. Lowe did not include Dr. Braden's intravenous antibiotic treatments. Plaintiff alleged that, as a result of Dr. Lowe's orders, Dr. Braden did not receive his intravenous antibiotics from 14 January to 23 January. Plaintiff alleged that Dr. Lowe went to Dr. Braden's hospital room and apologized for not having continued Dr. Braden's antibiotic treatment plan. On 13 August 2007, Dr. Braden died from respiratory and cardiac conditions that Plaintiff alleged were "brought on in part by the ravages of the infections that [Dr. Braden] had suffered and the physical immobility that resulted."

II. Plaintiff's Expert and Defendants' Motion to Dismiss

Plaintiff's complaint contains the following allegation:

> The medical care which is the subject of this Complaint has been reviewed by a health care provider who Plaintiff reasonably believes will qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is willing to testify that the medical care complained of did not meet the applicable standards of care.

Defendants filed an interrogatory seeking the identification of Plaintiff's expert witness and Plaintiff filed a response identifying Dr. William F. Alleyne II (Dr. Alleyne). Dr. Alleyne was deposed on 7 March 2011. After Dr. Alleyne's deposition, Defendants filed their motion to dismiss Plaintiff's complaint on the following grounds:

4. Plaintiff's Complaint violates Rule 9(j) as Plaintiff's Rule 9(j) expert is not reasonably expected to qualify as an expert witness pursuant to Rule 702 of the North Carolina Rules of Evidence.

5. Rule 702 provides that if a party against whom testimony is offered as a specialist, the expert witness must specialize in the same or similar specialty which includes within its specialty the performance of the procedure that is the subject of the Complaint and have prior experience treating similar patients.

6. Plaintiff's Rule 9(j) expert, Dr. William Alleyne, does not specialize in the same or similar specialty as . . . Defendants.

7. Specifically, Defendant Dr. Lowe is an orthopedic surgeon. However, Plaintiff's Rule 9(j) expert specializes in internal medical, pulmonary diseases and critical care medicine. Dr. Alleyne testified at his deposition that internal medicine, pulmonary diseases and critical care are not the same or similar specialty as orthopedic surgery and he has never specialized in the practice of orthopedics or similar specialty.

The trial court's judgment granting Defendants' motion to dismiss contains the following language:

[T]he Court finds as fact and concludes as law that Defendants' Motion shou1d be allowed as William Alleyne, M.D., Plaintiff's Ru1e 9(j) expert was not a person who cou1d have reasonably been expected to qualify as an expert witness under Ru1e 702 of the North Carolina Ru1es of Evidence.

Moreover, after the [c]ourt communicated its decision in the Motion, the Plaintiff filed a Motion for Reconsideration pursuant to rules 58 and 60 of the North Carolina Rules of Civil Procedure, which, in the interest of expediency, the [c]ourt will treat as timely filed. The [c]ourt has carefully considered . . . Plaintiff's Motion for Reconsideration, along with the accompanying materials and affidavit. The [c]ourt finds that . . . [P]laintiff's proposed expert, Dr. Alleyne, practiced in a similar specialty to that of . . . [D]efendant Dr. Lowe, insofar as the procedure for restarting antibiotics following an auto-stop, but the record does not establish that [Dr.] Alleyne participated in such activity during the twelve months preceding January 15, 2005. In its discretion, the [c]ourt will deny the Motion for Reconsideration. The Court will allow Dr. Alleyne's supplemental affidavit, which accompanied . . . [P]laintiff's motion

for reconsideration, to be made a part of the record in this case, in the event of an appeal.

III. Issues on Appeal

Plaintiff raises on appeal the issues of whether: (1) the trial court erred in granting Defendants' motion to dismiss because Plaintiff "met the expert certification requirements of Rule 9(j) prior to the filing of her complaint[;]" (2) the trial court erred in granting Defendants' motion to dismiss on the grounds that Plaintiff's expert did not participate in a similar procedure within the year prior to the acts giving rise to Plaintiff's complaint "because Plaintiff's expert did in fact participate in such a procedure multiple times during the prior year[;]" (3) the trial court erred in granting Defendants' motion to dismiss because Rule 9(j) does not actually contain a "one-year participation requirement[;]" (4) the trial court erred in granting Defendants' motion to dismiss because the motion was not timely filed and "any objections to the qualifications of the Rule 9(j) expert should have been deemed waived[;]" and (5) the trial court erred in granting Defendants' motion to dismiss because "Plaintiff properly pled ordinary negligence[.]"

IV. Standard of Review

N.C. Gen. Stat. § 1A-1, Rule 9(j) provides the following requirements for the pleading of a medical malpractice action:

> 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 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;
>
> (2) 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 that the complainant will seek to have qualified as an expert witness by motion under

> Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.
>
> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension. The plaintiff shall provide, at the request of the defendant, proof of compliance with this subsection through up to ten written interrogatories, the answers to which shall be verified by the expert required under this subsection. These interrogatories do not count against the interrogatory limit under Rule 33.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2011) (emphasis added).

"Whether the pleader could reasonably expect the witness to qualify as an expert under Rule 702 presents a question of law and is therefore reviewable *de novo* by this Court." *Trapp v. Maccioli*, 129 N.C. App. 237, 241 n. 2, 497 S.E.2d 708, 711 n. 2 (1998) (citation omitted). *See also Phillips v. Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (citations omitted) ("[A] plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*."). "This Court inquires as to whether [the] plaintiff reasonably expected [the experts] to qualify as expert witnesses pursuant to Rule 702, *not* whether they ultimately will qualify." *Grantham v. Crawford*, 204 N.C. App. 115, 118, 693 S.E.2d 245, 248 (2010) (emphasis added). " 'In other words, were the facts and circumstances known or those which should have been known to the pleader such as to cause a reasonable person to believe that the witness would qualify as an expert under Rule 702.' " *Id.* at 118-19, 693 S.E.2d 245 (citations omitted).

Further, " 'it is also now well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate.' " *Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr.*, 199 N.C. App. 425, 437, 681 S.E.2d 840, 849 (2009) (citation omitted).

> What must be established in discovery is not whether the witness is "in fact not an expert[,]" but whether "there is ample evidence in th[e] record that a reasonable person armed with the knowledge of the plaintiff at the time the pleading was filed would have believed that [the witness] would have qualified as an expert under Rule 702."

Id. 437-38, 681 S.E.2d 840 (citation omitted).

N.C. Gen. Stat. § 8C-1, Rule 702 provides the following concerning the qualification of experts to testify in medical malpractice actions:

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
>
> b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
>
> (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
>
> a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active

clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

N.C. Gen. Stat. § 8C-1, Rule 702 (2011).

V. Analysis

In the present case, Plaintiff's complaint contains a rule 9(j) certification. Thus, it remains to be determined whether Plaintiff, at the time of filing her complaint, could reasonably have had an expecta-

tion that Dr. Alleyne would qualify as an expert at a subsequent trial. Plaintiff contends that she had a "reasonable expectation of compliance with the three basic elements of Rule 702" because:

> 1) Dr. Alleyne is a licensed health care provider in this State; 2) Dr. Alleyne specializes in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and he has prior experience treating similar patients; and 3) during the year immediately preceding January 2005, Dr. Alleyne devoted a majority of his professional time to the active clinical practice of a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and has prior experience treating similar patients.

We first note that, on appeal, Plaintiff and Defendants appear to have a difference of opinion concerning the characterization of the procedure giving rise to this complaint. Defendants argue that the procedure was the amputation of Dr. Braden's toe. Plaintiff argues that the procedure was the continuance of antibiotics following Dr. Braden's surgery. The trial court found that Dr. Alleyne "practiced in a similar specialty to that of . . . [D]efendant Dr. Lowe, insofar as the procedure for restarting antibiotics following an auto-stop[.]" Plaintiff does not contend the trial court erred in that finding, nor do Defendants. We conclude the trial court's determination that Drs. Alleyne and Lowe practiced in a similar specialty with respect to the procedure governing antibiotics was without error.

The trial court's reasoning for granting Defendants' motion to dismiss turned not on the specialization of the procedure, but rather on whether Dr. Alleyne had participated in such a procedure within the relevant time frame: "[T]he record does not establish that [Dr.] Alleyne participated in such activity during the twelve months preceding January 15, 2005." Thus, it appears to this Court that the trial court found that Plaintiff could not reasonably expect Dr. Alleyne to qualify as an expert based solely on the N.C.G.S. § 8C-1, Rule 702 requirement that the expert must have performed the procedure within the year preceding the events giving rise to Plaintiff's complaint. We disagree with the trial court's conclusion.

Dr. Alleyne's deposition contained the following exchanges:

> Q. Okay. So therefore since certainly 2000 you've never been in Dr. Lowe's position where you had a patient who was on antibiotics that you took to the OR whose antibiotics were stopped

because you took them to the OR and you were then faced with the decision whether to restart the antibiotics; correct?

A. I disagree.

Q. Since 2000?

A. Since 2000 I have been in a situation, several situations, where we took a patient for bronchoscopy; following the bronchoscopy, we had to rewrite all of the orders and, therefore, had to rewrite antibiotics that had been stopped because I took a patient to a procedure.

Q. That's not my question. My question is: Since 2000 have you taken a patient to the OR?

A. That is correct; I have not.

Q. Okay. So since 2000 you've never taken a patient to the OR; correct?

A. That is correct.

Q. So since 2000 you never took a patient to the OR who was on antibiotics; correct?

A. That is correct.

Q. So since 2000 you've never taken a patient who - to the OR who is on antibiotics whose antibiotics were stopped because of your surgical procedure; correct?

A. That is correct.

Q. So, therefore, since 2000 you've never had a patient who was on antibiotics that you took to the OR whose antibiotics were stopped because you took them to the OR and you were then faced with the decision of whether to restart the antibiotics---

MS. SULLIVAN: Objection.

Q. ---correct?

MS. SULLIVAN: Objection.

A. Correct, to the extent that "taken to the OR."

Dr. Alleyne also submitted a supplemental affidavit, which the trial court made a part of the record, in which Dr. Alleyne stated:

> In 1999 or 2000 I became the Director of Respiratory Therapy at Piedmont Medical Center and regularly performed various inpatient invasive procedures, including bronchoscopies, which I continue to do to this day and did in 2004. These invasive procedures brought into play the automatic stoppage of medications including antibiotics. In 2004, I worked full time in the ICU Department at Piedmont Medical Center. As a result, on a daily basis in 2004 I had to re-start intravenous antibiotics in patients whose antibiotics had been discontinued by hospital auto-stop policies due to invasive procedures or other operative procedures. During 2004, on at least a weekly basis I reordered the intravenous antibiotic Vancomycin, which has the same indication as Daptomycin for treatment of MRSA infections.

Thus, it is clear that Dr. Alleyne stated that he had performed auto-stop antibiotic procedures "since 2000," including "on a daily basis in 2004[.]" We are persuaded that Dr. Alleyne's statements, "since 2000" and "on a daily basis in 2004," are sufficient to give Plaintiff a reasonable expectation that Dr. Alleyne performed the procedure during the twelve months preceding 15 January 2005 and thus would qualify as an expert pursuant to Rule 702. Based on Dr. Alleyne's statements, we find that Plaintiff could have had a reasonable expectation that Dr. Alleyne would qualify as an expert. We stress that our ruling does not address the actual qualification of Dr. Alleyne as an expert under Rule 702 as such a determination has not yet been made by the trial court; rather, our ruling strictly addresses whether Plaintiff could have reasonably expected Dr. Alleyne to qualify for purposes of N.C.G.S. § 1A-1, Rule 9(j). Because the trial court erred in determining that Plaintiff could not have had a reasonable expectation that Dr. Alleyne would qualify as an expert, we hold the trial court erred in granting Defendants' motion to dismiss. In light of this holding we do not address Plaintiff's remaining arguments.

Reversed and remanded.

Judges BEASLEY and THIGPEN concur.

CAMERON HOSPITALITY, INC. AND JOHN W. POWERS, PLAINTIFFS V. CLINE DESIGN ASSOCIATES, PA, INLAND CONSTRUCTION COMPANY, SABER ENGINEERING, PA, ROSS & WITMER, INC., COLUMBIA CAMERON VILLAGE, LLC, AND YORK PROPERTIES INC. OF RALEIGH, DEFENDANTS ROSS & WITMER, INC., COLUMBIA CAMERON VILLAGE, LLC, AND YORK PROPERTIES INC. OF RALEIGH, THIRD-PARTY PLAINTIFFS V. RICKY HALL'S PLUMBING, INC., THIRD-PARTY DEFENDANT

No. COA12-522

(Filed 6 November 2012)

Appeal and Error—interlocutory orders—denial of motion for summary judgment—no substantial right

Saber Engineering PA and Ross & Witmer Inc.'s appeal in a construction defect case from the denial of their motions for summary judgment was dismissed because it was from an interlocutory order and did not affect a substantial right. Further, the doctrine of *respondeat superior* was inapplicable.

Appeal by Defendants Saber Engineering, PA, and Ross & Witmer, Inc., from order entered 29 September 2011 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 October 2012.

The Law Offices of F. Bryan Brice, Jr., by F. Bryan Brice, Jr., Catherine Cralle Jones, and Matthew D. Quinn, and Harris, Winfield, Sarratt & Hodges, LLP, by Donald J. Harris, John L. Sarratt, and H. Clay Hodges, for Plaintiff Cameron Hospitality, Inc.

Allen, Moore & Rogers, L.L.P., by Joseph C. Moore, III, and John C. Rogers, III, for Defendant Saber Engineering, P.A.

McAngus, Goudelock & Courie, PLLC, by Mary M. Webb and E. Lang Hunter, for Defendant Ross & Witmer, Inc.

STEPHENS, Judge.

Procedural History and Factual Background

This construction defect action arises from the 2004—2006 renovation of a restaurant operated by Plaintiff Cameron Hospitality, Inc., ("Cameron"). Cameron's remodeling project included, *inter alia*, renovation of the property's HVAC system. Cameron hired Cline Design Associates, P.A., ("Cline") as architect and Inland Construction Company ("Inland") as general contractor. In turn, Cline hired Appellant-

defendant Saber Engineering, P.A., ("Saber") as engineer, and Inland hired Appellant-defendant Ross & Witmer, Inc., ("R&W") as the HVAC subcontractor. Following renovation, the restaurant was plagued with a bad odor, which Cameron alleged was a result of flaws in the HVAC renovation. The restaurant was forced to close down for extensive periods and suffered a decline in business once it reopened in 2008.

On 12 February 2009, Cameron filed a verified amended complaint against Cline and other parties involved with the renovation, including, *inter alia*, Inland, Saber and R&W. On 10 August 2009, Cameron filed a notice of voluntary dismissal with prejudice of all claims against Inland. On 8 November 2010, Cameron filed a notice of voluntary dismissal with prejudice of all claims against Cline. On 1 and 24 August 2011, R&W and Saber, respectively, filed motions for summary judgment.

Following a hearing on the motions, on 29 September 2011, the trial court entered an order denying summary judgment to Saber and R&W. On 25 October 2011, Saber and R&W gave notice of appeal from the order denying summary judgment. Saber and R&W also sought a hearing in the trial court as to whether the summary judgment order was immediately appealable. On 5 April 2012, Cameron filed a motion and affidavit for dismissal of the appeal. Following a hearing, the trial court entered an order on 25 April 2012 denying Cameron's motion to dismiss the appeal and concluding that the interlocutory appeal by Saber and R&W affected a substantial right and was thus immediately appealable. On 26 June 2012, Cameron moved this Court to dismiss the appeal, contending that it is interlocutory and does not affect a substantial right of either Saber or R&W. We agree and dismiss.

Discussion

As noted *supra*, during discovery, Cameron voluntarily dismissed with prejudice Cline and Inland. The subsequent motions for summary judgment by Saber and R&W were based upon an assertion that Saber and R&W were agents of Cline and Inland, respectively, and that Cameron's dismissal of the principals (Cline and Inland) acted as *res judicata* and/or collateral estoppel as to Cameron's claims against Saber and R&W.

This appeal, arising from the denial of motions for summary judgment, is interlocutory. *McCallum v. North Carolina Co-op. Extension Serv. of N.C. State University*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 230 (citation omitted), *appeal dismissed and disc. review*

denied, 353 N.C. 452, 548 S.E.2d 527 (2001). "As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a substantial right." *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993) (quotation marks omitted). "In deciding what constitutes a substantial right, it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Patterson v. DAC Corp. of North Carolina*, 66 N.C. App. 110, 112, 310 S.E.2d 783, 785 (1984) (citation, quotation marks, and brackets omitted).

In some cases, "the denial of a motion for summary judgment based on the defense of *res judicata may* affect a substantial right, making the order immediately appealable." *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161 (emphasis added). In *Bockweg*, our Supreme Court noted:

> Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. Thus, a motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*.

Id. (citation omitted). Relying on this reasoning, this Court has recently reaffirmed that "the denial of a motion for summary judgment based upon the defense of *res judicata may involve a substantial right* so as to permit immediate appeal *only where a possibility of inconsistent verdicts exists* if the case proceeds to trial." *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, ___ N.C. App. ___, ___, 727 S.E.2d 311, 314 (2012) (citations and quotation marks omitted) (emphasis added).

Here, Cameron dismissed with prejudice all claims against Cline and Inland, and a voluntary dismissal with prejudice is a final adjudication on the merits. *See Caswell Realty Assocs. I, L.P. v. Andrews Co.*, 128 N.C. App. 716, 721, 496 S.E.2d 607, 611 (1998). Saber and R&W contend that, under the doctrine of *respondeat superior*, these dismissals serve as *res judicata* as to Cameron's claims against them as well. We are not persuaded.

Under a theory of *respondeat superior*, the principal's liability is derivative, arising from the acts of the agent. *See Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974). Accordingly, where the agent has no liability, there is nothing from which to derive the principal's liability under the doctrine. *Id.* Applying this reasoning, the appellate courts of this State have repeatedly held that a final adjudication on the merits that an agent bears no liability acts as *res judicata* to prevent an attempt to pursue derivative claims against the principal. *See*, *e.g.*, *Reid v. Holden*, 242 N.C. 408, 88 S.E.2d 125 (1955); *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E.2d 366 (1942); *Leary v. Virginia-Carolina Joint Stock Land Bank*, 215 N.C. 501, 2 S.E.2d 570 (1939); *Morrow v. S. Ry. Co.*, 213 N.C. 127, 195 S.E. 383 (1938); *Whitehurst v. Elks*, 212 N.C. 97, 192 S.E. 850 (1937) (*per curiam*);[1] *Graham v. Hardee's Food Systems, Inc.*, 121 N.C. App. 382, 465 S.E.2d 558 (1996); *Barnes*, *supra*. In the case before us, the opposite situation is presented: only Cline and Inland, the purported principals, have been determined to have no liability. There has been no final adjudication of liability as to purported agents Saber and R&W.[2] Thus, neither the doctrine of *respondeat superior* nor the reasoning behind the cases cited by Saber and R&W is applicable here.

Further, we note that while the doctrine of *respondeat superior* is commonly applied to impute liability for torts committed by an employee to his employer, *McGee*, 21 N.C. App. at 289, 204 S.E.2d at 205, "[t]he general rule is that a company is not liable for the torts of an independent contractor committed in the performance of the contracted work." *Coastal Plains Utils., Inc. v. New Hanover Cnty*, 166 N.C. App. 333, 344, 601 S.E.2d 915, 923 (2004). While

> the principal must have the right to control both the means and the details of the process by which the agent is to accomplish his

1. We acknowledge that the Supreme Court in *Whitehurst* stated that, "[w]here the relation between two parties is analogous to that of principal and agent, or master and servant, or employer and employee, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, should be accepted as conclusive against [the] plaintiff's right of action against the other." 212 N.C. at 98, 192 S.E. at 851. We note, however, that this statement was *dicta* as to the effect of a judgment in favor of a principal on the plaintiff's right of action against an agent as that circumstance was not presented in the case before the Court. *Id.* at 97, 192 S.E. at 850. There is no case in this State holding that the dismissal of the principal requires release of claims against the agent.

2. The liability of an agent may be entirely independent of his principal's liability; for example, the agent may have acted outside the scope of his employment. *See Parker v. Erixon*, 123 N.C. App. 383, 391, 473 S.E.2d 421, 426 (1996). In such situations, unlike in the *respondeat superior* cases, there is no risk of an "inconsistent" verdict.

> task in order for an agency relationship to exist[,] . . .[a]n independent contractor . . . is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.

Id. at 344-45, 601 S.E.2d at 923 (citations, quotation marks, and emphasis omitted). Cameron's complaint alleges that Saber and R&W were subcontractors of Cline and Inland, respectively, not the agents of those entities.

For the reasons discussed *supra*, the doctrine of *respondeat superior* is inapplicable here. Because the denial of their motions for summary judgment does not affect a substantial right, Saber and R&W have failed to establish grounds for immediate appellate review of that interlocutory order. *See Bockweg*, 333 N.C. at 490, 428 S.E.2d at 160. Accordingly, this appeal is

DISMISSED.

Judges GEER and MCCULLOUGH concur.

CAPITAL RESOURCES, LLC, AND INSTITUTION FOOD HOUSE, INC., PLAINTIFFS, v. CHELDA, INC., CHARLOTTE METRO RESTAURANTS, LLC, BARN DINNER THEATRE, INC., MAKE SENSE OF DINING OF FLORIDA, LLC, MAKE SENSE DINING, INC., BUSTER'S GRILL, LLC, DABNEY C. ERWIN AND CHARLES B. ERWIN, DEFENDANTS.

No. COA12-288

(Filed 6 November 2012)

1 Jurisdiction—subpoenas—out-of-state courts—no jurisdiction to quash

The trial court lacked jurisdiction in an action for recovery of the unpaid balance and interest on a contract and promissory note to quash certain subpoenas. A superior court judge in this State does not have any authority over the courts of other states, and thus, to the extent the trial court purported to quash subpoenas issued by courts in other states, those portions of the order were void and to no effect. However, to the extent the entities in question failed to comply with the subpoenas, defendant's rem-

edy was to initiate contempt or other proceedings in those states' courts as provided for by their rules of civil procedure.

2. Contracts—breach of contract—unfair and deceptive trade practices—no evidence in support of claims

The trial court did not err in an action for recovery of the unpaid balance and interest on a contract and promissory note by entering directed verdicts for plaintiff on defendant Chelda's counterclaims for breach of contract and breach of the covenant of good faith and fair dealing, and its counterclaim brought pursuant to Chapter 75. No evidence was presented that would have supported verdicts for Chelda on its contract and Chapter 75 counterclaims.

3. Unfair Trade Practices—jury instructions—intent—action not commercial bribery

The trial court did not err in submitting issues and instructing the jury on defendant Chelda's Chapter 75 counterclaim arising out of alleged commercial bribery. The trial court properly instructed the jury on intent as to the first prong of the commercial bribery statute and plaintiff's actions did not constitute commercial bribery, nor were they "unfair" or "deceptive."

Appeal by Defendants Chelda, Inc., Barn Dinner Theatre, Inc., Make Sense Dining of Florida, LLC, Make Sense Dining, Inc., and Charles B. Erwin from order entered 28 February 2011 and judgment entered 26 April 2011 by Judge Eric L. Levinson in Catawba County Superior Court. Heard in the Court of Appeals 29 August 2012.

Katten Muchin Rosenman, LLP, by Christopher A. Hicks and David B. Morgen, for Plaintiff.

Roberts & Stevens, P.A., by Mark C. Kurdys, for Defendants Chelda, Inc., Barn Dinner Theatre, Inc., Make Sense Dining of Florida, LLC, Make Sense Dining, Inc., and Charles B. Erwin.

STEPHENS, Judge.

Defendants Chelda, Inc., Barn Dinner Theatre, Inc., Make Sense Dining of Florida, LLC, Make Sense Dining, Inc., and Chelda, Inc. CEO Charles B. Erwin ("Erwin") (collectively, "Chelda")[1] appeal from

1. All claims against Defendant Ham's Restaurant, Inc. were dismissed without prejudice on 1 December 2009 after Ham's began bankruptcy proceedings. Although no dismissal appears in the record before this Court, other documents in the record

(1) an order granting motions by Plaintiff Capital Resources, LLC, and Plaintiff-Intervenor Institution Food House, Inc., (collectively, "IFH") for a protective order and to quash subpoenas *duces tecum*, and (2) from judgment entered upon a jury verdict following the granting of IFH's motion for directed verdict as to Chelda's counterclaims in an action filed by IFH for recovery of the unpaid balance and interest on a contract and promissory note. We vacate in part the order appealed from, but affirm the judgment entered.

Chelda owns various restaurants and restaurant chains, including the corporate defendants named in the caption of this opinion. IFH is a distributor of food to restaurants and chains. IFH does not manufacture food, but instead orders, warehouses, and delivers food products from manufacturers to restaurants, essentially serving as a "middleman" between the manufacturers and restaurants. Capital Resources is a financial services affiliate of IFH. Chelda manages several restaurants and chains and, between 1997 and 2009, IFH sold and delivered food products to Chelda. The evidence at trial relevant to this appeal primarily concerns two sources of income to IFH and a bonus scheme Erwin arranged with a longtime employee: (1) markup percentages on food products which IFH charged Chelda for providing food products, (2) marketing allowances IFH charged some food product manufacturers for advertising and other marketing services, and (3) bonus payments consisting of percentages of savings resulting from the employee's negotiation of lower prices for certain food products.

Compensation for IFH's services to Chelda was outlined in a series of Product Purchase Agreements ("PPA") negotiated over the years between the parties. According to the PPA, the price Chelda paid IFH for food products was IFH's cost plus a certain markup percentage listed in an attachment to the PPA. Because food product prices change frequently, the specific prices IFH charges for food

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suggest that Defendant Charbuck, Inc. was likewise dismissed after entering bankruptcy. A motion for summary judgment by Defendant Charmike Holdings, LLC, was granted by order entered 11 January 2010. In that order, judgment was entered against Charmike for $132,976.70 plus costs and interest, and any remaining claims were dismissed with prejudice. Nothing in the record indicates how claims against Defendants Charlotte Metro Restaurants, Inc., and Buster's Grill, LLC, were resolved, but neither of these defendants is named or mentioned in the text of any documents filed by Defendants' trial counsel once trial began. Defendant Dabney C. Erwin likewise is not named in the text of those filings, but she clearly remained a party to the action as judgment was entered against her, along with her husband, Erwin, by the trial court on 26 April 2011. In any event, none of the defendants discussed in this footnote, including Dabney C. Erwin, gave notice of appeal and thus none are parties to this appeal.

products are not listed in the PPA. Instead, food prices are listed in separate "pricing schedules," unique to each customer and updated weekly by IFH, and the PPA lists only the markup percentage IFH will apply to the prices listed in the weekly pricing schedules. All PPAs between the parties were essentially identical, except for changes in the markup percentages.

For many food products, IFH handled all aspects of supplying Chelda, including negotiating the best prices with manufacturers. In addition, IFH allowed restaurant customers like Chelda a "direct negotiation option," under which restaurants negotiate prices directly with manufacturers. Under the direct negotiation option, if Chelda negotiated a lower price from a manufacturer than what IFH had secured, IFH would put the directly negotiated price into IFH's pricing schedule. IFH would then determine its charge to Chelda by applying the appropriate markup percentage listed in the PPA to the directly negotiated price. In such circumstances, Chelda would receive the benefit of its successful negotiation skills, while IFH would still be compensated for its services in ordering, warehousing, and delivering the food products.

From 2001 to 2008, Steven Stern was a purchasing manager for Chelda, in charge of direct negotiations with food product manufacturers. To "incentivize" Stern, Erwin set up a bonus program whereby if Stern secured savings to Chelda for one year on a food product, Stern would receive half the savings during the first ninety days as a bonus and Chelda would retain all savings after ninety days. IFH agreed to assist Chelda with implementing this bonus program. At trial, the assistance from IFH and the route of bonus payments to Stern was disputed: IFH claimed Chelda requested that IFH send bonus payments consisting of half of the amount saved directly to Stern, which is what in fact occurred, while Chelda claimed it had requested only the information on savings from IFH and had intended that bonus payments to Stern be paid through Chelda. Erwin testified that he only learned of the direct payments from IFH to Stern in late June 2008.

IFH also presented evidence of a common restaurant industry practice known as "marketing allowances." Marketing allowances are funds that food manufacturers pay the distributors of their products, usually as a lump sum or a percentage of the volume of a product ordered by a distributor. Distributors like IFH use marketing allowances to promote the manufacturer's food products in a variety of ways, including: hosting food shows, training chefs and menu

developers, sponsoring events for customers, and advertising in the distributor's catalog. IFH collects marketing allowances from some manufacturers after an order is placed, essentially "back-billing" the manufacturer for advertising that IFH performed prior to the order. IFH has marketing allowance programs with many manufacturers, billing them, on average, seven percent of invoiced costs of food products ordered. Marketing allowances are negotiated solely between IFH and food product manufacturers. Thus, IFH does not give credit for marketing allowances to customers, such as Chelda, nor are marketing allowances mentioned in contracts with customers, like the PPA.

In April 2008, prior to Erwin's alleged discovery of the direct payments to Stern, Chelda was $2 million behind on payments due IFH under the PPA. Chelda and IFH agreed to reduce this debt to a promissory note, with monthly payments of approximately $10,000 and a balloon payment due 1 May 2009. When Chelda failed to make the balloon payment, Capital Resources initiated this action by filing a complaint on 20 May 2009. Plaintiffs' amended complaint was filed 9 June 2009. By order entered 10 January 2010, IFH was joined as an intervenor-plaintiff.

On 7 January 2010, Chelda filed an answer and counterclaim, alleging seven claims for relief: two claims each of civil conspiracy (claims 1 and 5) and breach of the duty of good faith and fair dealing (claims 2 and 4), and one claim each of breach of contract (claim 3), constructive fraud (claim 6), and unfair and deceptive trade practices (claim 7). These counterclaims were based on two primary allegations: (1) that, as a result of IFH paying bonuses to Stern directly, Chelda never realized any of the "post-ninety-day" savings as intended under Erwin's bonus scheme, and (2) that the cost to which the PPA markups applied should have included adjustments based on IFH's receipt of marketing allowances from manufacturers through back-billing.

Chelda substituted counsel twice, in January and October 2010. On no fewer than five occasions between September 2009 and October 2010, Chelda requested a continuance to conduct more discovery. In January 2011, Chelda filed nine motions for orders of commission for out-of-state subpoenas *duces tecum* to non-party manufacturers that conducted business with IFH ("the 2011 Subpoenas"). The 2011 Subpoenas were issued on a rolling basis and sought information on marketing allowances paid to IFH by various manufacturers during the ten-year relationship between IFH and

Chelda. The Honorable Timothy Kincaid, Catawba County Superior Court, granted each motion and issued orders of commission. On 26 January 2011, IFH filed a motion for a protective order and a motion to quash the 2011 Subpoenas.[2]

On 21 February 2011, the Honorable Eric L. Levinson, Catawba County Superior Court, presided over a hearing on IFH's motions. By order entered 28 February 2011, Judge Levinson entered a protective order quashing the 2011 Subpoenas and ordering Chelda to consult with IFH before obtaining any additional subpoenas *duces tecum*. On 23 February 2011, Chelda sought a continuance of the pending trial claiming a denial of opportunity to obtain evidence, which was denied. On 4 March 2011, Chelda moved this Court for a temporary stay of proceedings, which was also denied.

On 7 March 2011, the case went to trial. At the close of evidence, IFH and Chelda each moved for a directed verdict with respect to the other's claims. Chelda withdrew its counterclaims 1, 5, and 6. The court denied Chelda's motion and granted IFH's motion as to Chelda's counterclaims 2, 3, 4, and, in part, 7. The jury found that Chelda had breached the PPA and promissory note and that IFH was entitled to damages totaling $2,489,422.82. The jury found that neither party committed unfair and deceptive trade practices. Chelda appeals from the trial court's order entered 28 February 2011 issuing a protective order and quashing the 2011 Subpoenas and from judgment entered upon the jury's verdict 26 April 2011 following the trial court's granting a directed verdict to IFH on Chelda's counterclaims.

Discussion

On appeal, Chelda brings forward three arguments: that the trial court erred in (1) quashing the 2011 Subpoenas; (2) issuing a directed verdict dismissing Chelda's counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, and unfair and deceptive trade practices related to IFH's marketing allowances; and (3) submitting the issues and instructing the jury as to Chelda's coun-

2. Previously, on 8 June 2009, Chelda filed a separate complaint in Guilford County Superior Court against IFH, alleging the same theories Chelda alleges as defenses and counterclaims here. On 8 June 2009, Chelda issued subpoenas *duces tecum* to several out-of-state manufacturers ("2009 Subpoenas"). The 2009 Subpoenas were identical to the 2011 Subpoenas at issue in this appeal—requesting information on marketing allowances paid to IFH—and sent to many of the same manufacturers. After IFH moved for a protective order, Chelda dismissed that lawsuit in October 2009 without pursuing a motion to compel. Discovery served on IFH in this case did not seek information or documents related to marketing allowances.

terclaim for unfair and deceptive trade practices arising out of commercial bribery.[3] We vacate in part and affirm in part.

I. The 2011 Subpoenas

[1] Chelda makes two contentions of error with respect to the trial court's 28 February 2011 order regarding the 2011 Subpoenas: (1) the trial court lacked jurisdiction to quash the 2011 Subpoenas because they were issued by other jurisdictions, and (2) the court abused its discretion in quashing the 2011 Subpoenas because it based its decision on speculation.[4] We agree that the trial court lacked jurisdiction to quash the subpoenas. Accordingly, we do not address Chelda's abuse of discretion argument.

The 28 February 2011 order states that the trial court is allowing IFH's motions "for protective orders and to quash various subpoenas *duces tecum*[.]" The order then provides "that each out-of-state subpoena . . . be and hereby are [sic] quashed" and that a copy of the order be served upon "the recipient of any such subpoena and to each [out-of-state] Clerk of Court to whom such a subpoena was directed." The order also provides that Chelda not serve any additional subpoenas *duces tecum* without properly notifying IFH and obtaining authorization from the trial court.[5]

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3. Chelda also lists an additional "Issue Presented" in its brief, to wit, that the trial court erred in awarding Capital Resources attorney's fees in the amount of 15% of the jury award for damages due on the promissory note, but by failing to argue this issue in the text of the brief, Chelda abandons this challenge.

4. In its brief, Chelda also argued that Judge Levinson did not have the authority to quash the 2011 Subpoenas because they were issued upon orders of commission entered by Judge Timothy Kincaid, and thus Judge Levinson's order in effect "overruled" that of another superior court judge. However, at oral argument, Chelda explicitly withdrew this contention, and we do not address it here.

5. Rule 5(a) of the North Carolina Rules of Civil Procedure provides that "every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, . . . shall be served upon each of the parties[.]" N.C. Gen. Stat. § 1A-1, Rule 5(a) (2012). "This Court has held the General Assembly's use of the word 'shall' [in Rule 5(a)] establishes a mandate, and failure to comply with the statutory mandate is reversible error." *In re D.A.*, 169 N.C. App. 245, 247-48, 609 S.E.2d 471, 472 (2005) (citation omitted). However, Chelda failed to serve IFH with any of its motions for commissions and the parties have also stipulated that Judge Kinkaid issued *all* of the commissions *ex parte* and without any notice to IFH. In addition, many, but not all, of Chelda's motions for commission falsely stated that they were made "upon the consent of all interested parties." As noted in the parties' "Stipulation to Correct Inaccuracies in the Record on Appeal," Chelda made no effort to confer with IFH about the motions and IFH had not consented to them. Thus, all of the orders of commission issued in response to Chelda's motions were procedurally flawed and many were issued upon a mistake of fact.

It is well-established that, because the primary duty of a trial judge is to control the course of the trial so as to prevent injustice to any party, *State v. Britt*, 285 N.C. 256, 271-72, 204 S.E.2d 817, 828 (1974), the judge "has broad discretion to control discovery[.]" *State v. Almond*, 112 N.C. App. 137, 148, 435 S.E.2d 91, 98 (1993) (citation omitted). For example, Rule 26 of the North Carolina Rules of Civil Procedure provides, in pertinent part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending *may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense*[.]

N.C. Gen. Stat. § 1A-1, Rule 26(c) (2012) (emphasis added). Among the orders that Rule 26(c) authorizes a trial court to enter are:

> (i) that the discovery not be had;
>
> (ii) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; [and]
>
> (iii) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery[.]

Id. Protective orders issued pursuant to Rule 26(c) are left to the trial court's discretion and will only be disturbed for an abuse of discretion. *Hartman v. Hartman*, 82 N.C. App. 167, 180, 346 S.E.2d 196, 203, *cert. denied as to additional issues*, 318 N.C. 506, 349 S.E.2d 860 (1986), *affirmed*, 319 N.C. 396, 354 S.E.2d 239 (1987).

We agree with Chelda that a superior court judge in this State does not have any authority over the courts of other states, and thus could not quash subpoenas issued by such courts. *See, e.g.*, *Irby v. Wilson*, 21 N.C. 568, 580 (1837) (observing that a State "has no power to enact laws to operate upon things or persons not within her territory; and if she does, although her domestic tribunals may be bound by them, those of other countries are not obliged to observe them, and are not at liberty to enforce them"). Thus, to the extent Judge Levinson purported to quash the 2011 Subpoenas issued by courts in other states, those portions of the order were void and to no effect. The out-of-state courts should certainly have realized Judge Levinson had no authority over them or their subpoenas, and those courts could simply have ignored the copy of the order Judge Levinson requested be served upon them.

However, our agreement with Chelda that the 28 February 2011 order's attempt to quash the 2011 Subpoenas was void does not permit us to offer any further relief to Chelda as to the documents sought thereunder. As Chelda notes, it is the out-of-state courts which retained authority and jurisdiction with regard to the 2011 Subpoenas, and it is in those courts that Chelda had recourse to enforce them. Had Chelda wished to proceed with its attempt to obtain documents under the 2011 subpoenas, Chelda could have requested those out-of-state courts to notify the subpoena recipients that Judge Levinson's order was to no effect. To the extent the entities in question failed to comply with the subpoenas, Chelda's remedy was to initiate contempt or other proceedings in those states' courts as provided for by their rules of civil procedure. Had Chelda thus obtained any documents it felt relevant to this action, it could have attempted to introduce such in this case. At that point, IFH might or might not have sought a protective order, which the trial court here might or might not have allowed.

However, these speculations are merely that, and are thus unavailing to Chelda. The record before us is silent on any actions Chelda may have undertaken in the courts of other states or the content of any documents it thus obtained. The only conclusion the record thus permits is that Chelda failed to pursue its subpoenas. Given this failure, we cannot conclude that Chelda was deprived of the opportunity to obtain and present evidence in support of its cases.[6] Thus, while we vacate the portion of the order purporting to quash the subpoenas, we can offer no further relief to Chelda.

II. Directed Verdict

[2] Chelda next argues that the trial court erred by entering directed verdicts for IFH on Chelda's counterclaims for breach of contract and of the covenant of good faith and fair dealing, and its counterclaim

6. We also note that, despite his error in attempting to "quash" the out-of-state subpoenas, Judge Levinson unquestionably had both the jurisdiction and authority to enter a Rule 26(c) protective order as part of his duty to control discovery in the case before him. As noted *supra*, the 28 February 2011 order also allowed IFH's motions for a protective order, and, as expressly permitted by Rule 26(c)(ii), ordered "that the discovery may be had only on specified terms and conditions[,]" to wit, that Chelda consult with and properly notify IFH prior to serving any additional subpoenas. Chelda has not brought forward any argument based on this portion of the order, and in any event, we observe no abuse of discretion in this portion of the order.

brought pursuant to Chapter 75, to the extent that claim related to the marketing allowances IFH received from food product manufacturers.[7] Specifically, Chelda contends that the court improperly concluded that the PPA precluded parol evidence. We disagree.

On appeal, our standard of review of a directed verdict granted at the close of all evidence is whether the evidence, taken in the light most favorable to the non-movant, is sufficient to go to the jury. *Ligon v. Strickland*, 176 N.C. App. 132, 135-36, 625 S.E.2d 824, 828 (2006). "It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted." *Id.* Further, "[i]f, at the close of the evidence, a plaintiff's own testimony has unequivocally repudiated the material allegations of his complaint and his testimony has shown no additional grounds for recovery against the defendant, the defendant's motion for a directed verdict should be allowed." *Cogdill v. Scates*, 290 N.C. 31, 44, 224 S.E.2d 604, 611 (1976).

"[W]here the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed that the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing." *Franco v. Liposcience, Inc.*, 197 N.C. App. 59, 70, 676 S.E.2d 500, 507, *affirmed*, 363 N.C. 741, 686 S.E.2d 152 (2009) (citations and quotation marks omitted). As a result, "[t]he parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is used to contradict, vary, or explain the written instrument." *Carolina First Bank v. Stark, Inc.*, 190 N.C. App. 561, 568, 660 S.E.2d 641, 646 (2008) (citation and quotation marks omitted). However, "when a part of the contract is in parol and part in writing, the parol part can be proven if it does not contradict or change that which is written." *Hoots v. Calaway*, 282 N.C. 477, 486, 193 S.E.2d 709, 715 (1973) (citation and quotation marks omitted).

In support of its contract and Chapter 75 counterclaims, Chelda alleged that IFH had fraudulently concealed from Chelda the existence of the marketing allowances it received from some food manufacturers. Chelda alleged it intended that the markup percentages

7. The trial court denied IFH's motion for directed verdict as to Chelda's counterclaim for unfair and deceptive trade practices to the extent that counterclaim relied on the direct payments of funds from IFH to Stern. To the extent Chelda's Chapter 75 counterclaim arose from those payments, the issue went to the jury and is addressed in section III of this opinion.

listed in the attachment to the PPA be applied not to the negotiated prices listed in the pricing schedules, but rather, to the listed prices less any marketing allowances IFH was to receive from food manufacturers. Chelda asserted that, as a result of IFH's receipt of marketing allowances, IFH actually paid less for the food products than the price IFH represented to Chelda as its cost, which in turn Chelda contends fraudulently inflated the amount Chelda paid IFH as markup. Chelda characterized these circumstances as both a breach of the terms of the PPA and unfair and deceptive conduct in or affecting commerce pursuant to Chapter 75.

We begin by noting that we can find no "conclusion" by the trial court that parol evidence was precluded by the PPA nor any suggestion that parol evidence was actually excluded from admission at trial. To the contrary, the trial court permitted witnesses for both sides to testify at length about their intent and understanding of the PPA. Indeed, although Chelda's brief states that "witnesses would supplement the PPA with [p]arol [e]vidence, [sic] which does not contradict or change the writing, namely that the PPA was a 'cost-plus contract,' "[8] a few sentences later Chelda admits that "both parties agree and understood that pricing under the PPA was 'cost[-]plus.' "

The true dispute at trial was to what "cost" the "plus" (or markup) was intended to be applied. Chelda asserts the need for parol evidence on this point and cites definitions from legal dictionaries and case law from various other jurisdictions which state, in essence, that under a cost-plus contract, the "cost" to which any markup is applied is the "seller's own cost[,]" *Tip Top Farms v. Dairylea Coop.*, 114 A.D.2d 12, 20 (N.Y. App. Div. 1985), with the buyer (here, Chelda) "get[ting the] advantage of all profits." *Grothe v. Erickson*, 59 N.W.2d 368, 370 (Neb. 1953). Chelda appears to argue that IFH's "own cost" is the cost negotiated with the manufacturer less any marketing allowances that manufacturer paid IFH. However, none of the cost-plus definitions Chelda relies upon suggests that a distributor's "cost" of food *products* purchased from a manufacturer is determined by offsetting payments it receives from providing entirely separate *services* to the manufacturer.

Our review of the trial transcript reveals that Erwin explicitly testified that he was unaware of the existence of marketing allowances,

8. While the term "cost-plus" does not appear in the PPA, Chelda uses this term to refer to the system of percentage markups on the cost of various food products that IFH charged Chelda per the PPA and its attachments.

either as a general industry practice or as a specific practice by IFH. The undisputed evidence at trial also established that IFH did not discuss marketing allowances with restaurants it supplied because the marketing allowances were payments for marketing services IFH provided to the manufacturers. Our review of the record further reveals that the PPA does not mention marketing allowances and explicitly provides that IFH's markups would be applied to the cost of the items as negotiated with manufacturers. We can find no evidence that IFH ever agreed to offset the marketing allowances it received against the negotiated prices for the food products or to otherwise account for the marketing allowances *vis* à *vis* the markups it charged Chelda pursuant to the PPA. Rather, all of the evidence indicates that the payment of marketing allowances was an arrangement for certain services between IFH and the food manufacturers it did business with, unrelated to IFH's PPA with Chelda.

In sum, the uncontradicted evidence at trial established that (1) Erwin was unaware of marketing allowances and thus cannot have intended that they be considered in determining prices to be marked up under the PPA; (2) marketing allowances were payments for IFH services provided to manufacturers and therefore unrelated to the cost of food products negotiated by IFH or directly by its restaurant customers; (3) in light of fact 2, IFH's "own cost" of food products did not include an offset for marketing allowances, but rather consisted of the cost negotiated with a manufacturer (whether by IFH or the restaurants directly); and thus, (4) the negotiated cost for each product listed in the pricing schedules was the proper "cost" to which IFH's markups (as contracted with Chelda) were applied. Because no evidence was presented that would have supported verdicts for Chelda on its contract and Chapter 75 counterclaims, the trial court's entry of directed verdicts in favor of IFH was proper. Accordingly, this argument is overruled.

III. Jury Issues

[3] Chelda also argues that the trial court erred in submitting issues and instructing the jury about Chelda's Chapter 75 counterclaim arising out of alleged commercial bribery, namely, the payments from IFH to Stern. Specifically, Chelda asserts error in the court's instruction that this counterclaim required proof of IFH's intent to influence Stern's purchasing decisions to the benefit of IFH and the detriment of Chelda. We disagree.

Section 75-1.1 of our General Statutes states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2012).[9] To prevail on a UDTP claim, a "[p]laintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Kewaunee Scientific Corp. v. Pegram*, 130 N.C. App. 576, 580, 503 S.E.2d 417, 420 (1998) (citation and quotation marks omitted). A practice is properly deemed unfair "when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. . . . [or] amounts to an inequitable assertion of . . . power or position." *McInerney v. Pinehurst Area Realty, Inc.*, 162 N.C. App. 285, 289, 590 S.E.2d 313, 316-17 (2004) (citations and quotation marks omitted). To prove deception, while "it is not necessary . . . to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, [a] plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452-53, 279 S.E.2d 1, 7 (1981).

As both parties note, the intent and knowledge of the parties is generally irrelevant in UDTP actions:

> A UDTP claimant need not establish the defendant's bad faith, intent, willfulness, or knowledge. Our Supreme Court explained that state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the states' unfair and deceptive practices act. Thus, if unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. . . .
>
> Moreover, not only is the defendant's intent irrelevant when evaluating a UDTP claim, the plaintiff's intent and conduct is also irrelevant.

Media Network, Inc. v. Long Haymes Carr, Inc., 197 N.C. App. 433, 452, 678 S.E.2d 671, 683-84 (2009) (citations, quotation marks, and brackets omitted).

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9. In our State's case law, claims brought under Chapter 75 are often referred to as "unfair and deceptive trade practices" or "UDTP" claims, referencing language used in previous versions of the Chapter. For ease of reading, we use the term UDTP here.

Here, however, Chelda specifically predicated its UDTP counterclaim upon allegations that Stern's receipt of bonus payments directly from IFH constituted the crime of commercial bribery. N.C. Gen. Stat. § 14-353 (2012). Under section 14-353, four categories of acts are criminalized. *Id.* Chelda's counterclaim was based upon acts falling under the first and fourth prongs of the statute:

> Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever *with intent to influence his action* in relation to his principal's, employer's or master's business [is guilty of commercial bribery];
>
> . . .
>
> [A]ny person who gives or offers [an employee authorized to procure materials by purchase or contract for his employer a] commission, discount or bonus [is guilty of commercial bribery.]

Id. (emphasis added); *see also State v. Brewer*, 258 N.C. 533, 552-53, 129 S.E.2d 262, 276-77, *appeal dismissed*, 375 U.S. 9, 11 L. Ed. 2d 40 (1963).

In *Brewer*, our Supreme Court concluded that acts constituting commercial bribery under the first prong could be the basis of a UDTP claim, and that in such cases, "[t]he intent specified [in the statute] is an essential element of the offense." *Id.* at 552, 129 S.E.2d at 276-77. Thus, while a defendant's intent need not be established to support most UDTP claims, where the UDTP claim rests upon an allegation under the first prong of the commercial bribery statute, proof of the defendant's intent to influence the actions of another's employee must be proven. *See id.*

Chelda further contends that, even if "intent to influence" is an element of the offense of UDTP arising from commercial bribery under prong one, the court erred in instructing the jury that IFH's intent must have been specifically that Stern act to benefit IFH and harm Chelda. In other words, Chelda asserts that IFH committed commercial bribery if it intended to "influence" Stern in *any* way, whether helpful, harmful, or unrelated to Chelda's or IFH's business interests. We find this assertion nonsensical. The statute in question is titled "Influencing agents and servants in violating duties owed employers." N.C. Gen. Stat. § 14-353. In addition "commercial bribery" is defined as "[c]orrupt dealing with the agents or employees of prospective buyers to secure an *advantage* over business competitors." Black's Law Dictionary 204 (8th ed. 2007) (emphasis added). As reflected by the statute's title and the very definition of the term, as

well as by common sense, commercial bribery involves an inducement to give the bribe-giver an unfair advantage or benefit in a business relationship. Surely our General Assembly did not intend that a payment made by IFH to influence Stern to undermine IFH's business relationship with Chelda or to work harder and more efficiently on behalf of Chelda be criminalized as commercial bribery. Rather, we conclude that acts of commercial bribery must result in (or be intended to result in) some disloyalty or harm to the employer and some benefit to the bribe-giver. *See, e.g.*, *Kewaunee Scientific Corp.*, 130 N.C. App. at 581, 503 S.E.2d at 420 (holding that where a UDTP claim is based upon commercial bribery, "commercial bribery harms an employer as a matter of law, with damages measured at a minimum by the amount of the commercial bribes"). Accordingly, the trial judge properly instructed the jury on intent as to the first prong of the commercial bribery statute.

We next turn to Chelda's contention that the trial court erred in refusing to instruct the jury under the fourth prong under section 14-353: "any person who gives or offers [an employee authorized to procure materials by purchase or contract for his employer a] commission, discount or bonus [is guilty of commercial bribery.]" N.C. Gen. Stat. § 14-353. As Chelda notes, unlike the first prong of the commercial bribery statute, the fourth prong does not explicitly mention "intent to influence." Thus, Chelda contends that, even without any proof of intent to influence Stern, IFH's payments to Stern were enough to establish commercial bribery and support their UDTP claim. At trial, Chelda sought an instruction under this prong in support of its UDTP claim, but the court denied the request. After careful review, we believe the trial court's decision was correct.

As noted above, the proper title of the commercial bribery statute is "Influencing agents and servants in violating duties owed employers." N.C. Gen. Stat. § 14-353. Where the undisputed evidence at trial shows that the plaintiff himself has designed and established the system of payments in question with the explicit purpose of rewarding an employee's diligence, we hold that the cooperation of a defendant in facilitating such a scheme *at the plaintiff's request cannot* constitute "influencing agents" to violate their duties to their employers. Here, Erwin testified that it was he who conceived of the bonus payments to Stern, with the intent that they "incentivize" Stern to secure the lowest prices on behalf of Chelda. According to Erwin's own testimony, Stern only received the payments when he secured lower prices on food products, to the benefit of Chelda. No evidence was

presented that Stern received bonus payments in any circumstance other than when he obtained *better* pricing for Chelda. Further, Erwin was aware that Stern was receiving payments directly from IFH. A number of bonus payment checks from IFH to Stern were introduced at trial. Due to a computer error, the third bonus payment check sent by IFH was made out to Chelda, rather than to Stern. This check, dated 23 August 2003, was endorsed "to Steve Stern from Chelda, Inc., by Charles B. Erwin, President[.]" In such circumstances, IFH's actions did not constitute commercial bribery, nor were they either "unfair" or "deceptive." *See McInerney*, 162 N.C. App. at 289, 590 S.E.2d at 316-17; *Overstreet*, 52 N.C. App. at 452-53, 279 S.E.2d at 7. This argument is overruled.

VACATED IN PART; AFFIRMED IN PART.

Judges CALABRIA and ELMORE concur.

EXECUTIVE MEDICAL TRANSPORTATION, INC., T/A EXECUTIVE TRANSPORTATION OF NORTH CAROLINA, INC., PLAINTIFF, v. JONES COUNTY DEPARTMENT OF SOCIAL SERVICES AND THE COUNTY OF JONES, DEFENDANTS

No. COA12-573

(Filed 6 November 2012)

Contracts—breach of contract—no certificate of compliance—no valid contract

The trial court erred in a breach of contract action by denying defendant's motions for judgment on the pleadings and to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(c) and 12(b)(6). No valid contract existed between the parties according to N.C.G.S. § 159-28(a) where no certificate of compliance existed.

Appeal by defendants from order entered 12 March 2012 by Judge Jack W. Jenkins in Jones County Superior Court. Heard in the Court of Appeals 10 October 2012.

John P. Marshall of WHITE & ALLEN, PA, attorney for plaintiff.

Scott Hart and Aaron D. Arnette of SUMRELL, SUGG, CARMICHAEL, HICKS & HART, PA, attorneys for defendants.

ELMORE, Judge.

Jones County Department of Social Services and the County of Jones (together defendants) appeal from an order denying their motion for judgment on the pleadings and motion to dismiss pursuant to Rules 12(c) and 12(b)(6). We reverse and remand.

In July 2008, Jones County Department of Social Services (DSS) entered into an oral contract with Executive Medical Transportation, Inc., T/A Executive Transportation of North Carolina, Inc. (plaintiff), in which plaintiff agreed to provide transportation services to residents of Jones County. The contract was for one year, and renewed annually in July 2009, July 2010, and July 2011. However, in November 2011, DSS informed plaintiff that it was terminating their arrangement.

On 1 December 2011, plaintiff filed suit for breach of contract. On 21 February 2012, defendants filed a motion for judgment on the pleadings and a motion to dismiss pursuant to Rules 12(c) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 12 March 2012, the trial court entered an order denying both motions. Defendants now appeal.

Defendants argue that the trial court erred in denying their motions because no valid contract existed between the parties according to N.C. Gen. Stat. §159-28(a). We agree.

"This Court reviews de novo a trial court's ruling on a motion to dismiss." *Transp. Servs. of N.C., Inc. v. Wake County Bd. of Educ.*, 198 N.C. App. 590, 593, 680 S.E.2d 223, 225 (2009). "Dismissal of a complaint is proper . . . when one or more of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 408, 399 S.E.2d 758, 759 (1991) (quotations and citations omitted).

Here, plaintiff filed suit against defendant for breach of contract. "N.C. Gen. Stat. § 159-28(a) sets forth the requirements and obligations that must be met before a county may incur contractual obligations." *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 407, 399 S.E.2d 758, 759 (1991). According to the statute, "[i]f an obligation is evidenced by a contract or agreement requiring the payment of money . . . the contract [or] agreement . . . shall

include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection." N.C. Gen. Stat. § 159-28 (2012). Further, "[w]here a plaintiff fails to show that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, there is no valid contract, and any claim by plaintiff based upon such contract must fail." *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247 (2001) (citation omitted).

The case at hand is similar to *Cincinnati Thermal Spray*. There, the plaintiff filed suit against Pender County for breach of an oral contract. Pender County filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, and the trial court granted the county's motion. On appeal, this Court affirmed the trial court's decision because no valid contract existed between the parties. We determined that "[p]laintiff has made no showing that . . . a certificate of compliance . . . exists." *Cincinnati Thermal Spray*, 101 N.C. App. at 408, 399 S.E.2d at 759. We then held "that plaintiff's first claim for [breach of contract] fails because plaintiff is unable to show that N.C. Gen. Stat. § 159-28(a) has been followed." *Id.* at 408, 399 S.E.2d at 759.

Likewise, here plaintiff has made no showing that a certificate of compliance exists. As such, no valid contract can exist between the parties. Thus, we conclude that the trial court erred in denying defendants' motion to dismiss.

Further, we note that on appeal plaintiff argues that the certificate of compliance requirement of N.C. Gen. Stat. § 159-28(a) only applies to written contracts. In essence, plaintiff contends that implicit in the plain language of N.C. Gen. Stat. §159-28(a) is the requirement that in order for the statute to apply, the agreement must be in writing. However, plaintiff has failed to distinguish its case from *Cincinnati Thermal Spray* in any meaningful or persuasive manner.

Reversed and remanded.

Judges STROUD and BEASLEY concur.

YOLANDA HERNANDEZ, PLAINTIFF v. COLDWELL BANKER SEA COAST REALTY, ELLIOT AND SUSAN TINDAL; SCOTT E. AVENT D/B/A AVENT APPRAISALS, INC.; BANK OF AMERICA HOME LOANS, DEFENDANTS

No. COA12-430

(Filed 6 November 2012)

1. Appeal and Error—interlocutory orders—partial summary judgment—voluntary dismissal

The trial court's grant of partial summary judgment became a final order and plaintiff's appeal from the order was not premature where plaintiff voluntarily dismissed her remaining claims against the other defendants.

2. Negligence—negligent misrepresentation—real estate appraiser—insufficient allegation or forecast of evidence

The trial court erred in dismissing plaintiff's claims against defendant real estate appraiser for negligence and negligent misrepresentation. Plaintiff failed to properly allege or forecast evidence in support of the essential elements required by Restatement (Second) of Torts § 552.

3. Civil Procedure—summary judgment hearing—argument of multiple defendants—no error

Plaintiff's argument that the trial court violated N.C.G.S. § 1A-1, Rule 49 by permitting multiple defendants in the matter to argue at the summary judgment hearing was meritless. Rule 49 was inapplicable, plaintiff made no objection to the proceedings during the summary judgment hearing, and there was no valid reason for plaintiff to object to the fact that the defendants were actually defending themselves.

4. Negligence—negligent misrepresentation—enabling statute—inapplicable

Plaintiff's argument that the trial court failed to properly interpret and apply N.C.G.S. § 93E-1-10(2) to a negligence and negligent misrepresentation case was meritless. This enabling statute did not support any of plaintiff's arguments that defendant breached his duty.

Appeal by plaintiff from order entered 18 August 2011 by Judge Charles H. Henry in Superior Court, New Hanover County. Heard in the Court of Appeals 11 September 2012.

Yolanda Hernandez, pro se.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Justin K. Humphries, for defendant-appellee.

STROUD, Judge.

Yolanda Hernandez ("plaintiff") appeals from a trial court's summary judgment order. For the following reasons, we affirm the trial court's order.

I. Background

On 25 May 2010, plaintiff filed a complaint against Coldwell Banker Sea Coast Realty, Elliot and Susan Tindal, Scott E. Avent d/b/a Avent Appraisals, Inc., and Countrywide Home Loans, Inc. d/b/a America's Wholesale (referred to collectively herein as "defendants"). In her complaint, she raised claims for negligence and negligent misrepresentation against defendant Coldwell Banker, claims for breach of the covenant against encumbrances against defendants Elliot and Susan Tindal, claims for negligence and negligent misrepresentation[1] against defendant Avent, and a claim for negligence against defendant Countrywide based on allegations surrounding a transaction involving plaintiff's purchase of real property in Wilmington, North Carolina. Plaintiff's complaint was amended on 30 June 2010 to add as a substitute defendant for defendant Countrywide Home Loans, Inc. defendant Bank of America Home Loan, being its successor in interest. On 11 August 2010, defendant Scott E. Avent d/b/a Avent Appraisals, Inc. ("defendant Avent") filed an answer to plaintiffs' amended complaint, raising a motion to dismiss and several affirmative defenses as well as denying the plaintiff's allegations regarding her claims for negligence and negligent misrepresentation. The deposition of plaintiff Yolanda Hernandez was taken on 2 November 2010. On 25 May 2011, defendant Avent filed a motion for summary judgment, with supporting documentation. In response, plaintiff filed affidavits and documentation in opposition to defendant Avent's summary judgment motion. The other defendants also filed motions for summary judgment. The affidavits, the transcript from plaintiff's deposition, and the additional documentation included with and in opposition to these motions tended to show that in April 2007 plain-

1. We presume that the other defendants also filed answers to plaintiff's complaint, as the record contains no entries of default or default judgments entered against them and they subsequently filed motions for summary judgment, but these answers were not included in the record on appeal.

tiff was thinking about investing in a multi-unit residential property and saw such a property for sale at 2134 Carolina Beach Road in Wilmington, North Carolina ("the subject property"). She stopped at the subject property to pick up an advertisement, which summarized several MLS listings, including the subject property. This advertisement described the property as a triplex and listed Julie Damron as the listing real estate agent. The MLS listing, which was prepared by Ms. Damron as an agent for Coldwell Banker Sea Coast Realty, also identified this property as a triplex.

On or about 9 April 2007, plaintiff contracted to purchase the subject property for $205,000. Ms. Damron served as a dual agent for plaintiff and defendants Elliot and Susan Tindal. Prior to contracting for purchase, plaintiff spoke only to Ms. Damron. The contract contained an appraisal contingency providing plaintiff the option to terminate the contract if the property did not appraise at the value which equaled or exceeded the sales price; this contingency expired on 30 April 2007. Plaintiff applied to Southeast Mortgage Services for a loan, and Southwest requested that defendant Avent do an appraisal of the subject property, which was performed on 16 May 2007.

On or about 22 May 2007, defendant Avent completed the appraisal report. This report described the subject property in the "Neighborhood Description" section as being a "duplex" but, in the subsequent comparison with comparable properties, it is described as a "triplex[.]" The appraisal report further stated that the subject property was legally in compliance with the R-7 zoning restrictions. It adopted the total appraisal value of $206,000 using the "sales comparison approach" but also stated a value of $212,000 using the "income approach" and a value of $211,028 using the "cost approach." Defendant Avent's affidavit stated that it was his understanding "that the [subject property] was 'grandfathered' from any zoning restrictions which would prohibit its use as a triplex rental property[.]"

Plaintiff ultimately accepted a mortgage with less favorable terms that specified in the contract, a 15 year term and a balloon payment at the end which accrued interest at a rate of 11.375 percent per annum. She stated that she never viewed a copy of the appraisal report prior to closing the purchase of the subject property; never talked to defendant Avent prior to purchasing the subject property; and she based her belief that the property was zoned to be a triplex solely on her communications with Ms. Damron. In his affidavit, defendant Avent stated that "neither I nor Avent Appraisals, Inc. had any contact or communications with plaintiff Yolanda Hernandez."

When plaintiff purchased the subject property, it had three tenants in place but, because one of the tenants was not paying rent, plaintiff evicted him from the residence. In August or September of 2007, plaintiff contacted the City of Wilmington to inquire about offering the subject property as a Section 8 rental housing but an unidentified city zoning officer informed her that the subject property could not be used as a triplex as this was an illegal use under the zoning restrictions. After this phone conversation, plaintiff did not attempt to rent the third unit but continued to rent out the two remaining units. She did not call the City back to confirm the zoning violation, nor did she try to sell the subject property. Plaintiff quit making her loan payments for the subject property over a year later, in November of 2008; the lender declared the loan in default on 19 February 2009; and the subject property was later foreclosed upon. On or about 16 February 2010, the City of Wilmington Code Enforcement Officer sent a letter to plaintiff at the address of the subject property stating that the subject property had been converted to a triplex but that use was not conforming with the uses allowed in an R-7 zone.

On 18 August 2011, the trial court entered an order granting partial summary judgment dismissing with prejudice claims against defendant Avent, but denied the remaining defendants' motions for summary judgment. Plaintiff voluntarily dismissed without prejudice her claims against the remaining defendants on 20 January 2012. Plaintiff filed written notice of appeal on 23 January 2012 from2 the trial court's 18 August 2011 order. On appeal, plaintiff contends that (1) the trial court erred in granting summary judgment in favor of defendant Avent, as her forecast of evidence showed that there was a genuine issue of material fact; (2) the trial court erred in "allowing multiple defendants in the hearing for summary judgment and allowing too many issues, all of which resulted in prolixity and confusion[;]" and (3) the trial court erred in interpreting and applying N.C. Gen. Stat. § 93E-1-10(2).

II. Interlocutory

[1] As noted above, plaintiff appeals from the trial court's order granting partial summary judgment. "Ordinarily, an appeal from an order granting summary judgment to fewer than all of a plaintiff's claim is premature and subject to dismissal." *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001) (citation omitted). However, "[p]laintiff's voluntary dismissal of [the] remaining claim does not make the appeal premature but rather has the effect of making the trial court's grant of partial summary judgment a

final order." *Id.* (citation omitted). As plaintiff voluntarily dismissed her remaining claims against the other defendants, the trial court's grant of partial summary judgment became a final order and is properly before us.

III. Standard of Review

The standard of review from a motion for summary judgment is well established:

> Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' N.C. Gen. Stat. § 1A-1, Rule 56(c). 'A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.' *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, ___ N.C. App. ___, ___, 705 S.E.2d 757, 764-65 (2011) (quoting *Liptrap v. Coyne*, 196 N.C. App. 739, 741, 675 S.E.2d 693, 694 (2009)), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). "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[.]" *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007) (citation, footnote, and quotation marks omitted).

IV. Genuine Issue of Material Fact

[2] Plaintiff, relying on *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E.2d 535 (1981), argues that the trial court erred in dismissing her claims against defendant Avent as her forecast of evidence showed that defendant Avent, a licensed appraiser, breached his duty of care. She argues that defendant Avent provided inaccurate information in the appraisal report, which stated that the zoning ordinance permitted the subject property to be used as a triplex; defendant Avent knew that the zoning ordinance did not permit this type of use but, without checking with public records, thought that the subject property was grandfathered from any zoning restrictions; and she relied

on the appraisal report in purchasing the subject property. Defendant Avent, citing *Williams v. United Cmty. Bank*, ___ N.C. App. ___, 724 S.E.2d 543 (2012), counters that the trial court properly dismissed plaintiff's claims as the parties' forecast of evidence shows that she did not rely on the appraisal reports. The arguments raised by the parties and the cases cited in support of those arguments require a review of the applicable law regarding the duty owed by a real estate appraiser to a party not in privity of contract, such as plaintiff, a purchaser of real property.

In *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E.2d 535 (1981), the case cited by plaintiff in support of her argument that defendant Avent breached his duty of care, the plaintiffs alleged that they had suffered economic loss by relying on the defendant appraiser's appraisal which indicated that the home purchased by the plaintiffs was in good condition when in fact the house contained serious defects. *Id.* at 603-04, 277 S.E.2d at 536. At trial, the plaintiffs put forth the following evidence in support of his allegations: the plaintiffs walked through the house two times prior to contracting to purchase the subject property; the contract was conditioned upon receiving a loan and loan approval was conditioned upon an appraisal; the plaintiffs paid $100 for the appraisal; after the sale was completed, the plaintiffs immediately noticed several defects in the subject property; an expert witness testified that soil compression under the subject property had caused the defects and a majority of this settling would have occurred the first few years after it had been constructed; another expert witness testified that "a competent appraiser exercising reasonable and ordinary care would have included at least the major defects in an appraisal and would have appraised the plaintiffs' property" approximately $17,000 less than its appraised value; and the loan officer testified that major defects would have had to been repaired before the loan would have been approved. *Id.* at 605-06, 277 S.E.2d at 537-38. The defendant appraiser testified that he saw no defects when he appraised the subject property and his appraisal was accurate based on his inspection. *Id.* at 606, 277 S.E.2d at 538. The trial court granted the defendant's motion for a directed verdict at the close of the plaintiff's evidence, dismissing plaintiff's negligence claim and the plaintiff appealed. *Id.* at 609, 277 S.E.2d at 539. On appeal, this Court stated that

> [t]he absence of contractual privity between plaintiffs and defendant is not a bar to plaintiffs['] recovery in tort. See Prosser, Misrepresentation and Third Persons, 19 Vand. L. Rev. 231 (1966).

> "[S]ound reason dictates that negligence liability be imposed, in appropriate circumstances, to protect the foreseeable interests of third parties not in privity of contract," [*Howell v. Fisher*, 49 N.C. App. 488, 493, 272 S.E.2d 19, 23 (1980)], and therefore, it has long been established that negligent performance of a contract may give rise to an action in tort.

Id. at 610, 277 S.E.2d at 540. In determining the defendant appraiser's duty to the plaintiff, the Court cited the following portion of the Restatement of Torts 2d, § 552 (1977):

> [o]ne who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Id. at 611, 277 S.E.2d at 541. This Court then concluded that "there was evidence from which the jury could have concluded that defendant should have reasonably foreseen and expected that plaintiffs would rely on the appraisal report" as the work order included the plaintiffs' names as the "Borrowers[;]" the plaintiff paid the appraisal fee; and the defendant had transacted enough similar business with the bank that he should have been aware of the importance of the appraisal to the buyer and "the reliance that borrowers would place thereon." *Id.* at 610-11, 277 S.E.2d at 540. The Court further stated that

> [t]he evidence also warrants an inference that plaintiffs actually relied on defendant's appraisal report to [the bank] and that defendant's failure to discover and disclose the alleged defects in the house was a proximate cause of plaintiffs' injury. [The plaintiff] Dr. Alva testified that the contract to purchase the house was conditioned upon his obtaining financing. The contract to purchase specifically stated "[i]n the event [plaintiffs, after exerting their best efforts to obtain financing, were unable to do so,] this contract shall be null and void." Dr. Alva also testified that he understood the loan was conditioned upon the appraisal and "assumed everything was all right when the loan was approved." [The plaintiff's] assumption as to the import of the appraisal was substantiated by the testimony of . . . the lending officer, who said

> "[e]ither the repair work had to be done or we would have had to decline the loan application."

