NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 228

18 JUNE 2013

6 AUGUST 2013

RALEIGH
2016

CITE THIS VOLUME

228 N.C. APP.

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[2] 1 January 2016

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LOIS EDMONDSON BYNUM, INDIVIDUALLY, AND LOIS EDMONDSON BYNUM, ADMINISTRATRIX OF THE ESTATE OF JAMES EARL BYNUM AND LOIS MARIE BYNUM, PLAINTIFFS
v.
WILSON COUNTY AND SLEEPY HOLLOW DEVELOPMENT COMPANY, DEFENDANTS

No. COA12-779

Filed 18 June 2013

1. Appeal and Error—interlocutory orders and appeals—non-immunity related issues

The only issue properly before the Court of Appeals involved the correctness of the trial court's decision to deny defendant Wilson County's request for summary judgment in its favor on immunity-related grounds. Defendant Wilson County's attempted appeal from that portion of the trial court's order addressing non-immunity-related issues and granting plaintiffs' motion to dismiss defendant Sleepy Hollow's appeal in its entirety were taken from an unappealable interlocutory order.

2. Immunity—governmental—proprietary operation of water system—injured when leaving government building

The trial court did not err by denying defendant Wilson County's motion for summary judgment based on governmental immunity grounds. The operation of a water system is a proprietary rather than a governmental function, plaintiff Mr. Bynum was lawfully on the pertinent premises for the purpose of paying his water bill, and Mr. Bynum allegedly sustained injuries as the result of negligence on the part of defendant Wilson County as he left the building after paying his water bill.

Appeal by defendants from order entered 19 March 2012 by Judge Milton F. Fitch in Wilson County Superior Court. Heard in the Court of Appeals 7 January 2013.

Thomas & Farris, PA, by Albert S. Thomas, Jr., and Kurt Schmidt; and Narron & Holdford, PA, by Ben L. Eagles, for Plaintiff-appellees.

Teague Campbell Dennis & Gorham, L.L.P., by Carrie E. Meigs and Leslie P. Lasher, for Defendant-appellants.

ERVIN, Judge.

Defendants Wilson County and Sleepy Hollow Development Company appeal from an order denying their motions for summary judgment with respect to the claims advanced against them by Plaintiff Lois Bynum, both individually and as administratrix of the estate of James Earl Bynum. On appeal, Defendant Wilson County argues that its appeal from the trial court's order denying its motion for summary judgment on governmental immunity grounds, although interlocutory, is properly before us and that it is entitled to immunity from suit in this case on the grounds that "operating and maintaining a county office building is a governmental function." In addition, Defendants argue that, in order to "avoid a fragmentary appeal," we should reach the merits of their non-immunity based challenges to the trial court's order, which rest on assertions that the evidentiary forecast presented to the trial court did not support a finding of negligence-based liability. After careful consideration of Defendants' challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court did not err by denying Defendant Wilson County's motion for summary judgment based on governmental immunity grounds and that we should decline to reach Defendants' other challenges to the trial court's order. As a result, we affirm the trial court's order in part and dismiss Defendants' appeals in part.

I. Factual Background

A. Substantive Facts

The factual basis underlying Plaintiffs' claims, to the extent that it is relevant to the issue properly before us at this time, was set out in our prior opinion in *Bynum v. Wilson County*, __ N.C. App. __, 716 S.E.2d 90, 2011 N.C. App. LEXIS 1964, [WL cite] (2011) (unpublished) (*Bynum I*), in which we stated that:

> In January 2007, Defendant Wilson County moved its main office building to 2201 South Miller Road in Wilson. Wilson County leased the building in question from Defendant Sleepy Hollow Development Company. . . .
>
> On 15 April 2008, Plaintiffs James Earl Bynum and his wife, Lois Marie Bynum, drove to the Wilson County office building, in which the offices of Wilson County's water department were located, for the purpose of paying their water bill. Since Plaintiffs usually paid their water bill in person, they had visited the building on approximately thirteen previous occasions. While Mr. Bynum entered the building to pay the water bill, Mrs. Bynum remained in their car.
>
> After climbing the front exterior steps, Mr. Bynum entered the building and . . . paid the couple's water bill. After . . . exiting the building, Mr. Bynum started down the front exterior stairs in order to return to the car where Mrs. Bynum was waiting. Approximately two-thirds of the way down the stairs, Mr. Bynum fell and sustained serious injuries.

Id., 2011 N.C. App. LEXIS 1964, at *1-*3, [WL cite at __].

B. Procedural History

We also addressed the procedural history of this case in *Bynum I*, in which we stated that:

> On 9 December 2008, Mr. Bynum filed a complaint in which he alleged that he had been injured as the result of Wilson County's negligence. On 2 January 2009, Wilson County filed an answer in which it denied the material allegations of Mr. Bynum's complaint and asserted a number of affirmative defenses, including a contention that Mr. Bynum's claims were barred by the doctrine of governmental immunity. On 30 July 2009, Plaintiffs filed an amended complaint in which they claimed to have been injured as the result of negligence on the part of Wilson County and Sleepy Hollow.
>
> On 3 June 2010, Defendants sought summary judgment. On 14 October 2010, the trial court entered an order denying Defendants' summary judgment motions. Defendants noted an appeal to this Court from the trial court's order.

Bynum I, 2011 N.C. App. LEXIS 1964, at *4, [WL cite at __]. As a result of the fact that Mr. Bynum died on 27 January 2011, Plaintiffs sought leave of court to substitute Mrs. Bynum, in her capacity as administratrix of Mr. Bynum's estate, for Mr. Bynum as a party plaintiff on 31 March 2011. This Court allowed the substitution motion on 15 April 2011. *Id.*

In *Bynum I*, we held that Defendant Wilson County's challenge to the denial of its summary judgment motion predicated on governmental immunity grounds affected a substantial right and was properly before us despite the interlocutory nature of the trial court's order. On the other hand, we held that Defendant Sleepy Hollow's appeal and Defendant Wilson County's challenge to the trial court's refusal to grant summary judgment in its favor with respect to more traditional liability-based issues involved a request for appellate review of an interlocutory order; that Defendants had not articulated any substantial right that would be jeopardized by a failure on our part to consider their non-immunity-related challenges to the trial court's order on an interlocutory basis; and that those portions of Defendants' appeals should be dismissed. After reaching the merits of Defendant Wilson County's challenge to the trial court's rejection of its governmental immunity defense, we observed that Defendant Wilson County had mistakenly submitted a different insurance policy from the one in effect at the time of Mr. Bynum's accident for consideration at the summary judgment hearing, refused to grant Defendant Wilson County's request that we permit the proper insurance policy to be substituted for the one that had been presented to the trial court, and allowed Defendant Wilson County's alternative motion to dismiss its appeal. As a result,

> we h[e]ld that, with the exception of Wilson County's challenge to the trial court's refusal to grant summary judgment in its favor on governmental immunity grounds, Defendants' appeal . . . is dismissed as having been taken from an unappealable interlocutory order. In addition, . . . we deny Defendants' request that we allow an amendment to the record on appeal to include what Defendants claim to be the correct insuring agreement. Finally, we deny Defendants' request that this case be remanded to the trial court subject to certain instructions and allow Defendants' alternative motion for leave to withdraw their appeal.

Bynum I, 2011 N.C. App. LEXIS 1964, at *17 [WL cite at __].

On 23 December 2011, Plaintiffs filed a motion seeking leave to amend their complaint in order to assert a wrongful death claim.[1] On 16 February 2012, Defendants filed motions seeking the entry of summary judgment in their favor. On 19 March 2012, the trial court entered an order denying Defendants' summary judgment motions. Defendants noted an appeal to this Court from the trial court's order. On 13 July 2012, Plaintiffs filed a motion to dismiss Defendant Sleepy Hollow's appeal as having been taken from an unappealable interlocutory order.

II. Legal Analysis

A. Scope of Appeal

[1] As a preliminary matter, we must identify the issues that are properly before us for appellate review. As was the case in *Bynum I*, Defendant Wilson County asserts, among other things, that the trial court erred by denying its motion for summary judgment based upon governmental immunity considerations. "This Court has held that appeals from interlocutory orders raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Williams v. Devere Constr. Co., Inc.*, __ N.C. App __, __, 716 S.E.2d 21, 25 (2011) (citing *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (other citations omitted). As a result, Defendant Wilson County's challenge to the trial court's refusal to enter summary judgment in its favor on governmental immunity grounds is properly before us.

In addition, Defendants have also sought immediate review of the trial court's decision not to resolve Defendant Wilson County's non-immunity-related challenges and Defendant Sleepy Hollow's challenges to the trial court's order in their favor by denying Defendants' motion for summary judgment concerning these issues.[2] Defendants have not, however, articulated any substantial right that would be lost in the absence of immediate appellate consideration of these additional challenges to the trial court's order in their brief and we decline, as a general proposition, to sift through the record for the purpose of determining

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1. Although the record does not contain an order allowing Plaintiffs' amendment motion, we gather from the contents of the parties' briefs that such an order was, in fact, entered.

2. The non-immunity-related claims asserted in Defendants' summary judgment motions consisted of claims that the evidentiary forecast presented to the trial court did not permit a finding that Mr. Bynum's injuries resulted from any negligence on the part of Defendants and that Plaintiffs' claims were barred by Mr. Bynum's contributory negligence.

whether a particular trial court order does, in fact, affect a substantial right. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (stating that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order" and that "the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits") (citations omitted). Although Defendant Sleepy Hollow's response to Plaintiffs' dismissal motion suggests that a failure to consider Defendants' non-immunity-related claims might create a risk of inconsistent verdicts, *Hartman v. Walkertown Shopping Center, Inc.*, 113 N.C. App. 632, 634, 439 S.E.2d 787, 789 (stating that, where "dismissal of this appeal as interlocutory could still result in two different trials on the same issues, creating the risk of inconsistent verdicts, a substantial right is prejudiced"), *disc. review denied*, 336 N.C. 780, 447 S.E.2d 422 (1994), we see no such risk in the event that we decide the issues arising from Defendant Wilson County's assertion of governmental immunity without addressing the other issues that Defendants seek to have us consider. As a result, consistently with our decision in *Bynum I*, we conclude that Defendants are "not entitled to obtain appellate review of the trial court's decision to refrain from granting summary judgment in [their] favor on the basis of any non-immunity-related argument and dismiss those portions of [their] appeal that rely on such non-immunity-related issues." *Bynum I*, 2011 N.C. App. LEXIS 1964, at *8 n.3 [WL cite at __].

In attempting to persuade us to reach the merits of their non-immunity-related challenges to the trial court's order, Defendants note that this Court has, on occasion, addressed additional issues that have been presented for our consideration in an appeal that arose from a trial court decision concerning immunity-related issues. For example, Defendants cite *RPR & Assocs. v. State*, 139 N.C. App. 525, 530-32, 534 S.E.2d 247, 251-53 (2000), *aff'd*, 353 N.C. 362; 543 S.E.2d 480 (2001), in which we addressed a service of process argument, and *Colombo v. Dorrity*, 115 N.C. App. 81, 84, 86, 443 S.E.2d 752, 755, 756, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 517 (1994), in which we addressed a statute of limitations issue. Although we held in these two instances that, given the specific factual and procedural contexts from which these cases arose, it would promote judicial economy to resolve these relatively clear-cut non-immunity-related issues in the same opinion in which we addressed the defendants' immunity-related arguments, we did not hold in either case that non-immunity-related issues would always be considered on the merits in the course of deciding an immunity-related interlocutory

appeal or recognize the existence of a substantial right to have multiple issues addressed in the course of an immunity-related appeal. On the contrary, in most immunity-related interlocutory appeals, we have declined requests that we consider additional non-immunity-related issues on the merits. *See, e.g.*, *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 764-65 (2010) (reviewing a defendant's challenge to the denial of an immunity-related dismissal motion on the merits while dismissing the remainder of the defendant's appeal as having been taken from an unappealable interlocutory order); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384-85, 677 S.E.2d 203, 207-08 (2009) (reviewing the defendant's challenge to the trial court's immunity-related decision on the merits while dismissing the remainder of the defendant's appeal), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010). As we noted in *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 464-65, 621 S.E.2d 1, 4, *disc. review denied*, 359 N.C. 629, 615 S.E.2d 866 (2005):

> [T]he question of whether a governmental entity is a "person" under [42 U.S.C.] § 1983 is analogous to the public duty doctrine and claims of immunity and, therefore, hold that it involves a substantial right permitting an interlocutory appeal.
>
> Defendants have, however, also [raised other arguments] on appeal[.] . . . Since these arguments do not involve any claim of immunity and defendants have made no other showing as to how this aspect of the trial court's ruling affected a substantial right, we decline to address these arguments and dismiss this portion of defendants' appeal.

(citing *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254). Thus, we conclude, as we did in *Bynum I*, that the only issue properly before us at this time is the correctness of the trial court's decision to deny Defendant Wilson County's request for summary judgment in its favor on immunity-related grounds. For that reason, we dismiss Defendant Wilson County's attempted appeal from that portion of the trial court's order addressing non-immunity-related issues and grant Plaintiffs' motion to dismiss Sleepy Hollow's appeal in its entirety as having been taken from an unappealable interlocutory order.[3]

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3. Although the record indicates that the trial court certified the order at issue in this case for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), Defendants have correctly refrained from relying on that certification in support of their request for immediate review of their non-immunity-related claims given that the trial court's order did not constitute a final resolution of any specific claim or of all claims relating to any specific party.

B. Standard of Review

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. [Gen. Stat.] § 1A-1, Rule 56(c) (2012). " 'When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). The moving party has the burden "to show the lack of a triable issue of fact and to show that he is entitled to judgment as a matter of law." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982) (citing *Oestreicher v. Stores*, 290 N.C. 118, 131, 225 S.E.2d 797, 806 (1976)). "The showing required for summary judgment may be accomplished by proving [that] an essential element of the opposing party's claim . . . would be barred by an affirmative defense," *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citing *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 21, 423 S.E.2d 444, 454 (1992)), such as governmental immunity. "Our standard of review of a trial court's order granting or denying summary judgment is *de novo*." *Bryson v. Coastal Plain League, LLC*, __ N.C. App __, __, 729 S.E.2d 107, 109 (2012) (citing *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig*, 363 N.C. at 337, 678 S.E.2d at 354 (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (internal citation omitted).

C. Availability of Governmental Immunity

[2] In its brief, Defendant Wilson County argues that the trial court erroneously failed to enter summary judgment in its favor on immunity-related grounds given that the "alleged causes of Decedent's injuries include governmental functions which were performed by Wilson County[.]" More specifically, Defendant Wilson County contends that "zoning and inspection [are] governmental function[s,]" that "operating and maintaining a county office building is a governmental function," and that "Wilson County's water supply system is also a governmental function." In addition, Defendant Wilson County argues that Mr. Bynum's injuries did not stem from the operation of a water system. We do not find any of these contentions persuasive.

1. General Principles

"Sovereign immunity stands for the proposition that 'the State cannot be sued except with its consent or upon its waiver of immunity.' " *Dawes v. Nash Cty.*, 357 N.C. 442, 445, 584 S.E.2d 760, 762 (2003) (quoting *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998), and citing *Guthrie v. State Ports Authority*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983)). "The counties are recognizable units that collectively make up our state, and are thus entitled to sovereign immunity under North Carolina law." *Archer v. Rockingham Cty.*, 144 N.C. App. 550, 553, 548 S.E.2d 788, 790 (2001), *disc. rev. denied*, 355 N.C. 210, 559 S.E.2d 796 (2002). "Nevertheless, governmental immunity is not without limit. '[G]overnmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.' Governmental immunity does not, however, apply when the municipality engages in a proprietary function. . . . [In] determining whether an entity is entitled to governmental immunity, the result therefore turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature." *Estate of Williams v. Pasquotank County*, __ N.C. __, __, 732 S.E.2d 137, 141 (2012) (quoting *Evans v. Housing Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004), and citing *Grimesland v. Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951)). " '[A]lthough an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases; and conversely, although classified in general as proprietary, certain phases may be considered exempt from liability. [In addition], it does not follow that a particular activity will be denoted a governmental function even though previous cases have held the identical activity to be of such a public necessity that the expenditure of funds in connection with it was for a public purpose.' Consequently, 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." *Estate of Williams*, __ N.C. at __, 732 S.E.2d at 143 (quoting *Sides v. Hospital*, 287 N.C. 14, 21-22, 213 S.E.2d 297, 302 (1975) (citations and emphases omitted).

The fact-intensive nature of the determination of whether a plaintiff's suit is barred by governmental immunity is illustrated in *Town of Sandy Creek v. East Coast Contr. Inc.*, __ N.C. App __, __ S.E.2d __, __, 2013 N.C. App. LEXIS 384 [WL cite] (2013) (*Sandy Creek II*), in which an engineering firm sought to recover damages for "breach of contract, negligence, and indemnity and contribution" associated with the construction of a sewer system. *Id.*, 2013 N.C. App. LEXIS 384, at *2 [WL

cite at __]. On remand for further consideration in light of *Estate of Williams*, we "recognize[d] that judicial precedent has previously held that construction of a sewer system is a governmental function." *Id.*, 2013 N.C. App. LEXIS 384, at *8 [WL cite at __] (citing *McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E.2d 169 (1969)). However, after concluding that "[construction of a sewer system] is not the nature of the claim in this case," we pointed out that " '[the] allegations of breaches of the duty of reasonable care [at issue in this case] do not concern decisions of governmental discretion such as whether to construct a sewer system or where to locate the sewer system' " and noted that, instead, " 'the alleged breaches concern [the municipality's] handling of the contract and [its] business relationship with the contractor, acts that are not inherently governmental but are commonplace among private entities.' " *Id.* (quoting *Town of Sandy Creek v. East Coast Contr., Inc.*, __ N.C. App. __, __ 736 S.E.2d 793, 797-98 (2012) (*Sandy Creek I*) (superseded by *Sandy Creek II*)). Thus, we held "that a local governmental unit acts in a proprietary function when it contracts with engineering and construction companies, regardless of whether the project under construction will be a governmental function once it is completed." *Sandy Creek II*, 2013 N.C. App. LEXIS 384, at *10 [WL cite at __].

A reliance on the same fact-intensive approach to determining whether a particular activity should be deemed governmental or proprietary for governmental-immunity purposes can be seen in other cases as well. For example, in *Aaser v. Charlotte*, 265 N.C. 494, 497, 144 S.E.2d 610, 613 (1965), in which the plaintiff alleged that she was injured by children playing in a corridor of the Charlotte Coliseum, the Supreme Court held that "[a] city is engaging in a proprietary function when it operates . . . an arena, or leases it to the promoter of an athletic event" and that "the liability of the city and of the Authority to the plaintiff for injury, due to an unsafe condition of the premises, is the same as that of a private person or corporation." (citing *Carter v. Greensboro*, 249 N.C. 328, 333, 106 S.E.2d 564, 568 (1959) (other citation omitted). On the other hand, in *Robinson v. Nash County*, 43 N.C. App. 33, 36, 257 S.E.2d 679, 681 (1979), in which the plaintiff sought damages for injuries sustained after he fell down the stairs while visiting the Register of Deeds office, we determined that Nash County was entitled to the benefit of governmental immunity given that the operation of the register of deeds office "is clearly a governmental function for which the county enjoys immunity from suit for negligence." Similarly, in *Seibold v. Library*, 264 N.C. 360, 141 S.E.2d 519 (1965), the plaintiff sought a personal injury recovery after falling on the steps of a governmentally owned library.

In affirming the trial court's determination that the plaintiff's claim was barred by immunity-related considerations, the Supreme Court held that operation of a public library is a governmental, rather than proprietary, function.

An analysis of these and similar cases reveals that the determinative factor to be considered in ascertaining whether a particular injury resulted from a governmental or proprietary activity is the nature of the plaintiff's involvement with the governmental unit and the reason for the plaintiff's presence at a governmental facility rather than the underlying tasks which the governmental entity allegedly performed in a negligent manner. Although *Aaser* held that operation of a municipal arena was a proprietary function and *Robinson* and *Seibold* held that operating a register of deeds' office and a library were governmental functions, none of these decisions rested on a determination of the extent to which the particular actions that might have prevented the plaintiff's injury, such as posting guards in the Coliseum or maintaining the buildings in which the register of deeds office and library were housed, were "governmental" or "proprietary" in nature. As a result, instead of holding "that maintaining county property is a governmental function," the pertinent cases hold that, where a plaintiff is injured as a result of his or her involvement with a governmental function, such as transacting business at the register of deeds office or borrowing a book from a public library, the relevant governmental entity is immune from suit. On the other hand, if a plaintiff is injured as a result of his or her involvement with a proprietary function, such as attending an event at a governmentally owned facility, then governmental immunity is not available.

2. Applicability of Immunity-Related Principles in this Case

According to the undisputed evidence before the trial court, Mr. Bynum was injured after falling on the steps of a building maintained by Wilson County and utilized for a number of different purposes, including providing a place where customers of the county's water system could pay their bills. Mr. Bynum had visited the building to pay his water bill and was injured as he left the building after making a payment. Although Defendant Wilson County argues that the operation of a water system is a governmental function, it only cites cases discussing other services, such as the operation of a jail or library, in support of this proposition. An examination of the decisions of this Court and the Supreme Court addressing the status of governmentally owned water systems for immunity-related purposes indicates, however, Defendant Wilson County's argument lacks merit.

The Supreme Court has "long held that a municipal corporation selling water for private consumption is acting in a proprietary capacity and can be held liable for negligence just like a privately owned water company." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010) (citing *Mosseller v. City of Asheville*, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966)). In other words, "[w]hen a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity and is liable for injury or damage to the property of others to the same extent and upon the same basis as a privately owned water company would be." *Bowling v. Oxford*, 267 N.C. 552, 557, 148 S.E.2d 624, 628 (1966) (citing *Mosseller*, 267 N.C. at 107, 147 S.E. 2d at 560; *Faw v. North Wilkesboro*, 253 N.C. 406, 409, 117 S.E. 2d 14, 17 (1960); and *Candler v. Asheville*, 247 N.C. 398, 406, 101 S.E. 2d 470, 476 (1958)) (other citations omitted). As a result, the operation of a municipal or county-owned water system is a proprietary rather than a governmental activity.

As we have already noted, a governmental entity acting in a proprietary capacity " 'is regarded as a legal individual . . . [which] may be held to that degree of responsibility which would attach to an ordinary corporation.' " *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 751, 407 S.E.2d 567, 568 (quoting *McCombs*, 6 N.C. App. at 238, 170 S.E.2d at 172) (internal citation omitted), *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991). For that reason, "a municipal corporation selling water for private consumption . . . is potentially liable for negligent acts of its agents or employees done in the scope of their agency or employment." *Fussell*, 364 N.C. at 225, 695 S.E.2d at 440 (citing *Jones v. Gwynne*, 312 N.C. 393, 409, 323 S.E.2d 9, 18 (1984), and *Munick v. Durham*, 181 N.C. 188, 195, 106 S.E. 665, 668 (1921) (stating that, "[w]hen cities are acting in their corporate character, or in the exercise of powers for their own advantage, they are liable for damages caused by the negligence or torts of their officers or agents").

According to well-established North Carolina law, a business owner is liable for the negligent maintenance of buildings in which customers may pay their bills.[4] For example, in *Lamm v. Bissette Realty*, 327 N.C. 412, 395 S.E.2d 112 (1990), the plaintiff was injured on the steps of a building to which she had gone for the purpose of paying an insurance bill. As a result of the fact that the "owners owe a duty to business

4. In light of this basic principle, Defendant Wilson County's argument that it should be deemed immune from suit in this case because Mr. Bynum's injuries did not result from the operation of the county's water system, narrowly defined, has no merit.

invitees to keep the entrance in a reasonably safe condition," the Supreme Court held that "a jury could find that defendants were negligent for not attempting to correct what defendants themselves called an open and obvious condition - the sloping asphalt - by adding a handrail to make it reasonably safe." *Lamm*, 327 N.C. at 417, 395 S.E.2d at 116. The Supreme Court's holding in *Lamm* reflects the general rule that a business has a responsibility to exercise reasonable care to ensure that the premises on which others are entitled to come in the course and scope of the business' operations are safe. For example, in *Farrell v. Thomas and Howard Co.*, 204 N.C. 631, 633, 169 S.E. 224, 225 (1933), the plaintiff alleged, in pertinent part, that he "went upon the premises of the defendant as an invitee; that the steps leading from the office to the sidewalk were in an unsafe condition; . . . that the defendant knowingly, negligently, and wilfully failed to use due care in providing reasonably safe steps; [and] that[,] while on the steps and in the act of leaving the defendant's premises[,] the plaintiff was thrown to the sidewalk and injured[.]" In rejecting the defendant's contention that the plaintiff's complaint should have been dismissed, the Supreme Court held that "[t]he defendant owed to the plaintiff as its invitee the duty to exercise ordinary care for her safety in going into and retiring from the office." (citing *Ellington v. Ricks*, 179 N.C. 686, 690, 102 S.E. 510, 511 (1920)); *see also*, *e.g.*, *Harrison v. Williams*, 260 N.C. 392, 395, 132 S.E.2d 869, 871 (1963) (stating that the "[d]efendant owed plaintiff, as invitee, the legal duty to maintain the aisles and passageways of its place of business in such condition as a reasonably careful and prudent proprietor would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety") (citations omitted). As a result of the fact that the operation of a water system is a proprietary rather than a governmental function, the fact that Mr. Bynum was lawfully on the premises in question for the purpose of paying his water bill,[5] and the fact that Mr. Bynum allegedly sustained injuries as the result of negligence on the part of Defendant Wilson County as he left the building after paying his water bill, we conclude that Defendant Wilson County

5. Although the Supreme Court abolished the common law "trichotomy" distinguishing between invitees, licensees, and trespassers which governed premises liability actions at the time that the cases discussed in the text were decided in favor of a standard "requiring a standard of reasonable care for all lawful visitors" in *Nelson v. Freeland*, 349 N.C. 615, 631, 507 S.E.2d 882, 892 (1998), we do not believe that this change in the applicable legal standard undercuts the continued viability of the basic principle discussed in the text, which is that a landowner, such as a business, has a duty to exercise reasonable care to ensure that individuals lawfully coming on particular premises, such as a person seeking to pay a bill, are not injured.

is not entitled to the entry of judgment in its favor based on a defense of governmental immunity.

In seeking to persuade us to reach a contrary conclusion, Defendant Wilson County notes, among other things, that Plaintiffs have alleged that it is liable based, at least in part, on the basis of an allegedly negligent zoning and inspection of the county building at which Mr. Bynum's fall occurred. More specifically, Defendant Wilson County argues that, because zoning and building inspection are governmental functions, it should be deemed immune from suit in any civil action in which allegations of negligent zoning and inspection are made. However, the ultimate issue in this case is Defendant Wilson County's liability for negligence in connection with the operation of its water system, including its alleged failure to provide a reasonably safe place at which its customers could pay their bills or conduct other water system-related business. The assertions that Plaintiffs have made with respect to zoning and inspection-related issues relate to their contention that Defendant Wilson County asserted jurisdiction over the building in question for zoning and inspection-related purposes in an effort to avoid making modifications to or repairs of the building and do not constitute contentions that Defendant Wilson County erred in the course of making specific zoning or inspection-related decisions. As a result of the fact that, as we have already established, the determination of whether a governmental entity was engaging in a governmental or proprietary activity at the time that the plaintiff was injured focuses on the nature of the activity which led to the plaintiff's injury and the fact that the zoning and inspection-related issues which Plaintiffs have raised do not involve any effort to look behind specific zoning and inspection-related decisions that Defendant Wilson County made, we do not believe that this aspect of Defendant Wilson County's argument has merit.

In addition, Defendant Wilson County posits that, because the water system's office is located in a county building, it is immune from suit on the grounds that "Wilson County is entitled to governmental immunity for operating its main office building." As we understand this argument, Defendant Wilson County is contending for the recognition of a general rule affording immunity from suit for any injury which might have occurred in connection with the "operat[ion] and maintain[ance of] a county office." The decisions upon which Defendant Wilson County relies in support of this proposition, however, find the existence of immunity from suit based on the nature of the underlying function being performed at the time of the plaintiff's injury rather than the nature of the tasks associated with maintenance of a governmentally owned building.

E.g. Hayes v. Billings, 240 N.C. 78, 80, 81 S.E.2d 150, 152 (1954) (county jail); *Seibold v. Kinston*, 268 N.C. 615, 620-21, 151 S.E.2d 654, 658 (1966) (public library); *Doe v. Jenkins*, 144 N.C. App. 131, 134, 547 S.E.2d 124, 127 (2001) (county courthouse), *disc. review denied*, 355 N.C. 284, 560 S.E.2d 799 (2002); and *Robinson*, 43 N.C. App. at 36, 257 S.E.2d at 681 (register of deeds office). We are unable to read any of these decisions as holding, consistently with Defendant Wilson County's position, that a county or municipality is immune from any suit seeking recovery for injuries allegedly resulting from the "maintenance" of a governmentally owned building, regardless of the manner in which the building is used or the reason for the plaintiff's presence at that building.

Finally, Defendant Wilson County suggests that "[Mr. Bynum's] subjective intent is not the appropriate basis for determining whether Wilson County was performing a governmental function at the time [he] was injured" and that, "[f]ollowing Plaintiffs-Appellees' logic, if [Mr. Bynum] had chosen to travel to the post office to mail his water bill, and was injured in a car accident on the way, [his] injuries would have risen out of a governmental function." We do not find this logic persuasive, given the obvious differences between the claims that Plaintiffs have asserted in this case from those posited by Defendant Wilson County and the absence of any authority tending to suggest that a business has a duty to ensure that the roads upon which its customers travel are maintained in a safe manner or to prevent its customers from being injured by the negligent driving of third parties. For that reason, Defendant Wilson County's "parade of horribles" argument does not persuade us to overturn the trial court's decision.

We do, however, recognize that our reading of the applicable law raises the prospect for potentially troubling results, such as making liability for falls like that suffered by Mr. Bynum contingent upon whether a plaintiff injured in a fall at a county-owned office building used for multiple purposes was on the premises for the purpose of paying a bill for water service or seeking the issuance of a building permit. On the other hand, the adoption of the approach advocated by Defendant Wilson County creates a risk of equally anomalous results, given that, under its understanding of the applicable law, an individual injured in a fall while paying a water bill would be able to pursue a damage recovery in the event that the governmentally owned water system was operated from a separate building while having no right to pursue such a recovery in the event that the water system was operated from a building that contained other offices performing clearly governmental functions.

The existence of anomalies similar to those that result from the adoption of either approach advocated in this case have been recognized in a slightly different context by the Supreme Court:

> It is generally held, that insofar as a town or city undertakes to sell water for private consumption it is engaged in a commercial venture, as to which it functions in a proprietary or corporate capacity, and for negligence in connection therewith it is liable. Insofar, however, as a municipality undertakes to supply water to extinguish fires, or for some other public purpose, it acts in a governmental capacity, and cannot be held liable for negligence.

Faw, 253 N.C. at 409-10, 117 S.E.2d at 17 (citing *Klassette v. Drug Co.*, 227 N.C. 353, 360, 42 S.E.2d 411, 416 (1947); *Woodie v. North Wilkesboro*, 159 N.C. 353, 356, 74 S.E. 924, 925 (1912) (additional citation omitted)); *see also*, *e.g.*, *Candler*, 247 N.C. at 406, 101 S.E.2d at 476 (stating that "public utilities, like water . . . are not provided by a municipality in its political or governmental capacity, except insofar as they may furnish water for extinguishing fires and for other municipal purposes") (citing *Fawcett v. Mt. Airy*, 134 N.C. 125, 129, 45 S.E. 1029, 1030 (1903); *Harrington v. Greenville*, 159 N.C. 632, 635-36, 75 S.E. 849, 850-51 (1912); *Howland v. Asheville*, 174 N.C. 749, 750, 94 S.E. 524, 524-25 (1917); and *Klassette*, 227 N.C. at 360, 42 S.E.2d at 416). A careful reading of these cases suggests that, in the event that a county or city water system negligently allows a water pipe to burst, the county would not be immune from a suit stemming from damage to the plaintiff's property resulting from water intrusion while being entitled to assert immunity from a suit alleging that, as a result of the same burst water pipe, the plaintiff had been unable to have a fire that burned his or her residence extinguished. Although such results may seem arbitrary or illogical, they are inherent in the application of the dichotomy between governmental and proprietary functions required by North Carolina law. As the Supreme Court stated in *Koontz v. City of Winston-Salem*, 280 N.C. 513, 528, 186 S.E.2d 897, 907 (1972):

> The case law defining governmental and proprietary powers as relating to municipal corporations is consistent and clearly stated in this and other jurisdictions. However, application of these flexible propositions of law to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary. . . .

Even so, "it is axiomatic that any change to the law in this area must come from the legislature, not the courts." *Clayton v. Branson*, 170 N.C. App. 438, 460, 613 S.E.2d 259, 274 (citing *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435-36 (1992) (stating that, while "plaintiff asks us either to abolish governmental immunity or to change the way it is applied," "any change in this doctrine should come from the General Assembly."), *disc. review denied*, 360 N.C. 174, 625 S.E.2d 785 (2005).[6] As a result, given that we are required to determine whether the activity at issue here was governmental or proprietary in nature, we conclude that the operation of a system for distributing water to the public is a proprietary activity and that Mr. Bynum's injuries stemmed from alleged negligence associated with and inherent in the operation of such a water system, necessitating the further conclusion that the trial court did not err by determining that Defendant Wilson County is not entitled to immunity from suit in this case on the basis of governmental liability.[7]

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiffs' motion to dismiss Sleepy Hollow's appeal from the trial court's order as

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6. Appellate courts in many other jurisdictions have noted that "application of the governmental/proprietary distinction 'to the facts of a particular case has led to seemingly incongruous and diverse results.' " *Cunningham v. City of Attalla*, 918 So. 2d 119, 124 (Ala. Civ. App. 2005) (quoting *Hillis v. City of Huntsville*, 274 Ala. 663, 667, 151 So. 2d 240, 243 (1963)). *See, e.g.*, *Tarbell Adm'r, Inc. v. City of Concord*, 157 N.H. 678, 682-83, 956 A.2d 322, 326 (2008) (stating that, although courts have attempted "to alleviate the harshness of the results produced by municipal immunity" by "distinguish[ing] between municipal functions that were 'governmental with immunity on the one hand, and proprietary with liability on the other hand,'" "this often artificial distinction [has] produced results [in practice] that were not only 'confused, inconsistent and difficult,' but absurd") (quoting *Gossler v. Manchester*, 107 N.H. 310, 315, 221 A.2d 242, 245 (1966) (Kenison, J., dissenting), *superseded by statute as stated in Dover v. Imperial Casualty & Indem. Co.*, 133 N.H. 109, 575 A.2d 1280 (1990)); *Greene County Agric. Soc'y v. Liming*, 89 Ohio St. 3d 551, 558, 733 N.E.2d 1141, 1147 (2000) (stating that the "attempted distinction between governmental and proprietary functions is a 'morass of conflict and confusion,' 'has been difficult and frequently leads to absurd and unjust consequences'") (quoting *Hack v. Salem*, 174 Ohio St. 383, 394, 189 N.E.2d 857, 864 (1963) (Gibson, J., concurring in judgment); and *Hudson v. Town of East Montpelier*, 161 Vt. 168, 177-78 n.3, 638 A.2d 561, 567 n.3 (1993) (stating that "Vermont is one of a minority of states that retains the governmental-proprietary distinction, which has been criticized by courts and commentators for many years as unworkable").