Id. at 611, 277 S.E.2d at 541. Based on the application of this portion of the Restatement of Torts 2d, § 552, this Court reversed the trial court's granting of directed verdict in favor of the defendant appraiser on the plaintiff's tort claim. *Id.* at 613, 277 S.E.2d at 542.

In *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 208, 367 S.E.2d 609, 614 (1988), our Supreme Court addressed the issue of "the scope of an accountant's liability for negligent misrepresentation in the context of financial audits." In addressing plaintiff Sidbec-Dosco's claim for negligent misrepresentation, the Court noted four different approaches to addressing this issue, but adopted the Restatement (Second) of Torts § 552 (1977), including the limitations in section (2)(a) & (b), which were not mentioned by the *Alva* Court:

> *Information Negligently Supplied for the Guidance of Others*
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Id. at 209-10, 214, 367 S.E.2d at 614, 617. The Court explained its understanding of the Restatement in determining an accountant's liability:

> [a]s we understand it, under the Restatement approach an accountant who audits or prepares financial information for a client owes a duty of care not only to the client but to any other

> person, or one of a group of persons, whom the accountant or his client intends the information to benefit; and that person reasonably relies on the information in a transaction, or one substantially similar to it, that the accountant or his client intends the information to influence. If the requisite intent is that of the client and not the accountant, then the accountant must know of his client's intent at the time the accountant audits or prepares the information.

Id. at 210, 367 S.E.2d at 614. The Court further explained the reasoning behind its adoption of the Restatement:

> the standard set forth in the Restatement (Second) of Torts § 552 (1977) represents the soundest approach to accountants' liability for negligent misrepresentation. . . . It recognizes that liability should extend not only to those with whom the accountant is in privity or near privity, but also to those persons, or classes of persons, whom he knows and intends will rely on his opinion, or whom he knows his client intends will so rely. On the other hand, as the commentary makes clear, it prevents extension of liability in situations where the accountant "merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon [the audited financial statements], on the part of anyone to whom it may be repeated." *Restatement (Second) of Torts* § 552, Comment h. As such it balances, more so than the other standards, the need to hold accountants to a standard that accounts for their contemporary role in the financial world with the need to protect them from liability that unreasonably exceeds the bounds of their real undertaking.

Id. at 214-15, 367 S.E.2d at 617. The Supreme Court specifically rejected the application of the reasonable foreseeability test as adopted by *Alva*, "because it would result in liability more expansive than an accountant should be expected to bear[,]" explaining that

> An accountant performs an audit pursuant to a contract with an individual client. The client may or may not intend to use the report for other than internal purposes. It does not benefit the accountant if his client distributes the audit opinion to others. Instead, it merely exposes his work to many whom he may have had no idea would scrutinize his efforts. We believe that in fairness accountants should not be liable in circumstances where they are unaware of the use to which their opinions will be put. Instead, their liability should be commensurate with those per-

> sons or classes of persons whom they know will rely on their work. With such knowledge the auditor can, through purchase of liability insurance, setting fees, and adopting other protective measures appropriate to the risk, prepare accordingly.
>
> It is instructive that Judge Cardozo, the architect of reasonable foreseeability as the touchstone for products liability, *MacPherson v. Buick Motor Co.*, 217 N.Y. 282, 111 N.E. 1050 (1916), declined to adopt the same standard for accountants' liability in *[Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931).]. Judge Cardozo distinguished accountants from manufacturers because of the potential for excessive accountants' liability. He wrote that if accountants could be held liable for negligence by those who were not in privity, or nearly in privity, accountants would face "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. at 179-80, 174 N.E. at 444. Because of this potential for inordinate liability Judge Cardozo concluded, as do we, that accountants should be held liable to a narrower class of plaintiffs than the class embraced by the reasonable foreseeability test.

Id. at 211, 213-14, 367 S.E.2d at 615, 616-17. The Court also held that the plaintiff Raritan's claim for negligent misrepresentation was properly dismissed, as this claim required actual reliance on the defendant's audit statements. *Id.* at 205-06, 367 S.E.2d at 612. The Court held that "a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information" and there was no justifiable reliance, as the plaintiff Raritan "allege[d] that it got the financial information upon which it relied, essentially IMC's net worth, not from the audited statements [produced by defendants], but from information contained in Dun & Bradstreet." *Id.* at 205-07, 367 S.E.2d at 612-13.

In *Ballance v. Rinehart*, 105 N.C. App. 203, 412 S.E.2d 106 (1992), this Court addressed the issue of "whether a licensed real estate appraiser who performs an appraisal of real property at the request of a client owes a prospective purchaser of such property who relies on the appraisal a duty to use reasonable care in the preparation of the appraisal." *Id.* at 205, 367 S.E.2d at 107. The plaintiff in *Ballance*, citing *Alva*, argued that the trial court erred in dismissing her action for damages for economic loss caused by the defendant appraiser's negligence in preparing the appraisal report, after she had relied on the

report in purchasing a property that she later discovered had several structural defects not listed in the report. *Id.* at 205, 367 S.E.2d at 108. The defendant appraiser argued that the case was not controlled by *Alva*, but by *Raritan*. *Id.* at 206, 367 S.E.2d at 108. The Court noted that

> The *Raritan* Court rejected as too expansive the position adopted by some courts which extends liability to all persons whom the accountant should reasonably foresee might obtain and rely on the financial information. In doing so, the Court emphasized the policy reasons which justify establishing a narrower class of plaintiffs to whom an accountant owes a duty of care, such as the lack of control by accountants over the distribution of their reports and the fact that accountants do not benefit if their clients decide to use the report for purposes other than those communicated to the accountant. *See Raritan*, 322 N.C. at 212-13, 367 S.E.2d at 616.

Id. at 207, 367 S.E.2d at 108-09. Based on our Supreme Court's policy reasoning in *Raritan*, the *Ballance* Court adopted the *Raritan* Court's application of the Restatement (Second) of Torts § 552 (1977), including the limitations in section (2)(a) & (b), "in assessing the liability of a real estate appraiser for negligent misrepresentation to prospective purchasers of the appraised property with whom the appraiser is not in contractual privity." *Id.* at 207, 367 S.E.2d at 109. The Court explained that like an accountant, "real estate appraisers have no control over the distribution of their reports once rendered and therefore cannot limit their potential liability" and "a real estate appraiser performs an appraisal pursuant to a contract with an individual client, often a lending institution or a homeowner." *Id.* In concluding that "plaintiff's complaint fails to state a claim under § 552 of the Restatement (Second) of Torts," and was properly dismissed, the *Ballance* Court stated that

> plaintiff has failed to sufficiently allege that she is a person for whose benefit and guidance defendant *intended* to supply the appraisal report, or that defendant *knew* that the recipients of the report, Peoples Bank and Jack Horton, intended to supply it to plaintiff. In fact, plaintiff's complaint is devoid of any alleged purpose for which Peoples Bank and Jack Horton requested the appraisal in question. Defendant could have supplied the appraisal in question as part of a refinancing transaction between Peoples Bank and Jack Horton, with no intention that a third party would later see and rely on the report.

Id. at 208-09, 367 S.E.2d at 109 (emphasis in original).

In *Williams v. United Cmty. Bank*, ___ N.C. App. ___, 724 S.E.2d 543 (2012), the case cited by defendants in support of their argument, the plaintiffs filed a complaint against the defendant appraisers, raising claims for, *inter alia*, negligence, and negligence misrepresentation, based on allegations surrounding the plaintiffs' investments in certain real estate development properties. *Id.* at ___, 724 S.E.2d at 547. On appeal, the plaintiffs argued that the trial court erred in granting the defendant appraiser's motion for summary judgment and dismissing those claims. *Id.* at ___, 724 S.E.2d at 547-48. In addressing the plaintiffs' claims for negligence and negligent misrepresentation, this Court relied on the holdings in *Ballance* and *Raritan*:

> In *Ballance v. Rinehart*, we considered "whether a licensed real estate appraiser who performs an appraisal of real property at the request of a client owes a prospective purchaser of such property *who relies on the appraisa*l a duty to use reasonable care in the preparation of the appraisal." 105 N.C. App. 203, 205, 412 S.E.2d 106, 107 (1992) (emphasis added). We expressly adopted the approach for determining negligence by accountants as set forth by our Supreme Court in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 201, 367 S.E.2d 609, 610 (1988). Raritan, in turn, relied on the . . . language from the Restatement (Second) of Torts[.]
>
> . . . .
>
> *Ballance*, 105 N.C. App. at 206-07, 412 S.E.2d at 108 (emphasis added)[.]

Id. at ___, 724 S.E.2d at 550. Without addressing whether the plaintiffs sufficiently alleged that they were persons for whose benefit and guidance defendants intended to supply the appraisal report, or whether the defendants knew that the recipients of the report intend to supply it to the plaintiffs, *see Ballance*, 105 N.C. App. at 208-09, 367 S.E.2d at 109, the Court focused on the element of plaintiffs' justifiable reliance on the appraisal reports: "plaintiffs asserting negligence claims against appraisers must forecast evidence of reliance in order to establish a *prima facie* case of negligence and negligent misrepresentation and survive a motion for summary judgment." *Id.* at ___, 724 S.E.2d at 550. As to the plaintiffs' actual reliance, the Court noted that

> [i]n deposition testimony, [plaintiff] Dr. Williams was asked whether the [defendants] made any verbal or written misrepre-

> sentations to him about the lots, and he responded, "Not to my knowledge, no, prior to closing." His wife also testified that the appraisal reports had not played any role in her decision to purchase the lots.
>
> . . . .
>
> In addition, [plaintiff] Dr. Williams signed the purchase contract for lots 607-12 in February 2006, but no appraisals were conducted on those lots until 2 March 2006. The purchase contracts for lots 596-606 and 613-15 are not contained in the record. Thus, [plaintiff] Dr. Williams was committed to purchase at least six of his 20 lots . . . *before any appraisals had been conducted.*
>
> All of the evidence shows that Plaintiffs made their decisions to invest in the development and contracted to do so without any awareness of, much less reliance on, the [defendant appraisers'] appraisals.

Id. at ___, 724 S.E.2d at 549-50 (emphasis in original). The Court went on to conclude that

> Here, as discussed above, the Williams Plaintiffs cannot show that they relied on the [defendant appraisers'] appraisals in making their investment decisions, where they signed the purchase contracts without reviewing appraisals and before at least some of the appraisals were even performed. The Williams Plaintiffs having failed to forecast evidence of reliance on the appraisals, the trial court's grant of summary judgment to the [defendant appraisers] was proper. Accordingly, we affirm.

Id. at ___, 724 S.E.2d at 550.

Even though here, like *Alva*, there was evidence forecast that plaintiff paid the appraisal fee and she was listed as the "borrower" on the appraisal report, *Alva's* foreseeability test is not the applicable law for the case *sub judice*, based on our Supreme Court's holding in *Raritan* and the application of *Raritan* and the Restatement (Second) of Torts § 552 in *Ballance* and *Williams* to determine an appraiser's duty. Based on our Courts holdings in *Raritan*, *Ballance*, and *Williams*, an appraiser's duty is determined by an application of the Restatement (Second) of Torts § 552, and its limitations to liability in section (2)(a) & (b) require the plaintiff to allege and put forth evidence showing that (1) she was a person or one of a limited group of persons for whose benefit and guidance the appraiser intended to supply the information or that the appraiser knew that the recipient

intended to supply the information to the plaintiff, and (2) justifiable reliance on that information. *See Raritan*, 322 N.C. at 209-10, 214, 367 S.E.2d at 614; *Ballance*, 105 N.C. App. at 207, 367 S.E.2d at 108-09; *Williams*, ___ N.C. App. at ___, 724 S.E.2d at 550. Justifiable reliance requires that the plaintiff actually relied on the information. *See Raritan*, 322 N.C. at 206, 367 S.E.2d at 612 ("A party cannot show justifiable reliance on information . . . without showing that he relied upon the actual . . . statements themselves to obtain this information.").

In addressing the first requirement, we note that, like *Ballance*, there are no allegations in plaintiff's complaint that she was a person or one of a limited group of persons for whose benefit and guidance defendant Avent intended to supply the appraisal report or that defendant Avent knew that the recipient, the lender, intended to supply it to plaintiff. In fact, plaintiff alleges that "Defendant Avent prepared the appraisal report for the lender and the intended use of the appraisal report was for the lender to evaluate the property appraised for a mortgage finance transaction." The appraisal report itself defines the "lender/client" as Southeast Mortgage Services and specifically states, "the intended user of this appraisal report is the lender/client" and "this appraisal is for the intended use of the assigned lender/client and/or their assigns for mortgage lending purposes and is not intended for any other use."

As to justifiable reliance, plaintiff did allege that she "relied on Defendant Avent's appraisal in deciding to proceed with the purchase of the appraised property and in obtaining a mortgage to finance said purchase." Even so, just as in *Williams*, the forecast of evidence by the parties shows that plaintiff did not actually rely on defendant Avent's appraisal. Plaintiff admitted in her deposition that she never viewed a copy of the appraisal prior to closing the purchase of the subject property. She also never talked to defendant Avent prior to purchasing the property. In fact, the purchase contract contained an appraisal contingency provision allowing plaintiff the option of terminating the purchase if the property did not appraise at a value which equaled or exceeded the sale price. However, this contingency expired on or before 30 April 2007 and defendant Avent performed the appraisal on 16 May 2007; plaintiff still closed on the purchase of the property without reviewing the appraisal. Additionally, plaintiff admits in her brief on appeal that she "did not scrutinize the appraisal at any time, as generally buyers are not familiar enough with the forms to easily interpret them." Plaintiff further argues that the lender relied on defendant Avent's appraisal in approving the loan

and she relied on the bank's reliance. This is similar to the plaintiff's reliance in *Alva* that he understood the loan was conditioned upon the appraisal and "assumed everything was all right when the loan was approved." *See Alva*, 51 N.C. App. at 611, 277 S.E.2d at 541. However, reliance by proxy was rejected by *Raritan*, which stated that the justifiable reliance required by the Restatement, as illustrated above in the *Williams* case, is the plaintiff's actual reliance on the information in the report, not reliance via a third party such as the lender. *See Raritan*, 322 N.C. at 205-07, 367 S.E.2d at 612-13. In addition, unlike *Alva*, plaintiff here voluntarily waived the appraisal condition of the contract by purchasing it even after the deadline for appraisal had passed; she also agreed to accept less favorable mortgage terms than she had specified in the contract. As plaintiff failed to properly allege or forecast evidence in support of the essential elements required by Restatement (Second) of Torts § 552 against defendant Avent for her negligence and negligent misrepresentation claims, *see Griffith*, 184 N.C. App. at 210, 646 S.E.2d at 554, we hold that the trial court's grant of summary judgment was proper.

V. Multiple Defendants in the Hearing

[3] Plaintiff next contends that the trial court violated N.C. Gen. Stat. § 1A-1, Rule 49 by permitting the multiple defendants in this matter to argue at the summary judgment hearing, resulting in "prolixity and confusion" as counsel for defendant Avent raised issues not relevant to the issues and "cloud[ed] the issues." Defendant Avent counters that plaintiff's argument has no merit because Rule 49 is inapplicable and she made no objection to the proceedings during the summary judgment hearing.

First, we agree with defendant Avent that N.C. Gen. Stat. § 1A-1, Rule 49 (2009) is inapplicable here, as it is only relevant to jury issues and verdicts, and plaintiff appeals from a summary judgment order. N.C. Gen. Stat. § 1A-1, Rule 56(b) permits "[a] party against whom a claim . . . is asserted" to move for summary judgment in his favor. N.C. Gen. Stat. § 1-11 (2009) states that "[a] party may appear either in person or by attorney in actions or proceedings in which he is interested." Plaintiff determined how many defendants she wanted to file claims against; they in turn filed motions for summary judgment in their favor; and they chose to be represented by counsel at this hearing. The hearing transcript shows that many of the statements which plaintiff argues were "confusing and disruptive," were merely the arguments presented by each individual defendant's trial counsel

regarding their defenses and entitlement to summary judgment. Plaintiff herself was also represented by counsel at this hearing and her counsel made arguments in opposition to defendants' motions for summary judgment. As defendant Avent points out, plaintiff raised no objection to the multiple defendants at the hearing, nor could we imagine any valid reason for a plaintiff to object to the fact that the defendants she chose to sue were actually defending themselves. Accordingly, we find no merit in plaintiff's argument.

VI. Statutory Interpretation

[4] Lastly, plaintiff argues that the trial court failed to properly interpret and apply N.C. Gen. Stat. § 93E-1-10(2), which established the duties for an appraiser and demonstrates that defendant Avent breached his duty. Defendant counters that this argument is not properly before us as it was neither raised in plaintiff's complaint nor at the summary judgment hearing.

N.C. Gen. Stat. § 93E-1-10(2) (2009), under the North Carolina Appraisers Act, is an enabling statute giving authority to the North Carolina Appraisal Board to "[p]rescribe standards of practice for persons registered as a trainee licensed or certified under this Chapter[.]" Plaintiff makes no mention of any of these specific standards nor does she allege which standards, if any, defendant may have failed to fulfill. We fail to see how this enabling statute would support any of plaintiff's arguments that defendant Avent breached his duty. Accordingly, we find no merit in plaintiff's argument.

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Chief Judge MARTIN and Judge GEER concur.

JUSTIN SHERRILL KELLY, PETITIONER v. D. BRAD RILEY, IN HIS OFFICIAL CAPACITY AS SHERIFF OF CABARRUS COUNTY, RESPONDENT

No. COA12-273

(Filed 6 November 2012)

1. Firearms and Other Weapons—concealed handgun permit renewal—applicable statutory provisions—petitioner failed to meet requirements

The trial court did not apply the wrong statutory provisions in upholding the sheriff's denial of petitioner's 19 January 2011 application for a concealed handgun permit. N.C.G.S. § 14-415.18(a) is only applicable to nonrenewals in the context of establishing the procedure for an appeal to the district court and N.C.G.S. § 14-415.16 specifically governs renewal of a concealed handgun permit. Petitioner did not meet the requirements of N.C.G.S. § 14-415.12 and, as a result, was not entitled to a renewal of his permit under N.C.G.S. § 14-415.16.

2. Constitutional Law—Second Amendment—concealed handgun permit—not within scope

Petitioner's right to carry a concealed handgun did not fall within the scope of the Second Amendment and N.C.G.S. § 14-415.12 was constitutional as applied to defendant.

Appeal by petitioner from order entered 15 November 2011 by Judge Martin B. McGee in Cabarrus County District Court. Heard in the Court of Appeals 12 September 2012.

Diener Law, by Cynthia E. Everson, for petitioner-appellant.

Cabarrus County Attorney Richard M. Koch, for respondent-appellee.

CALABRIA, Judge.

Justin Sherrill Kelly ("petitioner") appeals from a District Court order affirming D. Brad Riley's decision while serving in his official capacity as Sheriff of Cabarrus County ("respondent"). Respondent denied petitioner's application for a concealed handgun permit. We affirm.

I. Background

On 24 October 2005, petitioner sought a concealed handgun permit. In North Carolina, applicants for concealed handgun permits are required to answer a number of questions. Question number nine on petitioner's application was, "Have you ever been adjudicated guilty . . . for one or more crimes of violence constituting a misdemeanor, including but not limited to, a violation of the disqualifying criminal offenses listed on the reverse side of" the form. There were twenty-five disqualifying criminal offenses on the list. The last one on the list stated "[a]ny crime of violence found in Article 14 in the North Carolina General Statutes." Petitioner responded to the question by answering, "no," even though he had been convicted of assault on a female in May 2001, which was a misdemeanor under Article 8 of Chapter 14 in the North Carolina General Statutes. After petitioner completed the application, he submitted it to respondent. When respondent reviewed petitioner's application, he was unaware of petitioner's 2001 assault conviction and issued petitioner a concealed handgun permit.

Petitioner's initial concealed handgun permit had expired on 21 November 2010. On 19 January 2011, petitioner submitted another application and was again required to answer questions. The list on the back of the application had been revised since his initial application in 2005. Number twenty-five on the revised list of disqualifying criminal offenses read, "Assaults [Article 8 of Chapter 14 of the General Statutes]." Petitioner answered "no" to the same question on the front of the application that he had answered on the previous one. The question was whether he had ever "been adjudicated guilty . . . for one or more crimes of violence constituting a misdemeanor, including, but not limited to, a violation of the disqualifying criminal offenses listed on the reverse side of" the form. On 20 January 2011, respondent notified petitioner that he was ineligible for a permit and his application for renewal had been denied pursuant to N.C. Gen. Stat. § 14-415.12(b)(8). According to respondent, petitioner's previous conviction for assault on a female in violation of N.C. Gen. Stat. § 14-33(c)(2) from 14 May 2001 disqualified him from having a concealed handgun permit.

On 1 April 2011, petitioner filed a petition for judicial review alleging that the Sheriff's Department of Cabarrus County refused to issue a concealed handgun permit because an incorrect statute was applied in reviewing his application for renewal of a concealed hand-

gun permit. Specifically, petitioner alleged that his application was denied without a hearing and for a reason other than those stated in N.C. Gen. Stat. § 14-415.18. Petitioner also alleged that the Concealed Handgun Permit Act was unconstitutional as applied to him. On 30 August 2011, after determining the Sheriff's Department of Cabarrus County was not the real party in interest, respondent was substituted for the Sheriff's Department of Cabarrus County.

On 15 November 2011, after a hearing in Cabarrus County District Court, the trial court concluded that petitioner did not qualify for a concealed handgun permit because his prior conviction for assault on a female. Therefore, the trial court affirmed respondent's decision to deny petitioner a concealed handgun permit. However, the trial court did not rule on the constitutionality of the statute, but found that petitioner preserved that issue for appellate review. Petitioner appeals.

II. Application for a Concealed Handgun Permit

In North Carolina, Article 54B of Chapter 14 of the General Statutes provides the requirements for an individual to qualify for a concealed handgun permit. First, an application is submitted to the sheriff. If the individual qualifies for a permit based upon the criteria in N.C. Gen. Stat. § 14-415.12, then the sheriff "shall issue a permit to carry a concealed handgun . . . " and "[t]he permit shall be valid throughout the State for a period of five years from the date of issuance." N.C. Gen. Stat. § 14-415.11 (2011). The sheriff, however,

> shall deny a permit to an applicant who
>
> . . .
>
> > (8) Is or has been adjudicated guilty of . . . one or more crimes of violence constituting a misdemeanor, including but not limited to, a violation of a misdemeanor under Article 8 of Chapter 14 of the General Statutes.

N.C. Gen. Stat. § 14-415.12(b)(8) (2011).

An individual seeking to renew a concealed handgun permit must sign an "affidavit stating that the permittee remains qualified under the criteria provided in this Article . . . ." N.C. Gen. Stat. § 14-415.16(b) (2011). Notwithstanding the applicant's affidavit, the sheriff is still required to make an independent determination regarding whether "the permittee remains qualified to hold a permit in accordance with the provisions of G.S. 14-415.12." N.C. Gen. Stat. § 14-415.16(c) (2011). The sheriff is required to renew the permit only "if the per-

mittee remains qualified to have a permit under G.S. 14-415.12." N.C. Gen. Stat. § 14-415.16(c) (2011).

Thus, both initial and renewal applications require the sheriff to determine whether an applicant has violated any of the disqualifying criminal offenses under N.C. Gen. Stat. § 14-415.12. Specifically, if the applicant has been adjudicated guilty of a disqualifying criminal offense, the applicant is barred from issuance of a permit under the provisions of N.C. Gen. Stat. § 14-415.12(b), and the sheriff is required to deny their application regardless of whether the applicant is seeking a new permit or a renewal permit.

III. Denial of Application for Concealed Handgun Permit

[1] Petitioner contends that the trial court applied the wrong statutory provisions in upholding the sheriff's denial of petitioner's 19 January 2011 application for a concealed handgun permit. We disagree.

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Petitioner contends that his renewal application was governed by N.C. Gen. Stat. § 14-415.18. This statute, entitled "Revocation or suspension of permit," states, in relevant part:

> (a) The sheriff of the county where the permit was issued or the sheriff of the county where the person resides may revoke a permit subsequent to a hearing for any of the following reasons:
>
> (1) Fraud or intentional or material misrepresentation in the obtaining of a permit.
>
> (2) Misuse of a permit, including lending or giving a permit to another person, duplicating a permit, or using a permit with the intent to unlawfully cause harm to a person or property.
>
> (3) The doing of an act or existence of a condition which would have been grounds for the denial of the permit by the sheriff.
>
> (4) The violation of any of the terms of this Article.
>
> (5) The applicant is adjudicated guilty of or receives a prayer for judgment continued for a crime which would have disqualified the applicant from initially receiving a permit.
>
> A permittee may appeal the revocation, or nonrenewal of a permit by petitioning a district court judge of the district in which the applicant resides. The determination by the court, on appeal,

> shall be upon the facts, the law, and the reasonableness of the sheriff's refusal.

N.C. Gen. Stat. § 14-415.18(a) (2009).

Petitioner seizes on the word "nonrenewal" in the final paragraph of the statute to argue that the preceding language in the statute should also be read to apply to nonrenewals. Based upon this interpretation, petitioner argues that (1) he was entitled to a hearing before respondent denied his renewal application; and (2) respondent could only deny his application based upon one of the five reasons listed in N.C. Gen. Stat. § 14-415.18(a).

Petitioner is mistaken. The plain language of N.C. Gen. Stat. § 14-415.18(a) makes clear that the initial portions of the statute upon which petitioner relies only apply when the sheriff "revoke[s] a permit. . . ." *Id*. The word "nonrenewal" appears only in the last section of N.C. Gen. Stat. § 14-415.18(a), in a paragraph which explains how a permittee may appeal *either* a revocation or a nonrenewal to a district court judge. Accordingly, N.C. Gen. Stat. § 14-415.18(a) is only applicable to nonrenewals in the context of establishing the procedure for an appeal to the district court.

Moreover, petitioner's argument completely ignores N.C. Gen. Stat. § 14-415.16, which specifically governs "[r]enewal of [a concealed handgun] permit." That statute does not require a hearing prior to the nonrenewal of an applicant's concealed handgun permit. Instead, the statute provides that a concealed handgun permit should only be renewed "if the permittee remains qualified to have a permit under G.S. 14-415.12." N.C. Gen. Stat. § 14-415.16 (c) (2011).

In the instant case, petitioner's permit had expired and had not been revoked prior to its expiration. Therefore, the criteria for revoking a permit under N.C. Gen. Stat. § 14-415.18 did not apply to petitioner's renewal application. When petitioner applied to renew his concealed handgun permit, the sheriff was required to determine whether petitioner met the requirements of N.C. Gen. Stat. § 14-415.12. *See* N.C. Gen. Stat. § 14-415.16(c).

Under N.C. Gen. Stat. § 14-415.12, the sheriff "shall deny a permit to an applicant who[,]" *inter alia*, "has been adjudicated guilty of . . . one or more crimes of violence constituting a misdemeanor . . . [including] a violation of a misdemeanor under Article 8 of Chapter 14 of the General Statutes . . . ." N.C. Gen. Stat. § 14-415.12 (b)(8) (2011). Petitioner was adjudicated guilty in

Cabarrus County of assault on a female pursuant to N.C. Gen. Stat. § 14-33(c)(2) on 14 May 2001. Assault on a female is a crime of violence amounting to a misdemeanor violation under Article 8 of Chapter 14 of the General Statutes. Thus, petitioner did not meet the requirements of N.C. Gen. Stat. § 14-415.12 and, as a result, he was not entitled to a renewal of his permit under N.C. Gen. Stat. § 14-415.16. Accordingly, respondent properly denied petitioner's application, and the trial court did not err in upholding respondent's denial of petitioner's January 2011 application for a concealed handgun permit. This argument is overruled.

IV. Constitutional Violation

[2] Petitioner also argues that N.C. Gen. Stat. § 14-415.12, as applied to petitioner, violates the Second Amendment of the United States Constitution. We disagree.

"[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Summer Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

The Second Amendment of the United States Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. This language guarantees the "pre-existing" "individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592, 171 L. Ed. 2d 637, 657 (2008) (emphasis omitted). In *Heller*, the Supreme Court struck down a District of Columbia law that placed a ban on the possession of handguns in the home. *Id.* at 635, 171 L. Ed. 2d at 657.

Since the Supreme Court's ruling in *Heller*, several Federal Circuit Courts of Appeal have developed a two-part analysis for challenges to the Second Amendment. *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010). When applying this analysis, the first question is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification." *Chester*, 628 F.3d at 680. If not, the law is valid and the inquiry is complete. *Id.* If so, the law is evaluated under the appropriate form of "means-end scrutiny." *Id.* We find *Chester*, *Marzzarella* and *Reese* persuasive, and we will

also apply the two-part analysis to determine if the burden imposed by N.C. Gen. Stat. § 14-415.12 violates petitioner's constitutional rights.

As an initial matter, we must determine whether a permit to carry a concealed handgun is protected by the Second Amendment. Petitioner argues that he has a fundamental right protected by the Second Amendment to carry and conceal a handgun outside the home. Respondent argues that petitioner does not have a fundamental right to obtain a concealed handgun permit, and the Second Amendment does not apply.

The Supreme Court has recognized that the Second Amendment right to keep and bear arms is not infringed by prohibitions against carrying concealed weapons. *Robertson v. Baldwin*, 165 U.S. 275, 281-82, 41 L. Ed. 715, 717 (1897). While the *Heller* Court's definition of the term "bear arms" as used in the Second Amendment included the right of an individual to "carry . . . upon the person or in the clothing or in a pocket," the Court's opinion clarifies that the scope of the "Second Amendment right is not unlimited." *Heller*, 554 U.S. at 584 and 626, 171 L. Ed. 2d at 653 and 678. Specifically, the Court recognized that it is "not a right to keep a weapon whatsoever in any manner whatsoever and for whatever purpose[,]" and acknowledged that previously courts have "held that prohibitions on carrying concealed weapons were lawful under the Second Amendment and state analogues." *Id.* (citing *Nunn v. State*, 1 Ga. 243, 251 (1846)(finding that an act that suppressed an individual's ability to carry "certain weapons *secretly*," was valid because it did not "deprive the citizen of his *natural* right of self-defence [sic], or of his constitutional right to keep and bear arms.")).

Other state courts that have analyzed this language have found that the Second Amendment does not protect an individual's right to conceal a weapon. *See State v. Knight*, 218 P.3d 1177, 1190 (Kan. App. 2009) (noting that the *Heller* Court's mention of prohibitions on carrying concealed firearms "clearly shows that the *Heller* Court considered concealed firearms prohibitions to be presumptively constitutional under the Second Amendment"); *People v. Flores*, 86 Cal.Rptr.3d 804, 808 (Cal. App. 2008) (citing *Robertson* and *Heller* in holding that "[g]iven this implicit approval [in *Heller*] of concealed firearm prohibitions, we cannot read *Heller* to have altered the [C]ourts' longstanding understanding that such prohibitions are constitutional.").

The Supreme Court of North Carolina has also recognized that "the right of individuals to bear arms is not absolute, but is subject to regulation." *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968); *see also State v. Speller*, 86 N.C. 697, 700 (1882) ("The distinction between the *'right to keep and bear arms*,' and *'the practice of carrying concealed weapons'* is plainly observed in the constitution of this state. The first, it is declared, shall not be infringed, while the latter may be prohibited.").

In the instant case, petitioner was denied a concealed handgun permit pursuant to N.C. Gen. Stat. § 14-415.12 because of his previous conviction of assault on a female. While courts have consistently held that the Second Amendment protects an individual's right to *possess* a weapon, courts have also found that the Second Amendment does not extend to an individual's right to *conceal* a weapon. *See Robertson*, 165 U.S. at 281-82, 41 L. Ed. at 717; *Heller*, 554 U.S. at 626, 171 L. Ed. 2d at 678. Therefore, we conclude that petitioner's right to carry a concealed handgun does not fall within the scope of the Second Amendment, and N.C. Gen. Stat. § 14-415.12 is constitutional as applied to him. Since we have determined that N.C. Gen. Stat. § 14-415.12 does not impose "a burden on conduct falling within the scope of the Second Amendment's guarantee[,]" there is no reason to evaluate the law under any level of constitutional scrutiny. *Chester*, 628 F.3d at 680. This argument is overruled.

V. Conclusion

Petitioner sought but failed to renew his concealed handgun permit because he did not qualify according to the criteria required by N.C. Gen. Stat. § 14-415.16, the statute entitled "Renewal of permit." Furthermore, N.C. Gen. Stat. § 14-415.12 is constitutional as applied to the petitioner. Therefore, we affirm the trial court's order which concluded that respondent properly denied petitioner's application for a concealed handgun permit due to petitioner's conviction for assault on a female.

Affirmed.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. KEVIN MATTHEW BUCKHEIT, DEFENDANT

No. COA12-465

(Filed 6 November 2012)

1. Appeal and Error—untimely receipt of transcript—clerk's error—certiorari

The Court of Appeals granted a writ of certiorari so that defendant's appeal could be heard despite an untimely receipt of the transcript where the delay was due to an error in the trial court clerk's notification of the court reporter to prepare the transcript.

2. Motor Vehicles—driving while impaired—intoxilyzer test—witness

Defendant's intoxilyzer results should have been suppressed where defendant requested a witness to the test, defendant's witness timely arrived and made reasonable efforts to gain access to defendant, and was prevented from doing so.

On writ of certiorari to review denial of motion to suppress entered 25 October 2011 by Judge Orlando F. Hudson, Jr. and judgment entered 3 November 2011 by Judge W. Allen Cobb, Jr. in Wake County Superior Court. Heard in the Court of Appeals 8 October 2012.

Roy Cooper, Attorney General, by John W. Congleton and Joseph L. Hyde, Assistant Attorneys General, for the State.

Kyle S. Hall, for defendant—appellant.

MARTIN, Chief Judge.

Defendant Kevin Matthew Buckheit appeals the 25 October 2011 denial of his motion to suppress intoxilyzer results obtained by the State and the subsequent 31 October 2011 judgment entered upon his plea of guilty to impaired driving in violation of N.C.G.S. § 20-138.1. Defendant specifically notified the State and the trial court of his intent to appeal, thereby preserving that right, despite pleading guilty. *See* N.C. Gen. Stat. § 15A-979(b) (2011); *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404-05 (1995), *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996).

The facts in this case are not disputed. The unchallenged findings of fact contained in the order denying defendant's motion to suppress are that:

1. The Defendant was arrested for driving while subject to an impairing substance by Trooper I. J. Cooper of the North Carolina State Highway Patrol on October 17, 2009 at approximately 10:13 p.m.

2. The Defendant was then transported by Trooper Cooper to the Wake County Public Safety Center for the administration of an intoxilyzer test and for other processing to be completed.

3. At 10:33 p.m. the Defendant was advised of his rights by Trooper Cooper with regard to the administration of the intoxilyzer test, including the right to have a witness present for the administration of the test, and at 10:39 p.m. the Defendant in the presence of Trooper Cooper was able to make contact by telephone with a friend, Leslie Orcutt, and asked her to come to witness the administration of the test.

4. At 10:52 p.m. Ms. Orcutt arrived in the lobby of the Wake County Public Safety Center and told an officer working at the desk in the lobby that she was there to be a witness for Kevin Buckheit who had been arrested for driving while impaired. The officer told Ms. Orcutt that the Defendant was being processed and that she should wait in the lobby.

5. At 10:58 p.m. Ms. Orcutt sent the Defendant a text message from her cellphone to the cellphone of the Defendant saying that she was in the lobby. She got no response from the Defendant.

6. The Defendant informed Trooper Cooper that he did not want to take the intoxilyzer test before talking to his witness, Ms. Orcutt, and at 11:03 p.m. the Defendant again attempted to call Ms. Orcutt but was unable to make contact with her.

7. At 11:09 p.m. the Defendant was asked by Trooper Cooper to submit to the intoxilyzer test, approximately 36 minutes after he was advised of his rights with respect to taking the test. At the time the test was administered, the Defendant's witness, Ms. Orcutt, was in the lobby area of the Wake County Public Safety Center.

8. At no time did Trooper Cooper call up to the front desk in the lobby of the Wake County Public Safety Center to find out if anyone was present to witness the intoxilyzer test, and at no time did anyone contact Trooper Cooper about a witness being present to observe the testing procedure.

9. While waiting in the lobby as instructed, the witness, Leslie Orcutt, asked the officer working at the front desk in the lobby multiple times if she needed to do anything in reference to being a witness for the Defendant and was told that she did not need to do anything.

10. The witness, Ms. Orcutt, was able to see the Defendant a little before 12 a.m. on October 17, 2009 as he was being released from the Wake County Public Safety Center.

Based on these findings, the trial court concluded:

1. The actions or inactions of Trooper Cooper did not constitute a violation of the Defendant's rights under G.S. 20-16.2.

2. The Defendant's constitutional rights under *State v. Ferguson*, 90 N.C.App. 513, 323 N.C.367 [sic] (1988), were not violated.

3. The Defendant was not prejudiced in the preparation of his defense.

After careful review, we reverse.

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[1] Defendant seeks review by petition for writ of certiorari. Defendant's petition was occasioned by an error in the trial court clerk's notification of the court reporter to prepare the transcript, such that the transcript was untimely received. As the error was due to no fault of defendant, and as the record reveals that defendant otherwise properly gave notice of appeal, we grant defendant's petition for certiorari pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . .").

[2] Defendant's sole issue on appeal is whether the trial court erred by denying his motion to suppress when the evidence was obtained in violation of his statutory and constitutional rights to have his selected witness present during the testing proceedings.

When a defendant challenges a trial court's denial of a motion to suppress, but not the findings of fact, our review is limited to a *de novo* determination of whether the trial court's factual findings support its conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982); *State v. Pickard*, 178 N.C. App. 330, 333-34, 631 S.E.2d 203, 206, *appeal dismissed and disc. review denied*, 361

N.C. 177, 640 S.E.2d 59 (2006). The unchallenged findings of fact are "presumed to be correct." *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005) (quoting *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998)).

N.C.G.S. § 20-16.2(a) concerns chemical analyses in implied consent offenses, such as impaired driving, and provides in part that:

> Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:
>
> . . . .
>
> (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

N.C. Gen. Stat § 20-16.2(a) (2011). If a witness is selected to view the testing procedures, then that witness "must make reasonable efforts to gain access to the defendant." *State v. Hatley*, 190 N.C. App. 639, 642—43, 661 S.E.2d 43, 45 (2008) (citing *State v. Ferguson*, 90 N.C. App. 513, 519, 369 S.E.2d 378, 382, *appeal dismissed and disc. review denied*, 323 N.C. 367, 373 S.E.2d 551 (1988)). "Although a defendant may waive the statutorily prescribed right to select a witness, the denial of the right requires suppression of the intoxilyzer results." *Id.* at 643, 661 S.E.2d at 45 (citing *State v. Myers*, 118 N.C. App. 452, 454-55, 455 S.E.2d 492, 493-94, *disc. review denied*, 340 N.C. 362, 458 S.E.2d 195 (1995); *State v. Gilbert*, 85 N.C. App. 594, 597, 355 S.E.2d 261, 263 (1987); *State v. Shadding*, 17 N.C. App. 279, 283, 194 S.E.2d 55, 57, *cert. denied*, 283 N.C. 108, 194 S.E.2d 636 (1973)).

In *State v. Hatley* the defendant was arrested for impaired driving and taken to the local sheriff's office for chemical analysis via an intoxilyzer. *Hatley*, 190 N.C. App. at 640, 661 S.E.2d at 44. The defendant was apprised of her rights, opted to call a witness, and reached her selected witness by telephone. *Id.* The defendant made the chemical analyst aware that her witness had been contacted and was en route to observe the test. *Id.* at 641, 661 S.E.2d at 44. When the wit-

ness "timely arrived" at the sheriff's office, she indicated to the officer on duty at the front desk that she was "there for [defendant]" for "a DUI." *Id.* at 644, 661 S.E.2d at 46. The front desk officer simply told the witness where to wait and the witness did not observe the administration of the intoxilyzer test. *Id.* Based on those facts, this Court reversed the trial court's denial of the defendant's motion to suppress the intoxilyzer results. *Id.*

In the instant case, after being arrested, defendant was made aware of his rights under N.C.G.S. § 20-16.2(a) and chose to have a witness present. In the presence of the arresting officer, defendant made contact with his selected witness by telephone and asked her to come and witness the administration of the intoxilyzer test. Less than twenty minutes from the time defendant was apprised of his rights, his selected witness arrived in the lobby of the Wake County Public Safety Center. The witness told the officer at the front lobby desk that she was there to be a witness for defendant who had been arrested for driving while impaired. The officer told the witness to wait in the lobby. The witness then asked the front desk officer multiple times if she needed to do anything in reference to being a witness for defendant. Defendant's witness was not present when the intoxilyzer test was administered, because she was still being told to wait in the lobby of the Wake County Public Safety Center.

The instant case is indistinguishable from *Hatley*, 190 N.C. App. 639, 661 S.E.2d 43. We hold that after her timely arrival, defendant's witness made reasonable efforts to gain access to defendant, *see id.* at 642-44, 661 S.E.2d at 45-46, but was prevented from doing so, and therefore, the intoxilyzer results should have been suppressed, *see id.* at 643, 661 S.E.2d at 45. The State concedes the trial court's denial of defendant's motion to suppress was erroneous. The trial court's findings of fact do not support its conclusions of law, so we reverse the denial of defendant's motion to suppress and vacate the judgment entered upon defendant's guilty plea.

Reversed and judgment vacated.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA v. KEITH LAMAR CURETON

No. COA12-147

(Filed 6 November 2012)

1. Confessions and Incriminating Statements—motion to suppress—Miranda rights—knowing and intelligent waiver

The trial court did not err in a resisting a public officer, felonious breaking or entering, larceny after breaking or entering, felonious possession of a stolen firearm, and felonious possession of a firearm by a felon case by denying defendant's motion to suppress the statements he made during a recorded interrogation at the police station even though defendant contended that he never waived his *Miranda* rights. Defendant knowingly and intelligently waived his *Miranda* rights based on his repeated assurances that he understood his rights and wanted to continue talking to the detectives.

2. Confessions and Incriminating Statements—motion to suppress—ambiguous request for counsel—failure to exercise right

The trial court did not err in a resisting a public officer, felonious breaking or entering, larceny after breaking or entering, felonious possession of a stolen firearm, and felonious possession of a firearm by a felon case by denying defendant's motion to suppress the statements he made during a recorded interrogation at the police station even though defendant contended that his request for counsel was ignored. Defendant never unambiguously requested to speak with counsel. Further, once defendant was informed that it was his decision whether to invoke the right to counsel, he opted not to exercise that right.

3. Confessions and Incriminating Statements—motion to suppress—voluntariness

The trial court did not err in a resisting a public officer, felonious breaking or entering, larceny after breaking or entering, felonious possession of a stolen firearm, and felonious possession of a firearm by a felon case by denying defendant's motion to suppress the statements he made during a recorded interrogation at the police station even though defendant contended that his confession was not voluntary. The totality of the circumstances supported the trial court's ruling that defendant's confession was voluntary.

4. Constitutional Law—right to counsel—mental competency in gray-area—no higher competency standard for self-representation

The trial court did not violate defendant's Sixth Amendment rights by denying him counsel at trial in a resisting a public officer, felonious breaking or entering, larceny after breaking or entering, felonious possession of a stolen firearm, and felonious possession of a firearm by a felon case even though defendant contended his mental competence placed him in the "gray-area." Although self-representation resulting from forfeiture is not the same concept as self-representation due to voluntary waiver, the Supreme Court has expressly refused to adopt a higher competency standard for self-representation in general.

5. Constitutional Law—right to counsel—forfeiture—serious misconduct

The trial court did not commit structural error in a resisting a public officer, felonious breaking or entering, larceny after breaking or entering, felonious possession of a stolen firearm, and felonious possession of a firearm by a felon case by ruling that defend-ant forfeited his right to counsel. Defendant committed serious misconduct that would justify a ruling that he forfeited his right to court-appointed counsel. Due to his own misconduct, it could not be determined if defendant was even in the "gray-area." Further, defendant's trial participation provided strong evidence that he was able to understand and focus on pertinent legal issues.

Appeal by defendant from judgments entered 16 June 2011 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Jane Oliver, for the State.

Mary March Exum for defendant appellant.

McCULLOUGH, Judge.

On 24 March 2011, a jury found Keith Lamar Cureton ("defendant") guilty of six charges: resisting a public officer, felonious breaking or entering, larceny after breaking or entering, felonious possession of a stolen firearm, felonious possession of a firearm by a felon, and also of being an habitual felon. On appeal, defendant contends the trial

court erred by: (1) admitting into evidence his statement made to police during a recorded interrogation at the police station, during which time he confessed to having possessed the weapons in question as well as to having committed various property crimes; (2) denying his Sixth Amendment right to counsel by forcing him to proceed *pro se* at his criminal trial; and (3) determining that defendant forfeited his right to court-appointed counsel. We hold defendant received a fair trial free of prejudicial error.

I. Background

On 17 July 2009, at around 8:35 p.m., Mecklenburg County police officers Morton and Kodad stopped and questioned defendant after observing him standing in the middle of the street, failing to yield to traffic. Defendant appeared agitated and gave the officers a false name. Officer Kodad, suspecting defendant may be dangerous, approached defendant to place him in handcuffs. Before Officer Kodad could reach him, defendant fled on foot toward the breezeway at the Johnson and Wales college dorms. Both officers pursued defendant. At one point during the chase, Officer Kodad rounded a corner and saw defendant moving his hands toward the ground while hunched down at the bottom of a fence. Officer Kodad yelled at defendant to stop, but defendant turned and jumped the fence. The officers continued their pursuit of defendant, and eventually captured him at the base of a brick fence.

After defendant was detained, Officer Morton retraced the path where defendant had fled on foot. At the exact location where Officer Kodad had observed defendant hunched down toward the ground moving his hands, Officer Morton discovered two loaded, silver handguns. One of the handguns was a Highpoint .380 with altered serial numbers. The other handgun was a Lorcin .380 with a serial number identifying it as a handgun that had recently been reported stolen from a residence in Perth Court.

Defendant was subsequently arrested and transported to the Mecklenburg County Jail. On 20 July 2009, at 9:27 a.m., Detectives Grande and Simmons arrived at the Mecklenburg County Jail to question defendant about the handguns as well as defendant's suspected connection to a robbery in Perth Court. At the beginning of the interrogation, Detective Simmons read through the "Waiver of Rights" form, which defendant refused to sign. When asked whether he understood the rights that had been read to him, defendant indicated that he was somewhat confused. Defendant asked the detectives several questions about his rights, particularly about his right to counsel.

The detectives explained to defendant that it was his decision whether he wanted to speak to an attorney before answering any questions. Defendant never expressly requested the presence of an attorney. The detectives began interrogating defendant after he repeatedly indicated that he understood his rights and that he wanted to talk. Defendant ultimately confessed to having possessed both of the guns as well as to having committed three breaking or entering violations at Perth Court.

After being formally charged, defendant was appointed counsel on three separate occasions. Defendant's first court-appointed attorney, Gregory Tosi, met with defendant in February 2010. At their first meeting Tosi noticed that defendant appeared groggy and confused. Defendant claimed that he did not remember speaking with the police, nor did he understand why he was in jail. Concerned with defendant's capacity to stand trial, Tosi arranged to have defendant undergo psychological evaluations.

On 22 March 2010, Jennifer Kuehn, a certified forensic examiner, conducted an evaluation to determine whether defendant was capable of proceeding to trial. As a result of her examination, Kuehn concluded:

> Mr. Cureton's inability to communicate, whether intentional or due to undetermined cognitive limitations rendered it impossible for this screening to establish his capacity to proceed. Based upon his presentation at the time of the interview, it is my opinion the defendant would not be able to assist his attorney and participate in a meaningful way in his defense at this time . . . ; his abnormally disengaged affect and communication demands deeper evaluation to discern if the cause is related to his medications, his mental health, or malingering.

Kuehn subsequently recommended that defendant undergo further evaluation at the Pre-trial Center at Central Regional Hospital in Raleigh to determine his capacity to proceed.

On 10 June 2010, defendant was admitted to the pretrial evaluation unit at Dorothea Dix Hospital, and remained there until 17 June 2010. While there, defendant was evaluated by forensic psychologist Charles Vance, M.D., Ph.D. Dr. Vance's evaluation consisted of a thorough review of defendant's past medical and mental health records, numerous interviews with defendant, and ongoing observations of defendant's behavior while at Dorothea Dix. Defendant was described as "behaviorally cooperative but electively mute," he "showed poor eye contact . . . mumbled . . . [and] at times made ges-

tures . . . to communicate his meaning." While Dr. Vance found defendant's behavior "unusual," he noted that defendant's "presentation . . . does not readily conform to the clinical pictures typically encountered for any known mental illness." In order to further clarify defendant's condition, Dr. Vance administered a modified version of the Competency Assessment for Standing Trial for Defendants with Mental Retardation test. Defendant provided incorrect answers to all but three of the twenty-six questions that he answered. Dr. Vance noted:

> As each question on this test had only two possible choices, it could be said that a person would have a 50% chance of guessing any item correctly . . . . [A]n individual who is completely incompetent . . . would still be expected to get approximately half of the items correct purely by guessing.

Dr. Vance believed there was "an overwhelming likelihood that [defendant] was . . . intentionally performing badly on this test . . . to make himself appear more impaired than was actually the case." At the end of the week-long evaluation period, Dr. Vance's final conclusion was that defendant "voluntarily and willfully" "presents himself as being too impaired to proceed to trial" and diagnosed defendant as "malingering." Dr. Vance further concluded, "based on his prior experiences with the legal system, and based on the mental health conditions he does and does not have" defendant was fully competent to stand trial.

On 30 June 2010, the Honorable Forrest D. Bridges entered an order finding defendant capable of proceeding to trial. Judge Bridges' ruling was based on Dr. Vance's forensic report, as well as defendant's demeanor while in court. Prior to the hearing on defendant's capacity to proceed, Defense Counsel Tosi met with defendant to report the results of Dr. Vance's evaluation. Once defendant was informed of Dr. Vance's diagnosis, his behavior towards Tosi was markedly different than it had been previously. Defendant became angry, aggressive, loud and threatening, and accused Tosi of not doing his job. Additionally, defendant refused to speak with Tosi about the evidence, charges, or possible defenses available. Tosi believed the relationship had deteriorated to the point where he could no longer effectively represent defendant, and he moved to withdraw as counsel. This motion was granted and defendant was appointed a second attorney, Christopher Sanders, on 7 July 2010.

Sanders met with defendant on three separate occasions. During the first two meetings, defendant was agitated and combative. Defendant refused to discuss the discovery with Sanders, and he spent the bulk of the second meeting complaining about the plea offer, which he believed was overly harsh. During the third meeting, defendant was extremely loud, combative and animated. Defendant was irrational, uncooperative and continuously shouted at Sanders. At one point, defendant threatened to kill Sanders and spat in his face. This incident caused Sanders to believe his life was in jeopardy, and he feared defendant would harm him if he had the opportunity. On 25 August 2010, Sanders told the Honorable Calvin E. Murphy, Superior Court Judge Presiding, that he wanted to withdraw as defendant's counsel on the grounds that he feared for his personal safety. Judge Murphy allowed Sanders to withdraw as counsel and subsequently advised defendant that he was willing to appoint new counsel to represent defendant, but if defendant's conduct induced this counsel to seek withdrawal, the court might not appoint another attorney to represent defendant.

On 30 August 2010, the court appointed Lawrence Hewitt as the third counsel to represent defendant. Initially, Hewitt and defendant had a cooperative and productive relationship. However, this relationship quickly deteriorated after defendant began mailing Hewitt angry, accusative letters. In one such letter, defendant accused Hewitt of lying to his aunt, and stated that he had turned Hewitt in to the North Carolina State Bar for lying. In another letter, defendant wrote, "Don't come with . . . I no longer need you. I will represent myself in court, you lying assed bastard." Despite these letters, Hewitt tried to meet with defendant on several occasions, but their relationship became increasingly strained. Defendant was frustrated with Hewitt's inability to negotiate a more lenient plea offer, and he accused Hewitt of conspiring with the District Attorney. Defendant became increasingly uncooperative and defendant would often hover above Hewitt and yell at him during their meetings. Hewitt eventually concluded he could no longer effectively represent defendant, and moved to withdraw as counsel.

On 13 December 2010, Judge Levinson held a hearing to determine whether defendant had forfeited his right to court-appointed counsel. After hearing the testimony of Tosi, Sanders and Hewitt, Judge Levinson ruled on 17 December 2010, that defendant had forfeited his right to court-appointed counsel.

On 28 January 2010, Judge Levinson held a status conference with defendant, *pro se*, and the District Attorney. During the conference, Judge Levinson addressed defendant and informed him that he faced the real prospect of an extremely lengthy period of incarceration. After reminding defendant that he had forfeited his right to court-appointed counsel, Judge Levinson expressed that he would nonetheless prefer it if defendant were represented by counsel. Judge Levinson told defendant that he would be willing to appoint another attorney if defendant would provide some sort of assurance that it would be meaningful, and that he would not engage in any misconduct that would cause the attorney to move to withdraw. Judge Levinson repeatedly asked defendant whether he wanted a lawyer, and defendant did not respond, even after Judge Levinson informed him that a simple thumbs up or thumbs down would suffice.

On 3 February 2011, Judge Levinson held a second conference with defendant, *pro se*, the District Attorney, and an attorney, Rick Beam. Having read the opinion in *State v. Wray*, 206 N.C. App. 354, 698 S.E.2d 137 (2010), Judge Levinson indicated that he was fully confident defendant had engaged in serious misconduct to support his earlier ruling that defendant had forfeited his right to counsel. Nonetheless, Judge Levinson wanted to provide defendant with another opportunity to request court-appointed counsel. Judge Levinson informed defendant that he had asked Attorney Rick Beam to meet with defendant to determine whether it would be useful for him to represent defendant, and whether defendant wanted Mr. Beam to represent him. Mr. Beam left the room to meet with defendant privately, but defendant refused to speak with him. Mr. Beam reentered the court and informed Judge Levinson that defendant was not interested in his representation. Judge Levinson noted on the record that there was significant evidence defendant knew what was going on and that he had communicated with others, including the court deputies while outside of the courtroom. Judge Levinson decided not to appoint standby counsel for defendant and declared, "even if I put aside the fact that he has forfeited his rights to counsel, he has not asserted his rights to counsel. To the contrary, I begged him and told him that I would provide counsel."

The trial began on 21 March 2011 and defendant was not represented by counsel. At first, defendant sat silently and refused to participate. However, as the trial went on, defendant began to conduct his own defense. Using gestures, defendant participated in jury selection. Additionally, during the first day of trial, defendant cross-

examined Officer Morton, and was able to establish that Morton found no guns on defendant when he patted him down.

On the second day of trial, just before the State called its second witness, defendant suddenly informed the court that he wanted an attorney, because he did not understand the legal terms that had been used throughout the course of the trial. The court declined defendant's request on the grounds that the court had ruled on 17 December 2010 that defendant had forfeited his right to court-appointed counsel, and defendant failed to avail himself of multiple opportunities to request counsel subsequent to that date. After denying defendant's sudden request for counsel, the trial continued and defendant once again participated in his own defense. Defendant questioned Marcella Hunter, the owner of the stolen handgun, as well as the State's DNA expert. Additionally, defendant presented evidence on his own behalf, and recalled Officers Morton and Kodad for direct examination. Finally, defendant delivered a closing argument to the jury in which he summarized the weaknesses in the State's evidence, and argued that these weaknesses gave rise to a reasonable doubt as to his guilt.

The jury found defendant guilty of all charges. Defendant was ultimately sentenced to two consecutive sentences of between 100 and 129 months' imprisonment. Defendant gave oral notice of appeal on 24 March 2011.

II. Motion to Suppress

Defendant first contends that the trial court erred in denying his motion to suppress the statements he made during the recorded interrogation at the police station. Defendant specifically argues that his statements should be suppressed on the grounds that: (1) he never waived his *Miranda* rights, (2) his request for counsel was ignored, and (3) his confession was not voluntary. We find no error with the trial court's ruling.

When reviewing a trial court's denial of a motion to suppress, our review is strictly limited to determining whether competent evidence supports the trial court's underlying findings of fact, and whether those factual findings in turn support the trial court's legal conclusions. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "[T]he trial court's findings of fact after a *voir dire* hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts if supported by competent evidence. This is true even though the evidence is conflicting." *State v. Simpson*, 314 N.C.

359, 368, 334 S.E.2d 53, 59 (1985) (citations omitted). However, the trial court's conclusions of law that a defendant's statements were knowingly, intelligently, and voluntarily made are fully reviewable on appeal. *Id.*; *see also State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000).

A. Waiver of Miranda

[1] Defendant first argues that the trial court erred in denying his motion to suppress the statements he made during the police interrogation on the grounds that he never validly waived his *Miranda* rights, in particular, his right to counsel. Defendant argues that he never explicitly waived his *Miranda* rights, nor was he mentally competent to knowingly and intelligently do so. We disagree.

"The Fifth Amendment to the United States Constitution requires a criminal suspect to be informed of his rights prior to a custodial interrogation by law enforcement officers." *State v. Harris*, 111 N.C. App. 58, 65, 431 S.E.2d 792 (1993) (citing *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966)). These rights provide that he has the

> right to remain silent; that any statement may be introduced as evidence against him; that he has the right to have counsel present during questioning; and that, if he cannot afford an attorney, one will be appointed for him.

Simpson, 314 N.C. at 367, 334 S.E.2d at 58-59. "If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him." *Davis v. United States*, 512 U.S. 452, 458, 129 L. Ed. 2d 362, 370 (1994).

Because the right to counsel is "sufficiently important to suspects in criminal investigations," the United States Supreme Court has afforded it "the special protection of the knowing and intelligent waiver standard." *Id.* (internal quotation marks and citation omitted). Under this standard, "[w]aivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege[.]" *Edwards v. Arizona*, 451 U.S. 477, 482, 68 L. Ed. 2d 378, 385 (1981). "Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59. The prosecution bears the heavy burden of showing that the waiver was knowingly, intelligently, and voluntarily made. *Id.* at 367, 334 S.E.2d at 58-59.

As evidence that defendant did not knowingly and intelligently waive his right to counsel, defendant first points out that he never signed the "Waiver of Rights" form that was presented to him during the interrogation. This evidence does little, if anything to indicate that defendant did not validly waive his rights. As was explained by the United States Supreme Court in *North Carolina v. Butler*, although "[a]n express written or oral statement of waiver . . . of the right to counsel is usually strong proof of the validity of that waiver," it is neither sufficient, nor necessary for establishing waiver. 441 U.S. 369, 373, 60 L. Ed. 2d 286, 292 (1979).

Defendant next argues that he was incapable of knowingly and intelligently waiving his rights because his borderline mental capacity prevented him from fully understanding those rights. First, defendant emphasizes the fact that he has an IQ of 82 and a history of past mental illness. Although courts consider subnormal intelligence a relevant factor when determining the validity of a waiver, "[i]t is well established that . . . this condition standing alone will not render a confession inadmissible if it is in all other respects voluntarily and understandingly made." *Simpson*, 314 N.C. at 368, 334 S.E.2d at 59. Furthermore, it is important to note that a later psychological evaluation diagnosed defendant as "malingering" and found him fully competent to stand trial. Although this evaluation occurred subsequent to defendant's arrest, the North Carolina Supreme Court has found such evidence persuasive in determining whether a defendant was competent to knowingly and voluntarily waive his rights at the time of the interrogation. *See id.* at 369, 334 S.E.2d at 60. Thus, beyond establishing that defendant had subnormal intelligence or a past history of mental illness, there must be compelling evidence that these limitations actually prevented defendant from fully comprehending his rights.

As further evidence of his inability to understand his rights, defendant highlights specific excerpts from the interrogation where defendant indicated that he was confused about his rights. For instance, when asked whether he understood his rights, defendant responded, "I understand them but I don't fully understand them all the way." Additionally, defendant requested to call his aunt so that she could help him understand the "Waiver of Rights" form. Despite this evidence of confusion, a full review of the interrogation transcript supports the trial court's finding that defendant understood his rights, and that he knowingly and intelligently waived those rights.

Defendant's initial confusion is fully remedied by the detectives' subsequent conversations with defendant. The detectives repeatedly asked defendant to specifically describe what he did not understand about his rights. In response to defendant's inquiries, the detectives explained that it was his choice whether he wanted to speak with an attorney, and they also clarified that he did not have to sign the waiver form as long as he stated that he understood the form's contents. After answering defendant's questions, the detectives subsequently asked defendant numerous times whether he fully understood his rights, and whether he wanted to speak with them. Each time defendant answered in the affirmative. Despite these repeated assurances, Detective Grande gave defendant one more chance to ask further questions, or to change his mind before he began the interrogation. The conversation was as follows:

GRANDE: But, I want to make sure that we're really clear . . . in fairness to you, I just want to make sure if you have any questions about those protections. I want to answer those for you now.

CURETON: What's the protection?

GRANDE: The rights that were explained. They just protect you . . . make sure you understand the rules of the game and how things need to be done. You understand exactly what was read?

CURETON: Yeah.

GRANDE: Okay. And you want to speak to us about the break-in, and we will talk about the warrants and anything else that we might ask you about?

CURETON: Yeah[.]

In lieu of defendant's repeated assurances that he understood his rights and that he wanted to continue talking to the detectives, we hold that the trial court did not err in ruling that defendant knowingly and intelligently waived his *Miranda* rights.

B. Invocation of the Right to Counsel

[2] Beyond arguing that defendant never waived his right to counsel, defendant also contends that he actually invoked his right to counsel during the interrogation. Defendant argues that his statements should be suppressed because the interrogating officers ignored this request

for counsel. We disagree on the grounds that defendant never unambiguously requested to speak with counsel.

"[A] suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning[.]" *Davis*, 512 U.S. at 457, 129 L. Ed. 2d at 370. "[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Id.* at 358, 129 L. Ed. 2d at 370.

Courts apply an objective inquiry when determining whether the accused actually invoked his right to counsel. *Davis*, 512 U.S. at 459, 129 L. Ed. 2d at 371. In *Davis*, the United States Supreme Court described the standard for invocation as follows:

> Invocation of the Miranda right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." . . . [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.

Id. (citation omitted). In other words, in order for a defendant to effectively invoke the right to counsel, the request must be clear and unambiguous.

In the present case, defendant's argument that he invoked his right to counsel is based on a specific exchange between defendant and the detectives. After reading defendant his *Miranda* rights, Detective Simmons asked defendant if he understood what was just read to him. Defendant responded, "I understand them but I don't fully understand them all the way." Detective Grande asked defendant to explain what aspect of his rights he did not understand. Defendant replied:

> "[R]ight to talk to a lawyer to have a lawyer here with me now to advise . . . help during the questioning. That is what I was saying . . . I asked you can I talk with my lawyer or do I need to wait for? That's why I asked you."

Detective Simmons responded:

> "That's your decision. That's your decision. Now . . . people decide if they want to get . . . . If you don't want us to have your

> side of their . . . if you decided that you . . . you . . . you want a lawyer, then we're . . . we're out of here. We're gone 'cause we can't get your side."

In response, rather than requesting the presence of an attorney, defendant prodded the detectives for more information about the case, asking, "What have we got going on so far?" Detective Simmons responded, "Well, I can't talk to you about that unless you say you're willing to talk." Rather than requesting an attorney, defendant indicated that he wanted to talk.

An objective analysis of defendant's statements reveals that they are, at best, ambiguous concerning whether or not defendant requested an attorney. "Although a suspect need not 'speak with the discrimination of an Oxford don,' . . . he must articulate his desire to have counsel present sufficiently clearly[.]" *Davis*, 512 U.S. at 459, 129 L. Ed. 2d at 371. Defendant never expressed a clear desire to speak with an attorney. Rather, he appears to have been seeking clarification regarding whether he had a right to speak with an attorney before answering any of the detective's questions. There is a distinct difference between inquiring whether one has the right to counsel and actually requesting counsel. Once defendant was informed that it was his decision whether to invoke the right to counsel, he opted not to exercise that right.

C. Voluntary Confession

[3] Defendant finally contends that his statements during the interrogation should be suppressed because his confession was not voluntary. Defendant specifically claims that he "was cajoled and harassed by the officers into making statements that were not voluntary." Defendant also alleges that the detectives "put words in his mouth on occasion," and "bamboozled [him] into speaking against his interest." We are not persuaded by defendant's arguments, and find sufficient evidence on the record to support the trial court's finding that defendant's confession was voluntary.

A trial court's ruling on the voluntariness of a defendant's statement is fully reviewable on appeal. *State v. Kemmerlin*, 356 N.C. 446, 457-58, 573 S.E.2d 870, 880-81 (2002). Upon review, the Court looks to the totality of the circumstances in determining whether or not the defendant's statement was voluntary. *Id.* Some of the factors the Court considers are

> "whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant."

State v. Hyde, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000) (quoting *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994)). "The presence or absence of any one of these factors is not determinative." *Kemmerlin*, 356 N.C. at 458, 573 S.E.2d at 881. Applying these principles to the facts in the record, we find no error in the trial court's conclusion.

Although defendant claims that the officers harassed and tricked him into making statements against his interest, defendant never points to the specific evidence upon which these accusations are based. After reviewing the record, there does not appear to be any evidence that defendant was verbally or physically threatened, nor does there appear to be any evidence that the officers used promises to induce a confession. Additionally, there is no indication that the interrogation was unduly long, nor is there any suggestion that defendant was deprived of basic comforts and necessities.

Although the record does contain some evidence documenting defendant's limited mental capacity, the evidence does not indicate that defendant was unaware of his legal situation, or the potential ramifications of his statements. Rather, the evidence shows that defendant was read his *Miranda* rights, that he understood them, and that he made a conscious decision to waive those rights. In light of the foregoing facts, the totality of the circumstances support the trial court's ruling that defendant's confession was voluntary.

III. Sixth Amendment Right to Counsel

[4] Defendant's second argument on appeal is that the trial court violated his Sixth Amendment rights by denying him counsel at trial. Specifically, defendant argues that it was structural error to force him to proceed without counsel because his mental competence placed him in the "gray-area." "Gray-area" defendants are those who are " 'competent enough to stand trial under *Dusky* [*v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves'[.]" *State v.*

Lane, 362 N.C. 667, 668, 669 S.E.2d 321, 322 (2008) (quoting *Indiana v. Edwards*, 554 U.S. 164, 178, 171 L. Ed. 2d 345, 357 (2008)) (alteration in original), *cert. denied*, ___ U.S. ___, 181 L. Ed. 2d 529 (2011). In essence, defendant's argument is that the Sixth Amendment prohibits a court from forcing a defendant to proceed without counsel if that defendant's competence places him in the "gray-area." We disagree.

" 'It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated.' " *State v. Wray*, 206 N.C. App. 354, 356, 698 S.E.2d 137, 140 (2010) (quoting *Piedmont Triad Reg'l Water Auth. V. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)).

> The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution. A part of this right includes the right of an indigent defendant to appointed counsel. N.C. Gen. Stat. § 7A–450 [(2007)].

State v. Montgomery, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000) (citations omitted). However, this right is not absolute. Through his own actions, a defendant may lose his right to counsel. *Wray*, 206 N.C. App. at 357, 698 S.E.2d at 140. The loss of one's right to counsel is known as a forfeiture, which "results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[] to justify a forfeiture of defendant's right to counsel." *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (alteration in original) (internal quotation marks and citation omitted). "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (internal quotation marks and citation omitted).

The United States Supreme Court "has generally applied a presumption against the casual forfeiture of U.S. Constitutional rights." *Wray*, 206 N.C. App. at 359, 698 S.E.2d at 141. Although the court has never directly ruled on the issue of forfeiture of the right to counsel, the general consensus among federal and state courts is that it does not violate the Sixth Amendment if it is in response to "instances of severe misconduct." *See id.* However, a unique situation arises when issues of mental competency accompany the forfeiture of the right to

counsel. Defendant's basic assertion is that the Sixth Amendment right to counsel applies with greater force to a "gray-area" defendant than it does to a defendant who is merely indigent. Thus, although a "gray-area" defendant may commit serious misconduct that would ordinarily justify forfeiture, defendant argues that it would violate the Sixth Amendment to deprive this "gray-area" defendant of his right to counsel.

On the issue of mental competency, it is well established that the United States Constitution does not permit the trial of an individual who lacks mental competency. *See Godinez v. Moran*, 509 U.S. 389, 396, 125 L. Ed. 2d 321, 330 (1993). The competency standard for standing trial is often referred to as the *Dusky* standard, which analyzes "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against him.' " *Id.* By definition, a "gray-area" defendant satisfies the *Dusky* standard for mental competence. However, it is debatable whether a "gray-area" defendant is truly competent to represent himself at trial.

Although standing trial while represented by counsel is an entirely different concept than conducting one's own defense at trial, the Supreme Court has expressly refused to adopt a higher standard of competency for self-representation than the basic *Dusky* standard. In *Godinez*, the Court "reject[ed] the notion that competence to . . . waive the right to counsel must be measured by a standard that is higher than (or different from) the *Dusky* standard." 509 U.S. at 398, 125 L. Ed. 2d at 331. Although the *Godinez* decision involved the competency to waive representation rather than the competency to represent oneself at trial, the latter issue was directly confronted by the Supreme Court in *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345.