7. Although Defendant Wilson County also argues that it had not waived immunity by purchasing insurance that provided coverage for Plaintiffs' claims, we need not address this issue given the decision enunciated in the text of this opinion.

having been taken from an unappealable interlocutory order should be allowed, that Defendant Wilson County's attempt to assert non-immunity-related challenges to the trial court's order should be dismissed for the same reason, and that the trial court did not err by denying Defendant Wilson County's motion for summary judgment on governmental immunity grounds. As a result, the trial court's order should be, and hereby is, affirmed in part and Defendant's appeals should be, and hereby are, dismissed in part.

AFFIRMED IN PART AND DISMISSED IN PART.

Chief Judge MARTIN and Judge DILLON concur.

STEPHANIE CALLANAN, Plaintiff
v.
BRIAN WALSH, Defendant

No. COA13-85

Filed 18 June 2013

1. Appeal and Error—interlocutory orders and appeals—prior appeals and remands—new action on same issue

In an action involving a prenuptial agreement which had been appealed three times before, an appeal from the denial of a motion to dismiss a specific performance suit filed between the second and third appeals in an equitable distribution action was interlocutory but immediately reviewable. There was the possibility of a double recovery on the same issue or of different results from different venues on the same issue.

2. Jurisdiction—prenuptial agreement—superior court claim for specific performance—prior district court claim for equitable distribution

The superior court did not have jurisdiction over an action for specific performance of a prenuptial agreement and erred by denying defendant's motion to dismiss. The district court's jurisdiction had already been invoked in an equitable distribution (ED) claim involving the prenuptial agreement, and the superior court thus lacked jurisdiction to adjudicate plaintiff's claim. Further, plaintiff was barred from filing an action for specific performance as a means to circumvent a final ED judgment from which she did not appeal.

Appeal by defendant from order entered 26 September 2012 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 23 May 2013.

Donald H. Barton, attorney for plaintiff.

Joy McIver, attorney for defendant.

ELMORE, Judge.

Brian A. Walsh (defendant) appeals from an order entered 26 September 2012 by Judge Mark E. Powell, denying his motion to dismiss. After careful consideration, we reverse and remand.

I. Background

By now, the facts of this case are wholly familiar to this Court, as we have previously heard three separate appeals regarding the same issue again central to the instant appeal: *Callanan v. Walsh*, No. COA 04-1027, 2005 N.C. App. LEXIS 1732 (filed 16 August 2005) (unpublished) (Callanan I); *Callanan v. Walsh*, No. COA 09-482, 2010 N.C. App. LEXIS 48 (filed 19 January 2010) (unpublished) (Callanan II); *Callanan v. Walsh*, No. COA 11-911, 2012 N.C. App. LEXIS 189 (filed 7 February 2012) (unpublished) (Callanan III). The dispute that persists between the parties concerns an agreement (the premarital agreement) they entered into on the date of their marriage, 19 October 1997. In the premarital agreement, defendant and Stephanie Callanan (plaintiff) agreed that "in the event of a dissolution of their marriage" plaintiff "would receive the sum of $450,000.00 from the Defendant in any division of the parties Marital, Divisible, and/or Separate properties." Indeed, the parties separated in 2000 and plaintiff filed for divorce on 6 March 2001. Defendant filed an answer and counterclaim for post-separation support, alimony, and equitable distribution.

On 4 February 2004, Judge C. Dawn Skerrett entered a judgment which, in relevant part, treated the parties premarital agreement as marital debt. Plaintiff appealed, and in Callanan I we determined that the premarital agreement could not have been marital debt and we remanded to the trial court for further findings regarding the $450,000.00. In response to our ruling, Judge S. Cilley entered an order on 6 March 2008, adjusting the 4 February 2004 judgment such that plaintiff's assets were $450,000.00 greater than defendant's. However, on 23 July 2008, defendant filed a Rule 60 motion for relief from the 6 March 2008 order. On 5 November 2008, Judge Cilley entered a new order granting defendant's

motion, withdrawing the 6 March 2008 order, declaring it null and void, and ordering a mistrial. Judge Cilley opined that his 6 March 2008 order "can best be called un-beautiful" because he had based that order on some facts which were "found by another judge" and "on evidence that [he, himself] did not hear[.]" Plaintiff appealed from the 5 November 2008 order, and in Callanan II we vacated the portion of the order declaring a mistrial but dismissed plaintiff's appeal as interlocutory because the 5 November 2008 order required further proceedings. We also noted that the only issue to be resolved by the trial court following Callanan I and II was the treatment of the $450,000.00 in the premarital agreement.

On remand, the trial court entered a judgment on 21 September 2010, concluding that the $450,000.00 matter was a valid prenuptial agreement between the parties. Neither party appealed from this final judgment. However on 7 December 2010, defendant filed a motion for contempt against plaintiff. On 2 March 2011, the trial court found plaintiff in contempt for failing to abide by a portion of the 4 February 2004 judgment. Plaintiff appealed, arguing that 4 February 2004 judgment was no longer in effect. On appeal, we concluded in Callanan III that the 4 February 2004 judgment remained in effect despite the subsequent orders and appeals, with the only change being that the 21 September 2010 judgment reclassified the $450,000.00 in the 4 February 2004 judgment as "a valid prenuptial agreement" rather than "marital debt." We noted though, that "although the trial court originally classified the $450,000.00 matter as marital debt, the trial court arrived at the distributional award by deducting the $450,000.00 amount before dividing the parties' marital assets, ultimately achieving the same result as if the amount had been properly classified as a prenuptial agreement." We then concluded that "the 2010 Judgment is the final judgment in this matter, which left the 2004 Judgment in effect with the amended findings of fact regarding the classification of the $450,000.00 matter" and that "plaintiff did not appeal the 2010 Judgment." As such, we affirmed the trial court's contempt judgment against plaintiff.

Moving to the present appeal, the case is again before us because on 10 March 2011, before we issued our opinion in Callanan III, plaintiff filed a suit against defendant alleging that defendant had failed to pay plaintiff $450,000.00 as pursuant to their premarital agreement. In her complaint, plaintiff sought damages and specific performance. On 3 June 2011, defendant filed an answer and motion to dismiss, arguing, in part, 1) that plaintiff failed to state a claim upon which relief could be granted because her claim was already the subject of an equitable distribution (ED) action and had already been adjudicated and 2) that the trial

court lacked subject matter jurisdiction of plaintiff's claim because the same claim was already at issue in the ED case and pending on appeal (Callanan III). On 26 September 2001, the trial court entered an order denying defendant's motion to dismiss. Defendant now appeals.

II. Analysis

[1] We will first address whether defendant's appeal is interlocutory. It is well-established that "[a]n Order denying a Rule 12(b)(6) motion is interlocutory and clearly not appealable." *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 233 (1979) (citations omitted). Likewise, no immediate appeal exists from a motion to dismiss for lack of subject matter jurisdiction. *See Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384, 677 S.E.2d 203, 207 (2009) (There exists "an immediate appeal of the denial of a motion to dismiss based on personal jurisdiction, not subject matter jurisdiction."). However, defendant argues that we should reach the merits of his appeal because the dismissal of his appeal could result in two different trials on the same issue, creating the possibility of inconsistent verdicts. *See Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006) ("Where the dismissal of an appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right is prejudiced and therefore such dismissal is immediately appealable."). We agree.

The crux of defendant's argument for the immediacy of his appeal is that plaintiff filed her action on 10 March 2011, prior to our ruling in Callanan III, which was issued on 7 February 2012. As such, defendant fears that he is at risk of having the $450,000.00 agreement enforced against him twice in two different actions: once in the ED judgment, and again in the present action. Alternatively, defendant also argues that the trial court for the present suit could conclude opposite to how the trial court in the ED suit concluded, thus creating inconsistent verdicts. This Court has held that

> [a] party has a substantial right to avoid two trials on the same facts in different forums where the results would conflict. Where a party is appealing an interlocutory order to avoid two trials, the party must show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

Clements v. Clements, ___ N.C. App. ___, ___, 725 S.E.2d 373, 376 (2012) (quotations and citations omitted).

We conclude that defendant has met his burden. First, it is obvious that the same factual issue is being presented here as was presented in the ED suit. In Callanan I and II we clearly articulated that the issue being considered there "was the treatment of the purported prenuptial agreement[,]" and "the treatment of a certain $450,000 matter[.]" Here, plaintiff filed the present suit to "demand performance by the Defendant to the terms and conditions" of the same premarital agreement, and she specifically sought payment of $450,000.00. Thus, the trial court here is being presented with the same issue as the trial court in the ED action. Second, because the present suit was filed in superior court and the ED suit was adjudicated in district court there is a possibility of inconsistent verdicts, as two different venues are being asked to review and decide the same issues and circumstances. Thus, we will reach the merits of defendant's appeal.

[2] Turning now to the denial of defendant's motion to dismiss, we conclude that this decision was made in error, as the superior court does not have jurisdiction over the present suit. Defendant directs our attention to *Burgess v. Burgess*, 205 N.C. App. 325, 698 S.E.2d 666 (2010), which we find controlling in this instance.

In *Burgess*, the parties were husband and wife who each owned 50% shares of a residential contracting company, Burgess & Associates, Inc. The parties then divorced and an ED action was filed. In her divorce complaint, the wife requested "exclusive possession and full use of Burgess & Associates pending an equitable distribution of the company." 205 N.C. App. at 326, 698 S.E.2d at 667 (quotations omitted). Sometime later, another dispute arose between the parties regarding the company and the wife filed a separate shareholder action against the husband. The husband then filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the wife had already invoked the jurisdiction of the district court over the ownership of Burgess & Associates. The trial court denied the motion to dismiss, and the husband appealed. *Id.*

On appeal we conducted a *de novo* review of the matter. We noted that "[i]n an equitable distribution action, the district court is empowered to determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties[.]" *Id.* at 330, 698 S.E.2d at 670 (quotations and citations omitted). Further, once the district court's jurisdiction is invoked by an ED suit, "the superior court lack[s] subject matter jurisdiction to enter orders involving the same marital property." *Id.* at 328, 698 S.E.2d at 669. Applying these principles, we concluded that the wife's claim for ownership of the company was "squarely

addressed in her equitable distribution action" and therefore the wife had "already invoked the powers of the district court to divide the shares of Burgess & Associates" and she could not "use her shareholder suit as an end-around to obtaining sole ownership of the company." As such, we reversed the trial court's order. *Id.* at 330, 698 S.E.2d at 670.

Turning to the facts of the case *sub judice*, it is clear that the premarital agreement and the $450,000.00 matter were directly addressed in the ED suit. Thus, the district court's jurisdiction has already been invoked regarding this matter, and the superior court lacks jurisdiction to adjudicate plaintiff's claim. Further, we note that plaintiff is barred from filing an action for specific performance as a means to circumvent the final ED judgment issued on 21 September 2010, from which she did not appeal.

III. Conclusion

In sum, we conclude that the trial court erred in denying defendant's motion to dismiss. Defendant's motion should be granted, because the superior court lacks jurisdiction to adjudicate plaintiff's claim

Reversed and remanded.

Judges GEER and DILLON concur.

PATRICIA CHURCH, Employee, Plaintiff-Appellee
v.
BEMIS MANUFACTURING COMPANY, Employer,
PHOENIX INSURANCE COMPANY, Carrier, Defendants-Appellants

No. COA12-1433

Filed 18 June 2013

1. Workers' Compensation—suitable employment—post injury return to work—machine operator

The Industrial Commission did not err in a workers' compensation case by failing to recognize plaintiff's post injury return to work as a machine operator as suitable employment. Plaintiff could not perform all the tasks that the position required.

2. Workers' Compensation—total disability—no evidence to apportion disability

The Industrial Commission did not err in a workers' compensation case by finding plaintiff totally disabled as a result of her compensable left shoulder injury. Defendants failed to challenge the Commission's determination that there was no evidence of record upon which to apportion plaintiff's disability.

Appeal by Defendants from opinion and award entered by the North Carolina Industrial Commission on 27 July 2012. Heard in the Court of Appeals 21 May 2013.

Cox and Gage PLLC, by Robert H. Gage, for Plaintiff-Appellee.

Mullen Holland & Cooper, P.A., by J. Reid McGraw and Gerald L. Liska, for Defendants-Appellants.

McGEE, Judge.

Bemis Manufacturing Company and Phoenix Insurance Company (Defendants) admitted that Patricia Church (Plaintiff) sustained a compensable injury to her left shoulder. Plaintiff returned to work "under medical restrictions through August 9, 2009." On 18 August 2009, Plaintiff "had surgery to repair a cerebral aneurysm, followed by complications and has not returned to work."

The Commission awarded Plaintiff attorney's fees, medical expenses, and temporary total disability compensation "for the periods of work missed between the date of her injury by accident and her last day of work on August 9, 2009 and continuing until further Order of the Industrial Commission." The Commission ordered that "Defendants shall deduct from the temporary [total] disability compensation . . . the amount of short-term disability compensation paid to Plaintiff." Defendants appeal.

[1] Defendants first argue the Commission erred in "failing to recognize Plaintiff's post injury return to work as a machine operator as suitable employment." We disagree.

Although Defendants contend that the determination of what is suitable employment is a conclusion of law, Defendants provide no support for this assertion. The question of what constitutes suitable employment is a question of fact. *Keeton v. Circle K*, ___ N.C. App. ___, ___, 719 S.E.2d 244, 247-48 (2011); *Lowery v. Duke Univ.*, 167 N.C. App. 714, 719, 609 S.E.2d 780, 784 (2005).

"[F]indings of fact by the Full Commission are conclusive on appeal when supported by competent evidence even where evidence exists that would support a contrary finding." *Keeton*, ___ N.C. App. at ___, 719 S.E.2d at 247. Defendants contend the Commission erred in relying "on certain portions of [] Plaintiff's testimony while ignoring others." However, the Commission is "the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Lowery*, 167 N.C. App. at 717, 609 S.E.2d at 782. "Thus, the Commission may assign more weight and credibility to certain testimony than other." *Id.*

Competent evidence supports the finding that the position of machine operator was unsuitable employment for Plaintiff. Plaintiff could not perform all the tasks that the position required. Plaintiff testified that she "had trouble putting the heavier lids on the boxes. [Plaintiff] usually had to pull somebody to help [her]." Plaintiff found it difficult "to lift anything over ten pounds." As Plaintiff continued working as a machine operator from early 2008 to 2009, her arm hurt more. This finding of fact is conclusive on appeal. The Commission did not err in making this finding.

[2] Defendants next argue the Commission erred "by finding Plaintiff totally disabled as a result of her compensable left shoulder injury." We disagree.

"The Industrial Commission's conclusions of law are fully reviewable by the appellate courts." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (2002). "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2011).

An employee may show this incapacity in 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 preexisting 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.

Knight, 149 N.C. App. at 7, 562 S.E.2d at 439.

The Commission concluded:

> Prior to her aneurysm surgery, Plaintiff has proven that although she was medically released to work, due to her limited education, her limited vocational history and limited vocational skills in combination with her physical limitations and restrictions due to her left shoulder injury and resulting disabling pain, it would have been futile to seek employment with another employer in the competitive market. Plaintiff was also medically debilitated due to pain from her compensable injury prior to her aneurysm surgery.

Defendants contend the "conclusion is wrong on its face, as [] Plaintiff was working prior to the aneurism." (emphasis removed). However, Defendants do not challenge findings that Plaintiff missed work due to her compensable injury between the date of the injury and the date of the aneurysm surgery. Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009).

Defendants challenge the portion of finding of fact 44 regarding migraine headaches as unsupported by evidence. Defendants argue there "is no evidence that the migraines prevented [] Plaintiff from working." However, a doctor's record from Plaintiff's 1 July 2009 visit shows Plaintiff was out of work "all this week, still had headaches." Even assuming this evidence does not show that headaches forced Plaintiff out of work, the unchallenged remainder of finding of fact 44 supports the Commission's conclusion that Plaintiff was disabled.

The complete finding of fact 44 follows:

> Prior to her aneurysm surgery, Plaintiff has proven that although she was medically released to return to work, due to her limited education, her limited vocational history and skills, in combination with her physical limitations and restrictions due to her left shoulder injury and resulting disabling pain, it would have been futile to seek employment with another employer in the competitive market. Plaintiff has a high school diploma and she testified that prior to working for Defendant-Employer, she worked as a machine, rack and twister operator for various production

> plants. Plaintiff's job duties as a machine, rack and twister operator required constant walking, standing, carrying and reaching. When asked if she had performed any "office work," Plaintiff testified that she had performed some clerical job duties but that "was a long time ago" and it was before 1989. Based upon her testimony, Plaintiff was skilled only in the work she is physically unable to perform as a result of her compensable injury and resulting chronic left shoulder pain prior to her aneurism in August 2009. Therefore, due to pre-existing factors such as her limited education and her limited vocational history of work in unskilled manual labor jobs, her limited vocational skills, limited if any, transferable skills and poor health (including frequent migraine headaches), in combination with her pain, restrictions and limited functioning capacity due to her compensable injury, Plaintiff has proven it would have been futile for her to seek other employment prior to her aneurism. Plaintiff has also proven that she was medically debilitated due to severe pain and her resulting physical limitations from her compensable injury prior to the aneurysm surgery.

The Commission found that Plaintiff's limited education and vocational history, in combination with her compensable injury, made a search for other employment futile. The Commission's findings support the conclusion that Plaintiff was disabled under the third method in *Knight*, 149 N.C. App. at 7, 562 S.E.2d at 439. The Commission did not err in reaching this conclusion.

Within this argument, Defendants argue that finding of fact 45 is unsupported by evidence. Finding of fact 45 reads:

> The Full Commission finds that Plaintiff's aneurysm surgery and resulting complications worsened her compensable left shoulder condition and caused additional left sided weakness and decreased functional ability in her left upper extremity. Plaintiff's disability after the date of her cerebral aneurysm was caused by the combination of the effects of her left shoulder injury and her neurologic impairment due to her aneurysm.

A doctor testified that Plaintiff continued to report shoulder pain after her stroke. Even assuming this evidence does not support the finding, this finding is not necessary to the conclusion Defendants challenge.

Defendants challenge conclusion of law 5, which reads:

> Plaintiff's disability after the date of her cerebral aneurysm was caused by the combination of the effects of her left shoulder injury and her neurologic impairment due to her aneurysm. In *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 354 S.E.2d 477 (1987), the court held that where a claimant is rendered totally unable to earn wages, partially as a result of a compensable injury and partially as a result of a non-work-related medical condition, the claimant is entitled to an award for total disability in the absence of evidence to apportion [] Plaintiff's disability as between the compensable and non-compensable events.

Defendants argue that the "record is devoid of any evidence, whether through medical records or medical testimony, supporting this Conclusion of Law." However, Defendants fail to challenge the Commission's determination that there "is no evidence of record upon which to apportion Plaintiff's disability." Apportionment "is not proper where there is no evidence attributing a percentage of the plaintiff's total incapacity to earn wages to his compensable injury[.]" *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 393, 656 S.E.2d 608, 615, *aff'd*, 362 N.C. 676, 669 S.E.2d 319 (2008) (per curiam). The Commission did not err in reaching this conclusion.

Affirmed.

Judges STEPHENS and HUNTER, JR. concur.

CATHY FOX, PLAINTIFF
v.
PGML, LLC, MARIE TOMASULO, AND ESTATE OF GARY LEE TOMASULO,
BY AND THROUGH ITS EXECUTRIX, MARIE T. TOMASULO, DEFENDANTS

No. COA12-1257

Filed 18 June 2013

1. Premises Liability—slippery exterior stairway—building codes—summary judgment not appropriate

The trial court erred by granting summary judgment for defendants in a negligence action involving a fall down an exterior

stairway where there was conflicting engineering testimony about whether the stairway met code requirements.

2. Premises Liability—contributory negligence—slippery exterior stairway—summary judgment inappropriate

Summary judgment could not be granted for defendants in a negligence action arising from a fall on an exterior stairway where the evidence did not conclusively establish that plaintiff's failure to recognize the condition of the stairs was unreasonable.

Appeal by plaintiff from order entered 12 June 2012 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 13 March 2013.

Law Offices of James Scott Farrin, by Adrienne Blocker, for plaintiff-appellant.

Haywood, Denny & Miller, L.L.P., by John R. Kincaid, for defendant-appellees.

CALABRIA, Judge.

Cathy Fox ("plaintiff") appeals from the trial court's order granting summary judgment in favor of PGML, LLC, and the Estate of Gary Lee Tomasulo ("Tomasulo"), by and through its executrix, Marie Tomasulo[1] (collectively "defendants"). We reverse and remand.

I. Background

Defendants own a building located at 217 West Main Street in Washington, North Carolina ("the building") that is rented to tenants for use as retail stores, apartments, and storage. In July 2009, Tomasulo hired a crew to paint the metal steps on the exterior fire escape at the rear of the building. During the morning of 7 September 2009, Tomasulo was cleaning the upper floor of the building. Shortly before 9 a.m., Randy Walker, the owner of the adjacent building, discovered Tomasulo's body lying on the concrete next to the building's staircase and contacted law enforcement.

Plaintiff, a law enforcement officer employed by the City of Washington, arrived at the building to investigate Tomasulo's death.

1. At the outset of the summary judgment hearing, plaintiff consented to entry of dismissal against defendant Marie Tomasulo in her individual capacity.

During the investigation, plaintiff climbed to the top of the stairs to gather evidence about Tomasulo's fall. The steps were wet from rain that had occurred earlier in the day. While descending the staircase, plaintiff slipped on one of the wet stairs and fell to the landing below. As a result of the fall, plaintiff sustained an injury to her right shoulder, which required arthroscopic surgery.

On 13 July 2011, plaintiff filed a complaint in Beaufort County Superior Court against defendants alleging negligence. On 19 April 2012, defendants filed a motion for summary judgment. The trial court heard defendants' motion on 21 May 2012.

During the summary judgment hearing, defendants presented an affidavit from J. Stephen Janowski ("Janowski"), a civil engineer, which stated that the stairs were "in compliance in all respects with all applicable North Carolina and Beaufort County codes and building standards given the date of construction." Plaintiff responded with an affidavit from Michael J. Whitley ("Whitley"), a consulting engineer, which stated that the exterior staircase was an unreasonably slippery surface that did not meet the minimum requirements established by the 1953 North Carolina building code. In addition, the affidavit also averred that "the exterior stairway did not meet the minimum requirements for proper guards on the unenclosed sides of the stairway nor for the stair riser height and depth." After considering both affidavits and the arguments of the parties, the trial court granted defendants' motion for summary judgment on 12 June 2012. Plaintiff appeals.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)(quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). The party that moves "for summary judgment has the burden of establishing the lack of any triable issue." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

III. Premises Liability

A. Negligence

[1] Plaintiff argues that the trial court erred by granting defendants' motion for summary judgment. Specifically, plaintiff contends that there were genuine issues of material fact regarding whether defendants

maintained the stairway consistent with the standard of care owed to plaintiff. We agree.

In North Carolina, "the landowner now is required to exercise reasonable care to provide for the safety of all lawful visitors. . . ." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646 (1999). In order to prove a defendant's negligence, a "plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992). "Summary judgment is rarely appropriate in negligence cases, even when there is no dispute as to the facts, because the issue of whether a party acted in conformity with the reasonable person standard is ordinarily an issue to be determined by a jury." *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 650, 338 S.E.2d 129, 131 (1986).

To determine whether or not the court should grant summary judgment in a premises liability case, courts have focused on whether or not the premises met relevant building standards and whether there was evidence of a lack of notice of any prior problems with the premises. *See Davis ex rel. Gholston v. Cumberland Cnty. Bd. of Educ.*, ___ N.C. App. ___, ___, 720 S.E.2d 418, 421 (2011). "Whether or not a building meets these standards, though not determinative of the issue of negligence, has some probative value as to whether or not defendant failed to keep his [premises] in a reasonably safe condition." *Thomas v. Dixson*, 88 N.C. App. 337, 343, 363 S.E.2d 209, 213 (1988).

In the instant case, plaintiff did not assert that defendants had notice of any dangerous conditions on the stairway. Instead, plaintiff contends that the conflicting evidence as to whether the stairway complied with all relevant building code provisions created a genuine issue of material fact. Plaintiff argues that she presented evidence that the condition of the stairway violated several requirements of the building code, and that this evidence was "probative value as to whether or not defendant[s] failed to keep [the stairway] in a reasonably safe condition." *See id.*

In support of their motion for summary judgment, defendants presented an affidavit from Janowski averring that the staircase was in compliance with all relevant building codes. Plaintiff challenged defendants' motion by presenting an affidavit from Whitley which contradicted defendants' evidence by alleging specific violations of the relevant building codes. These affidavits establish the existence of conflicting evidence regarding whether defendants breached the standard

of care in their maintenance of the stairway that must be resolved by a jury. Specifically, Whitley's affidavit would require a jury to determine whether (1) the exterior staircase was an unreasonably slippery surface that did not meet the minimum requirements provided by the 1953 North Carolina building code; (2) the stairway met the minimum requirements for proper guards on the unenclosed sides of the stairway; and (3) the stair riser height and depth satisfied minimum requirements. Since we are not satisfied that the affidavits presented at the summary judgment hearing support the trial court's conclusion that there were no genuine issues as to any material fact regarding the stairway's compliance with applicable building code provisions, we determine that the trial court erred by granting defendants' motion for summary judgment.

B. Contributory Negligence

[2] Defendants argue that, regardless of the evidence regarding the issue of defendants' negligence, summary judgment was still appropriate because plaintiff was contributorily negligent. We disagree.

In North Carolina, "[a] finding of contributory negligence is a bar to recovery from a defendant for acts of ordinary negligence." *Bosley v. Alexander*, 114 N.C. App. 470, 472, 442 S.E.2d 82, 83-84 (1994). Summary judgment is rarely appropriate for contributory negligence issues. *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997). "Only where plaintiff's own negligence discloses contributory negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." *Id.*

Defendants argue that plaintiff was negligent because at the time she found Tomasulo's body at the base of the wet metal stairs, she had notice that the stairs were dangerous. In addition, defendants point to plaintiff's testimony which indicated that she did not see the wet stairs or take any extra precautions when descending the stairs. However, this evidence does not establish conclusively that plaintiff's failure to recognize the condition of the stairs was unreasonable. While defendants' conclusion may be plausible based on the evidence, it is not clearly the only reasonable conclusion that could be reached. As a result, summary judgment should not be granted based on contributory negligence.

IV. Conclusion

Accordingly, there were genuine issues of fact regarding whether the staircase complied with all relevant building code provisions. These issues of fact are directly relevant to whether or not defendants were negligent. As a result, the trial court erred in granting summary judgment

for defendants based on negligence. In addition, summary judgment could not be granted based on contributory negligence; therefore, we reverse and remand the case for trial.

Reversed and remanded.

Judges ERVIN and DILLON concur.

DARA LYNN HACKOS, Plaintiff-Appellant
v.
GOODMAN, ALLEN & FILETTI, PLLC; KERRI BORCHARDT TAYLOR and A. WILLIAM CHARTERS, Defendants-Appellees

No. COA12-1314

Filed 18 June 2013

1. Statutes of Limitation and Repose—legal malpractice—date of discovery

The one-year from the date of discovery provision of N.C.G.S. § 1-15(c) did not apply in a legal malpractice action and plaintiff was required to initiate her action within the three-year statute of limitations. The three-year statute of limitations applies unless at least two years have passed between the last act or omission giving rise to the injury and the date that plaintiff discovered or reasonably should have discovered the injury. In this case, approximately a year-and-a-half had passed at most.

2. Statutes of Limitation and Repose—legal malpractice—last act or omission—appeal

Plaintiff's legal malpractice claims were barred by the statute of limitations where more than three years passed between the alleged last act and the initiation of the action. The alleged acts or omissions at the trial level occurred more than four years before this action was filed, and, although plaintiff contended that defendants' negligence in conducting her appeal constituted the last act giving rise to her claim, plaintiff did not properly allege or argue those issues. Moreover, even if failing to petition the Supreme Court for relief was properly preserved and could qualify as negligence, on this record it did not constitute a last act or omission which would extend the statute of limitations.

Appeal by Plaintiff from order entered 25 June 2012 by Judge Elaine M. Bushfan in Superior Court, Durham County. Heard in the Court of Appeals 26 March 2013.

Twiggs, Strickland & Rabenau, P.A., by Jerome P. Trehy, Jr., for Plaintiff-Appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clinton R. Pinyan and Wes J. Camden, for Defendants-Appellees.

McGEE, Judge.

Dara Lynn Hackos (Plaintiff) alleged the following in her complaint filed 4 January 2012: Plaintiff was seriously injured in an automobile accident in Virginia on 25 August 2001, when Scottie Harrison Sparks (Sparks) rear-ended the vehicle Plaintiff was driving. Sparks was entirely at fault in the collision. Plaintiff hired a Virginia attorney to represent her in an action against Sparks and his employer.

Plaintiff next alleged that, after her Virginia attorney filed a complaint in Virginia on her behalf, Plaintiff met with David Curtis Smith (Smith), a North Carolina attorney, who convinced Plaintiff to allow him to represent her. Upon Plaintiff's request, her Virginia attorney withdrew, and Plaintiff filed a voluntary dismissal of the action in Virginia because Smith was not licensed to practice in Virginia. Smith assured Plaintiff that he could pursue the action in the United States District Court for the Middle District of North Carolina, "based upon diversity jurisdiction." Despite Smith's assurances to the contrary, the Middle District dismissed Plaintiff's action based upon improper venue.

Plaintiff alleged that, because of Smith's negligence, the statute of limitations in Virginia expired and Plaintiff lost her right to pursue the personal injury action. Plaintiff hired Attorney Brian Davis (Davis) to file a professional negligence claim against Smith. For reasons not made clear in Plaintiff's complaint, Davis withdrew as Plaintiff's attorney. Plaintiff then hired attorneys Kerri Borchardt Taylor (Taylor) and A. William Charters (Charters) of Goodman, Allen & Filetti, PLLC (with Taylor and Charters, Defendants). Smith moved for summary judgment, and a hearing date was set. Plaintiff alleged that Defendants failed to obtain a continuance, failed to respond to Smith's motion, and failed to appear at the summary judgment hearing. Plaintiff also failed to appear at the hearing, and summary judgment was granted based upon Smith's uncontested motion for summary judgment and its accompanying affidavit.

Plaintiff did not bring suit against Defendants at that time, but allowed them to continue representing her. Defendants filed a motion to reconsider the grant of summary judgment in favor of Smith, but the trial court denied Defendants' motion. Defendants filed a notice of appeal from (1) the order granting summary judgment to Smith and (2) the order denying Plaintiff's motion to reconsider.

This Court filed opinions in those two appeals on 16 December 2008. *Hackos v. Smith*, 194 N.C. App. 532, 669 S.E.2d 761 (2008) (*Hackos I*, deciding appeal from order granting summary judgment to Smith); *Hackos v. Smith*, 194 N.C. App. 557, 669 S.E.2d 765 (2008) (*Hackos II*, deciding appeal from denial of Plaintiff's motion to reconsider). In both *Hackos I* and *Hackos II*, this Court found that Defendants had committed multiple violations of the N.C. Rules of Appellate Procedure – most egregiously by failing to include any assignments of error in the records on appeal, which was, at that time, a requirement pursuant to N.C.R. App. P. 10(a) (2007); and by filing records on appeal that were materially different than those presented to Smith as the proposed records on appeal.

In *Hackos I*, this Court (1) affirmed the grant of summary judgment in favor of Smith; (2) sanctioned Defendants for filing a materially different record on appeal than that settled upon with Plaintiff; and (3) refused to address Plaintiff's two additional arguments because there were no assignments of error in the record. Assignments of error were not required when appealing from the granting of summary judgment. *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assoc.*, 362 N.C. 269, 277, 658 S.E.2d 918, 923 (2008) (citation omitted) ("for purposes of an appeal from a trial court's entry of summary judgment for the prevailing party, the appealing party is not required under Rule 10(a) of the Rules of Appellate Procedure to make assignments of error for the reason that on appeal, review is necessarily limited to whether the trial court's conclusions as to whether there is a genuine issue of material fact and whether the moving party is entitled to judgment, both questions of law, were correct"). Therefore, this Court, in *Hackos I*, considered the merits of Plaintiff's summary judgment argument *de novo*. *Hackos I*, 194 N.C. App. at 535-36, 669 S.E.2d at 763-64. However, we declined to address Plaintiff's two additional arguments because of the lack of assignments of error. *Id.* at 539, 669 S.E.2d at 765. In addition, in *Hackos II*, we dismissed Plaintiff's appeal because of Defendants' failure to include assignments of error in the record. *Hackos II*, 194 N.C. App. at 559-60, 669 S.E.2d at 767-68. Our decisions in *Hackos I* and *Hackos II* were unanimous, and no petition for discretionary review was filed with our Supreme Court for either opinion.

Plaintiff initiated the present action on 15 December 2011 by obtaining an order extending time to file a complaint. Plaintiff filed her complaint in the present action on 4 January 2012, and alleged that Defendants committed professional negligence in their handling of Plaintiff's action against Smith. Pursuant to N.C. Gen. Stat. 1A-1, Rule 12(b)(6), Defendants filed a motion to dismiss on 9 March 2012, contending that Plaintiff's complaint failed to allege "that Defendants committed any actionable negligence . . . within the period of any applicable statute of limitations and/or statute of repose that was the proximate cause of any legally cognizable damages allegedly suffered by Plaintiff." By order filed 25 June 2012, the trial court granted Defendants' motion to dismiss, ruling that Plaintiff's complaint failed to state a claim upon which relief could be granted, and that the allegations in Plaintiff's complaint "reveal that Plaintiff's claims fail or are defeated as a matter of law[.]" Plaintiff appeals.

I.

Plaintiff's sole issue on appeal is whether the trial court erred in granting Defendants' motion to dismiss. We affirm the order of the trial court dismissing Plaintiff's action.

II.

"We review de novo the grant of a motion to dismiss." *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003) (citation omitted). "In ruling upon such motion, the trial court must view the allegations of the complaint as admitted and on that basis must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Southeastern Hospital Supply Corp. v. Clifton & Singer*, 110 N.C. App. 652, 653, 430 S.E.2d 470, 471 (1993) (citation omitted).

[1] The issue on appeal is whether Plaintiff's claim was barred by the appropriate statute of limitations.