In *Indiana v. Edwards*, the Supreme Court held that it does not violate the constitution if a state refuses to allow a "gray-area" defendant to conduct his own defense at trial. *Id.* at 177-78, 171 L. Ed. 2d at 357. Although the court acknowledged that the *Dusky* standard alone is probably insufficient for determining a defendant's competency to represent himself at trial, it ultimately refused to endorse a federal constitutional standard different than the *Dusky* standard for determining whether a defendant is competent to proceed to trial without counsel. *Id.* at 178, 171 L. Ed. 2d 357. Rather, the court held that a

state is free to adopt higher competency standards for *pro se* defendants than the *Dusky* standard, but the constitution does not require such action. *Id.*

In the present case, there is sufficient evidence that the defendant was competent to stand trial. Although defendant had a low IQ and a history of mental illness, several formal evaluations diagnosed him as malingering. Even if defendant could successfully argue that his diminished mental capacity places him in the "gray-area," *Indiana v. Edwards* and *Godinez* make it clear that the constitution does not prohibit the self-representation of a "gray-area" defendant. Although self-representation resulting from forfeiture is not the same concept as self-representation due to voluntary waiver, the Supreme Court has expressly refused to adopt a higher competency standard for self-representation in general. *See Indiana v. Edwards*, 554 U.S. at 178, 171 L. Ed. 2d at 357; *Godinez*, 509 U.S. at 398, 125 L. Ed. 2d at 331. Thus, defendant's argument that it violates the Sixth Amendment to force a "gray-area" defendant to represent himself at trial is not supported by Supreme Court precedent.

IV. Forfeiture of the Right to Counsel

[5] Defendant's next argument on appeal is that the trial court committed structural error in ruling that defendant forfeited his right to counsel. Defendant's main argument is twofold. First, defendant contends that his conduct was not the type of serious misconduct that would justify a ruling of forfeiture. Second, defendant argues that he could not have forfeited his right to counsel because his competence placed him in the "gray-area," and North Carolina common law prohibits a "gray-area" defendant from representing himself at trial. Finally, defendant contends that the court's forfeiture ruling should be reversed on the grounds that the facts in the present case are closely analogous to the facts in *Wray*, 206 N.C. App. 354, 698 S.E.2d 137. We find none of these arguments persuasive.

A. Serious Misconduct

Defendant's first argument is that he never committed the type of serious misconduct that would justify a ruling of forfeiture. Specifically, defendant contends that "[t]he cases where forfeiture was upheld involved situations where the defendant was misbehaving in open court." Because defendant never egregiously misbehaved in open court, defendant argues that his conduct does not fit the category of severe misconduct that would support a ruling of forfeiture.

We disagree with defendant's mischaracterization of the case law concerning forfeiture, and affirm the trial court's ruling that defendant committed serious misconduct that would support a ruling of forfeiture.

First, we reject defendant's argument that the cases upholding forfeiture only involve situations where defendant misbehaved in open court. This argument completely ignores a bevy of cases where defendant's out-of-court conduct resulted in a ruling that defendant forfeited his right to counsel. *See e.g.*, *United States v. McLeod*, 53 F.3d 322, 325–26 (11th Cir. Ala. 1995) (defendant forfeited his right to counsel where he was abusive toward his attorney and threatened to harm him); *State v. Boyd*, 205 N.C. App. 450, 452, 697 S.E.2d 392, 394 (2010) (defendant forfeited his right to counsel by refusing to cooperate with his appointed attorneys and by adamantly insisting that his case would not be tried); *State v. Quick*, 179 N.C. App. 647, 650, 634 S.E.2d 915, 918 (2006) (defendant forfeited his rights to counsel because his failure to retain counsel over an eight-month period amounted to an obstruction and delay of the proceedings). Although forfeiture may occur as a result of egregious courtroom misbehavior, the focus is not on where the misbehavior occurred, but on the nature and effect of the misbehavior itself. "The general consensus has been that 'an accused may forfeit his right to counsel by a course of serious misconduct towards counsel that illustrates that lesser measures to control defendant are insufficient to protect counsel and appointment of successor counsel is futile. . . .' " *Wray*, 206 N.C. App. at 360, 698 S.E.2d at 142 (quoting *King v. Superior Court*, 132 Cal. Rptr. 2d 585, 588 (Cal. 3d Dist. Ct. App. 2003)). "Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel." *Quick*, 179 N.C. App. at 649–50, 634 S.E.2d at 917. " '[A] defendant who is abusive toward his attorney may forfeit his right to counsel.' " *Montgomery*, 138 N.C. App. at 525, 530 S.E.2d at 69 (quoting *McLeod*, 53 F.3d at 325 (holding defendant forfeited his rights to counsel after he was "repeatedly abusive, threatening, and coercive" toward his court-appointed counsels)).

In the present case, defendant was appointed counsel on three separate occasions. Each counsel moved to withdraw as a direct result of defendant's behavior. When revisiting his ruling that defendant forfeited his right to counsel, Judge Levinson was careful to point out that defendant's misconduct was "not just being uncooperative or merely noncomplian[t]," "it ha[d] gone beyond that." Judge Levinson specifically recounted that defendant had engaged in serious miscon-

duct by physically and verbally threatening several of his attorneys, and by threatening to bring a frivolous claim to the State Bar against his third attorney. In addition to these acts of misconduct, the testimony at the forfeiture hearing revealed that defendant consistently shouted at his attorneys, insulted and abused his attorneys and at one point spat on his attorney and threatened to kill him.

Defendant, a diagnosed malingerer, not only engaged in dilatory tactics by refusing to cooperate with his court- appointed counsels, but he consistently engaged in abusive conduct toward all three of his counsels. In light of the aforementioned evidence of defendant's serious misconduct, Judge Levinson did not err in finding that defendant committed serious misconduct that would justify a ruling that he forfeited his right to court-appointed counsel.

B. Forfeiture of "Gray-Area" Defendant's Right to Counsel

Defendant's next argument is that the trial court erred in ruling that he forfeited his right to court-appointed counsel, because defendant was in the "gray-area" of mental competence. Beyond arguing that the Sixth Amendment prohibits the forfeiture of a "gray-area" defendant's right to counsel, defendant additionally contends that such a result is prohibited by North Carolina common law. Defendant specifically argues that North Carolina law prohibits trying a "gray-area" defendant who is not represented by counsel. Thus, according to defendant, under North Carolina law, a "gray-area" defendant could never forfeit his right to counsel.

Defendant bases his legal argument on the North Carolina Supreme Court's holding in *Lane*, 362 N.C. 667, 669 S.E.2d 321, and the North Carolina Court of Appeals' holding in *Wray*, 206 N.C. App. 354, 698 S.E.2d 137. Both of these cases were decided in the wake of the United States Supreme Court's holding in *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345, and both cases sought to clarify North Carolina law in regard to self-representation by "gray-area" defendants.

In *Lane*, the North Carolina Supreme Court analyzed the significance of *Indiana v. Edwards* in relation to a "gray-area" defendant's voluntary waiver of his right to counsel. The defendant in *Lane* was a potential "gray-area" defendant who waived his right to counsel and was ultimately found guilty of first-degree murder. *Lane*, 362 N.C. 667, 669 S.E.2d 321. The defendant argued on appeal that he was entitled to a new trial because the trial court was unaware that the recent decision in *Indiana v. Edwards* afforded state courts the discre-

tionary power to deny a "gray-area" defendant's request to represent himself. *Id.* at 668, 669 S.E.2d at 322. The North Carolina Supreme Court remanded the case to the superior court to determine: (1) whether the defendant was "borderline-competent" at the time that he sought to represent himself; and (2) if the defendant was found to be "borderline-competent," would the trial court, in its discretion, have precluded self-representation for the defendant? *Id.*

Lane stands for the proposition that a North Carolina trial judge may prohibit a defendant from waiving his right to counsel if "a realistic account of the particular defendant's mental capacities" indicates that he would not be competent to conduct trial proceedings without the assistance of counsel. *Lane*, 362 N.C. at 668, 669 S.E.2d at 322. However, *Lane* stops short of holding that a trial judge may never permit a "gray-area" defendant to represent himself at trial. In other words, *Lane* fails to indicate whether North Carolina has elected to adopt a higher competency standard that absolutely prohibits a "gray-area" defendant from representing himself at trial. *See Indiana v. Edwards*, 554 U.S. at 178, 171 L. Ed. 2d at 357. This ambiguity is further highlighted by this Court's holding in *Wray*, 206 N.C. App. 354, 698 S.E.2d 137.

In *Wray*, a potential "gray-area" defendant specifically argued on appeal, "that the trial court erred by ruling that he had 'forfeited' his right to representation by counsel, on the grounds that there was evidence that Defendant was not competent to represent himself." *Wray*, 206 N.C. App. at 357, 698 S.E.2d at 140. The Court announced that it agreed with the defendant's argument and ultimately reversed the trial court's forfeiture ruling. *Id.* However, the Court's reversal was not exclusively based on the evidence that the defendant may have been in the "gray-area" of mental competence. *Id.* at 371, 698 S.E.2d at 148. Rather, the *Wray* Court cited four distinct reasons why the trial court erred in ruling that the defendant forfeited his right to counsel. *Id.* Thus, although the defendant's borderline incompetence was among those reasons, it cannot be said with any certainty that the evidence of the defendant's potential incompetence could have been sufficient on its own to support the Court's reversal.

Although the holdings of *Lane* and *Wray* indicate that North Carolina courts strongly disfavor self-representation by "gray-area" defendants, neither case explicitly forbids it. In the case *sub judice* defendant was found to be malingering and found to be competent, findings which we have upheld. Due to his own misconduct, it cannot be determined if defendant is even in the "gray-area."

Defendant seeks to rely on this Court's opinion in *Wray*, 206 N.C. App. 354, 698 S.E.2d 137. In *Wray*, the Court cited its reasons for reversing the trial court's forfeiture ruling as follows: (1) there was significant evidence that the defendant may be a person whose competence is in the "gray-area"; (2) the record did not establish that the defendant engaged in the kind of serious misconduct associated with forfeiture of the right to counsel; (3) the evidence of the defendant's misbehavior was the same evidence that cast doubt on his competence; and (4) the defendant was not given an opportunity to participate at his forfeiture hearing. *Wray*, 306 N.C. App. at 362, 698 S.E.2d at 143. Defendant argues that the present case is analogous to *Wray*.

By threatening his attorneys, writing insulting letters and spitting in the face of Sanders, defendant engaged in serious misconduct. This stands in stark contrast to the defendant in *Wray* whose primary misconduct was that he was "disagreeable, suspicious, and obsessed with legally irrelevant matters pertaining to his incarceration." *Wray*, 206 N.C. App. at 368, 698 S.E.2d at 146.

Turning to defendant's assertion that the evidence of his misbehavior was the same evidence that showed his incompetence, we find this argument unpersuasive. In *Wray*, as evidence of incompetence, the Court noted that the defendant "appeared not to grasp his legal situation and was unable to focus on pertinent legal issues." *Id.* Because the evidence of the defendant's misbehavior was his " 'apparent obsession' with irrelevancies, rather than abusive or disruptive actions," the Court concluded that this evidence was directly pertinent to the issue of defendant's competence. *Id.* In contrast, in the present case, the evidence of defendant's incompetence is rather distinct from the evidence of defendant's misbehavior. As evidence that defendant was incompetent to represent himself at trial, defense counsel focuses on defendant's alleged inability to understand what was going on at trial. In other words, defense counsel claims that defendant's substandard intelligence rendered him incompetent to represent himself at trial. When examining the evidence of defendant's misbehavior, this evidence does not point to defendant's inability to comprehend court proceedings. Rather, the evidence of defendant's misbehavior points to defendant's difficulties with controlling his anger and aggression. Defendant never argues that his aggressive tendencies rendered him incompetent to represent himself at trial. Furthermore, the trial transcript reveals an absence of this type of misbehavior while defendant was conducting his own defense at trial.

Finally, turning to defendant's argument that he was in the "gray-area," although there is some evidence that casts doubt on defendant's competency to represent himself at trial, there is a substantial amount of evidence that indicates defendant was not in the "gray-area" of mental competence. As mentioned earlier, the *Wray* Court considered the defendant's apparent inability to grasp his legal situation and focus on pertinent legal issues compelling evidence that the defendant was incapable of effectively representing himself. *Id.* at 368, 698 S.E.2d at 146. Additionally, the Court took special note of the trial judge's statement at trial: "it is obvious to me that Mr. Wray is incapable of representing himself effectively." *Id.* at 365, 698 S.E.2d at 145.

In the present case, defendant's argument that he was in the "gray-area" revolves almost exclusively around the evidence of his low IQ, his past psychological evaluations, and his history of mental illness. The persuasiveness of these past records is seriously undermined by Dr. Vance's more recent diagnosis that defendant was malingering. Furthermore, the trial transcript itself provides substantial evidence that defendant was sufficiently competent when he represented himself at trial. Analyzing the problem of "gray-area" defendants going to trial without counsel, the United States Supreme Court explained in *Indiana v. Edwards*:

> Mental illness . . . interferes with an individual's functioning at different times in different ways. [A]n individual . . . will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.

554 U.S. at 175-76, 171 L. Ed. 2d at 356. The Court described these tasks "as including organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury." *Id.* at 176, 171 L. Ed. 2d at 356. After reviewing the trial transcript, it is evident that defendant was able to carry out the basic tasks needed to present his own defense. Defendant participated in *voir dire*, he argued points of law, he cross-examined witnesses, he introduced evidence and he made a closing statement to the jury in which he summarized the facts in a manner that helped create a reasonable doubt as to his guilt. In contrast to the defendant in *Wray*, defendant's trial participation provides strong evidence that he was able to understand, and focus on pertinent legal issues. Accordingly, we hold that the trial court did not err in ruling that defendant forfeited his right to court-appointed counsel.

V. Conclusion

We hold that the trial court did not err in denying defendant's motion to suppress the statements defendant made during the police interrogation. The State presented sufficient evidence to show that defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. Furthermore, the State presented sufficient evidence that a reasonably objective officer would not have believed defendant invoked his right to counsel. Finally, the State presented sufficient evidence to show that defendant's confession was voluntarily made.

We hold that the State did not violate defendant's Sixth Amendment right to counsel by forcing defendant to proceed at trial without counsel.

We hold that the trial court did not err in ruling that defendant forfeited his right to court-appointed counsel. The State presented sufficient evidence that defendant committed the type of serious misconduct that would justify a ruling of forfeiture. Finally, the record contains significant evidence to rebut defendant's contention that the present case is analogous to the facts in *Wray*. Accordingly, we hold defendant received a fair trial free of prejudicial error.

No prejudicial error.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. CLEO PATRICK DAVIS, JR., DEFENDANT

No. COA11-1526

(Filed 6 November 2012)

1. Indictment and Information—variance with evidence at trial—not fatal—trafficking in opium and opium derivative

There was not a fatal variance between the indictment and the evidence at trial where the indictment alleged trafficking in opium pursuant to N.C.G.S. § 90-95(h)(4) and the evidence involved oxycodone, an opium derivative. The statute specifies that possession or transportation of an opium derivative is trafficking in opium or heroin.

2. Drugs—contents of seized pills—testimony specific

There was no error in the admission of a special agent's testimony about the contents of pills seized from defendant where the special agent performed a chemical analysis of the pills and her testimony complied with *State v. Ward*, 364 N.C. 133.

3. Drugs—instructions—mixture instead of derivative—no plain error

There was no plain error in a prosecution for trafficking in oxycodone where the trial court instructed the jury on possession of opium or an opium mixture rather than an opium derivative. Defendant did not dispute that he had the pills in his possession, defendant gave a signed statement that he intended to sell those pills and split the money with his mother, a special agent testified both that the pills contained oxycodone and that oxycodone is an opium derivative, and defendant could not show that the jury probably would have reached a different verdict with a correct instruction.

Appeal by defendant from judgment entered 2 June 2011 by Judge Thomas H. Lock in Columbus County Superior Court. Heard in the Court of Appeals 10 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Jonathan D. Shaw, for the State.

William D. Spence for defendant-appellant.

GEER, Judge.

Defendant Cleo Patrick Davis, Jr. appeals from his convictions of trafficking in opium by transportation and trafficking in opium by possession. Defendant primarily contends on appeal that there was a fatal variance between the indictment and the proof offered at trial. Defendant points out that the indictment alleged that he trafficked in opium, while the evidence showed that the substance was an opium derivative. Based on the plain language of the statute, we hold that no fatal variance occurred.

Facts

The State's evidence tended to show the following facts. At about 3:00 p.m. on 20 March 2009, Deputy Brett Sasser of the Brunswick County Sheriff's Department pulled over defendant for driving with-

out a seat belt. Deputy Sasser asked defendant for his driver's license and for consent to search his vehicle. After defendant consented to the search, Deputy Sasser found a small amount of marijuana in the center console. Deputy Sasser then obtained defendant's consent to search his person and found a prescription bottle containing 29 Percocet tablets in defendant's left front coat pocket.

Defendant told Deputy Sasser that he was picking up the pills for his mother. At Deputy Sasser's request, a fellow officer called the pharmacy and learned that defendant's mother had picked up the pills a few days earlier. Deputy Sasser then placed defendant under arrest. After arriving at the police station, Deputy Sasser interviewed defendant, and defendant told Deputy Sasser that his intention was to sell the pills and split the money with his mother.

Defendant was charged with trafficking in opium or heroin by transportation and by possession pursuant to N.C. Gen. Stat. § 90-95(h)(4). At trial, Special Agent Alisha Matkowsky testified that the pills contained oxycodone, a derivative of opium. The jury convicted defendant of trafficking in opium both by possession and by transportation. The trial court sentenced defendant to a term of 90 to 117 months imprisonment. Defendant timely appealed to this Court.

Discussion

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charges because there was a fatal variance between the indictment and the State's trial evidence. Specifically, defendant contends that the indictment alleged that he trafficked in "opium," while the State presented evidence that defendant was trafficking in oxycodone, an opium derivative.

The State points out that defendant did not make this argument at trial. Our Supreme Court has previously held that a defendant's motion to dismiss based on the sufficiency of the evidence is not sufficient to preserve for appellate review an argument that the evidence varied from the indictment. *See State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review."). However, even assuming, without deciding, that defendant's counsel did present this issue for appellate review, defendant has failed to show any fatal variance.

The Supreme Court has held that " '[a] motion to dismiss [for a variance] is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.' " *Id.* at 646, 488 S.E.2d at 172 (quoting *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971)).

It is well established that "the identity of the controlled substance that defendant allegedly possessed is considered to be an essential element which must be alleged properly in the indictment." *State v. Ahmadi-Turshizi*, 175 N.C. App. 783, 784-85, 625 S.E.2d 604, 605 (2006) (holding that indictment was *facially* invalid when it failed to identify controlled substance by name specified in statute). Defendant was, however, charged under N.C. Gen. Stat. § 90-95(h)(4) (2011), which provides that "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, *or any salt, compound, derivative, or preparation of opium* or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony *which felony shall be known as 'trafficking in opium or heroin'* . . . ." (Emphasis added.)

Thus, the plain language of the statute does not create a separate crime of possession or transportation of an opium derivative, but rather specifies that possession or transportation of an opium derivative is trafficking in opium or heroin, precisely as alleged in the indictment. Based on the statutory language, defendant has shown no fatal variance between the indictment and the evidence. At trial, the State presented evidence that defendant committed the precise crime that was charged.

[2] Defendant next argues that the trial court erred in admitting the testimony of Special Agent Matkowsky that the pills possessed by defendant were oxycodone. Our Supreme Court held in *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010), that "[u]nless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." In *Ward*, the Court concluded that the trial court should have excluded an agent's identification of prescription drugs based solely on comparing the outward appearance of the tablets and their markings with literature identifying pharmaceutical markings. *Id.* at 148, 694 S.E.2d at 747-48.

Here, however, Special Agent Matkowsky did perform a chemical analysis of the pills. Her testimony explained the technique she used to isolate the components of the pills, including running the material through an "instrument" that generated a graphic printout of the chemical make-up of the components, which she could then compare to known graphs of the components and identify the substances in the pills. Special Agent Matkowsky's testimony complied with *Ward* and, therefore, the trial court properly admitted her testimony.

[3] Finally, defendant argues that the trial court committed plain error when the evidence showed that defendant possessed an opium derivative, but the trial court instructed the jury that it could convict defendant if it found "that the defendant knowingly possessed Opium *or any mixture* containing such substance." (Emphasis added.) As our Supreme Court has observed:

> 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 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).

Even assuming that the trial court erred in giving the "mixture" instruction, defendant has not shown that in the absence of the error, the jury would probably have reached a different verdict. In this case, defendant does not dispute that he had the pills at issue in his possession. Defendant also gave a signed statement that he intended to sell those pills and split the money with his mother. Special Agent Matkowsky testified both that the pills contained oxycodone and that oxycodone is an opium derivative. Consequently, defendant cannot show that the jury probably would have reached a different verdict if the trial court had referred in its instructions to an opium derivative rather than a mixture. We, therefore, hold that defendant received a trial free from prejudicial error.

No error.

Judges ELMORE and THIGPEN concur.

STATE OF NORTH CAROLINA v. JAMES R. KOCHUK

No. COA12-525

(Filed 6 November 2012)

Search and Seizure—traffic stop—failure to maintain lane control

The trial court in an impaired driving prosecution did not err by granting defendant's motion to suppress where the State contended that an officer had reasonable suspicion for a stop based on defendant's failure to maintain lane control. Defendant's weaving alone was insufficient to establish reasonable suspicion and the trial court found that the officer saw no other signs of high or low speed, no prolonged weaving, no improper turns, no inappropriate use of signals, and no other evidence of any type of improper or erratic driving.

Judge BEASLEY dissenting.

Appeal by the State from order entered 3 October 2011 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 10 October 2012.

Attorney General Roy Cooper by Assistant Attorney General Joseph L. Hyde, for the State.

Russell Joseph Hollers, attorney for defendant.

ELMORE, Judge.

The State appeals from an order granting James R. Kochuk's (defendant) motion to suppress evidence obtained following a stop of his vehicle. We affirm.

On 3 July 2010, Trooper Ellerbe of the North Carolina State Highway Patrol was on duty and traveling eastbound on Interstate 40. Around 1:00 AM, Trooper Ellerbe began traveling 1-2 car lengths behind defendant's vehicle in the middle lane. He then observed defendant's vehicle cross over the dotted white line, causing both wheels on the passenger side of the vehicle to cross into the right lane for about 3-4 seconds, and then move back into the middle lane. Trooper Ellerbe then observed defendant lawfully merge into the right-hand lane. There, he observed defendant's vehicle drift over to the right-hand side of the right lane, with both wheels riding on top of the solid white line, twice for a period of 3-4 seconds each time.

Based on these observations, Trooper Ellerbe conducted a stop of defendant's vehicle, and defendant was cited for driving while impaired (DWI). On 25 January 2011, defendant was convicted of DWI and appealed to superior court. On 19 September 2011, defendant filed a motion to suppress. On 20 September 2011, a hearing was held on the motion, and on 3 October 2011 the trial court entered an order granting defendant's motion and suppressing all evidence obtained as a result of the stop. The State now appeals.

The State argues that the trial court erred in granting defendant's motion to suppress because Trooper Ellerbe had reasonable suspicion for the stop based on defendant's failure to maintain lane control. 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). "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). "Where, however, 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." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004) (citation omitted).

Here, the State does not challenge any of the trial court's findings. Thus, they are binding on appeal. However, the State argues that the trial court erred in concluding that Trooper Ellerbe lacked reasonable and articulable suspicion to support a stop of defendant's vehicle.

This determination actually appears as a finding of fact in the trial court's order, and not as a conclusion of law. Finding of fact 22 reads "when all of the facts and factors in this case were taken into account . . . [they] did not amount to reasonable and articulable suspicion and as such [the] subsequent stop . . . [was] invalid and illegal." Regardless, we conclude that this finding of fact is more appropriately classified as a conclusion of law, *see N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) ("any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law."), and we will review accordingly, *see id.* ("classification of an item within the order

is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.").

As the trial court correctly determined, this case is analogous to *State v. Fields*, 195 N.C. App. 740, 673 S.E.2d 765 (2009). In *Fields*, the defendant argued on appeal that the trial court erred in denying his motion to suppress, in part, because the initial stop of his car was not based on a reasonable and articulable suspicion of criminal activity. 195 N.C. App. at 742, 673 S.E.2d at 767. There, the defendant was stopped after the officer observed the defendant's car swerve to the white line on the right side of the traffic lane on three separate occasions. *Id.* at 741, 673 S.E.2d at 766. This Court reversed the trial court's decision because "[the] defendant's weaving within his lane, standing alone, [was] insufficient to support a reasonable suspicion that defendant was driving under the influence of alcohol." *Id.* at 746, 673 S.E.2d at 769. We also noted that this Court has previously held that "weaving can contribute to a reasonable suspicion of driving while impaired[,]" but that the weaving must be "coupled with additional specific articulable facts, which also indicate[] that the defendant was driving while impaired." *Id.* at 744, 673 S.E.2d at 768.

Here, the trial court's findings establish that Trooper Ellerbe witnessed defendant's "vehicle cross over the dotted white line" causing "both of the wheels on the passenger side" to enter "into the right lane for about three to four seconds" and that later he observed defendant's vehicle "drift over to the right-hand side of the right lane where its wheels were riding on top of the white line . . . twice for a period of three to four seconds each time." We conclude that these movements amount to nothing more than weaving. Further, the trial court found that "other than those movements," Trooper Ellerbe "saw no other signs of a high or low speed, no prolonged weaving, no improper turns, no inappropriate use of signals, and no other evidence of any type of improper or erratic driving."

Thus, consistent with our holding in *Fields*, we conclude that defendant's weaving alone was insufficient to establish reasonable suspicion. According, we affirm the trial court's order.

Affirmed.

Judge STROUD concurs.

Judge BEASLEY dissents by separate opinion.

BEASLEY, Judge, dissenting.

Because I believe controlling precedent determines that Trooper Ellerbe had reasonable suspicion, I respectfully dissent from the majority's opinion and would reverse the trial court's order granting Defendant's motion to suppress and remand the case for trial.

This case is controlled by *State v. Otto*, ___ N.C. ___, 726 S.E.2d 824 (2012). In Otto, our Supreme Court focused on " 'the totality of the circumstances.' " *Id.* at ___, 726 S.E.2d at 828 (quoting *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 440 (2008)). Prior to the case reaching our Supreme Court, this Court focused on its precedent requiring weaving in one's own lane plus one additional factor to constitute reasonable suspicion. *State v. Otto*, ___ N.C. App. ___, ___, 718 S.E.2d 181, 184–85 (2011). The Supreme Court held that there was reasonable suspicion based on the findings of fact that the defendant was continuously weaving at 11:00 p.m. on a Friday night. *Otto*, ___ N.C. at ___, 726 S.E.2d at 828. We have held that 1:43 a.m. is an unusual hour. *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 441 (2004). Moreover, in *State v. Hudson*, 206 N.C. App. 482, 486, 696 S.E.2d 577, 581 (2010), we held that crossing the center lines and fog lines twice amounts to probable cause to conduct a traffic stop for violation of N.C. Gen. Stat. § 20-146.

Based on the totality of the circumstances as articulated by the majority opinion in *Otto* and our case law in *Hudson*, I would hold that there was reasonable suspicion to stop Defendant. Defendant in this case momentarily crossed the right dotted line once while in the middle lane. He then made a legal lane change to the right lane and later drove on the fog line twice. Defendant, thus, was weaving within his own lane. The trial court also found that Trooper Ellerbe stopped Defendant at 1:10 a.m. These two facts coupled together, under the totality of the circumstances analysis as outlined in *Otto*, constitute reasonable suspicion for the stop.

Further, the Supreme Court's rationale is consistent with our Court's decision in *Fields*. The majority here notes that in *Fields*, our Court held that to constitute reasonable suspicion, weaving must be "coupled with additional specific articulable facts, which also indicate[] that the defendant was driving while impaired." *State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768 (2009). Here, in addition

to weaving, the additional specific articulable fact is the time of driving- 1:10 a.m.-the time that Trooper Ellerbe stopped Defendant.

Our courts must provide clarity in this area so that law enforcement officers can effectively carry out their responsibilities for the public's safety, and motorists need some reasonable consistency for how their driving might be critiqued in driving while impaired investigations, as well as other traffic-related investigations. In *Otto*, our Supreme Court held that the court must consider the totality of the circumstances in determining whether reasonable suspicion existed in a traffic stop such as in the one *sub judice*.

For the reasons stated above, I would reverse the trial court's order granting the motion to suppress and remand the case for trial. Thus, I respectfully dissent.

STATE OF NORTH CAROLINA v. ROBIN EUGENE LAND, DEFENDANT

No. COA11-1484

(Filed 6 November 2012)

1. Indictment and Information—delivery of marijuana—weight of marijuana—remuneration received—not required to be alleged

The indictment was sufficient in a delivery of marijuana case even though it did not allege either the weight of the marijuana or that defendant received remuneration for the delivery. The State was required to allege in the indictment only that defendant transferred marijuana to another person. The weight of the marijuana and defendant's receipt of remuneration were evidentiary facts that the State must have proved at trial, but need not have alleged in the indictment.

2. Drugs—delivery of marijuana—sufficiency of evidence

The trial court did not err in a delivery of marijuana case by denying defendant's motion to dismiss for insufficient evidence. The State's evidence was sufficient to establish delivery under N.C.G.S. § 90-95(a)(1) even if defendant did not personally profit from the transaction. Further, the chemical analysis of the substance was sufficient, for purposes of the motion to dismiss, to prove that the material delivered was marijuana.

3. Drugs—delivery of marijuana—jury instructions—plain error review—effective assistance of counsel

The trial court did not commit plain error in a delivery of marijuana case by (1) failing to instruct the jury that delivery of less than five grams of marijuana for no remuneration is not a delivery and (2) failing to instruct the jury on the lesser-included offense of simple possession of marijuana. Although the trial court erred by not instructing the jury that in order to prove delivery, the State was required to prove that defendant transferred the marijuana for remuneration, the jury probably would not have reached a different verdict with regard to the delivery charge if properly instructed. Further, given the evidence, defendant failed to show that the trial court committed plain error in failing to instruct on simple possession. Finally, since the trial court did not commit plain error by failing to give these instructions, defendant could not establish the necessary prejudice required to show ineffective assistance of counsel for failure to request the instructions.

Judge Elmore dissenting.

Appeal by defendant from judgments entered 14 December 2010 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Ebony J. Pittman, for the State.

Don Willey for defendant-appellant.

GEER, Judge.

Defendant Robin Eugene Land appeals from his convictions of possession with intent to sell or deliver marijuana, delivery of marijuana, and being a habitual felon. Defendant primarily argues on appeal that the indictment for delivery of marijuana was insufficient because it did not allege either the weight of the marijuana or that defendant received remuneration for the delivery. Given the language of the statute setting out the offense, we hold that the State was required to allege in the indictment only that a defendant transferred marijuana to another person. The weight of the marijuana and a defendant's receipt of remuneration are evidentiary facts that the State must prove at trial, but need not allege in the indictment. The

indictment in this case was, therefore, sufficient. Because defendant's other arguments on appeal are also unpersuasive, we find no error.

Facts

The State's evidence tended to show the following facts. On the evening of 14 August 2009, Charlotte-Mecklenburg Police Officer Andrew A. Demaioribus was working as part of a team targeting street-level narcotic sales by conducting undercover buy operations on Charlotte city streets. While working undercover, Officer Demaioribus wore plain clothes and drove alone in an unmarked car. Additional police units stayed within two blocks of Officer Demaioribus' location to provide assistance in the event that Officer Demaioribus' safety was compromised.

At about 11:25 p.m., Officer Demaioribus observed defendant in front of a residence. Officer Demaioribus pulled over and asked defendant if defendant could help him "get some green," to which defendant replied, "Yeah. I can get you some." Defendant then got into Officer Demaioribus' vehicle. Defendant instructed Officer Demaioribus to drive to several residences in the area in search of marijuana.

Before defendant left the car at the first residence, Officer Demaioribus handed defendant a $20 bill. Defendant was unable to locate marijuana at the first few residences. When they arrived at the last location, defendant got out of the car, walked out of sight, and returned after one or two minutes. In defendant's absence, Officer Demaioribus relayed his location to other officers using a cell phone. When defendant got back into the car, Officer Demaioribus asked, "Have you got my stuff?" Defendant replied, "Yeah. I got your shit. I got it." Defendant then handed Officer Demaioribus two baggies containing a green substance that Officer Demaioribus thought was marijuana.

After the transaction was complete, Officer Demaioribus gave a "take down signal" to inform other officers that defendant should be arrested. Defendant instructed Officer Demaioribus to drive him to a nearby store. Officer Demaioribus dropped defendant off in the store's parking lot and immediately radioed to a supporting officer, Charlotte-Mecklenburg Police Officer Derek E. Rud, to provide a description of defendant. Officer Rud pulled into the store's parking lot and arrested defendant. Although he searched defendant pursuant to the arrest, Officer Rud did not locate the $20 bill Officer Demaioribus had given defendant. Subsequently, chemical

analysis indicated that the substance in the baggies was 2.03 grams of marijuana.

On 24 August 2009, defendant was indicted for possession with intent to sell or deliver marijuana and for delivering cocaine. Defendant was additionally indicted for selling marijuana. Subsequently, on 2 November 2009, the State obtained a superseding indictment charging defendant with delivering marijuana. In addition, defendant was indicted for being a habitual felon.

Defendant testified on his own behalf at trial. He told the jury that he was walking on the street when a man in a small car drove slowly alongside him and asked if defendant could "get some green." Defendant replied, "Man, I just got out of prison and I don't even know the people with stuff like that, if they are still around here or not." However, the man persisted, and when defendant asked the man, "Well, what's in it for me?" the man said, "I'll buy you a beer or, you know, give you a couple dollars." Defendant then told a friend, "I'm going to see if I can go help this Dude buy some reefer." Defendant got into the man's car and directed him to several residences. While in the car, the man handed defendant a $20 bill and stated that he wanted "a twenty."

After several failed attempts to locate marijuana, the man became nervous and asked defendant if defendant intended to steal his money. Defendant responded by returning the $20 bill to the man and asking to be taken back to the location where defendant was picked up. As they drove back, defendant tried to locate marijuana at one last house. Defendant entered the house, informed the occupants that the man in the car "wants to get some weed," and then returned to the car. One of the occupants of the house then came to the car, and the man in the car gave the $20 bill to that person in exchange for marijuana. Defendant then directed the man to a store and asked, "Do you want to give me the Two Dollars so I can get me a beer?" The man responded, "Oh, man, you know, I ain't even got no more money on me." Defendant testified that although he "was looking to get a beer . . . from the guy that was driving the vehicle," he received no money, drugs, or other compensation from anyone that evening.

The jury found defendant guilty of (1) possession with intent to sell or deliver marijuana and (2) delivering marijuana. The jury further found that defendant was a habitual felon. The jury found defendant not guilty of selling marijuana. The trial court sentenced

defendant to two consecutive terms of 101 to 131 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court lacked subject matter jurisdiction to enter judgment against defendant for delivering marijuana because the indictment failed to allege all of the elements of the offense. It is well established that "[a]n indictment is fatally defective if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399 (2003) (internal quotation marks omitted). Here, defendant contends that the indictment charging delivery of marijuana failed to allege an essential element of the offense when it contained no allegation that defendant received remuneration for delivering less than five grams of marijuana.

Defendant was charged with violating N.C. Gen. Stat. § 90-95(a)(1) (2011), which provides: "[I]t is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" Since, "[i]n general, an indictment couched in the language of the statute is sufficient to charge the statutory offense," *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46 (1998), an indictment alleging delivery in violation of N.C. Gen. Stat. § 90-95(a)(1) should be sufficient if it alleges that the defendant delivered a controlled substance, in this case marijuana, to another person.

Defendant, however, argues, and the dissent agrees, that N.C. Gen. Stat. § 90-95(b)(2) creates an additional essential element for the offense of delivering less than five grams of marijuana—that the defendant receive remuneration—and that this additional element must be alleged in the indictment to properly charge that offense. In relevant part, N.C. Gen. Stat. § 90-95(b)(2) provides: "The transfer of less than 5 grams of marijuana . . . for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1)."

In *State v. Pevia*, 56 N.C. App. 384, 387, 289 S.E.2d 135, 137 (1982) (internal citation omitted), this Court specifically discussed the significance of N.C. Gen. Stat. § 90-95(b)(2) when a defendant has been indicted for delivery of marijuana:

> The offense of delivery under G.S. 90-95(a)(1) is complete when there has been a transfer of a controlled substance. It is not

necessary for the State to prove that defendant received remuneration for the transfer. Neither is the State initially required to prove the quantity transferred.

There is no separate statutory offense entitled delivery of marijuana. G.S. 90-95(b)(2), however, describes a situation limited in its applicability to the delivery of marijuana. If defendant transfers less than five grams of marijuana *and* receives no remuneration, he is not guilty of a delivery in violation of G.S. 90-95(a)(1).

Obviously that portion of G.S. 90-95(b)(2) will not apply to every charge of delivery of marijuana. Based on the statute's wording, if defendant transfers five or more grams of marijuana, he *is* guilty of delivery—despite the absence of remuneration. Likewise, defendant is guilty of delivery if he receives remuneration for the transfer of marijuana—regardless of the amount transferred. We, therefore, conclude that the State does *not* have to show both a transfer of five or more grams of marijuana and receipt of remuneration in order to submit to the jury the offense of delivery.

Thus, under *Pevia*, N.C. Gen. Stat. § 90-95 creates a single statutory offense of delivery of a controlled substance. There is not a separate offense of delivery of marijuana, as opposed to delivery of another controlled substance. As a result, an indictment is facially valid under N.C. Gen. Stat. § 90-95 when it alleges, as here, that defendant "did unlawfully, willfully and feloniously deliver to [a specified person] a controlled substance, to wit: marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act."

The issue addressed by N.C. Gen. Stat. § 90-95(b)(2) is, as its plain language indicates, what "constitute[s] a delivery in violation of G.S. 90-95(a)(1)." N.C. Gen. Stat. § 90-95(b)(2) establishes what is not a "delivery" of marijuana: transfer of less than five grams for no remuneration. In other words, N.C. Gen. Stat. § 90-95(b)(2) sets out what the State must prove in order to prove "delivery" when the controlled substance is marijuana.

"[A]n indictment need only allege the ultimate facts constituting the elements of the criminal offense and . . . evidentiary matters need not be alleged." *Blackmon*, 130 N.C. App. at 699, 507 S.E.2d at 46. The ultimate fact required to be proven for a violation of N.C. Gen. Stat. § 90-95(a)(1) is "delivery," while N.C. Gen. Stat. § 90-95(b)(2) establishes the evidence necessary to show delivery for marijuana. As

Pevia, 56 N.C. App. at 387, 289 S.E.2d at 137, explains, the State can, under N.C. Gen. Stat. § 90-95(b)(2), prove delivery of marijuana by presenting evidence *either* (1) of a transfer of five or more grams of marijuana, *or* (2) of a transfer of less than five grams of marijuana for remuneration.

Since the methods of proof set out in N.C. Gen. Stat. § 90-95(b)(2) are mere evidentiary matters, they need not be included in the indictment. *See State v. Williams*, 201 N.C. App. 161, 170, 689 S.E.2d 412, 417 (2009) (" 'The [indictment] is complete without evidentiary matters descriptive of the manner and means by which the offense was committed.' " (quoting *State v. Lewis*, 58 N.C. App. 348, 354, 293 S.E.2d 638, 642 (1982)). *See also State v. Coker*, 312 N.C. 432, 438, 323 S.E.2d 343, 348 (1984) (holding that because "[p]roof that defendant was impaired by one particular substance or another is a matter of evidence," State was not required to specify in indictment which substance impaired defendant).

We note, in addition, that given the language in N.C. Gen. Stat. § 90-95(b)(2), an indictment alleging a delivery of "marijuana" necessarily puts the defendant on notice that the State will have to prove either a transfer of more than five grams of marijuana or that the defendant received remuneration. *See Pevia*, 56 N.C. App. at 387, 289 S.E.2d at 137. A defendant may seek a bill of particulars to learn whether the State will be relying upon the weight of the marijuana or remuneration to establish delivery. *Coker*, 312 N.C. at 437, 323 S.E.2d at 348.

Defendant and the dissent, however, point to *Partridge*, 157 N.C. App. at 570-71, 579 S.E.2d at 399-400, in which this Court considered whether an indictment sufficiently alleged *felony* possession of marijuana when it did not include an allegation regarding the weight of the marijuana. N.C. Gen. Stat. § 90-95(a)(3) provides that "it is unlawful for any person . . . [t]o possess a controlled substance" without specifying whether it is a felony or a misdemeanor. N.C. Gen. Stat. § 90-95(d)(4), however, establishes that "any person who violates G.S. 90-95(a)(3) with respect to . . . [a] controlled substance classified in Schedule VI," including marijuana, "shall be guilty of a Class 3 misdemeanor" unless the amount of marijuana exceeded one-half ounce, in which case the offense would be a Class 1 misdemeanor. On the other hand, "[i]f the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana . . . the violation shall be punishable as a Class I felony." *Id.*

As this Court explained in *Partridge*, 157 N.C. App. at 571, 579 S.E.2d at 400, "[s]ection 90-95(d)(4) of the North Carolina General Statutes makes it a Class 3 misdemeanor to possess marijuana but increases the punishment level to a Class 1 misdemeanor for possession of more than one-half ounce of marijuana and if the weight exceeds one and one-half ounces, the punishment level is further raised to a Class I felony." This Court then held that "[p]ossession of more than one and one-half ounces of marijuana is . . . an essential element of the crime of *felony possession* of marijuana[,]" and, "because the indictment charging defendant failed to allege defendant was in possession of more than one and one-half ounces, the trial court was without jurisdiction to allow defendant to be convicted of *felony* possession of marijuana." *Id.* (emphasis added). The same indictment was sufficient, however, to support a conviction for Class 3 misdemeanor possession of marijuana. *Id.*

In other words, under N.C. Gen. Stat. § 90-95(d)(4), an indictment for possession of marijuana tracking the language of N.C. Gen. Stat. § 90-95(a)(3), without more, alleges only a Class 3 misdemeanor. Because the indictment in *Partridge* did not allege the weight of the marijuana, the indictment on its face alleged only a Class 3 misdemeanor. It did not allege a felony even though the State had prosecuted the defendant for the felony charge. *Partridge* did not involve, as this case does, an indictment that tracked the statutory language of the actual offense charged but omitted mere evidentiary matters.

The precise language of the statutory provisions involved in *Partridge* differs materially from the language of the controlling statutory provisions in this case. Based on the statutory language and *Pevia*, we hold that the indictment was facially valid.

II

[2] Defendant next argues that the trial court erred by denying his motion to dismiss for insufficient evidence. Defendant contends the error was two-fold: (1) the evidence that he received remuneration for the delivery of marijuana was insufficient; and (2) there was no competent evidence admitted at trial that the substance possessed by him was marijuana. We disagree.

" '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 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). It is well established that in deciding a motion to dismiss, "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).

First, defendant contends that because he was found not guilty of selling marijuana, the jury must not have been convinced that he received compensation for the transaction. Defendant's contention rests on the premise that defendant *himself* must receive compensation for the exchange in order for the State to prove that defendant transferred marijuana for remuneration within the meaning of N.C. Gen. Stat. § 90-95(b)(2). However, this Court rejected that argument in *Pevia*.

In *Pevia*, the evidence taken in the light most favorable to the State showed that an "undercover agent gave [the] defendant $20.00 with which to purchase a ten dollar bag of marijuana and some Eskatrols. The defendant returned to the agent a bag of marijuana, two capsules which she said cost $2.00 each, and $6.00." *Pevia*, 56 N.C. App. at 388, 289 S.E.2d at 137. On those facts, this Court "conclude[d] there was ample evidence from which a jury could reasonably infer that defendant had transferred marijuana for remuneration. Contrary to defendant's assertions, the State was not required to show that defendant made a profit on the transaction." *Id.*, 289 S.E.2d at 138.

In this case, the State presented evidence that Officer Demaioribus gave defendant $20.00 to obtain marijuana, and defendant subsequently gave the officer a bag of marijuana, but did not give the officer back his $20.00. Defendant's testimony to the contrary is immaterial. Under *Pevia*, the State's evidence was sufficient to establish delivery under N.C. Gen. Stat. § 90-95(a)(1) even if defendant did not personally profit from the transaction.

Next, defendant argues that there was no competent evidence to show that the substance he delivered was marijuana because admission of the chemical analysis report without testimony by the agent conducting the analysis violated defendant's constitutional right to

confront the witness. Defendant did not, however, object below on Confrontation Clause grounds and does not argue plain error on appeal. He cannot raise the unpreserved constitutional issue through the guise of a motion to dismiss. Regardless, in reviewing the denial of a motion to dismiss, we consider all evidence admitted in the trial court, "whether competent or incompetent." *Rose*, 339 N.C. at 192, 451 S.E.2d at 223. Consequently, the chemical analysis was sufficient, for purposes of the motion to dismiss, to prove that the material delivered to Officer Demaioribus was marijuana.

III

[3] Finally, defendant argues that the trial court committed plain error in (1) failing to instruct the jury that delivery of less than five grams of marijuana for no remuneration is not a delivery and (2) failing to instruct the jury on the lesser included offense of simple possession of marijuana. "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). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

Although defendant did not object to the trial court's jury instructions at trial, he seeks plain error review.

> 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 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).

Here, the trial court's instructions regarding delivery of marijuana consisted of the following:

> The Defendant has been charged with delivering marijuana, a controlled substance. For you to find the Defendant guilty of this offense, the State must prove beyond a reasonable doubt that the Defendant knowingly delivered marijuana to Mr. Demaioribus.

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant knowingly delivered marijuana to Mr. Demaioribus, then it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt then it would be your duty to return a verdict of not guilty.

We agree with defendant that because the evidence showed that defendant transferred to the officer, if anything, only 2.03 grams of marijuana, the trial court erred by not instructing the jury that in order to prove delivery, the State was required to prove that defendant transferred the marijuana for remuneration. *See Pevia*, 56 N.C. App. at 387, 289 S.E.2d at 137. The question remains, however, whether this omission rises to the level of plain error.

At trial, the State did not dispute that defendant no longer had the $20 bill on his person when he was arrested immediately after being dropped off by the undercover officer. In turn, defendant did not dispute at trial that he agreed to help the undercover officer buy marijuana and that the driver initially gave defendant a $20 bill. The dispute at trial was whether defendant, as he claimed, returned the $20 bill to the officer or whether he gave it to a man at the last house he visited and received back marijuana, which he then delivered to the officer. Defendant's defense of the charges rested on his testimony that after he returned the $20, another man walked up to the officer's car and dealt directly with the officer, who handed that man the $20 bill in exchange for the baggies of marijuana. According to defendant, he never had possession of the marijuana—he never handed any marijuana to the officer.

When the jury found defendant guilty of possession with intent to sell or deliver the marijuana, it necessarily rejected defendant's version of what occurred and defendant's claim that he did not transfer the marijuana to the officer. In order to find defendant guilty of the possession charge, the jury must have found the officer more credible and believed that defendant used the $20 bill to obtain marijuana, which defendant then transferred to the officer. Based on the possession verdict, we cannot say that the jury probably would have reached a different verdict with regard to the delivery charge if properly instructed, in accordance with *Pevia*, regarding remuneration.

Defendant, however, points to the jury's not guilty verdict with respect to the charge of sale of marijuana. That verdict reflects the lack of evidence that defendant retained any part of the $20 in

exchange for having obtained the marijuana. The verdict does not make it probable that a properly-instructed jury would have found defendant not guilty of having used the officer's $20 bill to obtain marijuana for him. To the contrary, we find that it is probable that even if properly instructed, the jury would have found the facts to be consistent with the officer's testimony: that defendant took the $20 bill, used it to obtain the marijuana, and delivered the marijuana to the officer. Defendant has not, therefore, shown plain error.

Defendant next argues that it was plain error not to instruct the jury on the lesser included offense of simple possession of marijuana. "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 determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant." *State v. Ryder*, 196 N.C. App. 56, 63-64, 674 S.E.2d 805, 811 (2009) (internal citation and quotation marks omitted).

Here, in order to find defendant guilty of simple possession, the jury would have had to believe the portion of defendant's testimony claiming that he returned the $20 to the officer, but disbelieved the portion of defendant's testimony that a third person actually handed the marijuana to the officer. The jury would, in other words, have to find that defendant was able to obtain the marijuana that he handed to the officer without using the officer's $20 bill. Because, given the evidence, such a verdict is improbable, defendant has failed to show that the trial court committed plain error in failing to instruct on simple possession.

Alternatively, defendant argues that he received ineffective assistance of counsel because of his trial counsel's failure to request these jury instructions. Since the trial court did not commit plain error when failing to give the instructions at issue, defendant cannot establish the necessary prejudice required to show ineffective assistance of counsel for failure to request the instructions. *See State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003) ("A successful ineffective assistance of counsel claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge.").

No error.

Judge THIGPEN concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge dissenting.

I respectfully disagree with the holding of the majority that the State was required to allege in the indictment only that defendant transferred marijuana to another person. Accordingly, I believe that the indictment in this case was insufficient, and I would vacate the judgment on defendant's conviction of delivery of marijuana.

Defendant contends that the superseding indictment for the delivery of marijuana was fatally defective because it failed to allege that he received remuneration for a delivery of less than five grams of marijuana. I agree.

"An indictment is fatally defective if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399 (2003) (quotation and citation omitted). Defendant was charged with violating section 90-95(a)(1), which states "it is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." N.C. Gen. Stat. § 90-95(a)(1) (2011). Section 90-95(b)(2) provides an exception, stating "[t]he transfer of less than 5 grams of marijuana or less than 2.5 grams of a synthetic cannabinoid or any mixture containing such substance for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1)." N.C. Gen. Stat. § 90-95(b)(2). In *Partridge*, we vacated the defendant's convictions of felony possession of marijuana because the indictment failed to allege the amount of marijuana possessed by the defendant, a necessary element of the charge. 157 N.C. App. at 571, 579 S.E.2d at 400. There, the indictment made no mention of the amount of marijuana of which defendant was in possession, though both parties agreed that the amount was 59.4 grams. *Id.* at 569, 579 S.E.2d at 399. In order to convict the defendant, the jury was required to find that defendant was in possession of more than 42 grams of marijuana (one and one-half ounces). Accordingly, we concluded that

> [p]ossession of more than one and one-half ounces of marijuana is thus an essential element of the crime of felony possession of marijuana. Therefore, because the indictment charging defendant failed to allege defendant was in possession of more than one and

> one-half ounces, the trial court was without jurisdiction to allow defendant to be convicted of felony possession of marijuana.

Id. at 571, S.E.2d at 400 (citation omitted).

Here, the indictment states that defendant did "unlawfully, willfully and feloniously deliver to A. Demaioribus, a controlled substance, to wit: marijuana." The amount of marijuana delivered by defendant was 2.03 grams, though this amount was not alleged in the indictment. In order for defendant to be convicted of delivery, there is no minimum amount that must be delivered under section 90-95(a)(1); however, if defendant did not deliver at least five grams, there is an additional requirement of remuneration. *See* N.C. Gen. Stat. §§ 90-95(a)(1), (b)(2). Here, like in *Partridge*, the indictment did not state the amount of marijuana that defendant possessed and delivered, nor did it mention remuneration. In this case, in order to convict defendant of delivery of marijuana, the amount of marijuana delivered must be in the indictment, as it affects whether or not the element of remuneration must also be alleged.

I disagree with the majority's analysis of *State v. Pevia*. In *Pevia*, the defendant delivered a ten dollar bag of marijuana, but there was no testimony regarding the amount of marijuana delivered. 56 N.C. App. 384, 388, 289 S.E.2d 135, 137 (1982). I believe that given the facts of that case, it may be inferred that the amount of marijuana delivered was well over five grams, thus remuneration was not required. Here, however, the amount of marijuana that was delivered was clearly established as 2.03 grams, triggering the required element of remuneration.

Therefore, because the indictment failed to allege that defendant received remuneration for a delivery of less than five grams of marijuana, I believe the trial court was without jurisdiction to allow defendant to be convicted of delivery of marijuana. Accordingly, I would vacate the judgment on defendant's conviction of delivery of marijuana.

STATE OF NORTH CAROLINA v. JONATHAN RUSS MINTON, DEFENDANT

No. COA12-243

(Filed 6 November 2012)

1. Conversion—by bailee—motion to dismiss—intent to defraud

The trial court did not err by failing to grant defendant's motion to dismiss the conversion of property by bailee charges. The State presented substantial evidence defendant intended to defraud Mr. Center by failing to comply with the terms of their agreement and failing to use the money for its intended purpose.

2. Damages and Remedies—restitution—amount—ability to pay

The trial court did not err in a conversion of property by bailee case by ordering defendant pay $5,000 in restitution. The evidence at trial supported the ten convictions for conversion, and thus, it supported the restitution amount of ten $500 payments. Further, the trial court complied with N.C.G.S. § 15A-1340.36(a) because evidence of defendant's financial condition and ability to pay restitution was established at trial.

Appeal by defendant from order entered 22 September 2011 by Judge Lindsay R. Davis, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 29 August 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Charlotte Gail Blake for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Jonathan Minton appeals from judgment entered against him after a jury found him guilty of ten counts of conversion of property by bailee in violation of N.C. Gen. Stat. § 14-168.1. On appeal, defendant argues that the trial court erred by: (1) denying defendant's motion to dismiss; and (2) ordering defendant to pay $5000 in restitution. After careful review, we find no error.

Background

Defendant was indicted for ten counts of obtaining property by false pretenses and ten counts of conversion of property by bailee ("conversion"). The cases were joined for trial.

The evidence at trial tended to establish the following: In 2005, defendant agreed to buy real property from Harold and Teresa Cantrell (collectively "the Cantrells" or, individually, "Mr. Cantrell" or "Ms. Cantrell") in Wilkes County. Under the terms of their agreement, defendant would pay the Cantrells $1000 per month for a total of 80 months. Once defendant paid them $75,000, the Cantrells would deed the property to him. The parties all signed a promissory note setting forth the details of this agreement. The property was a tract of land that included two trailers, a barn, and two chicken houses. Ms. Cantrell, who keeps the books on the property, testified that defendant paid a total of $35,000, but he has not made a monthly payment since July 2008.

In 2005, defendant approached Ed Center ("Mr. Center") to see if he was interested in paying half of the monthly payment. Mr. Center contended that he had a verbal agreement with defendant to pay half of the monthly payment in order to eventually share ownership of the land. However, defendant alleged that they only had a rental agreement whereby Mr. Center would rent one of the trailers on the property, and they never had an agreement to share ownership. Mr. Center testified that he began making monthly payments to defendant in 2005; however, he does not have any receipts for those payments.

Sometime in August 2009, Mr. Center claimed that defendant told him that he had not made a payment to Mr. Cantrell in nine months. In September 2009, after defendant told him they could avoid eviction by paying Mr. Cantrell $5000, Mr. Center gave defendant a certified check in the amount of $2500 to give Mr. Cantrell. The check was dated 29 September 2009.

At the end of the State's evidence, defendant made a motion to dismiss all charges. The trial court dismissed the ten counts of obtaining property by false pretenses because the State presented no evidence other than defendant's failure to comply with his contractual obligation to establish his intent to defraud. However, the trial court denied defendant's motion to dismiss the ten counts of conversion.

The trial court instructed the jury that the ten counts of conversion were based on the ten alleged acts of conversion defendant com-

mitted each month, when Mr. Center paid him $500, from August 2008 to May 2009. The jury found defendant guilty of all ten counts.

Defendant was sentenced to six to eight months, but the trial court suspended his sentence and placed defendant on 36 months of supervised probation. At sentencing, the State requested the trial court order defendant to pay $5000 in restitution based on the ten payments of $500 from Mr. Center, which defendant was convicted of converting. The trial court granted the State's request and ordered defendant to pay Mr. Center $5000 restitution.

Arguments

[1] Defendant first argues that the trial court erred by not granting defendant's motion to dismiss the conversion charges because the State failed to present substantial evidence that defendant possessed the necessary intent to defraud. Specifically, defendant contends that the only evidence the State offered to establish intent was defendant's failure to comply with an alleged contractual obligation. Since N.C. Gen. Stat. § 14-100(b) specifically states that evidence of nonfulfillment of a contract obligation, standing alone, does not establish the requisite intent to sustain an obtaining property by false pretenses charge, defendant argues that nonfulfillment of a contract obligation is not, or should not be, enough to establish the requisite intent for a conversion charge. We do not agree.

"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, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

Pursuant to N.C. Gen. Stat. § 14-168.1 (2011),

> [e]very person entrusted with any property as bailee . . . who fraudulently converts the same . . . to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a Class 1 misdemeanor. If, however, the value of the

> property converted . . . is in excess of four hundred dollars ($400.00), every person so converting or secreting it is guilty of a Class H felony.

Bailment is defined as the "delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose, usu. [sic] under an express or implied-in-fact contract." *Black's Law Dictionary* 163 (9th ed. 2009). Intent to defraud, as in cases of embezzlement, may be established by direct evidence or inferences from the facts and circumstances. *See generally State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 701-02 (noting that for purposes of embezzlement, fraudulent intent "may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred").

Here, defendant's argument is based on his contention that because "[e]vidence of nonfulfillment of a contract obligation" is not enough to establish intent for an obtaining property by false pretenses charge, N.C. Gen. Stat. § 14-100(b), this evidence should not be sufficient to establish the requisite intent to defraud for a conversion charge. While the legislature decided to specifically include that limitation in the obtaining property by false pretenses statute, it chose to not include it in the conversion statute. If we were to accept defendant's argument, we would have to rewrite the statute, not interpret it, to include that limitation, and we are without constitutional authority to do so. *See* N.C. Const. art. I, § 6 (2011) (noting that the powers of the legislative, judiciary, and executive branches of government are "separate and distinct"); *News and Observer Pub. Co. v. Easley*, 182 N.C. App. 14, 19-20, 641 S.E.2d 698, 702 (2007) (holding that "[art. I, § 6] . . . distributes the power to make law to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary"). Therefore, defendant's argument is without merit.

Moreover, a review of the record shows that the State presented substantial evidence that defendant intended to defraud Mr. Center. Here, taking the evidence in a light most favorable to the State, defendant and Mr. Center had an agreement where Mr. Center, the bailor, would give defendant, the bailee, $500 for a specific purpose—to use the money to pay the Cantrells to obtain ownership of the land. Although defendant took Mr. Center's money, he did not use it for its intended purpose of paying the Cantrells. This failure to do so is established by Ms. Cantrell's testimony that defendant has not made a payment since July 2008 even though Mr. Center testified he had been giving defendant money in subsequent months. Therefore, the

State presented substantial evidence defendant intended to defraud Mr. Center by failing to comply with the terms of their agreement and failing to use the money for its intended purpose.

In a separate but related argument, defendant also claims that there was not substantial evidence to establish intent to defraud because the alleged contract between himself and Mr. Center would be unenforceable in civil court due to the statute of frauds. *See* N.C. Gen. Stat. § 22-2 (2011) (stating that any contracts to sell or convey land which are not "in writing and signed by the party to be charged" are void). Defendant does not cite any authority in support of his argument, and we are unable to find any caselaw addressing the issue of whether intent to defraud for a criminal charge may be based on a party's failure to comply with an unenforceable contract. Thus, since there is no prohibition on using unenforceable contracts to establish substantial evidence to support a conversion charge, we find defendant's argument unpersuasive.

[2] Next, defendant argues the trial court erred in ordering defendant pay $5000 in restitution. Specifically, defendant contends the trial court erred because the amount was not supported by the evidence, as required by N.C. Gen. Stat. § 15A-1340.36(a), and by failing to consider defendant's circumstances, in violation of N.C. Gen. Stat. § 15A-1340.36. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1340.36(a) (2011), "[t]he amount of restitution must be limited to that supported by the record." Our Court has held that "the restitution amount requested by the State must be supported by evidence adduced at trial or at sentencing." *State v. Calvino*, 179 N.C. App. 219, 223, 632 S.E.2d 839, 843 (2006) (internal quotation marks omitted). Here, the evidence at trial supported the ten convictions for conversion; thus, the evidence at trial supported the restitution amount of ten $500 payments.

In addition to ordering restitution that is supported by the evidence, N.C. Gen. Stat. § 15A-1340.36(a) also states that:

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

In *State v. Smith*, 90 N.C. App. 161, 168, 368 S.E.2d 33, 38 (1988), *aff'd per curiam*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 104 L. Ed. 2d 1007 (1989), this Court found that the trial court erred in ordering the defendant to pay restitution where it "did not con-sider any evidence of defendant's financial condition." Our Supreme Court has also concluded that although N.C. Gen. Stat. § 15A-1340.36(a) does not require the trial court to enter written findings of fact regarding its award of restitution, "it requires the court to take into consideration the resources of the defendant, [his] ability to earn, [his] obligation to support dependents, and such other matters as shall pertain to [his] ability to make restitution or reparation." *State v. Hunter*, 315 N.C. 371, 376, 338 S.E.2d 99, 103 (1986).

Here, during sentencing, defendant's counsel requested the trial court suspend defendant's sentence because he was married with two young children. While the trial court never inquired as to defendant's employment status or support obligations during the sentencing hearing, there was evidence presented at trial to establish defendant's ability to pay the restitution. Specifically, defendant and his wife testified that around the time they appeared in court regarding the Cantrells' attempt to evict them, sometime in May 2010, they offered to buy the land from the Cantrells for $37,500. Moreover, even though defendant is not currently working, he did testify that he had been employed in the past, and he did not offer any testimony establishing he is unable to work. Accordingly, the trial court complied with N.C. Gen. Stat. § 15A-1340.36(a) and did not err in ordering defendant to pay restitution because evidence of defendant's financial condition and ability to pay restitution was established at trial.

Conclusion

Based on the foregoing reasons, we find no error.

No error.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. STEVEN FRANKLIN RYAN

No. COA12-228

(Filed 6 November 2012)

1. Evidence—expert opinion testimony—improper vouching for credibility of child sex abuse victim

The trial court committed plain error in a first-degree sex offense and taking indecent liberties with a child case by allowing the State's expert witness to improperly vouch for the credibility of a minor child victim when the expert stated that she had no concerns the child was giving a fictitious story and that there was no evidence that there was a different perpetrator other than defendant. Considering the testimony in light of the other evidence, the testimony had a probable impact on the jury's finding defendant guilty by enhancing the credibility of the child in the jurors' minds.

2. Evidence—expert testimony—inadmissible—not relevant to determination of guilt or innocence

Although the trial court did not commit plain error in a first-degree sex offense and taking indecent liberties with a child case by allowing testimony by the State's expert witness regarding her concern that defendant was living with his seven-year-old granddaughter at the time of the child's allegations, the testimony was not relevant to a determination of defendant's guilt or innocence and was therefore inadmissible. Accordingly, if the expert's written report is introduced into evidence on retrial, such notation should be redacted from the report.

3. Satellite-Based Monitoring—sexually violent offense—first-degree sex offense—indecent liberties with child

Because defendant's judgments were vacated, his arguments concerning the trial court's sex offender registration and satellite-based monitoring orders were not addressed. However, both of defendant's convictions for first-degree sex offense and taking indecent liberties with a child were encompassed in the definition of "a sexually violent offense" under N.C.G.S. § 14-208.6(5), and therefore they were both reportable convictions under the statute.

Appeal by defendant from judgments entered 31 May 2011 by Judge Ola M. Lewis in Johnston County Superior Court. Heard in the Court of Appeals 30 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Robert H. Hale, Jr. & Associates, Attorneys at Law, P.C., by Daniel M. Blau, for defendant appellant.

McCULLOUGH, Judge.

On 31 May 2011, Steven Franklin Ryan ("defendant") was convicted of one count of first-degree sex offense and two counts of taking indecent liberties with a child. On appeal, defendant contends he is entitled to a new trial for the following reasons: (1) the trial court's failure to reinstruct the deadlocked jury unconstitutionally coerced guilty verdicts; (2) the trial court abused its discretion in denying defendant's motion for a mistrial based upon the existence of a deadlocked jury; (3) the testimony of a State's witness vouching for the credibility of the minor child constituted plain error; (4) the State's closing argument was so improper as to necessitate *ex mero motu* intervention; and (5) the admission of the State's evidence regarding defendant's living arrangements with his granddaughter constituted plain error. Defendant also contends the trial court erred in ordering him to register as a sex offender and enroll in lifetime satellite-based monitoring ("SBM"). We hold the testimony of the State's expert witness vouching for the credibility of the minor child constituted plain error in this case, and therefore we order a new trial for defendant.

I. Background

The child victim in the present case ("the child") testified that she was 13 years old and was completing the eighth grade at the time of trial. She lived with her grandmother, Donna Allen ("Allen") from the time she was two until she was age ten. In 2007, the child and Allen were living with defendant in his three-bedroom trailer home.

The child testified she was left alone with defendant while Allen worked at night. She testified that at the end of her fourth grade year, when she was approximately ten years old, defendant began rubbing her back while wearing only his robe, and she could see his penis under his opened robe. She testified that defendant also kissed her. The child told Allen about the back rubs, but not about seeing defend-

ant's penis or that he had kissed her. Allen confronted defendant about the back rubs, but the child testified the back rubs continued.

By the beginning of her fifth grade year, the child testified defendant put his mouth on her breasts and her vagina and put his penis in her vagina and butt. She testified that when she went to the bathroom to urinate afterward, "[i]t was burning and hurting." The child testified defendant also put his fingers in her vagina. She testified that defendant told her that if she said anything about the encounters, he would break up with her grandmother. The child testified that during the encounters, she asked defendant to stop, and on one occasion she hit defendant. On one occasion, around her tenth birthday in August 2007, the child testified defendant held her arms down, kissed her, and then kissed her breasts and licked her vagina. The child testified defendant also took her hand and put it on his penis.

Sometime in late 2007 or early 2008, Allen's relationship with defendant deteriorated and the two broke up. Criminal charges were filed by both Allen and defendant against the other but were subsequently dropped. Evidence was introduced that at the time of the breakup, defendant had been drinking and threw Allen's belongings into the yard, at which point Allen left the residence. Evidence was also introduced indicating that Allen had threatened defendant, saying that he would not live in his house without her. Further evidence was introduced that following the breakup, defendant and Allen were civil to each other and performed favors for each other, such as providing transportation, haircuts, and machine maintenance.

The child went to live with her mother, Cailey, after her grandmother and defendant broke up. In September 2009, approximately two years after the alleged sexual abuse, the child told her mother defendant had raped her without providing any details. The child testified that she waited two years to tell anyone because she was scared and thought the sexual contact was her fault. The child also testified she came forward with the allegations because defendant was living with his seven-year-old granddaughter and she was afraid defendant would abuse her as well.

After the child told Cailey that defendant had raped her, Cailey informed Allen of what the child had said, and the two immediately took the child to speak with a relative who was a detective with the Johnston County Sheriff's Office, Kevin Massengill ("Detective Massengill"). The child initially remained in the vehicle while Allen informed Detective Massengill of the child's sexual assault accusa-

tions against defendant. Detective Massengill then spoke with the child about the accusations and advised Allen to seek a child medical evaluation. Detective Massengill testified that the child did not provide any details of the alleged incidents, but that she only stated she had been touched inappropriately. On the following day, Allen and Cailey took the child to WakeMed Hospital and were referred to a specialist.

Also on the following day, Detective Massengill referred the case to his supervisor at the Sheriff's Office. Detective Toni Lee ("Detective Lee") was assigned to the case. Detective Lee was an acquaintance of the child's family. Detective Lee interviewed the child about the allegations for approximately thirty minutes. Allen was present in the room while Detective Lee interviewed the child. During the interview, the child informed Detective Lee that once when she was home alone with defendant, he had kissed her. She also stated that defendant had rubbed her back twice and she had told him to stop. She further stated that one night, defendant held her down, kissed her on the mouth and on her breasts, stuck his fingers and tongue in her private area, and put his penis in her vagina.

Following her interview with the child, Detective Lee attempted to contact defendant at his residence and left her business card asking him to contact her. Defendant contacted her 23 minutes later and informed her he would be glad to speak with her and that she was welcome to come by. Detective Lee returned to defendant's residence and spoke with him about the child's allegations. The conversation lasted approximately six minutes, during which defendant denied the allegations and suggested to Detective Lee that Allen had influenced the child to fabricate the allegations against him. Following her interview with defendant, Detective Lee concluded that the child's accusations against defendant were not fabricated and did not conduct any further investigation.

On referral from WakeMed, the child was seen by Dr. Laura Gutman ("Dr. Gutman"), a pediatrician specializing in child maltreatment and child sexual abuse. Dr. Gutman was qualified as an expert witness in the field at trial. Dr. Gutman interviewed Cailey about the child's medical history and then talked at length with the child about the sexual abuse allegations. The child informed Dr. Gutman about the back rubs and defendant's exposing himself to her. Dr. Gutman then used anatomically correct dolls and proceeded to lead the child to various body parts, asking her if anything had happened there. During the body inventory, the child informed Dr. Gutman that defend-

ant had placed his tongue in her mouth and had put his penis in her private area. The child also informed Dr. Gutman that defendant had felt her breasts and private area with his fingers. When Dr. Gutman asked the child if anything happened in the anal area, the child responded defendant had put his penis in her butt. The child also stated defendant had put his penis in her mouth. Dr. Gutman testified about the child's ability to describe "sensory detail[s]" about these alleged incidents, such as the taste of defendant's tongue and the warmth of his penis. Dr. Gutman further testified that the child reported mental health symptoms that are common in sexually abused children, including nightmares, embarrassment, dissociation, and anger. The child told Dr. Gutman that no one else had touched her sexually.

Following her lengthy interview with the child, Dr. Gutman performed a physical exam on the child. She observed a deep notch in the child's hymen, which she testified was highly suggestive of vaginal penetration. Dr. Gutman also examined the child's anus and found it to be normal, although she testified that physical findings of anal abuse are uncommon. Finally, Dr. Gutman tested the child for sexually transmitted diseases. The tests were negative, except that the child was diagnosed with the presence of bacterial vaginosis. Dr. Gutman testified that the presence of bacterial vaginosis can be indicative of a vaginal injury, although it is the most common genital infection in women and can have many causes. Cailey had indicated the child had symptoms of vaginosis as early as 2006, which predated the alleged abuse. Based on the presence of the hymenal notch and bacterial vaginosis, and the child's history as taken from both Cailey and the child, Dr. Gutman testified as to her conclusion that the child had been sexually abused, that she had no indication the child's story was fictitious or that the child had been coached, and that defendant was the perpetrator.

The child also met with licensed clinical social worker Stacey Drake ("Drake"). Drake testified she provided therapy for the child's mental health issues and encouraged the child to keep a private journal about the alleged abuse as a coping method. Drake testified that when she first met with the child, the child was shy, made no eye contact, had a difficult time talking, and was acting very angry at home. Drake also testified the child was doing poorly in school and had gained weight. Drake testified the child had made progress with her mental health issues as of June 2010.

Defendant testified at trial in his own defense. He admitted to rubbing the child's back twice but stated he had stopped when Allen asked him to. Defendant repeatedly denied the allegations of sexual abuse and maintained that he and the child had always had a good relationship. Defendant testified there were other men, some with known criminal records, who had visited with Allen in the presence of the child following their breakup. Defendant testified concerning his belief that Allen had compelled the child to fabricate the allegations against him. Defendant's ex-wife also testified on defendant's behalf, stating that some time in 2007, after defendant's breakup with Allen, she was giving defendant a ride when they saw the child in her yard. She testified the child ran towards the truck waving and calling defendant's name and appeared happy to see him.

On 5 April 2010, defendant was indicted on two counts of first-degree rape, two counts of first-degree sex offense, and two counts of taking indecent liberties with a child. The State dismissed one count of first-degree rape prior to trial. Defendant was tried on the remaining five charges before a jury beginning 23 May 2011. Following three indications of deadlock by the jury, defendant moved for a mistrial, which was denied by the trial court. After approximately four hours of deliberations over two days, the jury returned unanimous verdicts on all five counts. The jury found defendant not guilty of first-degree rape and one count of first-degree sex offense. The jury found defendant guilty of the remaining charges—one count of first-degree sex offense and two counts of taking indecent liberties with a child. The trial court entered judgment on the verdicts, sentencing defendant to consecutive terms of 288-355 and 19-23 months' imprisonment. The trial court also ordered defendant to register as a sex offender and enroll in lifetime SBM. Defendant gave oral notice of appeal in open court following his convictions and has filed a petition for writ of certiorari with this Court seeking review of the trial court's sex offender registration and SBM orders.

II. Improper Expert Opinion Testimony Vouching For Credibility of Minor Child

[1] We first address defendant's argument that the trial court both erred and committed plain error in allowing the State's expert witness, Dr. Gutman, to improperly vouch for the credibility of the minor child. Defendant objected to some portions of Dr. Gutman's testimony, but not to others. Accordingly, this Court reviews those portions to

which defendant objected for prejudicial error and those portions to which defendant did not object for plain error.

Generally, an alleged error is prejudicial 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[.]" N.C. Gen. Stat. § 15A-1443(a) (2011). Nonetheless, "[e]videntiary 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).

"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) (2012); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). In its recent opinion in *State v. Towe*, ___ N.C. ___, ___ S.E.2d ___, No. 121PA11 (June 14, 2012), our Supreme Court reiterated the plain error standard, stating that "to establish plain error [a] defendant must show that a fundamental error occurred at his trial and that the error '"had a probable impact on the jury's finding that the defendant was guilty." ' " *Id.* at ___, ___ S.E.2d at ___, No. 121PA11, slip. op. at 11 (quoting *State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 333 (2012) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378)).

Here, those portions of Dr. Gutman's testimony challenged by defendant on appeal can be classified into three categories: (1) expert opinion testimony concluding that the child had been sexually abused, (2) expert opinion testimony that the child's story was not fictitious, and (3) expert opinion testimony that the child had not been coached. Defendant also challenges Dr. Gutman's testimony as to her conclusion that defendant was the perpetrator of the sexual abuse on the child.

A. Conclusion of Sexual Abuse

It is well-settled law that "[e]xpert opinion testimony is not admissible to establish the credibility of the victim as a witness." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *aff'd*, 356 N.C. 428, 571 S.E.2d 584 (2002). Nonetheless, "[w]ith respect to expert testimony in child sexual abuse prosecutions, our Supreme Court has approved, upon a proper foundation, the admission of expert testimony with respect to the characteristics of sexually abused children and whether the particular complainant has symptoms consistent with those characteristics." *Id.* (citing *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002); *State v. Kennedy*, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366-67 (1987)).

In addition, "an expert medical witness may render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation, i.e. physical evidence consistent with sexual abuse." *Id.* "However, in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility." *Id.*; *see also Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 789 ("In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility."). Thus, "[t]estimony that a child has been 'sexually abused' based solely on interviews with the child [is] improper." *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 183, *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001); *see also State v. Bates*, 140 N.C. App. 743, 748, 538 S.E.2d 597, 601 (2000) (acknowledging that where an expert witness conducted an interview and a physical examination of a child who claimed she had been sexually abused, and where the child's physical examination revealed no evidence that the child had been sexually abused, expert testimony "diagnos[ing]" the child as a victim of sexual abuse based solely on the child's statement that she had been abused lacked a proper foundation and should not have been admitted). Our Supreme Court reaffirmed these legal principles in its recent opinion in *Towe*, ___ N.C. at ___, ___ S.E.2d at ___, No. 121PA11, slip. op. at 9-10.

In the present case, Dr. Gutman testified that based upon her training, education, and experience, as well as her examination of the child, she concluded that the history given by the child and her phys-

ical findings "were consistent with sexual abuse[.]" Similarly, in Dr. Gutman's written report, she concluded that the child had been "sexually assaulted" based upon her medical evaluation of the child. We hold Dr. Gutman's conclusions in this regard were properly admitted, given the physical evidence of the child's unusual hymenal notch and bacterial vaginosis.

We note that in both her testimony and in her written report, Dr. Gutman did not state which acts of alleged sexual abuse she concluded had occurred, although she noted the various types of sexual acts alleged by the child in both her testimony and her written report. Had Dr. Gutman testified as to her specific conclusion that the child had been the victim of both vaginal and anal sexual abuse, we would hold the admission of such testimony to be error, as the State presented no physical evidence of anal sexual abuse, and Dr. Gutman admitted on cross-examination that such a conclusion would be based solely on her interview with the child.

However, Dr. Gutman did not give an opinion as to which specific assault she concluded had occurred. Rather, Dr. Gutman stated only her conclusions that the child's history and physical findings were "consistent with sexual abuse" and that based on her medical evaluation of the child, the child had been "sexually assaulted." Because the State introduced a proper foundation of physical evidence—the unusual deep hymenal notch and the presence of the child's vaginosis—prior to Dr. Gutman's stating her conclusion of sexual abuse, we cannot conclude it was error for Dr. Gutman to testify as to her general conclusions. *Cf. Towe*, ___ N.C. at ___, ___ S.E.2d at ___, No. 121PA11, slip. op. at 10 (expert witness testified "that she observed no injuries during her physical examination of the victim, that the victim's hymen appeared normal and smooth, and that the victim displayed no physical symptoms diagnostic of sexual abuse").

B. Truthfulness of Child and Coaching

" '[O]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.' " *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1997) (quoting *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988)). Accordingly, our Supreme Court "has found reversible error when experts have testified that the victim was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988) (citing *State v. Aguallo*, 318 N.C. 590,

350 S.E.2d 76 (1986); *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986); *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986)). However, our Supreme Court has agreed that "a statement that a child was not coached is not a statement on the child's truthfulness." *State v. Baymon*, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994).

In the present case, the following exchange occurred on redirect examination of Dr. Gutman:

> Q. [H]ave you ever diagnosed or made a finding that [a] child is not being truthful?
>
> A. I have done that on several occasions.
>
> Q. Can you explain to the jurors what you look for, the clues that you look for, and do you do that in every case?
>
> A. I do it in every case.
>
> . . . .
>
> Q. Was there anything about your examination of [the child] that gave you any concerns in this regard?
>
> A. That gave me concerns that she was giving a fictitious story?
>
> Q. Yes.
>
> A. Nothing. There was nothing about the evaluation which led me to have those concerns. And again, as I was getting into her history and considering this as a possibility, nothing came out.

We conclude Dr. Gutman's testimony that she was not concerned that the child was "giving a fictitious story" is tantamount to her opinion that the child was not lying about the sexual abuse. *See*, *e.g.*, *Heath*, 316 N.C. at 341-42, 341 S.E.2d at 568 (prosecutor's question to expert whether child victim was suffering from a mental condition which could have caused her to make up a story about sexual assault was designed to elicit expert's opinion as to whether child victim might have lied about the alleged assault and constituted inadmissible opinion testimony as to child's credibility). Our Supreme Court and this Court have repeatedly held that such testimony is inadmissible, and we hold the trial court erred in allowing Dr. Gutman to so testify.

The State argues that defendant opened the door to this particular testimony by contending that the child was coached into bringing the sexual abuse allegations against defendant. The State maintains that because defendant revealed this theory in his opening arguments to the

jury and in his cross-examination of the child and her grandmother, he opened the door to Dr. Gutman's opinion testimony that the child had not been coached. We are not persuaded by the State's argument.

Dr. Gutman testified separately regarding indications that a child has been "coached" and that, based upon her examination of the child, she concluded there were no indications that the child "had been coached in any way[.]" This testimony was elicited on direct examination, prior to Dr. Gutman's testimony that she had no concerns that the child was giving a fictitious story. Dr. Gutman testified again on redirect examination that she had no concerns that the child "had been coached in any way[.]" Given our Supreme Court's holding in *Baymon*, as denoted above, such opinion testimony that the child had not been "coached" was admissible. *Baymon*, 336 N.C. at 752, 446 S.E.2d at 3. The State, therefore, addressed defendant's "coaching" argument through separate, admissible testimony. However, opinion testimony that a child has not been "coached" is distinguishable from opinion testimony that a child is not lying or is not giving a fictitious story—testimony that is clearly inadmissible under our case law.

Our Supreme Court has noted, as the State contends, that "[u]nder certain circumstances, . . . otherwise inadmissible evidence may be admissible if the door has been opened by the opposing party's cross-examination of the witness." *Id.* Thus, "[t]his evidence is allowed only if defendant 'opened the door' by addressing the victims' credibility on cross-examination" of the witness presently testifying. *State v. Thaggard*, 168 N.C. App. 263, 274, 608 S.E.2d 774, 782 (2005). Despite the State's argument to the contrary, defendant's theory of the case, his opening arguments, and his cross-examination of other witnesses do not "open the door" to otherwise inadmissible testimony by a different witness. Otherwise, defendant's ability to put on a defense would be severely impaired. As to defendant's cross-examination of Dr. Gutman, the only questions relevant to the child's credibility consisted of questions concerning whether "[s]ome people make up stories of abuse" and whether some children "make false accusations" or "false representations[.]" We cannot say such generalized questions on cross-examination opened the door for Dr. Gutman to testify as to her opinion that the child in this case was not giving a fictitious story.

C. Defendant as Perpetrator

In addition to this testimony, Dr. Gutman further concluded that "there was no evidence that there was a different perpetrator" other than defendant. Dr. Gutman based her conclusion on her interview

with the child. In *State v. Brigman*, 178 N.C. App. 78, 632 S.E.2d 498 (2006), a pediatrician specializing in the diagnosis of sexual assault injuries in children testified as an expert concerning her conclusion that the child victims had "suffered sexual abuse by [defendant]." *Id.* at 85-86, 632 S.E.2d at 503. On appeal in *Brigman*, the defendant argued the doctor's testimony "constituted expert testimony on the guilt of the defendant." *Id.* at 91, 632 S.E.2d at 507. This Court agreed with the defendant's contention, holding that such testimony was "improper opinion testimony concerning the victims' credibility." *Id.* at 91-92, 632 S.E.2d at 507. Similarly, in *State v. Figured*, 116 N.C. App. 1, 446 S.E.2d 838 (1994), this Court held that testimony by an expert stating that "in his opinion the children were sexually abused *by this defendant*" constituted an expression of opinion as to the defendant's guilt and was thus improper. *Id.* at 8-9, 446 S.E.2d at 842-43. This Court reasoned that the doctor's "opinion that the children were sexually abused *by defendant* did not relate to a diagnosis derived from his expert examination of the prosecuting witnesses in the course of treatment. It thus constituted improper opinion testimony as to the credibility of the victims' testimony." *Id.* at 9, 446 S.E.2d at 843.

Here, we find no discernible difference between Dr. Gutman's testimony that "there was no evidence that there was a different perpetrator" other than defendant and the testimony by the doctors in *Brigman* and *Figured* that the child had been sexually abused by the defendant. Thus, the admission of such testimony constituted improper opinion testimony as to the credibility of the child's testimony and was also error.

D. Prejudicial Error

Because we hold Dr. Gutman's testimony that she had no concerns the child was giving a fictitious story and that there was no evidence that there was a different perpetrator other than defendant was inadmissible, we must address whether the error was prejudicial to defendant in this case. Defendant did not object to these particular lines of questioning, therefore we review for plain error.

Under our plain error review, "we must consider whether the erroneous admission of expert testimony that impermissibly bolstered the victim's credibility had the 'prejudicial effect necessary to establish that the error was a fundamental error.' " *Towe*, ___ N.C. at ___, ___ S.E.2d at ___, No. 121PA11, slip. op. at 11 (quoting *Lawrence*, ___ N.C. at ___, 723 S.E.2d at 335). "This Court has held that it is fun-

damental to a fair trial that a witness's credibility be determined by a jury, that expert opinion on the credibility of a witness is inadmissible, and that the admission of such testimony is prejudicial when the State's case depends largely on the testimony of the prosecuting witness." *Dixon*, 150 N.C. App. at 53, 563 S.E.2d at 599.

Notably, a review of relevant case law reveals that where the evidence is fairly evenly divided, or where the evidence consists largely of the child victim's testimony and testimony by corroborating witnesses with minimal physical evidence, especially where the defendant has put on rebuttal evidence, the error is generally found to be prejudicial, even on plain error review, since the expert's opinion on the victim's credibility likely swayed the jury's decision in favor of finding the defendant guilty of a sexual assault charge. *See Aguallo*, 318 N.C. at 599-600, 350 S.E.2d at 82; *State v. Trent*, 320 N.C. 610, 615, 359 S.E.2d 463, 466 (1987); *State v. Bush*, 164 N.C. App. 254, 259-60, 595 S.E.2d 715, 718-19 (2004); *State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002); *State v. Parker*, 111 N.C. App. 359, 366, 432 S.E.2d 705, 710 (1993).

In the present case, the State's evidence consisted of testimony from the child, her family members, her therapist, the lead detective on the case who was an acquaintance of the family, and an expert witness. All of the State's evidence relied in whole or in part on the child's statements concerning the alleged sexual abuse. The only physical evidence presented that bolstered the State's case that the child had been sexually abused was a deep hymenal notch in the child's vagina and the presence of bacterial vaginosis. However, Cailey testified that the child's symptoms of bacterial vaginosis predated the alleged sexual assaults by defendant. In addition, more than two years had elapsed since the alleged sexual contact and the child's medical examination. Further, there was no physical evidence that bolstered the State's case that the child was anally assaulted or that defendant was the perpetrator of any such abuse. There was no testimony presented by the State that did not have as its origin the accusations of the child. For this reason, the credibility of the child was central to the State's case.

In addition, the State presented Dr. Gutman as a specialist in child maltreatment and child sexual abuse. Dr. Gutman described her training and experience, specifically focusing on child infectious diseases, including sexually transmitted infections, and child sexual abuse. Dr. Gutman testified that she helped found a hospital clinic for

child maltreatment, that she had authored numerous publications on child sexual abuse, that she had seen approximately 1300-1400 cases of child maltreatment or child sexual abuse, that she had testified as an expert in the field 28 times in the five years prior to the trial of the present case, and that she had helped to train or teach other pediatricians in this field. Upon review of the record, it is clear that Dr. Gutman's testimony was central to the State's case, as her testimony comprises approximately 161 pages of the trial transcript, which is roughly equivalent to the testimony of the child, Cailey, Allen, Detective Massengill, and Detective Lee combined.

Defendant's evidence consisted of his testimony that he did not sexually abuse the child. Defendant's ex-wife also testified that she was with defendant on one occasion following the alleged sexual abuse and the child seemed happy to see defendant drive by and was shouting and waving at him. Evidence was also introduced that other men, some with known criminal records, had been in the presence of the child following defendant's split with Allen and prior to the child's sexual assault allegations, although the lead detective failed to investigate these other men. The child's account of what happened evolved over time, and new allegations of what happened to her, particularly the anal assault, came out during her evaluation by Dr. Gutman.

Except for Dr. Gutman's testimony, the evidence presented at trial amounted to conflicting accounts from the child, defendant, and their families. Because Dr. Gutman was an expert in treating sexually abused children, her opinion likely held significant weight with the jury. Considering Dr. Gutman's testimony in light of the other evidence, we must conclude the testimony in question had a probable impact on the jury's finding defendant guilty by enhancing the credibility of the child in the jurors' minds. Thus, we hold Dr. Gutman's improper expert opinion testimony vouching for the credibility of the child constituted plain error in this case. We must, therefore, vacate the judgments and order a new trial for defendant.

III. Remaining Issues

Having ordered a new trial for defendant on this issue, we shall comment only briefly upon those remaining issues raised by defendant that are likely to recur on retrial. We will not address defendant's first two arguments regarding the trial court's failure to reinstruct the deadlocked jury or his request for a mistrial, nor will we address his fourth argument regarding his objection to the prosecutor's closing argument, as these issues are not likely to recur.

[2] In his fifth argument on appeal, defendant argues the trial court committed plain error in allowing testimony by Dr. Gutman regarding her concern that defendant was living with his seven-year-old granddaughter at the time of the child's allegations. Defendant argues this testimony was irrelevant, and therefore inadmissible, as it made it no more probable that he had sexually abused the child.

In the present case, the entirety of the testimony concerning defendant's living with his granddaughter consisted of the following. On direct examination of the child, the following exchange took place:

Q. What made you wait two years and tell your mom in 2009?

A. I was scared because I thought it was my fault.

Q. Did you think about the defendant who lived with the defendant (sic)?

A. Uh-huh.

Q. Did you think about who was living with [defendant] at that time?

A. Yeah.

Q. Who was living with him?

A. His granddaughter.

Q. How old was she?

A. I'm not sure.

Q. Younger or older than you?

A. She's younger than me.

Q. And the fact that he was living with his granddaughter, how did that make you feel?

A. It made me feel bad.

Q. Why? What were you thinking?

A. That he might do it to her.

Q. So because of that, what did you tell your mom?

A. I told her what he had done.

Such evidence is relevant to the child's motives for reporting the alleged sexual abuse. *See State v. Whitman*, 179 N.C. App. 657, 668, 635 S.E.2d 906, 913 (2006) (photographs of two other children admissible because they were relevant to child victim's motives for coming forward with allegations of sexual abuse against the defendant).

Subsequently, during the direct examination of Dr. Gutman, Dr. Gutman testified that she had learned from the child's mother that defendant had a granddaughter "who is seven, who lived with him at that time currently" and that in her written report, she "noted with concern that [defendant] is reported to be living with a granddaughter who is age seven." Defendant did not object to any of the foregoing testimony. Although we believe the admission of such evidence did not rise to the level of plain error in this case, defendant is correct that Dr. Gutman's testimony as to this fact was not relevant to a determination of his guilt or innocence and was therefore inadmissible. Accordingly, if Dr. Gutman's written report is introduced into evidence on retrial, such notation should be redacted from the report.

[3] Finally, because we vacate defendant's judgments in the present case, we need not address his arguments concerning the trial court's sex offender registration and SBM orders. However, we note that the trial court's findings that defendant had been convicted of a reportable conviction, specifically "an offense against a minor under G.S. 14-208.6(1m)," as well as "rape of a child, G.S. 14-27.2A, or sexual offense with a child, G.S. 14-27.4A" were erroneous. Defendant's convictions for first-degree sex offense, a violation of N.C. Gen. Stat. § 14-27.4, and taking indecent liberties with a child, a violation of N.C. Gen. Stat. § 14-202.1, do not fall within the statutory definition of an "offense against a minor" or a "sexual offense with a child" pursuant to N.C. Gen. Stat. § 14-27.4A. However, both of defendant's convictions for first-degree sex offense and taking indecent liberties with a child are encompassed in the definition of "a sexually violent offense" under N.C. Gen. Stat. § 14-208.6(5), and therefore they are both reportable convictions under the statute.

IV. Conclusion

We hold Dr. Gutman's testimony that she had no concerns the child victim was giving a fictitious story was tantamount to expert opinion testimony that the child was not lying about the sexual abuse allegations, and therefore such testimony was inadmissible. Similarly, Dr. Gutman's testimony that there was no evidence of any other perpetrators of sexual abuse on the child other than defendant likewise

constituted improper expert opinion testimony concerning both the guilt of defendant and the credibility of the child.

Given that Dr. Gutman's testimony was central to the State's case, and in light of the minimal physical evidence and other conflicting testimony presented at trial, we hold Dr. Gutman's improper opinion testimony vouching for the credibility of the child had a probable impact on the jury's finding defendant guilty, and therefore, the admission of such testimony constituted plain error, necessitating a new trial for defendant.

New trial.

Judges HUNTER, JR., (Robert N.) and ERVIN concur.

STATE OF NORTH CAROLINA v. LARRY THOMAS SEXTON

No. COA12-445

(Filed 6 November 2012)

1. Identity Theft—attempt to avoid legal consequences—social security number written on citation

The trial court did not err by denying defendant's motion to dismiss the charge of identity theft. Defendant provided Mr. Ward's name, date of birth, employer, and possible address in an attempt to avoid the legal consequences of defendant's actions. By Mr. Ward's social security number being written on the citation issued to defendant, the jury could conclude that defendant "used" or "possessed" the social security number to avoid legal consequences.

2. Identity Theft—instruction—identifying information

The trial court did not commit plain error in an identity theft case by failing to instruct the jury that the "identifying information" involved in this case was the social security number. Based on the facts of this case, it was clear what identifying information was obtained, possessed, or used by defendant.

Appeal by Defendant from judgment entered 27 September 2011 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 25 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Ward Zimmerman, for the State.

Gilda Rodriguez for Defendant-Appellant.

McGEE, Judge.

Larry Thomas Sexton (Defendant) was convicted of identity theft on 27 September 2011 and sentenced to a term of imprisonment of 26 months to 32 months. Defendant appeals.

The evidence presented at trial tended to show that Defendant was observed engaging in shoplifting at a Best Buy in Asheville. The manager of the Best Buy detained Defendant and asked him to wait while the police were called. Officer Lynn Wilson (Officer Wilson) of the Asheville Police Department responded and conducted an interview with Defendant in an office at the Best Buy. Officer Wilson testified that Defendant did not have any identification with him, but that he stated his name was "Roy Lamar Ward." Defendant did provide Officer Wilson with a birth date, telephone number, and employer. Officer Wilson ran a check on the information Defendant had given her and the information she obtained corresponded to "Roy Lamar Ward." Defendant also stated to Officer Wilson that his address was "33 or 74 Winesap Drive, Hendersonville, North Carolina." Officer Wilson issued a citation in the name of Roy Lamar Ward (Mr. Ward) to Defendant for shoplifting. The citation issued to Defendant contained a social security number. Officer Wilson did not testify that Defendant provided her with the social security number listed in the citation. The record is unclear as to where Officer Wilson obtained the social security number.

A man named Roy Lamar Ward was later arrested for Defendant's actions that gave rise to the citation. Michael Downing, an investigator with the district attorney's office (Investigator Downing), showed Officer Wilson a photograph of Mr. Ward and one of Defendant. Officer Wilson identified Defendant as the person to whom she had issued the citation in the Best Buy office. Investigator Downing also spoke to the manager of the Best Buy who identified Defendant from a photographic line-up. Investigator Downing then obtained a warrant for the arrest of Defendant for identity theft.

Defendant was indicted on 4 April 2011 in an indictment containing language charging that Defendant did

> knowingly obtain, possess or use identifying information, name, date of birth, and Social Security number, of another person, Roy Lamar Ward, with the intent to fraudulently represent that . . . [D]efendant was the other person for the purpose of avoiding legal consequences. Roy Lamar Ward was arrested as a proximate result of this offense.

I. Issues on Appeal

Defendant raises on appeal the issues of: (1) whether the trial court erred in denying Defendant's motion to dismiss based on insufficient evidence and a fatal variance between the evidence presented and the allegations of the indictment; and (2) whether the trial court committed plain error by failing to properly instruct the jury on identity theft.

II. Motion to Dismiss

[1] Defendant first argues that the trial court erred by denying his motion to dismiss. Specifically, Defendant contends there was insufficient evidence that he "gave 'identifying information,' pursuant to the statute, to Officer Lynn Wilson[.]" Defendant asserts that there was no evidence that the social security number written on the citation was "provided by" Defendant. Defendant also argues that there was a fatal variance between the evidence and the indictment, in that the indictment required proof of Defendant's having provided the social security number. 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) (citation omitted). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "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).

The elements of identity theft are set forth by statute as follows:

> A person who knowingly *obtains*, *possesses*, *or uses* identifying information of another person, living or dead, with the

> intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences is guilty of a felony[.]

N.C. Gen. Stat. § 14-113.20(a) (2011) (emphasis added). The term "identifying information" includes, *inter alia*, social security numbers, state identification card numbers, and "[a]ny other numbers or information that can be used to access a person's financial resources." *Id.* The indictment in the present case specifically listed the identifying information as the "name, date of birth, and Social Security number, of" Mr. Ward. As stated above, Defendant's argument concerning his motion to dismiss is that there was insufficient evidence that Defendant provided Mr. Ward's social security number to Officer Wilson.

However, reviewing the statute, we conclude that the issue involved in the present case is not whether Defendant "provided" Mr. Ward's social security number, but whether Defendant "obtain[ed], possess[ed], or us[ed]" Mr. Ward's social security number. *See* N.C.G.S. § 14-113.20(a). We have found little case law addressing the interpretation of "obtains, possesses, or uses[.]" Our Court did address the word "use" in *State v. Barron*, 202 N.C. App. 686, 690 S.E.2d 22 (2010). In *Barron*, the defendant was charged with identity theft after using his brother's information to identify himself to police. *Id.* at 693-94, 690 S.E.2d at 28. The police officer who completed an arrest sheet for the defendant testified that he asked the defendant if he knew his social security number, to which the defendant replied negatively. *Id.* The officer took the name and date of birth provided and found a social security number which he then wrote on the arrest sheet. *Id.* The officer asked the defendant if the last four digits of the number he had discovered matched the last four digits of the defendant's social security number, to which the defendant replied affirmatively. *Id.*

Reviewing the sufficiency of the evidence on appeal in *Barron*, this Court noted that the "[d]efendant d[id] not deny using his brother's name and birth date to identify himself to police." *Id.* at 694, 690 S.E.2d at 28. The defendant argued that " 'agreeing with the police officer's recitation of the last four digits of that other person's social security number . . . is [not] "use [of] identifying information" within N.C.G.S. § 14–113.20.' " *Id.* This Court ultimately disagreed with the

defendant and concluded that the "[d]efendant's active acknowledgment to [the officer] that the last four digits of his social security number were '2301' was a 'use [of] identifying information' of another person within the meaning of N.C. Gen. Stat. § 14–113.20(a)." *Id.*

In the present case, Defendant provided Officer Wilson with Mr. Ward's name, employer, date of birth, and possible address. It appears that Officer Wilson took this information and obtained Mr. Ward's social security number from her squad-car computer. Officer Wilson then wrote Mr. Ward's social security number on the citation and issued the citation to Defendant. Unlike *Barron*, Defendant did not sign the citation nor did he confirm the social security number.

Viewing this evidence in the light most favorable to the State, we find sufficient evidence that Defendant did obtain, possess, or use Mr. Ward's social security number when Officer Wilson issued Defendant a citation that contained Mr. Ward's social security number. Further, Defendant provided Mr. Ward's name, date of birth, employer, and possible address in an attempt to avoid the legal consequences of Defendant's actions. Defendant's extensive arguments concerning the lack of evidence that he "provided" the social security number to Officer Wilson are inapposite given that the statute and the indictment refer not to "providing" but to "obtaining, using, or possessing." Notwithstanding the distinction between the present case and Barron, we conclude that, by Mr. Ward's social security number being written on the citation issued to Defendant, the jury could conclude that Defendant "used" or "possessed" the social security number to avoid legal consequences.

III. Jury Instructions

[2] Defendant next argues the trial court committed plain error when instructing the jury. Defendant did not object to the trial court's instruction and we are therefore limited to plain error review. Defendant argues:

> The jury needed to be instructed on what information mattered in deciding whether [Defendant] was innocent or guilty. Without the specificity the North Carolina Pattern Jury Instructions suggest for the first element, it is unclear whether the jury considered other identifying information—name, date of birth, address, telephone number, and place of employment—that was in evidence but not in violation of the identity theft statute under which [Defendant] was charged.

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (citation omitted). "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[.]' " *Id.* (citation omitted).

The pattern jury instructions for identity theft contain the following provision concerning identifying information: "defendant [obtained] [possessed] [used] personal identifying information of another person. (Name type of identifying information, e.g., social security number) would be personal identifying information." NCPI-Crim. 219B.80A. In the present case, the trial court did not instruct the jury that Mr. Ward's social security number would be personal identifying information. Assuming arguendo it was error for the trial court to instruct the jury as it did, we find that such error was not plain error. As stated above, to show plain error, Defendant "must show that the erroneous jury instruction was a fundamental error–that the error had a probable impact on the jury verdict." *Lawrence*, ___ N.C. at ___, 723 S.E.2d at 334. Defendant asserts that, because the jury was not instructed that the "identifying information" involved in this case was the social security number, the jury could have found Defendant guilty for having provided Mr. Ward's name, address, or birthdate to Officer Wilson.

In light of the evidence presented at trial, we are not persuaded that the instruction had a probable impact on the jury's verdict. In the present case, the citation with Mr. Ward's social security number written upon it was published to the jury. Officer Wilson testified that she issued the citation to Defendant and that Defendant avoided the legal consequences of having the citation issued in his own name by accepting the citation. It is clear what identifying information was obtained, possessed, or used by Defendant. In the present case, and on these facts alone, we conclude, assuming the trial court erred, that such error was not plain error.

No error in part, no plain error in part.

Judges BEASLEY and THIGPEN concur.

SUNTRUST BANK, PLAINTIFF v. C & D CUSTOM HOMES, LLC, CARROLL G. OGLE, SHEILA H. OGLE, ROBERT D. SCALES AND MCKNIGHT VENTURES I, LLC, DEFENDANTS

No. COA12-185

(Filed 6 November 2012)

Powers of Attorney—condition precedent—not satisfied—guaranties not effective

Summary judgment should have been granted for defendant Sheila Ogle (appellant) in an action on commercial promissory notes and personal guaranties used for real property development where appellant was included through a power of attorney given to her husband. The power of attorney clearly stated that its powers not be exercised until appellant was certified incompetent by a physician, a condition precedent that was not met, and no power of attorney ever vested in appellant's husband. Plaintiff was deemed to be on notice of any limitation contained in the power of attorney, and N.C.G.S. § 32A-40(a) did not apply because the attorney-in-fact acted beyond the power granted in the power of attorney.

Appeal by Defendants from order entered 27 June 2011 by Judge Ned W. Mangum in Wake County Superior Court. Heard in the Court of Appeals 15 August 2012.

Kilpatrick Townsend & Stockton, LLP, by Alan D. McInnes, for Plaintiff-Appellee.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for Defendant-Appellant Sheila H. Ogle.

BEASLEY, Judge.

Sheila H. Ogle (Appellant) appeals from a 27 June 2011 order granting summary judgment in favor of SunTrust Bank (Plaintiff). For the following reasons, we reverse the trial court's order as it applies

to Appellant and instruct the trial court to enter an order consistent with this opinion.

On 20 May 1996, Appellant executed a durable power of attorney (POA) that appointed her husband Carroll G. Ogle (Mr. Ogle) as her attorney-in-fact. The POA was recorded with the Wake County Register of Deeds on 27 August 1999. From September 2004 through March 2007, Defendants Robert D. Scales (Mr. Scales) and Mr. Ogle, through their entities C & D Custom Homes, LLC, and McKnight Ventures I, LLC, borrowed money from Plaintiff for the development of real property, executing a series of eleven commercial promissory notes and several personal guaranties. During that process, Mr. Ogle signed six personal guaranties[1] and one deed of trust in Appellant's name. The notes fell into default, and Plaintiff instituted foreclosure proceedings on the properties securing the notes. Some of these sales yielded less than the outstanding obligations, thus resulting in deficiencies.

Plaintiff commenced this action on 27 January 2010 by filing a complaint seeking judgment against C & D Custom Homes, LLC, Mr. Scales, McKnight Ventures I, LLC, Mr. Ogle, and Appellant (collectively, Defendants) on the eleven notes and related guaranties. Plaintiff filed a motion for summary judgment as to all Defendants on 11 April 2011, and then filed an amended motion for summary judgment on 13 May 2011. Defendants filed an objection to Plaintiff's motion for summary judgment as well as a motion for summary judgment as to Appellant on 16 May 2011. On 27 June 2011, the trial court granted Plaintiff's motion for summary judgment as to all Defendants. From this order, Appellant now appeals.[2]

Summary judgment "shall be rendered forthwith 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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707

1. Appellant's brief states that Mr. Ogle signed seven personal guaranties in Appellant's name; however, the record reflects only six such guaranties.

2. Although Defendants Sheila H. Ogle and Carroll G. Ogle both signed the notice of appeal filed with this Court, the appellant's brief only discusses the entry of summary judgment against Ms. Ogle.

(2001). "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

Appellant first argues that the trial court erred in granting Plaintiff's motion for summary judgment and denying Appellant's motion for summary judgment where the POA was not effective to vest Mr. Ogle with any powers. Plaintiff argues that Appellant failed to raise this claim in her answer, in her objection to the motion for summary judgment, or in her affidavit. Our review of Appellant's affidavit demonstrates that this issue was in fact raised. Appellant's affidavit states that Mr. Ogle "had neither actual nor apparent authority to sign any such unconditional guarantees." This affidavit was properly before the trial court and is sufficient to raise the issue of the effectiveness of the POA. We hold that the trial court erred in granting Plaintiff's motion for summary judgment where the undisputed facts fail to show that Appellant was incompetent; thus, Mr. Ogle had no authority to act on Appellant's behalf.

"A power of attorney creates an agency relationship between one who gives the power, the principal, and one who exercises authority under the power of attorney, the agent. A power of attorney must be strictly construed and will be held to grant only those enumerated powers." *Whitford v. Gaskill*, 119 N.C. App. 790, 793, 460 S.E.2d 346, 348 (1995), *rev'd on other grounds*, 345 N.C. 475, 480 S.E.2d 690 (1997) (internal citations omitted).

> There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent. The agent must have authority to act on behalf of the principal. It would be manifestly unjust to hold one party liable for the actions taken by another person if that person did not have authority to act for him.

Vaughn v. Dept. of Human Resources, 37 N.C. App. 86, 91, 245 S.E.2d 892, 895 (1978), *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1979) (internal citations omitted). The plaintiff must show the existence of a valid guaranty agreement in order to recover from the guarantor. *Tripps Rests. of N.C. v. Showtime Enters., Inc.*, 164 N.C. App. 389, 391-392, 595 S.E.2d 765, 767 (2004).

The terms of the POA clearly state, under the heading "RESTRICTIONS ON EXERCISE OF POWERS BY ATTORNEY-IN[-]FACT," that "[t]he rights, powers, duties and responsibilities herein conferred

upon my Attorney-in-Fact *shall not* be exercised by my Attorney-in-Fact *until* a physician has certified to my Attorney-in-Fact that in his or her opinion I am no longer able (physically or mentally) to handle my personal and business affairs." (emphasis added) Despite many broad powers conferred in Article III of the POA, we must strictly construe the instrument's terms. Appellant's mental or physical incompetence, as certified by a physician, is a condition precedent to the operation of the POA. Plaintiff argues that there is "nothing in the record to demonstrate that [Plaintiff] knew [Appellant] was competent." This may be true, but Plaintiff's assumption that Appellant was incompetent fails to create an issue of material fact. There is no evidence in the record or contention that Appellant was certified physically or mentally incompetent to handle her own affairs by a physician. As such, no power of attorney ever vested in Mr. Ogle.

Our decision is bolstered by *O'Grady v. First Union Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978), decided prior to the recodification of the statutes dealing with powers of attorney. In *O'Grady*, our Supreme Court held that the third-party defendant was not liable on a note solely because of his attorney-in-fact's unauthorized signature. *Id.* at 225-26, 250 S.E.2d at 596-97. The POA executed by the third-party defendant specifically limited the attorney-in-fact's powers to real estate transactions in Robeson County, and the evidence showed that the attorney-in-fact signed a note on properties outside of Robeson County. *Id.* at 225, 250 S.E.2d at 596. The Court rejected the bank's apparent authority argument, declaring,

> [i]f the act of an agent is one which requires authority in writing (*such as a power of attorney*, under G.S. 47-115.1), *those dealing with him are charged with notice of that fact and of any limitation or restriction on the agent contained in such written authority*, for the principal is bound only to the extent of that authority. In such instances the doctrine of apparent authority does not apply, for a *third party is deemed to have notice of the nature and extent of the agent's authority.*

Id. at 225-226, 250 S.E.2d at 596 (emphasis added) (internal citations omitted). Section 32A-8 contemplates that a durable POA is in writing; thus, Plaintiff is deemed to be on notice of any "limitation or restriction" contained in the POA, notwithstanding any record notice Plaintiff had by virtue of the instrument's registration with the Register of Deeds. As Plaintiff argues, we have found no requirement that a third party inquire as to the effectiveness of the POA. Nevertheless, a third party who fails to inspect a POA's terms does so

at his own peril since he is deemed on notice of the limitations and restrictions contained therein.

Plaintiff argues that it was justified in relying on Mr. Ogle's representations based on the broad grant of authority and the provision for third party reliance in the POA, and N.C. Gen. Stat. §§ 32A-9(c) and 32A-40(a) (2011). We reject these contentions.

Section 32A-9(c) provides that

> [a]ny person dealing in good faith with an attorney-in-fact acting under a power of attorney executed under this Article shall be protected to the full extent of the powers conferred upon such attorney-in-fact, and no person so dealing with such attorney-in-fact shall be responsible for the misapplication of any money or other property paid or transferred to such attorney-in-fact.

Further, § 32A-40(a) provides that

> [u]nless (i) a person has actual knowledge that a writing is not a valid power of attorney, or (ii) the action taken or to be taken by a person named as attorney-in-fact in a writing that purports to confer a power of attorney is beyond the apparent power or authority of that named attorney-in-fact as granted in that writing, a person who in good faith relies on a writing that on its face is duly signed, acknowledged, and otherwise appears regular, and that purports to confer a power of attorney, durable or otherwise, shall be protected to the full extent of the powers and authority that reasonably appear to be granted to the attorney-in-fact designated in that writing . . . .

As we stated earlier, Plaintiff's argument fails in part because the restriction quoted above regarding Appellant's incompetence is a condition precedent to Mr. Ogle having the power to act on her behalf. The broad grant of authority cannot override the unmistakable restriction that Appellant be certified incompetent by a physician. Similarly, § 32A-9(c) only protects a third party to the extent of the powers *conferred* on the attorney-in-fact. The POA conferred no power on Mr. Ogle to act on Appellant's behalf, so this statute is inapplicable. Section 32A-40(a) does not apply if Plaintiff had actual knowledge that the power was invalid or the attorney-in-fact acts "beyond the apparent power or authority of that named attorney-in-fact as granted in that writing[.]" While Plaintiff may not have had actual knowledge that Appellant was competent and therefore the

power was invalid, Appellant had constructive notice of the terms of the POA based on *O'Grady* and record notice of the terms since the POA was filed in the public records. The record indicates the exact book and page number where Plaintiff could have found the POA. The terms of the POA show that there was no apparent authority for Mr. Ogle to sign Appellant's name on these guaranties given the clear restriction on the vesting of his power. His actions were beyond the apparent authority of the written POA, making § 32A-40(a) inapplicable as well, despite Plaintiff's argument that it lacked actual knowledge.

In summary, there is no issue of material fact since the record fails to show that Appellant was incompetent at the time Mr. Ogle, purporting to be her attorney-in-fact, signed the guaranties at issue. Thus, no power of attorney ever vested in Mr. Ogle. The guaranty agreements between Plaintiff and Appellant are invalid, and Plaintiff is not entitled to recover from Appellant as a guarantor. Defendants' motion for summary judgment in favor of Appellant should have been granted. We reverse the trial court's order granting Plaintiff's motion for summary judgment as it applies to Appellant and remand for entry of summary judgment in favor of Defendant Sheila Ogle.

Reversed and Remanded.

Chief Judge MARTIN and Judge GEER concur.

KELVIN D. THOMPSON, EMPLOYEE, PLAINTIFF v. CAROLINA CABINET COMPANY, EMPLOYER, ISURITY, INC., CARRIER, DEFENDANTS

No. COA12-202

(Filed 6 November 2012)

1. Workers' Compensation—remand—new conclusion of law—capable of work but futile based on preexisting conditions

The Industrial Commission did not err in a workers' compensation case by following the Court of Appeals' instructions on remand when it made a new conclusion of law. It was apparent from the conclusion of law that the Commission found that plaintiff met his burden of proof under prong three of *Russell*, 108 N.C. App. 762, by producing evidence that he was capable of some work but that it would be futile because of pre-existing conditions.

2. Workers' Compensation—conclusion of law—vocational factors

The Industrial Commission did not err in a workers' compensation case by allegedly failing to identify the vocational factors that led to its decision in its conclusion of law. The findings of fact set out the vocational and physical considerations that supported the conclusion of law that plaintiff had met his burden of proving his disability under prong three of *Russell*, 108 N.C. App. 762.

3. Workers' Compensation—mislabeling of conclusion of law as finding of fact—reversal not required

Although the Industrial Commission's finding of fact 15 in a workers' compensation case was actually a conclusion of law, the Commission's mislabeling of this "finding" did not require reversal.

4. Workers' Compensation—disability—third prong of Russell—futile to search for job

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was disabled under the third prong of *Russell*. The findings, which were supported by competent evidence including testimony from plaintiff's physician, were sufficient to support the Commission's conclusion that it would be futile for plaintiff to search for a job consistent with his physical restrictions and pain given his age, education, and past work experience.

Appeal by defendants from opinion and award entered 1 December 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2012.

O'Malley Tunstall, PLLC, by Joseph P. Tunstall, III, for plaintiff-appellee.

Orbock Ruark & Dillard, PC, by Barbara E. Ruark and Jessica E. Lyles, for defendants-appellants.

GEER, Judge.

Defendants Carolina Cabinet Company and Isurity, Inc. appeal from an opinion and award of the North Carolina Industrial Commission following a remand by this Court. In arguing that the Commission erred in awarding plaintiff Kelvin D. Thompson temporary disability benefits, defendants primarily contend that plaintiff failed to present sufficient evidence of disability under *Russell v.*

Lowes Prod. Distribution, 108 N.C. App. 762, 425 S.E.2d 454 (1993). We hold that the Commission's findings of fact are supported by competent evidence and those findings in turn support the Commission's conclusion that plaintiff met his burden of showing disability under Russell. We, therefore, affirm.

Facts

On 21 October 2008, Mr. Thompson filed a claim for workers' compensation benefits. On 17 November 2009, the deputy commissioner issued an opinion and award concluding that Mr. Thompson had suffered a compensable back injury and awarding plaintiff temporary total disability benefits and payment of past and future medical expenses. On appeal by defendants, the Full Commission, in a 14 June 2010 opinion and award, adopted the deputy commissioner's opinion and award with minor modifications.

Defendants appealed to this Court. In *Thompson v. Carolina Cabinet Co.*, 214 N.C. App. 563, 714 S.E.2d 867, 2011 WL 3569961, 2011 N.C. App. LEXIS 1870 (2011) (unpublished), this Court remanded for clarification of the basis for the Commission's conclusion that plaintiff was disabled.

The Commission's pertinent conclusion of law had stated:

> 5. According to *Russell*, plaintiff can prove disability four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of pre-existing conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. *Russell v. Lowe's Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). In the present case the evidence shows that, given plaintiff's current physical and vocational limitations, plaintiff is incapable of work in any employment.

With respect to this conclusion of law, this Court held that because "the Full Commission used language from prongs one and three of *Russell* in its conclusion, we agree with defendants that the Full

Commission's conclusion is not clear." *Id.*, 2011 WL 3569961 at *3, 2011 N.C. App. LEXIS 1870 at *6.

The Court pointed out that "[t]he Full Commission's conclusion incorporates the 'any employment' language of the first prong and 'plaintiff's current physical . . . limitations' which could be referring to 'medical evidence that he is physically . . . incapable of work[,]' as the first prong requires." *Id.*, 2011 WL 3569961 at *3, 2011 N.C. App. LEXIS 1870 at *7 (first and third internal quotations quoting *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457). The Court continued: "The Full Commission's conclusion also relies on plaintiff's 'vocational limitations[,]' which could be referring to 'pre-existing conditions, i.e., age, inexperience, lack of education' in prong three but makes no mention as to whether plaintiff 'is capable of some work but that it would be futile' because of these 'vocational limitations' for plaintiff 'to seek other employment' as prong three requires." *Id.*, 2011 WL 3569961 at *3, 2011 N.C. App. LEXIS 1870 at *7 (second and fourth internal quotations quoting *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457). The Court therefore remanded the case to the Commission for clarification of its opinion and award. *Id.*, 2011 WL 3569961 at *3, 2011 N.C. App. LEXIS 1870 at *8.

On 1 December 2011, the Commission entered a new opinion and award on remand. The Commission concluded that plaintiff had "met his initial burden to show that he was totally disabled from September 10, 2008 and continuing[] by showing that a job search would be futile in light of his physical and vocational limitations." The Commission further concluded that "[d]efendants have not shown that suitable jobs are available for plaintiff and that plaintiff is capable of obtaining a suitable job, taking into account plaintiff's physical and vocational limitations." The Commission, therefore, awarded plaintiff temporary total compensation from 10 September 2008 and continuing until plaintiff returned to work or further order of the Commission. Defendants timely appealed to this Court.

Discussion

[1] As an initial matter, defendants argue that the Commission, on remand, did not follow this Court's instructions on remand when it made the following new conclusion of law:

> 5. In order to meet the burden of proving continuing disability, an employee must prove that he was incapable of earning pre-injury wages in either the same or in any other employment and that the incapacity to earn pre-injury wages

> was caused by the employee's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). An employee may meet the initial burden of production by producing one of the following: (1) medical evidence that he is physically or mentally, as a result of the work-related injury, incapable of work in any employment; (2) evidence that he is capable of some work, but that he has, after a reasonable effort, been unsuccessful in his efforts to obtain employment; (3) evidence that he is capable of some work, but that it would be futile because of preexisting conditions, such as age, inexperience, or lack of education, to seek employment; or (4) evidence that he has obtained other employment at wages less than his pre-injury wages. *Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 545 S.E.2d 485[, *aff'd per curiam*, 354 N.C. 355, 554 S.E.2d 337] (2001); *Russell*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). When a plaintiff meets his burden of showing disability, the burden then shifts to defendant to produce evidence that suitable jobs are available for the employee and that the employee is capable of obtaining a suitable job, taking into account both physical and vocational limitations. *Demery*, 143 N.C. App. 259, 545 S.E.2d 485 (2001). *In the instant case, plaintiff has met his initial burden to show that he was totally disabled from September 10, 2008 and continuing, by showing that a job search would be futile in light of his physical and vocational limitations. Russell*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). *Defendants have not shown that suitable jobs are available for plaintiff and that plaintiff is capable of obtaining a suitable job, taking into account plaintiff's physical and vocational limitations. Demery*, 143 N.C. App. 259, 545 S.E.2d 485 (2001).

(Emphasis added.)

Defendants contend that this conclusion of law remains inadequate because the Commission still did not expressly state which prong applied, did not find or conclude that plaintiff was capable of some work, and did not specify the vocational factors upon which it was relying to find a job search futile. Defendants argue further that "[b]y again including reference to Plaintiff's physical condition and failing to cite if they believe him to be capable of some work, the Commission's finding is no clearer now than it was initially." We disagree.

This Court's prior opinion essentially directed the Commission not to merge prongs one and three of *Russell*, but rather to identify

the specific prong upon which the Commission was basing its determination that plaintiff was totally disabled. It is now apparent from the conclusion of law that the Commission found that plaintiff met his burden of proof under *Russell's* third prong by producing evidence "that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment . . . ." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

Defendants, however, point to the Commission's reliance on "physical" limitations as well as "vocational" limitations as showing that the Commission again merged prong one and prong three. However, any determination under prong three that a job search would be futile necessarily required the Commission to consider the plaintiff's physical limitations. A job search would be limited only to those jobs consistent with the plaintiff's physical restrictions. Defendants also object that the Commission did not specifically say, as provided in *Russell's* third prong, that plaintiff was capable of some work. Yet, a finding of futility presumes that an employee is capable of some work physically. There would be no need for a finding that a job search would be futile if an employee was in fact incapable of working at all under prong one of *Russell*.

[2] Defendants next argue that the conclusion of law did not identify the vocational factors that led to its decision. While the opinion and award is not as detailed as we would prefer, it is minimally adequate regarding the basis for the determination that a job search would be futile. We note that the better practice would be to include more specific findings explaining the basis for the Commission's decision that any job search would be futile.

The findings of fact include plaintiff's age, indicate that plaintiff had only a high school education, and had a prior work history that included only heavy labor jobs. In addition, the Commission found that plaintiff's doctor had imposed work restrictions of 15 pounds lifting, no more than nine hours on the job, and avoidance of repetitious bending, lifting, and twisting. Because defendant employer had no work within plaintiff's restrictions, the company terminated his employment. Further, plaintiff continues to have steady pain that varies greatly in intensity. These findings of fact set out the vocational and physical considerations that supported the conclusion of law that plaintiff had met his burden of proving his disability under prong three of *Russell*.

Defendants, however, argue that certain of these findings of fact are not supported by the evidence. Specifically, defendants challenge the findings that (1) plaintiff received no further education after high school, (2) plaintiff's vocational history prior to working for defendant employer included only heavy labor jobs such as sheetrock work and welding, (3) plaintiff's fishing activities did not involve any activity materially inconsistent with plaintiff's testimony or information supplied to his doctors, and (4) plaintiff had steady pain that varied greatly in intensity. Our review of the transcript reveals that each of these findings is in fact supported by plaintiff's testimony. While plaintiff may not have used the precise words of the findings in his testimony, the findings reasonably paraphrase plaintiff's testimony or are inferences reasonably drawn from that testimony.

[3] Defendants also contend that the Commission's finding of fact 15 is actually a conclusion of law. That finding reads:

> The credible medical and vocational evidence of record shows that, as a result of his September 4, 2008 injury, taking into account both his physical and vocational limitations, plaintiff has been totally disabled and unable to earn any wages in any employment from September 10, 2008 and continuing.

"A 'conclusion of law' is a statement of the law arising on the specific facts of a case which determines the issues between the parties." *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999). We agree that finding of fact 15 is actually a conclusion of law. Nonetheless, the Commission's mislabeling of this "finding" does not require reversal. *See Stan D. Bowles Distrib. Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984) ("If the finding of fact is essentially a conclusion of law, however, it will be treated as a conclusion of law which is reviewable on appeal.").

[4] Finally, defendants argue that the Commission's conclusion that plaintiff is disabled is not supported by its findings of fact or the evidence. Defendants concede that this Court has held that a plaintiff is not required to present medical evidence or the testimony of a vocational expert on the issue of futility. Yet, curiously, defendants repeatedly assert that the Commission's conclusion that plaintiff met his burden of showing futility is unsupported because no physician or vocational expert testified that a job search would be futile. *But see Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 383, 607 S.E.2d 348, 352-53 (2005) (upholding Commission's conclusion that plaintiff met third prong of *Russell* without reference to any testimony by

vocational expert); *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 672, 606 S.E.2d 389, 399 (2005) (holding that while medical evidence is necessary under the first prong of *Russell*, "[t]he absence of medical evidence does not preclude a finding of disability under one of the other three tests").

We hold that the Commission's findings are sufficient to support its conclusion that plaintiff met his burden of showing futility. With respect to vocational considerations, the Commission pointed out that plaintiff was, at the time of its decision, 45 years old, had only completed high school, and his work experience was limited to heavy labor jobs. Turning to plaintiff's physical limitations, he was restricted to lifting no more than 15 pounds and working no longer than nine hours a day. He was required to avoid repetitious bending, lifting, and twisting. Defendant employer was unable to supply work that met those limitations. Further, plaintiff was experiencing steady pain, although that pain varied greatly in intensity.

These findings, which are supported by competent evidence, including testimony from plaintiff's physician, are sufficient to support the Commission's conclusion that it would be futile for plaintiff to search for a job consistent with his physical restrictions and pain given his age, education, and past work experience. Although the Commission was not required to reach this conclusion given the evidence, its decision is sufficiently supported under our standard of review. *See Weatherford*, 168 N.C. App. at 383, 607 S.E.2d at 352-53 (upholding Commission's conclusion that plaintiff was disabled under prong three based on plaintiff's evidence that he was 61, had only a GED, had worked all of his life in maintenance positions, was suffering from severe pain in his knee, and, as his doctor testified, was restricted from repetitive bending, stooping, squatting, or walking for more than a few minutes at a time); *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 392, 656 S.E.2d 608, 615 (holding that evidence tended to show that effort to obtain sedentary light-duty employment, consistent with doctor's restrictions, would have been futile given plaintiff's limited education, limited experience, limited training, and poor health), *aff'd per curiam*, 362 N.C. 676, 669 S.E.2d 319 (2008).[1]

1. Although defendants make various arguments regarding whether plaintiff met his burden under the first prong of *Russell*, we need not address them since that prong was not the basis for the Commission's opinion and award.

Once an employee meets his initial burden of production under *Russell*, the burden of production shifts to the employer to show that suitable jobs are available and that the employee is capable of obtaining a suitable job taking into account both physical and vocational limitations. *Demery*, 143 N.C. App. at 265, 545 S.E.2d at 490. Defendants have, however, made no argument that the trial court erred in concluding that defendants failed to meet their burden. In their brief on appeal, defendants simply state that they "contend that there are likely numerous jobs in the economy for which Plaintiff could have qualified and obtained [sic], given his age, education, experience, and light duty restrictions . . . ." Defendants cannot meet their burden through speculation.

We, therefore, uphold the Commission's determination that plaintiff is disabled under the third prong of *Russell*. Because defendants make no further arguments, the Commission's opinion and award is affirmed.

Affirmed.

Judges ROBERT C. HUNTER and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 NOVEMBER 2012)

ALLENDER v. STARR ELEC. CO., INC. No. 12-349	Indust. Comm. (891525)	Affirmed
BANK OF N.C. v. EQUITY PARTNERS, INC. No. 12-450	Guilford (11CVS66)	Affirmed
CITY OF CLINTON v. GLOBAL CONSTR., INC. No. 12-548	Sampson (10CVS2059)	Dismissed
DELOTE BUILDERS, LLC v. CONLEY No. 12-461	Union (09CVS4466)	Affirmed
ESTATE OF WATSON v. KING No. 12-532	Franklin (10CVS1262)	Affirmed
FIRST S. BANK v. BILTMORE CORP. OF GAINESVILLE No. 12-513	Beaufort (10CVS1075)	Affirmed
GRAYSON v. FIRST CHARLOTTE PERFUSION SERVS., INC. No. 12-454	Indust. Comm. (W17631)	Vacated
IDOL v. IDOL No. 12-503	Forsyth (09SP1266)	Affirmed
IN RE A.D.M. No. 12-583	Mecklenburg (11JB143)	No Error
IN RE C.M.R. No. 12-593	Union (07JT206-208)	Affirmed
IN RE E.S.P. No. 12-357	Pender (08JT22-23)	Affirmed in part and remanded in part.
IN RE FORECLOSURE OF DAVIS v. CHAIRMAKER SUBDIVISION PROP. OWNERS' ASS'N, INC. No. 12-272	Clay (08CVS209) (08SP40)	Dismissed
IN RE G.L.B. No. 12-474	Perquimans (10JA17)	Affirmed

IN RE L.L. No. 12-594	Orange (11JA1)	Reversed and remanded
IN RE M.A.M.C. No. 12-665	New Hanover (10JT209)	Affirmed
IN RE T.V.O. No. 12-650	Mecklenburg (08JT658-659)	Affirmed
JAMES v. EQUITY RESIDENTIAL MGMT. No. 12-569	Mecklenburg (11CVS7776)	Affirmed
KENNEDY v. LANGSTON No. 12-329	Bladen (09CVS448)	Affirmed in part, reversed and remanded in part
LITWIN v. UNIV. OF N.C. No. 12-171	Orange (11CVS909)	Affirmed
NOVANT HEALTH, INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 12-57	N.C. Dept. of Health & Human Svcs (10DHR3788)	Affirmed
REALE v. REALE No. 12-374	Wake (10CVD5477) (10CVD7539)	Dismissed
SCEARCE v. CHEMTEK, INC. No. 12-345	Indust.Comm. (148393)	Affirmed in part; Remanded in part.
SELLERS v. MCARTHUR SUPPLY No. 12-700	Indust.Comm. (677611)	Affirmed
SHAREEF v. N.C. CENT. UNIV. No. 12-602	Durham (10CVS6423)	Dismissed
STATE v. ARROWOOD No. 12-400	Burke (08CRS1251) (09CRS205) (09CRS4796)	Reversed
STATE v. AUTRY No. 12-368	Sampson (85CRS9027-33) (85CRS9458-60)	Affirmed

STATE v. BAILEY No. 12-597	Buncombe (11CRS345) (11CRS52339)	Remanded for entry of the correct maximum sentence and for correction of the clerical error regarding defendant's habitual offender status.
STATE v. BALDWIN No. 12-609	Montgomery (10CRS51852) (11CRS50161)	No error in part; remand in part for a new sentencing hearing; vacate and remand in part for a new restitution hearing.
STATE v. BRASON No. 12-508	Wilkes (09CRS1501-1536)	Affirmed
STATE v. CARSWELL No. 12-289	Halifax (10CRS50830) (10CRS50831) (10CRS953)	No Error
STATE v. CHAUDHRY No. 12-161	Guilford (10CRS94422)	No Error
STATE v. CLANTON No. 12-310	Halifax (10CRS1215) (10CRS51997)	No Error
STATE v. COLEY No. 12-313	Wayne (10CRS53496)	No Error
STATE v. DAVIS No. 12-301	Moore (10CRS50145)	No Error
STATE v. GIBBS No. 11-1504	Pitt (11CRS1558)	Affirmed
STATE v. GREENE No. 12-619	Mecklenburg (08CRS214302)	No Error
STATE v. GRIFFIN No. 12-544	Union (09CRS55852)	Affirmed
STATE v. HOLLOWAY No. 12-433	Mecklenburg (10CRS211443)	No Error

STATE v. IRIZARRY No. 12-42	Mecklenburg (10CRS203041)	No Error
STATE v. JOHNSON No. 12-221	Mecklenburg (09CRS63700)	No Error
STATE v. LANGSTON No. 12-554	Duplin (10CRS51157)	No error in part; No prejudicial error in part
STATE v. LOPEZ No. 12-536	Union (09CRS50082-83)	No prejudicial error.
STATE v. MCKENZIE No. 12-290	Guilford (09CRS83005)	No Error
STATE v. MIZELLE No. 12-351	Carteret (10CRS3545)	No Error
STATE v. OGBURN No. 12-408	Moore (10CRS52458)	Vacated and remanded for resentencing
STATE v. PHILLIPS No. 12-415	Brunswick (08CRS53383-84) (08CRS6413)	No error in part; no prejudicial error in part; dismissed in part
STATE v. ROY No. 12-443	New Hanover (10CRS50261)	No Error
STATE v. SMITH No. 12-253	Iredell (08CRS56760) (09CRS1889)	Vacated
STATE v. STEELE No. 12-191	Mecklenburg (09CRS240313) (09CRS76471)	No Error
STATE v. TOWNES No. 12-394	Mecklenburg (10CRS216826-27)	Affirmed
VELLINES v. CHILDREE No. 12-358	Currituck (10CVS248)	Affirmed
WATERS v. SCHENKER LOGISTICS, INC. No. 12-307	Indust. Comm. (W80408)	Affirmed

DIXON v. GORDON

[223 N.C. App. 365 (2012)]

JAMES O. DIXON, II, PLAINTIFF v. JENNIFER BROOKE GORDON (NOW MCLEOD), DEFENDANT

No. COA12-660

(Filed 20 November 2012)

1. Child Custody and Support—tender years doctrine—not applied

The trial court did not err in a child custody case by awarding mother primary custody. The trial court did not rely on evidence which supported the idea that mothers make better caregivers to young children or apply the tender years doctrine in awarding mother primary custody.

2. Child Custody and Support—temporary order—not prejudicial at permanent hearing

The trial court did not err in a child custody case by treating the temporary custody arrangement as the "status quo" and putting the burden on father to prove why the temporary order should not simply become the permanent order. There was no evidence that the trial court incorrectly considered the temporary order.

3. Child Custody and Support—decision-making authority—primary legal custody—no abuse of discretion

The trial court did not abuse its discretion in a child custody case by awarding mother primary decision-making authority thereby depriving father of any ability to share in the major decision-making with regard to the child. The trial court specifically determined that joint custody was not in the child's best interest.

4. Child Custody and Support—evidence—findings of fact—reweigh evidence

The trial court did not err in a child custody case by failing to consider specific evidence which father deemed important to the custody determination and making corresponding findings of fact. Father's argument essentially asked the Court of Appeals to reweigh the evidence, which it could not do.

5. Attorney Fees—child custody and support—findings of fact insufficient

The trial court erred by awarding attorney fees in a child custody case by failing to make findings of fact supported by evidence that father did not have sufficient means to employ counsel

and that mother had sufficient disposable income to pay father's attorneys fees.

Appeal by plaintiff and defendant from order entered 2 May 2011 by Judge Christy T. Mann in Mecklenberg County District Court. Heard in the Court of Appeals 22 October 2012.

Hamilton Stephens Steele & Martin, PLLC, by Amy S. Fiorenza, for plaintiff-appellant.

Casstevens, Hanner, Gunter, Riopel & Wofford, P.A., by Dorian H. Gunter, for defendant-appellee/cross-appellant.

MARTIN, Chief Judge.

Plaintiff-father James O. Dixon, II appeals from the permanent child custody order awarding primary physical and legal custody to defendant-mother Jennifer Brooke Gordon (now McLeod). Mother appeals from an order awarding father attorney's fees in the amount of $43,974. For the following reasons, we affirm in part, and reverse in part and remand.

The evidence at the permanent custody hearing tended to show that on 2 September 2009, a son, Adam, was born to the parties. The parties were not married at the time and have never been married. During mother's pregnancy she informed father that she no longer wanted to be in a relationship with him; however, the parties successfully communicated with each other regarding prenatal care, pediatricians, and other important considerations for the duration of the pregnancy.

Within two months of Adam's birth, father began to have overnight visits with Adam at his home. On one occasion in December 2009, father cared for Adam for approximately ten days while mother was on vacation. Father continued to care for Adam regularly through early 2010.

In February or March 2010, father learned that mother had resumed her relationship with Mullins McLeod, an attorney in Charleston, South Carolina. At this point, father hired an attorney. The parties agreed to mediate the custody dispute; however, before mediation could be scheduled, mother informed father that, from that point forward, father would only care for Adam every other weekend. This arrangement continued, over father's objection, until mother relocated to Charleston in April 2010.

A hearing was held to establish a temporary parenting arrangement (TPA) on 29 June 2010. The TPA awarded mother primary physical and legal custody of Adam. Father was granted weekend visitation three out of four weekends a month, one of these visits to occur in Charleston so that Adam would not need to travel for each visit. In carrying out the TPA, the transition between parents has been mostly uneventful. Adam is emotionally bonded and seems to feel secure with both parents.

In March 2011, a permanent custody hearing was held. The trial court found that mother has created a safe and loving environment for Adam in Charleston, where she regularly takes him to Gymboree, music class, the aquarium, museums, parks, and beaches. Mother employs several nannies who testified about their perceptions of mother as a parent; all reports were positive. The trial court found that mother is a pro-active parent, who considers what would make Adam's life better and takes action to make his life more fulfilling, whereas father's parenting style is more reactive in nature. The trial court also found that because mother and father do not have an ability to communicate with each other freely except with regard to surface issues, joint custody would not be in Adam's best interest. In its order, the trial court awarded primary physical and legal custody to mother, but noted that father is a fit and proper person to have visitation with Adam and granted father the same visitation outlined in the TPA order.

The trial court specifically ordered that both parties have complete access to school records and information, the right to participate in all school events, activities, and conferences, as well as the right to consult with teachers and school personnel. Both parties are to have access to all of Adam's medical records and the right to consult with Adam's physicians. Additionally, mother and father were ordered to share "any and all information pertinent to Adam including but not limited to information regarding Adam's general health, education, welfare and progress." The order specified, however, that mother has final decision-making authority regarding major decisions affecting Adam.

Father has been continuously employed by Bank of America since before Adam's birth. Father testified at the permanent custody hearing that he earns $82,000 a year at his job in addition to a yearly bonus, which works out to be between $50,000 and $60,000 a year after taxes. Father also owns a Christmas tree business and pumpkin patch, although these ventures were not profitable in the prior year.

Mother does not work outside of the home. She testified at the hearing that her net worth is forty million dollars. In connection with father's request for attorney's fees, the trial court made, *inter alia*, the following findings of fact:

> 46. Father is an interested party, acting in good faith, who does not have sufficient funds with which to employ and pay legal counsel to legal counsel [sic] to meet Mother on an equal basis. Father is entitled to a reasonable award of attorney's fees on the issue of child custody.
>
> . . . .
>
> 56. Considering the circumstances of this particular case, it is reasonable and appropriate that Mother pay $43,974 to [defendant's counsel's firm] to partially reimburse Father for the efforts on his behalf by Ms. Simpson in connection with this lawsuit.
>
> 57. Mother has sufficient funds to pay a reasonable award of attorney's fees in order for Father to employ counsel.

Both parties appeal.

On appeal, father challenges the trial court's award of permanent physical and legal custody to mother, arguing that the court abused its discretion by failing to award custody consistent with the best interests of the child because the trial court erroneously (1) applied the tender years presumption; (2) treated the temporary custody order as the "status quo"; (3) deprived father of any decision-making authority for the child; and (4) failed to consider all the evidence. Mother appeals the trial court's award of attorney's fees, arguing that the court abused its discretion by failing to find facts sufficient to support its award.

I.

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006).

A.

[1] Father contends the trial court applied the tender years presumption in awarding mother custody because it allowed improper evidence which supported the idea that mothers make better caregivers to young children to be admitted in two forms: an affidavit from a psychologist/author and mother's own testimony. We disagree.

The tender years doctrine was a legal presumption that benefitted mothers in custody disputes by giving mothers custody all other factors being equal, simply based on the fact that a "mother is the natural custodian of her young." *Spence v. Durham*, 283 N.C. 671, 687, 198 S.E.2d 537, 547 (1973) (citation and internal quotation marks omitted), *cert. denied*, 415 U.S. 918, 39 L. Ed. 2d. 473 (1974). Today this presumption has been specifically abolished by statute in N.C.G.S. § 50-13.2(a), which states "[b]etween the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2011); *see also Rosero v. Blake*, 357 N.C. 193, 208, 581 S.E.2d 41, 49-50 (2003) (holding that tender years doctrine no longer applies in cases involving an illegitimate child). Evidence submitted by the parties that incidentally supports the now-defunct presumption is not erroneous; it is error, however, for the court to use that evidence to apply the presumption that custody with the minor child's mother will necessarily promote the child's best interest.

This Court has held that the tender years doctrine was erroneously applied in a case where "the trial court did not view the father as equal to the mother and did not evaluate the evidence independent of any presumptions in favor of the mother," but instead, "the trial court used language in the order that cannot be distinguished from the abolished presumption and that is eerily reminiscent of language used in early cases applying the presumption such as *Spence*." *Greer v. Greer*, 175 N.C. App. 464, 471, 624 S.E.2d 423, 428 (2006). For example, the trial court in *Greer* remarked that "the law of nature dictates that early in the life of a child, the mother has a distinct advantage in the opportunity to care for that child." *Id.* In reversing the custody order, this Court found that "these 'findings,' [were] not based on the actual evidence of the case," and therefore, "cannot be meaningfully distinguished from the abrogated tender years presumption." *Id.* at 472, 624 S.E.2d at 428.