> " 'Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure . . . when some fact disclosed in the complaint necessarily defeats the plaintiff's claim.' " A motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar plaintiff's claims if the bar is disclosed in the complaint.

Carlisle v. Keith, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citations omitted). "N.C. Gen. Stat. § 1-15(c) governs legal malpractice claims, and establishes a three-year statute of limitations and a four-year

statute of repose." *Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 473, 665 S.E.2d 526, 531 (2008) (citation omitted).

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action[.]

N.C. Gen. Stat. § 1-15(c) (2011). "To determine when the last act or omission occurred we look to factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied." *Carle v. Wyrick, Robbins, Yates & Ponton*, ___ N.C. App. ___, ___, 738 S.E.2d 766, 771 (2013) (citation omitted). "Th[e] determination as to the last act giving rise to an action for malpractice is a conclusion of law appropriate for the trial judge to make based on the facts presented, such as the dates of relevant events in the attorney-client relationship." *Ramboot, Inc. v. Lucas*, 181 N.C. App. 729, 734, 640 S.E.2d 845, 848 (2007) (footnote omitted).

III.

Plaintiff alleged, *inter alia*, that Defendants committed legal malpractice by improperly filing certain documents with the trial court and by failing "to appear properly in this North Carolina action." Plaintiff further alleged Defendants' negligence was the proximate cause of the trial court's granting summary judgment in favor of Smith. These alleged acts or omissions by Defendants occurred on or before 13 July 2007, more than four years before Plaintiff initiated the present action on 4 January 2012. If those acts constituted the last acts of Defendants "giving rise to the cause of action[,]" then Plaintiff was barred from bringing the present action pursuant to the relevant statutes of limitations and repose. N.C.G.S. § 1-15(c); *Hargett v. Holland*, 337 N.C. 651, 655, 447 S.E.2d 784, 788 (1994) (citations omitted) ("Regardless of when plaintiffs' claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim.").

However, Plaintiff also alleged that Defendants' appellate representation was negligent. Plaintiff argues that Defendants "negligently committed acts of omission during the appeals that proximately resulted in the loss of [Plaintiff's] meritorious claims against Smith." Plaintiff

contends that Defendants' negligence in conducting her appeal constituted the last act giving rise to her legal malpractice action and, therefore, her action was filed within the statutes of limitations and repose. Plaintiff includes the following relevant allegations in her complaint:

> 109. For [Plaintiff's] appeals, the Court of Appeals indicated it was "gravely concerned by [Defendants'] lack of transparency in serving one version of the record on appeal on opposing counsel and a materially different version of that record on this Court."
>
> 110. On December 16, 2008, the Court of Appeals issued its decisions, sanctioning [Plaintiff's] counsel for "gross violations" of the appellate rules and affirming the trial court file No. CoAO7-1543, and dismissing No. CoA08-63 for the same gross violations of the appellate rules.
>
> . . . .
>
> 112. [Defendants] . . . failed to petition for further relief to the North Carolina Supreme Court in order to protect [Plaintiff] from the punishment rendered by the Court of Appeals for the gross violations of the Rules of Appellate Procedure.
>
> . . . .
>
> 114. Because Defendants . . . filed improper records on appeal in file No. CoAO7-1543 and CoA08-63 and because they repeatedly and continuously failed and omitted to correct, rectify or ameliorate these errors, the Court of Appeals dismissed and/or affirmed [Plaintiff's] appeals on January 5, 2009. By their failures, acts and omissions as described above, Defendants . . . breached the standards of practice owed to [Plaintiff] and were a direct and proximate cause of the summary judgment entered on behalf of Smith and against [Plaintiff] and the order denying [Plaintiff's] motion to reconsider, and were direct and proximate cause of the dismissal and/or affirmance of [Plaintiff's] meritorious appeals from the trial court's Order of Summary Judgment and Order Denying the Motion to Reconsider.

On 13 August 2007, Defendants filed notice of appeal on behalf of Plaintiff from the 16 July 2007 order granting summary judgment to Smith (*Hackos I*). On 29 October 2007, Defendants also filed notice of

appeal from the trial court's order denying Plaintiff's motion to reconsider (*Hackos II*). The mandate for this Court's opinions in *Hackos I* and *Hackos II* issued on 5 January 2009. Any petition to our Supreme Court for discretionary review of these opinions was required to have been filed within fifteen days of the issuance of the mandate. N.C.R. App. P. 15(b).

Therefore, *at most*, approximately a year and a half passed between the filing of the notices of appeal and the time Plaintiff would be charged, on 5 January 2009, with at least constructive notice of injury resultant from the deficient record. With respect to the alleged negligence in failing to petition our Supreme Court for further review in *Hackos I* and *Hackos II*, Plaintiff would be charged with constructive notice fifteen days after the mandate issued on 5 January 2009. N.C.R. App. P. 15(b). The three year statute of limitation applies unless at least two years have passed between the last act or omission giving rise to the injury and the date that Plaintiff did, or reasonably should have, discovered the injury:

> [W]henever there is . . . economic or monetary loss . . . which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage *is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action*, suit must be commenced within one year from the date discovery is made[.]

N.C.G.S. § 1-15(c) (emphasis added). Plaintiff discovered, or reasonably should have discovered, the alleged injury resulting from Defendants' alleged acts or omissions well before the two- year period mandated by N.C.G.S. § 1-15(c). Therefore, the "one year from the date discovery is made" provision did not apply in this matter, and Plaintiff was required to initiate this action within the three year statute of limitations. N.C.G.S. § 1-15(c); *Ramboot*, 181 N.C. App. at 732-33, 640 S.E.2d at 847.

[2] We are left only to determine whether Defendants' last act giving rise to the present cause of action occurred less than three years before 15 December 2011, which is the date Plaintiff initiated the present action. If Defendants' last act occurred on or after 15 December 2008, Plaintiff's claim is not barred by the three-year statute of limitations. However, if Defendants' last act occurred before 15 December 2008, Plaintiff has no claim. N.C.G.S. § 1-15(c); *Goodman*, 192 N.C. App. at 473, 665 S.E.2d at 531 ("N.C. Gen. Stat. § 1-15(c) governs legal malpractice claims, and establishes a three-year statute of limitations").

Referring to Plaintiff's complaint, the only act –which is actually an omission – suggested as indicative of negligence that occurred after 15 December 2008 is Defendants' alleged failure "to petition . . . from the punishment rendered by the Court of Appeals for the gross violations of the Rules of Appellate Procedure." However, in her complaint, Plaintiff does not appear to allege that failure to petition our Supreme Court constituted Defendants' last act. Plaintiff's complaint alleged that Defendants' failure to submit a proper record on appeal, and Defendants' subsequent failure to attempt to amend that record, constituted the last acts giving rise to the present action:

> 114. Because Defendants . . . filed improper records on appeal in file No. CoAO7-1543 and CoA08-63 and because they repeatedly and continuously failed and omitted to correct, rectify or ameliorate these errors, the Court of Appeals dismissed and/or affirmed [Plaintiff's] appeals on January 5, 2009. By their failures, acts and omissions as described above, Defendants . . . breached the standards of practice owed to [Plaintiff] and were a direct and proximate cause of the summary judgment entered on behalf of Smith and against [Plaintiff] and the order denying [Plaintiff's] motion to reconsider, and were direct and proximate cause of the dismissal and/or affirmance of [Plaintiff's] meritorious appeals from the trial court's Order of Summary Judgment and Order Denying the Motion to Reconsider.

Plaintiff does not include in this allegation Defendants' failure to petition our Supreme Court for review of this Court's opinions in *Hackos I* or *Hackos II*.

In her brief, Plaintiff states that "the negligence continued up through the appeal and up through the failure to seek discretionary review." This is the extent of Plaintiff's argument concerning any failure to petition for Supreme Court review. Plaintiff cites no authority in support of this conclusory statement, and fails to make any actual argument in her brief as required by N.C.R. App. P. 28(b)(6), resulting in abandonment of Plaintiff's argument. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008); *see also Rorrer v. Cooke*, 313 N.C. 338, 362, 329 S.E.2d 355, 370 (1985) (conclusory statement that alleged "departure from standards of care 'contributed greatly to the loss of [plaintiff's] claim when it was tried' is deficient" in that it was "not based upon specific facts" and "it does not aver that but for [the attorney's] negligence [the plaintiff] would have prevailed in her suit").

Furthermore, Plaintiff does not allege in her complaint that her contract with Defendants included petitioning our Supreme Court if an unfavorable outcome was obtained at this Court. *Garrett v. Winfree*, 120 N.C. App. 689, 694, 463 S.E.2d 411, 415 (1995) (citation omitted) ("The contractual arrangement between attorney and client determines the extent of the attorney's duty to the client and the end of the attorney's professional obligation."). Plaintiff makes no allegations that she ever requested Defendants to petition for further review after this Court filed its opinions in *Hackos I* and *Hackos II*, and there is nothing in the record showing that Defendants even had Plaintiff's consent to continue representation following the filing of this Court's opinions in *Hackos I* and *Hackos II*.

In addition, Plaintiff's allegation that Defendants were negligent in failing to petition our Supreme Court for review of this Court's opinions in *Hackos I* and *Hackos II* was that petition was necessary "in order to protect [Plaintiff] from the punishment rendered by the Court of Appeals for the gross violations of the Rules of Appellate Procedure." It is true this Court sanctioned Defendants for rules violations:

> We hold that the actions of plaintiff's counsel constitute gross violations of our appellate rules; therefore, pursuant to Rules 25 and 34, we elect to tax double the costs of this appeal against plaintiff's attorney[s].

Hackos I, 194 N.C. App. at 537, 669 S.E.2d at 764. However, this Court addressed the merits of Plaintiff's appeal as it related to the order granting Smith's motion for summary judgment in *Hackos I*. Plaintiff's appeal in *Hackos II* was limited to the trial court's denial of Plaintiff's "28 September 2007 denial of her motion to reconsider the 16 July 2007 granting of summary judgment" in favor of the defendants in that action. *Hackos II*, 194 N.C. App. at 558, 669 S.E.2d at 766. Because this Court affirmed the 16 July 2007 order granting summary judgment, the dismissal of Plaintiff's appeal in *Hackos II* from the trial court's denial of her motion to reconsider prejudiced her in no manner.

In her complaint, Plaintiff did not allege that Defendants' failure to petition our Supreme Court for review of this Court's affirmation, in *Hackos I*, of the 16 July 2007 order granting summary judgment, constituted legal malpractice. Plaintiff limited her allegation as follows: "[Defendants] failed to petition for further relief to the North Carolina Supreme Court in order to protect [Plaintiff] from the punishment rendered by the Court of Appeals *for the gross violations of the Rules of Appellate Procedure.*" (Emphasis added). Because this Court decided Plaintiff's argument concerning the July 2007 order granting summary

judgment on the merits, there was no "punishment" for rules violations in this regard.

Plaintiff does not reference, in either her complaint or her appellate brief, the two additional issues appealed in *Hackos I*. Plaintiff's appeal in *Hackos I* included arguments that: (1) the trial court erred in denying Plaintiff's pro se motion to continue, and (2) the trial court erred in granting summary judgment in favor of Defendants because neither Plaintiff nor her counsel had sufficient notice of the summary judgment hearing. These issues are not addressed in this Court's opinion in *Hackos I*; the sole reference to these issues being: "Plaintiff makes two other arguments in her brief. However, because our review is limited to the granting of summary judgment, we do not address [Plaintiff's] remaining arguments." *Hackos I*, 194 N.C. App. at 539, 669 S.E.2d at 765. These are the arguments that were dismissed because of Defendants' appellate rules violations. However, because Plaintiff makes no argument in her brief concerning these two dismissed issues, they are deemed abandoned. N.C.R. App. P. 28(b)(6).

Assuming, *arguendo*, that Plaintiff had properly preserved argument on these two issues, they would still fail. First, as noted above, Plaintiff fails to allege any contractual obligation requiring Defendants to represent Plaintiff beyond appeal to this Court. Plaintiff does not allege she requested Defendants petition our Supreme Court for discretionary review, or even authorized such.

Second, although we have found no opinions addressing the particular issue of whether failure to petition for Supreme Court review can be an act of legal malpractice, this Court has held that "failing to ask [the Court of Appeals] for a rehearing" is "clearly not actionable as legal malpractice[.]" *Sharp v. Gailor*, 132 N.C. App. 213, 215-16, 510 S.E.2d 702, 704 (1999). Without deciding whether failure to petition our Supreme Court for "further relief" can ever constitute negligence for the purposes of a legal malpractice action, we hold that on the record before us Defendants' failure to file a "petition for further relief" did not constitute the last "act or omission" giving rise to Plaintiff's claim. *Carle*, __ N.C. App. at __, 738 S.E.2d at 771. Therefore, the last act giving rise to Plaintiff's claim that initiated on 15 December 2011 necessarily occurred before 15 December 2008. More than three years passed between the alleged last act and the initiation of the present action. Plaintiff's claims were barred by the statute of limitations. We are not without sympathy for Plaintiff's position, particularly when the allegations of negligence concern the acts and omissions of professionals Plaintiff hired to represent her and protect her legal rights. However,

> " '[s]tatutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are . . . intended to require that litigation be initiated within the prescribed time or not at all.' "
>
> " 'The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: "Hard cases must not make bad law." ' "

Congleton v. City of Asheboro, 8 N.C. App. 571, 573-74, 174 S.E.2d 870, 872 (1970) (citations omitted).

Affirmed.

Judges GEER and DAVIS concur.

HALIFAX REGIONAL MEDICAL CENTER, INC., Plaintiff
v.
DARRELL JAMES BROWN, M.D., Defendant and Third-Party Plaintiff
v.
SMITH CHURCH OBSTETRICS & GYNECOLOGY, P.C. and RICHARD MINIELLY, M.D., Third-Party Defendants

No. COA12-1480

Filed 18 June 2013

1. Contracts—breach—not excused from performance

The trial court did not err in a breach of contract case by granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment. Defendant was not excused from performing under the agreement with plaintiff, where the decision of defendant's employer to terminate defendant's employment had no bearing on defendant's obligation to perform under his agreement with plaintiff.

2. Contracts—breach—motion to dismiss—motion to remove

The trial court did not err in a breach of contract case by granting third-party defendant's motions to dismiss and remove. Defendant's argument that defendant failed to argue its motion to dismiss in the trial court was not supported by the record. Furthermore, plaintiff's argument that there was a joint venture between plaintiff and third-party defendant failed.

Appeal by defendant from orders entered 29 August 2012 by Judge John E. Nobles, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 25 April 2013.

Joshua F. P. Long of WOODS ROGERS PLC, attorney for plaintiff.

E.C. Thompson, III, of THOMPSON & THOMPSON, P.C., attorney for defendant and third-party plaintiff.

Geoffrey P. Davis and Gilbert W. Chichester of CHICHESTER LAW OFFICE, attorneys for third-party defendants.

ELMORE, Judge.

Dr. Darrell James Brown (defendant) appeals from 1) an order entered 29 August 2012 granting summary judgment in favor of Halifax Regional Medical Center, Inc. (plaintiff) and denying his motion for summary judgment and 2) an order entered 29 August 2012 granting a motion to dismiss and motion to remove in favor of Smith Church Obstertrics & Gynecology, P.C. and Dr. Richard Minielly. After careful consideration, we affirm.

I. Background

Defendant is a medical doctor who specializes in the field of obstetrics and gynecology. In 2007, defendant and plaintiff entered into a Practitioner Incentive Agreement (the agreement) whereby plaintiff agreed to pay defendant an income subsidy of $195,804.10 and a relocation loan of $20,000.00, and defendant agreed to establish an OB/GYN practice in Roanoke Rapids. Under the terms of the agreement, to avoid repayment of the total money paid by plaintiff, defendant was required to maintain his practice for a period of one year beginning 18 June 2007. Then, according to the agreement, for each month defendant maintained his practice following this one year "subsidy period," plaintiff agreed to forgive a portion of the money owed each month for 24 months, at which

time defendant's indebtedness would be fully forgiven. Thus, in simple terms, to avoid repaying plaintiff for any of the money, defendant was required to maintain his practice from 18 June 2007 until 18 June 2010.

Defendant sought to fulfill his obligations under the agreement by establishing his practice with Smith Church Obstetrics & Gynecology, P.C., which was owned by Dr. Richard Minielly (collectively, Smith Church). On 5 February 2007, defendant and Smith Church entered into an employment contract (the contract) whereby defendant would be employed by Smith Church and paid a sum of $250,000.00 per year, renewable automatically each year unless either party gave 90 days notice of termination. Defendant maintained his practice with Smith Church until 3 June 2009, at which time Smith Church terminated defendant's employment. Defendant then accepted a position in Duplin County, thus ceasing his practice in Roanoke Rapids effective on 19 June 2009.

As a result, plaintiff sent defendant a demand letter, seeking "prompt repayment" of "$107,902.05, plus interest at the rate of 4.25% from June, 19, 2009, until paid." Defendant did not pay, and on 4 August 2010 plaintiff filed suit for breach of contract. In his answer filed 12 October 2010, defendant denied any obligation to repay the money owed under the agreement. He alleged that he entered into the agreement with plaintiff under the belief that there "were unmet demands for obstetrical/gynecological practice" in Roanoke Rapids, but that after the agreement was executed plaintiff further recruited another OB/GYN to practice in the area, which "oversupplied the community with obstetrical/gynecological services and consequently, resulted in a much less demand" for his services. Defendant further alleged that "[d]ue to the oversupply of ob/gyn positions in the community" he was "virtually unable to start a practice of his own" following his termination from Smith Church and therefore, he was forced to "look for employment elsewhere" which resulted in his employment "with University Health Systems in Duplin County[.]"

Defendant also filed a third-party claim against Smith Church for breach of contract and for interfering with his agreement with plaintiff. In the third-party claim, defendant alleged that Smith Church breached the employment contract by terminating defendant without notice and thereby interfered with his ability to comply with his agreement with plaintiff.

On 15 November 2010, Smith Church filed a motion to dismiss and motion to remove. Then on 30 August 2011, plaintiff filed a motion for summary judgment. Defendant also filed a motion for summary judgment against plaintiff. On 29 August 2012, the trial court entered an order granting plaintiff's motion for summary judgment and denying defendant's

motion for summary judgment. The trial court also ordered defendant to pay plaintiff $107,902.05 plus interest at a rate of 4.25% from 19 June 2009, until paid. That same day, the trial court also entered an order granting Smith Church's motion to dismiss the pending third-party claim. The trial court further granted Smith Church's motion to remove, to the effect that any further claims between Smith Church and defendant be sought according to the venue requirements of their contract. Defendant now appeals.

II. Analysis

A. Summary judgment

Defendant first argues that the trial court erred in granting plaintiff's motion for summary judgment and that summary judgment should have been granted in his favor. Defendant's primary argument is that he was excused from performing under the agreement with plaintiff, because plaintiff and Smith Church had a joint venture and Smith Church terminated defendant's employment. We disagree.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

Our Supreme Court has held that "[n]onperformance of a valid contract is a breach thereof . . . unless the person charged shows some valid reason which may excuse the non-performance; and the burden of doing so rests upon him." *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 217, 141 S.E.2d 292, 294 (1965) (citation omitted). Here, it is not in dispute that defendant failed to fully perform his duties under the agreement in order to avoid repaying plaintiff. Defendant was required to maintain his practice in Roanoke Rapids until June 2010, but in June 2009 he began practicing in Duplin County. However, defendant argues that the actions of Smith Church, namely their termination of his employment with them, excused him from performing under the agreement because Smith Church and plaintiff were in a joint venture.

The crux of defendant's argument rests on two rules. The first is that a party who prevents performance of an agreement by the other party may not take advantage of the nonperformance. *See Mullen v. Sawyer*, 277 N.C. 623, 633, 178 S.E.2d 425, 431 (1971) ("[O]ne who prevents the performance of a condition, or makes it impossible by his own act, will

not be permitted to take advantage of the nonperformance."). The second is that "[e]ach member of a joint adventure is both an agent for his coadventurer and a principal for himself[,]" *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 8, 161 S.E.2d 453, 460 (1968), and therefore responsible for the other's actions. Thus, what we must decide then is whether plaintiff and Smith Church were engaged in a joint venture.

A joint venture is "an alliance between two or more people in pursuit of a common purpose such that negligence of one participant may be imputed to another." *Slaughter v. Slaughter*, 93 N.C. App. 717, 720, 379 S.E.2d 98, 100 (1989) (quotations and citation omitted). A joint venture exists when two or more parties join together to:

> carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge[.]. . . Facts showing the joining of funds, property, or labor, in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a necessary fiduciary relation, will justify a finding that a joint adventure exists.

Pike, 274 N.C. App. at 8-9, 161 S.E.2d at 460 (quotations and citations omitted).

Here, the record does not support defendant's assertion that a joint venture existed between plaintiff and Smith Church. First, by its basic definition, a joint venture is a plan carried out *for profit*. None of plaintiff's business is conducted for profit. In its complaint, plaintiff alleged that it was a "non-profit corporation" and in his answer, defendant admitted that allegation. Further, the terms of the agreement make it clear that defendant was not recruited to establish a practice in Roanoke Rapids for any money-making reasons, but rather, to remedy a "lack of qualified physicians specializing in obstetrics/gynecology in the Community[.]"

Second, as plaintiff correctly argues in its brief, it had no right to direct or control the conduct of Smith Church. For a joint venture to exist, one party must have "the legal right to control the conduct of the other with respect to the prosecution of the common purpose." *Slaughter*, 93 N.C. App. at 721, 379 S.E.2d at 101 (citation omitted). Here, the agreement between plaintiff and defendant makes no mention or even reference to Smith Church, and defendant was not required to establish his practice with them. Further, we can find nothing in the record which establishes any fiduciary relationship between plaintiff and Smith Church.

In sum, we conclude that plaintiff and Smith Church were not engaged in a joint venture. Therefore, the decision of Smith Church to terminate defendant's employment had no bearing on defendant's obligation to perform under his agreement with plaintiff.

B. Motions to dismiss and remove

[2] Next, defendant argues that the trial court erred in granting Smith Church's motion to dismiss and motion to remove. We disagree.

With regards to the motion to dismiss, defendant argues that the trial court erred in granting the motion because Smith Church never argued the motion. We conclude that defendant's argument is not supported by the record.

According to its pleading, Smith Church based its motion to dismiss on the fact that "Defendant Darrell James, M.D. executed a contract (Brown's Exhibit A) wherein he agreed in paragraph 12 that in the event '. . . of a disagreement with respect to any matter whatsoever arising under this contract, the dispute shall be referred to an arbitration committee whose decision shall be binding on each of the parties hereto without further action or recourse.' " Turning to the transcript, it is clear that Smith Church made this same argument at the hearing. Counsel for Smith Church argued that "paragraph 12 . . . clearly and unambiguously states that if there's a disagreement between these two parties, Smith Church and Dr. Brown, that's to be resolved by arbitration." Thus, defendant's argument fails.

With regards to the motion to remove, defendant argues that since there was a joint venture between plaintiff and Smith Church, plaintiff acted for Smith Church in choosing Duplin County as the proper forum and therefore Smith Church's motion to remove should have been dismissed. As we have already discussed, plaintiff and Smith Church were not engaged in a joint venture, therefore defendant's argument again fails.

III. Conclusion

In sum, we conclude that the trial court did not err in granting summary judgment in favor of plaintiff or in granting Smith Church's motions to dismiss and remove. Accordingly, we affirm both orders.

Affirmed.

Judges GEER and DILLON concur.

RONNIE C. HEDGEPETH AND WIFE, SHIRA C. HEDGEPETH, PLAINTIFFS
v.
LEXINGTON STATE BANK AND TRUSTEE SERVICES, INC., TRUSTEE, DEFENDANTS

No. COA12-1057

Filed 18 June 2013

1. Appeal and Error—subject matter jurisdiction—no unresolved claims—final judgment—appeal not interlocutory

The Court of Appeals had jurisdiction to hear plaintiff's appeal. Although the trial court had ordered that the Massies be joined as defendants, plaintiffs never effectively sued the Massies and, therefore, there were no unresolved claims against the Massies and the judgment on appeal was a final judgment.

2. Unfair Trade Practices—standing—no fraudulent manner

The trial court did not err by dismissing plaintiff's unfair and deceptive trade practices claim against defendants. Although the trial court erred in concluding that plaintiff's lacked standing, the trial court's order of dismissal was still proper because plaintiff's evidence failed to show that defendants acted in a fraudulent manner towards plaintiffs.

Appeal by plaintiffs from judgment entered 23 April 2012 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 9 January 2013.

Stephen E. Lawing for plaintiffs-appellants.

Brinkley Walser, PLLC, by Stephen D. Barnhill, for defendants-appellees.

GEER, Judge.

Plaintiffs Ronnie C. Hedgepeth and Shira C. Hedgepeth appeal from a judgment dismissing, pursuant to Rule 41(b) of the Rules of Civil Procedure, their claim for unfair and deceptive trade practices ("UDTP") against defendants Lexington State Bank ("LSB") and Trustee Services, Inc. Although we agree with plaintiffs that the trial court erred in concluding that they lacked standing, we hold that dismissal was nevertheless proper because plaintiffs failed to present evidence that defendants committed an unfair and deceptive trade practice that harmed them.

Facts

The Hedgepeths were the sole owners of Business Cabling, Inc. ("BCI"). BCI obtained a loan from LSB in the amount of $75,000.00 secured by a deed of trust on the Hedgepeths' home. That loan had a maturity date of 14 January 2002, but was extended. On 29 April 2004, BCI obtained a second loan from LSB in the amount of $117,600.00 to secure performance bonds for two jobs BCI was doing for the Winston-Salem Forsyth County Schools.

The second loan was secured by a deed of trust on the home of Ms. Hedgepeth's parents, James Kent Caldwell and Helen Caldwell, who lived in Montgomery County, Virginia. The Caldwells' deed of trust included language providing that the deed of trust did not just secure the $117,600.00 amount, but also secured "any other indebtedness or liability of the above-named Borrower," which was identified as BCI, so long as the indebtedness was incurred for business, business investment, or agricultural purposes.

The $117,600.00 note was renewed on 10 June 2005, but was ultimately marked paid by LSB on 9 March 2006 after the performance bonds were no longer necessary. As of April 2006, however, BCI still had an outstanding debt of $73,936.00 on the first loan, which had matured on 23 February 2006. BCI also had an outstanding balance of $20,165.00 on another long term loan that was due to mature on 20 April 2006.

On 4 April 2006, LSB wrote the Hedgepeths and the Caldwells a letter stating that it was "unable to renew these notes, with their present structure." LSB, however, offered a commitment letter that consolidated the two debts into a single loan of $93,561.00. The new loan would be secured by (1) the existing deed of trust in the amount of $25,000.00 on the Hedgepeths' home, (2) a security agreement on accounts receivable and equipment from BCI, (3) the existing deed of trust on the Caldwells' home, and (4) an additional deed of trust in the amount of $70,000.00 on the Hedgepeths' home. The consolidated loan would be personally guaranteed by the Hedgepeths and the Caldwells. The commitment letter provided that all accrued interest and principal would be due in a single payment on 14 July 2006.

At that time, Ms. Hedgepeth met with Tom Thompson, Vice President of Credit Analyst-Risk Assessment for LSB. He explained to her that the deed of trust on her parents' home had not been released with the cancellation of the $117,600.00 promissory note, but rather the Caldwells' deed of trust secured BCI's other indebtedness as well. The Hedgepeths claim that LSB threatened to start foreclosure proceedings

on the Caldwells' home and property unless the Hedgepeths signed the new commitment letter. According to the Hedgepeths, because of the threat of foreclosure, on 20 April 2006, they signed the commitment letter and the additional deed of trust on their own home.

When the consolidated loan matured on 2 August 2006, the parties were unable to agree to terms for a renewal. LSB initiated foreclosure actions. On 4 January 2007, Billie D. Massie, a neighbor of the Caldwells, contacted LSB regarding purchasing the promissory note for the consolidated loan in order to forestall the foreclosure proceedings scheduled for 11 January 2007.

On 9 January 2007, the Hedgepeths filed this action against LSB and Trustee Services, asserting claims for fraud, UDTP under N.C. Gen. Stat. § 75-1.1, violation of the Fair Debt Collection Practices Act, harassment or abuse in violation of 15 U.S.C. § 1692d, unfair practices under 15 U.S.C. § 1692f(6), and false representations under 15 U.S.C. § 1692e(10). The Hedgepeths also sought a restraining order and injunction preventing foreclosure on both their home and the Caldwells' home.

On 10 January 2007, the trial court issued a temporary restraining order prohibiting LSB and Trustee Services from foreclosing on the two homes. Also on 10 January 2007, Mr. Massie purchased the Caldwells' "collateral note and components." The temporary restraining order was extended on 22 January 2007. In an order entered 29 January 2007, the trial court dissolved the temporary restraining order. The 29 January 2007 order stated that at a hearing on the order, LSB and Trustee Services showed that the foreclosure proceeding that was the subject of the temporary restraining order had been voluntarily dismissed without prejudice, leaving nothing further to be heard in connection with the restraining order.

On 8 June 2009, the trial court heard defendants LSB and Trustee Services' motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. It appears from the record that the trial court orally stated that it was dismissing all the Hedgepeths' claims against LSB and Trustee Services with the exception of the claim for fraud and UDTP. A written order was not, however, immediately entered with respect to that ruling.

On 22 June 2009, the trial court granted the Hedgepeths' motion to amend their pleadings to add Billy Dan Massie and Ruth G. Massie as defendants. On 4 August 2009, plaintiffs filed a verified pleading entitled "Amended Complaint, Third Party Complaint." With respect to LSB and Trustee Services, the amended complaint appears only to assert a

claim for fraud and UDTP, consistent with the trial court's oral ruling on defendants' motion to dismiss. Although the Massies were supposed to be added as defendants, plaintiffs purported to make them "Third-Party Defendants." In addition, the amended complaint did not assert any actual claims against the Massies, but rather included a statement regarding jurisdiction and then three "AFFIRMATIVE DEFENSES," including lack of good faith, paper overdue and dishonored, and actual notice of defenses and adverse claims.

On 26 January 2012, the trial court entered its written order dismissing all of the Hedgepeths' claims against LSB and Trustee Services with the exception of the UDTP claim. The court reserved ruling on the request for an injunction of the foreclosure. The case then proceeded to trial.

The pretrial conference order was entered 1 February 2012. The Massies were not included in the caption, and the order did not make any reference to them as being parties. The order included a stipulation that "all parties are properly before the court" and "there is no question as to misjoinder or nonjoinder of parties."

The trial court conducted a bench trial on 1 February 2012 involving only the Hedgepeths, LSB, and Trustee Services. At the close of the Hedgepeths' evidence, the trial court granted defendants' motion to dismiss pursuant to Rule 41(b) of the Rules of Civil Procedure.

The trial court entered a Judgment on 8 March 2012 finding that the notes and deeds of trust signed by the Hedgepeths and dated 11 February 2003 and 27 April 2006 had been marked satisfied and should be cancelled. It appears from the transcript that this judgment was considered necessary because LSB, having assigned the notes and deeds of trust to the Massies, did not believe it could mark the notes "satisfied," while the register of deeds did not consider the available paperwork sufficient to allow the Massies to mark all of the notes satisfied. In this judgment, therefore, the trial court concluded that the notes and deeds of trust as recorded in the Office of the Register of Deeds for Davidson County should be cancelled, and it ordered that the judgment be "registered in the proper county; and, Plaintiff shall produce to the register a copy hereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate of satisfaction."

The trial court entered a separate judgment on 23 April 2012 addressing the Hedgepeths' UDTP claim. The order found that "[a]ll of the causes of action alleged in the Complaint except for the First Count for Fraud and Unfair Trade Practices have heretofore been dismissed by the Court."

The court proceeded to dismiss as well the fraud and UDTP claim on the grounds (1) that "[t]he Hedgepeths do not have standing to bring into question the deed of trust executed by the Caldwells on April 29, 2004" and (2) that the Hedgepeths had failed to sufficiently prove they sustained any damages. The court, therefore, concluded "[t]he Defendants are entitled to have judgment of dismissal of the remaining claim." The Hedgepeths timely appealed to this Court from that judgment.

Discussion

[1] We first address this Court's jurisdiction. We note that the trial court ordered that the Massies be joined as defendants and that the Hedgepeths filed an amended complaint that purported to add the Massies in some capacity as parties to the action. The record on appeal includes evidence that the Massies were served with this document. If the Massies were in fact defendants, then this appeal would be interlocutory since nothing in the record resolves any claim against the Massies.

However, the trial proceeded in this action as if the Massies were not parties. The pretrial conference order's stipulations indicated that only the Hedgepeths, LSB, and Trustee Services were parties and that no one else needed to be made part of the action. Further, the transcript contains no mention of the Massies ever having been parties. Since this action has proceeded as if the Massies were never parties and since the amended complaint that purported to make the Massies "Third-Party Defendants" -- a status that would apply if LSB and Trustee Services had asserted claims against the Massies -- does not include any actual claims against the Massies, we hold that the Hedgepeths never effectively sued the Massies and, therefore, the judgment on appeal is a final judgment. This Court, therefore, has jurisdiction over this appeal.

[2] On appeal, the Hedgepeths challenge only the dismissal of their UDTP claim against LSB and Trustee Services after they rested their case. Rule 41(b) of the North Carolina Rules of Civil Procedure provides in pertinent part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court

> renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

"When a motion to dismiss pursuant to [Rule] 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him." *Dealers Specialties, Inc. v. Neighborhood Housing Servs., Inc.*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982). "The trial judge in a non-jury case does not weigh the evidence in the light most favorable to the plaintiff as he does on a motion for directed verdict in a jury trial." *Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis*, 86 N.C. App. 51, 55, 356 S.E.2d 372, 375 (1987).

The Hedgepeths first contend that the trial court erred in concluding that they did not have standing. In deciding that the Hedgepeths did not have standing, the trial court made the following relevant determinations:

> 5. The Caldwells are not parties to this action and did not sign the April 27, 2006 note, or anything else in connection with that loan.
>
> 6. The Hedgepeths do not have standing to bring into question the deed of trust executed by the Caldwells on April 29, 2004.

We agree with the Hedgepeths that these determinations suggest that the trial court misunderstood the theory underlying the Hedgepeths' UDTP claim when it concluded they lacked standing.

The Hedgepeths contend that LSB and Trustee Services fraudulently represented to the Hedgepeths that they had a right to foreclose on the Caldwells' deed of trust when, according to the Hedgepeths, LSB and Trustee Services had no legal right to do so. The Hedgepeths then argue that LSB and Trustee Services' fraudulent threats to foreclose on the Caldwells' home forced the Hedgepeths to enter into a new promissory note and grant a new deed of trust on the Hedgepeths' own home that increased the Hedgepeths' personal liability.

In other words, the Hedgepeths are alleging that LSB and Trustee Services fraudulently induced them to enter into a contract that nearly cost the Hedgepeths their own home. Contrary to the analysis of the trial court, this theory of liability does not call into question the Caldwells' deed of trust. The Hedgepeths' UDTP claim hinges on an allegedly fraudulent representation made to the Hedgepeths that they contend caused them harm. The UDTP claim does not depend on any contention that

the Caldwells' deed of trust constituted a UDTP or that LSB and Trustee Services mistreated the Caldwells.

With respect to standing for UDTP claims, N.C. Gen. Stat. § 75-16 (2011) provides in relevant part:

> If *any person* shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done . . . .

(Emphasis added.) Here, the Hedgepeths assert that they were injured by a UDTP directed at the Hedgepeths.

The Hedgepeths fall within the scope of N.C. Gen. Stat. § 75-16 and, therefore, we hold the trial court erred in concluding that the Hedgepeths lacked standing.[1] *See Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981) ("In enacting G.S. 75-16 and G.S. 75-16.1, our Legislature intended to establish an effective private cause of action for aggrieved consumers in this State."); *Hyde v. Abbott Laboratories, Inc.*, 123 N.C. App. 572, 584, 473 S.E.2d 680, 688 (1996) (noting legislative aims for broad application of Chapter 75 and allowing for suits by indirect purchases under Chapter 75).

Nonetheless, even though the trial court's basis for the dismissal was incorrect, the trial court's order of dismissal was still proper because the Hedgepeths' evidence failed to show that LSB and Trustee Services acted in a fraudulent manner towards the Hedgepeths. To prevail on a UDTP claim under Chapter 75 of our General Statutes, 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) (quoting *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995)).

A practice is properly deemed unfair "when it offends established public policy as well as when the practice is immoral, unethical,

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1. The trial court's confusion is understandable given our reading of both briefs and the transcript in this case.

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) (internal citations and quotation marks omitted). The question whether a particular practice is unfair or deceptive is a legal one reserved for the court. *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 282–83, 432 S.E.2d 428, 436 (1993), *aff'd per curiam*, 339 N.C. 602, 453 S.E.2d 146 (1995).

The Hedgepeths' UDTP claim is predicated upon their contention that LSB and Trustee Services had no legal right to assert that they could foreclose on the Caldwells' deed of trust. The Hedgepeths believe that the Caldwells' deed of trust provided collateral for the $117,600.00 promissory note and because LSB marked the $117,600.00 promissory note "paid," LSB and Trustee Services had no right to foreclose on the Caldwells' deed of trust.

This argument overlooks the plain language of the deed of trust. The deed of trust on the Caldwells' home was not limited to providing security for the $117,600.00 promissory note. The deed of trust provided that it also "secure[d] the payment of any other indebtedness or liability of the above-named Borrower . . . made by Noteholder to Borrower . . . ." The deed of trust identifies the "Borrower" as BCI. Thus, by the deed of trust's terms, the Caldwells were securing not only the $117,600.00 promissory note, but also any other existing indebtedness of BCI.

At the time the Caldwells signed the deed of trust on their home, BCI had a balance due on its first loan with LSB. The Caldwells' deed of trust, by its terms, secured that existing debt as well as the $117,600.00. As a result, when the $117,600.00 debt was satisfied, it did not result in cancellation of the Caldwells' deed of trust, and, contrary to the Hedgepeths' claim, LSB and Trustee Services were entitled to foreclose on the Caldwells' deed of trust if BCI defaulted on that first loan. *See In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) ("Unambiguous language in a deed of trust is controlling on the issue of whether the instrument raises a legal defense to foreclosure.").

The Hedgepeths' reliance on *Tr. Servs., Inc. v. R.C. Koonts & Sons Masonry, Inc.*, 202 N.C. App. 317, 688 S.E.2d 737 (2010), as establishing that LSB and Trustee Services engaged in a fraudulent act, is misplaced. *R.C. Koontz* involved a deed of trust granted to LSB with Trustee Services acting as trustee, but it addressed whether the language of a guaranty secured by the deed of trust made the guarantors liable for

future advances to a third party. *Id.* at 317-18, 322, 688 S.E.2d at 738-39, 741. Although the deed of trust at issue did include a future advances clause, this Court concluded, based on the plain language of the clause, that, in order to be secured by the deed of trust, the future advances had to be made to the grantors of the deed of trust and not to a third party. *Id.* at 322, 688 S.E.2d at 741. Accordingly, LSB and Trustee Services were not entitled to foreclose on the deed of trust when the third party defaulted on a promissory note. *Id.* at 323, 688 S.E.2d at 741.

Here, in contrast, the plain language of the Caldwells' deed of trust specified that the deed of trust secured existing indebtedness of the third party, BCI. Because the Caldwells' deed of trust did indeed authorize foreclosure if BCI defaulted on a loan other than the $117,600.00 promissory note, the Hedgepeths have not shown that they were fraudulently induced to enter into the letter commitment that resulted in their granting LSB an additional deed of trust on the Hedgepeths' home.

The Hedgepeths have, therefore, failed to point to any unfair or deceptive act that harmed them, and we affirm the trial court's dismissal on that alternative ground. *See Walker v. Branch Banking & Trust Co.*, 133 N.C. App. 580, 584, 515 S.E.2d 727, 730 (1999) (holding efforts at collection despite plaintiff's contesting his having signed instrument did not constitute UDTP in relevant part because "[i]t was not unreasonable to make a demand for payment of the promissory note against plaintiff, because the guaranty agreement provided, among other things, that '[t]his obligation and liability on the part of the undersigned [guarantor] shall be . . . payable immediately upon demand without recourse first having been had by Bank against the Borrower . . .' "). Because of this conclusion, we need not address the trial court's conclusion that the Hedgepeths failed to establish damages.

Affirmed.

Judges BRYANT and CALABRIA concur.

IN RE WHITTACRE

[228 N.C. App. 58 (2013)]

IN RE PROTEST OF DANIEL-LYNN WHITTACRE

No. COA12-1175

Filed 18 June 2013

Elections—protest—moot

Petitioner's appeal from the trial court's order affirming the decision of the State Board of Elections and dismissing his election protest was dismissed as moot. The Certificate of Election was properly issued under the applicable statutes and the winner of the general election had been seated by the United States House of Representatives.

Appeal by petitioner from order entered 29 June 2012 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 13 February 2013.

Richard E. Jester for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Susan K. Nichols, for respondent-appellee; and Blue Stephens & Fellers, LLP, by Daniel T. Blue, Jr., for intervenor-appellee.

GEER, Judge.

Petitioner Daniel-Lynn Whittacre appeals the trial court's order affirming the decision of the State Board of Elections and dismissing his election protest. The State and G.K. Butterfield have moved to dismiss this appeal as moot. As the Certificate of Election in this case properly issued under the applicable statutes and the winner of the general election has been seated by the United States House of Representatives, we agree that this appeal is moot and grant the motion to dismiss.

Facts

Mr. Whittacre filed a protest with the State Board of Elections claiming that the candidacy of Mr. Butterfield in the Democratic primary for North Carolina's First Congressional District was invalid because he had failed to file the affidavit required to run under a nickname pursuant to N.C. Gen. Stat. § 163-106(a) (2011). That protest was heard by the State Board of Elections on 23 May 2012. The Board of Elections dismissed Mr. Whittacre's protest in a 7 June 2012 order.

Mr. Whittacre appealed that decision to Wake County Superior Court on 15 June 2012 and filed a motion to stay the Board of Elections' certification of the primary results on the same date. The appeal and motion to stay were set for hearing on 25 June 2012. Mr. Butterfield also moved to intervene in the case on 25 June 2012. The trial court denied Mr. Whittacre's motion to stay certification of the election results, affirmed the State Board of Elections' decision, and dismissed Mr. Whittacre's election protest in an order on 29 June 2012. Mr. Whittacre timely appealed to this Court.

The appeal was docketed with this Court on 2 October 2012. Mr. Butterfield, having won the general election, was seated as a member of the 103rd Congress on 3 January 2013. The Board of Elections and Mr. Butterfield moved to dismiss the appeal as moot on 22 January 2013.

Discussion

We first address the Board of Elections and Mr. Butterfield's motion to dismiss this appeal as moot. N.C. Gen. Stat. § 163-182.14 (2011) provides for a right to appeal to the Superior Court of Wake County from a final decision of the State Board of Elections. Notwithstanding this right to appeal, "[a]fter the decision by the State Board of Elections has been served on the parties, the certification of nomination or election or the results of the referendum shall issue pursuant to G.S. 163-182.15 unless an appealing party obtains a stay of the certification from the Superior Court of Wake County within 10 days after the date of service." N.C. Gen. Stat. § 163-182.14(b). Once issued, "[t]he declaration of election as contained in the certificate *conclusively settles prima facie* the right of the person so ascertained and declared to be elected to be inducted into, and exercise the duties of the office." *Cohoon v. Swain*, 216 N.C. 317, 319, 5 S.E.2d 1, 3 (1939) (first emphasis added).

In this case, on 29 June 2012, the trial court denied Mr. Whittacre's request for a stay and affirmed the State Board of Elections' decision. Mr. Whittacre did not obtain a stay from this Court or the Supreme Court. In the absence of a stay, the certificate of nomination was issued five days after entry of the trial court's order. *See* N.C. Gen. Stat. § 163-182.15(b)(2) (2011). Because the certificate of nomination issued, Mr. Whittacre's appeal became moot. *Cohoon*, 216 N.C. at 319, 5 S.E.2d at 3.

Moreover, following the general election, Mr. Butterfield was declared the winner, and he was seated in the House of Representatives on 3 January 2013. Article I, section 5 of the United States Constitution provides that "[e]ach house shall be the judge of the elections, returns and qualifications of its own members . . . ." As the United States

Supreme Court has observed, this clause grants each house of Congress "the power to judge of [sic] the elections, returns, and qualifications of its own members," and the house's exercise of that power includes the power "to render a judgment which is beyond the authority of any other tribunal to review." *Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 613, 73 L. Ed. 867, 871, 872, 49 S. Ct. 452, 455 (1929). In *Barry*, the Supreme Court held that when an individual was elected to the United States Senate, received a certificate from the Governor of his state to that effect, and presented himself to the Senate, then the question whether "the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, was a matter within the discretion of the Senate." *Id.* at 614, 73 L. Ed. at 872, 49 S. Ct. at 455. *See also Roudebush v. Hartke*, 405 U.S. 15, 19, 31 L. Ed. 2d 1, 8, 92 S. Ct. 804, 807 (1972) ("Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question" and is "a question that [is not] the business of this Court.").

Therefore, when the House chose to administer the oath to and seat Mr. Butterfield, it acted within its power under Article I, section 5 of the United States Constitution. Its decision to seat Mr. Butterfield is not subject to judicial review, and petitioner's appeal is consequently moot. *See Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (holding under Article I, section 5, that court "lack[ed] jurisdiction to proceed" with respect to challenge to congressional election when House of Representatives had already seated individual); *In re Election Protest of Fletcher*, 175 N.C. App. 755, 758, 625 S.E.2d 564, 567 (2006) (" 'When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.' " (quoting *Benvenue Parent-Teacher Assoc. v. Nash Cnty. Bd. of Educ.*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969))). We, therefore, dismiss the appeal.

Dismissed.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

STEPHEN E. KING, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY AND MASTEC SERVICES COMPANY, INC., RESPONDENTS

NO. COA13-58

Filed 18 June 2013

Unemployment Compensation—disqualification from benefits—left work without good cause attributable to employer

The superior court erred by awarding petitioner unemployment insurance benefits. Petitioner was disqualified from benefits because he left work without good cause attributable to the employer.

Appeal by Respondent from judgment entered 25 October 2012 by Judge Gary E. Trawick in Northampton County Superior Court. Heard in the Court of Appeals 9 May 2013.

Wilson Law Group, PLLC, by Monica Wilson, for Petitioner.

Sheena J. Cobrand, Esquire, for Respondent North Carolina Department of Commerce, Division of Employment Security.

DILLON, Judge.

The Division of Employment Security of the North Carolina Department of Commerce (the Division) appeals from a judgment of the superior court awarding Stephen E. King (Petitioner) unemployment insurance benefits. We reverse.

I. Factual & Procedural Background

Petitioner was employed by Mastec Services Company, Inc. (Mastec) as a field tech supervisor from 3 February 2010 through 15 September 2011. During that time, Mastec provided Petitioner with a company vehicle, which Petitioner used to commute to and from work, a roundtrip distance of approximately 212 miles. On 14 September 2011, Mastec announced that it would no longer provide vehicles to its employees for personal use; instead, Mastec would provide each employee with a gas card and $60.00 each week to compensate for vehicle "wear and tear." The next day, 15 September 2011, Petitioner sent Mastec an email indicating his resignation, effective 20 September 2011, explaining that Mastec's new vehicle policy would "greatly create a financial hardship

on me and my family[.]" Petitioner's supervisor, Leon Floyd, accepted Petitioner's resignation and directed Petitioner to leave work that day. Petitioner was paid through 20 September 2011.

Petitioner subsequently filed a claim with the Division for unemployment insurance benefits under N.C. Gen. Stat. § 96-15(a). In his claim, Petitioner indicated that Mastec's "sudden change in policy" had "created financial hardship" and that "due to distance there would be a hardship as far as oil changes[,] tires[, and] brakes[.]" The Division determined that the weekly benefit amount payable to Petitioner was $515.00 with a maximum payable amount of $13,390.00; however, Petitioner's claim was referred to the Division's Adjudication Unit, which determined that Petitioner was disqualified from benefits under N.C. Gen. Stat. § 96-14(1) because he had "left work without good cause attributable to the employer." Petitioner appealed the Adjudicator's decision to a Division Hearing Officer. After hearing testimony from both Petitioner and Leon Floyd, the Hearing Officer affirmed the Adjudicator's decision to disqualify Petitioner from benefits. Petitioner thereafter appealed to the Division, which ultimately affirmed the Hearing Officer's ruling. On 25 July 2012, Petitioner filed a Petition for Judicial Review in Northampton County Superior Court. Following a hearing on 8 October 2012, the superior court entered a judgment reversing the Division, reasoning that "the Division's findings of fact do not support the conclusion of law that [Petitioner] left work without good cause attributable to the employer." From this judgment, the Division appeals.

II. Analysis

We review the Division's final decision under the same standard of review applied by the superior court; namely, we must determine whether the Division's findings of fact are supported by competent evidence and whether those findings of fact so supported, in turn, are sufficient to support the Division's conclusions of law. *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 614, 613 S.E.2d 350, 354 (2005). Unchallenged findings of fact made by the Division are binding on this Court. *Carolina Power & Light Co. v. Employment Sec. Comm'n of N. Carolina*, 363 N.C. 562, 564, 681 S.E.2d 776, 777-78 (2009). The Division's conclusions of law, however, are reviewed *de novo*. *Id.* at 564, 681 S.E.2d at 778.

We begin by observing that the Division made fifteen findings of fact to support its conclusion that Petitioner "left work without good cause attributable to the employer." The findings pertinent to this appeal are as follows:

> 3. The claimant left this job because he was losing use of a company vehicle to commute to and from work.
>
> 4. The claimant began working for the employer in February 2010. His commute to work was 212 miles roundtrip. The claimant had use of a company vehicle.
>
> 5. On September 14, 2011, the employer announced a change in its policy. Employees would no longer have use of a company vehicle for commuting to work. Instead, employees would be required to drive their personal vehicles. In exchange, the employer would provide each employee with a gas card for fuel. Each employee would also receive $60.00 per week to compensate for vehicle wear.
>
> . . . .
>
> 13. The claimant had a personal vehicle that he could use to commute to work, but did not believe that $60.00 per week was sufficient consideration for wear-and-tear.
>
> . . . .

Petitioner challenges only finding of fact 13 as unsupported by any competent evidence in the record. Specifically, Petitioner contends that "the first portion of Finding of Fact #13, that 'claimant had a personal vehicle that he could use to commute to work,' was in direct contradiction of the only evidence on the topic in the record." In his original claim filed with the Division, and in his testimony before the Hearing Officer, Petitioner indicated that he left his employment because he believed that the weekly allowance of sixty dollars would be insufficient to compensate for vehicle wear and tear due to the length of his commute. Nonetheless, Petitioner directs this Court to the following portion of his testimony before the Hearing Officer:

> [Counsel for Petitioner]: Now, Mr. King, how did not having a company vehicle impact your ability to continue working at [Mastec]?
>
> [Petitioner]: Because my commute one way to work was a hundred and six miles for a total of two hundred and twelve miles round trip. The gas card that they was providing was fine, but the sixty dollars a week for wear and tear on a vehicle, the vehicle maintenance, getting oil changes and, and tires would have well exceeded the amount of

> money that they were paying for the sixty dollar a week wear and tear on your vehicle. *And with that being said, my family, we only have one vehicle. So, therefore, I could not go out and purchase another vehicle for sixty dollars a week to commute back and forth a hundred and six miles one way.*

(Emphasis added). Petitioner argues that this portion of his testimony indicates that he did not have a personal vehicle that he could use to commute to work and thus contradicts finding of fact 13. However, Petitioner did not specifically testify before the Hearing Officer that his vehicle was not available for his commute to work. Petitioner did not produce any evidence through his testimony or otherwise that someone else in his family used the vehicle while he was at work. While we recognize that testimony is often open to multiple interpretations, this Court is not permitted to re-weigh the evidence presented before the Division; rather, our task is to determine only whether the testimony at issue was evidence "that a reasonable mind might accept as adequate to support the [contested] finding." *Andrews v. Fulcher Tire Sales & Serv.*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995). Applying this standard, we cannot say that the Division erred in finding that Petitioner "had a personal vehicle that he could use to commute to work" based upon Petitioner's testimony, *supra*.[1] Accordingly, Petitioner's contentions challenging finding of fact 13 are overruled.

Because Petitioner does not challenge any of the remaining findings made by the Division, we now turn to the issue of whether the Division's findings support its determination that Petitioner was disqualified from benefits because he left work without good cause attributable to the employer.

N.C. Gen. Stat. § 96-14(1) provides that "[a]n individual shall be disqualified for benefits . . . if it is determined by the Division that such individual is, at the time such claim is filed, unemployed because he left work without good cause attributable to the employer." N.C. Gen. Stat. § 96-14(1) (2011). The claimant bears the burden of showing that he left work with good cause attributable to the employer. N.C. Gen.

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1. Petitioner asserts in his brief that "[he] and his wife owned only one personal vehicle, which his wife used to commute to her own place of employment, and which she also used to transport [Petitioner's] elderly grandmother, who lived with [Petitioner]." However, Petitioner did not testify to these "facts" at the hearing before the Hearing Officer; rather, these "facts" allude to statements made by Petitioner's counsel during the superior court hearing. As such, they were not part of the record upon which the Division based its findings and are, therefore, irrelevant for purposes of our review.

Stat. § 96-14(1a) (2011). Our Supreme Court has defined "good cause" in this context to mean " 'a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work.' " *Carolina Power*, 363 N.C. at 565, 681 S.E.2d at 778 (citation omitted). "A separation is attributable to the employer if it was produced, caused, created or as a result of actions by the employer." *Id.* at 565-66, 681 S.E.2d at 778 (citations and quotation marks omitted). It is clear in this case that Petitioner left his employment as a result of Mastec's new vehicle policy. The issue presented, therefore, is whether this change in policy served as "good cause" for Petitioner's resignation.

In *Carolina Power*, our Supreme Court identified "two broad categories" of circumstances that constitute "good cause": (1) where continued employment would be "logistically impractical"; and (2) where continued employment would be "intolerable." *Id.* at 567-68, 681 S.E.2d at 779-80. With respect to the first category – which Petitioner contends applies in the instant case – the *Carolina Power* court explained that "an employee can leave work for 'good cause' under circumstances which make continued employment logistically impractical" and that "[s]uch circumstances include scheduling and transportation problems that outweigh the benefits of employment." *Id.* at 567, 681 S.E.2d at 779. The *Carolina Power* court cited *Barnes v. Singer Co.*, 324 N.C. 213, 376 S.E.2d 756 (1989) and *Couch v. Employment Sec. Comm'n*, 89 N.C. App. 405, 366 S.E.2d 574 (1988), as examples of instances where the circumstances surrounding the claimant's separation from employment constituted "good cause." *Carolina Power*, 363 N.C. at 567-68, 681 S.E.2d at 779. *Barnes* involved a claimant who no longer had transportation to work after his employer relocated its facilities. *Barnes*, 324 N.C. at 214, 376 S.E.2d at 757. "Good cause" for the claimant's separation from employment was found both in *Barnes* and in *In re Watson*, 111 N.C. App. 410, 432 S.E.2d 399 (1993), a subsequent decision in which this Court, relying on *Barnes*, reversed the superior court's decision to deny benefits where the employer's relocation left the claimant without reliable transportation to work. *Id.* at 413-16, 432 S.E.2d at 401-03. However, the Division's finding that Petitioner "had a personal vehicle that he could use to commute to work" – a finding which is binding for purposes of our review – clearly renders *Barnes* and *Watson* inapplicable in the instant case.

In *Couch*, the claimant was employed as a cook at a day care, where she worked five five-hour shifts per week. 89 N.C. App. at 408, 366 S.E.2d at 576. When the employer reduced the claimant's hours to five three-hour shifts per week (at the same pay rate), the claimant determined

that her wages no longer justified the cost of her commute to work and quit. *Id.* at 407-08, 366 S.E.2d at 576. In holding that "a unilateral, substantial reduction in one's working hours by his employer may permit a finding of good cause attributable to the employer[,]" our Supreme Court noted that "to continue on a job under reduced hours or wages . . . might not be economically feasible for the affected employee." *Id.* at 412, 366 S.E.2d at 578. However, the court concluded that it was unable to determine based upon the Division's findings whether the reduction in the claimant's hours was substantial and thus remanded to the Division to make additional findings, considering factors such as "[t]he amount of the reduction in wages or hours." *Id.* at 412-13, 366 S.E.2d at 578-79.

Here, the burden was on Petitioner to show that he left his employment with Mastec for good cause – i.e., that continued employment would have been logistically impractical – as a result of Mastec's new vehicle policy. As discussed *supra*, Petitioner's contention that he left Mastec because he lacked an available vehicle is not properly before this Court, and thus we address only his original position that, essentially, the new vehicle policy rendered his continued employment economically infeasible. More specifically, Petitioner's contention – for purposes of our review – is that $60.00 per week was insufficient compensation for the wear and tear to his personal vehicle that would result from his daily commute. However, Petitioner did not present any evidence demonstrating the extent to which he suffered financial injury. For instance, Petitioner's testimony before the Hearing Officer that "the sixty dollars a week, total of thirty-one hundred dollars a year running two hundred and twelve miles a day would not pay for the maintenance and the wear and tear on my vehicle [and] would create another financial strain on my family" is conjectural and conclusory in nature. The Division did not make any findings indicating that Petitioner had suffered any financial injury or that the new policy had otherwise rendered Petitioner's continued employment logistically impractical. *See Carolina Power*, 363 N.C. at 568, 681 S.E.2d at 780 (concluding that the claimant's continued employment would not have been logistically impractical where the Division made no such findings). Rather, the Division's findings – by which we are bound – establish that Petitioner "left [his] job because he was losing use of a company vehicle to commute to and from work" (finding of fact 3) but that Petitioner "had a personal vehicle that he could use to commute to work" (finding of fact 13). The Division did not find that $60.00 per week was insufficient consideration for wear and tear to Petitioner's vehicle; rather, the Division found only that Petitioner "*did not believe* that $60.00 per week was sufficient consideration for wear-and-tear" (finding of fact 13). We, accordingly, conclude that the

Division's findings are sufficient to support its conclusion that Petitioner did not leave work for good cause attributable to the employer, and our standard of review precludes us from inquiring further.

III. Conclusion

In light of the foregoing, the judgment of the superior court is hereby

REVERSED.

Judges ELMORE and GEER concur.

LUMBERMANS FINANCIAL, LLC, A MICHIGAN LIMITED LIABILITY COMPANY, PLAINTIFF
v.
SEAN J. POCCIA, DEFENDANT

No. COA12-1410

Filed 18 June 2013

Judgments—Uniform Enforcement of Foreign Judgments Act—no authority to award damages in excess of foreign award

The trial court erred by requiring defendant to pay damages in excess of the award in a foreign judgment obtained in a bankruptcy court in the state of Michigan. The trial court's authority permitted it to make a determination of the amount of any payments on the debt made by defendant or credits due to him from the sale of the Dutch Road property, which were to be deducted from the $250,000.00 in damages, plus post-judgment statutory interest.

Appeal by defendant from judgment entered 13 August 2012 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 March 2013.

Stone & Witt, P.A., by Bryan W. Stone, for plaintiff-appellee.

John F. Hanzel, P.A., by John F. Hanzel, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Sean J. Poccia ("Poccia") appeals from the trial court's order enforcing against him a foreign judgment obtained in a bankruptcy court in the state of Michigan by plaintiff Lumbermans Financial, LLC ("Lumbermans"). Poccia contends the trial court erred by ordering him to pay damages in excess of the award in the foreign judgment. After careful review, we reverse the trial court's order and remand this action for further proceedings.

Background

In 2004, Poccia was the owner of a residential building company registered in Michigan and known as Lucas Home Builders, LLC. Lumbermans, also a Michigan-registered limited liability company, loaned money to Lucas Home Builders contingent upon Poccia's personal guaranty of the debt. In 2003, Poccia sought Chapter 7 bankruptcy protection in the Eastern District of Michigan. Lumbermans filed an adversary proceeding seeking to have the debt guaranteed by defendant deemed non-dischargeable.

On 2 September 2004, the parties executed a Stipulation for Entry of Consent Judgment ("the Stipulation") which contained the following language:

> 1. That [Lumbermans] has incurred damages in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars against the [d]efendant and [d]ebtor [Poccia].
>
> . . .
>
> 5. That the parties acknowledge that the stipulated damages of Two Hundred Fifty Thousand ($250,000.00) Dollars are an estimate because [Lumbermans] has not completed the Dutch Road Residence and sold it. When [Lumbermans] sells the Dutch Road Project, [Poccia] may request that an audit be preformed [sic] at [Poccia's] expense to determine [Lumbermans's] actual damages which may be less or may be more than the stipulated amount of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Based on the Stipulation, the United States Bankruptcy Court of the Eastern District of Michigan, Southern Division, entered a consent judgment on 18 October 2004 ("the 2004 Consent Judgment") in which the court ordered that Lumbermans "shall have a judgment against [Poccia] on its claim in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars plus statutory interest to incur after this date[.]"

On 3 October 2011, Lumbermans filed a notice of filing of a foreign judgment pursuant to the Uniform Enforcement of Foreign Judgments Act, N.C. Gen. Stat. §§ 1C-1701 *et seq*. ("the UEFJA"), in Mecklenburg County Superior Court. In the notice of filing, Lumbermans stated that the 2004 Consent Judgment was for "the principal amount of $240,479.80," plus post-judgment interest of 2.18% compounded annually. Lumbermans also filed an affidavit in support of the filing in which it averred that the 2004 Consent Judgment was a "final" judgment awarding Lumbermans a "total sum" in the amount of $240,479.80, plus post-judgment interest.

In response, Poccia filed a motion for relief from the judgment alleging that he entered the consent judgment under duress and that the judgment was signed by his counsel not by himself. On 24 February 2011, Judge Forrest D. Bridges entered an order denying Poccia's motion for relief. The order stayed Lumbermans's collection efforts for 30 days during which time Lumbermans was required to account for any credits to which Poccia was entitled that resulted from payments on the debt, from the sale of the Dutch Road property, or for any other reason.

On 2 March 2012, Lumbermans forwarded to Poccia an accounting of the debt owed in which Lumbermans alleged that "the actual judgment amount as of October 18, 2004 should be $305,340.61," plus interest incurred from the date of the 2004 Consent Judgment. Poccia filed an objection to Lumbermans's accounting in which he argued that he did not agree to pay more than $250,000.00 in damages, plus interest, and was not aware of any documentation showing that the 2004 Consent Judgment had been modified. Lumbermans requested a hearing on Poccia's objection to the accounting in Mecklenburg County Superior Court.

Following the hearing, Judge Yvonne M. Evans entered a judgment on 13 August 2012 concluding that the amount of damages provided in the 2004 Consent Judgment was "an approximation" of the actual damages owed to Lumbermans that was subject to an audit as provided in Paragraph 5 of the Stipulation. As a result of that audit, the trial court concluded that the amount of actual damages owed by Poccia at the time of the 2004 Consent Judgment was $415,831.06, which was to be reduced by a $135,462.51 credit. Consequently, the trial court ruled that Poccia owed Lumbermans $280,368.55 plus interest. Poccia appeals.

Discussion

Poccia argues that the trial court erred in ordering him to pay damages to Lumbermans in excess of the $250,000.00 in damages, plus interest, ordered in the 2004 Consent Judgment. We agree.

" 'The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *United Leasing Corp. v. Guthrie*, 192 N.C. App. 623, 630, 666 S.E.2d 504, 509 (2008) (quoting *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176, *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002)). The trial court's conclusions of law, however, are subject to *de novo* review. *Id.*

"The Constitution's full faith and credit clause requires states to recognize and enforce valid judgments rendered in sister states." *Gardner v. Tallmadge*, 207 N.C. App. 282, 287, 700 S.E.2d 755, 758-59 (2010) (citing U.S. Const. art. IV, § 1), *aff'd sub nom. In re Ohio Judgment*, __ N.C. __, 721 S.E.2d 928 (2011). "In carrying out this constitutional mandate, the United States Supreme Court has consistently held that 'the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced.' " *Boyles v. Boyles*, 308 N.C. 488, 490, 302 S.E.2d 790, 792-93 (1983) (quoting *Underwriters Nat'l Assur. Co. v. N.C. Life and Accident and Health Ins. Guar. Ass'n*, 455 U.S. 691, 704, 71 L. Ed. 2d 558, 570 (1982)).

"The Uniform Enforcement of Foreign Judgments Act . . . governs the enforcement of foreign judgments that are entitled to full faith and credit in North Carolina." *Gardner*, 207 N.C. App. at 287, 700 S.E.2d at 758-59 (citing N.C. Gen. Stat. §§ 1C–1701 *et seq.* (2009)). Once notice of the filing of the foreign judgment is filed by the judgment creditor,

> the judgment debtor may file a motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign judgment has been appealed from, or enforcement has been stayed by, the court which rendered it, or on any other ground for which relief from a judgment of this State would be allowed.

N.C. Gen. Stat. § 1C-1705(a); *see DOCRX, Inc. v. EMI Servs. of NC, LLC*, __ N.C. App. __, __, 738 S.E.2d 199, 203 (2013) (holding that post-judgment relief from foreign judgments under N.C. Gen. Stat. § 1A–1, Rule 60(b) is limited to the grounds that the foreign judgment was based on extrinsic fraud, is void, has been satisfied, released, or discharged, or a judgment upon which the foreign judgment is based has been reversed or vacated, or should no longer be enforced prospectively on equitable grounds). The judgment creditor may then move for "enforcement of the foreign judgment as a judgment of this State[.]" N.C. Gen. Stat. § 1C-1705(b).

In its notice of the foreign judgment filing, Lumbermans asserted that the 2004 Consent Judgment was for the principal amount of $240,479.80, plus post-judgment interest and sought enforcement of the judgment. Poccia's motion for relief from the 2004 Consent Judgment was denied, and Lumbermans produced an accounting of the debt asserting that the damages due were greater than the actual judgment amount. Poccia objected to the accounting and requested a hearing before the trial court. In response, Lumbermans filed a trial brief in which it acknowledged that its actual damages "exceeds the judgment amount of $250,000.00," but insisted that "this possibility was understood by the parties" as evidenced by Paragraph 5 of the Stipulation. Lumbermans suggested that the trial court was required to construe the language of the parties' "contract" to discern their intent that the actual damages were greater than $250,000.00, plus interest. Consequently, Lumbermans asked the trial court to "revise[]" the amount of damages in the consent judgment.

We note that the 2004 Consent Judgment is not a contract but a final judgment of the United States Bankruptcy Court in the Southern Division of the Eastern District of Michigan. The judgment states that the bankruptcy court read the parties' Stipulation for the entry of the consent judgment and, for the reasons provided in the Stipulation, ordered that Lumbermans "shall have a judgment against [Poccia] on its claim in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars plus statutory interest." We find this language to be unambiguous and to award Lumbermans a judgment of $250,000.00, plus post-judgment interest.

Paragraph 5 of the Stipulation clearly contemplates that as of 2 September 2004, Poccia and Lumbermans agreed that the debt Poccia owed to Lumbermans "may be less or may be more" than $250,000.00. However, the Stipulation was not incorporated into the consent judgment. Nor does it appear that the Stipulation was filed with the consent judgment. The trial court recognized that the Stipulation was not filed in its order: "the Stipulation, *unfiled by its terms* at the time of the entry of the Consent Judgment, stated as follows . . . ." (Emphasis added.)

Lumbermans cites no authority which provides that the trial court could have assumed jurisdiction to modify the consent judgment entered by the bankruptcy court. Nor have we found such authority. The UEFJA provides that a valid foreign judgment may be *enforced* in our state; it does not provide that the courts of North Carolina may modify the original judgment to provide for a greater recovery. *See* N.C. Gen. Stat. §§ 1C-1701 to -1708. Indeed, a foreign judgment is only entitled to "the *same* credit, validity and effect," in a sister state as in the state in which it was rendered, *Boyles*, 308 N.C. at 490, 302 S.E.2d at 792-93 (emphasis

added), not more. Therefore, the trial court improperly concluded that the 2004 Consent Judgment entitled Lumbermans to a judgment for damages in the principal amount of greater than $250,000.00, plus post-judgment interest. We conclude that the trial court's authority permitted it to make a determination of the amount of any payments on the debt made by Poccia or credits due to him from the sale of the Dutch Road property, which were to be deducted from the $250,000.00 in damages, plus post-judgment statutory interest. We reverse the trial court's order and remand for further proceedings consistent with this opinion.

Conclusion

For the reasons stated above, the trial court's 13 August 2012 order is reversed and remanded.

REVERSED and REMANDED.

Chief Judge MARTIN and Judge STEPHENS concur.

ANGELA S. SMITH, ET AL., PLAINTIFFS
v.
LAKE BAY EAST, LLC, ET AL., DEFENDANTS

No. COA12-1541

Filed 18 June 2013

Appeal and Error—interlocutory orders and appeals—water level in canal—condemnation rule not applicable

An appeal from an order that defendants admitted was interlocutory was dismissed where defendants contended that their appeal was subject to immediate review under *N.C. Dep't of Transp. v. Stagecoach Village*, 360 N.C. 46. However, the principle adopted in *Stagecoach Village* is only applicable in condemnation cases and this case involved claims for breach of real covenant, nuisance, negligence, and injunctive relief rising from the water level in a canal.

Appeal by defendants from order entered on or about 10 August 2012 by Judge Douglas B. Sasser in Superior Court, Bladen County. Heard in the Court of Appeals 24 April 2013.