Here, the court made no such findings. Rather, father points to the affidavit submitted by John K. Rosemond, a psychologist and author specializing in parenting and family issues, which stated that he is generally opposed to overnight visitations with the non-custodial parent based on a young child's attachment to its primary caretaker, who he goes on to specify is "usually, but not always, the mother." Rosemond opined that visitation with an infant or young toddler should ideally occur in their primary home environment because young children commonly experience separation anxiety

and occasionally reject attempts by their father to parent them. Father also points to mother's own testimony, where she testified that "we have a special bond with being a mother. He grew inside of me, he was in my womb. I think there's something special to that . . . . I feel like that there is a special bond between a mother and a child."

There is nothing in the record to suggest that the trial court relied on this evidence in particular in awarding mother primary custody or that the court applied the tender years presumption. In fact, the trial court noted in Finding of Fact 25 that Adam is securely bonded to father. Therefore, this argument is overruled.

B.

[2] Father next contends the trial court erred by treating the temporary custody arrangement as the "status quo" and putting the burden on him to prove why the temporary order should not simply become the permanent order.

"[I]f a child custody or visitation order is considered temporary, the applicable standard of review for proposed modifications is best interest of the child, not substantial change in circumstances." *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003) (citation and internal quotation marks omitted). Thus, there is no burden placed on either parent. In determining the best interests of the child, it is not erroneous to consult the TPA. *See Raynor v. Odom*, 124 N.C. App. 724, 728, 478 S.E.2d 655, 657 (1996). In fact, "[w]hen a trial judge is attempting to evaluate what is in the best interests of the child . . . it is an undue restriction to prohibit the trial judge's consideration of the history of the case on record." *Id.*

Here, the trial court assured father that the permanent custody hearing was "not going to be prejudicial to either side" and that it was going to start from "scratch" or "ground zero." The trial court further promised father, "all I can tell you is, I'm not going to hold [the TPA] against you; that I will have a hearing in which there will be a clean slate." There is no evidence that this was not the case. Therefore, this argument is overruled.

C.

[3] Father also contends the trial court abused its discretion by depriving father of any ability to share in the major decision-making with regard to Adam. Specifically, father points to *Diehl v. Diehl*, 177 N.C. App. 642, 648, 630 S.E.2d 25, 29 (2006), in which this Court reversed a custody order, holding the findings of fact were insuffi-

cient to award father joint legal custody but deprive him of all decision-making authority.

This case differs in a significant way; here, the trial court awarded mother primary legal custody in its order. The trial court specifically determined that joint custody was not in Adam's best interest in one of its conclusions of law. This conclusion was based on its finding that mother and father cannot communicate effectively except with regards to surface issues; thus, the trial court named mother as the party with the final say regarding "major" decisions involving Adam, the implication being that this power is to be used in the event of a disagreement between mother and father.

Furthermore, the permanent custody order in this case explicitly orders that each parent have access to all school records, teachers, medical records, doctors and healthcare professionals, as well as any and all information related to the child's health, education, welfare, and overall progress. The order encourages father to actively participate and be informed and involved in all aspects of Adam's life. Thus, this argument is overruled.

D.

[4] Father further contends the trial court erred by failing to consider specific evidence which he deems important to the custody determination and make corresponding findings of fact. In particular, father contends the trial court should have made findings which address "what [it is] about Mother or Charleston that make that environment more desirable[.]" Father also argues that the trial court was "enamored" with mother because she is "an attractive female . . . worth $40 million, and a celebrity" and therefore overlooked other "facts," such as mother making "selfish" decisions for Adam and marrying a man "with whom she had a shaky past," which, in turn, ended after "5 ½ short months."

The trial court is vested with broad discretion in child custody cases, and thus, the trial court's order should not be set aside absent an abuse of discretion. *See Pulliam v. Smith*, 348 N.C. 616, 624-25, 501 S.E.2d 898, 902 (1998). "[T]he trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629, *reh'g granted in part*, 327 N.C. 438, 375 S.E.2d 698 (1990), *aff'd per curiam*, 328 N.C. 324, 401 S.E.2d 362 (1991).

Contrary to father's assertion, the trial court made relevant findings regarding Adam's life in Charleston, including that mother's home was baby-proofed and thereby safe for Adam, that mother took advantage of various attractions in Charleston, including the beach, parks, and aquarium, and that Adam is able to have play dates with friends and family members in Charleston. Father's argument, therefore, seems to be nothing more than a "request that we reweigh the evidence and reach a different conclusion on the facts than that deemed appropriate by the trial court." *Underwood v. Underwood*, ____ N.C. App. ____, 720 S.E.2d 460 (2011) (unpublished) (citation and internal quotation marks omitted). Accordingly, "[w]e are simply not permitted to act in accordance with [father's] request under the applicable standard of review." *Id.* Consequently, this issue is overruled.

II.

[5] Mother contends the trial court abused its discretion by failing to make findings of fact supported by evidence that father did not have sufficient means to employ counsel and that she had sufficient disposable income to pay father's attorney's fees.

In an action for child custody, "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6 (2011). "A party has insufficient means to defray the expense of the suit when he or she is unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (citation and internal quotation marks omitted), *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996).

In *Atwell v. Atwell*, 74 N.C. App. 231, 238, 328 S.E.2d 47, 51 (1985), this Court found that a child custody order was not in compliance with the statutory requirements of N.C.G.S. § 50-13.6 when the trial court merely found that the wife was an interested party acting in good faith who had insufficient means to defray the expenses of the suit. The Court stated that "this 'finding' is, in reality, a conclusion of law" which is unsupported by findings of fact. *Id.* Thus, the Court found the award of attorney's fees to be an abuse of discretion and instructed, "[o]n remand, the court must make findings to support the conclusion that the wife does not have the means to defray her legal expenses, that is, it must find she is unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant." *Id. See also Cameron v. Cameron*, 94 N.C. App. 168, 172, 380

S.E.2d 121, 124 (1989) (vacating the order awarding attorney's fees to plaintiff and remanding for more findings of fact where Court found that it had "little more" before it than a "bald statement that a party has insufficient means to defray the expenses of the suit").

Here, the only findings of fact were that "father . . . does not have sufficient funds with which to employ and pay legal counsel to legal counsel [sic] to meet Mother on an equal basis." Although information regarding father's gross income and employment was present in the record in father's testimony, there are no findings in the trial court's order which detail this information[1]. We believe that because the findings in this case contain little more than the bare statutory language, the order is insufficient to support an award of attorney's fees. Therefore, we remand so that the trial court can make additional required findings of fact regarding father's means to employ counsel.

Affirmed in part; reversed in part and remanded.

Judges STEELMAN and ERVIN concur.

CHARLES M. ERTHAL, DELORES ERTHAL, JEROME A. BUDDE, JR., AND ILENA T. BUDDE, PLAINTIFFS, V. FREDERICK B. MAY AND FRANCINE L. APPEL, A/K/A FRANCINE L. MAY, DEFENDANTS

No. COA12-603

(Filed 20 November 2012)

1. Deeds—restrictive covenants—commercial use of land

The trial court erred by granting summary judgment in favor of plaintiffs in an action seeking an injunction preventing defendants from making any commercial use of their land to board horses. The case was remanded for entry of summary judgment in favor of defendants and to dismiss plaintiffs' claims. Construing all of the relevant restrictive covenants together, they

1. The necessity for such detailed financial findings is rare for an order dealing solely with child custody; most orders disposing of issues of child custody and attorney's fees also dispose of alimony or child support issues, which require a determination of the supporting and dependent spouse and necessarily involve delving more closely into the finances of each party. *See* N.C. Gen. Stat. §§ 50-13.4(c)(1), 50-16.6A (2011). Therefore, more specific findings of fact are normally present in cases where attorney's fees are awarded for actions involving child custody.

did not prohibit commercial boarding and care of horses so long as this was done in conjunction with the single family residential use of the lot.

2. Abuse of Process—counterclaim—punitive damages

The dismissal of defendants' counterclaims for abuse of process and punitive damages was affirmed. The mere filing of a civil action with an ulterior motive was not sufficient to sustain a claim for abuse of process.

Judge BEASLEY concurring in separate opinion.

Appeal by defendants from order entered 12 December 2011 by Judge Gary M. Gavenus in Superior Court, Polk County. Heard in the Court of Appeals 10 October 2012.

Prince, Youngblood & Massagee, PLLC, by Sharon B. Alexander, for plaintiffs-appellees.

Law Offices of Travis S. Greene, PC, by Travis S. Greene, for defendants-appellants.

STROUD, Judge.

The parties to this case are all homeowners in the Stirrup Downs development, an equestrian community. Charles M. Erthal, Delores Erthal, Jerome A. Budde, Jr., and Ilena T. Budde ("plaintiffs") brought this action seeking an injunction preventing Fredrick B. May and Francine L. Appel, a/k/a Francine L. May ("defendants") from making any commercial use of their land to board horses at their operation known as Serenity Acres. The trial court granted summary judgment allowing the injunction, and defendants appeal. For the following reasons, we reverse in part and remand for entry of summary judgment in favor of defendants, dismissing the plaintiffs' claims, and we affirm in part, as to the dismissal of defendants' counterclaims.

I. Procedural History

On or about 29 March 2010, plaintiffs filed the original complaint.[1] On 9 June 2010, defendants filed their answer to plaintiffs' original complaint, denying plaintiffs' allegations and raising several affirmative defenses, a motion to dismiss, and counterclaims for abuse of

1. The original complaint is not included in the record on appeal.

process and punitive damages. On 25 June 2010, plaintiffs were permitted to file an amended complaint against defendants requesting an injunction based on allegations that defendants were operating a "commercial enterprise" known as "Serenity Acres" in violation of the restrictive covenants of their subdivision. Plaintiffs alleged that at "Serenity Acres" the defendants provide "various and multiple commercial services, including but not limited to sales, events, instruction, riding lessons, horse boarding facilities, and horse training." On 9 July 2010, defendants filed their answer to plaintiffs' amended complaint, denying plaintiffs' allegations, raising several affirmative defenses, a motion to dismiss, and incorporating by reference the counterclaims for abuse of process and punitive damages as stated in their original answer. On 3 August 2010, plaintiffs filed a motion to dismiss defendants' counterclaims and their reply to those counterclaims. On 28 October 2011, defendants filed a motion to amend their answer to the amended complaint. On the same date, defendants filed a motion for partial summary judgment, with supporting documentation, "based upon the defenses set forth by the Defendants." On 3, 4, and 15 November 2011, plaintiffs filed affidavits in opposition to defendants' motion. On 6 December 2011, the trial court denied defendants' motion to amend their answer. Following a hearing, the trial court entered an order on 12 December 2011, denying defendants' motion for partial summary judgment. Instead, the trial court granted summary judgment in favor of plaintiffs as to defendants' counterclaims and affirmative defenses; granted summary judgment in favor of plaintiffs as to their request for an injunction; and "order[ed] the Defendants to cease all commercial activities and commercial use of Lot C of Stirrup Downs Subdivision." On 10 January 2012, defendants filed written notice of appeal from the trial court's 12 December 2011 order. On appeal, defendants contend that (1) the trial court erred in denying their motion for partial summary judgment based on their affirmative defenses and (2) the trial court erred in granting summary judgment as to defendants' counterclaims and plaintiffs' claim for injunctive relief.

II. Factual Background

In 1989 Sardonyx Investments, Inc. began a real estate development in Polk County, North Carolina. On or about 20 September 1992, Sardonyx filed "Declarations of Restrictions" creating the Stirrup Downs subdivision which consisted of six lots (A-F), totaling

approximately 110 acres.[2] The restrictions for Stirrup Downs include the following pertinent provisions:

1. Each lot shall be used for residential purposes only.

. . .

2. There shall be constructed on each lot only one (1) primary single family dwelling, together with accessory buildings and one (1) guest house.

. . . .

9. No illegal, noxious, or offensive activity shall be permitted, on any part of said land, nor shall anything be permitted nor done thereon which is or may become a nuisance or a source of embarrassment, discomfort or annoyance to the neighborhood. No trash, garbage, rubbish, debris, waste material, or other refuse shall be deposited or allowed to accumulate or remain on any part of said land.

. . . .

13. The Developer expressly intends to permit the pasturing of horses upon the various lots. However, such pasturing of horses shall be limited to reasonable use of the land. Because horses are permitted, the phrase "customary outbuildings" is expressed [sic] defined to include storage facilities, barns and stables.

The restrictions do not include any specific prohibition of commercial or business use of the lots.

On or about 12 January 1993, defendants purchased Lot C in the Stirrup Downs subdivision. Plaintiffs Charles and Delores Erthal purchased Lot B in Stirrup Downs on or about 14 February 1994, but did not began residing there until 1996. On or about 11 August 1997, plaintiffs Jerome and Ilena Budde purchased Lot D in Stirrup Down but did not began residing there until 2000. Shortly after moving into their residence in 1993, defendants begin to board horses for other owners, ultimately expanding this operation by constructing a barn and progressively adding multiple stables to accommodate boarded horses;

2. It appears to be undisputed that Stirrup Downs is an equestrian community; in fact, this Court has previously noted that the fact that "horses are specifically allowed by the Restrictive Covenants, and the presence of horses would make the community 'equestrian.' " *Steiner v. Windrow Estates Home Owners Ass'n, Inc.* ___ N.C. App. ___, ___, 713 S.E.2d 518, 526 (2011).

they also expanded their pastures and built a hay storage area and a riding arena. The defendants' operation is known as "Serenity Acres."

The name Serenity Acres is somewhat ironic, as serenity has not been the order of the day for the legal affairs within Stirrup Downs. On 22 July 2004, Gilbert and Dorothy Stanley, owners of lot E in the Stirrup Downs subdivision, filed a complaint against the Stirrup Downs Landowners Association, and the other owners of lots in Stirrup Downs, including plaintiffs Charles and Delores Erthal and Jerome and Ilena Budde, and defendants Frederick and Francine May. This complaint made the following specific allegations:

> 29. That the owner of Lot C is operating an active horse boarding, training, sales and dressage and eventing lesson business, known locally as "Serenity Acres" with public advertisement through both the Tryon Daily Bulletin and the internet.
>
> 30. Said horse boarding business is in violation of the restrictions limiting the use of the property for residential purposes only.
>
> 31. That as a direct result of the operation of said commercial business, there is excessive vehicular traffic, including truck and trailer traffic, on the road.

In their answer to this complaint, plaintiffs and defendants herein, all defendants in the Stanley lawsuit, denied these allegations. The Stanley lawsuit was ultimately settled by a consent judgment in 2005. After the settlement, Defendants continued to operate Serenity Acres, continued to advertise in local publications for horse boarding services, and made various improvements to their operation. From the affidavits and depositions filed in this case, it is clear that Defendants do board, breed, sell, and care for horses at Serenity Acres and that they receive financial remuneration for these services, although the exact number of horses has varied over time as boarders come and go and with the births, sales, and deaths of horses; it appears that there have never been more than ten horses, whether owned by defendants or boarded, at Serenity Acres at any one time.

III. Standard of review

In appeals from a trial court's ruling from a party's motion for summary judgment

> [t]his Court's standard of review is *de novo*, and we view the evidence in the light most favorable to the non-movant. The standard of review for an order granting a motion for summary judgment

> requires 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.

Green v. Kearney, ___ N.C. App. ___, ___, 719 S.E.2d 137, 140 (2011) (quoting *Honeycutt v. Honeycutt*, ___ N.C. App. ___, ___, 701 S.E.2d 689, 694 (2010)) (citations and quotation marks omitted). "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." *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007) (citation, footnote, and quotation marks omitted).

Interpretation of the language of a restrictive covenant is a question of law reviewed *de novo*. *See Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C. App. 222, 228, 689 S.E.2d 180, 184 (observing that "restrictive covenants are contractual in nature." (citation omitted)), *disc. rev. denied*, 364 N.C. 242, 698 S.E.2d 402 (2010); *Harris v. Ray Johnson Const. Co., Inc.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (stating that contract interpretation is a matter of law, reviewed *de novo*).

III. Summary Judgment

A. Defendants' affirmative defenses

Defendants argue that the trial court erred in denying their motion for partial summary judgment as the forecast of evidence established all of their pled affirmative defenses including laches, consent, estoppel, waiver, license, unclean hands, balance of the hardships, and ambiguity of the restrictive covenants. Plaintiffs counter that "the trial court did not err in denying [defendants'] motion for partial summary judgment on their affirmative defenses and granting [their] motion for summary judgment on all such defenses."

Defendants have raised many affirmative defenses, the most compelling of which is judicial estoppel, based upon the fact that plaintiffs herein were co-defendants in the prior Stanley lawsuit, in which plaintiffs took the position that Serenity Acres was not in violation of

the restrictive covenants.[3] But even if plaintiffs were judicially estopped from claiming that defendants' operation of Serenity Acres is in violation of the restrictive covenants based upon activities as they were conducted up to the time of settlement of the Stanley lawsuit in 2005, plaintiffs also claim that defendants have increased and expanded the activities of Serenity Acres after 2005.[4] So even if we were to assume that plaintiffs are judicially estopped from bringing this claim based upon the scope of activities up to 2005, plaintiffs argue that the defendants' activities have changed and are thus now in violation of the restrictive covenants, even if they were not in 2005. So instead of addressing each of defendants' affirmative defenses, we will address instead the heart of the matter, which is the interpretation of the covenants, as this issue is dispositive.

B. Interpretation of restrictive covenants

[1] This Court has previously summarized the principles which guide our consideration of restrictive covenants as follows:

> [J]udicial enforcement of a restrictive covenant is appropriate at the summary judgment stage unless a material issue of fact exists as to the validity of the contract, the effect of the covenant on the unimpaired enjoyment of the estate, or the existence of a provision that is contrary to the public interest.
>
> We also note that[] . . . while the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.

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3. "[J]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation." *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (quotation marks omitted).

4. The extent of any increase is not clear, as Plaintiffs actually produced the responses of Defendants May and Appel in the Stanley lawsuit as a part of their response to Defendants' First Set of Interrogatories and Request for Production of Documents. In the responses in the Stanley lawsuit, May and Appel set forth the number of horses boarded (6, 2 owned by defendants) and the amounts of horse feed and hay used as well as identification of veterinarians and farriers who had performed services at Serenity Acres. It appears from depositions that defendants may have had up to ten horses at Serenity Acres at times.

> The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.
>
> Covenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous. This is in accord with general principles of contract law, that the terms of a contract must be sufficiently definite that a court can enforce them. Accordingly, courts will not enforce restrictive covenants that are so vague that they do not provide guidance to the court.

Wein II, LLC v. Porter, 198 N.C. App. 472, 479-80, 683 S.E.2d 707, 712-13 (2009) (quotation marks, citations, and brackets omitted).

Defendants argue that "[r]estrictive covenants one (1) and thirteen (13) create an ambiguity of the degree that enforcement against the defendants would be inequitable." As noted above, covenant 1 restricts use of the lots to "residential purposes only," while covenant 13 expressly allows "pasturing of horses upon the various lots" as well as construction of "storage facilities, barns and stables."[5] Based upon the dictionary definitions of the relevant words, Defendants contend that "residential purposes" and pasturing of horses are two different uses, noting that

> it is clear that there is no correlation between the terms "residential" and "pasturing." While restrictive covenant one purports to restrict lots to use for residential purposes only, the allowance for the pasturing of horses found in restrictive covenant thirteen stands in direct contradiction to residential use. The pasturing of horses would best be described as an agricultural use and not a residential use. "Agriculture" is defined as "the science, art, or occupation concerning the cultivating of land, raising of crops, and feeding, breeding, and raising livestock; farming." Random House Webster's College Dictionary 28 (Robert B. Costello et al. eds., 1991).

Defendants also note that "the term "commercial" does not appear in the original restrictions or the Amended Declaration of Restrictions and argue that

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5. Although the phrase "customary outbuildings" is defined in covenant 13, it does not appear elsewhere in the restrictive covenants. But covenant 1 does permit "accessory buildings" to be constructed in addition to the one "single family dwelling," so the only logical interpretation of the covenants is that the "customary outbuildings" defined in covenant 13 and the "accessory buildings" noted in covenant 1 are the same thing under these covenants.

> [i]f the developer and the parties to the Amended Declaration of Restrictions had intended to prohibit any "commercial" aspects to the pasturing of horses, that intention could have been clearly expressed. Instead, the parties are left with contradictory and ambiguous restrictions. "This Court may not restrict the use of the property when the restrictive covenant has failed to do so in a clear manner." *Winding Ridge Homeowners Ass'n, Inc. v. Joffe*, 184 N.C. App. 629, 641, 646 S.E.2d 801, 809 (2007).

Plaintiffs claim that the covenants are "plain and unambiguous", arguing that

> The plain meaning and usage of the term "pasturing" is unambiguous. It means "to feed on growing grass or herbage: GRAZE." Webster's Third New International Dictionary, G. & C. Merriam Co., 1981. Appellants acknowledge that boarding involves more than pasturing, such as cleaning stalls, feeding, turning out, blanketing, bandaging, grooming, and arranging veterinarian and farrier visits. (App. p. 3; Fran May Dep. Vol. I at pp. 137, 217-218) Notably, Appellants attempted to amend the Declaration to add and include boarding as a permitted use. (Fred May Dep., pl. Ex. 91) There is no inherent conflict between the terms "residential" and "pasturing" since residential owners may peacefully allow their own horses to graze on private pasture without engaging in a commercial business, and that was exactly the developer's intent. A conflict only arises between "residential" and "pasturing" under Appellants' strained and unreasonable interpretation of "pasturing" to include commercial boarding.

Plaintiffs ask that we look only to the word "pasturing" to determine the meaning of the covenants, as they attempt to extrapolate a prohibition on "commercial" pasturing (as opposed to "private" pasturing) from the word "pasturing", but we are required instead to examine and interpret the covenants in their entirety. *See Lynn v. Lynn*, 202 N.C. App. 423, 435, 689 S.E.2d 198, 207 (2010) (stating that a "contract must be considered as an entirety." (quotation marks and citation omitted)), *disc. rev. denied*, 364 N.C. 613, 705 S.E.2d 736.

The trial court focused upon plaintiffs' claim that "commercial" use of the lots was prohibited, and in fact the trial court's order required "Defendants to cease all commercial activities and commercial use of Lot C of Stirrup Downs Subdivision." Yet the covenants contain absolutely no prohibition of business or commercial use of the lots; any restriction upon commercial or business use can only be

inferred from the covenants. Plaintiffs attempt to find this restriction by looking only to the definition of "pasturing," but this argument ignores the other pertinent provisions of the covenants. There is no dispute that the covenants allow the boarding and pasturing of horses on the lots—plaintiffs do not contend that horses owned by the parties must be stabled and cared for elsewhere but only put out to graze on the lots. The covenants expressly allow construction of "storage facilities, barns and stables," thus allowing owners to construct buildings needed to stable the horses and to store their provisions.

Read in the context of covenant 13, it is apparent that these buildings are related to the boarding and care of horses. The ordinary meanings of these words are clear. A "stable" is defined as "a building in which domestic animals are sheltered and fed; [especially]: such a building having stalls or compartments <a horse [stable]>." Merriam Webster's Collegiate Dictionary 1213 (11th ed. 2003). A "barn" is "a [usually] large building for the storage of farm products or feed and [usually] for the housing of farm animals or farm equipment." *Id.* at 99.

There is no restriction upon the number or size of "storage facilities, barns and stables" which may be constructed on each lot, although each lot is limited to only "one (1) primary single family dwelling" and "one (1) guest house." Contrary to plaintiffs' argument, there is no indication in the covenants that any other activities related to caring for horses, such as "cleaning stalls, feeding, turning out, blanketing, bandaging, grooming, and arranging veterinarian and farrier visits" are somehow prohibited; in fact, plaintiffs acknowledge in their responses to discovery that they also care for their own horses in the same manner as defendants. Whether horses are kept for personal use or as paying boarders, all horses need these types of care.

We believe that all of the covenants can be given effect with "fair and reasonable intendment." *Belverd v. Miles*, 153 N.C. App. 169, 174, 568 S.E.2d 874, 877 (quotation marks and citation omitted), *disc. rev. denied*, 356 N.C. 610, 574 S.E.2d 466.(2002). Construing all of the relevant restrictive covenants together, we hold that they do not prohibit commercial boarding and care of horses in Stirrup Downs so long as this is done in conjunction with the single family residential use of the lot. Our interpretation of these covenants is guided by *Belverd v. Miles*, 153 N.C. App. 169, 568 S.E.2d 874 (2002) and *Bumgarner & Bowman Bldg., Inc. v. Hollar*, 7 N.C. App. 14, 171 S.E.2d 60 (1969). In both cases, one provision of the covenants standing alone was susceptible to one interpretation, but another provision of the covenants created an apparent conflict or ambiguity. *Belverd*,

153 N.C. App. at 173-74, 568 S.E.2d at 876-77; *Bumgarner & Bowman Bldg., Inc.*, 7 N.C. App. at 17-18; 171 S.E.2d at 61-62. In both cases, the court examined the covenants in their entirety in seeking to reconcile them, and to the extent that the covenants were still ambiguous when "when considered together . . . resolve[d] these doubts in favor of the defendants." *Bumgarner & Bowman Bldg., Inc.*, 7 N.C. App. at 18, 171 S.E.2d at 62; *see Belverd*, 153 N.C. App. at 174, 568 S.E.2d at 877 (construing covenants together in light of the preference for free use of property).

Here, we note that these covenants lack a provision all other reported cases (other than *J.T. Hobby & Sons, Inc. v. Family Homes*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981), as discussed below) which we have been able to find dealing with restrictions of "residential use" have had: there is no mention of a restriction on commercial or business use of the property. Often these restrictions appear together. But residential use means simply that "the property is used for the habitation of human beings and for those activities such as eating, sleeping, and engaging in recreation which are normally incident thereto" *J.T. Hobby & Sons, Inc. v. Family Homes*, 302 N.C. at 71, 274 S.E.2d at 179. There is no dispute that the defendants do use Lot C for their personal residence, although Serenity Acres is also on Lot C. While the lots are restricted to residential use "only," the covenants also clearly allow horses to be kept on the lots, and there is no restriction as to the number of horses or buildings needed for their shelter and care.

Plaintiffs' arguments focus quite narrowly upon their claim that the covenants prohibit a *commercial* use of the lots; in other words, defendants' activities at Serenity Acres would be acceptable to plaintiffs if only defendants did not receive any financial remuneration for them. Based upon their arguments, it appears that plaintiffs would have no objection to the defendants' boarding, riding, pasturing, and maintaining any number of horses, so long as defendants were not paid for these activities.[6] But our Supreme Court has previously noted that determining "the nature of the usage of the property at issue does not turn upon the economic basis upon which the property is supported. That basis does not detract from the primary objective behind the operation of the facility and the essence of that operation." *J.T. Hobby & Sons, Inc.*, 302 N.C. at 72-73, 274 S.E.2d at 180.

6. Plaintiffs Budde keep and care for three horses on their lot; plaintiffs Erthal have four. All of the parties have stables for their horses; Plaintiffs Erthal also have a riding ring.

In *Hobby*, the court noted that the "issue turns upon our construction of two phrases contained in the restrictive covenant upon which plaintiffs rely: 'residential purpose' and 'single-family dwelling' " *Id.* at 70, 274 S.E.2d at 179. The plaintiffs sought to prevent the defendant from using a dwelling for purposes of a family care home for mentally retarded adults, claiming that the family care home was not a "single family dwelling" with a "residential purpose." *Id.* at 68-69, 274 S.E.2d at 177-78. The Supreme Court agreed with the defendants that the "residential usage requirement is satisfied if the property is used for the habitation of human beings and for those activities such as eating, sleeping, and engaging in recreation which are normally incident thereto" and held that the fact "that defendant is compensated for the services it renders does not render its activities at the home commercial in nature." *Id.* at 71, 73, 274 S.E.2d at 179-80. The court noted that "[w]hile it is obvious that the home would not exist if it were not for monetary support being provided from some source, that support clearly is not the objective behind the operation of this facility." *Id.* at 73, 274 S.E.2d at 180. The *Hobby* court was not considering a restriction of commercial use, but instead a definition of "residential purpose", *see id.* at 68-69, 274 S.E.2d at 177-78, just as we are here, since the covenants do not include a commercial use restriction.

It is instructive that the Supreme Court looked to the "objective behind the operation" of the facility and did not consider the fact of "monetary support" for the home dispositive. *See id.* at 71-73, 274 S.E.2d at 179-80. Here, the covenants allow the "objective" of keeping and caring for horses, by allowing any reasonable number of horses to be pastured and by allowing construction of any number of barns, stables, and storage.[7] Whether or not the owner of the lot maintains the operation for his own personal enjoyment or for a commercial purpose does not change the nature of the use, where the covenants contain no restriction on business or commercial use of the lots.

Covenant 9 does not change our analysis of the covenants in their entirety. Although plaintiffs do not expressly allege a violation of covenant 9 in their complaint, they do allege that the "commercial business owned by the Defendants" creates "excessive traffic on the private road . . . causing additional noise and wear and tear of the

7. The covenant does limit the pasturing to "reasonable use of the land," but plaintiffs have not argued that defendants have pastured horses in an unreasonable manner on Lot C, so we will not attempt to discern what "reasonable" pasturing use might be, although we would imagine that there is a point at which the number of horses, or the manner in which they are kept and used, would be unreasonable.

road." As there is no provision in the covenants which addresses use of the roads or noise, covenant 9 is the only provision which might conceivably forbid activities which create "excessive traffic" or noise. In answers to interrogatories, plaintiffs also complain about excessive and annoying noise: "canines" barking when "strangers [are] coming and going;" "the hammering of metal on metal" by the farriers which "appears to sound louder than normal and is more annoying, especially at dinner time;" defendants' boarders who "chatter loudly" and ride outside the boundaries of the CETA trails on the plaintiffs' lots.[8]

In pertinent part, covenant 9 provides that "no illegal, noxious, or offensive activity shall be permitted, on any part of said land, nor shall anything be permitted nor done thereon which is or may become a nuisance or a source of embarrassment, discomfort or annoyance to the neighborhood." This Court has recently held an almost identical provision to be void for vagueness.

> [T]here is little case law addressing the question of what language in a restrictive covenant is void for vagueness, and what language is not. It appears that we have not dealt with this void for vagueness question because our courts usually supply a definition for an undefined term in a covenant rather than void the entire covenant. Unless the covenants set out a specialized meaning, the language of a restrictive covenant is interpreted by using its ordinary meaning. We are thus left to consider the "ordinary meaning" of the words used by paragraph 6.
>
> Here, paragraph 6 of the Restrictive Covenants focuses on the subjective emotions or feelings of 'embarrassment, discomfort, annoyance, or nuisance' experienced by 'the neighborhood.' The definition of things or activities proscribed by paragraph 6 of the Restrictive Covenants is expanded to cover that which 'is in any way noxious, dangerous, unsightly, unpleasant or of a nature as may diminish or destroy the enjoyment of other property in the neighborhood by the owners thereof.' We do not think it necessary here to cite specific dictionary definitions of the operative words: embarrassment, discomfort, annoyance, nuisance, noxious, unsightly, and unpleasant; each of these words describes a subjective and personal experience or feeling. Just as beauty is in

8. Plaintiffs are part of the Collinsville Equestrian Trails Association (CETA) "which provides fellow landowners with trails owned by them a place to ride our horses." Plaintiffs agreed to "allow horses on certain trails on [their] property but they are not deeded easements."

> the eye of the beholder, each of these terms can be defined only from the perspective of the beholder. See generally Coates v. Cincinnati, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed. 2d 214, 217 (1971) ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning." (citation and quotation marks omitted)).

Steiner, ___ N.C. App. at ___, 713 S.E.2d at 527 (quotation marks and other citation omitted).

Overall, plaintiffs claim that defendants' boarders are "annoying" because they create additional noise and traffic, both equine and motor vehicle, in and out of Stirrup Downs. In *Steiner*, we determined that although the plaintiffs considered the defendant's two Nigerian dwarf goats, Fred and Barney, to be "annoying, noxious, and unpleasant [while the] plaintiffs consider[ed] them adorable and lovable[,] [t]he Restrictive Covenants as written do not provide sufficient guidance or definitions to permit the Board, or a court, to make any sort of objective determination of who is right, and this is the essence of vagueness." *Id.* Just as in *Steiner*, the restrictive covenants do not have "sufficient guidance or definitions" that a court can make an objective determination, so covenant 9 is too vague to provide any additional limitation upon the parameters of keeping horses in Stirrup Downs. The trial court therefore erred in granting summary judgment in favor of plaintiffs and instead should have granted summary judgment in favor of defendants.

C. Defendants' counterclaims

[2] As we have determined that the trial court should have granted defendant's motion for summary judgment as to plaintiffs' claim, we must now address the portion of the trial court's order which grants summary judgment in plaintiffs' favor as to the defendants' counterclaims for abuse of process and punitive damages. The only argument defendants raise on appeal as to the trial court's granting of summary judgment in favor of plaintiffs and dismissing their counterclaims is that it was error for the trial court to make a ruling on their counterclaims or plaintiff's request for injunctive relief as their motion for summary judgment, the only motion before the trial court, was only "as to their affirmative defenses[.]" Defendants reason that the trial

court had no authority to allow summary judgment against them regarding their counterclaims and upon plaintiff's claim for injunctive relief because plaintiffs had not filed a motion for summary judgment and they were not given the required ten-day notice, which would have allowed them time to submit affidavits in support of their counterclaims. Plaintiffs counter that the Rules of Civil Procedure permit the trial court to grant summary judgment against the moving party.

"Rule 56 does not require that a party move for summary judgment in order to be entitled to it." *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 77 N.C. App. 149, 151, 334 S.E.2d 499, 501 (1985), *disc. review denied*, 315 N.C. 391, 338 S.E.2d 880 (1986). Thus, the trial court can grant summary judgment against the moving party. *Carricker v. Carricker*, 350 N.C. 71, 74, 511 S.E.2d 2, 5 (1999). Here, the issue is not whether the trial court could find against the movant, but whether the trial court could grant summary judgment on a counterclaim on which *no* party moved for summary judgment.

Our Supreme Court has previously held that even if the parties have only moved for partial summary judgment, it is not error for the trial court to grant summary judgment on all claims where both parties are given the opportunity to submit evidence on all claims before the trial court. *See A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 448 (1979) (holding that summary judgment on all claims was proper in that case because evidence was submitted on all claims, although the relevant motion only requested summary judgment as to some of the claims before the trial court).

The trial court had the power to enter summary judgment as to all of the claims before it, even though defendant only moved for partial summary judgment, as the parties submitted evidence addressing the counterclaims. Here, the depositions of the individual defendants were submitted, and defendant Francine May answered a series of questions regarding the counterclaim for abuse of process in her deposition. Thus, the parties had submitted evidence addressing both the plaintiffs' affirmative claims as well as the defendants' counterclaim.

We must next consider whether the defendants' forecast of evidence, viewed in a light most favorable to defendants, would support the counterclaim for abuse of process.

> Abuse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion

> of a legally issued process whereby a result not lawfully or properly obtainable under it is attended [sic] to be secured. Abuse of process requires both an ulterior motive and an act in the use of the legal process not proper in the regular prosecution of the proceeding, and that both requirements relate to the defendant's purpose to achieve through the use of the process some end foreign to those it was designed to effect. The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process used. The act requirement is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some willful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter.

Chidnese v. Chidnese, ___ N.C. App. ___, ___, 708 S.E.2d 725, 734-35 (2011) (citations, quotation marks, and brackets omitted; emphasis in original).

Here, although defendant Francine May claimed in her deposition that defendants have been embarrassed by the present action, defendants failed to allege facts in their counterclaim or forecast evidence which might show any act taken with ulterior motive *after* the initiation of the present suit. Defendants only alleged that plaintiffs filed this action to gain control of the Stirrup Downs Landowners Association. We have made clear that "the mere filing of a civil action with an ulterior motive is not sufficient to sustain a claim for abuse of process." *Id.* at ___, 708 S.E.2d at 735. Thus, defendants have failed to state a claim for abuse of process.

Further, defendants' punitive damages counterclaim are based entirely on their abuse of process claim. To recover for punitive damages, the party seeking such damages must first establish that they have suffered some legal wrong. *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992). Having held that defendants failed to properly state a claim for abuse of process, we must conclude that defendants also cannot sustain their punitive damages claim.

"[S]ummary judgment may be entered against a party if the nonmovant fails to allege or forecast evidence supporting all the elements of his claim." *One Beacon Ins. Co. v. United Mechanical Corp.*, 207 N.C. App. 483, 485, 700 S.E.2d 121, 123 (2010). Because defendants failed to show any act by the plaintiffs after initiation of

the lawsuit and because defendant's demand for punitive damages relies solely on that claimed legal wrong, summary judgment was properly granted and we affirm the trial court's order as to those counterclaims.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order granting summary judgment for plaintiffs as to defendants' counterclaims for abuse of process and punitive damages, but we reverse and remand for entry of summary judgment in favor of defendants as to plaintiffs' claims.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judge ELMORE concurs.

Judge BEASLEY concurs in a separate opinion.

BEASLEY, Judge concurring separately.

I agree with the majority that the trial court should not have granted summary judgment in favor of Plaintiffs, but I would reach this result on differing grounds. I would not find the restrictive covenants to be ambiguous; I would reverse and remand the case as I believe there is an issue of material fact regarding the defense of laches. I also would reverse the order granting Plaintiffs summary judgment on Defendants' counterclaims since the record is unclear as to whether Defendants had an "adequate opportunity" to show that there was a genuine issue of fact. Thus, I write separately.

First, I would hold that the restrictive covenants in this case are not ambiguous. I believe Covenants 1 and 13 can be construed according to their plain meanings and in a way that does not use strict construction in place of common sense.

"[R]estrictive covenants should not be so strictly construed 'as to defeat the purpose of the restriction.' " *Donaldson v. Shearin*, 142 N.C. App. 102, 106, 541 S.E.2d 777, 780 (2001)(quoting *Robinson v. Pacemaker Investment Co.*, 19 N.C. App. 590, 594, 200 S.E.2d 59, 61 (1973)). "In construing the language used in restrictive covenants, 'each part . . . must be given effect according to the natural meaning of the words.' A dictionary is an appropriate place to gather the natural meaning of words." *Agnoff Family Revocable Trust v. Landfall Assocs.*, 127 N.C. App. 743, 744, 493 S.E.2d 308, 309 (1997)(quoting

J.T. Hobby & Sons, Inc. v. Family Homes, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981)).

The majority opinion points out that the covenants in this case do not mention a ban on commercial use. Though a covenant restricting use to residential purposes and a ban on commercial use may tend to go together, the case law cited by the majority does not attach any significance to the presence of a prohibition on commercial use in addition to the restriction for residential purposes. *See Belverd v. Miles*, 153 N.C. App. 169, 568 S.E.2d 874 (2002); *Bumgarner & Bowman Bldg., Inc. v. Hollar*, 7 N.C. App. 14, 171 S.E.2d 60 (1969). My reading of *Belverd* reveals that the restrictions in that case did not expressly prohibit commercial use but had merely restricted use to residential purposes. *Bleverd*, 153 N.C. App. at 173, 568 S.E.2d at 876.

This case can be contrasted with the conflicting covenants in *Belverd* and *Bumgarner*. In *Belverd*, Covenant 1 stated, "No lot shall be used for other than residential purposes. No residential dwelling shall be erected, placed or permitted to remain on any lot other than one single family dwelling[.]" *Id.* Covenant 13 stated,

> No lot shall be used for the purpose of constructing a public street or to provide access to and from the properties located in the subdivision of Partridge Bluff, Section One, to property surrounding Partridge Bluff, Section One, except with the written consent and permission of Allan D. Miles and wife, Wanda M. Miles, their heirs and assigns.

Id. This Court held that

> [n]either paragraph one nor paragraph thirteen is, on its own, ambiguous. However, in terms of whether a lot may be used for a through-street, paragraphs one and thirteen conflict with each other. Paragraph one would prohibit the use of a lot for a public through-street since such use is clearly not "residential". . . . Paragraph thirteen, on the other hand, would allow such use if the Mileses gave written consent.

Id. at 173-74, 568 S.E.2d at 876-77 (citations omitted). In *Bumgarner*, a restrictive covenant prohibited business use on any of the lots and prohibited all structures other than "one detached single family dwelling" on each lot. *Bumgarner*, 7 N.C. App. at 15, 171 S.E.2d at 60. Another restrictive covenant prohibited a "trailer, separate basement, tent, shack, garage or other outbuildings" from being used as a temporary or permanent residence. *Id.* The outbuildings provision was

susceptible to two interpretations: that the named buildings are permitted so long as they are not used as a residence, or that they are buildings that cannot be used as a "detached single family dwelling." *Id.* at 15-16, 171 S.E.2d at 60-61. This Court held that the two provisions when considered together were ambiguous. *Id.* at 17-18, 171 S.E.2d at 61-62. The essence of *Belverd* and *Bumgarner* is that if one restrictive covenant can reasonably be interpreted to allow an activity that another restrictive covenant would prohibit, the covenants are ambiguous.

I fail to see how the covenant allowing pasturing of horses allows an activity that is prohibited by the restriction on residential use. Common sense dictates that a restriction limiting use of the property to residential purposes thereby prohibits commercial use. Residential use is a use for "the habitation of human beings and for those activities such as eating, sleeping, and engaging in recreation which are normally incident thereto." *J.T. Hobby*, 302 N.C. at 71, 274 S.E.2d at 179. Commercial use would be a use other than residential use. Taking the Plaintiffs' asserted definition that the majority quotes, "pasture" means "to feed on growing grass or herbage." The plain dictionary definition of "pasture" creates no conflict with the restriction on residential use. I would interpret the covenant allowing pasturing of horses to mean that the definition of residential use includes pasturing of horses, not that the pasturing of horses potentially allows a commercial activity, which then conflicts with the restriction on residential use. Pasturing one's horse is a residential use given that the Supreme Court's definition of residential use includes recreation incident to human habitation. *Id.* The developer "expressly intend[ed] to permit the pasturing of horses" as part of the recreation in the area. It may have been implicit in the restriction on residential use that pasturing of horses was allowed, but the additional, explicit covenant allowing pasturing makes it clear.

The majority opinion also relies heavily on *J.T. Hobby* to say that the fact that Defendants accept remuneration in exchange for providing services for customers' horses that they would otherwise provide if the horses were their own makes no difference in determining whether the use is residential. I find that case to be distinguishable based on the activity involved and public policy. *J.T. Hobby* involved a developer's challenge to the proposed use for one of the lots as a group home for mentally handicapped individuals. *Id.* at 69, 274 S.E.2d at 178. Though not expressly discussed, public policy likely influenced the result in *J.T. Hobby* given that the use of the home pro-

vided a valuable service for a sector of the public that has historically faced discrimination. The activity in *J.T. Hobby* involved humans, whereas in the activity in this case involves horses. The defendants in *J.T. Hobby* also had a loftier goal than these Defendants, as the Supreme Court noted:

> That defendant is compensated for the services it renders does not render its activities at the home commercial in nature. While it is obvious that the home would not exist if it were not for monetary support being provided from some source, that support clearly is not the objective behind the operation of this facility. That defendant is paid for its efforts does not detract from the essential character of its program of non-institutional living for the retarded. Clearly, the receipt of money to support the care of more or less permanent residents is incidental to the scope of defendant's efforts. In no way can it be argued that a significant motivation behind the opening of the group home by defendant was its expectation of monetary benefits.

Id. at 73, 274 S.E.2d at 180. Defendants here have never claimed a higher purpose in their boarding of horses. Defendants operate Serenity Acres with the expectation of monetary benefits, specifically arguing in their brief that the trial court erred in granting Plaintiffs summary judgment based on the balance of hardships and the money they would lose. I would hold that the covenants are not ambiguous and that commercial activity is prohibited by the covenant restricting use to residential purposes.

Notwithstanding my disagreement with the majority's holding that the restrictions are ambiguous and thus invalid, the reversal of summary judgment in Plaintiffs' favor is correct. I would reverse and remand the case as I believe that an issue of material fact exists on the defense of laches, precluding summary judgment.

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the

> defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001).

Delores Erthal's affidavit indicates that the number of horses Defendants boarded fluctuated along with the traffic in and out in or after 1996 when she took riding lessons from Francine May that. Charles Erthal's affidavit indicates that he gradually became aware sometime after 1996 that Defendants were not boarding the horses on their property without remuneration. He noticed a fluctuation in traffic and the number of horses. In 2006, he and his wife noticed the number of horses increase as well as the traffic. Ilena Budde's amended affidavit states that she noticed the boarding as early as 1999. She knew that Defendants were boarding three horses in 2001. Jerome Budde's amended affidavit also indicates that Defendants informed him that they were boarding in 1999 when they saw a woman lead her horse off the property. Since 2000, the Buddes noticed that the number of horses and traffic has fluctuated, culminating in 2006 when they noticed that the number of horses and traffic had increased.

There is an issue of material fact as to when the Plaintiffs knew of the existence of the grounds for the claim. The Erthals may have been aware of commercial activity on Defendants' property as early as 1996 and the Buddes may have been aware of commercial activity on Defendants' property as early as 1999. On the other hand, the number of horses and traffic increased around 2006 according to Plaintiffs' affidavits, perhaps indicating that only then did they know of the grounds for their claim. If 2006 is when the Plaintiffs were aware of the existence of their claim, then this delay is not unreasonable considering the health problems that the Buddes experienced beginning in 2007 and considering that the Erthals did not want a neighbor to retaliate and bar them from using his riding trails. *See Williamson v. Pope*, 60 N.C. App. 539, 542-43, 299 S.E.2d 661, 663 (1983)(finding that plaintiff's delay of a few years in filing suit was not barred by laches when it was not due to neglect). If 1996 or 1999 is when the Plaintiffs were aware of the existence of their claim, then this delay is unreasonable since Defendants expended additional sums of money in furtherance of their business by adding stalls to their barn and clearing three acres of land after 1999. *See Farley v. Holler*, 185 N.C. App. 130, 132, 647 S.E.2d 675, 678 (2007)(finding

plaintiffs' case barred by laches when the "undisputed facts" showed that plaintiffs delayed nine years before filing suit, defendants spent $100,000 in the meantime, and the relations of the parties had changed). A genuine dispute exists regarding a material fact; thus, summary judgment was inappropriate on this defense.

I also disagree with the majority's holding regarding Defendants' counterclaims. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 448 (1979), upheld summary judgment for the defendant on all claims when the plaintiff had merely moved for partial summary judgment since the "moving party ha[d] been given adequate opportunity to show in opposition that there is a genuine issue of fact to be resolved." *Id.* Though not discussed in *A-S-P Associates*, Rule 56(c) of the North Carolina Rules of Civil Procedure requires ten days' notice for a motion for summary judgment. Even though summary judgment may appropriately be granted to the non-moving party, *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 77 N.C. App. 149, 151, 334 S.E.2d 499, 501 (1985), some degree of notice is required before the trial court can rule against a party on all claims when the moving party has, at most, requested partial summary judgment in his favor. *See Tri City Building Components v. Plyler Construction*, 70 N.C. App. 605, 607-08, 320 S.E.2d 418, 420 (1984) ("[W]ith adequate time to prepare for the summary judgment hearing, the issues can often be made clearer and the court's task easier. The defendant either by affidavit or brief might have been able to point more directly to the crucial evidence that was available on the issue, if it had had an opportunity to do so, and that the court might have profited by such aid, is self-evident.") *A-S-P Associates* is controlling, but on this record, I cannot hold that Defendants were given an "adequate opportunity" to oppose such an order, considering that this Court has noted that the parties are often in a better position to direct the trial court to the crucial evidence than leaving the trial court to its own devices. Thus, I would reverse the grant of summary judgment in favor of Plaintiff and remand the case.

For the reasons stated above, I respectfully write separately.

FRIENDS OF JOE SAM QUEEN, PLAINTIFF v. RALPH HISE FOR N.C. SENATE AND N.C. REPUBLICAN EXECUTIVE COMMITTEE, DEFENDANTS

No. COA12-455

(Filed 20 November 2012)

1. Parties—proper party to bring action—conceded at oral argument

In an action involving the attribution of political advertising, the parties' substantive arguments were heard even though there was a question as to whether the proper party had brought the action where defendants conceded at oral argument that the present suit was properly authorized.

2. Elections—Stand by Your Ad—requirements for action

The trial court did not err by granting defendants' motion for summary judgment, or by denying plaintiff's motion for summary judgment, in an action under the Stand by Your Ad law where neither plaintiff nor defendants fully complied with the statute. In order to recover damages under N.C.G.S. § 163-278.39A, plaintiff must prove that he violated none of the statutory disclosure requirements. Different entities or individuals that jointly purchase a message, air time, portions of either, or both, must disclose joint sponsorship under the statute.

Appeal by plaintiff from order and final judgment entered 14 December 2011 by Judge Gary E. Trawick in Superior Court, Haywood County. Heard in the Court of Appeals 10 October 2012.

Wallace & Nordan, L.L.P. by John R. Wallace and Joseph A. Newsome, for plaintiff-appellant and Frank G. Queen, P.L.L.C. by Frank G. Queen, for plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. by Thomas A. Farr and Michael D. McKnight, for defendants-appellees.

STROUD, Judge.

I. Introduction

This case arises from alleged violations of the "Stand by Your Ad" disclaimers required for political advertisements under N.C. Gen. Stat. § 163-278.39A (2009) which occurred during the 2010 campaign between Senator Ralph Hise and Senator Joe Sam Queen in North

Carolina's 47th senatorial district. As both plaintiff and defendants failed to provide proper disclosures of the joint sponsorship of television advertisements by both the candidate committee and the political party, plaintiff's claim is barred by the statutory *tu quoque* defense. Since no prior case has interpreted N.C. Gen. Stat. § 163-278.39A and given the ambiguity inherent in the statute, as discussed below, it is not surprising that plaintiff and defendants would in good faith come to slightly different understandings of the requirements of the statute, and we do not mean to imply that either plaintiff or defendants intentionally violated N.C. Gen. Stat. § 163-278.39A. We affirm the trial court's order dismissing plaintiff's claim for the reasons below.

II. Background

Friends of Joe Sam Queen ("plaintiff" or "Queen Committee"), a political committee formed in North Carolina, filed a complaint on 28 January 2011 in Haywood County seeking damages under N.C. Gen. Stat. § 163-278.39A(f) from Ralph Hise for N.C. Senate ("Hise Committee") and the North Carolina Republican Executive Committee, now known as the North Carolina Republican Party ("NCGOP"), also political committees (jointly, "defendants"). Plaintiff alleged that defendants violated disclosure requirements for advertising paid for by NCGOP during the 2010 race for North Carolina Senate.

In 2010, Joe Sam Queen was the Democratic candidate, and incumbent, for North Carolina Senate from the 47th North Carolina Senatorial District. His opponent was now-Senator Ralph Hise, a Republican. Both campaigns received substantial financial support for their media campaigns from their respective party committees, spending several hundred thousand dollars on television advertising over the course of the 2010 election season. Each political party paid for the production of video messages to be used in its candidate's advertising. NCGOP transferred funds to American Media and Advocacy Group ("American Media") for the specific purpose of media buys for the Hise campaign, and American Media held these funds in a separate account designated for Senator Hise until he authorized a media purchase with the funds. The North Carolina Democratic Party ("NCDP"), by contrast, donated money to the Queen campaign to be used to purchase air time through its media company, Envision, and Envision's subcontractor, Buying Time, Inc. Each contribution by the NCDP to the Queen Committee was transferred to the committee's account for a brief period of time, and held there normally no longer than several hours—once only eleven minutes—before being transferred to Buying Time. Both Senators Hise

and Queen authorized all expenditures to purchase the air time.[1] Substantively, the only difference in the actions of the plaintiff and the defendants is that the Democratic Party ran the contributed funds briefly though the candidate's campaign account before they were used for a media buy, while the Republican Party sent the funds directly to the media company to be held "in escrow" for the candidate to be disbursed for a media buy only at the candidate's direction. Both candidates listed the candidate or campaign committee as the "sponsor" of the advertising in the required on-air disclosure statements and neither listed a political party as a "sponsor." Neither candidate committee had sufficient funds, but for the contributions of the respective political parties, to pay for their television advertising campaigns.[2]

Plaintiff filed its complaint on 28 January 2011, alleging that defendants violated the disclosure rules for political television advertising under N.C. Gen. Stat. § 163-278.39A. Specifically, plaintiff alleged that because the NCGOP paid American Media directly, as opposed to through the Hise campaign, it should have been disclosed as the sole "sponsor" of the Hise advertisements. Plaintiff further alleged that Ralph Hise for N.C. Senate was complicit in these violations and, therefore, also liable under § 163-278.39A(f). Plaintiff also claimed that its campaign advertising had complied fully with N.C. Gen. Stat. § 163-278.39A, as it must in order to bring this claim.

After defendants answered the complaint, denying that the alleged acts constituted violations and raising various defenses, the parties submitted affidavits, took depositions, and filed cross-motions for summary judgment. Defendants also asserted a statutory *tu quoque* ("you too") defense under § 163-278.39A(f) analogous to the equitable defense of unclean hands, claiming that plaintiff engaged in equivalent conduct, so that if defendant's actions were in violation of the statute, the plaintiff's actions were also in violation, as they were substantively the same. Defendants further claimed that even if they were liable under the statute, § 163-278.39A violates their rights under the First and Fourteenth Amendments to the United States Constitution, as well the parallel provisions of the North Carolina Constitution.

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1. N.C. Gen. Stat. § 163-278.17 (2009) provides in part that "each media shall require written authority for each expenditure from each candidate, treasurer or individual making or authorizing an expenditure." There is no dispute that both Senators Hise and Queen properly authorized the media expenditures at issue in this case.

2. The NCDP contributions paid for approximately 91% of the Queen Committee advertising, and the NCGOP contributions paid for approximately 84% of the Hise Committee advertising.

The trial court granted defendants' motion for summary judgment and denied plaintiff's motion for summary judgment by an order entered 14 December 2011, thus dismissing the plaintiff's claims. Plaintiff timely filed notice of appeal from both rulings in that order on 22 December 2011.

III. Standard of Review

Plaintiff timely appeals from the trial court's final order denying its motion for summary judgment and granting defendant's motion for summary judgment.

> "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) (citation and quotation marks omitted). In our review of the trial court's judgment, "we view the evidence in the light most favorable to the nonmoving party." *Beeson v. Palombo*, ___ N.C. App. ___, ___, 727 S.E.2d 343, 346-47 (2012) (citation and quotation marks omitted).

IV. Cause of Action Under § 163-278.39A(f)

[1] This case, which turns on the interpretation of the "Stand by Your Ad" law enacted in 1999, is one of first impression in this Court. N.C. Session Laws 1999-453. Although neither party raises this issue, we must address the preliminary matter of whether the proper plaintiff has brought this action. N.C. Gen. Stat. § 163-278.39A(f) provides that "a *candidate* for an elective office who complied with the television and radio disclosure requirements throughout that candidate's entire campaign shall have a monetary remedy in a civil action against" an opponent-candidate, candidate committee, political party organization, or other sponsor of political advertisements who violates the disclosure provisions of § 163-278.39A. N.C. Gen. Stat. § 163-278.39A(f) (emphasis added). The statute further provides that "[t]he plaintiff candidate may bring the civil action personally or authorize his or her candidate campaign committee to bring the civil action." N.C. Gen. Stat. § 163-278.39A(f)(2)

Some explanation of the structure of Article 22A may be helpful in our discussion of the issues raised by this case. The statutory definitions of several words are important in this case. Article 22A, entitled "Regulating Contributions and Expenditures in Political Campaigns," includes in N.C. Gen. Stat. § 163-278.6 (2009) a set of

general definitions for terms used for most of Article 22A, while N.C. Gen. Stat. § 163-278.38Z (2009) includes additional definitions which are applicable only to Part 1A, entitled "Disclosure Requirements for Media Advertisements." Plaintiff's claim is brought under a provision of Part 1A, specifically N.C. Gen. Stat. § 163-278.39A(f). The terms "candidate," "candidate campaign committee," and "political action committee" have definitions which are applicable only to Part 1A and are different from the definitions of the same words in N.C. Gen. Stat. § 163-278.6. *See* N.C. Gen. Stat. § 163-278.6(4),(14); N.C. Gen. Stat. § 163-278.38Z(2), (3), (5). We will use the definitions which are specific to Part 1A for these terms and will use the general definitions set forth in N.C. Gen. Stat. § 163-278.6 for the other relevant defined terms.

For purposes of Part 1A, a "candidate" is an individual who has filed the requisite notice of candidacy or has otherwise been certified as such. N.C. Gen. Stat. § 163-278.38Z(2). A "candidate campaign committee" is "any political committee organized by or under the direction of a candidate." N.C. Gen. Stat. § 163-278.38Z(3). As noted above, these two terms are defined separately in Part 1A of Article 22A and are used as separate terms in subsection (f). N.C. Gen. Stat. §§ 163-278.38Z, 163-278.39A(f) (stating that the *plaintiff-candidate* has a cause of action against "an opposing *candidate or candidate committee*" (emphasis added)). The statute identifies the *candidate* as the injured party by vesting the individual candidate with the right to bring a cause of action. N.C. Gen. Stat. § 163-278.39A(f) (stating that "a *candidate* for an elective office . . . shall have a monetary remedy in a civil action) (emphasis added)). Thus, the statute clearly provides the right to bring such an action only to an individual candidate or to that candidate's candidate campaign committee where the candidate has specifically authorized the committee to bring the action. *See* N.C. Gen. Stat. § 163-278.39A(f)(2).[3]

Here, although there is no allegation of explicit and direct authorization of this lawsuit in the complaint and no written authorization in the record on appeal, defendants conceded at oral argument that the present suit was properly authorized by Senator Queen. While in another case this absence could be fatal to the plaintiffs claim, as the

3. It is worth noting that our Supreme Court has observed, in a different context, that a candidate committee "is the creature of the candidate . . . [and] is, in effect, the alter ego of the candidate." *In re Wright*, 313 N.C. 495, 497, 329 S.E.2d 668, 669 (1985). But this particular statute consistently differentiates between the candidate and the candidate committee. Perhaps N.C. Gen. Stat. § 163-278.39A(f) could be considered the "Stand by your Lawsuit" provision of the "Stand by your Ad" law.

parties agree that Senator Queen authorized his committee to pursue this action, we will consider the parties' substantive arguments.

V. Interpretation of N.C. Gen. Stat. §§ 163-278.38Z, *et seq.*

[2] This statute, known as the "Stand by Your Ad" law, was enacted in 1999. N.C. Session Laws 1999-453; N.C. Gen. Stat. §§ 163-278.38Z, *et seq.* (2009). N.C. Gen. Stat. § 163-278.39A(f) gives "a candidate for an elective office" a cause of action against "an opposing candidate or candidate committee" or "any political party organization, political action committee, individual, or other sponsor" whose advertisement for "that elective office" violates the § 163-278.39A disclosure requirements for television and radio advertising. Plaintiff's only claim against defendants arises from this provision of the statute. In order to recover damages under this statute, plaintiff must prove that (1) his opponent or his opponent's candidate committee violated the disclosure requirements of § 163-278.39A, and (2) he violated none of those disclosure requirements. N.C. Gen. Stat. § 163-278.39A(f).[4]

A. Statutory Ambiguity in § 163-278.39A

Plaintiff contends that the trial court erred in denying its motion for summary judgment, and granting defendant's, because it presented undisputed evidence which indicates that defendant NCGOP paid for television advertisements that did not bear the appropriate disclosures required under N.C. Gen. Stat. § 163-278.39A and that therefore it is entitled to recover damages under N.C. Gen. Stat. § 163-278.39A(f) in the amount of three times the money spent on the improper advertising.[5] In its complaint, plaintiff alleged that defendants violated the disclosure requirements of § 163-278.39A because they aired television ads indicating that they were sponsored by Ralph Hise for NC Senate when the NCGOP had provided the funds to pay for the air time directly to the media buyer, rather than first providing the funds to the Hise Committee so that the Hise Committee could pay for the air time. Plaintiff contends that the NCGOP should have been identified as the "sponsor" of the advertisements or at least as a joint sponsor of the advertisements, along with the Hise Committee. Under the facts presented in this case,

4. The plaintiff must also file the necessary notices under § 163-278.39A(f) to preserve the right to bring the action. There is no dispute that Senator Queen did so here.

5. A plaintiff-candidate under this statute is entitled to treble damages if after notifying the opponent that his advertisement is improper, the opponent continues to run the advertisement. N.C. Gen. Stat. § 163-278.39A(f)(2). Plaintiff here sent such a notice.

Plaintiff's claim depends on what it means to be a "sponsor" of an "advertisement." Therefore, our review must begin with an interpretation of that statute. *See State ex rel. Thornburg v. Lot and Bldgs. at 800 Waughtown St.*, 107 N.C. App. 559, 562, 421 S.E.2d 374, 376, *disc. review denied*, 333 N.C. 170, 424 S.E.2d 915 (1992).

The "Stand by Your Ad" statute requires the following disclosures:

> (1) Candidate advertisements on television—Television advertisements *purchased by a candidate or candidate campaign committee* supporting or opposing the nomination or election of one or more clearly identified candidates shall include a disclosure statement spoken by the candidate and containing at least the following words: 'I am (or 'This is ___') [name of candidate], candidate for [name of office], and I (or 'my campaign') *sponsored* this ad.'
>
> (2) Political party advertisements on television—Television advertisements *purchased by a political party organization* supporting or opposing the nomination or election of one or more clearly identified candidates shall include a disclosure statement spoken by the chair, executive director, or treasurer of the political party organization and containing at least the following words: "The [name of political party organization] sponsored this ad opposing/supporting [name of candidate] for [name of office]." The disclosed name of the political party organization shall include the name of the political party as it appears on the ballot.

N.C. Gen. Stat. § 163-278.39A(b) (emphasis added). Similar provisions apply to political action committees, § 163-278.39A(b)(3), private individuals, § 163-278.39A(b)(4), and any other "sponsor", § 163-278.39A(b)(5). Thus, whoever "purchased" the advertisement, i.e. the "sponsor", must include a disclosure statement so indicating. The statute does not define what it means to purchase an advertisement and only defines "sponsor" as an entity or individual "that purchases an advertisement." N.C. Gen. Stat. § 163-278.38Z(10). An advertisement is defined as "any *message appearing* in the print media, on television, or on radio that constitutes a *contribution* or *expenditure* under this Article." N.C. Gen. Stat. § 163-278.38Z(1) (emphasis added).

Plaintiff claims that the "purchaser" or "sponsor" of an advertisement is anyone who furnishes money directly to a media buyer for air time, while payment for the production of the message which is aired is "not relevant." Plaintiff argues that NCGOP "purchased" both the

production of the Hise Committee message and the air time for its broadcast, so it was the sole "sponsor," or at least a joint sponsor, by its participation in the air time purchase. Defendants first counter that the purchaser or "sponsor" of an advertisement should be defined as the individual or entity which has ultimate editorial control over the advertisement—the message itself. Defendants next contend that Senator Hise did actually "purchase" the air time for the advertisements, as he had control over the funds in the American Media escrow account and he authorized and directed each expenditure of these funds for air time. Defendants also argue that

> [e]ven assuming that the NCGOP "purchased" TV airtime by sending funds directly to American Media as Plaintiff contends, nothing in N.C.G.S. § 163-278.39A or Chapter 163 defines the "purchaser" of an advertisement as the person or entity who purchases only the air time for the ad. Unlike the term "purchase," the statute defines "advertisement" as "any message appearing in the print media, on television, or on radio that constitutes a contribution or expenditure under this Article." N.C.G.S. § 163-278.38Z(10). Thus, a television "advertisement" requires at least two things: (1) a message and (2) air time on which to broadcast that message.

Although defendants' brief does not concede that they committed any violation of the disclosure requirements, they argue that if they did violate the statute, plaintiff did also, as the air time for plaintiff's advertisements was purchased with funds contributed by the NCDP which were deposited into Senator Queen's campaign account before being almost immediately disbursed for each purchase of air time.

"The cardinal principle of statutory interpretation is to ensure that legislative intent is accomplished. To determine legislative intent, we first look to the language of the statute." *Insulation Systems, Inc. v. Fisher*, 197 N.C. App. 386, 389-90, 678 S.E.2d 357, 360 (2009) (quotation marks and citations omitted), *disc. rev. denied*, 363 N.C. 654, 684 S.E.2d 890. "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and" we need not look further. *In re Hamilton*, ___ N.C. App. ___, ___, 725 S.E.2d 393, 396 (2012) (quotation marks and citation omitted). Indeed, "when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* If, however, "the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to defeat or impair the object of the statute if that can reasonably be done without doing vio-

lence to the legislative language." *Dayton v. Dayton*, ___ N.C. App. ___, ___, 725 S.E.2d 439, 442 (2012) (quotation marks, citation, brackets, and ellipses omitted).

As noted above, a "sponsor" of an "advertisement" is the entity or individual "that purchases an advertisement." Although the statute does not define "purchase, the normal dictionary definition is clear. *See* Black's Law Dictionary 1354 (9th ed. 2009) (defining purchase as "[t]he act or an instance of buying."). But the phrase "purchase," an advertisement" is ambiguous, given the definition of "advertisement." N.C. Gen. Stat. § 163-278.38Z(1) defines an "advertisement" as: "any message appearing in the print media, on television, or on radio that constitutes a contribution or expenditure under this Article." N.C. Gen. Stat. § 163-278.38Z(1). Thus, a television advertisement consists of two parts—the message and its appearance on television, or the "air time". Looking at the definition of "advertisement" grammatically, the term "message" is modified by two phrases: "that constitutes a contribution or an expenditure under this Article" and "appearing in print media, on television or on radio."[6]

Where the same person or entity "purchases" both the production of the message and the air time to broadcast the message, there is no ambiguity in the identity of the "sponsor" of the advertisement. Here, the problem is that the political parties—both NCDP and NCGOP—paid for the production of the messages and then contributed funds to pay for the air time in slightly different ways; both of the political parties and the candidate committees jointly participated in the purchases of the advertisements.

The issue is then whether a "sponsor" is the one who purchases the message (i.e., production of the actual recording, video, etc.), the air time, or both. Given three possible interpretations, we must conclude that this provision of the statute is ambiguous, especially considering the uniquely powerful remedy against those who violate these provisions.[7]

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6. N.C. Gen. Stat. § 163-278.6(9) defines the term "expend" or "expenditure" as "any *purchase*, advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever, whether or not made in an election year, and any contract, agreement, or other obligation to make an expenditure, to support or oppose the nomination, election, or passage of one or more clearly identified candidates, or ballot measure." N.C. Gen. Stat. § 163-278.6(9) (emphasis added).

7. The enforcement mechanism chosen by our legislature is unique in the world of election law. Many other jurisdictions have analogous disclosure laws. *See*, *e.g.*, 2

B. Defining "sponsor"

"[W]hen the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose." *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 782 (1981), *disc. rev. denied*, 304 N.C. 392, 285 S.E.2d 833. This act is entitled "Stand by your Ad." N.C. Session Laws 1999-453. As the title makes clear, the primary purpose of this act is to let the public know who is responsible for the content of the advertisement and to further the State's interest in "informing voters who or what entity is trying to persuade them to vote in a certain way." *Alaska Right to Life Committee v. Miles*, 441 F.3d 776, 793 (9th Cir. 2006); *see KVUE, Inc.*

U.S.C. § 441d (2006) (setting out federal disclosure requirements for political advertisements), Md. Code Ann., Elec. Law § 13-401 (West 2010) (requiring an authority line on campaign material), Va. Code Ann. § 24.2-957.1 (2011) (requiring on-air disclosures for political television advertisements). However, after diligent searching, it appears that North Carolina has the only statute that provides candidates with a private cause of action against their opponents for advertising disclosure violations, rather than enforcement through government-enforced criminal or civil penalties. *See, e.g.*, 2 U.S.C. § 437g(6) (2006) (authorizing the Federal Election Commission to institute civil enforcement actions), Md. Code Ann., Elec. Law §§ 13-602, 13-603, 13-604 (West 2010) (making knowing election law violations, including violation of Maryland's disclosure and disclaimer requirements for campaign materials, misdemeanors prosecutable by the State), Va. Code Ann. § 24.2-955.3 (2011) (establishing civil and criminal penalties, enforceable by the State Board of Elections, to be paid to the state), Fla. Stat. § 106.1439 (2008) (making election law violations misdemeanors), 10 Ill. Comp. Stat. 5/9-23 (2010) (establishing civil penalties for election law violations, enforced by the Attorney General), Tenn. Code Ann. § 2-19-120 (West 2003) (requiring disclosures for political advertisements and making violations criminal), S.C. Code Ann. § 8-13-1520 (2011) (making violations misdemeanors), Cal. Gov't Code § 91000 (West 2012) (establishing criminal penalties for election law violations), Minn. Stat. §§ 211B.16, 211B.19 (2010) (providing for criminal penalties enforced by county attorneys), Iowa Code § 68A.701 (2012) (making violation of campaign finance and disclosure laws a "serious misdemeanor"), Del. Code Ann. tit. 15, § 8043 (2006) (providing for criminal penalties for election law violations), N.H. Rev. Stat. Ann. § 664:21 (2012) (establishing civil and criminal penalties to be pursued by the State for violations of election law), *but see* Cal. Elec. Code § 20010 (West 2003) (providing candidates a civil action against those who maliciously misappropriate their image in political advertising). Indeed, the most analogous statutes appear to be those punishing non-criminal fraud of various sorts, or for violation of telemarketing disclosure rules. *See, e.g.*, N.C. Gen. Stat. § 58-2-161 (2011) (providing cause of action, including treble damages, for false statements regarding insurance claims), N.C. Gen. Stat. § 75-16 (2011) (providing cause of action, including treble damages, for those injured by the breakup of a monopoly), N.H. Rev. Stat. Ann. § 664:14-a (establishing a civil action for those injured by political "robo-calls", including treble damages for willful violations); *see also* 47 U.S.C. § 227(d), (g) (2006) (requiring disclosure statement at the beginning of "robo-calls" and authorizing civil enforcement action against violators, including treble damages), *and Maryland v. Universal Electronics*, ___ F.Supp.2d ___, ___, 2012 WL 1940543 (discussing civil enforcement action by Maryland against company who made robo-calls without the required disclosure).

v. Moore, 709 F.2d 922, 933 (5th Cir. 1983) (noting that similar Federal Election Commission rules "are designed to reveal whether a commercial is authorized by a candidate."); Timothy Moran, Format Restrictions On Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech, 67 Ind. L. J. 663, 677-78 (1992) (discussing the purpose of political advertising disclosure laws).