Matthew J. Dixon, PLLC, by Matthew J. Dixon, for plaintiff-appellees.

Hester, Grady & Hester, P.L.L.C., by H. Clifton Hester, for defendant-appellants.

STROUD, Judge.

Defendants appeal from an interlocutory order denying their motion to add necessary parties. For the following reasons, we dismiss.

I. Background

On 22 April 2010, plaintiffs filed a complaint against defendants alleging that in 2007 they purchased real property located in the "Bay Tree Lake subdivision, in Bladen County[.]" The previous owners of the property had filed a suit against two of the defendants, Lake Bay East, LCC ("Lake Bay") and Lake Creek Corporation ("Lake Creek") because

> Defendants planned to raise the water level of the canal located in the rear of the premises (hereinafter referred to as the subject canal), which would raise the ground water level, cause moisture to form underneath the house located on the premises, cause drainage problems, and result in standing water during periods of rain.

After mediation the previous owners and two defendants

> agreed to establish a high water level of the subject canal to be the same as the invert, or bottom, of the existing street drain pipe. This was to be done within thirty (30) days, or by July 7, 2006, and was to be done regardless of whether the [previous owners] sold the premises prior to completion of the agreed upon remedy.

However, according to plaintiffs,

> the Defendants have begun raising the water level in the subject canal by draining water from Bay Tree Lake and the old canal system into the subject canal. The subject canal's water level is now above the high water level established in the aforementioned Mediated Settlement Agreement. The Defendants have also raised the pipes connecting the street drains to the subject canal, which has resulted in no drainage during periods of rain.

Plaintiffs allege that defendants' actions have resulted in "[t]he ground water level . . . raising approximately four (4) inches below the surface of the land on the premises; "[d]rainage problems . . .; [and m]oisture has formed underneath the house . . . causing mold to form underneath the house and in the HVAC system." Plaintiffs sued for breach of real covenant, nuisance, negligence, and requested a temporary restraining order and a preliminary and permanent injunction.

On 7 July 2010, defendants Lake Bay, Lake Creek, and JOCO Incorporated answered plaintiff's complaint. Defendants admit that they entered into an agreement with the previous owners of the premises, but deny that the agreement provides the relief plaintiffs claim it does and that it is even applicable to plaintiffs. Defendants allege numerous defenses and also counterclaim for contribution.

On or about 14 May 2012, defendants Lake Creek and Lake Bay filed a motion to add "the owners of all the lots in the Bay Tree Lakes subdivision" as their properties would be affected by the outcome of this suit. On or about 10 August 2012, the trial court denied defendants' motion, finding that plaintiffs' requested relief affected only plaintiffs' property. Defendants appeal.

II. Interlocutory Appeal

Defendants admit that they are appealing from an interlocutory order.

> 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. . . . As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts. Appeals from interlocutory orders are only available in exceptional cases. Interlocutory orders are, however, subject to appellate review:
>
> > if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C. Gen. Stat. § 1A–1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.
>
> The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal

> is appealable despite its interlocutory nature. If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds.

Hamilton v. Mortgage Information Services, Inc., ___ N.C. App. ___, ___, 711 S.E.2d 185, 188-89 (2011) (citations, quotation marks, and brackets omitted). "Our Court has held that the challenge of an order declining to name an entity a necessary party is interlocutory." *Nello L. Teer Co. v. Jones Bros., Inc.*, 182 N.C. App. 300, 305-06, 641 S.E.2d 832, 837 (2007) (dismissing defendant's appeal from order concluding that one defendant was "no longer a necessary party[,]" noting that the remaining defendant had "failed to show how the trial court's order prejudice[d] any asserted substantial right").

Defendants contend that their appeal affects a substantial right as their motion sought "to add parties who own the easement which plaintiffs' claim seeks to impair or restrict." Defendants direct this Court's attention to *N.C. Dep't. of Transp. v. Stagecoach Village*, wherein our Supreme Court stated that "[t]he possible existence of an easement, the basis upon which the trial court ordered joinder of the unit owners, is a question affecting title; therefore, the trial court's order is subject to immediate review." 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005). However, it is clear that the principle adopted in *Stagecoach Village* is only applicable in condemnation cases, *see id.*, 360 N.C. 46, 619 S.E.2d 495, and does not disturb the prior and subsequent decision of this Court determining that the denial of motions predicated on a plaintiff's failure to join allegedly necessary parties does not affect a substantial right and is not immediately appealable. *See Building Mut. v. Meeting Street Builders*, ___ N.C. App. ___, ___, 736 S.E.2d 197, 201 (2012); *Auction Co. Inc. v. Myers*, 40 N.C. App. 570, 573, 253 S.E.2d 362, 364 (1979). As the order defendants are appealing from is interlocutory and is not certified for immediate appeal, and as defendants have failed to argue a substantial right on their own behalf, we dismiss. *See id; Hamilton*, ___ N.C. App. at ___, 711 S.E.2d at 188-89 (2011); *Nello L. Teer Co.*, 182 N.C. App. at 305-06, 641 S.E.2d at 837 (2007).

DISMISSED.

Judges HUNTER, Robert C. and ERVIN concur.

STATE OF NORTH CAROLINA
v.
RUDOLPH ALEXANDER COLEMAN

No. COA12-1173

Filed 18 June 2013

Search and Seizure—traffic stop—tip—cup of beer in parking lot

The trial court erred in an impaired driving prosecution by denying defendant's motion to suppress evidence obtained in a traffic stop where the stop was based on a tip that there was a cup of beer in a vehicle parked at a gas station. A tip must be reliable in its assertion of illegality and, while possession of an open container of alcohol in a public vehicular area was once prohibited, N.C.G.S. § 20-138.7(a) was changed in 2000 to apply the prohibition only to highways or rights-of-way. Any mistake by the officer in his understanding of the law was not reasonable; moreover, the tip lacked sufficient indicia of reliability to provide a reasonable suspicion to stop defendant.

Appeal by defendant from order entered 7 March 2012 by Judge Paul Gessner in Wake County Superior Court. Heard in the Court of Appeals 25 March 2013.

Attorney General Roy Cooper, *by Associate Attorney General Gayle L. Kemp*, *for the State.*

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

HUNTER, Robert C., Judge.

Defendant Rudolph Alexander Coleman appeals from the judgment entered against him after he pled guilty to driving while impaired. On appeal, defendant argues that the trial court erred in denying his motion to suppress. After careful review, we reverse the trial court's order denying his motion to suppress and remand for trial.

Background

The State's evidence tended to show the following facts: On 2 April 2010, Officer B.W. Lampe ("Officer Lampe") with the Raleigh Police Department received a "be on the lookout" call ("BOLO call") from his

communications center. The communications center had issued the BOLO call after receiving a tip from an anonymous citizen. The caller reported that there was a cup of beer in a gold Toyota sedan parked at the Kangaroo gas station at the corner of Wake Forest Road and Ronald Drive. The caller stated the license plate number of the car was VST-8773. Although the complainant wished to remain anonymous, the communications center obtained the caller's name, Kim Creech ("Ms. Creech"), and phone number. It is unclear from the record whether the caller willingly provided that information or if the communications center was able to obtain that information independently. Officer Lampe testified that he did not know Ms. Creech nor had he worked with her in the past. Ms. Creech did not provide any identifying information about the driver of the vehicle.

After receiving the BOLO call, Officer Lampe responded to the gas station parking lot and observed a vehicle, later identified as defendant's vehicle, that he believed fit the description of the car in Ms. Creech's tip. In his citation, Officer Lampe noted that defendant's car was a Nissan, not a Toyota, but that its license plate matched that provided by Ms. Creech. As defendant began pulling out of the parking lot, Officer Lampe got behind him and followed him onto Wake Forest Road. Then, Officer Lampe initiated his emergency lights and pulled defendant over; defendant pulled into a TGI Friday's parking lot. Prior to pulling defendant over, Officer Lampe did not observe defendant commit any traffic violations. Officer Lampe administered a chemical analysis test to defendant, and defendant was subsequently charged with and arrested for DWI.

After defendant pled guilty in district court and appealed his conviction, defendant filed a motion in Wake County Superior Court to suppress all evidence obtained as a result of his stop. The matter came on for hearing on 2 February 2012. The trial court denied defendant's motion to suppress. Specifically, it found that: (1) Kim Creech provided a "citizen tip" to the communications center; (2) Officer Lampe arrived at the gas station "shortly after" the BOLO was issued; (3) Officer Lampe observed the vehicle described in the BOLO call in the parking lot; and (4) Officer Lampe was able to verify that defendant's vehicle had the same license plate number as the number provided by Ms. Creech. Based on these findings, the trial court concluded that, based on the totality of the circumstances, Officer Lampe had reasonable and articulable suspicion to stop defendant.

After his motion to suppress was denied, defendant pled guilty to DWI but reserved his right to appeal the denial of his motion to suppress. The trial court sentenced him to 30 days imprisonment, but suspended

the sentence and placed him on unsupervised probation for 12 months. Defendant timely appealed.[1]

Arguments

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Specifically, defendant contends that Ms. Creech's tip lacked sufficient indicia of reliability, and Officer Lampe did not have reasonable suspicion to stop him. Because we find that the tip did not contain any reliable assertion of illegality given that Officer Lampe's mistaken belief that possessing an open container of alcohol in a parking lot was not reasonable, pursuant to *State v. Heien*, __ N.C. __, 737 S.E.2d 351 (2012), we agree.

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).

An officer must have a reasonable suspicion of criminal activity before conducting an investigatory stop of a vehicle. *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003). A tip from a confidential and reliable informant or a tip from an anonymous informant may provide an officer reasonable suspicion to initiate a *Terry* stop. *Id.* at 213, 582 S.E.2d at 374. However, the Supreme Court has noted that a "tip [must] be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Florida v. J.L.*, 529 U.S. 266, 272, 146 L. Ed. 2d 254, 261 (2000); *see also Hughes*, 353 N.C. at 209, 539 S.E.2d at 632 (noting that "reasonable suspicion does not arise merely from the fact that the individual met the description given to the

1. We note that defendant filed a petition for writ of *certiorari* should this Court determine that his notice of appeal was not proper pursuant to *State v. Miller*, 205 N.C. App. 724, 696 S.E.2d 542 (2010). In *Miller*, 205 N.C. App. at 725-26, 696 S.E.2d at 543, this Court concluded that it did not have jurisdiction to consider the defendant's appeal pursuant to N.C. Gen. Stat. § 15A-979(b) because the defendant only appealed the denial of his motion to suppress, not his final judgment of conviction. However, based on the transcript of the sentencing hearing, it appears that defendant appealed both the denial of his motion to suppress and his final conviction after he pled guilty. Moreover, the Appellate Entry, filed 14 May 2012, indicates that defendant gave proper notice of appeal. Thus, defendant's notice of appeal was properly given. Accordingly, we dismiss defendant's petition for writ of *certiorari* as it is not necessary for us to consider defendant's appeal.

officers" in a tip but the tip must also show the tipster has knowledge of concealed criminal activity).

We note that, in this case, Officer Lampe's sole reason for stopping defendant was the information contained in Ms. Creech's tip. He testified that he did not observe defendant commit any traffic violations or see any evidence of improper driving that would suggest impairment prior to initiating the stop. Thus, in determining whether Ms. Creech's tip was reliable in its assertion of illegality, we must first determine whether defendant's alleged behavior, i.e., possessing an open container of alcohol in the Kangaroo gas station parking lot, was illegal. While it is illegal to possess an open container of alcohol in the passenger area of a vehicle while the motor vehicle is on the highway or the highway right-of-way, *see* N.C. Gen. Stat. § 20-138.7 (a1) (2011), possessing an open container of alcohol in a gas station parking lot is not illegal. Pursuant to N.C. Gen. Stat. § 20-4.01(32)(a)(2) (2011), the parking lot of a service station constitutes a "public vehicular area" ("PVA"), not a highway or highway right-of-way, and there is no statute prohibiting a person from possessing an open container of alcohol in a PVA. While N.C. Gen. Stat. § 20-138.7(a) formerly prohibited a person from driving with an open container of alcohol in a PVA, the statute was changed in 2000 so that an individual was prohibited from driving with an open container of alcohol only on highways or highway right-of-ways. *See* 2000 N.C. Sess. Laws ch. 155, § 4 (2000). Accordingly, Ms. Creech's tip contained no actual allegation of criminal activity.

That being said, what complicates our decision is that, presumably, in responding to the BOLO call, Officer Lampe believed that it was illegal to possess an open container of alcohol in a gas station parking lot. In other words, it appears that Officer Lampe mistakenly believed that Ms. Creech's tip contained an allegation of criminal activity. Thus, our Supreme Court's recent decision in *Heien*, __ N.C. at __, 737 S.E.2d at 358, compels us to consider whether Officer Lampe's mistaken belief that the tip included an actual allegation of illegal activity was objectively reasonable. In *Heien*, our Supreme Court departed from this State's Fourth Amendment jurisprudence and concluded that "so long as an officer's mistake[n] [belief that a person has violated the law] is reasonable, it may give rise to reasonable suspicion." *Id.* Thus, if we conclude that Officer Lampe's mistaken belief of law was reasonable, Ms. Creech's tip would include an "assertion of illegality," *J.L.*, 529 U.S. at 272, 146 L. Ed. 2d at 261, necessary for an officer to have reasonable suspicion to conduct a *Terry* stop.

In addressing this issue, the *Heien* Court focused on the interpretation and analysis necessary to understand the general statutes at issue in that case—specifically, the brake light statutes. *Id.* at __, 737 S.E.2d at

353. This Court had concluded that a motor vehicle was only required to have one working brake light. *Id.* On review, our Supreme Court classified this Court's statutory analysis of the brake light statutes as "a novel issue of statutory interpretation[.]" *Heien*, __ N.C. at __, 737 S.E.2d at 353. Specifically, the Court stated that:

> Our General Statutes mandated that each "motor vehicle . . . have all originally equipped rear lamps or the equivalent in good working order." [N.C. Gen. Stat.] § 20–129(d). Our legislature permitted a vehicle's brake lighting system to be "incorporated into a unit with one or more other rear lamps." *Id.* § 20–129(g). It is reasonable to read these two provisions of section 20–129 to say that, because it may be "incorporated into a unit with . . . other rear lamps," *id.*, a brake light is a rear lamp which, like all "originally equipped rear lamps," must be kept "in good working order," [N.C. Gen. Stat.] § 20–129(d). Such a reading is particularly reasonable in light of both the federal requirement that a passenger vehicle maintain two red brake lights on the rear of the vehicle "at the same height, symmetrically about the vertical centerline, as far apart as practicable," 49 C.F.R. § 571.108, at S7.3.1 & Table I-a (2011), and the reference in [N.C. Gen. Stat.] § 20–129.1 to the required color of the lenses of multiple "brake *lights*," [N.C. Gen. Stat.] § 20–129.1(9) (emphasis added). When the stop at issue in this case occurred, neither this Court nor the Court of Appeals had ever interpreted our motor vehicle laws to require only one properly functioning brake light. Given these circumstances, Sergeant Darisse could have reasonably believed that he witnessed a violation of our motor vehicle laws when he observed that the [defendant's car] had an improperly functioning brake light.

Id. at __, 737 S.E.2d at 358-59. In sum, the *Heien* Court's finding that the officer's mistaken belief of law was reasonable was predicated on the complex and novel language of the brake light statutes. Similarly, in *U.S. v. Martin*, 411 F.3d 998, 1001 (2005), a case relied upon by our Supreme Court in adopting the new jurisprudence, the Eighth Circuit, in addressing the objective reasonableness of an officer's mistaken belief of law, focused on the "counterintuitive and confusing" language of the traffic laws at issue.

In contrast, the statute at issue here, our State's open container law, is neither novel nor complex. It clearly and unambiguously prohibits the

possession of an open container in a motor vehicle only on highways and highway right-of-ways. There is no confusing or counterintuitive language in N.C. Gen. Stat. § 20-138.7(a1). Furthermore, as discussed, while the statute formerly prohibited driving in a PVA with an open container of alcohol, it was changed over ten years earlier. Moreover, we note that, while the distinction between "highway" and "public vehicular area" may be unfamiliar to lay persons, their definitions are clearly stated in section 20-4.01 of our motor vehicle laws as:

> (13) Highway. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" and "street" and their cognates are synonymous.
>
> . . .
>
> (32) Public Vehicular Area. — Any area within the State of North Carolina that meets one or more of the following requirements:
>
> a. The area is used by the public for vehicular traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:
>
> . . .
>
> 2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.

The term "PVA" frequently appears in our motor vehicle laws, over two dozen times. Law enforcement officers would not only be familiar with these terms but would also be aware of the distinction between a PVA and a highway. Finally, unlike *Heien* where the state of the law regarding brake lights was unclear at the time the officer made the stop, here, the open container law, N.C. Gen. Stat. § 20-138.7, had been well-settled for over ten years. Based on these circumstances, Officer Lampe's mistaken understanding of the open container law is simply not reasonable, and his mistaken belief that defendant was violating the open container law, which served as the basis for his stop, was unreasonable. Accordingly,

we reverse the trial court's denial of defendant's motion to suppress and grant him a new trial.

We note that even if we had concluded that Officer Lampe's mistaken belief of law was reasonable pursuant to *Heien*, we also find that Ms. Creech's tip lacked sufficient indicia of reliability to provide Officer Lampe reasonable suspicion to stop defendant. In concluding that the tip was not sufficiently reliable to establish reasonable suspicion, this Court, in *McArn*, 159 N.C. App. at 214, 582 S.E.2d at 375, stated that:

> [T]he fact that the anonymous tipster provided the location and description of the vehicle may have offered some limited indicia of reliability in that it assisted the police in identifying the vehicle the tipster referenced. It has not gone unnoticed by this Court, however, that the tipster never identified or in any way described an individual. Therefore, the tip upon which Officer Hall relied did not possess the indicia of reliability necessary to provide reasonable suspicion to make an investigatory stop. The anonymous tipster in no way predicted defendant's actions. The police were thus unable to test the tipster's knowledge or credibility. Moreover, the tipster failed to explain on what basis he knew about the white Nissan vehicle and related drug activity

Similarly, in *State v. Peele*, 196 N.C. App. 668, 673, 675 S.E.2d 682, 686, *disc. review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009), we determined that an anonymous tip was insufficient to provide reasonable suspicion when the anonymous caller provided no way for the officer to test the tipster's credibility and included no prediction of the defendant's future actions.

We can discern no meaningful distinction between Ms. Creech's tip and those in *McArn* and *Peele*. While the fact that Ms. Creech's tip provided the license plate number and location of defendant's car may have provided some limited indicia of reliability, she did not identify or describe defendant, did not provide any way for Officer Lampe to assess her credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions. Accordingly, even if we had concluded that Officer Lampe's mistaken belief of law was reasonable, we would have reversed the trial court's order and remanded for a new trial because Ms. Creech's anonymous tip lacked the sufficient indicia of reliability necessary to establish reasonable suspicion.

Conclusion

Based on the foregoing reasons, we reverse the trial court's order denying defendant's motion to suppress and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA
v.
PAUL DIAL

No. COA12-1334

Filed 18 June 2013

1. Firearms and Other Weapons—possession by felon—findings of fact—supported by evidence

The trial court's challenged findings of fact in a possession of a firearm by a felon case were supported by competent evidence.

2. Search and Seizure—reasonable suspicion—residence harbored dangerous individual

The trial court did not err in a possession of a firearm by a felon case by denying defendant's motion to suppress the evidence of the firearms that was discovered as a result of a protective sweep of his residence. Deputies had a reasonable suspicion that the residence may have harbored an individual posing a danger to the deputies where defendant took an unusually long time to answer the door at his residence, weapons were known to be inside the residence, and defendant's own actions led him to be arrested in the open doorway.

Appeal by defendant from judgment entered 12 April 2012 by Judge Richard W. Stone in Chatham County Superior Court. Heard in the Court of Appeals 24 April 2013.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Michele Goldman for defendant-appellant.

STEELMAN, Judge.

Where defendant took an unusually long time to answer the door at his residence, weapons were known to be inside the residence, and defendant's own actions led him to be arrested in the open doorway, deputies had a reasonable belief that the residence may have harbored an individual posing a danger to the deputies. The trial court properly denied defendant's motion to suppress evidence recovered as a result of the deputies' protective sweep.

I. Factual and Procedural Background

On 20 May 2011, Chris Burger[1] (Burger), a deputy with the Chatham County Sheriff's Office, went to the residence of Paul Dial (defendant) to serve defendant with an order for arrest. Burger had previously served orders for arrest upon defendant at the residence. During the previous encounters, defendant had answered the door promptly when Burger knocked and announced his presence. On 20 May 2011, Burger arrived at defendant's residence and observed a van in the driveway. The van's windows were open and there was a buzzing noise coming from the vehicle consistent with the key being in the ignition in the "on" position. Burger knocked on the front door and immediately heard shuffling on the other side of the door that could have been caused by one or more persons. No one answered the door. For five to ten minutes, Burger continued to knock and announce who he was, called defendant by name, and asked defendant to come outside. No one came to the door. Burger called for backup from his patrol car, indicating that defendant had barricaded himself in the residence and that Burger needed assistance. Burger then used his patrol vehicle PA system to try to get someone to come out of the residence for approximately five minutes. Burger was concerned for his safety because he knew firearms were normally inside the residence and defendant usually responded promptly when Burger knocked and announced his presence.

Deputies Tipton (Tipton) and Miller (Miller) responded to Burger's request for assistance, arrived at the residence, and were briefed on the situation. Burger informed them he believed weapons to be inside the residence and showed them the order for defendant's arrest. The three deputies developed a plan to try to observe who was in the residence.

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1. We note that in the transcript of the suppression hearing Burger's name is spelled as "Berger." The trial court's order denying defendant's motion to suppress refers to Burger as "Burger."

Tipton and Miller planned to knock on the front and side doors while Burger attempted to look inside the residence through windows. As the deputies approached the residence, the "front door flew open and defendant stepped out." Tipton drew his weapon and gave verbal commands to defendant. Defendant walked down the front steps with his hands raised. Defendant was not resisting arrest, but was not complying with the deputies' instructions. As Burger buckled defendant's knees and cuffed him, Tipton and Miller entered the open front door to perform a protective sweep of the residence. Tipton and Miller considered the open door to be a "fatal funnel" that would provide an assailant inside the residence with a clear shot at the deputies. Acting out of concern for Burger's safety, deputies attempted to clear the residence by making sure there was no one else inside either posing a threat to the deputies or who was injured. The protective sweep lasted approximately thirty seconds. Deputies only inspected areas where a person could have been hiding. While inside the residence, deputies observed ammunition magazines on the kitchen table and firearms inside a room. There was no one else inside the residence. Several hours after the arrest, deputies returned with a search warrant and searched defendant's residence and vehicle.

On 10 October 2011, defendant was indicted for possession of a firearm by a felon. Defendant filed a motion to suppress the evidence that was discovered as a result of the protective sweep of his residence. On 15 March 2012, Judge Allen Baddour denied defendant's motion to suppress. Defendant subsequently pled guilty before Judge Stone to possession of a firearm by a felon, reserving the right to appeal the denial of his motion to suppress. The trial court sentenced defendant to twelve to fifteen months imprisonment. This sentence was suspended and defendant was placed on supervised probation for thirty months.

Defendant appeals.

II. Motion to Suppress

In his only argument on appeal, defendant contends that the trial court erred in denying his motion to suppress the evidence of the firearms that was discovered as a result of a protective sweep of his residence. We disagree.

A. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they

are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

B. Challenged Findings of Fact

[1] Defendant challenges three of the trial court's findings of fact from its order denying the motion to suppress.

Defendant first challenges the finding of fact that states Burger "had dealt with defendant on other occasions as well, including making felony drug arrests at the residence." At the suppression hearing, Burger testified that he previously served defendant at least six times with child support papers and that he had "dealings with other individuals" at the residence as well. He further testified that on one of these occasions he arrested an individual for felony possession of cocaine at the residence and characterized the residence as a known "drug house." At the suppression hearing, defendant acknowledged being arrested in 2004 on marijuana charges. This testimony supports the trial court's finding of fact that Burger had previously made felony drug arrests at the residence.

Even assuming *arguendo* that this evidence only supports a finding of fact that Burger made one felony drug arrest at the residence, there is no prejudicial error. Any discrepancy in the number of felony drug arrests, whether it was one or several, is inconsequential to the analysis of whether Tipton and Miller had a reasonable belief that defendant's residence harbored an individual posing a danger to the deputies.

Defendant next challenges the trial court's finding of fact that states "Burger briefed [Tipton and Miller] on the situation, letting them know that he believed there to be weapons inside [defendant's residence]." At the suppression hearing, Tipton and Miller were questioned about their conversation with Burger that occurred shortly after their arrival, what Burger told them, and what they knew about the situation. Tipton and Miller never mentioned in their testimony whether or not Burger informed them that there were weapons inside the residence. Burger testified that he "knew there [were] firearms inside that house" from his previous encounters at the residence, and that he "briefed [Tipton and Miller] on what happened with my prior occasions at the house as far as my dealings with [defendant]. I -- for their safety, I informed them there was [sic] weapons to my knowledge inside the house." Defendant contends that Tipton or Miller did not testify that Burger communicated this information to them. However, Burger's testimony, by itself, supports the trial court's finding of fact that he informed Tipton and Miller that he

believed there to be weapons inside the residence. The testimony from Tipton and Miller did not contradict Burger's testimony.

Finally, defendant challenges the competency of evidence supporting the trial court's conclusion of law stating "the arrest occurred [within the fatal funnel] based on the actions of the defendant, not of law enforcement." Defendant characterizes this conclusion as a finding of fact. Assuming *arguendo* that this statement is a finding of fact, there was evidence presented at the suppression hearing that supported it. The evidence was that defendant refused to exit the residence while Burger repeatedly knocked on the door and announced his presence; that after a considerable amount of time, during which two additional deputies arrived, defendant flung the door open, "not just casually [or] slowly;" and that while defendant was not resisting arrest, he was not complying with the deputies' instructions. We hold there was competent evidence to support the trial court's finding of fact that defendant's arrest occurred as it did because of defendant's actions.

C. Protective Sweep

[2] Defendant contends that the trial court's findings of fact do not support its conclusion of law that Tipton and Miller had a reasonable suspicion, based on articulable facts, that the residence may have harbored an individual posing a danger to the deputies and required a protective sweep.

"A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327, 108 L. Ed. 2d 276, 281 (1990). These sweeps are "reasonable if there are 'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.' " *State v. Bullin*, 150 N.C. App. 631, 640, 564 S.E.2d 576, 583 (2002) (quoting *Buie*, 494 U.S. at 334, 108 L. Ed. 2d at 286). Because a protective sweep is aimed at protecting the officers, "[i]t is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Buie*, 494 U.S. at 327, 108 L. Ed. 2d at 281. The sweep must also "last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *State v. Wallace*, 111 N.C. App. 581, 588, 433 S.E.2d 238, 242 (1993).

In *Wallace*, we upheld the trial court's conclusion that officers did not have reasonable and articulate suspicion to justify a protective

sweep. *Id.* at 588, 433 S.E.2d at 242-43. In that case, the officers who performed the sweep were at the residence only to gain information and not to make an arrest. *Id.* When the officers arrived at the residence, they encountered no resistance and the defendant answered the door immediately. *Id.* The defendant shut the door to the residence behind him and the door remained shut while the officers questioned the defendant. *Id.* at 583, 433 S.E.2d at 239-40. The officers admitted that they never felt afraid or felt they were in a dangerous situation at any point during the encounter. *Id.* at 588, 433 S.E.2d at 243. The officers heard footsteps and a door shut inside the residence. *Id.* The officers attempted to obtain the defendant's consent to search the residence, but the defendant stated he would not consent until he had time to get rid of the drug paraphernalia and marijuana seeds in the residence. *Id.* at 583, 433 S.E.2d at 240. Thereafter, the officers performed a five-minute protective sweep of the residence. *Id.* at 588, 433 S.E.2d at 243.

The facts of the instant case are distinguishable from those in *Wallace*. The deputies were attempting to serve an order for arrest. Defendant did not immediately respond to Burger and did not respond after ten to fifteen minutes of Burger knocking and announcing his presence. Burger heard shuffling on the other side of the door and he could not determine if it was caused by one or more persons. When Tipton and Miller arrived, they were briefed on the situation, showed the order for defendant's arrest, and informed that Burger believed there to be weapons inside the residence. When the deputies approached the residence, "the front door flew open[,]" defendant stepped out, and walked down the front steps with his hands raised. "As soon as Burger had his hands on defendant," the other two deputies entered the residence and performed a protective sweep, which lasted approximately thirty seconds. While Tipton and Miller's concern that the open door at an unsecured residence was a "fatal funnel" by itself may not have been a sufficient basis for believing there was another individual in the residence that posed a threat, the trial court's findings of fact reveal that there were additional factors present that provided a proper basis for the protective sweep. These include: defendant's unusually long response time and resistance, the known potential threat of weapons inside the residence, shuffling noises that could have indicated more than one person inside the residence, defendant's alarming exit from the residence, and defendant's own actions that led him to be arrested in the open doorway. The trial court's findings of fact indicate that Tipton and Miller acted immediately and responded as soon as Burger was in potential danger. Their sweep was of a very brief duration, and they only looked in places where a person might be hiding. The trial

court's findings of fact support its conclusion of law that Tipton and Miller had a reasonable belief based on specific and articulable facts, that the residence harbored an individual who posed a danger to the safety of the deputies. The trial court's conclusion of law that the "case at bar is factually distinctive from *State v. Wallace*, 111 N.C. App. 581, (1993)" was supported by its findings of fact. The fact that the deputies did not find another person in the residence is in no way determinative of the reasonableness of the protective sweep.

The motion to suppress the evidence was properly denied. This argument is without merit.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
VICTOR ALFONSO CRUZ GARCIA, DEFENDANT

No. COA12-972

Filed 18 June 2013

1. Evidence—interrogation transcript—detective's questions—relevant—not improper opinion testimony

The trial court did not commit plain error in a second-degree murder case by admitting the transcript of defendant's interrogation without redacting certain challenged statements. Each of the challenged statements was relevant and did not constitute improper opinion testimony of the credibility of defendant or of the State's witnesses.

2. Appeal and Error—preservation of issues—Rule 403 balancing test—plain error

Defendant's argument that the trial court committed plain error by allowing into evidence certain statements under Rule 403 was not preserved for appellate review. The balancing test of Rule 403 is reviewed by this Court for abuse of discretion, and the Court does not apply plain error to issues which fall within the realm of the trial court's discretion.

3. Evidence—detective's testimony—relevant—defendant's credibility

The trial court did not err in a second-degree murder case by overruling defendant's objection to the detective's testimony regarding his interrogation strategy. The detective's strategy was relevant to defendant's credibility at trial.

Appeal by defendant from judgment entered 13 February 2012 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 January 2013.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

Duncan B. McCormick for defendant-appellant.

GEER, Judge.

Defendant Victor Alfonso Cruz Garcia appeals from his conviction of second degree murder. On appeal, defendant primarily argues that the trial court, when admitting the transcript of defendant's interrogation, should have excluded certain statements made by the interrogating detective because, defendant contends, those statements were irrelevant and constituted an improper comment on the credibility of defendant and of the State's witnesses. We hold that the detective's interrogation statements were properly admitted under *State v. Miller*, 197 N.C. App. 78, 676 S.E.2d 546 (2009), and *State v. Castaneda*, ___ N.C. App. ___, 715 S.E.2d 290, *appeal dismissed and disc. review denied*, 365 N.C. 354, 718 S.E.2d 148 (2011).

Facts

The State's evidence tended to show the following facts. As of May 2009, defendant and Jennifer Fuentes had been dating and living together for approximately three months. Prior to dating defendant, Ms. Fuentes had lived with Edgardo Perez. Ms. Fuentes had a young son that Mr. Perez treated as his son, although Mr. Perez may not have been the boy's biological father.

Prior to dating defendant, Ms. Fuentes was a happy person and enjoyed spending time with her cousin, Lidia Noemi Mejia Pineda. The two often laughed, visited each other's homes, and went out together. According to Ms. Pineda, once Ms. Fuentes began dating defendant, Ms.

Fuentes became very quiet and was "not the same person" she had been before. Ms. Fuentes rarely called or visited Ms. Pineda. Although Ms. Fuentes had been a person "that would always make herself up," she stopped doing so while dating defendant. Ms. Fuentes worked and made good money. However, after she started dating defendant, Ms. Fuentes began asking to borrow money from Ms. Pineda.

On 10 May 2009, Ms. Pineda went to the house Ms. Fuentes shared with defendant and asked Ms. Fuentes to go out with Ms. Pineda to celebrate Mother's Day. Ms. Fuentes was very quiet, was not made up, and would not commit to leaving the house. Ms. Fuentes then went into the bedroom with defendant, came back out, and told Ms. Pineda she could not go out. According to another of Ms. Fuentes' cousins, Elder Mejia, who lived with Ms. Fuentes and defendant at the time, defendant locked Ms. Fuentes in their bedroom that evening and refused to let her leave the house.

At one point while Mr. Mejia was living in the house with Ms. Fuentes and defendant, Mr. Mejia asked Ms. Fuentes why she hid all the knives in the house. She replied that it was because defendant was capable of anything. Another time, while defendant and Ms. Fuentes were arguing about jealousy, defendant told Ms. Fuentes, "[I]f I can't have you, then nobody can have you." Ms. Fuentes told Mr. Mejia she was afraid of defendant, and defendant mistreated her.

Sometime in May 2009, defendant beat Ms. Fuentes and threw her to the floor. Mr. Mejia was present and tried to intervene, but he stopped when defendant grabbed his shirt, pointed a black pistol at Mr. Mejia, and warned Mr. Mejia not to call the police or defendant would kill him. Following that incident, Mr. Mejia moved out of the house.

On 30 May 2009, a Saturday evening, Mr. Perez went to Ms. Fuentes' house and, while there, fought with defendant. During the fight, defendant pointed a gun at Ms. Fuentes, just below her neck. The police were called, but defendant ran from the house before they arrived. Mr. Perez remained and was arrested and taken to jail.

Ms. Fuentes and her son stayed with a neighbor, Martha Juarez, that night. Later that night, defendant came to Ms. Juarez' house, knocked on the bedroom window and the door, and asked to speak with Ms. Fuentes. Defendant pushed past Ms. Juarez to try to get into the bedroom with Ms. Fuentes, but Ms. Juarez' husband made defendant leave the house.

Defendant returned to Ms. Juarez' house the next morning, 31 May 2009, and asked to talk with Ms. Fuentes. Ms. Juarez did not let him in

and called her adult daughter, Vicky Soto, to come over. Ms. Fuentes told Ms. Soto she was afraid of defendant and that defendant had a gun and had fought with Mr. Perez. Defendant then returned to Ms. Juarez' house and asked to speak with Ms. Fuentes again. Ms. Soto told defendant that Ms. Fuentes did not want to talk and that she was calling the police. In response, defendant called the police himself.

Two police officers arrived, and Ms. Fuentes and Ms. Soto spoke with them in the front yard. The officers asked defendant to wait away from Ms. Fuentes because she did not want to speak to them with him present. Ms. Fuentes told the officers that she did not want to go back to the house, that she wanted defendant out of the house, and that the police should have arrested defendant and not Mr. Perez the previous night because defendant had the gun.

Ms. Soto then translated for defendant, who only speaks Spanish, so he could talk with the police. Defendant asked the officers to make Ms. Fuentes return home, and they responded that they could not do so. Defendant told the officers he did not have a gun and that he would not leave the house because it was his home. The officers then told Ms. Fuentes that they could not make defendant leave until she obtained a legal order requiring him to leave the house. They explained to her that the office where she could request the order was closed on Sundays.

Later that morning, Ms. Pineda met Ms. Fuentes as she was leaving the neighbor's house. Ms. Fuentes was sad, worried, and afraid of what defendant would do if Ms. Fuentes helped bail Mr. Perez out of jail. Nevertheless, Ms. Fuentes and Ms. Pineda went to the courthouse that day to learn with what crimes Mr. Perez had been charged and then tried to locate an attorney who could help Mr. Perez get out of jail. They encountered defendant, and defendant told Ms. Fuentes to "not be going trying to get [Mr. Perez] out of jail because she would regret it." Defendant told Ms. Pineda she should not get involved, and she "didn't know what he was capable of."

Also on that Sunday, Ms. Fuentes and Ms. Pineda went to the police department so that Ms. Fuentes could attempt to obtain a protective order against defendant and thereby have defendant removed from the house. That same day, Ms. Fuentes told Mr. Mejia that she wanted to separate from defendant and that defendant was planning on killing somebody with his pistol, but she did not know if would be her or Mr. Perez.

On Sunday night, Ms. Fuentes told Ms. Pineda that Ms. Fuentes "had to go back to her house," but she asked Ms. Pineda to allow her son to

stay at Ms. Pineda's house for the night. Ms. Fuentes also told Ms. Pineda that she had assured defendant she was not trying to help Mr. Perez get out of jail, and she warned Ms. Pineda not to tell defendant anything to the contrary.

On Monday, 1 June 2009, Ms. Fuentes picked up Ms. Pineda in the morning and the two again searched for an attorney to help Mr. Perez get out of jail, ultimately finding one and paying him $800.00. That sum did not cover Mr. Perez' bail money. Ms. Fuentes repeatedly told Ms. Pineda she was very afraid of what would happen if defendant found out what they were doing. At approximately 3:30 p.m., Ms. Fuentes went back to her house to pick up clothes for herself and her son so that they could move in with Ms. Pineda. Ms. Pineda offered to go with Ms. Fuentes, but Ms. Fuentes preferred to go alone because she was afraid something might happen to Ms. Pineda.

Ms. Pineda called Ms. Fuentes twice after she left, asking if Ms. Fuentes was okay and if she would return soon. Each time Ms. Fuentes gave unusually brief answers, saying that she was okay without elaboration. Ms. Fuentes failed to pick up her son from the baby-sitter that evening. At approximately 6:00 p.m., Ms. Fuentes called another cousin, Christine Mejia. Ms. Fuentes sounded nervous and asked Ms. Mejia if she could borrow $500.00. Ms. Mejia said she could not lend the money, and the call suddenly dropped. Ms. Mejia tried to call Ms. Fuentes back, but there was no answer. Five minutes later, Ms. Fuentes called Ms. Mejia back, and, during the call, Ms. Mejia heard a male voice in the background, Ms. Fuentes spoke something unintelligible to the male, and the call ended abruptly.

At some point that evening, defendant went to the house of Ms. Juarez, the neighbor. He asked Ms. Juarez' husband if he could use the phone to try to get a key to his house because he was locked out and was looking for Ms. Fuentes.

When Ms. Fuentes had still not returned to Ms. Pineda's house by 7:30 p.m., Ms. Pineda went to Ms. Fuentes' house and found it locked. After nobody answered the door, Ms. Pineda went to Ms. Juarez' house and, together with Ms. Juarez and Ms. Juarez' husband, obtained a key to Ms. Fuentes' house. Ms. Juarez' husband entered the house and found Ms. Fuentes' body. Ms. Pineda immediately called the police.

The responding officers found Ms. Fuentes dead on the bedroom floor with a knife stuck in her back and a black semi-automatic handgun under her armpit. The gun defendant had threatened Mr. Mejia with

was also a black handgun with a magazine. Ms. Fuentes had 16 cut or stab wounds from a knife, nine of which would have been independently fatal. Among other places, Ms. Fuentes had been stabbed in the eye, the neck, the chest, five times in the right side, and three times in the back. A knife wound to Ms. Fuentes' forearm was a defensive wound; wounds to her hands may also have been defensive wounds.

An officer responding to the scene spotted defendant walking on a nearby street. The officer stopped and talked to defendant, and defendant told him that he was walking home and lived at the address to which the officer was responding. The two walked to defendant's address, and, upon arriving, defendant asked the officer what was going on and repeatedly asked if his "lady" was okay. After defendant arrived on the scene, a responding firefighter translated for defendant, and defendant told the officers that he had been out all evening looking for apartments. The firefighter found it strange that defendant was calm and "just stood there watching like he was watching a commercial on TV." During this time, an officer identified the tread of defendant's shoes as matching bloody shoeprints inside the house.

Detective David Osorio of the Charlotte-Mecklenburg Police Department responded to the scene, spoke with defendant, and noticed that defendant had drops and smears of blood on the top of his shoes. That night, Detective Osorio interviewed several witnesses and then interviewed defendant. Throughout his interview, defendant maintained he had not been in the house that evening, he had been out looking for apartments, and he did not know what happened to Ms. Fuentes. Despite extensive questioning by Detective Osorio as to why, among other things, defendant's shoes were bloody and there were bloody footprints matching the tread of defendant's shoes in the house, defendant repeatedly denied knowledge of the killing. Defendant stated that he only learned of the killing when he arrived at the scene, Ms. Mejia told him "they had killed [Ms. Fuentes]," and then Ms. Mejia began accusing defendant of killing Ms. Fuentes. Defendant ultimately told Detective Osorio that he would "take this explanation to the graveyard . . . [b]ecause one has to tell the truth."

On 15 June 2009, defendant was indicted for first degree murder. At trial, defendant testified in his own defense to the following. According to defendant, defendant's fight on Saturday night had been with Mr. Perez only, and defendant had never threatened Ms. Fuentes. During the fight, defendant took a gun from Ms. Fuentes' brother and fired two shots into the ceiling. In the evening on Sunday, 31 May 2009, Ms. Fuentes returned home, defendant apologized, and she forgave him.

On the next evening, 1 June 2009, Ms. Fuentes returned home from work, was agitated, and told defendant that the landlord was kicking them out of the house immediately. She began hitting defendant, still upset that Mr. Perez had been arrested. Defendant attempted to call 911, but Ms. Fuentes grabbed for the phone and, during a struggle, the phone broke. Ms. Fuentes then grabbed a knife and began motioning that she would stab defendant. After Ms. Fuentes backed defendant into a corner, defendant struggled with her and took the knife. Ms. Fuentes said, "I'm going to kill you" and pointed a pistol at defendant. Defendant then stabbed Ms. Fuentes in self-defense.

Defendant claimed he was afraid, left the house, and wandered around the neighborhood. He did not request help from the neighbors and did not consider helping Ms. Fuentes. Although defendant knew how to call 911, he did not do so because he did not want to interact with the police. When a police officer on the street spoke to him, defendant decided to deny killing Ms. Fuentes. Defendant was not aware that he could claim self-defense, and he believed that if he told the truth, he would be placed in jail. Defendant acknowledged that during his interview with Detective Osorio, defendant had consistently and deliberately concealed the truth and denied stabbing Ms. Fuentes in an effort to avoid going to jail.

The jury found defendant guilty of second degree murder, and the trial court sentenced defendant to a presumptive-range term of 135 to 171 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant filed a motion in limine to redact portions of the transcript of his interrogation on the night of the killing. The trial court granted the motion in part and denied it in part. Defendant argues on appeal that the trial court erred by "failing to exclude evidence relating to statements [of the detective] that did not elicit substantive responses or cause [defendant] to change his story during the interview." Defendant groups the challenged statements into three categories: (1) Detective Osorio's "assertions that [defendant] was not being truthful"; (2) Detective Osorio's "statements that [defendant] was going to look like a monster and a murderer if he did not give an explanation for the killing"; and (3) Detective Osorio's "assertions that [Ms. Fuentes] feared [defendant] and the detective's speculation about what happened."

Defendant concedes that he did not, however, object to admission of any of the challenged statements when the interrogation transcript was admitted into evidence and published to the jury. Defendant also failed

to object when the interrogating detective testified, using the transcript, to the substance of many of the challenged statements. Because defendant failed to renew his objections at trial, defendant did not preserve these issues for appellate review. *State v. Crandell*, 208 N.C. App. 227, 235, 702 S.E.2d 352, 358 (2010) ("A motion *in limine* does not preserve a question for appellate review in the absence of the renewal of the objection at trial."), *disc. review denied*, 365 N.C. 194, 710 S.E.2d 34 (2011).

Defendant argues, however, that the trial court committed plain error in admitting the transcript without redacting the challenged statements.

> 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).

Defendant first argues that none of the challenged statements by Detective Osorio were relevant. " 'Relevant evidence' " is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. " 'In order to be relevant, . . . evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.' " *Miller*, 197 N.C. App. at 86, 676 S.E.2d at 551 (quoting *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991)). " '[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.' " *Id.* at 86-87, 676 S.E.2d at 552 (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)).

Defendant concedes that his responses during the interrogation -- which were inconsistent with his trial testimony -- were relevant and

admissible. *See State v. Workman*, 344 N.C. 482, 504, 476 S.E.2d 301, 313 (1996) (" 'Inconsistent prior statements are admissible for the purpose of shedding light on a witness's credibility,' and when the 'prior statement relates to material facts in the witness's testimony, extrinsic evidence may be used to prove the prior inconsistent statement.' " (internal citation omitted) (quoting *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984))). Defendant argues, however, that the challenged statements by the detective were not relevant.

Detective Osorio's statements at issue included statements questioning defendant's credibility such as (1) telling defendant to stop insulting the detective's intelligence; (2) calling defendant a "fool" and saying defendant was acting like an "idiot"; and (3) describing defendant's story as "stupid," "disgusting," "shit and . . . pure lies," and "a lie."

Defendant also points to a second group of statements (1) urging defendant to explain the killing so defendant did not appear to be a person "that doesn't feel sorry or regret at all" and so defendant would not look like "a criminal" or "a person that has killed another human being without . . . forgiveness"; (2) claiming that defendant's responses to the questions were making him look like "a monster" and "a murderer"; (3) suggesting that if defendant explained the killing, the detective could tell the prosecutor that defendant told the detective he was not a murderer and gave a reason for the killing; (4) warning that defendant was going to go to jail for the rest of his life if he persisted in not truthfully explaining what happened; and (5) suggesting that if the detective killed his wife or girlfriend, he would give an explanation for his actions so he would not appear to be a monster or a murderer.

The third category of statements included comments (1) that defendant had threatened Ms. Fuentes; (2) that Ms. Fuentes had been calling "everybody" and telling them she feared defendant and she did not want to remain in the house with him; (3) that defendant had threatened Ms. Fuentes' cousin; (4) that defendant needed to explain what happened; (5) that something happened to cause defendant to get angry; and (6) that defendant surprised Ms. Fuentes when she was making a phone call to a cousin and trying to raise money for Mr. Perez' bail.

In *Miller*, the defendant challenged the relevancy of certain statements made by two detectives to the defendant during interrogation in which the detectives referred to "statements purportedly made by nontestifying others, including [the defendant's] co-defendants and his sisters." 197 N.C. App. at 85, 676 S.E.2d at 551. The Court held that the detectives' statements were relevant, reasoning:

> The questions and their answers were relevant to facts under dispute. In addition, here, the questions gave context to defendant's responses. . . . [D]uring the course of questioning, defendant eventually conceded to the truth of many of the statements relayed to him via the detectives' questions. *The circumstances under which these concessions were made were relevant to understanding the concessions themselves and therefore to the subject matter of the case.* At other times, after being confronted with the purported statements of others via the detectives' questions, defendant changed his story substantially. In these instances, *the questions were also relevant to explain and provide context to defendant's subsequent conduct of changing his story.*

Id. at 87, 676 S.E.2d at 552 (emphasis added).

Defendant's arguments appear to be based upon the premise that, under *Miller*, *each* of the challenged interrogation statements must, independently from the others, have elicited or provided the specific context for a specific relevant response in order to be admissible. *Miller* does not require such a narrow reading. *See id.* at 86, 87, 676 S.E.2d at 551, 552 (analyzing "eight specific portions" of detectives' questions as a group and explaining questions were relevant to give context to defendant's responses because, "during the course of questioning, defendant eventually conceded to the truth of many of the statements relayed to him via the detectives' questions" and "circumstances under which these concessions were made were relevant to understanding the concessions themselves and therefore to the subject matter of the case").

Further, defendant reads *Miller* as allowing admission of an interrogator's statements as providing "context" only if they caused the defendant to concede the truth or change his story. Again, we believe that *Miller* does not limit "context" to those two situations. Rather, whether an interrogator's remarks provide relevant "context" for a defendant's responses depends on the facts of each case.

At the outset of the interrogation in this case, defendant denied having any knowledge of Ms. Fuentes' killing and denied being in the home during the relevant time. Detective Osorio then began making the challenged statements, putting increasing pressure on defendant to tell the truth and to provide an explanation for why defendant killed Ms. Fuentes. However, even when faced with Detective Osorio's aggressive statements providing defendant with strong reasons to come forward

with his self-defense claim, defendant repeatedly and emphatically asserted he was telling the truth when he said he knew nothing about the murder. For example, after Detective Osorio had made many of the challenged statements, defendant said, "Well, I'll take this explanation to the graveyard, this one. Because one has to tell the truth, what I'm telling is the truth . . . ." Similarly, at the end of the interview, after Detective Osorio had made all but one of the challenged statements, defendant said, "I only know to tell you what I know, the truth."

Thus, defendant steadfastly denied any involvement in the killing during his interrogation, but, at trial, admitted killing Ms. Fuentes (although claiming self-defense) and admitted consciously and purposefully lying during the interrogation. Defendant's credibility was a key issue for the jury to decide.

The fact that defendant was willing to repeatedly lie, in spite of Detective Osorio's pressuring interrogation techniques, was highly probative of defendant's credibility. Here, the relevant "context" provided by Detective Osorio's statements is that the defendant's admitted lies that he knew nothing about the murder were made over and over despite increasing pressure by Detective Osorio. Detective Osorio's statements provided "context" because they showed that defendant's responses during the interrogation were not merely prior inconsistent statements.

Defendant's resistance to coming forward with his explanation for the killing when under significant pressure and given incentives to do so, as well as his ability to persist in an admitted lie despite the pressure, was relevant to the credibility of defendant's testimony at trial, including while under cross-examination. The aggregate of Detective Osorio's statements, the type of statements, and defendant's consistent stance in response to those statements that he was telling the truth made the challenged statements relevant in this case.

Defendant alternatively argues that Detective Osorio's statements that defendant was lying constituted improper opinion testimony on defendant's credibility and that Detective Osorio's statements that Ms. Fuentes feared defendant and his speculation about what happened constituted improper opinion testimony on the credibility of defendant and the State's witnesses. In support of his arguments, defendant asserts that he testified at trial that he never threatened Ms. Fuentes or her cousin, that the evidence that Ms. Fuentes wanted to separate from defendant was in conflict, and that the jury's assessment of the credibility of defendant and the State's witnesses on these matters was critical to the issue of self-defense.

In *Castaneda*, ___ N.C. App. at ___, 715 S.E.2d at 294, the defendant argued that an interrogating officer's statements to the defendant that the defendant was lying constituted inadmissible opinion evidence on the veracity of the defendant's pretrial statement and, ultimately, his trial testimony. The *Castaneda* defendant specifically challenged the admissibility of the detective's interrogation statements that the defendant's story was a " 'lie,' " " 'bullshit,' " and "like 'the shit you see in the movies.' " *Id.* at ___, 715 S.E.2d at 294. The defendant contended that, because "the issue of defendant's credibility was 'for the jury and the jury alone,' the trial court erred in admitting th[e] evidence." *Id.* at ___, 715 S.E.2d at 294.

The Court in *Castaneda* observed that " '[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury' and that testimony 'to the effect that a witness is credible, believable, or truthful is inadmissible.' " *Id.* at ___, 715 S.E.2d at 294 (quoting *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995)). However, the Court pointed out that the defendant shifted his story and made inculpatory statements in response to the detective's interrogation statements challenging his story. *Id.* at ___, 715 S.E.2d at 295. Accordingly, this Court held:

> Because [the detective's] statements were part of an interrogation technique designed to show defendant that the detectives were aware of the holes and discrepancies in his story and were not made for the purpose of expressing an opinion as to defendant's credibility or veracity at trial, the trial court properly admitted the evidence.

Id. at ___, 715 S.E.2d at 295.

The Court in *Castaneda* cautioned, however, that "[i]nterrogators' comments reflecting on the suspect's truthfulness are not . . . always admissible." *Id.* at ___, 715 S.E.2d at 295. In this respect, the Court quoted approvingly the Idaho Court of Appeals:

> "A suspect's answers to police questioning are only admissible to the extent that they are relevant. Thus, an interrogator's comments that he or she believes the suspect is lying are only admissible to the extent that they provide context to a relevant answer by the suspect. Otherwise, interrogator comments that result in an irrelevant answer should be redacted."

Id. at ___, 715 S.E.2d at 295 (quoting *State v. Cordova*, 137 Idaho 635, 641, 51 P.3d 449, 455 (Idaho Ct. App. 2002)).

In this case, Detective Osorio's comments that defendant was lying expressed an opinion regarding defendant's credibility during the interrogation only. Yet, defendant acknowledged at trial that Detective Osorio was correct when he accused defendant of lying in the interrogation. The jury was not, therefore, required to decide the credibility of defendant's responses during the interrogation.

Even if the detective's interrogation technique could be viewed as an expression of an opinion, it did not invade the province of the jury in this case. Instead, the detective's comments were "part of an interrogation technique designed to show defendant that the detective[] w[as] aware of the holes and discrepancies in his story." *Id.* at ___, 715 S.E.2d at 295. Further, Detective Osorio was also using a strategy designed to give defendant an incentive and opportunity to provide an explanation for the killing. Despite the use of those interrogation techniques, defendant persisted in denying any knowledge of the killing and never mentioned self-defense. Under these circumstances, the challenged statements were properly admitted as a whole, because they provided the context to relevant answers by defendant that directly related to the credibility of defendant's claim of self-defense made for the first time at trial.

In sum, because each of the challenged statements put additional pressure on defendant to admit his now undisputed involvement in the killing, and because defendant steadfastly maintained he was telling the truth throughout the interrogation when denying involvement, each statement provided context to and, in part, elicited defendant's prior inconsistent statement that he did not kill Ms. Fuentes. Each of the challenged statements was, therefore, relevant and did not constitute improper opinion testimony on the credibility of defendant or of the State's witnesses.

II

[2] Defendant further argues that Detective Osorio's interrogation statements that defendant was going to look like a monster and a murderer if he did not give an explanation for the killing were erroneously admitted because, under Rule 403 of the North Carolina Rules of Evidence, any probative value was substantially outweighed by both the danger of unfair prejudice and confusion of the issues presented to the jury. Defendant concedes he did not object to admission of these statements at trial and, therefore, argues admission of the statements was plain error.

Our courts have held, however, that "[t]he balancing test of Rule 403 is reviewed by this court for abuse of discretion, and we do not apply plain error '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)). Because the issue was not properly preserved for appeal, we do not address it.

III

[3] Finally, defendant contends that the trial court erred by overruling his objection to Detective Osorio's trial testimony that when he interviews suspects his "strategy" is "to give them an opportunity to describe what happened," because "[p]eople in general don't normally kill other people." Specifically, the objection occurred in the following context:

> Q. Did you make it clear to him, Detective Osorio, that you were giving him the opportunity to give an explanation for what had happened on June the 1st?
>
> A. I did. You know, when I do interviews with suspects, you know, I always, you know, my strategy is trying to allow them to give -- to give them an opportunity to describe what happened. People in general don't normally kill other people. Things happen that --
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.

Defendant contends that the testimony regarding Detective Osorio's strategy was not relevant to any issue in the case.

Because defendant made only a general objection at trial to this testimony, he argues that it amounted to plain error. *See State v. Shamsid-Deen*, 324 N.C. 437, 444, 379 S.E.2d 842, 846 (1989) (" 'A general objection, if overruled, is ordinarily no good, unless, on the face of the evidence, there is no purpose whatever for which it could have been admissible.' " (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 27, at 136 (3d ed. 1988))).

Immediately after the trial court overruled defendant's objection, Detective Osorio continued to testify and describe the interrogation, without objection, as follows:

> A. Things happen that lead up to a certain situation or people snap, and that was what I was trying to express to [defendant]. That I believed that something happened that led up to this particular incident.

. . . .

> I gave him numerous opportunities to be upfront with me and describe, you know, what it was that led up to this situation. *And he just stuck to his guns and said he didn't know; he wasn't there.*

(Emphasis added.) Thus, despite Detective Osorio's interrogation techniques, defendant maintained his later-recanted story.

Defendant's responses were relevant as prior inconsistent statements to impeach his trial testimony. Detective Osorio's interrogation techniques pressured defendant to admit his involvement in the killing during the interrogation and gave defendant an incentive and reason to come forward with his claim of self-defense. Because Detective Osorio's interrogation strategy was designed to encourage a defendant to provide any explanation for a killing that he had, and defendant, despite that encouragement, "stuck to his guns," Detective Osorio's strategy was relevant to defendant's credibility at trial. *See Castaneda*, ___ N.C. App. at ___, 715 S.E.2d at 295 (holding detective's interrogation statements which jury could understand to be interrogation techniques, and which gave context to defendant's relevant responses, were relevant and did not constitute improper comment on defendant's veracity). Accordingly, the trial court did not err in overruling the objection.

No error.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
MASON JAMEL HOWARD

No. COA 12-996

Filed 18 June 2013

Appeal and Error—preservation of issues—no objection at trial—no argument on appeal—dismissed

Defendant's appeal in a possession of a firearm by a felon and carrying a concealed weapon case arguing that the trial court erred by admitting an officer's testimony concerning defendant's prior

acts was dismissed. Defendant failed to object under Rule 404(b) at trial, and failed to argue under Rule 403 on appeal.

Judge HUNTER, Jr., dissents in a separate opinion.

Appeal by defendant from judgment entered 8 February 2012 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 30 January 2013.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Bryan Gates for defendant-appellant.

STEELMAN, Judge.

Where defendant objected upon one basis before the trial court, he cannot "swap horses" and argue a different theory on appeal. Where defendant does not argue the objection made before the trial court on appeal, we must dismiss his appeal.

I. Factual and Procedural Background

At about 10:53 P.M. on 20 November 2010, Kannapolis Police Department Officer Christopher D. Hill (Officer Hill) observed a Cadillac De Ville traveling east on Dale Earnhardt Boulevard in Kannapolis. Officer Hill stopped the vehicle because the license plate light was not working. Brandon Eugene Martin (Martin) was in the driver's seat, and Mason Howard (defendant) was in the front passenger seat. The vehicle was owned by Martin's girlfriend.

Officer Hill approached the vehicle and asked both Martin and defendant for identification. Defendant gave Officer Hill a North Carolina identification card; Martin provided a North Carolina driver's license. Martin and defendant told Officer Hill they were driving from Charlotte to Kannapolis for a cook-out. Officer Hill ran their names through the Kannapolis Police Department Communication Center. There was an outstanding warrant for defendant's arrest from Mecklenburg County for possession of a firearm by a felon. The information stated that defendant was considered armed and dangerous. Officer Hill called for backup and Officer Carpenter responded to the scene of the stop.

With Officer Carpenter present, Officer Hill approached the passenger side of the vehicle and asked defendant to exit the vehicle. When

defendant stepped out of the vehicle, Officer Hill noticed an open vodka bottle in a paper bag at defendant's feet. Officer Hill advised defendant of the outstanding arrest warrant. Defendant was arrested and placed inside a patrol car.

Officer Hill called another Kannapolis police officer, Officer Hamilton, to bring a drug-sniffing dog to the scene of the stop. When Officer Hamilton arrived, he had Martin exit the vehicle and then led the dog around the vehicle. At the driver's side door, the dog indicated that the vehicle contained drugs. After the dog alerted to the presence of drugs, Martin admitted he had marijuana on the rear seat of the vehicle. Officer Hamilton then searched the vehicle and found thirteen grams of marijuana inside Martin's baseball cap on the driver's side rear seat. After Officer Hamilton confiscated the marijuana, Officer Hill searched the rest of the vehicle.

When Officer Hill searched the front passenger area, he confiscated the open vodka bottle from the front floorboard. While collecting the vodka bottle, Officer Hill discovered a loaded 38-caliber revolver underneath the passenger seat where defendant had been sitting. After Officer Hill found the revolver, he placed Martin in handcuffs. Martin denied any knowledge of the revolver. Officer Hill charged Martin with: (1) driving while impaired; and (2) possession of marijuana. Martin was then taken to the Kannapolis Police Department for processing.

Officer Hill also took defendant to the Kannapolis Police Department to process him for the outstanding Mecklenburg County arrest warrant. A criminal record check at the police department revealed that defendant had previously been convicted of a felony in 2007: conspiracy to commit robbery with a dangerous weapon. Officer Hill also discovered defendant had another outstanding Mecklenburg County arrest warrant for carrying a concealed weapon.

On 13 December 2010, defendant was indicted for: (1) possession of a firearm by a felon; (2) carrying a concealed weapon; and (3) possession of an open container of alcohol (for the vodka bottle).

Defendant was tried at the 7 February 2012 Criminal Session of Cabarrus County Superior Court. The State called Officer Sean Parker (Officer Parker) of the Charlotte-Mecklenburg Police Department to testify about a previous encounter with defendant in Charlotte a few months earlier. The State offered Officer Parker's testimony pursuant to Rule 404(b) of the North Carolina Rules of Evidence. At the conclusion of a *voir dire* hearing, the trial court overruled defendant's objection, determining that "the probative value of the testimony outweighs any unfair prejudice to the defendant under Rule 403."

The jury found defendant guilty of: (1) carrying a concealed weapon; and (2) possession of a firearm by a felon. The trial court dismissed the charge of possession of an open container of alcohol. Defendant was sentenced to an active sentence of 14-17 months for possession of a firearm by a felon and a consecutive active sentence of 45 days for carrying a concealed weapon.

Defendant appeals.

II. Standard of Review

"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." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); see also N.C.R. App. P. 10(a)(1).

III. Analysis

[1] In his arguments on appeal, defendant contends that the trial court erred in admitting Officer Parker's testimony concerning defendant's prior acts. We disagree.

The trial court conducted a hearing outside of the presence of the jury to determine the admissibility of Officer Parker's testimony concerning the incident that occurred on 14 July 2010 in Mecklenburg County.

Officer Parker testified that on 14 July 2010 he was dispatched to a breaking and entering in progress. When he arrived, Officer Parker saw defendant talking to another police officer. As Officer Parker approached, he saw defendant flee, tossing a black semi-automatic handgun into nearby bushes. Officer Parker chased defendant for about 200 yards. He eventually caught defendant and arrested him for: (1) possession of a firearm by a felon; (2) carrying a concealed weapon; and (3) resisting a public officer.

Following the State's proffer, counsel for defendant made the following objection:

> MR. COOK: I apologize for my voice. I'm having a difficulty this week. Thank you. No further questions, but, Your Honor, I do object to the proffer of all the evidence under 404(B) as being prejudicial. The prejudice to my client would outweigh the probative value in regard to the facts of this case.

> THE COURT: You're making your objection under Rule 403.
>
> MR. COOK: I am.

The trial court made two rulings at the conclusion of the *voir dire* hearing: first, that the testimony was admissible under Rule 404(b) of the North Carolina Rules of Evidence; and second, that "the probative value of the testimony outweighs any unfair prejudice to the defendant under Rule 403." Defendant's objection to the evidence was only as to its prejudicial effect, not its admissibility. The objection was phrased in terms that the "prejudice to my client would outweigh the probative value in regard to the facts of this case." The court then specifically confirmed with counsel that the objection was being made under Rule 403.

Although defendant mentioned Rule 404(b) in his objection, it is clear that the objection was made pursuant to Rule 403. As defendant did not object pursuant to Rule 404(b), such objection is not preserved on appeal, unless plain error is argued. *See State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012). Defendant has not argued plain error on appeal.

Defendant objected pursuant to Rule 403. However, in his brief to this Court, defendant fails to argue error under Rule 403, and makes his entire argument under Rule 404(b). Any argument pertaining to Rule 403 is deemed abandoned. *See* N.C. R. App. P. 28(b)(6).

A defendant cannot "swap horses between courts in order to get a better mount[.]" *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Defendant cannot object under Rule 403 at trial and then argue under Rule 404(b) on appeal.

Because defendant failed to object under Rule 404(b) at trial, and failed to argue under Rule 403 on appeal, we dismiss defendant's appeal.

DISMISSED.

Judge GEER concurs.

Judge HUNTER, Jr., Robert N., dissents in a separate opinion.

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

I do not believe the majority opinion applies the correct standard of review. For this reason, I respectfully dissent.

I. Standard of Review

When reviewing evidentiary rulings under North Carolina Rules of Evidence 404(b) and 403,

> we conduct distinct inquiries with different standards of review. 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). Thus, we engage in a *de novo* review of whether the circumstances satisfy the similarity, temporal proximity, and relevancy requirements of Rule 404(b). *See id.* at __, 726 S.E.2d at 158–59. If we determine the trial court did not err in this determination, we then analyze whether the trial court abused its discretion by concluding the danger of unfair prejudice does not substantially outweigh the evidence's probative value. *See id.*

"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) (quotation marks and citation omitted); *see also Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009).

"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); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.").

In light of these distinctions, I believe Defendant preserved his arguments under *both* Rule 404(b) and Rule 403.

"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." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1).

Defendant did not need to object again at trial after objecting during the *voir dire* hearing. *See State v. Randolph*, __ N.C. App. __, __, 735 S.E.2d 845, 851 (2012) (holding that a defendant preserved his evidentiary argument by objecting to the evidence's admission and obtaining a ruling on admissibility during a mid-trial *voir dire* hearing). Here, Defendant preserved his argument by (i) objecting to Officer Parker's testimony during the *voir dire* hearing; and (ii) obtaining an evidentiary ruling.

The majority holds Defendant only preserved his argument for Rule 403 abuse of discretion review, not Rule 404(b) *de novo* review. I respectfully disagree.

The relevant part of the trial occurred as follows. During the *voir dire* hearing, the prosecutor stated, "I will be proffering [Officer Parker's] testimony under Rule 404(B)." Officer Parker then testified. Immediately afterward, the following exchange occurred:

> [Defense Counsel]: I do object to the proffer of all the evidence under 404(B) as being prejudicial. The prejudice to my client would outweigh the probative value in regard to the facts of this case.
>
> THE COURT: You're making your objection under Rule 403.
>
> [Defense Counsel]: I am.

The trial court then explained its Rule 404(b) analysis and decided:

> The Court's going to overrule the objection to the testimony. The Court will, if it becomes necessary, do a written order under Rule 404(B).
>
> The Court finds that the probative value of the testimony outweighs any unfair prejudice to the defendant under Rule 403.

On 17 February 2012, the trial court entered a written order determining Officer Parker's testimony was admissible under both Rule 404(b) and Rule 403. The majority holds that "Defendant's objection to the evidence was only as to its prejudicial effect, not its admissibility." I disagree. A Rule 404(b) objection does not preclude a simultaneous Rule

403 objection; in fact our Supreme Court has implicitly acknowledged the two rules are often intertwined. *See Beckelheimer*, __ N.C. at __, 726 S.E.2d at 159. I believe defense counsel's response to the trial court's Rule 403 inquiry simply expanded the scope of his objection, rather than invalidating his previous Rule 404(b) objection. Consequently, I would have held defense counsel properly preserved Defendant's Rule 404(b) argument by stating: "I do object to the proffer of all the evidence under 404(B) as prejudicial."

Additionally, I believe reviewing Defendant's arguments under Rule 404(b) preserves the spirit and purpose of North Carolina's Rules of Evidence. Rule of Evidence 102 makes clear that the Rules "shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." N.C. R. Evid. 102. Only reviewing the trial court's evidentiary decision under the Rule 403 abuse of discretion standard when Defendant explicitly cited Rule 404(b) in his objection fundamentally contradicts this purpose.

Overall, the relevant interaction at trial is summarized as follows: (i) the prosecution offered Officer Parker's testimony under Rule 404(b); (ii) Defendant objected under Rule 404(b); and (iii) the trial court ruled under Rule 404(b). Consequently, I would have engaged in de novo Rule 404(b) analysis on appeal. *See id.* Given this conclusion, I now address the merits of Defendant's arguments under de novo Rule 404(b) analysis.

II. Rule 404(b) Analysis

Defendant's convictions concern the revolver found under his seat on 20 November 2010. On appeal, Defendant argued the trial court erred by admitting Officer Parker's testimony because the testimony: (i) was not needed to show knowledge of illegality; (ii) was not relevant to prove identity; and (iii) did not show a common scheme or plan. Defendant then argued this error was prejudicial. I would have vacated and remanded for new trial under Rule 404(b).

North Carolina Rule of Evidence 404(b) states:

> (b) *Other crimes, wrongs, or acts.* — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. R. Evid. 404(b). However, North Carolina Rule of Evidence 403 excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid. 403.

Our courts have characterized Rule 404(b) as a

> general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). Therefore, "evidence of other offenses is admissible so long as it is relevant to any fact or issue *other than* the character of the accused." *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (emphasis added) (quotation marks and citation omitted); *see also* N.C. R. Evid. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Still, our Supreme Court warns that "Rule 404(b) evidence . . . should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002). This is because:

> [w]hen evidence of a prior crime is introduced, the natural and inevitable tendency for a judge or jury is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge. Indeed, the dangerous tendency of Rule 404(b) evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts.

State v. Carpenter, 361 N.C. 382, 387–88, 646 S.E.2d 105, 109–110 (2007) (internal quotation marks and citations omitted).

"To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of

similarity and temporal proximity." *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123 (2002). Our Supreme Court has elaborated that:

> [w]hen the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.

State v. Artis, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023 (1990). Although similarities need not "rise to the level of the unique and bizarre," *State v. Martin*, 191 N.C. App. 462, 467–68, 665 S.E.2d 471, 475 (2008) (quotation marks and citation omitted), "there must be shown some unusual facts present in both crimes or particularly similar acts." *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983).