As noted above, an advertisement has two parts: the message and its appearance on television. As the production of the message must occur prior to its broadcast, we will first address the "message."

Plaintiff argues that the purchase of the "message," or payment of production costs, is "not relevant" to the determination of "who purchased or sponsored the advertisement." Plaintiff recognizes that an advertisement has two parts, the message and its broadcast but argues that only "the purchase and use of airtime on television . . . under the statute, turns a video into an advertisement." This statement is true, but an advertisement also cannot exist without a message and the message must exist before the "use of airtime" can occur. We believe that ignoring the fact that the "message" is an essential part of the "advertisement" would fail to give effect to the statutory language and would undermine the purpose of the statute, which is to inform the public of who is trying to influence them. Air time without a message is white noise; the message is the only portion of an "advertisement" with any substantive content. Failure to identify the entity which paid for the message's production would be contrary to the primary purpose of the "Stand by Your Ad" law.

In further support of its argument that payment for production costs for the message is irrelevant, Plaintiff notes that the statute does not mention "production costs or the other tangential costs affiliated with the making of political advertisements." Yet the definition of "advertisement" itself specifically defines an advertisement in part as "any message . . . that constitutes a contribution or expenditure." N.C. Gen. Stat. § 163-278.38Z(1). For a message to constitute a contribution or expenditure, some transfer of money or thing of value is needed. Art. 22A broadly defines "expenditures," "contributions," and "independent expenditures", all of which include some form of transfer of "money or anything of value" to "support or oppose the nomination [or] election" of a "clearly identified candidate." The payments of expenses for the production of videos which supported or opposed the elections of both Senators Hise and Queen were reported as "in kind contributions" and "coordinated expenditures" under Article 22A by Senators Hise and Queen as well as the NCDP and NCGOP.

Plaintiff also contends that payment for the message production is irrelevant because the statutory damages are calculated based on "the total dollar amount of television and radio advertising time that was aired and that the plaintiff candidate correctly identifies as being in violation of the disclosure requirements of this section." *See* N.C. Gen. Stat. § 163-278.39A(f)(2). But the fact that the General Assembly chose to base the damages just upon "time that was aired" and not upon production costs as well makes sense, as no one is misled by a message or the disclaimer on a message that has not been aired yet—no violation can occur until a message is actually disseminated by airing it.

We hold that payment of production costs for the "message," here the videos, constitutes part of the sponsorship of an "advertisement" under N.C. Gen. Stat. § 163-278.39A(b). Thus, for the "sponsors" to be properly identified, all of the purchasers of both parts of the advertisement must be identified in the disclaimer.

This interpretation best advances the purpose of the statute while avoiding violence to its language. Indeed, it is clear that the legislature contemplated the possibility that an advertisement could have multiple sponsors. In § 163-278.39A(e1), the statute provides fairly detailed instructions on how to properly disclose joint sponsors:

> If an advertisement described in this section is jointly sponsored, the disclosure statement shall name all the sponsors and the disclosing individual shall be one of those sponsors. If a candidate is one of the sponsors, that candidate shall be the disclosing individual, and if more than one candidate is the sponsor, at least one of the candidates shall be the disclosing individual.

N.C. Gen. Stat. § 163-278.39A(e1). Thus, where different entities or individuals jointly purchase the message, the air time, portions of either, or both, they must disclose joint sponsorship under this section.

The facts regarding payment of production costs for both the Hise and Queen Committees television advertisements are undisputed, and were summarized by Plaintiff as follows:

> The NCDP paid Envision Communications directly for the cost of producing these TV ads. Production costs paid by the NCDP were reported by the NCDP on its campaign finance reports as a "coordinated party expenditure." The Queen Committee reported these payments by the NCDP as "in-kind" contributions.

> The [Hise Committee] ads were produced by a media company called Innovative Advertising. The NCGOP paid Innovative Advertising directly for the costs of producing these ads. The NCGOP's payments to Innovative Advertising were disclosed on the campaign finance reports of both the NCGOP and the Hise Committee as "in-kind" contributions to the Hise Committee for "media production."

It is undisputed that the NCDP paid for the production of the message, or video, for the Queen Committee advertisements, and that the NCGOP paid for the production of the video of the Hise Committee advertisements. It is also undisputed that the Queen Committee advertisements identified only the Queen Committee as the "sponsor" of the advertisements; NCDP was not identified as a joint sponsor under N.C. Gen. Stat. § 163-278.39A(e1). Thus, Senator Queen is not a "candidate for an elective office who complied with the television and radio disclosure requirements throughout that candidate's entire campaign," and he cannot recover under N.C. Gen. Stat. § 163-278.39A(f) even if defendants also violated the disclosure requirements because of the manner of the transfer of funds to American Media for the air time.

As we have determined that plaintiff is barred from recovery for failure to disclose the joint sponsorship of the Queen advertisements, we need not examine the second portion of the definition of "sponsorship" of an advertisement, the method of payment for the air time. Whether we were to determine that Senator Hise purchased the airtime for his advertisements because he paid for the airtime with funds which were held by American Media, or that NCGOP actually purchased the airtime because the funds were transferred directly to American Media instead of to the Hise Committee campaign account, the result would be the same, since neither NCDP or NCGOP was identified as a "sponsor" of the advertisements based upon their payment of production costs. It is therefore unnecessary for us to address the parties' various arguments regarding the method by which NCGOP and the Hise Committee actually paid for the airtime for the Hise Committee advertisements.

VI. Conclusion

Plaintiff's only claim against defendants depended on showing that the NCGOP was the "sponsor" of advertisements run in Senator Hise's name and that plaintiff's advertisements included a disclaimer identifying all sponsors in compliance with N.C. Gen. Stat.

§ 163-278.39A. Because we have determined that neither plaintiff nor defendants fully complied with N.C. Gen. Stat. § 163-278.39A, plaintiff's claim is barred by N.C. Gen. Stat. § 163-278.39A(f). Therefore, we need not reach defendants' other statutory or constitutional arguments. As there were no genuine issues of material fact and defendants were entitled to judgment as a matter of law, the trial court did not err in granting defendants' motion for summary judgment or in denying plaintiff's motion for summary judgment.

AFFIRMED.

Judges ELMORE and BEASLEY concur.

BECHARD P. HODGIN AND WIFE, WILLINE N. HODGIN, PLAINTIFFS v. UNITED COMMUNITY BANK, FRANKLIN, DEFENDANT

No. COA12-383

(Filed 20 November 2012)

Civil Procedure—Rule 60(b) motion—appropriate remedy for errors of law—appeal or Rule 59 motion

The trial court abused its discretion in a breach of contract, fraud, unfair and deceptive trade practices, unjust enrichment, and punitive damages case by granting plaintiffs' motion for N.C.G.S. § 1A-1, Rule 60(b) relief. The appropriate remedy for errors of law committed by the trial court is either appeal or a timely motion for relief under N.C.G.S. § 1A-1, Rule 59(a)(8). Assuming *arguendo* that a Rule 60(b) motion was an appropriate manner of recourse for plaintiffs to seek relief from the final order, the trial court erred in granting such motion because the request did not meet any of the requirements set forth in Rule 60(b).

Appeal by defendant from order entered 28 November 2011 by Judge Monica Leslie in Macon County District Court. Heard in the Court of Appeals 12 September 2012.

Eric Ridenour and Jeffrey Goss of RIDENOUR & GOSS, PA, attorneys for plaintiffs.

Esther E. Manheimer, Mark A. Pinkston, Lynn D. Moffa of THE VAN WINKLE LAW FIRM, attorneys for defendant.

ELMORE, Judge.

United Community Bank, Franklin (defendant) appeals from an order denying its motion for reconsideration and granting an amended motion for appropriate relief in favor of Bechard P. Hodgin and his wife Willine P. Hodgin (plaintiffs). After careful consideration, we reverse the decision of the trial court.

I. Background

The dispute between the parties to this appeal began in 2003 when plaintiffs entered into an agreement with defendant to finance a loan for the construction of a new home on a 1.62 acre parcel of land owned by plaintiffs. At that time, plaintiffs also owned an adjacent 2.09 acre tract of land. Plaintiffs borrowed $168,000.00 from defendant, and they secured the loan by executing a Deed of Trust (the 2003 DOT) in favor of defendant. Plaintiffs only intended for the 1.62 acre parcel of land to be collateral for the loan, but the 2003 DOT adjoined the 2.09 acre tract of land as well.

Later, in 2004, plaintiffs required additional funds to complete their home construction, and they borrowed $18,050.00 from defendant in the form of an unsecured loan. Plaintiffs then failed to make their loan payments. However, to avoid default, the parties agreed to refinance plaintiff's total debt, thus covering both the $168,000.00 loan and the $18,050.00 loan with a new Deed of Trust (the 2006 DOT). Again, plaintiffs intended to encumber only the 1.62 parcel of land as collateral, but the 2006 DOT adjoined the 2.09 acre tract of land as well. After the 2006 DOT was executed, defendant recorded a satisfaction of the 2003 DOT in the Macon County Registry.

Soon thereafter, plaintiffs discovered that both the 2003 DOT and the 2006 DOT encumbered their 2.09 acre tract of land. Plaintiffs informed defendant of this fact, and on 16 March 2006, defendant executed and recorded a release deed in the Macon County Register of Deeds. Plaintiffs thought that the release deed released the 2.09 acre tract of land from the 2006 DOT. However, the release deed actually only released the 2.09 acre tract of land from the 2003 DOT, which had been satisfied and was no longer in effect.

Plaintiffs then again defaulted on their loan, and defendant initiated foreclosure proceedings on both parcels of land, pursuant to the 2006 DOT. At the foreclosure sale, defendant purchased both the 1.62 acre parcel of land and the 2.09 acre tract of land and later sold both pieces of property to a bona fide purchaser.

On 22 April 2010, plaintiffs filed suit against defendant for 1) breach of contract, 2) fraud, 3) unfair and deceptive trade practices, 4) unjust enrichment, and 5) punitive damages. In that suit, plaintiffs argued that defendant agreed to release the 2.09 acre tract of land, and that plaintiffs had been fraudulently led to believe that the 2.09 acre tract of land had been released from the 2006 DOT by the release deed. On 10 June 2010, defendant filed a motion to dismiss and motion to stay proceedings pending arbitration. In that motion, defendant argued that the loan agreement and 2006 DOT contained arbitration provisions, and defendant asked the trial court to enter an order referring the case to binding arbitration.

On 16 August 2010, the trial court held a hearing regarding defendant's motion. At that hearing, the trial court told Plaintiff Bechard P. Hodgin that defendant "is saying that you have to go to arbitration." Plaintiff Bechard P. Hodgin then replied "Okay. I'll go to arbitration." The trial court then entered an order granting defendant's motion and referring the case to arbitration.

The arbitration hearing was held on 22 November 2010 at the Macon County Courthouse. After the hearing, the arbitrator issued a final award on 21 December 2010. In that award, the arbitrator found that "it is clear that the intent of the parties was to rely upon the 1.62 acre tract . . . as collateral" for the loan and that "there was no intent to include the 2.09 acre parcel . . . as collateral for any of those loans." But since the bank sold the 2.09 acre tract of land "to a bona fide purchaser, the 2.09 acre tract cannot be returned to the Plaintiffs." The arbitrator then awarded plaintiffs "only the fair market value of the 2.09 acres at the time of the foreclosure," $16,040.00.

However, plaintiffs believed that the actual value of the 2.09 acre tract of land was substantially greater than the amount awarded in arbitration. Thus, plaintiffs sought to appeal the arbitration award by filing a request for trial *de novo* with the trial court on 22 December 2010. That trial was scheduled for 1 March 2011, but later continued to the next jury term of 6 June 2011.

However, in the interim, defendant filed a motion to confirm the arbitration award on 3 February 2011. On 2 June 2011, two days before the *de novo* trial was to occur, the trial court entered an order granting defendant's motion to confirm the arbitration award. Plaintiffs then filed a motion for appropriate relief on 20 June 2011. On 29 July 2011, plaintiffs filed an amended motion for appropriate relief pursuant to Rule 60 of the North Carolina Rules of Civil

Procedure. In that motion, plaintiffs requested 1) that the 2 June 2011 order be vacated, 2) that the 16 August 2011 order be vacated, and 3) that the trial court allow plaintiffs to proceed with a *de novo* trial by jury.

On 23 August 2011, a hearing was conducted regarding plaintiffs' amended motion for appropriate relief. At that hearing, the trial court orally granted the motion on the grounds that plaintiff's claims fell outside of the scope of the contractual arbitration clauses found in the agreement and the 2006 DOT.

Defendant then filed a motion for reconsideration on 14 September 2011. On 28 November 2011, the trial court entered an order denying defendant's motion for reconsideration and granting plaintiff's amended motion for appropriate relief. There, the trial court concluded that "the claims in this case do not fall within the scope of the parties' agreement to arbitrate." Specifically, "the question of whether the Deeds of Trust erroneously included acreage that the parties did not intend to be included is not a dispute 'arising from this Deed of Trust.'" Accordingly, the order 1) vacated the trial court's 16 August 2010 order staying proceedings pending arbitration, 2) declared the arbitration award a nullity without force or effect, 3) declared the 2 June 2011 order confirming the arbitration award to be moot, and 4) granted plaintiffs a *de novo* trial by jury on all of their claims. Defendant now appeals.

II. Arguments

Defendant presents four arguments on appeal: 1) that the trial court abused its discretion in granting plaintiffs' motion for Rule 60(b) relief, 2) that plaintiffs are estopped from challenging the arbitrability of their claims by their consent in open court and voluntary participation in the arbitration proceedings, 3) that the trial court erred as a matter of law in failing to apply well established principles of limited judicial review of final arbitration awards, and 4) that the trial court erred as a matter of law in its resolution of the underlying arbitrability issue. We agree that the trial court erred in granting plaintiffs' motion for appropriate relief, but we reach this decision because a Rule 60(b) motion cannot in any circumstances be used to collaterally attack a final order from which a party chose not to appeal.

"Rule 60(b) provides no specific relief for errors of law. The appropriate remedy for errors of law committed by the [trial] court is either appeal or a timely motion for relief under [N.C. Gen. Stat.

§] 1A-1, Rule 59(a)(8). Motions pursuant to Rule 60(b) may not be used as a substitute for appeal." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citations omitted).

Here, plaintiffs did not appeal or move for relief pursuant to Rule 59 from the final order entered 6 June 2011 by Judge Earwood. Instead, plaintiffs moved for relief pursuant to a Rule 60(b) motion, arguing that the trial court erred in determining that their claims regarding the 2.09 acre parcel fell within the scope of the contractual arbitration clause. This Court has held that "questions of contract interpretation are reviewed as ***a matter of law***[.]" *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008) (citation omitted) (emphasis added). As such, we conclude that the trial court erred in granting plaintiffs' motion for appropriate relief, because plaintiffs improperly used that motion as a substitute for appeal.

Further, assuming *arguendo* that a Rule 60(b) motion was an appropriate manner of recourse for plaintiffs to seek relief from the final order, we nonetheless conclude that the trial erred in granting such motion here. We agree with defendant that the request did not meet any of the requirements set forth in Rule 60(b).

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

Rule 60(b) allows for relief from judgments for newly discovered evidence. *See* N.C. Gen. Stat. § 1A-1, Rule 60 (2011). However, for relief to be properly granted under this section, "[t]he evidence must be such as was not and could not by the exercise of diligence have been discovered in time to present in the original proceeding." *Harris v. Family Medical Center*, 38 N.C. App. 716, 719, 248 S.E.2d 768, 770 (1978) (quotations and citations omitted).

Here, according to its order, the trial court granted plaintiffs' Rule 60(b) motion on the basis that at the "August 23, 2011 [hearing,] the court was provided documents ***for the first time*** that tend to show that the 2.09 acre tract which is the subject of this action was erroneously pledged in both the initial and the second Deeds of Trust entered by the parties." As such, the trial court found that "the question of whether the Deeds of Trust erroneously included acreage that the parties did not intend to be included is not a dispute 'arising from this Deed of Trust.' "

However, the fact that the 2.09 acre tract was erroneously included in the 2003 DOT and the 2006 DOT was hardly new information. As early as 2006, 4 years before the first hearing in this case, plaintiffs contacted defendant to inform defendant that they believed that the 2.09 acre tract was mistakenly included in both DOTs. Further, in their complaint filed 22 April 2010, plaintiffs alleged that "the total acreage encumbered by the aforementioned Deed of Trust was a breach of the Parties' agreement" and that they "contacted Defendant and informed him that the 2.09 acre tract of land was erroneously included as part of the collateral."

We conclude that plaintiffs could have introduced this evidence during the initial proceedings at the 16 August 2010 hearing, but they did not. At that hearing, defendant told the trial court "I do have the credit agreement an (*sic*) the Deed of Trust at issue in this case, both of which have pretty clear arbitration provisions[.]" The trial court then asked plaintiff Bechard P. Hodgin "All right. Mr. Hodgin, do you want to be heard?" "They are saying that you have to go to arbitration." To which, he replied "Okay, that's fine." "Okay. I'll go to arbitration."

Thus, even if a Rule 60(b) motion was properly sought here, the evidence at issue was not newly discovered. As such, we reverse the decision of the trial court.

Reversed.

Judges CALABRIA and STEPHENS concur.

IN THE MATTER OF H.J.A. AND T.M.A.

No. COA12-638

(Filed 20 November 2012)

Termination of Parental Rights—findings of fact—insufficient

The trial court erred in a termination of parental rights case by failing to make sufficient findings of fact pursuant to N.C.G.S. § 7B-907 to support its order ceasing reunification efforts with respondent-mother and to support its order terminating respondent-mother's parental rights. The orders were reversed and remanded for additional findings of fact.

IN RE H.J.A.

[223 N.C. App. 413 (2012)]

Appeal by respondent-mother from orders entered 6 January 2011 and 7 February 2012 by Judge Louis A. Trosch, Jr., in District Court, Mecklenburg County. Heard in the Court of Appeals 29 October 2012.

Twyla Hollingsworth-Richardson petitioner-appellee for Mecklenburg County Department of Social Services, Youth and Family Services.

Appellate Defender Staples Hughes by Assistant Appellate Defender Joyce L. Terres for respondent-appellant mother.

M. Carridy Bender for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from the trial court's 7 February 2012 order terminating her parental rights to her daughters, H.J.A. and T.M.A., as well the trial court's 6 January 2011 order ceasing reunification efforts. Because the trial court failed to make sufficient findings of fact to support its order ceasing reunification efforts and its order terminating respondent-mother's parental rights, we reverse the trial court's orders and remand for additional findings of fact.

I. Facts

In May 2008, the Mecklenburg County Department of Social Services, Youth and Family Services Division, ("DSS") filed a petition alleging that H.J.A. ("Hailey")[1] was a dependent juvenile. DSS was given nonsecure custody of Hailey on the same day. At the time the petition was filed, Hailey was two days old, and respondent-mother herself was a juvenile, also in DSS custody. Respondent-mother and Hailey were placed together in a maternity home. In an order entered on 1 July 2008, the trial court adjudicated Hailey dependent and kept custody of Hailey with DSS.

A year later, while still a juvenile and in DSS custody, respondent-mother had a second child, T.M.A. ("Tracy"). When Tracy was one day old, DSS filed a petition alleging that she was a dependent juvenile. DSS was given nonsecure custody of Tracy on the same day. On 10 August 2009, the trial court entered an order adjudicating Tracy dependent and kept custody of Tracy with DSS. At the time of Tracy's adjudication and disposition hearing, paternity had not been established for either juvenile.

1. We will refer to juveniles H.J.A. and T.M.A. by pseudonyms to protect their privacy and for ease of reading.

The matter came on for a permanency planning hearing on 6 January 2011. By this time, paternity had been established for Hailey, but not for Tracy. Hailey's father was incarcerated; however, DSS had been exploring providing services for him and was investigating his family members for a potential placement. In an order entered 6 January 2011, the trial court adopted a concurrent plan of reunification and adoption. The trial court ordered DSS to cease reunification efforts with respondent-mother, albeit not in a perfectly clear manner, as will be addressed below. On 12 January 2011, respondent-mother filed a notice to preserve her right to appeal from the trial court's order ceasing reunification efforts, pursuant to N.C. Gen. Stat. §§ 7B-507 (c) and -1001(a)(5) (2011).

On 15 April 2011 and 3 August 2011, DSS filed petitions to terminate respondent-mother's parental rights to Hailey and Tracy, based on the following grounds: (1) neglect; (2) willfully leaving the juveniles in foster care for more than twelve months without showing reasonable progress to correct the conditions that led to removal; and (3) willful failure to pay a reasonable portion of the cost of care for the juveniles. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2011). Following a hearing, the trial court entered an order on 7 February 2012 in which it found the existence of all three grounds for termination alleged against respondent-mother.[2] The trial court also concluded that termination of respondent-mother's parental rights was in the juveniles' best interest. Respondent-mother timely appealed from the order.

II. Statutory Requirements of § 7B-907

On appeal, respondent-mother first argues that the trial court's order ceasing reasonable reunification efforts and continuing the juveniles in DSS custody failed to comply with the statutory requirements of N.C. Gen. Stat. §§ 7B-507 and -907.

If a trial court decides not to return a child to her home at the end of a permanency planning hearing, the court must make written findings regarding

(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;

(2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or

2. The trial court also terminated the parental rights of the fathers of the juveniles, but they do not appeal.

some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;

(3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;

(4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;

(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;

(6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b) (2011). "While it is true that the court is not expressly required to make every finding listed, it must still make those findings that are relevant to the permanency plans being developed for the children." *In re J.S.*, 165 N.C. App. 509, 512, 598 S.E.2d 658, 660-61 (2004).

Moreover, "[w]hen a trial court is required to make findings of fact, it must make the findings of fact specially." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citations omitted). "[T]he 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. 94, 97, 564 S.E.2d 599, 602 (2002) (quotation marks, citation, and ellipses omitted).

In the case *sub judice*, the trial court concluded that the juveniles should not be returned to respondent-mother, therefore the trial court was required to make the necessary written factual findings to support that conclusion. *See In re J.S.*, 165 N.C. App. at 512, 598 S.E.2d at 661. The trial court made the following relevant factual findings:

2. [Mother] has not complied w/ drug screen requests or [domestic violence treatment]. [Mother] completed parenting education.

> [Mother] reports employment but [the social worker] says she has been unable to confirm employment. [Mother] reports taking her prescribed meds.
>
> . . . .
>
> 4. It is possible for the juvenile(s) to be returned home immediately or within 6 months, therefore reunification with mother or father remains the goal.
>
> . . . .
>
> 7. DSS has not made reasonable efforts to implement the permanent plan for the juvenile.
>
> . . . .
>
> 10. Pursuant to NCGS §7b-507, the Court specifically finds: [Mother]only
> efforts to reunite would be futile and would be inconsistent with the juvenile(s)' health, safety, and need for a safe permanent home within a reasonable period of time.
>
> 11. At this time, the juvenile's continuation in or return to his/her home is contrary to his/her best interest[.]
>
> . . . .
>
> Additional findings of court: . . . . [Mother] lied at the last [hearing] regarding her participation in therapy. . . . [the trial court] is at a point today where he cannot trust [mother]. It appears [mother] says whatever she needs to say to move to the next step.

The trial court then concluded that

> 4. Continuation of the juveniles(s)[sic] in or return to the home would be contrary to their best interest, health, safety and welfare.

Respondent-mother contends that the trial court's factual findings are insufficient under § 7B-907. We agree.

Under § 7B-907(b), the trial court must consider the relevant criteria and issue written findings. Finding 4, stating that reunification is possible, and finding 7, stating that DSS has not made reasonable efforts, do not support a conclusion continuing placement with DSS. Based on its other findings, such as finding 11 that return to the home is contrary to the juveniles' best interest, it seems the trial court only meant to find that reunification remained possible with Hailey's

father. However, as to the § 7B-907 criteria, the court did not distinguish between the two parents.

We note that the confusion evident in this order arises from the fact that although the court was addressing two parents with very different situations, the court entered one order as to both parents using a form order as its basis, with some additional handwritten findings. In some places, the order notes that a particular finding addresses only one parent; in other places, provisions appear to apply to both parents, although it seems that the trial court really meant to refer to only one parent. Although the form itself is an excellent form, the modifications made and handwritten additional findings, which were apparently written as a summary by another person in the courtroom,[3] make it very difficult to determine exactly what the court actually found as to each separate parent. Only from reading the transcript of the trial court's statements in court can we determine that the court meant to cease reunification efforts as to the mother only and not to the father, and why this is so. As this court has noted previously, a narrative summary of a witness' testimony is not a finding of fact. *See In re O.W.*, 164 N.C. App. at 702-03, 596 S.E.2d at 854.

Further, although the trial court found that returning the juveniles to the home is contrary to their best interest, that finding alone is insufficient to support the trial court's conclusion not to return the juveniles home. N.C. Gen. Stat. § 7B-907(b)(1) requires the trial court to consider and make findings about "[w]hether it is possible for the juvenile to be returned home immediately or within six months, and if not, why it is not in the juvenile's best interests to return home" and any other relevant factor under § 7B-907(b)(1). N.C. Gen. Stat. § 7B-907(b).

"[T]he trial court must . . . find the ultimate facts essential to support the conclusions of law." *In re O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853 (quotation marks and citation omitted). "Evidentiary facts are those subsidiary facts required to prove the ultimate facts. Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *Appalachian Poster Advertising Co., Inc. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988) (quotation marks, citations and brackets omitted).

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3. Many of the handwritten findings are stated as a third person narrative summary of both testimony and the court's comments. For example, paragraph 16, entitled "Other Findings" begins "Ct. has all parties, family members, friends and agency reps. affirm prior to offering the ct. any testimony or evidence." Many findings begin with statements such as "M (mother) says…," "SW (social worker) says …," "Ct. (court) tells M (mother)…," "Ct. stated it would …", and "Ct. says he …."

In this case, one ultimate fact missing from the trial court's current order is a finding that it is not possible for the juveniles to be returned to their mother's home within six months and *why* returning the juveniles to their mother is not in their best interest, if it found that the evidence supports such a finding.[4] *See In re Ledbetter*, 158 N.C. App. 281, 286, 580 S.E.2d 392, 395 (2003) (reversing trial court for, *inter alia*, failure to explain why it was not in the juvenile's best interest to return home). The trial court recited a good deal of testimony which might support such a finding, but the recitation of testimony does not constitute a finding of fact. *See In re O.W.*, 164 N.C. App. at 702-03, 596 S.E.2d at 854. Further, although referencing the Guardian Ad Litem's report or the DSS summary can helpfully point reviewing courts to the evidence underlying a trial court's findings, merely incorporating those reports by reference without making specific findings is not sufficient. *In re A.S.*, 190 N.C. App. 679, 694, 661 S.E.2d 313, 322 (2010).

We hold that the trial court's findings here are insufficient under § 7B-907 to support its conclusion not to return the juveniles to their mother's home. However, there was sufficient evidence in the record to support proper findings as to this issue, and it appears from the trial judge's statements at the hearing that he meant to make these findings. Accordingly, we must reverse the trial court's order ceasing reunification efforts and remand for additional findings of fact. *See In re J.M.D.*, ___ N.C. App. ___, ___, 708 S.E.2d 167, 174 (2011).

In her second through fourth arguments on appeal, respondent-mother contends that the trial court erred in terminating her parental rights to the juveniles. As we must reverse and remand the order ceasing reunification efforts as to respondent-mother, we must also reverse and remand the order terminating her parental rights to the juveniles. However, given our disposition above, we will not address respondent's arguments regarding the trial court's termination order.

REVERSED and REMANDED.

Judges ELMORE and STEELMAN concur.

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4. We note that in the form used by the trial court, there would be room for sufficient findings under the part of finding 4 *not* used by the trial court, which states, "It is not possible for the juvenile(s) to be returned home immediately or within 6 months nor is it in the juvenile(s)' best interest to return home *because*: " (emphasis added).

IN RE K.O.

[223 N.C. App. 420 (2012)]

IN THE MATTER OF K.O.

No. COA12-722

(Filed 20 November 2012)

Termination of Parental Rights—drug abuse—alternative child care arrangements—private custody action

The trial court did not err by concluding that grounds existed to terminate respondent's parental rights to the juvenile under N.C.G.S. § 7B-1111(a)(6) (respondent's drug abuse with the lack of an alternative care arrangement). Although respondent argued that she had placed the juvenile with petitioner in an alternative childcare arrangement, petitioner had commenced a private custody action against respondent and was awarded custody of the juvenile. Respondent had no ability to unilaterally decide that she no longer wanted petitioner to have custody of the juvenile, and petitioner could be deemed to be respondent's alternative child care arrangement for the juvenile.

Appeal by respondent-mother from judgment entered 14 March 2012 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 29 October 2012.

Shapack & Shapack, P.A., by Edward S. Shapack, and Horack, Talley, Pharr & Lowndes, PA, by Elizabeth Johnstone James, for petitioner-appellee.

Richard Croutharmel for respondent-appellant mother.

ELMORE, Judge.

Mother (respondent) appeals from a judgment terminating her parental rights to her minor child, K.O. (the juvenile). We affirm.

I. Background

In August 2008, L.A.W. (petitioner) an acquaintance of the respondent initiated a custody action against respondent seeking legal and physical custody of the juvenile. By order entered 16 April 2009, the trial court awarded permanent legal and physical custody of the juvenile to petitioner. The trial court found respondent had abandoned the juvenile to petitioner's exclusive care and control, and had failed to follow through with a drug treatment program.

On 2 September 2011, petitioner filed a petition to terminate respondent's parental rights to the juvenile on the ground that the juvenile was a dependent juvenile (N.C. Gen. Stat. § 7B-1111(a)(6)) due to respondent's continued drug abuse problems. Petitioner filed a motion to amend the petition on 1 November 2011, seeking to add the ground that respondent's parental rights to another child had been terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(9). The trial court allowed the motion to amend by order entered 28 December 2011.

After a hearing on 22 February 2012, the trial court entered a judgment terminating respondent's parental rights on 14 March 2012. In its judgment, the trial court deemed the petition amended to add the ground of abandonment (N.C. Gen. Stat. § 7B-1111(a)(7)) to conform with the evidence presented at the hearing. The trial court concluded grounds existed to terminate respondent's parental rights to the juvenile based on the grounds alleged in the petition, and the newly added ground of abandonment. Respondent now appeals.

II. Dependent Juvenile

Respondent argues that the trial court erred in concluding the existence of the ground of dependency under N.C. Gen. Stat. § 7B-1111(a)(6) because respondent had placed the juvenile in an alternative childcare arrangement. We disagree.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), a trial court may terminate parental rights where it finds:

> 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.

N.C. Gen. Stat. § 7B-1111(a)(6) (2011). Respondent does not contest the trial court's conclusion that the juvenile is a dependent juvenile due to respondent's pattern of substance abuse and failure to provide proper care, supervision and a safe home for the juvenile. Respondent only challenges the trial court's conclusion that she lacks an appropriate alternative child care arrangement. Respondent contends that her alternative child care arrangement is custody of the

juvenile with petitioner, and, thus, for petitioner to show she lacked an alternative child care arrangement, petitioner would have to prove respondent no longer desired the juvenile to live with petitioner, which petitioner has not done.

We are not persuaded by respondent's argument. Petitioner does not have custody of the juvenile at respondent's request. Rather, petitioner commenced a private custody action against respondent and was awarded custody of the juvenile due to respondent's substance abuse problems and abandonment of the juvenile in petitioner's care. Respondent has no ability to unilaterally decide that she no longer wants petitioner to have custody of the juvenile, and petitioner cannot be deemed to be respondent's alternative child care arrangement for the juvenile. Accordingly, we hold the trial court did not err in concluding that grounds exist to terminate respondent's parental rights to the juvenile under N.C. Gen. Stat. § 7B-1111(a)(6).

Respondent does not contest the trial court's conclusion that termination of her parental rights was in the best interest of the juvenile. Accordingly, we affirm the trial court's order terminating respondent's parental rights to the juvenile, and we need not address respondent's arguments regarding the court's amendment of the petition and conclusions that grounds also existed to terminate her parental rights under N.C. Gen. Stat. § 7B 1111(a)(7) and (9). *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds." (citation and quotations omitted)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

III. Conclusion

Accordingly, we affirm the trial court's order terminating respondent's parental rights to her juvenile K.O.

Affirmed.

Judges STEELMAN and STROUD concur.

LEARNING CENTER/OGDEN SCHOOL, INC., D/B/A THE LEARNING CENTER CHARTER SCHOOL, PLAINTIFF V. CHEROKEE COUNTY BOARD OF EDUCATION, D/B/A CHEROKEE COUNTY SCHOOLS, DEFENDANT

No. COA11-1270

(Filed 20 November 2012)

Schools and Education charter school funding—amendment of county budget

The trial court properly entered summary judgment for the Cherokee County Board of Education (CCBE) with respect to a transfer of funds that affected the amount due to charter schools. Under *Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ.*, No COA10-1121 (20 September 2011), since CCBE amended its budget prior to the end of the fiscal year, that amendment was effective to preclude the Learning Center Charter School from sharing in the funds transferred by the amendment.

Appeal by plaintiff from order entered 24 May 2011 by Judge Zoro J. Guice, Jr. in Cherokee County Superior Court. Heard in the Court of Appeals 15 August 2012.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot, A. Ward McKeithen, and Matthew F. Tilley, for plaintiff-appellant.

Campbell Shatley, PLLC, by Christopher Z. Campbell and Brian D. Elston, for defendant-appellee.

GEER, Judge.

Plaintiff Learning Center/Ogden School, Inc., d/b/a the Learning Center Charter School ("Learning Center"), appeals from the trial court's order granting summary judgment to defendant Cherokee County Board of Education, d/b/a Cherokee County Schools ("CCBE"). Learning Center argues that the trial court erroneously concluded that CCBE properly amended its 2009-2010 budget before the end of the 2009-2010 fiscal year, transferring funds from the local current expense fund to a separate fund. Learning Center contends that it was entitled to a pro rata share of the funds that were the subject of the budget amendment, arguing only that the amendment was not sufficient to remove the funds from the local current expense fund.

This Court's recent decision in *Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ.*, 215 N.C. App. 530, 715 S.E.2d 625

(2011), *disc. review denied*, 325 N.C. 573, 724 S.E.2d 531 (2012), is controlling. Under *Thomas Jefferson*, since CCBE amended its budget prior to the end of the fiscal year, that amendment was effective to preclude Learning Center from sharing in the funds transferred by the amendment. Accordingly, we affirm the order of the trial court.

In prior cases, school boards and charter schools have litigated which funds received by a local school administrative unit must be shared with the charter schools. Our legislature has provided that for each student attending a charter school in a particular school district, the "local school administrative unit" must transfer to the charter school "an amount equal to the per pupil *local current expense appropriation* to the local school administrative unit for the fiscal year." N.C. Gen. Stat. § 115C-238.29H(b) (2011) (emphasis added).

Under N.C. Gen. Stat. § 115C-426 (2011), the State Board of Education in cooperation with the Local Government Commission has authority to create a uniform budget format for use by local school administrative units.[1] That uniform budget format must include a "local current expense fund." N.C. Gen. Stat. § 115C-426(c). The "local current expense fund," in turn, must include "appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system. . . ." N.C. Gen. Stat. § 115C-426(e).

This Court has held that the "local current expense fund" under N.C. Gen. Stat. § 115C-426 is synonymous with the "local current expense appropriation" that must be shared with charter schools under N.C. Gen. Stat. § 115C-238.29H(b). *Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 347, 563 S.E.2d 92, 98 (2002). While school boards have argued that not all funds deposited in the local current expense fund are subject to distribution to charter schools, this Court, in *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 655 S.E.2d 850 (2008) (*Sugar Creek I*), and *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 673 S.E.2d 667 (2009) (*Sugar Creek II*), set out a simple bright-line rule. As this Court explained in *Thomas Jefferson*, the holdings in those cases established "that when 'restricted funds' are placed in the 'local current expense fund' and not in a separate account, they must be

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1. N.C. Gen. Stat. § 115C-426 was amended by 2010 N.C. Sess. Law ch. 31, § 7.17(a) (effective July 1, 2010), to clarify the provisions at issue here.

included in the computation of the amount due to the charter school." 215 N.C. App. at 539, 715 S.E.2d at 631. *See also id.* at 538, 715 S.E.2d at 631 ("[I]f the funds are placed in the 'local current expense fund' and not in a 'special fund,' they must be considered when calculating the per pupil amount due the charter schools.").

On 16 December 2009, following this Court's decision in *Sugar Creek II*, the Department of Public Instruction and the Local Government Commission exercised their authority under N.C. Gen. Stat. § 115C-426(a) to authorize creation of a new fund. This fund, called Fund 8, was one in which school boards could "separately maintain funds that are restricted in purpose and not intended for the general K-12 population" in the local school administrative unit.

On 17 May 2010, plaintiff Learning Center sent a letter to CCBE demanding payment of funds it alleged the Board still owed the school for the 2006-2007, 2007-2008, and 2008-2009 school years, as well as an as-yet-undetermined amount for the 2009-2010 school year. On 8 June 2010, CCBE adopted a resolution creating "Fund 8." Then, on 28 June 2010, prior to the close of the 2009-2010 fiscal year, CCBE adopted a resolution moving certain funds in the 2009-2010 budget that it classified as restricted from its local current expense fund to the newly-created Fund 8.

In addition, also on 28 June 2010, CCBE adopted a resolution that attempted to move certain restricted funds received by the Board in fiscal year 2006-2007 out of the local current expense fund and into Fund 8 for the 2006-2007 fiscal year. On 12 August 2010, CCBE adopted an identical resolution purporting to transfer restricted funds for fiscal years 2007-2008 and 2008-2009.

Learning Center filed suit alleging that CCBE was in violation of the charter school funding statutes because it had transferred to Learning Center a *pro rata* share of only a portion of the funds in its local current expense appropriation for the years 2006-2007, 2007-2008, 2008-2009, and 2009-2010. Learning Center contended that the resolutions amending the budgets for those years were ineffective and that CCBE owed Learning Center $231,157.00 for the fiscal years running from 2006 through 2009 and owed an unknown amount for the 2009-2010 fiscal year. CCBE, in its answer, included a counterclaim seeking a declaratory judgment that it did not have to share funds with Learning Center that were restricted by law as to their use or were used to provide voluntary services to populations outside its obligation to provide an education to public school students.

The parties cross-moved for summary judgment. On or about 20 May 2011, the trial court granted summary judgment to Learning Center as to fiscal years 2006-2007, 2007-2008, and 2008-2009, but granted summary judgment to CCBE with respect to funds transferred to Fund 8 during the 2009-2010 fiscal year. Both parties timely appealed to this Court.

Discussion

After the filing of the parties' notices of appeal, this Court, in *Thomas Jefferson*, again considered what funds must be included in a school board's calculation of the *pro rata* share to be distributed to charter schools. In that opinion, the Court addressed, among other issues, the effect of a school board's attempt to amend its budget resolutions for fiscal year 2008-2009 and 2009-2010, precisely the issues presented by this case.

In *Thomas Jefferson*, the attempted amendment of the 2008-2009 budget occurred on 8 December 2009, after the close of the fiscal year on 30 June 2009. 215 N.C. App. at 540, 715 S.E.2d at 632. The board created a new Fund Seven and stated that it was transferring funds from the local current expense fund into Fund Seven, even though no funds could actually transfer since all the funds for the 2008-2009 school year had been spent. *Id*. The Court agreed with the trial court that "[s]ince the funds were already spent, the trial court correctly held that the purported amendment to the 2008-09 budget was 'without legal effect.' " *Id*. at 541, 715 S.E.2d at 632.

With respect to the 2009-2010 fiscal year budget, however, the Court noted that the school board had amended that budget on 12 January 2010, before the end of the fiscal year, and had transferred over $5 million from the local current expense fund into Funds Seven and Eight. *Id*. 715 S.E.2d at 633. In concluding that the school board had authority to amend its 2009-2010 budget to make this transfer, the Court first noted that *Sugar Creek I* had already rejected the charter school's argument that "all monies provided to the local administrative unit must be placed into the 'local current expense fund' (Fund Two)." *Thomas Jefferson*, 215 N.C. App. at 542, 715 S.E.2d at 633. Further, the Court also rejected the charter school's claim that " 'restricted funds' cannot be placed in a fund separate from the 'local current expense fund' without the specific direction from the donor of the funds." *Id*. at 544, 715 S.E.2d at 634.

Instead, this Court explained, "*Sugar Creek I* and *II* clearly indicate that it is incumbent upon the local administrative unit to place restricted funds into a separate fund. If the funds are left in the 'local current expense fund,' then they are to be considered in computing the per pupil amount to be allocated to the charter school." *Id.* at 544-45, 715 S.E.2d at 634. Therefore, the Court held, the school board "had the authority to amend its 2009-10 budget to transfer restricted funds from Fund Two to Funds Seven and Eight." *Id.* at 545, 715 S.E.2d at 634.

In this case, CCBE, because of *Thomas Jefferson*, moved to withdraw its appeal on 6 July 2012, acknowledging that the decision resolved the question whether CCBE could effectively amend its budgets for prior fiscal years. This Court allowed that motion on 10 July 2012.

With respect to Learning Center's appeal, the only issue before this Court is whether CCBE's amendment of the budget for the 2009-2010 fiscal year was effective in removing the funds sought to be transferred from the local current expense fund. Learning Center does not dispute that the funds that CCBE was attempting to transfer were properly classified as "restricted funds" that could be placed in "Fund 8," as provided by the Department of Public Instruction.

Learning Center urges on appeal that although *Thomas Jefferson* held that a school board could effectively amend its budget during the current fiscal year, this Court should hold that a purported transfer of funds from the local current expense fund is only effective to the extent that the school board can show that the money has not already been spent. However, the language in *Thomas Jefferson* cited by Learning Center in support of this argument related only to a school board's attempt to amend prior year budgets. The Court observed as to such post hoc amendments, "[s]ince the funds were already spent, the trial court correctly held that the purported amendment to the 2008–09 budget was 'without legal effect.' " *Id.* at 541, 715 S.E.2d at 632. *Thomas Jefferson* did not include such a requirement for current-year amendments even though the amendment in that case occurred mid-way through the fiscal year.

Instead, the Court's "Conclusion" in *Thomas Jefferson* set out the following rules with respect to calculation of the amounts due to a charter school:

> Under our prior holdings in *Delany* and *Sugar Creek I* and *II*, funds placed into the "local current expense fund" must be con-

> sidered in computing the amounts due to a charter school. During the current fiscal year, a local administrative unit may amend its budget to place restricted funds into special funds. However, it may not retroactively amend the budget of a fiscal year that has already ended and the funds expended.

Id. at 545, 715 S.E.2d at 635. This Court's holding was precise and unambiguous. We may not alter it to add the requirement that a school board, when amending a current fiscal year budget, must show that the money being transferred had not already been spent.

Here, CCBE amended its budget during the current fiscal year, although, admittedly, only just before the end of that year. Under *Thomas Jefferson*, this amendment was effective to transfer the restricted funds into the special fund. The trial court, therefore, properly entered summary judgment in favor of CCBE with respect to the 2009-2010 fiscal year.

Affirmed.

Judges ROBERT C. HUNTER and BEASLEY concur.

PEDRO L. MARTINEZ, PLAINTIFF v. UNIVERSITY OF NORTH CAROLINA, DEFENDANT

No. COA12-396

(Filed 20 November 2012)

1. Immunity—sovereign—breach of contract—university salary

Trial court erred in dismissing plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2) where plaintiff filed a breach of contract action concerning his salary after he moved from being provost of Winston-Salem State University to a full time faculty position. Defendant waived its sovereign immunity on a claim for breach of contract by entering into a contract with plaintiff regarding employment and salary.

2. Jurisdiction—failure to exhaust administrative remedies—breach of contract—university salary

The trial court erred in dismissing plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) where plaintiff filed a breach of contract action concerning his salary after moving from

provost of Winston-Salem State University to a full time faculty position. An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies; here, it is clear from the record that plaintiff exhausted the administrative remedies available to him by initiating a grievance with the faculty grievance committee, an appeal with the provost, and a further appeal with the chancellor.

3. Contracts—university salary—claim for breach—sufficiently stated

The trial court erred in dismissing plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff filed a breach of contract claim concerning his salary after he moved from being provost of Winston-Salem State University to being a full-time faculty member. When viewed as admitted, plaintiff's allegations stated a valid claim for breach of contract.

Appeal by plaintiff from order entered 18 January 2012 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 10 October 2012.

David B. Puryear of PURYEAR & LINGE PLLC, attorney for plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Brian R. Berman, for The University of North Carolina.

ELMORE, Judge.

Pedro L. Martinez (plaintiff) appeals from an order granting a motion to dismiss in favor of The University of North Carolina (defendant). We reverse and remand.

In August 2008, plaintiff was employed as provost of Winston Salem State University (WSSU), a constituent institution of defendant. Sometime that month, plaintiff was approached by the chancellor of WSSU and asked to resign from his position as provost, and to accept a full-time faculty position. Plaintiff agreed, and he entered into a written contract with WSSU (the contract). The contract, titled "Settlement Agreement," governed the terms of plaintiff's transition from provost to full-time faculty member. The contract provided that plaintiff "shall continue to receive full administrative annual salary of $180,000.00 . . . from September 1, 2008 and ending June 30, 2009,"

after which, plaintiff would then "retreat to the Faculty of the School of Education at a salary commensurate with comparable salaries of senior faculty in the School of Education as determined at that time."

In May 2009, WSSU notified plaintiff that he would be paid an annual salary of $85,000.00 per year as a full-time faculty member. However, plaintiff was not satisfied with that salary. According to plaintiff, that amount was "not a salary commensurate with salaries paid to other senior tenured faculty members employed by defendant who have retreated from an administrative position[.]" Plaintiff then initiated a grievance, and a faculty grievance committee investigated his argument. The committee determined that plaintiff's salary was appropriate, and plaintiff appealed this decision to the new provost of WSSU. The new provost affirmed the decision on 1 March 2010. Plaintiff then continued his appeal to the chancellor of WSSU, who also affirmed the decision on 23 March 2010.

On 17 May 2011, plaintiff filed suit against defendant for 1) breach of contract and 2) violation of the Wage and Hour Act. However, on 14 September 2011, plaintiff amended his complaint, alleging only a claim for breach of contract. On 21 September 2011, defendant filed a motion to dismiss 1) pursuant to Rules 12(b)(1) and (2) of the North Carolina Rules of Civil Procedure under the theory of sovereign immunity and 2) pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. On 18 January 2012, the trial court entered an order granting defendant's motion. Plaintiff now appeals.

II. Arguments

A. Sovereign immunity

Plaintiff first argues that the trial court erred in dismissing his amended complaint pursuant to Rules 12(b)(1) and (2) because defendant waived its sovereign immunity. We agree.

i. 12(b)(2)

[1] "[A]n appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction[.]" *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) (citations omitted). We must review the record to determine whether there is evidence to support the trial court's determination that exercising its jurisdiction would be appropriate. *See Stacy v. Merrill*, 191 N.C. App. 131, 134,

664 S.E.2d 565, 567 (2008) (Holding that "[t]he standard of review of the trial court's decision to grant a motion to dismiss under Rule 12(b)(2) is whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate.").

It is a well established rule that "[t]he State cannot be sued in its own courts or elsewhere unless it has expressly consented to such suits." *Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 383, 269 S.E.2d 217, 219 (citation omitted). However, our Supreme Court has held that

> whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. Thus, in this case, and in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant.

Smith v. State, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) (citation omitted).

Here, defendant, an agency of the State, entered into a contract with plaintiff regarding employment and salary. As such, defendant waived its sovereign immunity to suit based on a claim for breach of that contract. Accordingly, we conclude that the trial court erred in dismissing plaintiff's complaint pursuant to Rule 12(b)(2).

i. 12(b)(1)

[2] Likewise, we also conclude that the trial court erred in dismissing plaintiff's complaint pursuant to Rule 12(b)(1). "An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies. An appellate court's review of such a dismissal is *de novo*." *Johnson v. Univ. of N.C.*, 202 N.C. App. 355, 357, 688 S.E.2d 546, 548 (2010) (quotations and citations omitted).

Here, it is clear from the record that plaintiff exhausted the administrative remedies available to him. Before filing suit, plaintiff initiated a grievance with the faculty grievance committee, an appeal with the provost, and a further appeal with the chancellor.

B. Failure to state a claim

[3] Plaintiff next argues that the trial court erred in dismissing his amended complaint pursuant to 12(b)(6) because the amended complaint adequately pled all elements of a cause of action for breach of contract. We agree.

"The motion to dismiss under N.C.R. Civ. P. 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). "The elements of breach of contract are (1) the existence of a valid contract and (2) breach of the terms of the contract." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (quotations and citation omitted).

Here, plaintiff's amended complaint alleged 1) "plaintiff contracted with defendant to receive, upon his return to a full time tenured faculty position, a salary commensurate with salaries paid to other senior tenured faculty members who have retreated from an administrative position" and 2) "[d]efendant breached its contract with plaintiff by failing and refusing to pay plaintiff, upon his return to his full time tenured faculty position, a salary commensurate with comparable salaries of senior faculty[.]" When viewed as admitted, these allegations state a valid claim for breach of contract. Thus, we conclude that the trial court erred in dismissing plaintiff's complaint pursuant to Rule 12(b)(6).

III. Conclusion

In sum, we conclude that the trial court erred in dismissing plaintiff's claim pursuant to Rules 12(b)(1), (2), and (6). We reverse the trial court's order and remand for further proceedings.

Reversed and Remanded.

Judges STROUD and BEASLEY concur.

MINTZ v. VERIZON WIRELESS

[223 N.C. App. 433 (2012)]

CYNTHIA MINTZ, EMPLOYEE PLAINTIFF v. VERIZON WIRELESS, EMPLOYER, AMERICAN INSURANCE GROUP PLAN, INC., CARRIER (SEDGWICK CMS, THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA12-306

(FILED 20 NOVEMBER 2012)

1. Workers' Compensation—injury arising out of employment—causal relationship

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's injury arose out of her employment. There was a causal relationship between plaintiff's employment and her injury because she incurred her injury based on a condition in her workplace.

2. Workers' Compensation—injury occurring in the course of employment—time, place, circumstances

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's injury occurred "in the course of" her employment. Plaintiff's injury occurred during the hours of employment, even though it happened during an unpaid break, and plaintiff was injured on premises essentially controlled by defendant-employer while returning to her cubicle after engaging in an activity she undertook for her personal comfort.

3. Workers' Compensation—finding of fact—supported by material evidence

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff's fall materially aggravated the arthritic condition in her knee. The finding was supported by the testimony of Dr. Messina, which was competent evidence.

4. Attorney Fees—workers' compensation—properly awarded

The Industrial Commission did not err in awarding plaintiff attorney's fees through a proper application of N.C.G.S. § 97-88.

Appeal by defendants from opinion and award entered 7 October 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 August 2012.

Greg Jones & Associates, P.A., by Cameron D. Simmons, for plaintiff.

Hedrick Gardner Kincheloe & Garofalo, L.L.P., by M. Duane Jones, Erica B. Lewis, and Lindsey L. Smith, for defendants.

HUNTER, Robert C., Judge.

Defendant-employer Verizon Wireless ("defendant-employer") and defendant-carrier American Insurance Group Plan, Inc. (Sedgwick CMS, third-party administrator) ("collectively defendants") appeal from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("Full Commission") filed 7 October 2011. Defendants argue on appeal that the Full Commission erred by: (1) concluding plaintiff Cynthia Mintz ("plaintiff") sustained an injury "arising out of" and "in the course of" her employment; (2) finding plaintiff's fall materially aggravated her underlying arthritis in her knee; and (3) awarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88. After careful review, we affirm the opinion and award.

Background

Plaintiff is a 54-year-old woman who has been an employee of defendant-employer for six years as a customer care representative. She worked on the second floor of the building. At the time of the incident, defendant-employer did not own the building where plaintiff was injured. Todd Lee Swank ("Mr. Swank"), plaintiff's supervisor, testified that, in addition to defendant-employer, there were several other businesses in the building including: (1) Strayer University, which only offered services to employees of defendant-employer; (2) Eurst, a cafeteria for defendant-employer's employees; (3) SOS Security, which provided security services to defendant-employer; (4) defendant-employer's mail room facility; and (5) in-house contractors that provided cleaning services. The general public did not have access to the building without permission and authorization from an employee's supervisor.

On 22 July 2009, plaintiff contends that during her hour-long unpaid lunch break, which defendant-employer required she take, she walked through the hallways on the first floor of the building for exercise. Plaintiff testified that "[t]hey had a thing set up that you can walk in there through the hallways on the first floor[.]" The hallways on the first floor were a common area to which all employees had access. After she walked for 30 minutes, plaintiff went to the restroom on the first floor. As she was leaving the bathroom and

walking toward the elevator to return to her cubicle, she slipped on a piece of ice from the ice-machine located outside the ladies' bathroom and fell on her knee.

After the incident, plaintiff saw Dr. Robert Messina ("Dr. Messina") whom she had seen in the past for knee pain. Five years prior to this incident, plaintiff underwent knee surgery on the same knee on which she fell. On 29 July 2009, after plaintiff's fall, Dr. Messina diagnosed her with a left knee contusion. Plaintiff had numerous follow-up visits with Dr. Messina where she underwent steroid injections and was prescribed various medications for her ongoing knee issues. At his deposition on 28 September 2010, Dr. Messina stated that plaintiff's fall materially aggravated the arthritis in her knee.

On 12 August 2010, Deputy Commissioner Robert Harris heard the matter and filed an opinion and award on 8 March 2011 concluding that plaintiff suffered a compensable injury and awarding plaintiff indemnity benefits, medical compensation, and $4770 in attorney's fees, assessed in a separate order, pursuant to N.C. Gen. Stat. § 97-90(c). Defendants appealed Deputy Commissioner Harris's opinion and award on 23 March 2011 and appealed his separate order assessing attorney's fees on 31 March 2011. On 11 August 2011, the Full Commission heard the matter. After reviewing the evidence, the Full Commission filed its opinion and award on 7 October 2011 ("Full Commission's opinion"). Specific findings of fact and conclusions of law will be addressed as needed as they relate to defendants' arguments on appeal.

Arguments

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). "The Commission's conclusions of law are,

however, reviewed *de novo*." *Gray v. RDU Airport Auth.*, 203 N.C. App. 521, 525, 692 S.E.2d 170, 174 (2010).

I. Injury "Arising Out Of" and "In The Course of" Employment

Under the Workers' Compensation Act, a plaintiff is entitled to compensation for an injury "only if (1) it is caused by an accident, and (2) the accident arises out of and in the course of employment." *Gray*, 203 N.C. App. at 525, 692 S.E.2d at 174 (internal quotation marks omitted); *see also* N.C. Gen. Stat. § 97-2(6) (2011). "The phrases 'arising out of' and 'in the course of' one's employment are not synonymous but rather are two separate and distinct elements both of which a claimant must prove to bring a case within the Act." *Gallimore*, 292 N.C. at 402, 233 S.E.2d at 531.

A. "Arising Out Of" Plaintiff's Employment

[1] Defendants argue that the Full Commission's conclusions of law nos. 2 and 3 were erroneous because plaintiff was injured on an unpaid lunch break, plaintiff's employment was not a contributing proximate cause of the accident, and "[n]othing about [p]laintiff's job duties placed her at a greater risk than the general public of slipping on ice or water." We are not persuaded.

" 'Arising out of' the employment is construed to require that the injury be incurred because of a condition or risk created by the job. In other words, [t]he basic question [to answer when examining the arising out of requirement] is whether the employment was a contributing cause of the injury." *Billings v. Gen. Parts, Inc.*, 187 N.C. App. 580, 586, 654 S.E.2d 254, 258 (2007) *writ denied* and *review denied*, 362 N.C. 233, 659 S.E.2d 435 (2008) (internal quotation marks and citations omitted). Our Supreme Court has held that, generally, "an injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment." *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E.2d 350, 354 (1972) (internal quotations marks omitted). "When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment." *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968).

Based on the record of evidence, the Full Commission found, in pertinent part, that "[m]embers of the general public were not allowed in the building. Only those with a security badge or who were on a guest list approved by [d]efendant-[e]mployer could enter the building." This finding was supported by competent evidence in the record, the testimony of Mr. Swank. Thus, it is conclusive on appeal.

Based on this finding, the Full Commission concluded that plaintiff's injury was "incidental to her employment" since she would not be "equally exposed," as defendants contend, to the risk of slipping had she not been employed by defendant-employer. We find that there is a causal relationship between plaintiff's employment and her injury because she incurred her injury based on a condition in her workplace. Plaintiff was injured in a common area of the building, and the record indicates that employees were not only authorized but also encouraged to go to the first floor since Eurst, the cafeteria for employees, was located there, and employees had authorization to walk through the hallways on the first floor. Thus, we affirm the Full Commission's conclusion that plaintiff's injury "arose out of" her employment.

B. "In the Course of" Employment

[2] Next, defendants argue that plaintiff's injury did not occur "in the course of" her employment because plaintiff failed to meet the three elements of time, place, and circumstances. Specifically, defendants contend that: (1) plaintiff's injury did not occur at a time reasonably related to her employment since she was on an unpaid lunch break; (2) defendant-employer did not control or own the building where defendant was injured; and (3) plaintiff was not engaged in activities related to her employment. We disagree.

With regard to determining whether an injury occurs "in the course of" employment, this Court has concluded that

> The words [i]n the course of have reference to the time, place and circumstances under which the accident occurred. Clearly, a conclusion that the injury occurred in the course of employment is required where there is evidence that it occurred during the hours of employment and at the place of employment while the claimant was actually in the performance of the duties of the employment.

Harless, 1 N.C. App. at 455-56, 162 S.E.2d at 52. With regard to the time element, "the course of employment begins a reasonable time

before actual work begins and continues for a reasonable time after work ends and *includes intervals during the work day for rest and refreshment.*" *Id.* at 456, 162 S.E.2d at 53 (emphasis added). Defendants allege that this element is not met because plaintiff was on an unpaid lunch break.

The Full Commission determined that plaintiff's injury occurred during a time in her work day "built in for the employees' rest and refreshment." Moreover, the Full Commission noted that defendant-employer requires its employees to take an hour-long lunch break. While defendants focus on the fact that plaintiff was injured during an unpaid break to support their argument that the injury did not occur at a time reasonably related to her employment, we have no support in our caselaw for the proposition that the element of time is not established if an employee is on an unpaid break. Here, plaintiff's injury occurred during the hours of employment, even though it happened during an unpaid break. Thus, the Full Commission's conclusion accurately reflects that "in the course of" includes times during the workday for rest and refreshment. *See Harless*, 1 N.C. App. at 456, 162 S.E.2d at 53. Therefore, we affirm the Full Commission's conclusion of law with regard to the element of time.

With regard to the element of place, defendants contend that the Full Commission's conclusion of law no. 5 was erroneous. Moreover, defendants allege that findings of fact nos. 4-8, to the extent they infer defendant-employer maintained or controlled the building, were not supported by competent evidence.

Place is considered the "premises of the employer." *Harless*, 1 N.C. App. at 456, 162 S.E.2d at 52. While the Full Commission noted in its findings that defendant-employer no longer owned the building where plaintiff worked, it indicated that "[d]efendant-[e]mployer continued to be the main tenant in the building and maintained and controlled all activities occurring in the building." These findings were supported by competent evidence in the record that established all other contractors in the building, including the cleaning contractors, mail room, security, and Eurst, provided services to defendant-employer. Moreover, the only other business, Strayer University, offered services exclusively to employees of defendant-employer.

Based on these findings, the Full Commission concluded that because "an accident may be compensable if it occurs on the premises of the employer or adjacent premises that are owned or controlled by the employer[,]" the element of place was met because

defendant-employer "still essentially controlled the building, including the common area in which [p]laintiff fell." In support of its conclusion, the Full Commission cited *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977), and *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E.2d 570 (1962). In *Bass*, our Supreme Court noted that "injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment . . . provided the employee's act involves no unreasonable delay." 258 N.C. at 232, 128 S.E.2d at 574. Here, there was competent evidence that plaintiff was injured on premises essentially controlled by defendant-employer while she was returning to her cubicle from the first floor of the building during her lunch break. Thus, the conclusion that the element of place was met is justified, and defendants' argument is without merit.

With regard to the circumstances element, when an employee "is engaged in activity which he is authorized to undertake and which is calculated to further, [d]irectly or indirectly the employer's business, the circumstances are such as to be within the course of employment." *Harless*, 1 N.C. App. at 456, 162 S.E.2d at 52. Moreover, "[a]ctivities which are undertaken for the personal comfort of the employee are considered part of the 'circumstances' element of the course of employment." *Spratt v. Duke Power Co.*, 65 N.C. App. 457, 468-69, 310 S.E.2d 38, 45 (1983).

The Full Commission concluded that "[a]n employee tending to her personal needs is indirectly benefiting the employer[,]" and "it was in [d]efendant-[e]mployer's interest that [p]laintiff be rested and refreshed so she could provide pleasant and effective customer service, and the activity in which [p]laintiff was engaging when she fell thus indirectly benefited [d]efendant-[e]mployer." Therefore, plaintiff's lunch break was within the course of her employment.

Here, plaintiff was injured while returning to her cubicle after engaging in an activity she undertook for her personal comfort. The present case is similar to those cases where our Courts have recognized the personal comfort doctrine and found that employees engaging in activities for health and comfort constitute circumstances in the course of the employment. *See generally Rewis v. New York Life Ins. Co.*, 226 N.C. 325, 328, 38 S.E.2d 97, 99 (1946) (noting that "[a]n employee, while about his employer's business, may do those things which are necessary to his own health and comfort, even though personal to himself, and such acts are regarded as incidental to the

employment" and concluding that the employee's act of visiting the restroom and seeking comfort by the open window was in the course of his employment); *Spratt*, 65 N.C. App. at 468-69, 310 S.E.2d at 45 (concluding that "[a]ctivities which are undertaken for the personal comfort of the employee are considered part of the 'circumstances' element of the course of employment."). Moreover, we note that, with regard to the personal comfort doctrine, Larson's treatise on workers' compensation specifically states that:

> [i]njuries occurring on the premises during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he or she pleases.

Arthur Larson & Lex K. *Larson*, *Larson's Workers' Compensation Law* § 21.02[1][a] (2012) (hereinafter *Larson's*). We find Larson's explanation of the personal comfort doctrine persuasive and adopt its reasoning. If an employee is injured on premises owned or controlled by the employer on a lunch break, whether or not that break is paid, we hold that the circumstances are within "the course of" employment. Thus, defendants' argument is without merit.

II. Material Aggravation

[3] Next, defendants argue that the Full Commission's findings of fact that plaintiff's fall materially aggravated the arthritic condition in her knee were not supported by the "overall testimony" because Dr. Messina's assumption that plaintiff was asymptomatic prior to her fall was contradicted by evidence. Specifically, defendants contend that Dr. Messina's medical opinion was based on conjecture and speculation and was, therefore, incompetent. We disagree.

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Our Supreme Court has held that "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Young v. Hickory Business Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (quoting *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)).

In the present case, the Full Commission found that Dr. Messina testified with a reasonable degree of medical certainty that plaintiff's fall "materially aggravated [p]laintiff's underlying left knee arthritic condition." Furthermore, the Full Commission noted that "Dr. Messina held this opinion regardless of whether [p]laintiff had intermittent flare-ups in her left knee between 2005 and 2009." Accordingly, the Full Commission concluded that "[b]ased on a preponderance of the evidence, [p]laintiff has shown that her ongoing left knee condition is causally related to her compensable July 22, 2009 injury."

The Full Commission's finding of causation was supported by competent evidence. At his deposition, Dr. Messina testified that he concluded, with a reasonable degree of medical probability, that plaintiff's fall exacerbated the arthritis in her left knee. Dr. Messina also stated that the fact that plaintiff experienced intermittent knee pain in the time between her surgery and her fall "wouldn't impact" his opinion that "there was material aggravation." Here, Dr. Messina stated his opinion unequivocally with a reasonable degree of medical certainty; thus, this testimony is what distinguishes this case from those where our Courts have held that the finding of causation was based on incompetent evidence. *See Young*, 353 N.C. at 233, 538 S.E.2d at 916-17, (holding that because the medical expert's testimony "consists of comments and responses demonstrating his inability to express an opinion to any degree of medical certainty as to the cause of Ms. Young's illness," his opinion was incompetent and insufficient to support the Industrial Commission's finding of causation); *Edmonds v. Fresenius Medical Care*, 165 N.C. App. 811, 818, 600 S.E.2d 501, 506 (2004) (Steelman, J., dissenting) (concluding that because the medical expert's testimony only established that the treatment for plaintiff's injury "possibly" or "could or might" have caused plaintiff's renal problems, "[t]his testimony does not rise above a guess or mere speculation"), *rev'd per curiam for reasons stated in the dissent*, 359 N.C. 403, 610 S.E.2d 374 (2005).

III. Attorney's Fees

[4] Finally, defendants argue that the Full Commission's award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88 was premature since attorney's fees would not be allowed if this Court concluded the Full Commission erred. "The Commission or a reviewing court may award an injured employee attorney's fees [u]nder section 97-88, . . . if (1) the insurer has appealed a decision to the [F]ull Commission or to any court, and (2) on appeal, the Commission or

court has ordered the insurer to make, or continue making, payments of benefits to the employee." *Cox v. City of Winston Salem*, 157 N.C. App. 228, 237, 578 S.E.2d 669, 676 (2003) (internal quotation marks omitted). Here, plaintiff was awarded attorney's fees through a proper application of N.C. Gen. Stat. § 97-88. Thus, since we are affirming the Full Commission's opinion, we affirm the award of attorney's fees.

Conclusion

Because we find the Full Commission's conclusions of law that plaintiff's injury "arose out of" and "in the course of" her employment were justified and based on findings supported by competent evidence, we affirm the Full Commission's conclusions of law nos. 2-6. Moreover, since there was competent evidence supporting the finding that plaintiff's fall materially aggravated her arthritic condition, we affirm the Full Commission's finding of fact 19. Finally, we affirm the Full Commission's award of attorney's fees.

Affirmed.

Judges BRYANT and STEELMAN concur.

MNC HOLDINGS, LLC, PETITIONER v. TOWN OF MATTHEWS, RESPONDENT

No. COA12-703

(Filed 20 November 2012)

1. Appeal and Error—service of notice of appeal—non-jurisdictional—not a substantial or gross violation of appellate rules

The trial court had jurisdiction even though petitioner MNC Holdings contended it was not properly served notice of appeal in this matter. Any error in service made by the Town was non-jurisdictional and was not a substantial or gross violation of the appellate rules.

2. Zoning—variance petition—structural alterations when "required by law"

The trial court did not err by reversing the Town board's denial of a variance petition based on its erroneous application of

Section 153.224(D) of the Town of Matthews' Zoning Ordinance. The plain meaning of the zoning ordinance suggested that it allowed structural alterations when "required by law" in general. Because MNC was compelled by law to make the alteration, the ordinance should be interpreted liberally.

3. Judgments—recitation of facts in record—not freestanding findings of fact

Those portions of the judgment contested by respondent Town in a zoning case were merely a recitation of the facts contained in the record and not freestanding "findings of fact." Regardless, even if these portions somehow mischaracterized the evidence in the record before the trial court, there was no indication that the trial court's ultimate interpretation of the zoning ordinance would have been different absent these portions of its judgment.

Appeal by Respondent from judgment entered 19 March 2012 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 October 2012.

Smith Moore Leatherwood LLP, by Thomas E. Terrell, Jr. and Elizabeth Brooks Scherer, and Bringewatt & Snover, PLLC, by Kevin M. Bringewatt, for Petitioner-appellee.

Hamilton Stephens Steele & Martin, PLLC, by Rebecca K. Cheney, for Respondent-appellant.

HUNTER JR., Robert N., Judge.

This appeal arises from the denial of a variance petition by the Town of Matthews ("the Town"). Petitioner MNC Holdings, LLC ("MNC") sought review of the denial by writ of certiorari in superior court, which was granted. The court then reversed the denial of the petition, concluding the Town erroneously applied Section 153.224(D) of the Town of Matthews' Zoning Ordinance. For the following reasons, we hold that the trial court's application of the Ordinance was correct and affirm.

I. Factual & Procedural History

Since the 1980s, MNC and its predecessors have operated a medical waste incineration facility in the Town of Matthews. In 1991, the Town annexed the subject property and rezoned the land on which the facility is located from Heavy Industrial use to Single-Family

Residential use. This rezoning made the existing facility a "nonconforming use."[1] This status requires MNC to seek permission from the Town by variance petition before making physical alterations to the facility.

Since 1991, changes in Environmental Protection Agency regulations governing medical waste incinerators required MNC's air pollution equipment to be upgraded. On at least one prior occasion, the Town allowed MNC to make alterations to its facility. In 2009, the EPA and the North Carolina Department of Environment and Natural Resources ("DENR") adopted more stringent air quality regulations. These air quality regulations are enforced by DENR.

While the regulations at issue here were not scheduled to take effect until 2014, the Town petitioned DENR's Mecklenburg County Air Quality Division to shorten the time frame for MNC's compliance. At the Town's request, the date for MNC to comply was advanced to 6 October 2012. MNC promptly requested a variance from the Town. MNC explained that extensive and accelerated modifications to its facility would be necessary in order to comply with the new regulations in this shortened timeframe. In evaluating MNC's request for a variance, the Town zoning administrator held that Section 153.224(D) of the Town of Matthews' Zoning Ordinance ("the Ordinance") would not permit MNC to make the necessary alterations. His interpretation of the Ordinance would limit modifications to MNC's plant to only those alterations required by law to ensure the safety of the structure.

Following the zoning administrator's denial of MNC's request to make the necessary changes, MNC appealed to the Town's zoning board. On 3 November 2011, the zoning board unanimously upheld the zoning administrator's decision denying the variance. As required by the Ordinance, MNC then filed a petition for writ of certiorari for judicial review. The petition for review was granted and a hearing was held on 26 January 2012. The arguments presented at that hearing are discussed *infra*.

On 19 March 2012, the trial court reversed the Town's decision. On 20 March 2012, the Town properly filed notice of appeal. The same day, the Town emailed its notice of appeal to MNC's counsel of record. After the deadline for service by mail of the notice of appeal

1. The Town's zoning code defines a non-conforming use generally as one which "may not meet the minimum standards contained in [the zoning code] because they were developed under no specific standards or under standards which were less restrictive." Town of Matthews Zoning Ordinance § 153.220 (2012).

had expired on 18 April 2012, MNC moved in the trial court to dismiss the Town's appeal for failure to timely serve its notice of appeal as provided by Rule 3 of the N.C. Rules of Appellate Procedure. Judge Hugh B. Lewis of the Mecklenburg County Superior Court denied the motion to dismiss. MNC has renewed its motion to dismiss in this Court.

II. Jurisdiction

This Court has jurisdiction over appeals from the final judgments of Superior Courts in civil cases. N.C. Gen. Stat. § 7A–27(b) (2011). This includes appeals arising from "any final judgment entered upon review of a decision of an administrative agency." *Id.; see also Premier Plastic Surgery Center, PLLC v. Bd. of Adjustment for Town of Matthews*, ____ N.C. App. ____, ____, 713 S.E.2d 511, 514 (2011) ("Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A–27(b) [as] . . . a right of appeal lies . . . from the final judgment of a superior court entered upon review of a decision of an administrative agency." (quotation marks and citation omitted)).

III. Analysis

A. MNC's Motion to Dismiss

[1] MNC argues this Court lacks jurisdiction because MNC was not properly served notice of appeal in this matter. MNC contends the Town's email service of its notice of appeal did not comply with N.C. R. App. P. 3(e), which specifies that "[s]ervice of copies of the notice of appeal may be made as provided in [N.C. R. App. P. 26]." MNC argues email is not a method of service permitted by Rule 26, and therefore the Town's service violates the appellate rules, thus divesting this Court of jurisdiction to hear the Town's appeal. While MNC is correct that Rule 26 has not been strictly complied with, we disagree with MNC's conclusion that this Court lacks jurisdiction to hear the Town's appeal.

Prior to 1993, our Supreme Court held that both filing and proper service of the notice of appeal were jurisdictional requirements that must be met in order for our appellate courts to have jurisdiction. *See Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991) (stating that "[u]nder . . . the Rules of Appellate Procedure, a party entitled by law to appeal from judgment of superior court rendered in a civil action may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner. This rule is jurisdictional.").

In 1993, the Supreme Court held that proper filing of a notice of appeal is necessary to vest appellate courts with subject matter jurisdiction. However the manner of proper service of that notice is not a matter of subject matter jurisdiction, but rather a matter of personal jurisdiction which may be waived by a party. *See Hale v. Afro-American Arts Int'l*, 335 N.C. 231, 436 S.E.2d 588 (1993).

Following *Hale*, our Supreme Court decided *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008). The Court in *Dogwood* noted that "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198, 657 S.E.2d at 365. However, even non-jurisdictional errors may lead to dismissal of appeal if the error is substantial or gross. *Id.* at 199, 657 S.E.2d at 366.

> In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process.

Id. at 200, 657 S.E.2d at 366–67.

In *Lee v. Winget Rd., LLC*, this Court held in light of *Hale* and *Dogwood* that proper service of a notice of appeal is a non-jurisdictional requirement. 204 N.C. App. 96, 102, 693 S.E.2d 684, 689 (2010) (holding that "where a notice of appeal is properly and timely filed, but not served upon all parties" the "violation of Rule 3 is a non-jurisdictional defect"). Nevertheless, the Court in *Lee* dismissed the appeal, holding that the failure of the appellant to provide any notice whatsoever to some of the parties was a substantial violation of the rules necessitating dismissal. *Id.* at 103, 693 S.E.2d at 690. The Court explained that:

> two of the parties to this case were never informed of the fact that there was an appeal which affects their interests, [and] this Court has no way of knowing the positions these parties would have taken in this appeal. The fact that these parties have not objected to our consideration of the appeal is irrelevant, because as far as we can tell from the record, these parties are unaware of the appeal. Simply put, all parties to a case are entitled to notice that a party has appealed.

Id. The Court concluded that the *Lee* appellant's "noncompliance has impaired this Court's task of review and that review on the merits would frustrate the adversarial process." *Id.* at 102, 693 S.E.2d at 690.

Here we hold that any error in service made by the Town is non-jurisdictional and is not a substantial or gross violation of the appellate rules. In contrast to the appellees in *Lee*, MNC has been given actual notice of the Town's appeal, allowing them to fully participate in the proceedings. Moreover, both parties to this appeal are present and have submitted well researched briefs. Any technical error in service alleged by MNC has not materially impeded the adversarial process or impaired our ability to examine the merits of this appeal. As our Supreme Court has observed, "it is the task of an appellate court to resolve appeals on the merits if at all possible." *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 199, 657 S.E.2d at 366. We cannot conclude under these circumstances that the Town's noncompliance is "substantial or gross" noncompliance with our appellate rules. While practitioners need be cautioned that non-compliance with the Rules in future cases may result in dismissal and that an appellate discussion of their failure to follow the rules should be unnecessary, dismissal of the Town's appeal is unwarranted under the facts of this case.

B. Interpretation of the Ordinance

[2] Our review of a "trial court's zoning board determination is limited to determining [(1)] whether the superior court applied the correct standard of review, and to determin[ing] [(2)] whether the superior court correctly applied that standard." *Bailey & Assoc., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 190, 689 S.E.2d 576, 586 (2010) (quotation marks and citation omitted) (second alteration in original). The superior court reviews a board of adjustment's interpretation of a municipal ordinance *de novo*. *Morris Comm. Corp. v. City of Bessemer*, 365 N.C. 152, 155, 712 S.E.2d 868, 871 (2011). From the record it is clear that the trial court employed the proper standard of review. The issue in this appeal is whether the trial court's legal interpretation of the Ordinance was correct. Because interpretation of the Ordinance is a question of law, we also employ *de novo* review. *See Lamar Outdoor Adv., Inc. v. Hendersonville Zoning Bd.*, 155 N.C. App. 516, 518, 573 S.E.2d 637, 640 (2002). "Under *de novo* review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris Comm. Corp.*, 365 N.C. at 156, 712 S.E.2d at 871.

The parties present two fundamentally different interpretations of the Ordinance, which reads as follows:

> No structural alterations are allowed to any structure containing a nonconforming use except for those required by law or an order from the office or agent authorized by the Board of Commissioners to issue building permits to ensure the safety of the structure. **(Doc. Ex. 470)**.

The Town argues the Ordinance allows only alterations to nonconforming uses required by law to ensure the safety of the structure; thus, because the EPA regulations are not aimed at ensuring the safety of the structure, MNC is not permitted to make the alterations. The Town asserts that the plain meaning and purpose of the Ordinance is to regulate building safety, and that this fact, coupled with North Carolina law's disfavoring of nonconforming uses, warrants reversal of the trial court.

MNC contends that the Ordinance allows any alteration required by law; thus, the alteration should be allowed because the EPA regulation is a law requiring alterations to MNC's structure. The trial court agreed, explaining that "the intent of [the Ordinance] is to allow property owners of buildings that house a nonconforming use to make structural alterations that are required by law," and reversed the Town's narrow construction of the Ordinance. We agree with the trial court's interpretation that the plain meaning of the Ordinance suggests that it allows structural alterations when "required by law" in general.

Our Supreme Court has observed that:

> [w]hen construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Wiggs v. Edgecombe Cty., 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (internal citations and quotation marks omitted).

A plain reading of the Ordinance would apply the phrase "to ensure the safety of the structure" only to the phrase immediately preceding it, "an order from the office or agent authorized by the

Board of Commissioners to issue building permits[,]" and not to the prior phrase "those required by law[.]" ***See*** **Doc. Ex. 470**. However, in exercising a *de novo* construction of the statute, the trial court additionally examined the "intent" of the Ordinance. Thus, we must also examine the intent.

The intent of the statute is to allow property owners to make alterations when such alterations are "required by law." In our legal system, town ordinances must defer to state and federal laws. *See*, *e.g.*, *Craig v. Cty. of Chatham*, 356 N.C. 40, 53, 565 S.E.2d 172, 180–81 (2002) (finding a town's ordinance to be preempted by state law).[2] The fact that the Town enacted the Ordinance recognizes this fact. Further, "[z]oning ordinances are in derogation of the right of private property, and, where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner." *In re W.P. Rose Builders' Supply Co.*, 202 N.C. 496, 500, 163 S.E. 462, 464 (1932). Our Supreme Court has observed that this is especially true when property owners are required by law to make alterations to their property. *See Morris Comm. Corp.*, 365 N.C. at 159, 712 S.E.2d at 873. (finding a company could reinstall a nonconforming sign after being required to remove it because of a state highway project because "[o]ne of the fundamental purposes of zoning boards of adjustment is to provide flexibility and 'prevent . . . practical difficulties and unnecessary hardships' resulting from strict interpretations of zoning ordinances") (citation omitted) (second alteration in original); *In re O'Neal*, 243 N.C. 714, 719, 92 S.E.2d 189, 192 (1956) (finding a nursing home had the right to construct a new fireproof building required by law despite the Zoning Board of Adjustment's refusal).

Accordingly, because MNC is compelled by law to make the alteration, the Ordinance should be interpreted liberally. The provision of the Ordinance allowing for alterations "required by law" was placed there by the legislators specifically for the purpose of "provid[ing] flexibility and 'prevent[ing] practical difficulties and unnecessary hardships.' " *See Morris Comm. Corp.*, 365 N.C. at 159, 712 S.E.2d at 873. (citation omitted) Accordingly, we affirm the trial court's reversal of the zoning board.

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2. Federal regulations are generally given the same deference as federal statutes under a preemption analysis. *See Hopkins v. Ciba-Geigy Corp.*, 111 N.C. App. 179, 185, 432 S.E.2d 142, 145 (1993) ("Preemption is not limited to conflicts between state and federal statutes; federal regulatory schemes may preempt state common-law . . . as well.").

C. Erroneous "Findings of Fact"

[3] The Town additionally contends that the trial court erroneously made "findings of fact" that "there is substantial evidence in the Record that the required alterations can be accomplished within the footprint where the existing equipment and structures are located" and that "a previous zoning administrator had allowed *structural* alterations to Petitioner's property[.]" However, these portions of the judgment appear to be merely a recitation of the facts contained in the record, not freestanding "findings of fact." Regardless, even if these portions of the judgment somehow mischaracterize the evidence in the record before the trial court, there is no indication that the trial court's ultimate interpretation of the Ordinance would have been different absent these portions of its judgment.

IV. Conclusion

For the foregoing reasons, the judgment of the trial court is

AFFIRMED.

Judges HUNTER, Robert C., and CALABRIA concur.

STATE OF NORTH CAROLINA v. WILLIAM RONNIE BARNETT

No. COA12-381

(Filed 20 November 2012)

1. Evidence—prior crimes or bad acts—testimony—common scheme

The trial court did not err in a second-degree rape case by admitting testimony regarding defendant's prior bad acts under N.C.G.S § 8C-1, Rules 404(b) and 403 as part of a common scheme. Assuming *arguendo* that it was error to admit the testimony of T.I. and C.M., any error was harmless in light of T.L.'s properly admitted testimony. Further, the probative value of the prior incidents with T.L. outweighed any unfair prejudice to defendant.

2. Evidence—cross-examination elicited substantially similar evidence—no plain error

The trial court did not commit plain error in a second-degree rape case by allowing a witness to testify that she bought a shotgun and was going to shoot defendant. There is no prejudice to the defendant when cross-examination elicits testimony substantially similar to the evidence challenged.

3. Sentencing—no written findings—remanded for clerical error

Although the trial court did not err in a second-degree rape case by not making written findings in imposing a prison term greater than the presumptive sentence, the case was remanded for correction of a clerical error since the trial court found an aggravating factor but the incorrect box was marked on the judgment.

4. Appeal and Error—preservation of issues—failure to argue—failure to cite authority

The trial court did not err in a second-degree rape case by allowing T.I. and C.M. to give victim impact testimony. As defendant only cursorily argued that he was denied due process and cited no authority in support of his argument, the Court of Appeals declined to address that portion of his argument. N.C. R. App. P. 28(b)(6).

Appeal by Defendant from judgment entered 29 July 2011 by Judge Anna Mills Wagoner in Iredell County Superior Court. Heard in the Court of Appeals 11 September 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

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

BEASLEY, Judge.

Defendant appeals from his conviction of second-degree rape in violation of N.C. Gen. Stat. § 14-27.3(a). For the reasons stated below, we find no error in part and remand for correction of a clerical error in part.

The events giving rise to the charged offense in this case occurred twenty-seven years ago in 1985. The prosecuting witness, T.L.,[1] was born on 17 July 1969. Defendant, born in 1959, is her uncle.

Defendant filed a motion *in limine* to exclude testimony by T.L. and T.I., Defendant's daughter, under Rules 404 and 403 of the North Carolina Rules of Evidence. During a *voir dire* hearing on 25 July 2011, T.L., T.I., and C.M., a niece of Defendant and cousin of T.L. and T.I., testified to Defendant's prior sexual acts with them. The trial court found a "strikingly similar pattern" of sexual abuse and admitted the evidence to show motive, common plan, or opportunity. The trial court further found that the evidence was more probative than prejudicial and admitted the evidence subject to a limiting instruction. Defendant renewed his objection prior to each witness's testimony and each objection was overruled. The trial court gave limiting instructions as to the purposes for which the testimonies were offered at the conclusion of each witness's testimony.

At trial, T.L. testified that in late July or early August of 1985 she and her parents traveled from their home in West Virginia to visit her grandparents in Mooresville, North Carolina. At that time, Defendant lived with his wife, Nancy, in a trailer close to his parents' (T.L.'s grandparents') house. T.L., then sixteen years old, and her cousin Gary visited Defendant and Nancy at the trailer. On the way to the trailer, Defendant, Nancy, Gary, and T.L. went to the store and purchased fortified wine and some beer. Defendant, Nancy, Gary, and T.L. played cards, drank alcohol, and smoked marijuana at the trailer. T.L. drank an entire bottle of wine over the course of a couple of hours. T.L. was warm, so Defendant told Nancy to give T.L. a pair of her shorts to wear. After putting on the shorts, T.L. mentioned she had a headache. Nancy gave her a yellow pill to help her headache. T.L. swallowed the pill in the kitchen. After taking the pill, T.L. felt "dizzy," "woozy," and "sleepy." The last thing T.L. remembered was taking another shot of wine. When T.L. awoke, she was in Defendant's bed. T.L. was no longer wearing Nancy's shorts. Defendant was on top of her, vaginally penetrating T.L. with his penis. Nancy was also in the room. T.L. told Defendant to stop, tried to push Defendant off, and begged Nancy to help her. T.L. remembered nothing between taking the shot in the kitchen and waking up in the bedroom.

T.L. recounted Defendant's prior sexual contact with her. In 1977, Defendant touched T.L.'s breasts on several occasions at her grand-

1. We will use initials to protect the identities of the witnesses in this case.

parents' swimming hole. She testified that these encounters always occurred at her grandparents' house. Defendant would send the others away so that he and T.L. were alone when he touched her. On more than one occasion in 1978, Defendant touched her breasts, put her hand on his penis, and made her rub his penis up and down. These incidents ended when T.L. was about ten years old and her grandparents and Defendant moved to North Carolina.

In 1980, Defendant also masturbated in front of T.L. on two occasions. T.L. and her parents were unable to visit her grandparents for about three years due to financial troubles. T.L. visited her grandparents' house again when she was fifteen years old, but no incidents occurred during that visit.

T.I. was born on 21 March 1979. T.I.'s mother, Julie Barnett (Julie), was married to Defendant. After her parents separated, T.I. lived primarily with her mother but visited Defendant at her grandparents' house where Defendant lived. When she was three years old, Defendant digitally penetrated her genitals while bathing her. When she was four years old, Defendant masturbated in front of her in his bedroom. Defendant asked T.I. several times to touch him.

T.I.'s mother, Julie, also testified. Upon learning that Defendant had molested T.I., Julie called the police and the hospital. Julie received no help from the police or hospital. Julie then purchased a shotgun and shells. On direct examination, Julie stated without objection that she called Defendant's father and told him to tell Defendant to come over to her house. Julie told Defendant's father that she was going to kill him "because he messed with [her] baby." Julie repeated this testimony on cross-examination.

C.M.'s testimony demonstrated a lengthy history of sexual abuse by Defendant. C.M. was born 21 August 1966 and grew up in West Virginia. Defendant lived with his parents, C.M.'s grandparents, ten miles away. C.M. often visited her grandparents' house with her sister and brothers. When C.M. was four or five years old, Defendant had sexual intercourse with her twice on a bookcase in his bedroom and in the swimming hole. When C.M. was six or seven years old, Defendant had sexual intercourse with her in an old schoolhouse on her grandparents' property. Defendant showed C.M. sex positions from pornographic magazines and instructed her to imitate the pictures. When C.M. was eight or nine years old, Defendant had sexual intercourse with her at her parents' house. During several of these occasions, Defendant had sexual intercourse with C.M. and

Defendant would send her brothers out of the room to perform these sexual acts. Defendant had sexual intercourse with C.M. many times after that and did not stop until C.M. was eleven years old and began having her menstrual period.

The jury convicted Defendant of second-degree rape on 29 July 2011. Defendant stipulated to his prior conviction for DWI in 2003. The State offered the conviction as an aggravating factor. Defendant presented no evidence of mitigating factors. T.L., T.I., and C.M. gave victim impact testimony. Prior to T.I. and C.M. speaking before the court, the prosecutor stated, "I'm sure that the other ladies may want to be heard; but for purposes of sentencing on the second degree rape, your Honor, that's my offer, [T.L.]. I'll leave it up to your Honor." The prosecutor later asked the trial court to "take into consideration what [Defendant] has done to the lives of these women, and the lives of the women that you haven't heard from." Stating that it only considered the prior conviction, the trial court sentenced Defendant to thirty years in prison under the Fair Sentencing Act. The trial court made no written findings of fact. On the judgment, the clerk marked box "(a)" indicating that no written findings were made because the prison term imposed did not require such findings. Defendant now appeals his conviction and sentence.

[1] Defendant argues that the trial court erred in admitting testimony regarding Defendant's prior bad acts under Rules 404(b) and 403. We find no error with regard to the admission of prior bad acts with T.L. as part of a common scheme. Assuming *arguendo* that it was error to admit the testimony of T.I. and C.M., any error was harmless in light of T.L.'s properly admitted testimony.

The Supreme Court North Carolina recently clarified the standard of review for admission of evidence under Rules 404(b) and 403.

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, ___ N.C. ___, ___, 726 S.E.2d 156, 159 (2012).

In general, evidence of prior bad acts may not be used to show a defendant's propensity to commit the charged offense. *See* N.C. Gen.

Stat. § 8C-1, Rule 404(b) (2011). North Carolina courts have generally been very liberal in admitting evidence of similar sex offenses under Rule 404(b), *see State v. McCarty*, 326 N.C. 782, 785, 392 S.E.2d 359, 361 (1990), especially under the common plan or scheme exception, *see State v. Gordon*, 316 N.C. 497, 504, 342 S.E.2d 509, 513 (1986). This state's courts are also "quite liberal" in admitting similar, prior sex offenses when both the prior offenses and the charged offense involve the same victim. *State v. Thompson*, 139 N.C. App. 299, 303, 533 S.E.2d 834, 838 (2000).

"Though it is a rule of inclusion, Rule 404(b) is still 'constrained by the requirements of similarity and temporal proximity.' " *Beckelheimer*, ____ N.C. at ____, 726 S.E.2d at 159 (quoting *State v. Al–Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002)). A prior act or crime is considered "similar" under Rule 404(b) "if there are some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991)(citations omitted)(internal quotation marks omitted). "[R]emoteness in time tends to diminish the probative value of the evidence and enhance its tendency to prejudice." *State v. Artis*, 325 N.C. 278, 300, 384 S.E.2d 470, 482 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Temporal proximity is not eroded when the remoteness in time can be reasonably explained. *See State v. Jacob*, 113 N.C. App. 605, 611-12, 439 S.E.2d 812, 815-16 (1994)(lack of access to preferred victim); *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990)(incarceration).

When the prior bad acts occur in the same place as the charged offense, our courts have found the prior acts to be similar to the charged offense. *See State v. Boyd*, 321 N.C. 574, 577-78, 364 S.E.2d at 120 (1988); *State v. Thaggard*, 168 N.C. App. 263, 271, 608 S.E.2d 774 (2005). When there are still other similarities, prior incidents and the charged offense are not dissimilar even though the charged offense occurred in private and the prior incidents occurred in plain view. *State v. Khouri*, ___ N.C. App. ___, ___, 716 S.E.2d 1, 8 (2011).

In this case, we hold that the prior acts with T.L. are sufficiently similar to the charged offense. T.L.'s testimony shows a progression from inappropriate touching in 1977 to sexual intercourse in 1985. These assaults occurred where Defendant was living at the time, either his parents' house in North Carolina or the trailer he shared with his then-wife. Though the prior incident in the bedroom window occurred in plain view while S.M. was present, it is not too dissimilar

from the charged offense that is alleged to have occurred in the relative privacy of the bedroom in Nancy's presence.

The prior offenses and the charged offense are also not too remote. Though it appears that there is a five-year gap between the instances when T.L. was eleven years old and the charged incident when T.L. was sixteen years old, T.L.'s testimony provides a reasonable explanation for three years of the gap financial difficulties. Given this reasonable explanation, the lapse is therefore only two years. *See Jacob*, 113 N.C. App. at 611-12, 439 S.E.2d at 815-16 (ignoring the years in which defendant did not have access to preferred type of victim in analyzing temporal proximity). There is also a lapse of two years between when T.L. was nine years old and when T.L. was eleven years old. We do not find two lapses of two years each to warrant exclusion of T.L.'s testimony regarding prior incidents with Defendant. *See State v. Moore*, 173 N.C. App. 494, 502, 620 S.E.2d 1, 7 (2005)(holding that seventeen-month lapse was not significant); *see also State v. Frazier*, 344 N.C. 611, 615-16, 476 S.E.2d at 300 (1996) (citing cases holding lapses of seven years, ten years, and twenty years to be permissible). We hold that the trial court properly admitted T.L.'s testimony to show a common plan.

Evidence, though relevant, may still be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2011). When limiting instructions are given, this Court presumes that the jury follows such instructions. *State v. Brown*, ___ N.C. App. ___, ___, 710 S.E.2d 265, 273 (2011), *aff'd*, ___ N.C. ___, ___, 722 S.E.2d 508 (2012). Limiting instructions mitigate the danger of unfair prejudice to the defendant. *See Beckelheimer*, ___ N.C. at ___, 726 S.E.2d at 160.

Here, the probative value of the prior incidents with T.L. outweighs any unfair prejudice to Defendant. The trial court gave the jury a limiting instruction following T.L.'s testimony, and we assume that the jurors followed the instruction. The trial court did not abuse its discretion under Rule 403.

Turning to the testimonies of T.I. and C.M., their testimonies also show some similarities with the 1985 incident and a progression of sexual abuse. All three women are family members of Defendant. T.L., T.I., and C.M. were all prepubescent girls when Defendant began touching them. Defendant molested them at his home, except for the incident at C.M.'s parents' house. Though we acknowledge there are some differences between the charged offense and the prior bad acts

with T.I. and C.M., prior bad acts with T.I. and C.M. were similar for the purposes of Rule 404(b) and, if not, then any error due to their testimonies was harmless error.

"The test for prejudicial error is whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *State v. Goodwin*, 186 N.C. App. 638, 644, 652 S.E.2d 36, 40 (2007) (internal quotation marks and citations omitted). A new trial will only be ordered if the defendant shows prejudicial error. *State v. Macon*, 346 N.C. 109, 117, 484 S.E.2d 538, 543 (1997).

Though Nancy's testimony generally denied T.L.'s version of events and there was no physical evidence from twenty-seven years ago to corroborate T.L.'s testimony, T.L.'s testimony showed a common scheme to molest her. The jury could have regarded Nancy's testimony as self-serving since T.L.'s testimony painted Nancy in an unflattering light. We cannot say that but for the admission of T.I.'s and C.M.'s testimonies that the jury would not have convicted Defendant; therefore, we find any error in admitting their testimonies harmless.

[2] Next, Defendant argues that it was plain error to allow Julie to testify that she bought a shotgun and was going to shoot Defendant. We find no error.

> 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.

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

There is no prejudice to the defendant when cross-examination elicits testimony substantially similar to the evidence challenged. *State v. Eubanks*, 151 N.C. App. 499, 502, 565 S.E.2d 738, 741 (2002). We assumed without deciding that the witnesses' testimonies were inadmissible under Rule 404(b) but still found no prejudice since the defendant elicited similar testimony on cross-examination. *Id.*

In this case, the particular statements Defendant has selected from Julie's testimony that he argues were improper were elicited on direct examination without objection as well as on cross-

examination. We hold that Defendant was not prejudiced by this evidence, nor was it plain error.

[3] Defendant argues that the trial court erred by not making written findings in imposing a prison term greater than the presumptive sentence. Defendant also argues that the trial court improperly considered victim impact testimony from T.I. and C.M. who were not prosecuting witnesses and that he was denied due process. We find no legal error as to the lack of written findings for his sentence and remand the case for correction of a clerical error. We find no error in allowing T.I. and C.M. to give victim impact testimony. As Defendant only cursorily argues that he was denied due process and cites no authority in support of his argument, we decline to address that portion of his argument. N.C. R. App. P. 28(b)(6).

The State contends that Defendant failed to preserve the sentencing issue for appeal. No objection is necessary to preserve an issue for appellate review when the challenge is that "[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." N.C. Gen. Stat. § 15A-1446(d)(18) (2011). The Supreme Court has held that this statute does not conflict with a specific provision of Appellate Rule 10 and operates as a "rule or law" that deems a sentencing issue preserved for appellate review. *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010). We have jurisdiction to hear Defendant's sentencing argument.

Sentencing in this case is controlled by the Fair Sentencing Act since the rape occurred in 1985. *See State v. Lawrence*, 193 N.C. App. 220, 222, 667 S.E.2d 262, 263 (2008). Under the Fair Sentencing Act, " '[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.' " *State v. Vaughters*, ___ N.C. App. ___, ___, 725 S.E.2d 17, 20 (2012)(quoting *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962)).

> If the judge imposes a prison term for a felony that differs from the presumptive term . . ., the judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence. If he imposes a prison term that exceeds the presumptive term, he must find that the factors in aggravation outweigh the factors in mitigation . . . .

N.C. Gen. Stat. § 15A-1340.4(b) (1991)(repealed 1993). Failure to make written findings regarding the aggravating factors is reversible error, *State v. Ledford*, 315 N.C. 599, 625, 340 S.E.2d 309, 325 (1986), unless the trial transcript makes it clear that the error was merely clerical, *see State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349 (2000). No specific findings that the aggravating factors outweigh the mitigating factors are necessary when there is a single aggravating factor. *State v. Summerlin*, 98 N.C. App. 167, 177, 390 S.E.2d 358, 363 (1990)(citing *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985)). Twelve years was the presumptive sentence for second-degree rape, a Class D felony, under Fair Sentencing. N.C. Gen. Stat. §§ 14-27.3(b) (1991)(amended 1993), 15A-1340.4(f)(2) (1991)(repealed 1993).

The trial court in the instant case imposed a sentence of thirty years, well in excess of the presumptive term. Thus, written findings were required; however, we find no error based on the case law stated above.

The prosecutor moved the trial court to consider the conviction, to which Defendant stipulated, as an aggravating factor. The trial court stated that it could properly consider the conviction under the Fair Sentencing Act. Given this context, it is evident that the trial court found an aggravating factor but the incorrect box was marked on the judgment. Thus, we remand the case to correct the clerical error.

[4] We find no error in allowing T.I. and C.M. to give victim impact testimony because, even if it was error to allow victims other than the prosecuting witness to give victim impact testimony, Defendant has failed to show that the trial court in fact considered their testimonies in sentencing him.

"We presume that the trial court disregarded incompetent evidence unless there is affirmative evidence to the contrary." *State v. Flowers*, 100 N.C. App. 58, 61, 394 S.E.2d 296, 298 (1990). Defendant has not established affirmative evidence that the trial court considered their testimonies in deciding his sentence. Although the prosecutor urged the trial court to sentence Defendant based on the effect he had on all three women's lives, contradicting her prior offer of only T.L.'s testimony, the trial court made no mention of considering the other victims' testimonies in pronouncing the sentence. We find no error.

For the reasons stated above, we find no error in part and remand for correction of clerical error in part.

No error in part; Remanded in part for correction of clerical error.

Judges MCGEE and THIGPEN concur.

STATE OF NORTH CAROLINA v. JERRY WADE GRICE

No. COA12-577

(Filed 20 November 2012)

1. Constitutional Law—seizure of marijuana plants from yard—plain view—knock and talk investigation

There was plain error in a prosecution for the sale and manufacture of marijuana where the trial court admitted evidence of marijuana plants seized from defendant's yard after they were seen by officers conducting a "knock and talk" investigation. The Court of Appeals rejected the State's argument that the initiation of a valid "knock and talk" inquiry gave the officers a lawful right of access to walk across defendant's backyard in order to seize the plants.

2. Constitutional Law seizure of marijuana plants in yard—no exigent circumstances

The trial court erred in a prosecution for manufacturing and selling marijuana by holding that the seizure of marijuana plants in defendant's yard was valid under the "exigent circumstances" exception to the warrant requirement. No evidence was presented at trial to support the trial court's finding.

3. Evidence—erroneous introduction of marijuana plants—plain error

There was plain error in a prosecution for manufacturing and selling marijuana where the trial court erroneously admitted evidence of marijuana plants seized from defendant's yard during a "knock and talk" investigation by officers. The jury probably would have reached a different result without physical evidence.

Appeal by defendant from judgment entered 14 December 2011 by Judge James G. Bell in Johnston County Superior Court. Heard in the Court of Appeals 24 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt & Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellant.

HUNTER JR., Robert N., Judge.

Jerry Wade Grice, Jr. ("Defendant") appeals from a judgment sentencing him to a suspended sentence of 6–8 months imprisonment following a jury verdict convicting him of one count of manufacturing marijuana. On appeal, Defendant argues the trial court erred by denying his pre-trial motion to suppress and by admitting evidence Defendant claims was unconstitutionally seized. We agree and grant Defendant a new trial.

I. Factual and Procedural History

On 11 July 2011, the Johnston County grand jury indicted Defendant on charges of manufacturing marijuana and maintaining a dwelling house for the keeping of a controlled substance, in violation of N.C. Gen. Stat. §§ 90-95(a)(1) and 90-108(a)(7).

On 5 May 2011 Detectives Jason Guseman and Chadwick Allen of the Johnston County Sheriff's Office went to Defendant's home in order to investigate an anonymous tip that Defendant was growing and selling marijuana. The detectives' supervisor directed them to perform a "knock and talk" investigation in response to the tip. They arrived at Defendant's residence and drove about a tenth of a mile up a driveway to Defendant's home, where they parked behind a white car in the driveway. When the detectives exited their patrol car, Detective Guseman walked up the driveway to knock on the door, while Detective Allen stayed in the driveway.

While Detective Guseman was knocking on the door, Detective Allen, standing in the driveway, looked "around the residence . . . from [his] point of view." As he looked over the hood of the white car, he observed four plastic buckets about fifteen yards away. Plants were growing in three of the buckets. Detective Allen immediately identified these plants as marijuana. He pointed out the plants to Detective Guseman, who also believed they were marijuana. Both detectives then walked to the backyard where the plants were growing beside an outbuilding.

The detectives then contacted their supervisor, who instructed them to seize the plants and return to the Sheriff's Office so that they could then apply for a search warrant. The detectives then took some photographs of the surrounding area and uprooted the plants.

The next day, after applying for and receiving a search warrant, the detectives and two other officers returned to the residence to execute the warrant. The officers "forced the door open" and handcuffed Defendant and two other individuals who were also inside the home. Defendant admitted to owning the seized plants, and upon hearing that the officers were there to search for drugs and paraphernalia, also admitted to having a small amount of marijuana in his living room. After finding this marijuana, the officers arrested Defendant.

The matter came on for trial at the 13 December 2011 criminal session of the Johnston County Superior Court. The trial court held a pre-trial suppression hearing, where Defendant moved to suppress the evidence obtained during the "knock and talk" investigation. The trial court denied Defendant's motion. Defendant did not object at trial to the introduction of the plants seized or to other evidence derived from the seizure.

On 14 December 2011, a jury convicted Defendant of manufacturing marijuana. The trial court then sentenced Defendant as a Level II offender to a suspended sentence of 6–8 months imprisonment and placed Defendant on supervised probation for 30 months. Defendant gave oral notice of appeal in open court.

II. Jurisdiction & Standard of Review

As Defendant appeals from the final judgment of a superior court, an appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

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). However, "[t]he 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).

Because Defendant failed to object to the introduction of the seized evidence at trial, we review any error on the part of the trial court for plain error. *See* N.C. R. App. P. 10(a)(4); *see also State v.*

Goss, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835 (2008). "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." *State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

III. Analysis

[1] Defendant argues the trial court erred in denying his pre-trial suppression motion and by allowing the State to introduce evidence derived from the warrantless seizure of the marijuana plants at trial. Defendant argues that Detectives Guseman and Allen had no right to enter his property and seize the plants without first securing a warrant. Defendant contends this seizure was *per se* unreasonable under the Fourth Amendment, and as such, any evidence obtained from the illegal seizure was inadmissible at trial. The State contends that because the plants were in plain view, their seizure did not implicate Defendant's Fourth Amendment rights. We agree with Defendant.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. As a general rule, searches and seizures "conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is the "plain view" doctrine. Under the plain view doctrine, police may seize contraband or evidence without a warrant if "(1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband." *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999). This first requirement means that "[n]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have *a lawful right of access to the object itself.*" *Horton v. California*, 496 U.S. 128, 137 (1990) (emphasis added).

The State contends Detectives Guseman and Allen had a "lawful right of access" to the plants, because they were lawfully on the property under the auspices of a valid "knock and talk" investigation. We disagree.

" 'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31. Our courts have long recognized that this heightened expectation of privacy extends not only to the home itself, but also to the home's "curtilage." *See United States v. Dunn*, 480 U.S. 294, 300 (1987) ("The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself.") "[T]he curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984) (citation omitted). In North Carolina, "curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house *as well as the area occupied by barns, cribs, and other outbuildings*." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955) (emphasis added).

The State is correct in noting that officers may conduct "knock and talk" investigations that do not rise to the level of a Fourth Amendment search. *See State v. Wallace*, 111 N.C. App. 581, 585, 433 S.E.2d 238, 241 (1993) ("Law enforcement officers have the right to approach a person's residence to inquire whether the person is willing to answer questions."); *see also State v. Church*, 110 N.C. App. 569, 573–74, 430 S.E.2d 462, 465 (1993) ("[W]hen officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful . . . . [O]fficers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances.") (quotation marks and citation omitted). However, officers generally may not enter and search the curtilage of a home without first obtaining a warrant. *See State v. Rhodes*, 151 N.C. App. 208, 213–16, 565 S.E.2d 266, 269–71 (2002) (holding warrantless search of defendant's trash can unconstitutional when it was within the curtilage of his home). Moreover, this Court has expressly

rejected the notion that "law enforcement officers may enter private property whenever they are conducting 'legitimate law enforcement functions.' " *See State v. Nance*, 149 N.C. App. 734, 742, 562 S.E.2d 557, 563 (2002) (recognizing the validity of "knock and talk" inquiries, but holding that the line of cases authorizing them do not "stand[] for the proposition that law enforcement officers may enter private property without a warrant and seize evidence of a crime")

In this case, we decline to adopt the State's argument that the initiation of a valid "knock and talk" inquiry gave Detectives Guseman and Allen a lawful right of access to walk across Defendant's backyard in order to seize the plants. If we were to adopt such an approach, it would be difficult to articulate a limiting principle such that "knock and talk" investigations would not become a pretense to seize any property within the home's curtilage, so long as that property otherwise satisfied the remaining prerequisites for seizure under the plain view doctrine. As this Court has observed, "[t]he implication that police officers have the right to seize any item which comes into their plain view at a place they have a right to be is fraught with danger and would sanction the very intrusions into the lives of private citizens against which the Fourth Amendment was intended to protect." *State v. Bembery*, 33 N.C. App. 31, 33, 234 S.E.2d 33, 35, *disc. review denied*, 293 N.C. 160, 236 S.E.2d 704 (1977). Accordingly, we hold the trial court erred in its conclusion that no Fourth Amendment violation resulted from the seizure in light of the fact "Detective Allen visually observed what he believed to be marijuana plants in plain view."

[2] In the alternative, the State argues that since the trial court found the detectives' seizure of the plants "was to prevent their destruction," that the seizure was valid under the "exigent circumstances" exception to the warrant requirement. We disagree, because no evidence was presented at trial to support the trial court's finding to that effect.

Our Supreme Court has held that "[i]f the circumstances of a particular case render impracticable a delay to obtain a warrant, a warrantless search on probable cause is permissible." *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979). One such exigent circumstance is the "probable destruction or disappearance of a controlled substance." *State v. Nowell*, 144 N.C. App. 636, 643, 55 S.E.2d 807, 812 (2001); *Wallace*, 111 N.C. App. at 586, 433 S.E.2d at 241-42 (noting that an "officer's reasonably objective belief that the contra-

band is about to be removed or destroyed" is a factor in determining whether, with probable cause, a warrantless seizure is justified).

On appeal this Court 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." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. Upon review of the record, we cannot ascertain the basis for the trial court's finding that the plants were seized "to prevent their destruction."

Detective Guseman testified that he knocked on Defendant's door "numerous times" and no one answered. He further testified:

> Q. [H]ad you determined that there was anyone at the house?
>
> A. No one would come to the door if there was anyone at the house.
>
> Q. Had you determined that there was anyone who had detected your presence at the house?
>
> A. No.
>
> . . . .
>
> Q. Was there anything that prevented you from securing the area and then getting a search warrant?
>
> A. No. I had done exactly what Captain Fish instructed me to do and that was to seize the plants, come back to the Sheriff's office and apply for a search warrant for the residence.

Detective Guseman further testified that he had no knowledge of any illicit transactions occurring on the property within the prior three days. A review of the record produces no evidence contrary to Detective Guseman's testimony.

The State contends that evidence was presented which could support the trial court's finding, arguing that:

> [t]he record contains several facts supporting the trial court's conclusion. First, the record indicates that there was a white vehicle parked in the driveway of the house, and that no one came to the door after the officers knocked repeatedly. Suspects sometimes do not come to the door when law enforcement knocks, as is readily apparent from defendant's choice to not answer the door when served the search warrant the next day. From this evidence, the trial court could reasonably conclude

that defendant or someone else may have been in the house waiting for the officers to leave in order to destroy the marijuana plants. Additionally, because three marijuana plants is a relatively small quantity, the court may have concluded they were more readily destructible.

Although the record does reveal that there was in fact a white car in the driveway, and that there were only three plants, nothing in the record suggests that this provided the impetus for the seizure. Accordingly, the trial court's finding "[t]hat this seizure was to prevent [the plants] destruction" is not supported by competent evidence in the record. Absent a finding supported by evidence that the detectives had a "reasonably objective belief that the contraband [was] about to be removed or destroyed," *Wallace*, 11 N.C. App. at 586, 433 S.E.2d at 241–42, "exigent circumstances" cannot be a justification for this warrantless seizure.[1]

Therefore, we hold the trial court erred in concluding that Defendant "did not have an expectation of privacy in this instance and [that] there [was] no Fourth Amendment violation" and that "the evidence obtained was properly seized."

We must then turn to the issue of whether the erroneous admission of this evidence by the trial court rises to the level of plain error such that it "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, ___ N.C. at ___, 723 S.E.2d at 334 (citation and quotation marks omitted). We conclude the trial court's failure to grant Defendant's motion to suppress does rise to the level of plain error in this case. Had the trial court granted Defendant's motion, the State would have been barred from introducing not only the plants themselves, but also the close-up photographs of the plants, the expert testimony identifying the plants as marijuana, and Defendant's statements regarding the plants. *See State v. Jackson*, 199 N.C. App. 236, 244, 681 S.E.2d 492, 497 (2009) ("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.") (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). Thus, the only evidence the State could have presented was Detectives

1. We note that although the trial court made a finding of fact that the seizure was performed to prevent the plants' destruction, the court made no conclusion of law explicitly mentioning "exigent circumstances" as justification for the seizure. To contrast, the court did conclude that "plain view . . . is an exception to the warrant requirement" such that "[t]he evidence obtained was properly seized."

Guseman and Allen's testimony regarding their identification of the plants as marijuana, with no physical evidence to support those determinations. We conclude the jury probably would have reached a different result had this been the case.

IV. Conclusion

For the foregoing reasons we vacate Defendant's conviction, reverse the trial court's denial of his motion to suppress, and remand for a

NEW TRIAL.

Judges HUNTER, R.C. and CALABRIA concur.

STATE OF NORTH CAROLINA v. W.D. HOPE, DEFENDANT

No. COA12-659

(Filed 20 November 2012)

1. Appeal and Error—notice of appeal—not sufficient—writ of certiorari

Defendant's appeal was heard pursuant to a writ of *certiorari* where his notice of appeal did not indicate the court to which appeal was taken, which would normally deprive the Court of Appeals of jurisdiction.

2. Assault Deadly weapon—self defense instructions

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by denying defendant's request to include in its jury charge the self-defense instruction from the North Carolina Pattern Jury Instructions-Crim. 308.40. The language from *State v. Clay*, 297 N.C. 555, provided clear guidance on how to instruct the jury in a case like the one *sub judice* where the weapon is not a deadly weapon *per se*.

3. Appeal and Error—self-defense instruction—waiver of appellate review

Defendant waived any right to appellate review concerning the trial court's failure to give a self-defense instruction by object-

ing to the correct instruction, requesting the incorrect instruction, and choosing to forgo a self-defense instruction when given the option of the North Carolina Pattern Jury Instructions Crim. 308.45 or none.

4. Assault—instructions—simple assault not supported

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the evidence did not support a simple assault instruction and the trial court did not err in refusing defendant's request for an instruction lacking the serious injury element. Even if the jury found that defendant did not use a deadly weapon and fully believed his narrative of events, there was substantial evidence from the State that the victim suffered serious injury caused by defendant and there was no contradictory evidence from defendant. Defendant only requested an instruction on simple assault and did not argue the issue of misdemeanor assault inflicting serious injury on appeal.

5. Constitutional Law—effective assistance of counsel—request for instructions—error not prejudicial

Defendant did not receive ineffective assistance of counsel in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury from trial counsel's objection to the correct self-defense instruction, which resulted in no self-defense instruction being given. Given the overwhelming evidence against defendant, there was no reasonable probability of a different result but for trial counsel's error.

Appeal by defendant from judgment entered on or about 6 October 2011 by Judge V. Bradford Long in Superior Court, Randolph County. Heard in the Court of Appeals 24 October 2012.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jane L. Oliver, for the State.

M. Alexander Charns, for defendant-appellant.

STROUD, Judge.

I. Factual Background

W.D. Hope ("defendant") was indicted on 13 September 2010 for assaulting Mr. Thomas Goddard with a deadly weapon with intent to kill inflicting serious injury. Defendant pleaded not guilty and the case went to jury trial.

The State's evidence presented at trial tended to show the following: On 23 April 2010, defendant went to Mr. Goddard's house. Defendant was angry with Mr. Goddard either because he believed that Mr. Goddard had made a move on his wife or because he believed that Mr. Goddard owed him money (the evidence was inconsistent on this point). When Mr. Goddard opened his front door, the defendant approached him, yelling, "Where's your money, I'm gonna kill you." Defendant then began beating him in the face and body with a metal pipe. After beating Mr. Goddard with the pipe, defendant left Mr. Goddard's house and went to a neighbor's house covered in blood, carrying a pipe which also had blood on it. When defendant entered the neighbor's house he told the neighbors that "he had beat up and killed a man."

Mr. Goddard suffered a severely broken jaw, several lost teeth, lacerations on his face, arms, and legs, as well as a substantial amount of blood loss. When the first responders arrived, Mr. Goddard was "covered in blood from head to toe." He was airlifted to a trauma center, where the doctors stitched his lacerations, wired his jaw shut, and installed a metal plate in his jaw.

The only evidence presented in defendant's case-in-chief was from defendant's interactions with police. Defendant made the following statement to police:

> I went to Mr. Goddard's house on Glovinia Street to get 75 dollars he owed me for a table and TV. Also, he owed me for a hedge trimmer. When I got there, he said he didn't have my money. I told him I needed my money. We—we both were drinking and words were exchanged. He hit me in the mouth with his fist while I was standing at the door. We started fighting and went into the living room. He pulled a pipe from under the sofa and hit me on the left lower leg.
>
> We continued to fight over the pipe and I got control of the pipe. I picked him up and—to body slam him, and his heads (sic)—his head hit the bedroom doorframe. He got up and stumbled to the bed. I seen (sic) lots of blood coming from his head, so I left. I never hit him with the pipe or while he was in the bedroom.

Defendant also showed police what they described as "an old injury" on his leg, implying that it was from Mr. Goddard's alleged assault on him.

In the charge conference, the trial judge and the attorneys discussed which self-defense instruction to use. The judge proposed that he instruct the jury using North Carolina Pattern Jury Instructions Crim. 308.45. N.C.P.I.—Crim. 308.45. Defendant's trial counsel objected and urged the judge to use N.C.P.I.—Crim. 308.40. The trial court noted that the instructions for assault with a deadly weapon with intent to kill inflicting serious injury cross-referenced 308.45, not 308.40. However, defendant's trial counsel persisted and opted to have no self-defense instruction rather than 308.45. Further, defense counsel requested that the trial court instruct as to the lesser included offense of simple assault, which the court denied. In its instructions to the jury, the trial court did not include any self-defense instruction, but did include the lesser offenses of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon.

The jury returned a verdict of guilty as to the most serious charge. Defendant was then sentenced to 146 to 185 months imprisonment in the custody of the N.C. Department of Corrections. Defendant filed written notice of appeal on 11 October 2011.

II. Jurisdiction

[1] "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) (citations omitted). In order for this Court to have jurisdiction to consider an appeal from a judgment or order entered in a criminal case, the appellant must give oral notice of appeal at trial or file written notice of appeal. N.C.R. App. P. 4. Defendant admits that his notice of appeal is flawed in that it does not indicate to which court the appeal is taken, in violation of Rule 4(b). Therefore, we would normally be without jurisdiction to hear defendant's appeal. *See Brooks*, 69 N.C. App. at 707, 318 S.E.2d at 352.

Defendant filed a petition for writ of certiorari on 28 September 2012. The State filed no response to defendant's petition. In its discretion, the Court grants defendant's petition. Therefore, we will consider defendant's substantive arguments.

III. Jury Instructions

A. Standard of Review

Where the defendant preserves his challenge to jury instructions by objecting at trial, we review "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) (citation omitted). However, "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. N.C. Gen. Stat. § 15A-1443(3)(2005). Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Goodwin*, 190 N.C. App. 570, 574, 661 S.E.2d 46, 49 (2008) (citation and quotation marks omitted), *disc. rev. denied*, 363 N.C. 133, 675 S.E.2d 664 (2009).

B. Analysis

Defendant argues that the trial court erred in not giving a self-defense instruction and in failing to give a simple assault instruction. Defendant contends that either the trial court should have given the requested 308.40 self-defense instruction or given the 308.45 self-defense instruction over the defendant's objection, rather than giving him the option of a 308.45 instruction or none. Defendant further contends that the trial court erred in denying his request for an instruction on the lesser included offense of simple assault because there was sufficient evidence to give the jury that option.

1. Failure to Give N.C.P.I.—Crim. 308.40 or N.C.P.I.—Crim. 308.45 Self-Defense Instruction

[2] Defendant first argues that the trial judge erred in not giving the requested 308.40 pattern self-defense instruction, or, in the alternative, not giving the 308.45 pattern self-defense instruction over the defendant's objection. Defendant properly preserved this issue for our review by objecting in the instruction conference and again at trial, when the trial judge gave the parties an opportunity to object to the instructions.

"The trial court must give a requested instruction when supported by the evidence in the case." *State v. Soles*, 119 N.C. App. 375, 382, 459 S.E.2d 4, 9 (1995) (citation omitted), *disc. rev. denied*, 341 N.C. 655, 462 S.E.2d 523. However, it is not error for a judge to refuse to give an instruction that is an incorrect statement of the relevant law. *See State v. Snider*, 168 N.C. App. 701, 703, 609 S.E.2d 231, 233 (2005).

> Our Supreme Court has held when there is evidence from which it may be inferred that a defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court. Where there is evidence that defendant acted in self-defense, the court must charge on this

> aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence. . . . The evidence is to be viewed in the light most favorable to the defendant.

State v. Whetstone, ___ N.C. App. ___, ___, 711 S.E.2d 778, 781-82 (2011) (citations, brackets, and quotation marks omitted).

The two instructions at issue in the present case are self-defense instructions N.C.P.I.—Crim. 308.40 and N.C.P.I.—Crim. 308.45. N.C.P.I.—Crim. 308.40 states, in relevant part:

> Even if you find beyond a reasonable doubt that the defendant assaulted the victim, the assault would be justified by self-defense under the following circumstances:
>
> (1) If the circumstances, at the time the defendant acted, would cause a person of ordinary firmness to reasonably believe that such action was necessary or apparently necessary to protect that person from bodily injury or offensive physical contact, and
>
> (2) The circumstances created such belief in the defendant's mind. You determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time.

N.C.P.I.—Crim. 308.45, by contrast, states in relevant part:

> If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from death or great bodily harm, and the circumstances did create such a belief in the defendant's mind at the time the defendant acted, such assault would be justified by self-defense.
>
> . . . .
>
> NOTE WELL: *If the defendant used a weapon which is a deadly weapon "per se," do not give the following paragraph. If the weapon is not a deadly weapon per se, give the following paragraph. State v. Clay, 297 N.C. 555, 566 (1979).*
>
> (If the defendant assaulted the victim, but not with a deadly weapon or other deadly force, and the circumstances would create a reasonable belief in the mind of a person of ordinary firmness that the action was necessary or appeared to be necessary to protect that person from bodily injury or offensive physical con-

> tact, and the circumstances did create such belief in the defendant's mind at the time the defendant acted, the assault would be justified by self-defense—even though the defendant was not thereby put in actual danger of death or great bodily harm; however, the force used must not have been excessive.)

This Court, in *State v. Whetstone*, and our Supreme Court, in *State v. Clay*, have laid out which self-defense instructions are appropriate for charges of assault with a deadly weapon with intent to kill inflicting serious injury. This Court has stated that where a defendant is charged with assault with a deadly weapon, including where that deadly weapon is a deadly weapon *per se* or as a matter of law,

> trial judges should, in the charge, instruct that the assault would be excused as being in self-defense only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm.

Whetstone, ___ N.C. App. at ___, 711 S.E.2d at 784 (quoting *State v. Clay*, 297 N.C. 555, 565-66, 256 S.E.2d 176, 183, *overruled on other grounds by State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982)) (quotation marks omitted). If, however, the weapon used by the defendant is *not* a deadly weapon *per se*, i.e., where the jury must determine whether the weapon used was a deadly weapon, the trial court's instructions must incorporate the possibility that the jury could find that he did not use a deadly weapon. Thus, in that situation, the trial judge should further instruct the jury

> that if they find that defendant assaulted the victim *but do not find that he used a deadly weapon*, that assault would be excused as being in self-defense if the circumstances at the time he acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from 'bodily injury or offensive physical contact.'

Clay, 297 N.C. at 566, 256 S.E.2d at 183-84.

In *Whetstone*, this Court applied the above rules to pattern jury instructions 308.40 and 308.45 and concluded that it was error for the trial judge to instruct on self-defense using 308.40. The Court reasoned that when the deadly weapon element is not given to the jury to decide, 308.40 forces the jury to find that the defendant used excessive force. *Whetstone*, ___ N.C. App. at ___, 711 S.E.2d at 786. In

Whetstone, the trial court instructed the jury that "a knife is a deadly weapon," but, using 308.40, also instructed that "the right to use force extends only to such force reasonably appearing to the defendant under the circumstances necessary to protect the defendant from bodily injury or offensive physical contact." *Id.* at ___, 711 S.E.2d at 785. The Court observed that the combination of these two instructions lessened the State's burden of proof on self-defense by forcing the jury had to conclude that the use of a deadly weapon would never be *necessary* to protect the defendant from mere bodily injury or offensive contact, as opposed to death or great bodily harm. *Id.* at ___, 711 S.E.2d at 786-87.

This case is distinguishable from *Whetstone* because the judge left the question of the deadly nature of the weapon to the jury and, under the facts of this case, the only feasible self-defense theory would have been under the lesser "bodily injury or offensive contact" standard. However, the language from *Clay* quoted above provides clear guidance on how to instruct the jury in a case like the one *sub judice* where the weapon is not a deadly weapon *per se*. *See Clay*, 297 N.C. at 566, 256 S.E.2d at 183-84.

In the present case, defendant's trial counsel noted that the evidence only supported a finding of self-defense if the jury believed defendant's statement that he assaulted Mr. Goddard with his hands in response to Mr. Goddard's initial punch, as opposed to with a deadly weapon. Under this version of the facts, one without a deadly weapon, the jury would have considered the self-defense claim under the "bodily injury or offensive physical contact" standard. This standard is incorporated into both 308.40 and, if the weapon is not a deadly weapon *per se*, 308.45.

Nevertheless, it would have been error for the court to give 308.40 as it does not contain language explaining how the self-defense claim relates to the jury's findings on the deadly weapon element. 308.45, by contrast, incorporates the key language from *Clay* that explains the relationship between the jury's finding on the deadly weapon element and self-defense:

> *if they find that defendant assaulted the victim but do not find that he used a deadly weapon*, that assault would be excused as being in self-defense if the circumstances at the time he acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from bodily injury or offensive physical contact.

Clay, 297 N.C. at 566, 256 S.E.2d at 183-84 (emphasis added); *see* N.C.P.I.—Crim. 308.45 ("If the defendant assaulted the victim, but not with a deadly weapon or other deadly force . . ."). Therefore, the trial court did not err in denying defendant's request to include the 308.40 self-defense instruction in its jury charge.

[3] Defendant argues in the alternative that if 308.40 was not the correct instruction it was plain error for the trial court not to use 308.45 over the objections of his trial counsel. Specifically, defendant, citing *Whetstone*, argues that not using any self-defense instruction lessens the State's burden of proof. While, as the trial judge noted, defendant submitted sufficient evidence, taken in the light most favorable to the defense, to support a 308.45 instruction, "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error." *Goodwin*, 190 N.C. App. at 574, 661 S.E.2d at 49. Here, defendant invited the failure to give a self-defense instruction by objecting to the correct instruction, requesting the incorrect instruction, and by choosing to forgo a self-defense instruction when given the option of 308.45 or none. Therefore, defendant has waived any right to appellate review concerning this alleged error. *See id.*

2. Decision Not to Give Simple Assault Instruction

[4] Defendant next argues that he was entitled to a simple assault instruction, because as in *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977), if the jury did not find that he used a deadly weapon, the evidence would support a conviction for simple assault. We disagree.

> It is well-settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense.

State v. Porter, 198 N.C. App. 183, 189, 679 S.E.2d 167, 171 (2009) (citation and quotation marks omitted).

Misdemeanor "[s]imple assault and assault inflicting serious injury are lesser included offenses of assault with a deadly weapon inflicting serious injury." *State v. Bell*, 87 N.C. App. 626, 635, 362 S.E.2d 288, 293 (1987).[1] Simple assault under N.C. Gen. Stat. § 14-33 is an assault where there is neither serious injury nor a deadly weapon. N.C. Gen. Stat. § 14-33 (a) (2010); *State v. Uvalle*, 151 N.C.

1. Defendant here requested an instruction on simple assault, but not misdemeanor assault inflicting serious injury.

App. 446, 454, 565 S.E.2d 727, 732 (2002), *disc. rev. denied*, 356 N.C. 692, 579 S.E.2d 95 (2003).[2] Because the defendant here only requested an instruction as to simple assault and has not argued the issue of misdemeanor assault inflicting serious injury on appeal, we only consider the issue of simple assault. N.C.R. App. P. 28(a).

This Court and our Supreme Court have had many opportunities to address the issue of lesser included offenses of assault with a deadly weapon inflicting serious injury. We have not, however, specifically decided whether a defendant is entitled to a simple assault instruction where the deadly weapon element is left to the jury, but there is uncontroverted evidence of serious injury.

In *State v. Palmer*, the Supreme Court found that the defendant was entitled to a jury instruction on simple assault where the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. *Palmer*, 293 N.C. at 643-44, 239 S.E.2d at 413. In that case, the evidence tended to show that the defendant hit the victim with a wooden stick, causing welts on his arm. *Id.* at 640, 239 S.E.2d at 411. Although there was evidence that the victim suffered serious injury from a subsequent assault by the same defendant without the stick, there was evidence of only minor injury from the use of the stick in the first assault. *Id.* at 640-41. The Court held that the stick in that case was not a deadly weapon *per se* and therefore the jury could find for the defendant on the issue of whether the stick was a deadly weapon. *Id.* at 643, 239 S.E.2d at 413. As a result, the Court concluded, the jury should have been instructed on simple assault. *Id.* at 643-44, 239 S.E.2d at 413.

By contrast, in *State v. Tillery* there was uncontroverted evidence of serious injury to the victim. 186 N.C. App. 447, 448, 651 S.E.2d 291, 292-93 (2007). As in *Palmer*, the weapon used—a 2x4 board—was not a deadly weapon *per se*. *Id.* at 451, 651 S.E.2d at 294. This Court held that under those facts, the jury should have been instructed on misdemeanor assault inflicting serious injury. *Id.* However, as it was apparently not raised, the Court did not specifically address whether the defendant in that case would have been entitled to an instruction on simple assault.

It is well established that where the State has presented uncontroverted evidence of serious injury, it is not error for a trial court to

2. Also included as misdemeanor assaultive crimes in § 14-33 are assault inflicting serious injury and assault with a deadly weapon. N.C. Gen. Stat. § 14-33(c)(1); *State v. Owens*, 65 N.C. App. 107, 110-11, 308 S.E.2d 494, 498 (1983).

refuse instructions on lesser included offenses lacking that element. *See State v. Williams*, 31 N.C. App. 111, 112, 228 S.E.2d 668, 669 (1976) (affirming trial court's refusal to instruct on assault with a deadly weapon, lacking the serious injury element, where the evidence of serious injury was uncontroverted), *disc. rev. denied*, 291 N.C. 450, 230 S.E.2d 767; *Uvalle*, 151 N.C. App. at 454-55, 565 S.E.2d at 732 (approving trial court's denial of the defendant's request for a lesser included lacking the serious injury element); *but see Bell*, 87 N.C. App. at 629, 635, 362 S.E.2d at 290, 293 (holding that it was error not to instruct on either simple assault or assault inflicting serious injury where there was conflicting evidence as to whether a deadly weapon was used and how the complainant's injuries arose).

Here, there was substantial evidence from the State that Mr. Goddard suffered serious injury caused by defendant, but no contradictory evidence offered by defendant. In fact, defendant's own statement to police was that Mr. Goddard had "lots of blood coming from his head" after defendant had "body slammed" him and his head hit the doorframe. Under the theories presented both by the State and the defense, defendant assaulted Mr. Goddard. Mr. Goddard suffered a severely broken jaw, requiring it to be wired shut and a metal plate to be installed, several lost teeth, lacerations on his face, arms and legs, as well as a substantial amount of blood loss. Indeed, one witness described Mr. Goddard as "covered in blood from head to toe." Mr. Goddard testified that after the assault he had, and continued to have at the time of trial, trouble concentrating and, even after treatment and surgery, has lost feeling on the side of his face. Thus, even if the jury found that defendant did not use a deadly weapon and fully believed his narrative of events, the evidence would not support a simple assault instruction and the trial court did not err in refusing defendant's request for an instruction lacking the serious injury element. *See Williams*, 31 N.C. App. at 112, 228 S.E.2d at 669.

3. Conclusion

The trial court correctly denied defendant's request for self-defense instruction 308.40, did not err in failing to give self-defense instruction 308.45 over defendant's objection, and did not err in failing to give the defendant's requested simple assault instruction. Therefore, on the issues properly before us we find no error in the jury instructions as given by the trial court.

IV. Ineffective Assistance

A. Standard of Review

> "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. 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 quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed. 2d 116 (2006).

B. Analysis

[5] The only error made by trial counsel raised by defendant on appeal is his objection to the trial court's offer to instruct the jury using pattern jury instruction 308.45, thereby depriving defendant of any self-defense instruction. Since we conclude that the record on appeal "reveals that . . . [defendant's] claims . . . may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing" we will decide his ineffective assistance claim on its merits. *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2001) (quotation marks and citation omitted), *cert. denied*, 546 U.S. 830, 163 L.Ed. 2d 80.

Even assuming trial counsel's error fell below an objective standard of reasonableness, 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." *Allen*, 360 N.C. at 316, 626 S.E.2d at 286. "This determination must be based on the totality of the evidence before the finder of fact." *State v. Wade*, 155 N.C. App. 1, 18, 573 S.E.2d 643, 655 (2002) (citation and quotation marks omitted), *disc. rev. denied*, 357 N.C. 169, 581 S.E.2d 444.

Here, there was overwhelming evidence of defendant's guilt. The State offered the testimony of Mr. Goddard, who described the assault in detail, including defendant's demands for money, the substantial injuries he suffered, and their lasting after-effects. The State

also offered the testimony of a pastor who stated that before the assault defendant said to him, "I'm going over there and kill him right now," and that of two neighbors who testified that defendant showed up at their house covered in blood, holding a bloody pipe, and told them that he had "beat up and killed a man." The State further presented evidence that there was blood spatter all over Mr. Goddard's living room.

The only evidence offered favorable to defendant was his statement to the police that he body-slammed Mr. Goddard after Mr. Goddard hit him in the mouth and in the leg, and that defendant had an old scab on his leg where he claimed Mr. Goddard hit him with the pipe. This evidence formed the whole basis of his self-defense claim. Given the overwhelming evidence against defendant, there is no reasonable probability that but for trial counsel's error the result would have been different. *See State v. Whitted*, ___ N.C. App. ___, ___, 705 S.E.2d 787, 797 (2011) (observing that "the overwhelming evidence against Defendant would likely have led to the same jury verdicts of guilty on all charges."). Therefore, we hold that defendant received no prejudicial ineffective assistance of counsel.

NO ERROR.

Judges ELMORE and BEASLEY concur.

STATE OF NORTH CAROLINA v. WAYNE ANTHONY HUSS

No. COA12-250

(Filed 20 November 2012)

1. Rape—second-degree—physically helpless victim—evidence not sufficient

Convictions for second-degree rape and second-degree sex offense were reversed where the State proceeded under the theory that the victim was physically helpless and evidence of defendant's size, martial arts prowess, and actions was not sufficient. In determining whether a victim is "physically helpless," the court looks to factors and attributes unique and personal to the victim. Defendant's contention that the category of "physically helpless" does not apply because the victim did not suffer a permanent physical condition was rejected.

2. Kidnapping—first-degree—intent—second-degree rape—helpless victim—evidence not sufficient

A first-degree kidnapping conviction was reversed where the indictment alleged the intent to commit second-degree rape but the State proceeded under an improper theory of that offense (a physically helpless victim) and did not sufficiently prove the particular felonious intent alleged.

Appeal by defendant from judgments entered 1 July 2012 by Judge Beverly T. Beal in Lincoln County Superior Court. Heard in the Court of Appeals 10 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant.

ELMORE, Judge.

Wayne Anthony Huss (defendant) appeals from judgments entered upon jury convictions of 1) first-degree kidnapping, 2) second-degree sexual offense, and 3) second-degree rape. Judgment was arrested on the second-degree rape conviction, and defendant was sentenced to 71 to 95 months imprisonment on both the first-degree kidnapping and second-degree sexual offense convictions, to run consecutively. After careful consideration, we reverse the judgments of the trial court.

I. Background

Defendant and the victim first met in the fall of 2006. At that time, the victim was employed as the director for an after-school program at Central Latino, a non-profit organization in Hickory. Defendant was a martial arts instructor who taught classes at the local YMCA. The two met when the victim attended a self-defense class taught by defendant. Later, in January 2007, the victim invited defendant to begin teaching self-defense programs at Central Latino. Soon after, defendant and the victim began a romantic relationship.

Their relationship continued for several months, but the couple began experiencing difficulties in March of that same year. Defendant became frustrated with the victim because she maintained an ongoing relationship with her prior boyfriend. The victim was similarly

frustrated with defendant, because she felt as though he was not giving her enough space. Ultimately, the couple decided to end their relationship. In doing so, they agreed to meet on 9 May 2007 at defendant's home, and, without telling the victim, defendant decided to videotape their interactions during the meeting.

Both the victim and defendant disagree as to what happened that day. According to defendant, he and the victim engaged in consensual sex, which included vaginal intercourse, digital penetration, the use of a vibrator, and defendant tying the victim's hands behind her back with a martial arts belt. Defendant maintains that this type of sexual activity was not abnormal for the couple, as they often engaged in spanking, role-playing, and bondage.

However, according to the victim, the two had never before engaged in the use of restraints or role-playing during consensual sex. In this particular instance, the victim maintains that defendant insisted the two have sex one last time, and that she realized he wasn't going to let her go unless she did.

After the event, the victim did not immediately discuss details of the incident with anyone. However, several days later she saw defendant again at a festival in downtown Hickory. There, the two got into a public argument, and the victim then decided to report the event to the police.

Defendant was arrested on 1 August 2007 and charged with 1) first-degree kidnapping, 2) second-degree sexual offense, and 3) second-degree rape. On 28 July 2011, the case came on for trial. At the close of all evidence, defendant moved to dismiss all charges, which the trial court denied. On 1 July 2011, defendant was convicted of all charges. Judgment was arrested on the second-degree rape conviction, and defendant was sentenced to 71 to 95 months imprisonment on both the first-degree kidnapping and second-degree sexual offense convictions, to run consecutively. Defendant now appeals.

II. Arguments

Defendant presents four arguments on appeal. He argues that: 1) The trial court erred in denying his motion to dismiss all charges at the close of evidence because the victim was not "physically helpless" as defined in N.C. Gen. Stat. §14-27.1(3); 2) The trial court erred in failing to dismiss the kidnapping charge because there was insufficient evidence of a restraint separate from any rape or sex offense; 3) The trial court erred in failing to intervene *ex mero motu* in response

to the prosecutor's closing arguments; 4) The trial court committed plain error by failing to instruct the jury that lack of consent is an element of rape and sexual offense of a "physically helpless" person. We agree, in part, with defendant's first argument. As such, we need not address defendant's remaining arguments on appeal.

III. Analysis

A. Physically helpless

[1] Defendant first argues that the trial court erred in denying his motion to dismiss, because the victim was not "physically helpless" as the term is defined under our general statutes. According to defendant, the term "physically helpless" applies only to individuals who are asleep, who are unconscious, or who suffer from a permanent physical condition. We agree, in part, with defendant's argument.

"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, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "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).

Here, the indictment charged defendant, in part, with second-degree rape under N.C. Gen. Stat. § 14-27.3(a), and second-degree sexual offense under N.C. Gen. Stat. § 14-27.5(a). According to the second-degree rape statute,

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person: (1) By force and against the will of the other person; or (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.3(a)(1)-(2) (2012). The language of the second-degree sexual offense statute is nearly identical, with the term "sexual act" replacing "vaginal intercourse." *See* N.C. Gen. Stat. § 14-27.5 (2012). At trial, the State proceeded under a theory that the victim was "physically helpless," in essence, prosecuting defendant only under N.C. Gen. Stat. § 14-27.3(a)(2) and N.C. Gen. Stat. § 14-27.5(a)(2). Thus, at issue is whether the victim in this case was "physically helpless."

According to our General Statutes, "'[p]hysically helpless' means (i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act[.]" N.C. Gen. Stat. § 14-27.1(3) (2012). Here, neither party contends that the victim was unconscious during the event. Thus, we will review whether the victim fell under the second category of "physically helpless."