If evidence satisfies the similarity, temporal proximity, and relevancy requirements of Rule 404(b), the trial court must then balance the evidence's probative value with the danger of unfair prejudice under Rule 403. *See State v. Glenn*, __ N.C. App. __, __, 725 S.E.2d 58, 67 (2012). Thus, in making a Rule 404(b)/Rule 403 determination, the trial court analyzes three issues:

> First, is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried? Second, is that purpose relevant to an issue material to the pending case? Third, does the probative value of the evidence substantially outweigh the danger of unfair prejudice pursuant to Rule 403?

Id. (internal citations omitted).

On appeal, if this Court determines the trial court erred in its Rule 404(b)/Rule 403 determination, we only remand for new trial if the error was prejudicial. *See Sisk v. Sisk*, __ N.C. App. __, __, 729 S.E.2d 68, 71 (2012) ("New trials are not awarded because of technical errors. The error must be prejudicial." (quotation marks and citation omitted)). "The party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission." *State v. Anthony*, 133 N.C. App. 573, 579, 516 S.E.2d 195, 199 (1999). "This burden may be met by showing that there is a reasonable

possibility that a different result would have been reached had the error not been committed." *State v. Jones*, 188 N.C. App. 562, 569, 655 S.E.2d 915, 920 (2008); *see also* N.C. Gen. Stat. § 15A-1443 (2011).

In the present case, Defendant argued the trial court erred by admitting Officer Parker's testimony under Rule 404(b) to show: (i) knowledge of illegality; (ii) identity; and (iii) common scheme or plan. He then contended this error was prejudicial. Although the majority dismisses the case because Defendant did not make any appellate arguments under Rule 403, I would have analyzed the trial court's decision to admit Officer Parker's testimony under Rule 404(b). I believe the trial court should have excluded the testimony under Rule 404(b) for lack of similarity.

A. Lack of Similarity

Defendant's 14 July 2010 arrest is not sufficiently similar to the events of 20 November 2010 to satisfy Rule 404(b)'s "similarity" requirement.[1] *See Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123; *State v. Ward*, 199 N.C. App. 1, 15, 681 S.E.2d 354, 364 (2009) (applying the "similarity" requirement when the trial court admitted prior bad act testimony to show knowledge, identity, and common scheme or plan).

Although the trial court determined the events of 14 July 2010 and 20 November 2010 were "similar, frankly identical," they bear almost no factual similarities. First, Defendant's 14 July 2010 arrest occurred in Charlotte; his 20 November 2010 arrest occurred in Kannapolis, more than 20 miles away. Second, on 14 July 2010 Defendant was arrested while fleeing from the scene of a breaking and entering; on 20 November 2010 Defendant was riding in a car. Third, the gun involved in the 14 July 2010 arrest was a semi-automatic handgun; the gun involved in the 20 November 2010 arrest was a revolver.[2] Fourth, on 14 July 2010 Defendant carried the gun in his waistband; on 20 November 2010 no evidence indicates Defendant even touched the revolver. Lastly, on 1 4 July 2010 the gun was found in bushes; on 20 November 2010 the gun was found under the car's passenger seat. In short, I find no similarities

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1. I acknowledge that only four months separate the events of 14 July 2010 and 20 November 2010. However, I do not base my dissent on the Rule 404(b) "temporal proximity" requirement. Instead, I focus solely on lack of similarity. *See Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123 (describing temporal proximity and similarity as two separate requirements).

2. At trial, Agent Tanya Pallotta, a special agent and forensic scientist with the North Carolina State Crime Lab, testified that the revolver under Defendant's seat did not have any latent fingerprints.

between the two incidents other than that they both involved a felon and a firearm.

Additionally, my dissent is guided by our Supreme Court's decision in *Carpenter*. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) ("[The Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (quotation marks and citation omitted) (second and third alterations in original)). In *Carpenter*, the defendant was a passenger in a car during a routine traffic stop. 361 N.C. at 383, 646 S.E.2d at 107. Police officers suspected the car contained drugs, searched all the passengers, and found cocaine in the defendant's sweatshirt pocket. *Id.* at 384, 646 S.E.2d at 107. At the defendant's trial for possession of cocaine with intent to sell, the court admitted testimony that a police informant had previously purchased cocaine from the defendant at a residence during a sting operation. *Id.* at 384–85, 646 S.E.2d at 108.

In *Carpenter*, our Supreme Court determined "the State's efforts to show similarities between crimes establish no more than characteristics inherent to most crimes of that type." *Id.* at 390, 646 S.E.2d at 111 (quotation marks and citation omitted). Consequently, our Supreme Court reversed and remanded for new trial because "the State has failed to show that sufficient similarities existed for the purposes of Rule 404(b)." *Id.* (quotation marks and citation omitted); *see also Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123; *State v. Flood*, __ N.C. App. __, __, 726 S.E.2d 908, 913–14 (2012).

Therefore, I would have held the trial court erred by failing to exclude Officer Parker's testimony for lack of similarity.

B. Knowledge, Identity, and Common Scheme or Plan

Although I believe the trial court should have excluded Officer Parker's testimony for lack of similarity, I also note that the testimony has very little probative value under any permissible Rule 404(b) rationale.

First, knowledge is not an element of possession of a firearm by a felon. In North Carolina, "[w]here guilty knowledge is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, even though the evidence reveals the commission of another offense by the accused." *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 367 (1954); *see also Ward*, 199 N.C. App. at 16, 18, 681 S.E.2d at 365, 367 (allowing testimony about a prior arrest for illegal possession of

prescription drugs because specific intent to possess prescription drugs is an element of the offense).

The elements of possession of a firearm by a felon are: "(1) [the] defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Cunningham*, 188 N.C. App. 832, 836, 656 S.E.2d 697, 700 (2008) (quotation marks and citation omitted); see also N.C. Gen. Stat. § 14-415.1 (2011). This offense does not require evidence of "guilty knowledge." *See McClain*, 240 N.C. at 175, 81 S.E.2d at 367. Therefore, Officer Parker's testimony was not relevant to show knowledge of illegality.[3]

Second, identity was not at issue in the instant case. Defendant does not contest that he was sitting in the passenger seat of the car stopped by Officer Hill on 20 November 2010.[4] *See State v. Pace*, 51 N.C. App. 79, 83, 275 S.E.2d 254, 256 (1981) (holding that when the defendant in a rape case admitted he had intercourse but alleged it was consensual, identity was not at issue). Instead, Defendant argues the State did not meet its burden of proving he actually or constructively possessed the revolver.[5] Thus, since Defendant's counsel acknowledged Defendant was present during the events of 20 November 2010, identity was not at issue here.

Third, Officer Parker's testimony was not relevant to show a common plan or scheme because, as discussed previously, there were no unusual similarities between the events of 14 July 2010 and 20 November 2010. Instead, the only similarities were "characteristics inherent to

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3. Defendant was also convicted of carrying a concealed weapon. This offense does have a specific intent component. *See* N.C. Gen. Stat. § 14-269(a1) (2011) (making it unlawful to "willfully and intentionally" carry a concealed weapon); *see also State v. Sauls*, 199 N.C. 193, 154 S.E. 28 (1930) (holding that this requirement equates to criminal intent to conceal). Therefore, Officer Parker's testimony may have had limited probative value to show intent to conceal. However, since I believe the trial court should have excluded Officer Parker's testimony under Rule 404(b) for lack of similarity, I decline to balance this minor probative value with Rule 403 prejudice.

4. In fact, defense counsel repeatedly acknowledged at trial that Defendant was present during the events of 20 November 2010. For instance, when cross-examining Officer Hill, defense counsel asked: (i) "Did you ever at any time notice Mr. Howard moving about the compartment in a way that alarmed you?"; and (ii) "it came to your knowledge [that Mr. Howard] was impaired by alcohol[?]" Similarly, defense counsel asked Officer Carpenter about his supervision of Defendant while he was in custody.

5. "Actual or constructive possession" is an element of "possession of a firearm by a felon." *See State v. Cox*, __ N.C. App. __, __, 721 S.E.2d 346, 348–49. Additionally, our courts have equated the "carrying" aspect of "carrying a concealed weapon" with actual or constructive possession. *See State v. Best*, __ N.C. App. __, __, 713 S.E.2d 556, 561 (2011).

most crimes of that type." *Carpenter*, 361 N.C. at 390, 646 S.E.2d at 111 (quotation marks and citation omitted).

III. Prejudice

Since I believe the trial court erred by admitting Officer Parker's testimony under Rule 404(b), I need not balance its purported probative value with the "danger of unfair prejudice" under Rule 403. *See Glenn*, __ N.C. App. at __, 725 S.E.2d at 67. However, I believe the trial court's error was prejudicial because "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2011); *see also State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

In the instant case, the State's only evidence that Defendant constructively possessed the revolver was that: (i) Officer Hill found the revolver under Defendant's seat; and (ii) Officer Parker previously arrested Defendant in an unrelated incident on 14 July 2010. The State acknowledged that the revolver was not registered to Defendant.[6] Additionally, there was no evidence Defendant ever even touched the revolver. Given this lack of evidence, I believe there is a reasonable possibility the trial court would have reached a different result without Officer Parker's testimony.

To this effect, this Court has previously held that the "mere fact that [a] defendant was in a car where a gun was found is insufficient standing alone to establish constructive possession." *Cox*, __ N.C. App. at __, 721 S.E.2d at 349 (quotation marks and citation omitted)(alteration in original)[7]; *see also State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683

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6. At trial, the State introduced into evidence a firearms trace summary showing the revolver was last reported purchased by Charles Lamar Williams, Jr. in Charlotte in 1975. The summary did not indicate the revolver had ever been reported stolen.

7. In *Cox*, the defendant was a passenger in a car at a DWI checkpoint. *Id.* at __, 721 S.E.2d at 347. The driver pulled into a nearby driveway to avoid the checkpoint. *Id.* When police approached the car, they found a revolver in the nearby grass. *Id.* at __, 721 S.E.2d at 348. The defendant admitted he owned the gun and was charged with possession of a firearm by a felon. *Id.* at __, 721 S.E.2d at 349.

In that case, we first noted that "the State may not rely solely on the extrajudicial confession of a defendant to prove his or her guilt; other corroborating evidence is needed to convict for a criminal offense." *Id.* (quotation marks and citation omitted). We then reversed the defendant's conviction for possession of a firearm by a felon because:

> [t]he mere fact that [a] defendant was in a car where a gun was found is insufficient standing alone to establish constructive possession.

(2003); *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998), *superseded by statute on other grounds*. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Here, without Officer Parker's testimony, the only evidence linking Defendant to the revolver is that Officer Hill found the weapon under Defendant's seat. Therefore, absent Officer Parker's testimony, there is a reasonable possibility the trial court would have reached a different result. *See* N.C. Gen. Stat. § 15A-1443 (2011).

In conclusion, I believe the instant case represents precisely the type of scenario Rule 404 seeks to remedy. Officer Parker's testimony provided little probative value for any permissible Rule 404(b) rationale. Instead, its main purpose was to show that because Defendant had previously been arrested for the crimes at issue, he has a propensity for those crimes. Rule 404 expressly rejects this purpose. *See* N.C. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."). The United States Supreme Court further elaborates that:

> [t]he inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475–76 (1948). Here, the trial court "den[ied] [Defendant] a fair opportunity to defend" against his charges. *Id.* Therefore, because the trial court should have excluded Officer Parker's testimony for lack of similarity, I would have vacated and remanded for new trial.

> Thus, the mere fact that [a] defendant was in a car *next to* where a gun was found is not enough to establish constructive possession.

Id. (quotation marks and citation omitted)(second alteration in original).

MARGARET TRANTHAM AND MARGERET TRANTHAM
EXECUTOR OF ESTATE OF GRADY TRANTHAM, PLAINTIFFS
v.
MICHAEL L. MARTIN, INC. N/K/A EQUITY MANAGEMENT, INC.; MICHAEL L. MARTIN, INDIVIDUALLY; AND ROANOKE LAND COMPANY, INC.; DEFENDANTS

No. COA12-1160

Filed 18 June 2013

1. Appeal and Error—preservation of issues—argument not raised at trial

An argument on appeal concerning lack of consideration in a real estate transaction was overruled where lack of consideration was not raised at trial.

2. Fraud—constructive—confidential relationship—benefit

The trial court did not err in a constructive fraud claim arising from a real estate transaction by submitting constructive fraud to the jury. There was more than a scintilla of evidence to support the existence of a confidential relationship and sufficient evidence that defendant Martin individually received a benefit.

3. Real Property—substitution of collateral—negligent misrepresentation

The evidence in a negligent misrepresentation claim arising from a real estate transaction was sufficient to submit to the jury where there was sufficient evidence that defendant Martin received a financial benefit from the substitution of collateral and that he prepared information given to plaintiffs without reasonable care.

4. Unfair Trade Practices—real estate—constructive fraud

The trial court did not err by denying defendants' motion for a directed verdict on a claim for unfair and deceptive trade practices arising from a real estate transaction. The jury could consider constructive fraud and that conduct was sufficient to support an unfair and deceptive trade practices claim. Moreover, the business of buying and developing real estate is an activity in or affecting commerce for purposes of this claim.

5. Statutes of Limitation and Repose—real estate transaction—multiple causes of action—activities extending time for filing complaint

The trial court did not err by denying defendants' motions for a directed verdict in several causes of action arising from a

substitution of collateral agreement in a real estate transaction where the motions were based on the statute of limitations. The applicable statutes of limitation were three and four years, and the time from the substitution agreement to the complaint was four years and eleven months. However, there was evidence of written promises to bring notes current and evidence of when plaintiffs learned that defendant had not disclosed that he was in arrears that was sufficient to extend the time for filing.

6. Damages and Remedies—double recovery—corporate and individual defendant—remand for credit

An award for damages in an action for breach of contract and other claims arising from a real estate transaction was remanded where the trial court reduced the judgments against the corporate and individual defendants, but all of the causes of action sought to make plaintiffs whole for the interrelated wrongs of losing the farm and not being paid. Plaintiffs were entitled to but one recovery; on remand, the judgment should be modified such that the amount paid by the corporate defendants is credited toward the judgment against the individual defendant.

7. Appeal and Error—preservation of issues—authority not cited—argument not sufficiently developed

Arguments on appeal for which authority was not cited and which were not sufficiently developed were overruled.

Appeal by defendants from judgment entered 27 February 2012 and amended judgment entered 10 May 2012 by Judge Bradley B. Letts in Henderson County Superior Court. Heard in the Court of Appeals 11 February 2013.

Van Winkle, Buck, Wall, Starnes and Davis, PA, by W. James Johnson, for plaintiffs–appellees.

Hogan & Brewer, PLLC, by James W. Lee III, for defendants–appellants.

MARTIN, Chief Judge.

Michael L. Martin in his individual capacity, Michael L. Martin, Inc. n/k/a Equity Management, Inc., and Roanoke Land Company, Inc. ("defendants") appeal from a judgment entered upon a jury's verdict finding all defendants liable for breach of contract and defendant Michael L.

Martin, individually, liable for constructive fraud, unfair and deceptive trade practices, and negligent misrepresentation.

The evidence at trial tended to show that Margaret and Grady Trantham owned approximately one hundred acres of farmland in Pickens County, South Carolina. The Tranthams purchased the farmland in 1972 following Grady Trantham's retirement after thirty-one years as a machine operator at the Champion Paper Mill in Canton, North Carolina. The Tranthams farmed the land, raising crops and livestock, until 1997 or 1998 when they decided they were too old to continue. The Tranthams placed the farm for sale and met defendant Michael Martin when he came to view the property.

Martin was a real estate broker with some considerable experience, having held a North Carolina real estate broker's license for over thirty years and having been "involved with approximately 100 seller-financing transactions during that time." In contrast, Grady Trantham attended school through the seventh grade, while Margaret Trantham completed the ninth grade and never worked outside the home. Martin and the Tranthams agreed to an owner-financed sale of the Pickens County property for $388,000.00. Martin structured the transaction through a series of notes and purchase money mortgages taken by multiple entities that Martin solely owned and controlled. As a licensed real estate broker, Martin also received a commission on the sale of the property.

Martin subdivided and developed the property, selling tracts to individuals. Defendants, however, soon fell behind on the monthly payments on the various notes. Martin made assurances to the Tranthams that he would eventually make the payments and bring current the arrearages. Throughout their dealings, Martin fostered a personal relationship with the Tranthams, visiting with them at their home. Martin summarized his relationship with the Tranthams in a 2008 letter he wrote to them, saying, "I continue to appreciate very much the confidence that you have always placed in me." Martin also handled all the accounting on the loans, providing periodic reconciliation statements to the Tranthams and documentation to their income tax preparer. Margaret Trantham testified that she and her husband Grady "trusted Mike [Martin]. We got to know him real well, and he was more like a friend. And we liked him. And we just trusted him."

In 2004, while still behind on payments to the Tranthams in excess of $60,000, Martin proposed in writing that the Tranthams release their remaining liens on the property, enabling him to sell the remaining lots. In exchange, Martin was to use the proceeds of the sale to "bring all

arrearages and current sums due to [the Tranthams] current" and the Tranthams were to receive substitute collateral in the form of a second lien position on a warehouse in Hendersonville, North Carolina. Martin represented that the value of the warehouse was "in the range of $450,000" and the first lien was in the amount of $175,000, leaving $275,000 in equity. The Tranthams accepted the substitution of collateral agreement. Martin did not explain to the Tranthams the significance of the second lien position.

Martin also failed to disclose that he was in arrears on the warehouse's first mortgage at the time of the collateral substitution. In a 2007 email to an attorney for the first lien holder, Martin acknowledged the history of financial troubles with the property: "I have been in a catch 22 from the beginning with this property. It has been in rough shape, which impacts the rentability."

Following the substitution of collateral agreement, Martin made gross sales of all the remaining property totaling $362,297.00. However, Martin did not make payment to the Tranthams to bring the arrearages current, as contemplated in the agreement.

In February 2007, the holder of the first note on the warehouse property in Hendersonville called the note because of the continued arrearages on that property. Martin, acting through Roanoke Land Company, Inc., then took an assignment of the six original notes due to the Tranthams, purportedly to "defend them" and collect against the warehouse. The warehouse was ultimately foreclosed upon by the first lien holder and no additional monies were ever remitted to the Tranthams.

Grady Trantham died on 18 March 2011 and his estate was represented in this action through Margaret Trantham, who was ninety-one years old at the time of trial.

The jury's verdict awarded identical sums of $426,927.41 to plaintiffs for: 1) breach of the substitution of collateral agreement by Martin, individually; 2) breach of the promissory notes by Michael L. Martin, Inc.; 3) breach of the promissory notes by Roanoke Land Company, Inc.; 4) constructive fraud by Martin, individually; 5) unfair and deceptive trade practices by Martin, individually; and 6) negligent misrepresentation by Martin, individually. Defendants made a post-trial motion to, *inter alia*, alter or amend the judgment and attached a proposed judgment reducing the amounts owed by Michael L. Martin, Inc. and Roanoke Land Company, Inc. to $92,963.34 and $333,964.07, respectively, and assessing no liability to Martin, individually. In a 10 May 2012 amended judgment, the trial court entered judgment against Michael L. Martin, Inc. in the

amount of $92,963.34, and Roanoke Land Company, Inc. in the amount of $333,964.07. The trial court also entered judgment against Martin, individually, in the amount of $426,927.41, which was trebled pursuant to N.C.G.S. § 75-1.1. Defendants appeal.

Defendants first argue that the trial court erred by denying defendants' motion for a directed verdict with respect to each of plaintiffs' causes of action. "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 158, 179 S.E.2d 396, 398 (1971)). "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). The non-movant is given "the benefit of every reasonable inference which may legitimately be drawn [from the evidence,] resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Id.* " 'A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim.' " *J.T. Russell & Sons, Inc. v. Silver Birch Pond L.L.C.*, __ N.C. App. __, __, 721 S.E.2d 699, 703 (2011) (quoting *Weeks v. Select Homes, Inc.*, 193 N.C. App. 725, 730, 668 S.E.2d 638, 641 (2008)).

Defendants argue the trial court erred by denying a directed verdict of plaintiffs' claim of breach of contract against Michael L. Martin, individually, because the contract was unenforceable for lack of consideration. However, at trial defendants argued the contract claim should be dismissed because "no evidence [has been] presented that [Martin] in any way signed in his individual capacity for those notes under the first cause of action." No argument was advanced nor mention made of consideration. " '[A]n appellate court will not consider grounds other than those stated to the trial court in reviewing the trial court's ruling on the motion.' " *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 18, 564 S.E.2d 883, 886 (2002) (quoting *Stacy v. Jedco Constr., Inc.*, 119 N.C. App. 115, 123, 457 S.E.2d 875, 881, (1995)), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003). Therefore, this argument is overruled.

Defendants next argue the trial court erred by denying their motion for a directed verdict as to the claim of constructive fraud. Specifically, defendants argue there was insufficient evidence to support the

contention that there was a relationship of trust and confidence between the parties or that Michael L. Martin, individually, received a benefit from the substitution of collateral.

The elements of a claim of constructive fraud require: "(1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (citing *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003)), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). " '[A]n essential element of constructive fraud is that defendants sought to benefit themselves in the transaction.' " *Sterner*, 159 N.C. App. at 631, 583 S.E.2d at 674 (quoting *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998)). Whether a confidential relationship exists is typically a question of fact for the jury. *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 53 (2009).

In this case, plaintiffs presented evidence that Martin was a savvy and practiced real estate broker with over thirty years' experience, having been "involved with approximately 100 seller-financing transactions during that time." The evidence showed that Grady Trantham only completed the seventh grade, while Margaret Trantham completed the ninth grade and never worked outside the home. Evidence was presented that Martin fostered a personal relationship with the Tranthams, visiting with them on occasion at their home. Plaintiffs presented evidence that Martin handled all the accounting on the loans, providing periodic reconciliation statements to them and documentation to their income tax preparer. Margaret Trantham testified that she and her husband Grady "trusted Mike [Martin]. We got to know him real well, and he was more like a friend. And we liked him. And we just trusted him." Plaintiffs also introduced a letter from Martin which referenced their relationship by saying, "I continue to appreciate very much the confidence that you have always placed in me." When viewed in the light most favorable to plaintiffs, we are satisfied that this evidence provided "more than a scintilla" of support for the existence of a confidential relationship, such that it was proper to submit the issue to the jury. *See J.T. Russell & Sons, Inc.*, __ N.C. App. at __, 721 S.E.2d at 703; *Davis*, 330 N.C. at 322, 411 S.E.2d at 138.

We are also satisfied that more than a scintilla of evidence was presented to support the contention that Michael L. Martin, individually, received a benefit from the substitution of collateral. Martin testified that he was "the only one that made any money from [Michael L. Martin,

Inc.]," that he was the sole owner, and that the company had no employees aside from him. He also testified the same was true for Roanoke Land Company. The evidence introduced showed the substitution of collateral agreement allowed defendants to make additional gross sales of $362,297.00, while not making any payment to the Tranthams to bring the arrearages current, as contemplated in the agreement. This evidence, when both viewed in the light most favorable to the plaintiffs and given "the benefit of every reasonable inference which may legitimately be drawn," was sufficient to submit the issue to the jury. *See Davis*, 330 N.C. at 322, 411 S.E.2d at 138; *Turner*, 325 N.C. at 158, 381 S.E.2d at 710. Therefore, this argument is without merit.

Defendants next argue the trial court erred by denying their motion for a directed verdict on the issue of negligent misrepresentation. Specifically, they argue insufficient evidence was presented that Michael L. Martin, individually, had a financial interest in the subject transaction or that the information allegedly supplied by Martin was false.

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988).

As addressed above, there was sufficient evidence that Martin received a financial benefit from the substitution of collateral agreement. Therefore, there was also sufficient evidence to show Martin had a financial interest in the subject transaction. The evidence was likewise sufficient to show that Martin prepared information without reasonable care. In writing, Martin represented that the property was worth $450,000 and that a first lien existed in the amount of $175,000, leaving an equity value of $275,000. Martin also indicated he "thought the warehouse was a better deal for the Tranthams" and a "win-win for [him] and the Tranthams . . . ." However, Martin testified at trial that the rental income on the property was insufficient to sustain even the debt owed to the first lien holder. Evidence was introduced that if all arrearages were brought current and the premises were fully occupied, the property would still produce a $1,200 negative monthly cash flow. Taking this evidence in the light most favorable to the plaintiffs and giving it "the benefit of every reasonable inference which may legitimately be drawn," we believe it was sufficient to submit the issue of negligent misrepresentation to the jury. *See Davis*, 330 N.C. at 322, 411 S.E.2d at 138; *Turner*, 325 N.C. at 158, 381 S.E.2d at 710. Therefore, this argument is without merit.

Defendants next argue the trial court erred by denying their motion for a directed verdict on the issue of unfair and deceptive trade practices. Specifically, defendants argue the alleged acts do not constitute unfair or deceptive trade practices and the alleged acts were not "in or affecting commerce."

"To prevail on a claim for unfair and deceptive trade practices, one must show: (1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business." *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 301, 435 S.E.2d 537, 542 (1993) (citing *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460–61, 400 S.E.2d 476, 482 (1991)), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994).

Defendants assert Martin's alleged acts do not constitute unfair or deceptive trade practices. We disagree. "North Carolina case law has held that conduct which constitutes a breach of fiduciary duty and constructive fraud is sufficient to support a UDTP claim." *Compton v. Kirby*, 157 N.C. App. 1, 20, 577 S.E.2d 905, 917 (2003) (citing *Spence v. Spaulding & Perkins, Ltd.*, 82 N.C. App. 665, 668, 347 S.E.2d 864, 866 (1986)). Because we have already concluded the jury could properly consider a constructive fraud claim, this argument is without merit. *See id.* ("Because we have already held that the issue of constructive fraud was properly submitted to the jury, defendant's argument that the UDTP claim is improper must fail.").

Defendants also assert that the alleged acts were not "in or affecting commerce." N.C.G.S. § 75-1.1(b) defines "commerce" for UDTP claims: " '[C]ommerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b) (2011). "The business of buying, developing and selling real estate is an activity 'in or affecting commerce' for the purposes of [N.C.]G.S. § 75–1.1." *Governor's Club, Inc. v. Governor's Club Ltd. P'ship*, 152 N.C. App. 240, 250, 567 S.E.2d 781, 788 (2002) (citing *Wilder v. Squires*, 68 N.C. App. 310, 314–15, 315 S.E.2d 63, 65–66 (1984)), *aff'd per curium*, 357 N.C. 46, 577 S.E.2d 620 (2003).

In this case, considerable evidence was presented that defendants were engaged in the buying, developing, and selling of real estate. At plaintiffs' request, the trial court took judicial notice of a finding of fact from the order allowing foreclosure of the deed of trust on the warehouse property that "Michael Martin held a real estate license for approximately 30 years and is currently in the business of real estate financing, and has been involved with approximately 100 seller-financing

transactions during that time." The underlying transactions in this case involve the buying, developing, and selling of real estate. The substitution of collateral agreement states that its purpose was to "complete pending and proposed sales of all or part of [the remaining unsold land.]" Based upon the testimony received and exhibits presented, we are satisfied that more than a scintilla of evidence supports the "in or affecting commerce" element of the plaintiffs' claim, such that it was proper to submit the issue to the jury. *See J.T. Russell & Sons, Inc.*, __ N.C. App. at __, 721 S.E.2d at 703. Therefore, this argument is without merit.

Defendants next contend the trial court erred by denying their motions for a directed verdict on plaintiffs' causes of action for breach of contract, negligent misrepresentation, and unfair and deceptive trade practices based upon the applicable statutes of limitations.

"When a defendant pleads the statute of limitations in bar of a plaintiff's claim, the burden is upon the plaintiff to show that its suit was commenced within the appropriate time from the accrual of the cause of action." *Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC*, 211 N.C. App. 295, 304, 710 S.E.2d 218, 224 (2011) (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)). The statute of limitations for breach of contract and negligent misrepresentation is three years. *See* N.C. Gen. Stat. § 1-52 (2011). The statute of limitations for an unfair and deceptive trade practices claim is four years. *See* N.C. Gen. Stat. § 75-16.2 (2011).

Certain events may delay or extend the accrual of a cause of action. For example, in contract actions, a new promise to pay an existing debt may extend the time to collect the debt up to three years from the time of the new promise, provided however, the new promise must be in writing. *Andrus v. IQMax, Inc.*, 190 N.C. App. 426, 428, 660 S.E.2d 107, 109 (2008). "[A] claim for negligent misrepresentation does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation, and second, the claimant discovers the misrepresentation." *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 35, 681 S.E.2d 465, 470–71 (2009) (alteration in original) (internal quotations marks omitted). When an action for unfair and deceptive trade practices is "based on fraud, [the action accrues] at the time the fraud is discovered or *should have been discovered* with the exercise of reasonable diligence." *Nash v. Motorola Commc'ns & Elecs., Inc.*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989), *aff'd per curium*, 328 N.C. 627, 400 S.E.2d 36 (1991).

In this case, the substitution of collateral agreement was signed 4 November 2004 and the complaint was filed on 9 October 2009—more

than four years and eleven months later. However, evidence was introduced at trial that tended to show Martin made written promises to bring the notes current on 9 March 2007, 4 February 2008, and 28 March 2008. These actions by Martin were sufficient to extend the time for filing a breach of contract cause of action such that the filing was timely in October 2009. *See Andrus*, 190 N.C. App. at 428, 660 S.E.2d at 109. Additionally, the evidence tended to show that Martin failed to disclose that he was in arrears on the warehouse's first mortgage at the time of the 4 November 2004 collateral substitution, and instead the Tranthams learned of the issue in 2007, once the foreclosure process was imminent. This later discovery was sufficient to delay the accrual of the action until 2007, which was within three years (and four years) of the date the complaint was filed in October 2009. *See Guyton*, 199 N.C. App. at 35, 681 S.E.2d at 470–71; *Nash*, 96 N.C. App. at 331, 385 S.E.2d at 538. Thus, the claims were not barred by the statutes of limitations.

Defendants next argue the trial court erred by not ruling on their objection to the jury instructions and issue sheet until after trial and also erred by denying in part their motion to alter or amend the judgment. Defendants contend the jury instructions, issue sheet, and amended judgment allowed for a double recovery and windfall to plaintiffs.

"[T]he trial court has wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are 'sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.' " *Murrow v. Daniels*, 321 N.C. 494, 499–500, 364 S.E.2d 392, 396 (1988) (quoting *Chalmers v. Womack*, 269 N.C. 433, 435–36, 152 S.E.2d 505, 507 (1967)). "Motions to amend judgments pursuant to N.C.G.S. § 1A-1, Rule 59 are addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of that discretion." *Spivey & Self, Inc. v. Highview Farms, Inc.*, 110 N.C. App. 719, 728, 431 S.E.2d 535, 540, *disc. review denied*, 334 N.C. 623, 435 S.E.2d 342 (1993).

In general, plaintiffs are only entitled to one recovery for the same alleged wrongful conduct. *Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.*, 187 N.C. App. 658, 666, 654 S.E.2d 495, 501 (2007).

> Where the same course of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of [N.C.]G.S. [§] 75-1.1, damages may be recovered either for the breach of contract, or for violation of [N.C.]G.S. [§] 75-1.1, but not for both.

Marshall v. Miller, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *aff'd as modified by* 302 N.C. 539, 276 S.E.2d 397 (1981).

We first note the trial court did not delay ruling upon defendants' objection until after the trial. Rather, the trial court indicated during the charge conference that, "I will note the objection. I think that's something I would consider postjudgment if the jury does rule —," and then specifically overruled the renewed objection after the instructions were given to the jury. Additionally, it appears from the record before us the trial court properly reduced the judgment as to the two corporate defendants from $426,927.41 each, to $92,963.34 against Michael L. Martin, Inc. and $333,964.07 against Roanoke Land Company, Inc., avoiding a double recovery on the breach of the various promissory notes. The trial court also reduced the award against Martin, individually, from a combined $1,707,709.64 on four causes of action to $426,927.41. These causes of action were for breach of the substitution of collateral agreement, constructive fraud, negligent misrepresentation, and unfair and deceptive trade practices, which are separate from the breach of promissory notes by the corporate defendants. However, they arise out of the same series of transactions or course of conduct. Thus, all the causes of action seek to make the plaintiffs whole for the interrelated wrongs of both losing the farm and not being paid on the notes. Yet, plaintiffs are entitled to but one recovery. *See Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 20, 472 S.E.2d 358, 368 (1996) ("[P]laintiff has set forth a panoply of causes of action arising from the same injury. We emphasize that plaintiff may recover for an injury but once."), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172–73 (1997).

Therefore, we remand this matter to the trial court and instruct the court to modify its judgment to reflect that any amount the corporate defendants pay on the combined $426,927.41 judgment against them be credited toward plaintiffs' properly trebled judgment of $1,280,782.23 against Martin, individually. *See Barbee v. Atl. Marine Sales & Serv., Inc.*, 115 N.C. App. 641, 650, 446 S.E.2d 117, 123 (ordering the trial court to modify its judgment to avoid a double recovery by crediting amounts paid by one defendant toward another defendant's judgment), *disc. review denied*, 337 N.C. 689, 448 S.E.2d 516 (1994).

Finally, defendants purport to argue the trial court erred in several additional ways. However, defendants cite no authority for these positions and do not sufficiently develop these arguments. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6). Nor is it the duty of this Court to construct arguments for the parties on

appeal. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Therefore, these remaining arguments are overruled.

No error in part, remanded in part with instructions.

Judges McGEE and CALBRIA concur.

THOMAS F. WEBB, TRUSTEE FOR THE THOMAS FREDRICK WEBB, DDS PA PENSION AND PROFIT SHARING PLAN AND TRUST, PLAINTIFF
v.
MCJAS, INC., D/B/A MCALISTER'S DELI; DOUGLAS AMAXOPOLUS; AND GINA AMAXOPOLUS, DEFENDANTS

No. COA12-906

Filed 18 June 2013

Judgments—default judgment—proper consideration of extent of damages

The trial court did not abuse its discretion by entering default judgment against defendant Douglas Amaxopulos in the amount of $992.88 for the unpaid rent under the terms of the parties' original lease and guaranty agreement and $506.78 for reasonable attorney fees. The trial court properly exercised its authority to consider the extent of the damages based on the allegations in plaintiff's complaint and evidence in support thereof.

Appeal by plaintiff from orders entered 21 January 2010 and 4 August 2010 by Judge Clifton W. Everett, Jr., and 27 January 2012 by Judge Marvin K. Blount, III, in Pitt County Superior Court. Heard in the Court of Appeals 12 December 2012.

Poyner Spruill LLP, by Thomas R. West and Andrew H. Erteschik, for plaintiff-appellant.

The Bettis Law Firm, PLLC, by Lee W. Bettis, Jr., for defendant-appellee.

BRYANT, Judge.