Defendant argues that our Courts have limited this category to apply only to victims who suffer from some permanent physical disability or condition. In support of his argument, he directs our attention to two cases: 1) *State v. Atkins*, 193 N.C. App. 200, 666 S.E. 2d 809 (2008); 2) *State v. Joines*, 66 N.C.App. 459, 311 S.E.2d 49, *rev'd on other grounds*, 311 N.C. 398, 319 S.E.2d 282 (1984). In *Atkins*, the victim was deemed "physically helpless" because she was an 83-year-old woman who suffered from arthritis. Similarly in *Joines*, the victim suffered from multiple sclerosis and was thus found to be "physically helpless." Defendant argues that these are the only two cases in which our Courts have addressed the second category of "physically helpless." Likewise, the State concedes that there are a "dearth of decisions interpreting physically helpless victims in sex offense cases." Based on this lack of authority, defendant argues that the second category of "physically helpless" does not apply to the victim here, because she did not suffer from any permanent physical condition. We reject this argument, but we nonetheless conclude that the victim here did not fall within the special class of victims the term "physically helpless" was meant to protect. *See Atkins*, 193 N.C. App. at 204, 666 S.E.2d at 812 ("N.C. Gen. Stat. § 14-27.3(a)(2)[] is applicable when the victim falls within a special class of victims[.]").

First, we do not think it would be wise for this Court to adopt such a strict application, as defendant suggests, of the term "physically helpless." In *Atkins*, this Court established that "a 'physically helpless' victim, as used within N.C. Gen. Stat. § 14-27.3(a)(2), is a

victim who is physically unable [[t]o strive or work against; oppose actively] an act of vaginal intercourse or a sexual act[.]" Id. at 205, 666 S.E.2d at 812-13 (alterations in original). There, this Court examined a number of factors to determine that the victim was "physically helpless." We determined that "[g]iven the evidence of Brown's age, frailty, and physical limitations, there is evidence from which the jury could reasonably conclude that Brown was not able to actively oppose or resist her attacker." *Id.* at 205, 666 S.E.2d at 813. Thus, contrary to defendant's contention, it is clear that this Court in *Atkins* considered more than just the victim's physical disability in determining that she was "physically helpless."

Rather, what this Court in *Atkins* considered were a number of factors and attributes that were unique and personal to the victim, which rendered the victim physically unable to strive or oppose an act of vaginal intercourse or a sexual act. Upon a *de novo* review of the record, we are unable to find similar evidence concerning the victim here.

At trial, the State presented evidence that defendant "had fought professionally" and that he "was very high ranked" in martial arts. Further, the victim testified that at the time of the event, she weighed "125, maybe 130 max[]" and that defendant weighed "[m]aybe 250, 260[,]" twice as much as her. She also testified that "[w]ell, a lot of the time he had—he was on top of one of my arms, and one of my legs was in like a submission hold." She further explained that "he got a martial arts belt and between the middle of the floor and the couch, tied my hands behind my back."

Based on this evidence, the State argues that the victim was "physically helpless." However, we disagree for a number of reasons. First, as we have discussed, in determining whether a victim is "physically helpless," this Court looks to factors and attributes unique and personal of *the victim*. Thus, the evidence that *defendant* was 1) a skilled fighter and 2) weighed twice as much as the victim is not dispositive of whether the victim was "physically helpless." Second, the evidence that defendant 1) pinned the victim in a submissive hold and 2) tied her hands behind her back is, again, not a unique and personal attribute of the victim, but rather, more indicative of the use of force. *See State v. Scott*, 323 N.C. 350, 372 S.E.2d 572 (1988) (Finding sufficient evidence to support the defendant's guilt of second-degree rape by force because he pinned the victim against the kitchen sink with one of his arms on each side of her body.).

Thus, we conclude that the State failed to present sufficient evidence at trial to establish that the victim was "physically helpless." However, it appears from the record that the State did present evidence sufficient to establish that defendant engaged in sexual acts with the victim by force and against her will. This Court has held that "[w]here there is evidence that a rape has been effectuated by force and against the will of the victim, the best practice is for the State to prosecute the defendant under the theory codified by N.C. Gen. Stat. § 14-27.3(a)(1)" and not under N.C. Gen. Stat. § 14-27.3(a)(2). *Atkins*, 193 N.C. App. at 206, 666 S.E.2d at 813. Accordingly, we reverse the second-degree rape and second-degree sex offense judgments.

B. First-degree kidnapping

[2] As a result, we must also reverse the first-degree kidnapping judgment. The elements of first-degree kidnapping as applicable here are: 1) the confinement or restraint of any other person 16 years of age or over, 2) for the purpose of facilitating the commission of any felony. *See* N.C. Gen. Stat. § 14-39(a)(2) (2012). Further, "[w]hen an indictment alleges an intent to commit a particular felony, the state must prove the particular felonious intent alleged." *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 270 (1982) (citations omitted).

Here, the indictment alleged that "the defendant named above unlawfully, willfully, and feloniously did kidnap [the victim], a person who has attained the age of 16 years by unlawfully restraining the victim, without the victim's consent, and for the purpose of facilitating the commission of a felony, second[-]degree rape." Thus, because the State proceeded under an improper theory of second-degree rape, we are unable to find that the State sufficiently proved the particular felonious intent alleged here. Accordingly, we reverse the first-degree kidnapping judgment.

IV. Conclusion

In sum, we reverse the judgments of the trial court.

Reversed.

Judges STROUD and BEASLEY concur.

STATE OF NORTH CAROLINA v. ERIC STEVEN JONES AND JERRY ALVIN WHITE

No. COA12-282

(Filed 20 November 2012)

1. Identity Theft—sufficiency of evidence—representation as credit card holders

The trial court did not err in an identity theft case by denying defendant's motion to dismiss for insufficient evidence. The State presented sufficient evidence that defendant intended to fraudulently represent himself as the persons whose credit card numbers he used to make various purchases.

2. Appeal and Error—preservation of issues—sufficiency of evidence—argument not raised at trial

Defendant's argument that the trial court erred by denying his motion to dismiss the charge of identity theft because the State failed to prove that defendant possessed the credit card numbers of three or more natural persons was dismissed. Defendant failed to raise this argument before the trial court and thus, this argument was not properly preserved for appellate review.

3. Appeal and Error—preservation of issues—indictment—fatal variance—argument not raised at trial

Defendant's argument that the trial court erred by denying his motion to dismiss the charge of identity theft because a fatal variance existed between his identity theft indictment and the evidence produced at trial was dismissed. Defendant's trial counsel never made an argument in the trial court that the evidence at trial varied from the facts alleged in the indictment and thus, this argument was not properly preserved for appellate review. Further, no variance existed between the proof at trial and the factual allegations in the indictment.

4. Identity Fraud— evidence—admission of other debit cards—preservation of issues—no abuse of discretion

The trial court did not err in an identity theft case by allowing the State to introduce evidence that, when arrested, defendant possessed debit and EBT cards of two persons other than the victims in this case ("the other cards"). At the pretrial hearing, defendant made no argument that the other cards should be excluded under N.C.G.S. § 8C-1, Rule 404(b) and thus, this argument was not properly preserved for appellate review. Further,

the decision to admit evidence of the other cards was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

5. Indictment and Information—obtaining property by false pretenses—insufficient

The trial court did not err by granting defendant's motion to dismiss the charges of obtaining property by false pretenses where the indictment was insufficient to sustain the charge.

6. Indictment and Information—trafficking in stolen identities—insufficient

The trial court did not err by granting defendant White's motion to dismiss the charges of trafficking in stolen identities. The State failed to allege in the bill of indictment the name of the person to whom the transfer was made or that his name was unknown.

Judge ELMORE dissenting.

Appeals by Defendant Eric Steven Jones from judgment entered 7 September 2011 and by the State from orders entered 7 September 2011 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 August 2012.

Attorney General Roy Cooper, by Assistant Attorneys General Kimberly N. Callahan and Joseph L. Hyde, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew J. DeSimone, for Defendant Eric Steven Jones.

Brock, Payne & Meece, P.A., by C. Scott Holmes, for Defendant Jerry Alvin White.

STEPHENS, Judge.

Procedural History and Evidence

On 28 June 2010, Defendant Jerry Alvin White ("White") was indicted on three counts of trafficking in stolen identities pursuant to N.C. Gen. Stat. § 14-113.20. On 7 September 2010, the grand jury returned a superseding indictment against White for four counts of trafficking in stolen identities. On the same date, Defendant Eric Steven Jones ("Defendant") was indicted on four counts of trafficking in stolen identities, two counts of obtaining property by false pre-

tenses, and one count of identity theft. The State's pretrial motion for joinder of the cases was unopposed and joinder was granted.

At the close of the State's evidence, both White and Defendant moved to dismiss all charges, asserting insufficiency of the evidence and fatally flawed indictments. The trial court denied the motion as to insufficiency of the evidence and delayed its ruling on the indictment issue. Neither White nor Defendant presented evidence, and both renewed their motions to dismiss at the close of all evidence.

On 7 September 2011, the jury returned guilty verdicts against White on all four counts of trafficking in stolen identities, and against Defendant on two counts of obtaining property by false pretenses and one count of identity theft. After receiving the jury's verdicts, the court dismissed the charges of obtaining property by false pretenses against Defendant and all counts of trafficking in stolen identities against White, concluding that those indictments were "insufficient as a matter of law." The court denied Defendant's motion to dismiss as to the offense of identity theft.

The trial court determined Defendant was a Prior Record Level II for sentencing purposes and imposed an active term of 18 to 22 months imprisonment on the identity theft conviction. From this judgment, Defendant appeals. From the orders dismissing the remaining charges against Defendant and all charges against White, the State appeals. We find no error.

The evidence at trial tended to show the following: On 2 June 2010 between 4:30 and 5:00 a.m., Officer Steven Maloney of the Charlotte-Mecklenburg Police Department ("CMPD") observed a silver Hyundai Accent he believed to be suspicious and began following it. Maloney ran a computer check on the car's tag number and discovered it was a suspect vehicle in a financial transaction card theft case committed at Tire Kingdom. Maloney initiated a traffic stop. Defendant, the driver, was unable to produce a valid driver's license or registration card.

When Maloney searched the car, he found two bags of marijuana and a work order from Maaco Collision Repair ("Maaco") listing James Coleman as the customer. Maloney arrested Defendant, and upon searching him, discovered a debit card bearing the name "Elaine Taylor" and an EBT (food stamp) card in the name of "Lonnie Bickman," as well as pieces of paper listing the name, address, and credit card information of four victims in this case: James Payton, Charles Batchelor, Sean Daly, and John Rini. A subsequent police

investigation revealed that each of the four men had been checked in by White, a front desk clerk, for stays at the Blake Hotel in Charlotte in May 2010.

On 12 May 2010, Payton stayed at the Blake Hotel and paid with a credit card assigned to him and bearing his name, but issued on a corporate account in the name of JEL Construction, Inc. Later, Payton was notified by the fraud department of the credit card company that there had been suspicious charges made to his account, including $54.13 and $43.30 to Cricket Communications, $650.78 and $369.46 to Duke Energy, and $236.47 to Foot Action.

Also on 12 May 2010, Batchelor stayed at the Blake Hotel and paid with a credit card issued directly to him; however, the card was a corporate card with Batchelor listed as a secondary cardholder on the account. The primary account holder was his employer, Christina Close of C & C Swimming, Inc. Fraudulent charges in the amount of $5.42 were made for purchases at Cricket Communications using this card number.

On 20 May 2010, Daly stayed at the Blake Hotel and paid with a corporate credit card issued to Identity Theft 911, LLC. The card bore the company name as well as Daly's name, who was the president and CEO of the company. Daly verified that no fraudulent charges were made to his card.

On 20 May 2010, Rini also stayed at the Blake Hotel and used a personal credit card to pay for his stay. Rini's credit card statement revealed fraudulent charges for purchases made at Cricket Communications in the amount of $64.95.

On 10 June 2010, CMPD Detective Kevin Stuesse and Special Agent Tom Hunter interviewed White. During the interview, White admitted to writing down the credit card information, names, and addresses for Payton, Batchelor, and Daly, and did not deny passing the information to another individual. White denied writing down Rini's information. After the interview, White was arrested.

Further investigation revealed that, on 18 May 2010, a Hyundai Accent with the same vehicle identification number as the car Defendant was driving when arrested had been dropped off at Tire Kingdom for the installation of four new tires and rims, an alignment, and brake services. The work order listed the customer as James Payton. The serial numbers on the tires purchased at Tire Kingdom matched the serial numbers on the tires of the Hyundai Accent. The

$1,181.09 bill was paid for over the phone with a Visa credit card ending in 3501. Upon pickup of the vehicle, the receipt was signed by a male who used the name James Payton. On 20 May 2010, Melanie Wright's Visa ending in 3501 was charged in the amount of $1,181.09; the evidence tended to show that Wright had previously stayed at the Blake Hotel. On 24 May 2010, Defendant, representing himself as James Coleman, brought the Hyundai Accent to Maaco to be painted and paid with a credit card in the name of Mary Berry.

Discussion

On appeal, Defendant brings forward four arguments: that the trial court erred in denying his motion to dismiss the identity theft charge where the State failed to prove (1) that he possessed the specific intent required and (2) that he possessed the credit card numbers of three or more natural persons; and where (3) there existed a fatal flaw in his identity theft indictment; and (4) in allowing the State to introduce certain evidence under Rule 404(b). We dismiss in part and find no error in part.

The State brings forward two arguments on appeal: that the trial court erred by granting (1) Defendant's motion to dismiss the charges of obtaining property by false pretenses; and (2) White's motion to dismiss the charges of trafficking in stolen identities. We find no error.

Defendant's Appeal

1. Specific Intent

[1] Defendant first argues that the trial court erred in denying his motion to dismiss because the State failed to prove that he possessed the specific intent necessary to be convicted of identity theft, to wit, the intent to fraudulently represent himself as the persons whose credit card numbers he used to make various purchases. 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).

> On a motion to dismiss, the trial court's task is to determine whether there is substantial evidence of each essential element of the charged offense. Substantial evidence is such evidence as a reasonable mind would accept as sufficient to support a conclusion. All of the evidence actually admitted, both competent and incompetent may be considered. Such evidence should be viewed in the light most favorable to the State, giv-

> ing the State the benefit of every reasonable inference to be drawn therefrom. . . . If the State has offered substantial evidence of each essential element of the crime charged, the defendant's motion must be denied.

State v. Rupe, 109 N.C. App. 601, 607-08, 428 S.E.2d 480, 485 (1993) (citations omitted).

Identity theft occurs when a person

> knowingly obtains, possesses, or uses identifying information of another person, living or dead, *with the intent to fraudulently represent that the person is the other person* for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences[.]

N.C. Gen. Stat. § 14-113.20(a) (2011) (emphasis added). "Intent is an attitude or emotion of the mind, and is seldom, if ever, susceptible of proof by direct evidence. It must ordinarily be proven by facts and circumstances from which it may be inferred." *State v. Little*, 278 N.C. 484, 487, 180 S.E.2d 17, 19 (1971). Thus, "[i]t is not necessary that the State offer direct proof of fraudulent intent if facts and circumstances are shown from which it may be reasonably inferred." *Rupe*, 109 N.C. App. at 609, 428 S.E.2d at 486. Specifically, the appellate courts of this State have long recognized that fraudulent intent in various financial crimes need not be shown by a verbal misrepresentation, but can also be established based upon a defendant's conduct or actions. *See*, *e.g.*, *id.* (embezzlement); *State v. Parker*, 354 N.C. 268, 553 S.E.2d 885 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002) (obtaining property by false pretenses by presenting another's driver's license and bank withdrawal slip to a bank teller in order to get cash); *State v. Perkins*, 181 N.C. App. 209, 638 S.E.2d 591 (2007) (obtaining property by false pretenses by using another's credit card to make purchases).

Here, Defendant contends that no evidence was offered that he "fraudulently represent[ed] that [he was] the other person for the purposes of making financial or credit transactions in the other person's name." N.C. Gen. Stat. § 14-113.20(a). Specifically, Defendant notes that the State failed to present any evidence about who the user of the credit cards represented himself to be when making purchases at Foot Action, Duke-Energy, and Cricket Communications. Further, Defendant points out that the person who made the Tire Kingdom purchase represented himself as James Payton, but paid with a credit

card number belonging to Mary Wright, and the person who made the purchase at Maaco represented himself as James Coleman, while paying with a credit card assigned to Mary Berry. Thus, Defendant asserts that the State failed to present substantial evidence that he represented himself to be any of the persons to whom the credit cards belonged. We are not persuaded.

Here, the evidence tended to show that Defendant possessed the credit card information of several other people without authorization, was the owner[1] of the Hyundai Accent which had received a paint job, new tires, and other products and services paid for via unauthorized charges to some of the credit cards, possessed a cell phone from a store where unauthorized charges were made to some of the credit cards, and had a utility account for which one of the credit cards was used to make a payment. Taken in the light most favorable to the State, this evidence would support a reasonable inference by the jury that Defendant fraudulently used credit card numbers belonging to other people without authorization to make purchases and payments on his own behalf. In keeping with our State's case law on implicit misrepresentations by conduct, we hold that, when one presents a credit card or credit card number as payment, he is representing himself to be the cardholder or an authorized user thereof. Accordingly, where one is not the cardholder or an authorized user, this representation is fraudulent. No verbal statement of one's identity is required, nor can the mere stating of a name different from that of the cardholder negate the inference of misrepresentation. Because the State here presented substantial evidence that Defendant intended to use the credit card information of others to fraudulently obtain financial benefit, the trial court properly denied Defendant's motion to dismiss the identity theft charge. Accordingly, this argument is overruled.

2. Identifying Information of Natural Persons

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of identity theft because the State failed to prove that defendant possessed the credit card numbers of three or more natural persons. Defendant bases this contention on the fact that three of the four credit card numbers he possessed were issued to business entities rather than to natural persons. We dismiss this argument as not properly before us.

1. Another man was the registered owner of the car, but when contacted by police, the man explained that he had sold the car to Defendant and was merely holding on to the title until Defendant finished paying him.

Rule 10(a)(1) of our Rules of Appellate Procedure requires that, 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) (2011). "It is well-established that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Tellez*, 200 N.C. App. 517, 521, 684 S.E.2d 733, 736 (2009) (citations and quotation marks omitted).

At the close of the State's evidence, Defendant's trial counsel first made extensive arguments about alleged defects in the indictments, before concluding with the following statement:

> [Defendant's counsel]: So first, the indictment issues I'd ask really all charges be dismissed.
>
> And as far as the sufficiency of the evidence, I would also ask that, *especially on the trafficking charges*, *that there is no evidence that was presented*—no—*the State did not present sufficient evidence on each element for the trafficking*, *i.e.*, *purchased.* They never said that anything was purchased. And this goes back to the sufficiency of the evidence.
>
> Mr. White's transcript says that he never received anything of value for this at all, and that hadn't been, I guess, stated anywhere that anyone received anything—well, that he sold, transferred or purchased the identifying information.
>
> *So as far as the trafficking goes*, I would ask that there's been, in the light most favorable to the State, *no evidence presented that he purchased* because you will focus specifically on purchased the information. [sic]
>
> And then, I guess, on the third element also that because of the confusion with the corporate entities and the way it's written, it's almost like *you have to take that information and then use the same person's information. You can't take someone's financial information and use a different name.* That's whatever name it is.
>
> *So for those reasons*, *we would argue that the charges should be dismissed* and all the charges—additionally—in addition to the indictment issue, we'd ask they be dismissed because the State hasn't met its burden at this point.

(Emphasis added).

As the above-quoted portion of the transcript shows, Defendant's trial counsel did not argue the failure of the State to prove that Defendant possessed the credit card numbers of three or more natural persons as a basis for his motion to dismiss for insufficiency of the evidence. Rather, he made two arguments: that no evidence of a purchase had been presented and that "[y]ou can't take someone's financial information and use a different name." While the latter argument includes a passing mention of "confusion with the corporate entities," its essence can only be reasonably interpreted as a reference to Defendant's argument 1 *supra*, namely, that because Defendant gave the credit card numbers of certain victims but did not verbally state that he was the victims, the State had not met its burden of proof. In renewing his motion to dismiss at the close of all evidence, Defendant merely asked that all charges against him be dismissed without noting a specific basis. Defendant, having failed to make the argument he now makes on appeal in support of his motion to dismiss in the trial court, has not preserved it for our review. *See Tellez*, 200 N.C. App. at 521, 684 S.E.2d at 736. Accordingly, we dismiss this argument.

3. *Variance between the identity theft indictment and the evidence at trial*

Defendant next argues that a fatal variance existed between his identity theft indictment and the evidence produced at trial. Specifically, he contends that while the indictment for identity theft alleged that Defendant possessed credit card numbers belonging to four natural persons, the evidence at trial showed that three of the credit cards in question were actually business credit cards owned by the businesses and merely issued in the names of the four natural persons. We must also dismiss this argument.

> Whether an indictment is sufficient on its face is a separate issue from whether there is a variance between the indictment and the evidence presented at trial, although both issues are based upon the same concerns[:] . . . to insure that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident.

State v. Norman, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). "A variance occurs where the allegations in an indictment, although

they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *Id.*

Because jurisdiction is implicated, "a defendant on appeal may challenge an indictment on the grounds that the indictment is insufficient to support the offense of which [the] defendant was convicted, even when the defendant failed to challenge the indictment on this basis at trial." *Id.* at 591, 562 S.E.2d at 456.[2] However, "a challenge to a fatal variance between the indictment and proof" is made by motion to dismiss for insufficiency of the evidence in the trial court. *State v. Wall*, 96 N.C. App. 45, 49-50, 384 S.E.2d 581, 583 (1989).

Here, our review of the transcript reveals that Defendant's trial counsel never made an argument in the trial court that the evidence at trial varied from the facts alleged in the indictment:

> As far as the identity theft portion of it, the statute is a little confusing. If the Court would indulge me. I'm just going to try to read the jury instruction because it's confusing.
>
> [trial counsel reads statute and discusses the specific intent/verbal misrepresentation argument addressed in section 1 *supra*]
>
> . . . .
>
> So that's kind of what the problem is with those two indictments also. They don't properly state or they don't do what the law requires, and it's confusing to say how it should go, but I'm going to kind of try to, say, like it should be like.
>
> For example, it should say he used the number of Payton to obtain things of value or used—they both should say, I guess, the same person. That's what I'm trying to say. He—in order to commit this crime, he would have to say I am James Payton; this is James Payton's credit card information, because that's what the elements one and two says. . . .
>
> *And then additionally, going back to those charges, we still have that corporate identification issue, which I won't go into again, with Batchelor, Payton and Daly because, because they are not the actual victims; they are employees*

2. "There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966) (citations and quotation marks omitted).

> *of the victims and it should say that, and I won't continue too much longer.*
>
> *It should say Identity Theft, 911, LLC for Daly, Batchelor, C and C Swimming, doing business whoever their other name is, and Payton would be JEL Construction Incorporated.*
>
> So for all those reasons, Your Honor, I would ask that we dealt with the indictment issue.
>
> You asked about, I guess, sufficiency of the evidence now. Do you want to address that now?
>
> . . . .
>
> [defense counsel makes various unrelated sufficiency of the evidence arguments]
>
> And then, I guess, on the third element *also that because of the confusion with the corporate entities and the way it's written, it's almost like you have to take that information and then use the same person's information. You can't take someone's financial information and use a different name. That's whatever name it is.*

(Emphasis added). Defendant never argued variance between the proof at trial and the indictment and specifically made his identity theft argument in the context of challenging the facial validity of the indictments. When he turned to arguments regarding the sufficiency of the evidence, the proper channel for addressing alleged variances, he returned only to the specific intent/verbal misrepresentation argument. Accordingly, Defendant has not preserved this issue for our review, and we must dismiss.

We further note that, even were the matter properly before us on appeal, Defendant would not prevail. "[N]o fatal variance exists when the indictment names an owner of the stolen property and the evidence discloses that that person, though not the owner, was in lawful possession of the property at the time of the offense." *State v. Liddell*, 39 N.C. App. 373, 374-75, 250 S.E.2d 77, 78 (1979). Here, Batchelor, Payton, and Daly were the only authorized users of the credit cards issued to their respective businesses, and no evidence at trial suggested they were not in lawful possession thereof. Thus, no variance existed between the proof at trial and the factual allegations in the indictment.

4. Admission of evidence about other cards

[4] Finally, Defendant argues that the trial court erred in allowing the State to introduce evidence that, when arrested, Defendant possessed debit and EBT cards of two persons other than the victims in this case ("the other cards"). On appeal, Defendant bases his arguments on alleged violations of North Carolina Rules of Evidence 403 and 404(b). Defendant's argument under Rule 404 is not before us. As to his argument under Rule 403, we disagree.

During a pretrial hearing, Defendant's counsel reviewed the State's exhibit list and objected to introduction of the other cards:

> My client wasn't charged with anything related to Lonnie Bickman or Elaine Taylor. These items are in the discovery, but he hadn't been charged with them, and he hadn't—I don't know what the purpose of the introduction of those are other than to basically *confuse the jury* with some information that he had an EBT card or a Visa debit card on him, but *they're not relevant* I would argue to any determination of anything in this particular case.

Defendant also objected on hearsay grounds, noting that the persons to whom the other cards apparently belonged were not available to testify and be cross-examined. The State responded:

> The credit cards are 404(b) evidence. In addition, they are items that were found on Mr. Jones' possession at the time he was arrested. They indicate, I believe, knowledge, intent, lack of mistake that you have two other credit card numbers belonging to other individuals. I do not plan on calling those individuals to testify. However, I think it is incredibly probative that those were also found in his possession.
>
> Detective Stuesse will testify he attempted to make contact with those individuals, but no contact information could be located for them.

In response, Defendant continued to argue that the other cards should not be admitted because they were irrelevant, overly prejudicial, and likely to confuse the jury:

> They're just going to, again, have evidence here that's highly prejudicial, information for which my client is not even charged with. It's not in the indictment. They're listed in discovery, but we'd argue that would be *highly prejudicial*

> *against my client* based on the nature of the case. If he had used these cards, why didn't they charge him with it? Why didn't they make us aware earlier today we're going to introduce these cards? This is definitely an issue that I would argue does not need to be introduced. There's no reason for this except *to confuse the jury* to say, oh, he had someone else's card, which he wasn't charged with. He had to be using these other cards fraudulently. I think there is some issue where these cards were found and where the other information that had credit card numbers that the State will allege were found at.
>
> . . . .
>
> It is clearly—*it should not be allowed under I'd say Rule 403.* If it's relevant, if it's probative, still hearing this without any explaining, just how are they going to introduce it?
>
> . . . .
>
> If it is relevant and it is probative, the *value of any of that relevance or probative value is outweighed by clearly undue prejudice* to my client that the jury is going to hear, and we'd argue it not be allowed.

(Emphasis added). Thus, at the pretrial hearing, Defendant made no argument that the other cards should be excluded under Rule 404(b). Instead, he argued that the other cards were either not relevant as defined in Rule 401 or that, if relevant, the minimal probative value of the other cards was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2011).

During trial, when the State attempted to elicit testimony about the other cards, Defendant objected:

> Well, Your Honor, this objection was based on our previous conversation about the two—I think the officer wasn't allowed to testify to two other financial cards that were found in Mr. Jones's wallet, one is Elaine Taylor, and one of Lonnie Bickman, and part of it was those *should be excluded based on Rule 403.*
>
> He's not charged with any kind of identity theft or fraud or anything of Elaine Taylor or Lonnie Bickman. And we would argue *under Rule 403 that although this evidence may be relevant, it should be excluded because it's* [sic] *probative value is sub-*

> *stantially outweighed by the danger of any unfair prejudice, confusion of the issues, or misleading of the jury upon consideration of delay, waste of time, or needless presentation of evidence.*
>
> Essentially what we're arguing is this is —he's charged with these other financial theft charges. He's not charged with these people's—stealing these people's—these individuals[']] identification. And we think this should not be allowed because the jury is not going to be able to differentiate between what he's charged with and what he's not charged with.
>
> In this case he's not charged with this, there's no investigation that this is anything illegal. They didn't charge him, so therefore I'd argue that this information should not be gone into, especially when he has all these other charges which basically amount to four counts of identity theft, two counts of obtaining property by false pretenses, and trafficking in stolen identities.
>
> I think it's going to *confuse the jury*, it's going to be really *very prejudicial* to Mr. Jones. And perhaps if he was charged with it, then I would argue that it might be relevant. And *it may be relevant now*, but I'd just say *the probative value is outweighed by the danger of unfair prejudice.*

(Emphasis added). The transcript makes clear that, at trial, Defendant only objected to the evidence of the other cards under Rule 403. Accordingly, we do not consider Defendant's arguments on appeal regarding Rule 404(b), but instead address the trial court decision to admit evidence about the other cards over Defendant's Rule 403 objection.

"A trial court's rulings under Rule 403 are reviewed for an abuse of discretion. . . . This Court will find an abuse of discretion only where a trial 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. Theer*, 181 N.C. App. 349, 359-60, 639 S.E.2d 655, 662-63 (2007) (citations and quotation marks omitted); *see also State v. Beckelheimer*, ___ N.C. App. ___, ___, 726 S.E.2d 156, 159 (2012).

In response to Defendant's objection at trial, the State argued that the other cards tended to show Defendant "had the intent and the motive and the plan to commit identity theft and credit card fraud by possessing credit cards belonging to not just [the victims in the

instant case], but also these other individuals as well[.]" The transcript reveals that the trial court carefully considered the arguments made by both parties and specifically questioned the State about the probative value of the other cards and the jury's possible confusion. The trial court ultimately admitted evidence of the other cards to show intent. Because the decision to admit evidence of the other cards was not "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision[,]" *Theer*, 181 N.C. App. at 360, 639 S.E.2d at 662-63 (quotation marks omitted), we hold that the court did not abuse its discretion. Accordingly, this argument is overruled.

The State's Appeal

1. Indictment against Defendant for obtaining property by false pretenses

[1] The State first argues that the trial court erred by granting Defendant's motion to dismiss the charges of obtaining property by false pretenses, contending that the indictment failed to specify with particularity the property obtained. We disagree.

> The indictment must charge the essential elements of the alleged offense. To provide notice, an indictment must contain, a plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. The elements of obtaining property by false pretenses are (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.
>
> Regarding the crime of obtaining property by false pretenses, it is the general rule that the thing obtained . . . must be described with reasonable certainty, and by the name or term usually employed to describe it.

State v. Ledwell, 171 N.C. App. 314, 317, 614 S.E.2d 562, 565 (2005) (citations, quotation marks, and brackets omitted) (alterations). For example, an

> allegation that the defendant obtained "goods and things of value" is too vague and uncertain. The "goods and things"

> should have been described specifically by the names and terms usually appropriated to them; and since it was money that was sought to be proven the defendant had fraudulently obtained it should have been described at least by the amount, as, for instance, so many dollars and cents.

State v. Smith, 219 N.C. 400, 401, 14 S.E.2d 36, 36-37 (1941) (citations and quotation marks omitted) (holding that an indictment charging a defendant with obtaining money by false pretenses should describe the money by the amount); *State v. Gibson*, 169 N.C. 380, 383 (169 N.C. 318), 85 S.E. 7, 8 (1915) (holding that a promissory note must be described as such and not as money); *State v. Reese*, 83 N.C. 637, 639 (1880) (holding that indictments for obtaining property by false pretenses should describe goods by the usual name and money in "dollars and cents").

Here, the indictment alleged that Defendant obtained "services" from Tire Kingdom and Maaco, without even the most general description of the services or their monetary value. This indictment was plainly insufficient to sustain the charge. Accordingly, we conclude that the trial court did not err in dismissing the obtaining property by false pretenses charges against Defendant.

In light of our holding *supra* that the trial court properly dismissed the obtaining property by false pretenses charges against Defendant, we need not address the State's alternative argument that the trial court erred in dismissing those charges on the basis that the indictment failed to name the proper owner of the credit card used to obtain the services.

2. Trafficking in Stolen Identities: Naming Recipient of Identifying Information

[6] The State argues that the trial court erred by granting White's motion to dismiss the charges of trafficking in stolen identities. We disagree.

In a long line of cases involving the illegal trafficking of substances ranging from seeds to liquor to narcotics, the Courts of this State have consistently held that

> it is necessary, for a conviction, to allege in the bill of indictment the name of the person to whom the [transfer] was made or that his name is unknown, unless some statute eliminates that requirement. The proof must, of course, conform to the

> allegations and establish a [transfer] to the named person or that the purchaser was in fact unknown.

State v. Bissette, 250 N.C. 514, 517-18, 108 S.E.2d 858, 861 (1959) (misleadingly-labeled tobacco seed); *see also State v. Bennett*, 280 N.C. 167, 185 S.E.2d 147 (1971) (narcotics); *State v. Blythe*, 18 N.C. 199 (1835) (spiritous liquors). In *Bissette*, the Court explained the reasoning behind this holding:

> The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial[;] and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case.

Bissette, 250 N.C. at 516, 108 S.E.2d at 859 (citation and quotation marks omitted).

Defendant was charged under this State's trafficking in stolen identities statute, which makes it "unlawful for a person to sell, transfer, or purchase the identifying information of another person with the intent to commit identity theft, or to assist another person in committing identity theft, as set forth in [section] 14-113.20." N.C. Gen. Stat. § 14-113.20A(a) (2011). In turn, section 14-113.20 makes it a felony for any "person [to] knowingly obtain[], possess[], or use[] identifying information of another person[.]" N.C. Gen. Stat. § 14-113.20(a) (2011). No language in either statute eliminates the common law requirement that the recipient of the identifying information be specified. Accordingly, under the reasoning and rule set forth in *Bissette*, in order to charge Defendant with trafficking in stolen identities, the State was required "to allege in the bill of indictment the name of the person to whom the [transfer] was made or that his name is unknown[.]" 250 N.C. at 518, 108 S.E.2d at 861.

We would note that the nature of the "identifying information" covered by the statute at issue here makes the common law rule discussed above particularly crucial to avoid the risk of double jeopardy in such cases. The types of information covered by the trafficking in stolen identities statute are listed in section 14-113.20(b) and include

various numbers, passwords, and other personal data. N.C. Gen. Stat. § 14-113.20(b). Unlike seeds, liquor, narcotics, or other tangible items, these types of information are fully retained by the thief even after they have been transferred to one or more persons. Thus, the same piece of personal identity information, such as a credit card number, can be trafficked an infinite number of times to an infinite number of recipients. For example, a defendant may steal a single credit card number, but then transfer that single credit card number to hundreds of others. This assessment applies equally to every example of identity information listed in section 14-113.20(b).

Put simply, the double jeopardy risk to which a defendant charged with trafficking in stolen identities under section 14-113.20A is put lies *not* with any lack of clarity about the *identity of the stolen information* for which he is being prosecuted. Rather, the danger lies in a lack of clarity as to which *incidence of trafficking* the stolen information he must defend. Given the susceptibility of a single piece of identity information being transferred to multiple persons, we hold that indictments for trafficking in stolen identities must specify the identity of the recipient of the stolen information. Accordingly, the indictments against White were fatally flawed, and the trial court's dismissal of those charges was not error.

DISMISSED IN PART; NO ERROR IN PART.

Judge CALABRIA concurs.

Judge ELMORE concurs in part and dissents in part.

ELMORE, Judge, dissenting in part, concurring in part.

I respectfully disagree with the majority's decision to uphold the trial court's dismissal of the charges for trafficking in stolen identities against White. The majority concludes that, as per the common law, an indictment for trafficking in stolen identities must name the recipient of the identifying information or provide that such name is unknown. From this decision, I respectfully dissent.

In making such determination, the majority's decision hinges on the application of the common law rule that requires indictments charging a person with the sale and/or transfer of an illicit substance to include the purchaser or recipient of the illicit substance or provide that such person is unknown, unless the requirement is elimi-

nated by statute. *See State v. Bissette*, 250 N.C. 514, 517, 108 S.E.2d 858, 861 (1959).

I do not contest the validity of the common law rule as applied to indictments charging a person with the sale and/or transfer of an illicit substance. However, I recognize that the inherent nature of prosecuting crimes involving the sale and/or transfer of illicit substances is unique in that such substances do not possess any independent identifying information in-and-of-themselves—a gram of cocaine is a gram of cocaine. Therefore, in order to avoid double jeopardy concerns and ensure that the accused is on notice of the crimes for which he has been charged, it is helpful that these indictments name the recipient of the illicit substance.

Alternatively, trafficking in stolen identities is a distinct crime and, in this instance, the common law rule is inapplicable. It is informative to consider the items that the legislature deemed to be "identifying information" as set out in N.C. Gen. Stat. § 14-113.20(b). The documents and information listed in the statute include, but are not limited to, one's social security number, driver's license number, passport, bank account number, and credit card numbers. These items each have independent identifying characteristics which can be specifically described in an indictment so as to put the accused on notice regarding the identifying information he allegedly sold or transferred. Moreover, transactions involving the use of one's identifying information are generally traceable.

Few cases have dealt with issues pertaining to the crime of trafficking in stolen identities, most likely because such crimes have only recently become more prevalent. Today, it is not uncommon for the average person to have his credit card information, bank account number, passwords, and other personal information stored online. Accordingly, the identifying information provided for in N.C. Gen. Stat. § 14-113.20(b) is the type of information often stored online. It can be easily accessed without authorization and transferred to another in an anonymous online transaction.

The majority contends that the application of the common law rule is "even more crucial to avoid the risk of double jeopardy" because the identifying information provided for in N.C. Gen. Stat. § 14-113.20(b) can be trafficked an infinite number of times. However, the majority fails to account for the fact that oftentimes the transferor himself may not know the recipient of the identifying information. Those who utilize the internet to sell identifying information

have the ability to pass such information in an anonymous vacuum. As such, should we impose the common law rule, the majority of indictments would likely provide that the transferee's identity is "unknown." Therefore, it is not advantageous to *require* such indictments to name the recipient. I do not suggest that the inclusion of the recipient's name in a trafficking indictment should be prohibited as I recognize that the inclusion of the recipient's name helps to ensure the indictment is sufficiently particular. However, its inclusion is not so vital that without it the accused would be unsure of the accusations against him and thus unable to adequately prepare his defense.

Furthermore, this Court need not consider whether the trafficking indictment could have been more definite and certain. We need only to consider whether the indictment sufficiently apprised a defendant of "the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5)(2011). Ultimately, imposing the common law rule is short-cited as it fails to account for the unique nature of trafficking in stolen identities, especially the possibility that the recipient's identity may be unknown to the transferor.

Turning now to the case at hand, White transferred the credit card numbers of the victims to defendant who then made fraudulent purchases using those numbers. White's indictment alleged all of the essential elements of the offense and contained the date of transfer, the place of transfer, the victim's name, and the type of identifying information allegedly trafficked.

White neither argued that by the failure to name defendant as the recipient he was deprived of needed information in order to adequately prepare for trial, nor did he claim that he was in doubt as to whom he allegedly transferred the credit card information. Furthermore, White was not liable for any fraudulent purchases made by defendant after the date of transfer. Should White have needed further clarification in order to prepare his defense, he was entitled to file a motion for a bill of particulars.

Here, White's indictment did not name defendant as recipient of the identifying information because the inclusion of the recipient's name is neither an element of the offense nor required by statute. In looking at the sum of the information included in White's indictment, I believe that White was not prejudiced by the fact that the indictment failed to name defendant as the recipient; thus the purpose of the indictment has been served. Therefore, because I believe the trial

court erred in dismissing the charges against White, I would reverse the decision and remand for a sentencing hearing of White. I concur in all other aspects of the majority opinion.

STATE OF NORTH CAROLINA v. KENNY JERMAINE MARTIN, DEFENDANT

No. COA12-553

(Filed 20 November 2012)

Satellite-Based Monitoring—remainder of natural life—does not violate ex post facto clauses of constitution

The trial court did not err by ordering defendant to enroll in satellite-based monitoring (SBM) for the remainder of his natural life. Subjecting defendants to the SBM program does not violate the *Ex Post Facto* Clauses of the state or federal constitution.

Appeal by defendant from order entered 19 January 2012 by Judge James M. Webb in Superior Court, Moore County. Heard in the Court of Appeals 24 October 2012.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Lisa Y. Harper, for the State.

Ryan McKaig, for defendant-appellant.

STROUD, Judge.

On 19 January 2012, defendant was ordered to "enroll in satellite-based monitoring" ("SBM") for "the remainder of . . . [his] natural life[.]" Defendant appealed arguing solely that

> [t]he trial court erred in determining that . . . [he] was required to submit to satellite-based monitoring where such monitoring would require him to waive his rights under the United States Constitution against unreasonable search and seizure or be subject to criminal prosecution for noncompliance, and where . . . [his] citizenship rights had been restored.

(original in all caps). Defendant contends that SBM

> would require . . . [him] to allow DOC officials to make routine warrantless entries into his home, despite the fact that he has completed his sentence, is not on probation, and has had his

> citizenship rights restored. As applied to . . . [him], North Carolina's satellite-based monitoring scheme would result in the permanent forfeiture of . . . [his] Fourth Amendment rights under the United States Constitution, or would place him in a position where he is forced to choose between forever waiving his Fourth Amendment rights or face criminal prosecution for failing to cooperation with the DOC.

"The standard of review is *de novo*." *State v. Bare*, 197 N.C. App. 461, 464, 677 S.E.2d 518, 522 (2009) (stating that whether SBM violated a constitutional provision should be reviewed *de novo)*, *disc. review denied*, 364 N.C. 436, 702 S.E.2d 492 (2010). Defendant concedes that in considering "the Fourth Amendment rights of those convicted felons subject to SBM" our Supreme Court has stated that

> it is beyond dispute that convicted felons do not enjoy the same measure of constitutional protections, *including the expectation of privacy under the Fourth Amendment*, as do citizens who have not been convicted of a felony. Here felons convicted of multiple counts of indecent liberties with children are not visited by DCC personnel for random searches, but simply to ensure the SBM system is working properly.

State v. Bowditch, 364 N.C. 335, 349-50, 700 S.E.2d 1, 11 (2010) (emphasis added) (citations omitted).

Defendant contends that the quoted portion of *Bowditch* is "dictum" and "not applicable." We disagree. In *Bowditch*, the "[d]efendants dispute[d] their eligibility for SBM, arguing that their participation would violate guarantees against ex post facto laws contained in the federal and state constitutions." *Id.* at 336, 700 S.E.2d at 2. The defendants prevailed on their argument at the trial level; the State appealed, and defendants petitioned the Supreme Court "to address the significant constitutional question at issue." *Id.* at 337, 700 S.E.2d at 3. Our Supreme Court allowed defendants' petition. *Id.* The Court was thus required to consider whether SBM was sufficiently punitive that it would be a punishment or if it was instead a civil regulatory scheme. *Id.* at 341-42, 700 S.E.2d at 6. The Court determined that

> [t]he SBM program at issue was enacted with the intent to create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist tendencies of convicted sex offenders. . . . [W]e conclude that neither the purpose nor effect of the SBM program negates the legislature's civil intent. Accordingly, subjecting defendants to the SBM program does

> not violate the Ex Post Facto Clauses of the state or federal constitution.

Id. at 352, 700 S.E.2d at 13.

Bowditch considered the defendants' argument that SBM was punitive in effect, in part because SBM requires certain infringements upon the offender's privacy as required for DCC's maintenance of the SBM equipment, including visits to his home. *Id.* at 349-50, 700 S.E.2d at 11. Thus, our Supreme Court considered the fact that offenders subject to SBM are required to submit to visits by DCC personnel and determined that this type of visit is not a search prohibited by the Fourth Amendment, *id.*, exactly the opposite of what defendant herein claims. As the Fourth Amendment was one of the factors which the Supreme Court considered to support its conclusion of the punitive effect of SBM, *see id.*, this language would not be dicta. *See generally State v. Breathette*, 202 N.C. App. 697, 701, 690 S.E.2d 1, 4 ("Language in an opinion not necessary to the decision is *obiter dictum*[.]") (citation and quotation marks omitted), *disc. review denied*, 364 N.C. 242, 698 S.E.2d 656 (2010).

But even if we were to assume *arguendo* that the quoted language from *Bowditch* is dicta, we find the Supreme Court's reasoning in that case highly persuasive and would apply it here. *See Ellis-Walker Builders, Inc. v. Don Reynolds Properties, LLC*, 205 N.C. App. 306, 309, 695 S.E.2d 832, 835 (2010) (applying dicta as persuasive authority). Accordingly, we affirm the order of the trial court ordering defendant to enroll in SBM.

AFFIRMED.

Judges ELMORE and BEASLEY concur.

STATE OF NORTH CAROLINA v. NICHOLAS SERGAKIS

No. COA12-336

(Filed 20 November 2012)

1. Larceny—felonious—value of stolen goods—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of felonious larceny because the evidence was insufficient to show that the goods taken were valued at more than $1,000. The victim's opinion that the stolen laptop was worth at least $600, along with the evidence that $500 was taken from his home, was substantial evidence that the property taken was valued at more than $1,000.

2. Larceny—instructions—felonious only

The trial court did not commit plain error by failing to instruct the jury on the lesser charge of misdemeanor larceny where all of the evidence was that the value of the property was more than $1,000.

3. Conspiracy—disjunctive instructions—offense not charged

There was plain error where the trial court's disjunctive charge instructed the jury that it could convict defendant of conspiracy by finding that he agreed to commit felony breaking and entering (with which defendant was charged) or that he agreed to commit felony larceny (with which he was not charged). Because the verdict sheet listed the conspiracy charge only as "Felonious Conspiracy," it was impossible to determine the offense the jury found that defendant had committed.

Appeal by Defendant from judgments dated 14 June 2011 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 12 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Rudolph Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for Defendant.

STEPHENS, Judge.

Procedural History

Following his indictment for breaking and entering, felonious larceny, conspiracy to commit breaking and entering, and giving a false report to a law enforcement officer, Defendant Nicholas Sergakis pled not guilty to the charges and was tried before a jury in New Hanover County Superior Court. The jury returned verdicts finding Defendant guilty on all charges except breaking and entering, on which charge the jury was unable to reach a unanimous verdict and the trial court declared a mistrial. The court sentenced Defendant to active prison terms for the guilty convictions, but suspended the sentences and placed defendant on supervised probation. Defendant appeals.

Discussion

Defendant makes four arguments on appeal: (1) that the trial court erred in denying his motion to dismiss the charge of felonious larceny for insufficiency of the evidence; (2) that the trial court committed plain error by failing to instruct the jury on the lesser charge of misdemeanor larceny; that the trial court erred in its jury charge on felony conspiracy by (3) instructing on a theory not charged in the indictment and (4) using the disjunctive to describe the felony Defendant allegedly conspired to commit, thus improperly permitting his conviction by less than a unanimous verdict. Because they are closely related, we address the first two arguments together and find no error. We agree with Defendant's third argument, and accordingly, vacate Defendant's conviction for felony conspiracy and grant him a new trial on that charge. Having vacated Defendant's conspiracy conviction, we do not address Defendant's final argument.

I. Sufficiency of the Evidence and Jury Instructions re: Felonious Larceny

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of felonious larceny because the evidence was insufficient to show that the goods taken were valued at more than $1,000. We disagree.

Upon a defendant's motion for dismissal, the reviewing court, taking the evidence in the light most favorable to the State, *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009), must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). To establish the

offense of larceny, the State must show that the defendant took and carried away the goods of another with the intent to permanently deprive the owner of the property. *State v. Perry*, 52 N.C. App. 48, 56, 278 S.E.2d 273, 279 (1981), *modified and affirmed*, 305 N.C. 225, 287 S.E.2d 810 (1982). Larceny is felonious if the evidence shows, *inter alia*, that the goods taken were valued at more than $1,000. N.C. Gen. Stat. § 14-72(a) (2011). This Court has held that a "witness's testimony as to his opinion of the 'value' of . . . stolen [property is] sufficient to require submission to the jury of an issue as to [the] defendant's guilt of felonious larceny[.]" *State v. Coleman*, 24 N.C. App. 530, 532, 211 S.E.2d 542, 543 (1975).

Here, the victim testified that $500 in cash and a laptop computer valued at least at $600 were taken from his home. The victim's opinion that the stolen laptop was worth at least $600, along with the evidence that $500 was taken from his home, was substantial evidence that the property taken by Defendant was valued at more than $1,000. Thus, the trial court properly denied Defendant's motion to dismiss, and Defendant's argument is overruled.

[2] In a related argument, Defendant contends that the trial court committed plain error by failing to instruct the jury on the lesser charge of misdemeanor larceny because there was no evidence that the value of the property taken was more than $1,000. However, "[t]he necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 191 (1993) (citation and quotation marks omitted). Because all of the evidence showed that the value of the property here was more than $1,000, the trial court was correct in not instructing on the lesser charge. This argument is overruled.

II. Jury Instructions re: Conspiracy

[3] Defendant next argues that the trial court erred in instructing the jury that it could find Defendant guilty of conspiracy if the jurors found beyond a reasonable doubt that Defendant had conspired to commit felony larceny or had conspired to commit felony breaking and entering. Specifically, Defendant contends that this instruction permitted the jury to convict him of a crime not charged in the indictment. We agree.

Because Defendant did not object to the conspiracy instruction at trial, we review the challenged instruction only for plain error, a stan-

dard which requires Defendant to establish he was prejudiced by the alleged error. *See State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983). "In deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (quotation marks omitted).

Our Supreme Court has "consistently held that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." *State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 863 (1984) (citations omitted); *see also State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986) (holding that "a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment").

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or do a lawful act in an unlawful way or by unlawful means. In order for a defendant to be found guilty of a conspiracy, it must be established by competent evidence that the defendant entered into an unlawful confederation *for the criminal purposes alleged.*

State v. Massey, 76 N.C. App. 660, 661-62, 334 S.E.2d 71, 72 (emphasis added), *supersedeas allowed*, 314 N.C. 672, 335 S.E.2d 325 (1985); *see also State v. Dalton*, 122 N.C. App. 666, 672, 471 S.E.2d 657, 661 (1996) ("A criminal conspiracy is an agreement between two or more people to commit *a substantive offense.*") (emphasis added). Thus, an indictment for criminal conspiracy must allege the criminal purpose to which a defendant agreed.

Defendant's indictment charged him with conspiracy "to commit the felony of Breaking and Entering a Building With the Intent to Commit a Larceny, [N.C. Gen. Stat. §] 14-54(a)[.]" This Court has held that an indictment alleging that a defendant agreed with another to "feloniously break and enter into a building . . . with the intent to commit a felony therein, to-wit: Larceny" did not "charge [the] defendant with conspiracy to commit larceny." *State v. Fie*, 80 N.C. App. 577, 579, 343 S.E.2d 248, 251 (1986), *rev'd on other grounds*, 320 N.C. 626, 359 S.E.2d 774 (1987). We see no meaningful difference between the language of the indictment in *Fie* and that in Defendant's indictment. Accordingly, Defendant was charged with conspiracy to commit felony breaking or entering; Defendant was *not* charged with conspiracy to commit larceny. However, the trial court instructed the

jury that it could find him guilty of felony conspiracy if the State proved beyond a reasonable doubt that Defendant had agreed with others "to commit felony breaking or entering or felony larceny." (Emphasis added).

In *State v. Turner*, we found plain error and awarded a new trial where the

> defendant was indicted for "conspir[ing] with Ernie Lucas to commit the felony of trafficking to deliver to *Ernie Lucas* 28 grams or more . . . of cocaine[,]" [but] "the trial court instructed the jury 'that . . . the defendant agreed with Ernie Lucas to deliver 28 grams or more of cocaine to another, and that the defendant,— and that Ernie Lucas intended at the time the agreement was made, that the cocaine would be delivered . . . ."

98 N.C. App. 442, 447-48, 391 S.E.2d 524, 527 (1990). Although both the indictment and the instruction on the conspiracy charge alleged trafficking to deliver cocaine, the indictment alleged the agreement was with Ernie Lucas to deliver the drugs *to Ernie Lucas*, while the instruction characterized the conspiracy as an agreement with Lucas to deliver drugs *to another*. *Id.* Citing *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986), for the "well established rule that it is prejudicial error for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment[,]" this Court held that, although "the State's evidence does support the trial court's instruction[,] . . . the indictment [against the defendant] does not." *Turner*, 98 N.C. App. at 447, 448, 391 S.E.2d at 527 (quotation marks omitted). Consequently, the defendant was granted a new trial on that charge. *Id.* at 448, 391 S.E.2d at 527. Because the crime of conspiracy is the *agreement* to commit a criminal act, the holding in *Turner* requires that the indictment must allege *with specificity* the criminal act agreed to, and the trial court's jury instructions must closely conform thereto.

Here, the trial court's disjunctive charge instructed the jury that it could convict Defendant on the charge of conspiracy by finding that Defendant agreed to commit felony breaking and entering—a crime with which Defendant was charged—or that he agreed to commit felony larceny—a crime with which he was not charged. We note that the variance here was far greater and more substantive than that found to constitute plain error in *Turner*, where the same felony was alleged and instructed on.

Moreover, because the verdict sheet lists the conspiracy charge only as "Felonious Conspiracy," it is impossible to determine whether the jury found that Defendant committed the charged offense of conspiracy to commit felony breaking and entering, or whether the jury found that he committed the uncharged offense of conspiracy to commit felony larceny. Indeed, the jury was unable to return a unanimous verdict on the felonious breaking and entering charge, but did return a guilty verdict on felony larceny.

We conclude that the trial court erroneously allowed the jury the option of convicting Defendant of a crime not charged in the indictment. Moreover, although Defendant did not object at trial, the erroneous instructions by the trial court amount to plain error. *See Brown*, 312 N.C. at 249, 321 S.E.2d at 863 (holding that plain error exists where a judge's instructions permit the jury "to predicate guilt on theories of the crime which were not charged in the bill of indictment"). Accordingly, Defendant is entitled to a new trial on the charge of conspiracy to commit breaking and entering.

NO ERROR in part; NEW TRIAL in part.

Judges CALABRIA and ELMORE concur.

REGINA SINCLAIR THOMPSON, PLAINTIFF v. CHADWICK O'BRIAN THOMPSON, DEFENDANT

No. COA12-298

(Filed 20 November 2012)

1. Appeal and Error Interlocutory orders—contempt order—postseparation support

The appeal of a contempt order affected a substantial right and was therefore immediately appealable. However, the postseparation support order was a temporary measure, it was from an interlocutory order, it did not affect a substantial right, and thus it was not appealable.

2. Contempt—civil—postseparation support—no findings of present ability to pay

The trial court failed to make sufficient findings of fact and conclusions of law in its civil contempt order. The trial court

made a finding of fact regarding defendant's past ability to pay, but there were no findings regarding defendant's present ability to pay postseparation support.

Appeal by Defendant from orders entered 14 November 2011 and 18 January 2012 by Judge Scott Brewer in Stanly County District Court. Heard in the Court of Appeals 11 September 2012.

No brief filed for Plaintiff-Appellee.

James A. Phillips, Jr., for Defendant-Appellant.

BEASLEY, Judge.

Defendant appeals from an order requiring him to pay postseparation support (PSS) to Plaintiff and an order holding Defendant in contempt for failing to pay PSS. For the reasons stated herein, we reverse in part the trial court's contempt order and dismiss in part the appeal with regard to the PSS order.

Plaintiff is Regina Sinclair Thompson. Defendant is Chadwick O'Brian Thompson. The Thompsons were married on 15 April 1989. They separated on 21 February 2010. Three children were born of the marriage, and only one of the children is a minor. On 3 March 2011, Plaintiff filed a complaint for divorce, custody, child support, equitable distribution, PSS, alimony, and attorney's fees in Stanly County District Court. On 28 April 2011, Defendant answered and counterclaimed for custody and equitable distribution. Both Plaintiff's and Defendant's financial affidavits indicated that they have a mortgage on the marital home. Defendant filed a bankruptcy schedule of expenses and obligations owed to creditors in a supplemental pleading on 2 September 2011. The parties subsequently reached an agreement as to custody and support of the minor child.

On 18 October 2011, the trial court held a hearing on the matter of PSS. On 14 November 2011, the trial court entered an order awarding PSS to Plaintiff in the amount of $400 per month for twelve months or until the hearing on alimony. On 16 November 2011, Defendant filed his notice of appeal from the PSS order.

On 30 November 2011, Plaintiff filed a motion for an order to show cause for Defendant's failure to pay PSS. The motion was heard on 15 December 2011.[1] On 18 January 2012, the trial court held

1. Prior to the hearing, the trial court entered a decree of absolute divorce on 6 December 2011.

Defendant in contempt for willfully refusing to pay PSS under the 14 November 2011 order. The order failed to use the word "contempt" but ordered Defendant to serve thirty days in jail or pay Plaintiff $400 by the end of the day. The substance of the trial court's two findings of fact are as follows:

> 1. The Defendant has had the ability and means to pay the Post Separation Support previously ordered, or at least a substantial portion of that amount.
>
> 2. The Defendant has willfully refused to pay the Post Separation Support previously ordered.

The trial court made one conclusion of law: "The prior Post Separation Support Order is an interlocutory order and it is well settled law that it is not appealable since it did have an end date." Defendant filed his notice of appeal from the contempt order on 19 January 2012.

Defendant argues that the trial court's findings of fact and conclusion of law in the contempt order are insufficient. We agree. Defendant additionally argues that the trial court erred in numerous ways in granting PSS to Plaintiff. We hold that his appeal from the PSS order is interlocutory and dismiss all arguments regarding the PSS order.

[1] "The appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002)(citing *Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976)). We therefore have jurisdiction to hear the appeal from the contempt order under N.C. Gen. Stat. § 7A-27(d)(1) (2011).

By contrast, "a postseparation support order is a temporary measure, it is interlocutory, it does not affect a substantial right, and it is not appealable." *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998). A temporary order in a domestic case remains interlocutory despite a subsequent order holding a party in contempt for violating the temporary order. *See File v. File*, 195 N.C. App. 562, 568-70, 673 S.E.2d 405, 410-11 (2009)(upholding contempt order for parent violating temporary custody order). The PSS order is reviewable once the trial court has entered an order awarding or denying alimony. *See Crocker v. Crocker*, 190 N.C. App. 165, 167-68, 660 S.E.2d 212, 214 (2008)(reviewing findings of facts in PSS order after alimony was awarded). We therefore dismiss the appeal as to the PSS order.

[2] "The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). When the trial court fails to make sufficient findings of fact and conclusions of law in its contempt order, reversal is proper. *Bishop v. Bishop*, 90 N.C. App. 499, 506-07, 369 S.E.2d 106, 110 (1988).

Since the order before us is devoid of any mention of "contempt," we must first determine that this order is in fact a contempt order and, if it is a contempt order, the type of contempt applied.

> [C]ontempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.

O'Briant v. O'Briant, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (internal citations omitted). This Court has previously defined civil contempt as "[f]ailure to comply with an order of a court." *Carter v. Hill*, 186 N.C. App. 464, 465, 650 S.E.2d 843, 844 (2007)(quoting N.C. Gen. Stat. § 5A-21 (2007)). The purpose for which the court exercises its contempt power is a significant factor in determining whether the contempt is civil or criminal. *O'Briant*, 313 N.C. at 434, 329 S.E.2d at 372. "Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil." *Id.*

In this case, the trial court ordered Defendant to either pay Plaintiff $400 or serve thirty days in jail for willfully refusing to pay PSS to Plaintiff. The action here was for Defendant's failure to comply with the court's previous order. It is evident that the trial court was exercising its contempt power to "provide a remedy for an injured suitor and to coerce compliance with an order." *Id.* Therefore, this is a contempt order, and it is civil contempt.

In order to hold a party in civil contempt, the trial court must find the following:

> (1) The order remains in force;
> (2) The purpose of the order may still be served by compliance with the order;
> (2a) The noncompliance by the person to whom the order is directed is willful; and
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2011). A factual finding that the defendant "has had the ability to pay as ordered" supports the legal conclusion that violation of the order was willful; "however, standing alone, this finding of fact does not support the conclusion of law that defendant has the present ability to purge himself of the contempt by paying the arrearages." *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985)(internal quotation marks omitted).

Here, the trial court utterly failed to make findings regarding subsections (1) and (2) of § 5A-21(a). Additionally, the trial court's "finding of fact" that "Defendant has had the ability and means to pay the Post Separation Support previously ordered, or at least a substantial portion of that amount" is insufficient. The trial court's finding of fact in this case is similar to the finding of fact in *McMiller*. The trial court in this case made a finding of fact regarding Defendant's *past* ability to pay. While the trial court's finding that Defendant "has had the ability to pay" PSS may support the legal conclusion that his failure to do so was willful which the trial court labeled a finding of fact rather than a conclusion of law there are no findings regarding Defendant's *present* ability to pay PSS. Further, while we appreciate the trial court's "conclusion of law" that the underlying PSS order is interlocutory, this is not a conclusion of law nor does it have any relevance to contempt.

In sum, we hold that the trial court's findings of fact and conclusion of law in the contempt order are insufficient; thus, we reverse in part the trial court's order. We dismiss in part Defendant's appeal from the PSS order as interlocutory.

Reversed in part; Dismissed in part.

Judges MCGEE and THIGPEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 NOVEMBER 2012)

AMMONS v. GOODYEAR TIRE & RUBBER CO. No. 12-424	Indus. Comm. (622446)	Affirmed
EBERT v. EBERT No. 12-241	Mecklenburg (08CVD25169)	Affirmed
FRANK LILL & SON, INC. v. STATE OF NC No. 12-496	Wake (11CVS5977)	Dismissed
IN RE A.R. No. 12-752	Alexander (09JT56)	Affirmed
IN RE D.D.R. No. 12-521	Guilford (08JT669)	Affirmed
IN RE H.R. No. 12-549	Randolph (11JA92-95)	Affirmed
IN RE R.B. No. 12-858	Wake (09JT886)	Affirmed
IN RE S.M.D. No. 12-373	Guilford (08JT690) (08JT693-694)	Affirmed
IN RE T.M. No. 12-895	Mecklenburg (08JT772-774)	Affirmed
JENKINS v. WHIMPER-JACKSON No. 12-268	Craven (09CVD1916)	Reversed and Remanded
KING v. BLANTON No. 12-534	Columbus (11CVS906)	Affirmed
METROLINA BUILDERS, INC. v. NEW BEGINNINGS CMTY. CHURCH OF CHARLOTTE, INC. No. 12-217	Mecklenburg (10CVS19905)	Reversed and Remanded
SPAINHOWER v. SPAINHOWER No. 12-291	Carteret (09CVS875)	Dismissed
STATE v. AMIR No. 12-617	Moore (09CRS54623) (10CRS27)	No Error

STATE v. BAILEY No. 12-558	Mecklenburg (11CRS206822) (11CRS206826)	No Error
STATE v. BARBOUR No. 12-378	Wake (10CRS222841) (10CRS222851)	No Error
STATE v. BEST No. 12-409	Johnston (10CRS4597) (10CRS53747-48)	Affirmed
STATE v. BLACK No. 12-431	Mecklenburg (09CRS259831)	No Error
STATE v. BLEVINS No. 12-447	Carteret (10CRS55178) (11CRS819)	No error in part; dismissed in part
STATE v. CARTER No. 12-248	Rockingham (11CRS50264-65)	No Error
STATE v. FOSTER No. 12-367	Mecklenburg (10CRS231550) (11CRS18247)	No Error
STATE v. GRIER No. 12-410	Mecklenburg (10CRS234736)	No Error
STATE v. HERNANDEZ No. 12-723	Davie (10CRS1217) (10CRS50947)	No Error in Part and Dismissed in Part.
STATE v. HURST No. 11-145-2	Buncombe (09CRS65286) (10CRS40)	No Error
STATE v. MARTIN No. 12-808	Wake (11CRS203216)	Affirmed
STATE v. MORRING No. 12-429	Martin (10CRS50803)	No Error
STATE v. PRUNER No. 12-514	Durham (11CRS2900)	No Error
STATE v. ROSE No. 12-477	Forsyth (11CRS14680)	Dismissed

STATE v. RUIZ No. 12-497	New Hanover (10CRS50140)	No Error
STATE v. THOMAS No. 12-590	Washington (10CRS50183)	No Error
STATE v. WALL No. 12-483	Forsyth (06CRS59834)	Affirmed
STATE v. WILLIAMS No. 12-585	Iredell (08CRS61073) (08CRS61077)	Affirmed
STEELE v. SAFECO INS. CO. OF AM. No. 12-266	Mecklenburg (10CVS13799)	Affirmed
UNION ACAD. v. UNION CNTY. PUB. SCH. No. 11-1300	Union (11CVS554)	Reversed and Remanded
WARD v. BORUM HEALTHCARE, LLC No. 12-418	Watauga (11CVS35)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

Motion to suppress—ambiguous request for counsel—failure to exercise right—The trial court did not err in a resisting a public officer, felonious breaking or entering, larceny after breaking or entering, felonious possession of a stolen firearm, and felonious possession of a firearm by a felon case by denying defendant's motion to suppress the statements he made during a recorded interrogation at the police station even though defendant contended that his request for counsel was ignored. Defendant never unambiguously requested to speak with counsel. Further, once defendant was informed that it was his decision whether to invoke the right to counsel, he opted not to exercise that right. **State v. Cureton, 274.**

Motion to suppress—voluntariness—The trial court did not err in a resisting a public officer, felonious breaking or entering, larceny after breaking or entering, felonious possession of a stolen firearm, and felonious possession of a firearm by a felon case by denying defendant's motion to suppress the statements he made during a recorded interrogation at the police station even though defendant contended that his confession was not voluntary. The totality of the circumstances supported the trial court's ruling that defendant's confession was voluntary. **State v. Cureton, 274.**

Voluntariness—deception—no plain error—There was no plain error in the admission of defendant's confession even though he contended that it was involuntary in that it was obtained through deceptive statements regarding the polygraph and DNA. Deception is not dispositive where the confession is otherwise voluntary; such statements generally do not affect the reliability of the confession. **State v. Graham, 150.**

Voluntariness—false hope of leniency—There was no plain error in the admission of defendant's confession even though defendant contended that the confession was involuntary because he was induced to confess by false hope of leniency. There was no direct promise to defendant that he would receive a lesser charge or no charge should he confess. **State v. Graham, 150.**

Voluntariness—friendship with officer—shared racial background—There was no plain error in the admission of a confession that defendant contended was involuntary in that it was induced by a shared racial background and friendship with an officer. Defendant did not show that the officer's reference to race was coercive and a mere reference to friendship is not enough to show plain error, especially where the friendship lacked intimacy. **State v. Graham, 150.**

Voluntariness—no plain error—There was no plain error in the trial court's findings and conclusions concerning the voluntariness of defendant's confession where the court found that defendant was not in custody and *Miranda* warnings were not required; that defendant was coherent, unimpaired, and gave reasonable answers to the questions; and that the interview lasted one hour. **State v. Graham, 150.**

Voluntariness—questions about religious belief—There was no plain error in the admission of a confession which defendant contended was involuntary in that it was induced by questions regarding whether defendant went to church or believed in God. There was no indication that defendant's will was affected, the line of questioning was brief and did not directly elicit defendant's admission, and there was no indication of a change in defendant's demeanor. **State v. Graham, 150.**

WILLS

Provisions sufficient to convey interest—collection of manuscripts and documents—The trial court did not err in an action involving the ownership of a collection of various manuscripts and documents (Collection) that belonged to plaintiffs' ancestor Colonel Charles E. Johnson (Johnson) by granting summary judgment to plaintiffs. The provisions of Johnson's and his wife's wills were sufficient to convey their interests in the Collection to their descendants. **Johnson v. N.C. Dep't of Cultural Res., 47.**

WORKERS' COMPENSATION

Conclusion of law—vocational factors—The Industrial Commission did not err in a workers' compensation case by allegedly failing to identify the vocational factors that led to its decision in its conclusion of law. The findings of fact set out the vocational and physical considerations that supported the conclusion of law that plaintiff had met his burden of proving his disability under prong three of *Russell*, 108 N.C. App. 762. **Thompson v. Carolina Cabinet Co., 352.**

Disability—third prong of Russell—futile to search for job—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was disabled under the third prong of *Russell*. The findings, which were supported by competent evidence including testimony from plaintiff's physician, were sufficient to support the Commission's conclusion that it would be futile for plaintiff to search for a job consistent with his physical restrictions and pain given his age, education, and past work experience. **Thompson v. Carolina Cabinet Co., 352.**

Finding of fact—supported by material evidence—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff's fall materially aggravated the arthritic condition in her knee. The finding was supported by the testimony of Dr. Messina, which was competent evidence. **Mintz v. Verizon Wireless, 433.**

Injury arising out of employment—causal relationship—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's injury arose out of her employment. There was a causal relationship between plaintiff's employment and her injury because she incurred her injury based on a condition in her workplace. **Mintz v. Verizon Wireless, 433.**

Injury occurring in the course of employment—time, place, circumstances—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's injury occurred "in the course of" her employment. Plaintiff's injury occurred during the hours of employment, even though it happened during an unpaid break, and plaintiff was injured on premises essentially controlled by defendant-employer while returning to her cubicle after engaging in an activity she undertook for her personal comfort. **Mintz v. Verizon Wireless, 433.**

Mislabeling of conclusion of law as finding of fact—reversal not required—Although the Industrial Commission's finding of fact 15 in a workers' compensation case was actually a conclusion of law, the Commission's mislabeling of this "finding" did not require reversal. **Thompson v. Carolina Cabinet Co., 352.**

Remand—new conclusion of law—capable of work but futile based on pre-existing conditions—The Industrial Commission did not err in a workers' compensation case by following the Court of Appeals' instructions on remand when it made a new conclusion of law. It was apparent from the conclusion of law that