Where the trial court was within its authority to consider limited damages owed by defendant Douglas Amaxopulos to plaintiff Thomas Frederick Webb, DDS, P.A., Pension and Profit Sharing Plan and Trust arising under the original lease and guaranty agreements as set forth in plaintiff's complaint and attachments, we affirm the trial court's default judgment against Douglas Amaxopulos.

On 12 July 2002, Alexander Amaxopulos as President of McJas, Inc. (d/b/a McAlister's Deli) entered into a Lease agreement with Thomas F. Webb, DDS, as trustee for the Thomas Frederick Webb, DDS, P.A., Pension and Profit Sharing Plan and Trust, with the pension and profit sharing plan and trust as landlord and McJas, Inc. as tenant. Per the lease agreement, "Alex Amaxopulos and wife, Gina Amaxopulos and Douglas Amaxopulos, unmarried, shall execute a Guaranty of Lease . . . ." Douglas Amaxopulos was the father of Alex and agreed to serve as guaranty on the lease signed by Alex on behalf of McJas, Inc. Alex, Gina, and Douglas signed a Guaranty of Lease on 12 July 2002 "for a term of one five year[.]" The Guaranty of Lease stated "[t]he provisions of the lease may not be changed, modified, amended, or waived by agreement between Landlord and Tenant at any time without the Guarantor's written consent . . . ." Furthermore, the "Guaranty may not be changed, modified, discharged or terminated orally or in any manner other than by an agreement in writing signed by Guarantor and Landlord."

Attached to the Lease and Guaranty of Lease is a handwritten note that appears to be signed by Alex Amaxopulos, dated 18 July 2007: "June rent to be paid by July 26, 2007. July rent to be by August 25, 2007. August rent and September rent paid by September 25th, 2007[.] The current lease will be renewed for 5 more years according to all terms of current lease."

On 29 July 2008, plaintiff Thomas F. Webb, DDS, as trustee for the Thomas Frederick Webb, DDS, P.A., Pension and Profit Sharing Plan and Trust filed a complaint in Pitt County Superior Court naming as defendants McJas, Inc., Douglas Amaxopulos, and Gina Amaxopulos.[1] The complaint alleged that McJas, Inc. defaulted on a lease agreement with plaintiff and that plaintiff was entitled to recover the unpaid portion of the rent as well as attorney fees from defendants Douglas Amaxopulos

1. There is no indication in the record on appeal as to the status of Alex Amaxopulos and he is not a party to this action. While Gina Amaxopulos was a party at the trial court level, the action against her was dismissed without prejudice and she is not a party to this appeal.

and Gina Amaxopulos, as provided in the Guaranty of Lease. Attached to the complaint was the above referenced Lease, Guaranty of Lease, and handwritten note. The complaint sought judgment in the amount of $87,309.81, reasonable attorney fees, and costs.

On 3 September 2008, Gina Amaxopulos filed an answer denying liability and asserting as affirmative defenses *inter alia* that plaintiff failed to properly renew the original lease and failed to obtain her signature as guarantor of the lease. Neither McJas, Inc. nor Douglas Amaxopulos answered the complaint.

On 5 May 2009, plaintiff filed motions for entry of default as to defendants Douglas Amaxopulos and McJas, Inc. That same day, the Pitt County Clerk of Superior Court filed entry of default as to both defendants.

On 22 May 2009, with the leave of the trial court, plaintiff filed an amended complaint. Plaintiff again alleged that McJas, Inc. defaulted on its lease agreement with plaintiff and that plaintiff was entitled to recover the unpaid rents plus attorney fees less any rents paid by the new tenant which began on 1 March 2009. Plaintiff alleged that Douglas Amaxopulos and Gina Amaxopulos were liable for the unpaid rent as they had executed a Guaranty of Lease for all amounts due plaintiff from the corporation. Plaintiff alleged unpaid rent in the amount of $139,259.86. Again, Gina answered the amended complaint. In her answer, she asserted that she was unaware of any discussion "between the Landlord and Tenant regarding the original Lease or possibilities of renewing the Lease." Gina further provided that "[she] and Alexander Amaxopulos were separated in 2004 and [she] ha[d] not had any association or knowledge of day to day business of McJas . . . since that time." Again, McJas, Inc. and Douglas failed to file an answer.

On 21 July 2009, plaintiff again filed motions for entry of default along with supporting affidavits against McJas, Inc. and Douglas. The Clerk of Court filed entry of default and default judgments against both McJas, Inc. and Douglas Amaxopulos. In each default judgment, the Clerk of Superior Court ordered that plaintiff recover from McJas, Inc. and Douglas Amaxopulos $139,259.86 plus reasonable attorneys' fees in the amount of $20,888.98.

On 2 November 2009, Douglas filed a motion to set aside entry of default and default judgment. The matter was heard during the civil session of Pitt County Superior Court commencing 14 December 2009, the Honorable Clifton W. Everett, Jr., Judge presiding. Upon Douglas'

oral motion, the trial court heard the matter "as a motion to vacate an improperly entered default judgment and a motion to set aside entry of default . . . ." Douglas noted for the trial court that there were three defendants named in the complaint, that one defendant had answered the complaint, and that default judgment had been entered as to the remaining two defendants; however, the complaint did not assert that defendants were jointly and severally liable and no determination of liability had been made as to the defendant who responded to the complaint. Douglas went on to assert that in violation of the Guaranty of Lease agreement, he had received no written notice that the lease agreement was to be renewed. When he received service of process in the action, he contacted his then daughter-in-law defendant Gina Amaxopulos who informed him that "they had talked to an attorney and that the matter was being handled."

On 21 January 2010, the trial court filed an order granting the motion and vacating the default judgment as to Douglas Amaxopulos as improperly entered but denying the motion to set aside entry of default due to Douglas' failure to show good cause for failure to file a responsive pleading to plaintiff's complaint.

On 1 June 2010, plaintiff filed notice of voluntary dismissal without prejudice as to Gina Amaxopulos. Plaintiff also filed a motion for default judgment requesting that judgment be entered against Douglas Amaxopulos for the amounts alleged in the amended complaint. On 14 June 2010, the matter was again brought before Judge Everett who ordered that a subsequent hearing be conducted to determine the amount of damages to be awarded plaintiff pursuant to his motion.

The hearing to determine the amount of damages to be awarded plaintiff occurred during the 21 March 2011 civil session of Pitt County Superior Court, the Honorable Marvin K. Blount, III, Judge presiding. On 27 January 2012, the trial court entered default judgment against Douglas Amaxopulos in the amount of $992.88 for the unpaid rent under the terms of the original lease and guaranty agreement and $506.78 for reasonable attorneys' fees. Plaintiff appeals.

On appeal, plaintiff contends the trial court's entry of default judgment was in error when the trial court allowed defendant to present a defense following entry of default and concluded that defendant was not liable.

Standard of Review

"As a general rule, this Court reviews an entry of default judgment for abuse of discretion." *MRD Motorsports, Inc. v. Trail Motorsports, LLC*, 204 N.C. App. 572, 575, 694 S.E.2d 517, 519 (2010) (citation omitted).

Analysis

Plaintiff first argues that once defendants' liability had been conclusively established by entry of default and the 21 January 2010 order by Judge Everett denying defendant Douglas Amaxopulos' motion to set aside entry of default, Judge Blount erred by allowing defendant Douglas Amaxopulos to present a defense on the merits during the damages hearing and concluding in his 27 January 2012 order that defendant Douglas Amaxopulos was not liable. We disagree with plaintiff's characterization of the trial court's action and the assertion that the trial court's decision was contrary to law.

Pursuant to North Carolina General Statutes, section 1A-1, Rule 55, entitled "Default," the clerk of court shall enter default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead . . . and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise . . . ." N.C. Gen. Stat. § 1A-1, Rule 55(a) (2011). "Once the default is established defendant has no further standing to contest the factual allegations of plaintiff's claim for relief." *Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980) (citation omitted). "A default judgment admits only the allegations contained within the complaint, and a defendant may still show that the complaint is insufficient to warrant plaintiff's recovery." *Hunter v. Spaulding*, 97 N.C. App. 372, 377, 388 S.E.2d 630, 634 (1990) (citations omitted); *see also*, *Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.*, 187 N.C. App. 658, 664, 654 S.E.2d 495, 500 (2007) ("At a damages hearing following entry of default, evidence showing how the injury occurred is competent, not to exculpate defendants from liability, but to allow the [factfinder] to make a rational decision as to the amount of damages to be awarded." (citation omitted)). "[W]hen one party fails to file an answer and the trial court enters a judgment determining the issue of liability but ordering a trial on the issue of damages, the judgment is only an entry of default rather than a default judgment." *Decker*, 187 N.C. App. at 661, 654 S.E.2d at 498 (citation omitted).

Rule 55(b) governs judgment by default. *See* N.C.G.S. § 1A-1, Rule 55(b). With the exclusion of those cases in which the clerk of court is authorized to enter judgment by default (e.g. where "the plaintiff's claim

against a defendant is for a sum certain or for a sum which can by computation be made certain," N.C.G.S. § 1A-1, Rule 55(b)(1)) "the party entitled to a judgment by default shall apply to the judge therefor[,]" N.C.G.S. § 1A-1, Rule 55(b)(2).

> If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages . . ., the judge may conduct such hearings or order such references as the judge deems necessary and proper . . . .

N.C.G.S. § 1A-1, Rule 55(b)(2).

In his 21 January 2010 order, Judge Everett "conclude[d] as a matter of law that [Douglas Amaxopulos] ha[d] failed to show good cause . . . for his failure to file a responsive pleading to Plaintiff's Complaint and Amended Complaint." And, as a result ordered "[t]hat Douglas' Motion to Set Aside Entry of Default [was] hereby denied." However, on 4 August 2010, Judge Everett ordered that a bench hearing take place "to determine the amount of damages to be awarded to Plaintiff pursuant to his Motion for Default Judgment[.]"

Following the damages hearing, Judge Blount in his 27 January 2012 order entering default judgment against Douglas made the following findings of fact:

> 5. On or about July 12, 2002, Douglas and Gina executed a Guaranty of Lease (the "Guaranty"), guaranteeing payment by Douglas and Gina to the Plaintiff of all amounts due under the original term of the lease to Plaintiff from the Corporation.
>
> . . .
>
> 6. On or about July 12, 2002, Plaintiff entered into a Lease with the Corporation.
>
> . . .
>
> 11. The Lease provided the Corporation with the option to renew the provision within the Lease for up to two additional five-year periods . . . .
>
> 12. After the renewal period in the original lease expired the Corporation on or about July 18, 2007 entered into a lease for an additional five-year term. Neither Douglas nor Gina entered into or guaranteed the new five-year term lease agreement.

> 13. The Corporation failed to make payment for rents and other expenses described in the Lease and vacated the premises at some unknown date in October 2007, constituting an event of default pursuant to the Lease.
>
> 14. Subsequent to the Corporation's default. Plaintiff relet the real Property described in the Lease, and Plaintiff began receiving rental payments from such new tenant on March 1, 2009.

Based on its findings of fact, the trial court concluded that Douglas had entered into an agreement to guarantee rental payments and other expenses due from McJas, Inc., under the initial term of the lease and that McJas, Inc. had defaulted on its lease agreement. The court further concluded that the guarantee agreement Douglas entered into "did not automatically renew nor did [defendant] renew his guarantee beyond the original term of the lease." Under the original term of the lease, plaintiff was due damages in the amount of $3,378.53 which Douglas guaranteed. But, because plaintiff was paid $2,385.65 through McJas, Inc.'s bankruptcy case, the remaining amount due plaintiff from Douglas was $992.88. Judge Blount thereupon ordered that default judgment be entered against Douglas Amaxopulos in the amount of $992.88 and that Douglas pay plaintiff reasonable attorney fees in the amount of $506.78.

Plaintiff contends that the trial court allowed Douglas to present a defense challenging his liability for McJas, Inc.'s unpaid rent beyond the original term of the lease; however, we note that plaintiff's complaint and amended complaint include as an attachment not only the lease agreement between plaintiff and McJas, Inc., and the Guaranty of Lease signed by Douglas, but also a handwritten notice of renewal signed by Alex Amaxopulos, not Douglas Amaxopulos. Therefore, plaintiff's complaint, on its face, is insufficient to support the extent of the recovery of damages as requested by plaintiffs. *See*, *e.g.*, *Hunter*, 97 N.C. App. 372, 388 S.E.2d 630. We further note that during the hearing to assess damages owed by Douglas, plaintiff acknowledged that "[t]he information that I have, his client Mr. Amaxopulos, Douglas Amaxopulos, I mean, he was not a party to the lease extension discussions."

The trial court's findings and conclusion as to the extent of damages for which Douglas was liable to plaintiff as set out in Judge Blount's 21 January 2012 order was in compliance with the orders entered 21 January 2010 and 4 August 2010 by Judge Everett. And, as the trial court was within its authority to determine the amount of damages, we find no error in the trial court's consideration of the aforementioned attachments to plaintiff's complaint in order to determine the amount of

the damages to be awarded plaintiff by default judgment. *See* N.C.G.S. § 1A-1, Rule 55(b)(2).

Plaintiff also argues that if the trial court was permitted to consider issues of liability notwithstanding the entry of default against Douglas, the trial court's decision on liability was contrary to law and unsupported by the evidence. We disagree.

> A personal guaranty is a contract, obligation or liability ... whereby the promisor, or guarantor, undertakes to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself ... liable to such payment or performance. The guarantor makes his own separate contract, ... and is not bound to do what his principal has contracted to do, except in so far as he has bound himself by his separate contract. . . .
>
> Thus, to hold a guarantor liable under a guaranty agreement, plaintiff must first establish the existence of the agreement. . . . It is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.

Tripps Rest. v. Showtime Enterprises, 164 N.C. App. 389, 391-92, 595 S.E.2d 765, 767-68 (2004) (citations and quotations omitted).

Plaintiff cites *Devereux Properties, Inc. v. BBM&W, Inc.*, 114 N.C. App. 621, 624, 442 S.E.2d 555, 556 (1994), in support of its proposition that "notwithstanding a material alteration in the contract, a guarantor remains liable where there is implied consent." We note that in *Devereux Properties, Inc.*, "[t]he guaranty agreement . . . specifically state[d] that [the] defendants 'agree to perform each and every obligation of Tenant under this Lease Contract *or any extension or renewal thereof*.' " *Id.* at 623, 442 S.E.2d at 556 (emphasis added). In the instant case, the Guaranty of Lease Douglas entered into contains no such language. In fact, the Guaranty of Lease stated clearly that it was effective for one five year term and could not be changed other than by written agreement between the guarantor (Douglas Amaxopulos) and landlord (plaintiff). *Devereux Properties, Inc.* is inapposite.

As we noted earlier, the lease agreement signed by Alex Amaxopulos as president of McJas, Inc., and the Guaranty of Lease signed by Douglas

on 12 July 2002 was for a five year term. The handwritten note renewing the lease was not signed by Douglas Amaxopulos, and there is no indication in the allegations of the complaint, the documents submitted as exhibits to plaintiff's complaint, or in the evidence presented during the hearing to determine the extent of damages Douglas Amaxopulos owed to plaintiff, that Douglas renewed his Guaranty of Lease.

Therefore, even if the trial court were permitted to consider liability, which we find it did not, a discussion on liability would be supported by the evidence in this case. Upon this record, we find that the trial court did not err in concluding that the damages owed to plaintiff by Douglas Amaxopulos were limited to those which arose during the original lease term, for which Douglas Amaxopulos did enter into a Guaranty of Lease agreement. *See Tripps Rest.*, 164 N.C. App. at 391-92, 595 S.E.2d at 767-68. Accordingly, plaintiff's argument is overruled.

In conclusion, we hold the trial court properly exercised its authority to consider the extent of the damages based on the allegations in plaintiff's complaint and evidence in support thereof. *See Hunter*, 97 N.C. App. at 377, 388 S.E.2d 634 (citing *Weft, Inc. v. G. C. Investment Assoc.*, 630 F.Supp. 1138, 1141 (E.D.N.C.1986), *aff'd*, 822 F.2d 56 (4th Cir.1987), for the proposition that "default not treated as absolute confession by defendant of plaintiff's right to recover and court must consider whether plaintiff's allegations are sufficient to state claim for relief").

Affirmed.

Judges CALABRIA and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JUNE 2013)

ALLEN v. ALLEN No. 12-956	Rowan (09CVD2113)	Affirmed in part; remanded in part
BODIE v. BODIE No. 12-1525	Transylvania (05CVD334)	Affirmed in part, reversed and remanded in part
BRAFFORD v. BRAFFORD No. 13-126	Union (09CVD4213)	Affirmed
DELANCEY v. DELANCEY No. 12-1512	Rockingham (11CVD419)	Reversed and remanded in part, affirmed in part
GORDON v. GORDON No. 12-1126	Guilford (09CVD10832)	Affirmed
GUNTER v. GUNTER No. 12-1222	Wayne (12CVD376)	Affirmed
IN RE A.A.J. & S.D.D. No. 12-1555	New Hanover (10JT163-164)	Affirmed
IN RE C.J.B. & J.M.B. No. 12-1572	New Hanover (11JT187-188)	Reversed
IN RE K.P. No. 13-84	Wake (11JA52)	Affirmed, in part; Reversed and Remanded, in part
JONES v. KIDDE TECHNOLOGIES, INC. No. 12-1463	N.C. Industrial Commission (X29552)	Affirmed
LIVESAY v. CAROLINA FIRST BANK No. 12-1177	Henderson (05CVS2081) (05E675)	Reversed and Remanded
ROGERS v. SMITHSON No. 12-1374	Pitt (10CVS3342)	Appeal dismissed; writ of mandamus denied
STATE v. BIGGS No. 13-71	Martin (11CRS50553) (11CRS50554) (11CRS50555)	No Error

STATE v. BROOME No. 13-31	Union (09CRS51420)	Affirmed
STATE v. FORTE No. 12-1562	Wilson (12CRS50233) (12CRS50510)	12 CRS 50233 is reversed in part and remanded for resentencing. We affirm the restitution order but remand for correction of the file number listed thereon. 12 CRS 50233 Judgment and Commitment - Sentence reversed and remanded for resentencing 12 CRS 50233, 50510 Restitution Order - Affirmed; remanded for correction of clerical error 12 CRS 50510 Judgment and Commitment - Appeal dismissed
STATE v. HINES No. 13-50	Mecklenburg (04CRS206146) (04CRS212177)	Affirmed
STATE v. MINTER No. 13-48	Mecklenburg (02CRS238861)	Affirmed in part, vacated and remanded in part
STATE v. VELASQUEZ-CARDENAS No. 12-1567	Wake (09CRS203008)	No Prejudicial Error
STATE v. WASHINGTON No. 12-1559	Cabarrus (11CRS2819) (11CRS54108)	Dismissed
STATE v. ASKEW No. 12-1187	Martin (09CRS50322)	No Error
STATE v. BANKS No. 12-1449	Buncombe (12CR2649) (12CR52615) (12CR53266)	Affirmed

STATE v. CAMERON No. 12-1256	Johnston (11CRS4381) (11CRS54708)	No error; remanded for new sentencing hearing
STATE v. CHERRY No. 12-1074	Nash (11CRS52350)	Remanded
STATE v. COLEMAN No. 12-1075	Mecklenburg (09CRS211722) (09CRS211724) (09CRS21238)	No Error
STATE v. CONNOR No. 12-1220	Robeson (08CRS53451-52)	New Trial
STATE v. EAVES No. 12-1217	Mecklenburg (11CRS212659-61)	No error in part, remanded for resentencing
STATE v. HAIZLIP No. 12-1289	Guilford (11CRS24787) (11CRS87052) (12CRS24119)	No Error
STATE v. HILLIARD No. 12-1196	Edgecombe (12CRS203)	Affirmed
STATE v. JONES No. 12-1459	Craven (10CRS51682)	No error in part; vacated and remanded in part
STATE v. MOORE No. 12-1440	Durham (11CRS55325)	Affirmed
STATE v. NAY No. 12-817	Guilford (11CRS70827) (11CRS70829)	No Error
STATE v. PARKER No. 12-754	Sampson (10CRS52077)	New Trial
STATE v. RANDOLPH No. 12-1310	Wayne (10CRS54859)	Reversed and Remanded
STATE v. ROYAL No. 12-1063	New Hanover (11CRS51196)	No Error

STATE v. SPAKE No. 12-1451	Lincoln (11CRS51570)	No Error
STATE v. WILLIAMS No. 12-1337	Duplin (11CRS50747-8) (11CRS50801)	No Error
STATE v. WILLIAMS No. 12-1501	Martin (11CRS51406)	No Error
TEAGUE v. FORBES No. 12-1421	Pasquotank (10CVS896)	Affirmed

AMY M. HORNE, PLAINTIFF,
v.
CUMBERLAND COUNTY HOSPITAL SYSTEM, INC., D/B/A CAPE FEAR VALLEY HEALTH SYSTEM, A/K/A CAPE FEAR VALLEY MEDICAL CENTER, DEFENDANT

No. COA12-1276

Filed 2 July 2013

Employer and Employee—termination from employment—failure to state claim—claims properly dismissed

The trial court did not err in an action based on plaintiff's termination from her employment by granting defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff's failure to include in her complaint a specific no-discharge-except-for-cause allegation was fatal to her breach of contract claim; plaintiff's complaint failed to sufficiently allege that her termination violated the public policy of this State and failed to sufficiently allege facts establishing the first and third elements of negligent infliction of emotional distress; and plaintiff's claim for defamation was barred by the statute of limitations. As the trial court properly dismissed all of plaintiff's substantive claims, she was precluded from recovering punitive damages and her claim for punitive damages was properly dismissed.

Appeal by plaintiff from order entered 1 August 2012 by Judge Douglas B. Sasser in Cumberland County Superior Court. Heard in the Court of Appeals 12 March 2013.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellant.

K&L Gates LLP, by Amie Flowers Carmack and Brian C. Fork, for defendant-appellee.

DAVIS, Judge.

Amy M. Horne ("plaintiff") appeals from the trial court's order dismissing her complaint against Cumberland County Hospital System, Inc. ("CCHS") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm.

Factual Background

We have summarized the pertinent facts below using plaintiff's own statements from her complaint, which we treat as true in reviewing the trial court's order dismissing her complaint under Rule 12(b)(6). *See, e.g.*, *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.").

Plaintiff began working part time for CCHS in April 2001 as a registered radiologic technologist. In May 2001, she switched to full-time employment in the same position. On 30 December 2010, plaintiff was hired as a CT technologist. In early February 2011, plaintiff attended an employee orientation, where she acknowledged in writing that she had received a copy of CCHS's employee handbook, which provided certain grievance procedures for employees.

On 16 March 2011, an incident occurred during a procedure that resulted in the wrong scan being performed on a patient. Although plaintiff did not perform the scan, a student intern involved with the procedure wrote plaintiff's initials on the form memorializing the procedure. On 21 March 2011, plaintiff was "written up" by her supervisor as a result of this incident. The write-up cited the policy violation as being a "failure of the employee to perform his/her assigned tasks to include neglect, carelessness in duty, or failure to adequately document work activities."

On 22 March 2011, plaintiff received a second write-up. Plaintiff's supervisor expressed concerns about " 'issues noticed during orientation/probation period' relating to being a team player, and doing more paperwork than physical work, taking smoke breaks, poor organizational skills regarding workflow and prioritizing work . . . ." Plaintiff was written up a third time on 29 March 2011 for allegedly "walk[ing] out of a procedure . . . ." A final write-up occurred on 29 March 2011 for "a statement that [plaintiff] allegedly said during the middle of a procedure . . . ."

Plaintiff's employment with CCHS was terminated on 18 April 2011. The documentation evidencing her dismissal referenced "four incidents of scanning exams incorrectly, alleged delay in patient care, scanning the wrong anatomy, alleged complaint on a patient survey, peer reviews of which [plaintiff] knew nothing, and alleged complaints from co-workers." Plaintiff's supervisor told her that she was not allowed to contest any of the incidents contained in her personnel file due to the fact that she was in her probationary period at the time. After her termination, plaintiff applied for, and received, unemployment benefits.

On 17 April 2012, plaintiff filed a complaint against CCHS, asserting four causes of action: (1) breach of contract; (2) wrongful discharge in violation of public policy; (3) negligent infliction of emotional distress; and (4) defamation. In addition to compensatory damages, plaintiff sought punitive damages, costs, interest, and attorney's fees. On 15 June 2012, CCHS filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted. After conducting a hearing, the trial court entered an order on 1 August 2012 granting the motion and dismissing plaintiff's complaint with prejudice. Plaintiff timely appealed to this Court.

Analysis

Plaintiff's sole argument on appeal is that the trial court erred in dismissing her complaint pursuant to Rule 12(b)(6). "When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Enoch v. Inman*, 164 N.C. App. 415, 417, 596 S.E.2d 361, 363 (2004). "A complaint may be dismissed pursuant to Rule 12(b)(6) where (1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim." *Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002), *appeal dismissed and disc. review denied*, 357 N.C. 66, 579 S.E.2d 576 (2003). An appellate court reviews *de novo* a trial court's dismissal of an action under Rule 12(b)(6). *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).

I. Breach of Contract Claim

Initially, plaintiff argues that the trial court erred in dismissing her breach of contract claim. Under North Carolina law, unless the employer and employee have entered into a contract specifying a definite term of employment, the employment relationship "is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997). Plaintiff does not allege that a contract specifying a definite period of employment existed between her and CCHS. Instead, she asserts that certain contractual rights regarding termination and grievance procedures arose out of CCHS's "Employee Handbook." CCHS's failure to follow those

procedures in terminating her employment, she argues, constitutes a breach of contract. We disagree.

Plaintiff relies entirely on *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E.2d 617, *disc. review denied*, 316 N.C. 557, 344 S.E.2d 18 (1986), with regard to her breach of contract claim. In *Trought*, this Court reversed the trial court's dismissal of the plaintiff's wrongful discharge claim, which was premised on the plaintiff's assertion that her employer's policy manual had become part of her employment contract. *Id.* at 762, 338 S.E.2d at 620. The plaintiff in *Trought* alleged that (1) the defendant's policy manual provided that employees could be discharged only for cause; (2) when the plaintiff was hired, she was required to sign a statement acknowledging that she had read the policy manual; and (3) she was discharged without cause. *Id.*, 338 S.E.2d at 619-20.

As this Court has recognized, *Trought* is "[t]he only North Carolina case that has upheld a breach of contract claim based on an employee manual . . . ." *Guarascio v. New Hanover Health Network, Inc.*, 163 N.C. App. 160, 164, 592 S.E.2d 612, 614, *disc. review denied*, 358 N.C. 375, 597 S.E.2d 130 (2004). In *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E.2d 357 (1987), our Supreme Court "limited the rule in *Trought* to its narrow facts." *Guarascio*, 163 N.C. App. at 164, 592 S.E.2d at 614.

The plaintiff in *Harris* – in contrast to the plaintiff in *Trought* – failed to allege that his employer's procedure manual expressly represented that an employee could be discharged only for cause. *Harris*, 319 N.C. at 631, 356 S.E.2d at 360. In the absence of such an allegation, the Supreme Court held that the plaintiff in *Harris* could not rely on *Trought* in order to survive the defendant's motion to dismiss for failure to state a valid claim for breach of contract. *Id.* at 633, 356 S.E.2d at 360.

As we are bound by our Supreme Court's decision in Harris, we conclude that plaintiff has failed to state a valid claim for breach of contract. Nowhere in plaintiff's complaint does she allege that CCHS's employee handbook provided that an employee could be terminated only for cause. Instead, she merely alleges that, "[a]s part of [CCHS's] employee orientation, [plaintiff] was required to acknowledge in writing the receipt of the Employee Handbook that set forth the grievance procedures that were available to employees of [CCHS]" and that she was likewise "required to acknowledge in writing the receipt of Standards of Performance for Employees." Thus, as in *Harris*, plaintiff's failure to include in her complaint a "specific no-discharge-except-for-cause allegation" is fatal to her claim. *Id.* at 631, 356 S.E.2d at 360. Accordingly, the trial court properly dismissed plaintiff's breach of contract claim.

II. Wrongful Discharge in Violation of Public Policy Claim

The trial court's dismissal of plaintiff's claim for wrongful discharge in violation of public policy was also correct. Under the employment-at-will doctrine, employees may be discharged for any reason, for no reason at all, or for an irrational or arbitrary reason. *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446 (1989). However, an exception to this doctrine is that employers are prohibited from discharging employees for reasons that violate the public policy of our State. *Garner v. Rentenbach Constructors Inc.*, 350 N.C. 567, 571, 515 S.E.2d 438, 441 (1999).

Claims for wrongful discharge in violation of public policy have been recognized in circumstances where the employee was terminated: "(1) for refusing to violate the law at the employer[']s request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy." *Ridenhour v. Inter'l Bus. Mach. Corp.*, 132 N.C. App. 563, 568-69, 512 S.E.2d 774, 778 (citations omitted), *disc. review denied*, 350 N.C. 595, 537 S.E.2d 481 (1999).

With respect to claims for wrongful termination in violation of public policy, this Court has explained that "notice pleading is not sufficient to withstand a motion to dismiss; instead a claim must be pled with specificity." *Gillis v. Montgomery County Sheriff's Dep't*, 191 N.C. App. 377, 379, 663 S.E.2d 447, 449, *appeal dismissed and disc. review denied*, 362 N.C. 508, 668 S.E.2d 26 (2008). In order to maintain such a claim, therefore, the plaintiff must allege "*specific conduct* by a defendant that violated a *specific expression* of North Carolina public policy . . . ." *Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 321-22, 551 S.E.2d 179, 184 (emphasis added), *aff'd per curiam*, 354 N.C. 568, 557 S.E.2d 528 (2001).

Plaintiff contends that her complaint sufficiently alleges that her termination violated the public policy of this State in four ways: (1) CCHS violated her constitutional rights to procedural and substantive due process; (2) CCHS failed to comply with its own internal grievance procedures; (3) CCHS breached the covenant of good faith in the employer-employee relationship; and (4) CCHS violated numerous statutory expressions of public policy. We discuss each of these arguments in turn.

i. Due Process

It is well established that in order for an employee to be entitled to procedural due process protection, the employee must possess

a property interest or right in continued employment with a public employer. *Soles v. City of Raleigh Civil Serv. Comm'n*, 345 N.C. 443, 446, 480 S.E.2d 685, 687 (1997). Because CCHS is a private employer, plaintiff did not have any constitutional protections. *See Teleflex Info. Sys., Inc. v. Arnold*, 132 N.C. App. 689, 693-94, 513 S.E.2d 85, 88 (1999) (rejecting plaintiff's arguments that his discharge violated his constitutional rights because such rights were not "implicated in a dispute between an employee and a private employer").

Moreover, this Court has expressly held that an at-will employee, such as plaintiff, even if a government employee, "does not have a constitutionally protected right to continued employment and does not have the benefit of the protections of procedural due process." *Wuchte v. McNeil*, 130 N.C. App. 738, 740, 505 S.E.2d 142, 144 (1998). As such, plaintiff cannot rely on procedural due process principles to support her wrongful discharge claim.

With regard to her substantive due process claim, plaintiff, in her brief, fails to cite any legal authority in support of her contention on this issue. We, therefore, deem this argument abandoned on appeal pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

ii. Failure to Follow Internal Grievance Policies

Plaintiff's second ground for her wrongful discharge claim is that CCHS violated its own internal policies by preventing plaintiff from using CCHS's grievance procedures to (1) challenge her termination; or (2) pursue her complaints against her supervisor. Plaintiff, however, failed to identify in her complaint any express public policy violated by a private employer's failure to comply with its own internal procedures. The failure to include such an allegation warrants dismissal of plaintiff's claim. *See Considine*, 145 N.C. App. at 319, 551 S.E.2d at 183 (affirming dismissal of claim for wrongful discharge in violation of public policy where "[p]laintiff's complaint d[id] not assert that defendant's . . . conduct violated any public policy that has been established by our state's statutes or constitution").

Moreover, plaintiff's assertion that CCHS failed to follow the grievance procedures set out in its policy handbook is not the same as an allegation that she was *terminated* for a reason that violates the public policy of our State – the essence of a claim for wrongful discharge in violation of public policy. *See Garner*, 350 N.C. at 572, 515 S.E.2d at 441 ("In order to support a claim for wrongful discharge of an at-will employee [in violation of public policy], the termination itself must be motivated by an unlawful reason or purpose that is against public policy.").

iii. Bad Faith

Plaintiff's third basis for her wrongful discharge claim is that CCHS terminated her employment in bad faith. However, our Supreme Court has made clear that North Carolina "d[oes] not recognize a separate claim for wrongful discharge in bad faith." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 360, 416 S.E.2d 166, 173 (1992). Accordingly, this claim was properly dismissed.

iv. Statutory Violations

Finally, plaintiff makes the blanket assertion that her discharge contravenes "important" public policy statements expressed in North Carolina's: (1) "unemployment compensation laws"; (2) "labor relations laws"; (3) "'[b]lacklisting' and '[j]ob [r]eferences' laws"; and (4) "the compliance and good business practices laws embodied within the corporate laws . . . ."

However, in making these allegations, plaintiff merely refers generally to various topics addressed in the North Carolina General Statutes without citing any specific statutory provisions. Such oblique references are insufficient to put CCHS "on notice of what public policy [its] termination of plaintiff violated." *Gillis*, 191 N.C. App. at 381, 663 S.E.2d at 450; *accord Considine*, 145 N.C. App. at 321-22, 551 S.E.2d at 184 (affirming dismissal of wrongful discharge claim based on caselaw requiring allegations of "specific conduct by a defendant that violated a *specific* expression of North Carolina public policy") (emphasis added). Given the absence of such allegations, we conclude that the trial court properly dismissed plaintiff's claim for wrongful discharge in violation of public policy pursuant to Rule 12(b)(6).

III. Negligent Infliction of Emotional Distress Claim

Plaintiff also contends that the trial court erred in dismissing her claim for negligent infliction of emotional distress ("NIED"). In order to state a claim for NIED, a plaintiff must allege that (1) the defendant negligently engaged in conduct; (2) it was reasonably foreseeable that such conduct would cause the plaintiff to suffer severe emotional distress; and (3) the conduct did, in fact, cause the plaintiff to suffer severe emotional distress. *Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Plaintiff's complaint fails to sufficiently allege facts establishing the first and third elements.

The first element of an NIED claim requires allegations that the "defendant failed to exercise due care in the performance of some legal duty owed to [the] plaintiff under the circumstances[.]" *Guthrie*

v. Conroy, 152 N.C. App. 15, 25, 567 S.E.2d 403, 410-11 (2002). Nowhere, however, in her complaint does plaintiff reference any duty owed to her by CCHS. The failure to allege such a duty owed by the defendant to the plaintiff is fatal to an NIED claim on a motion to dismiss. See id., 567 S.E.2d at 411 ("[P]laintiff alleges no duty that [defendant] owed plaintiff . . . . Absent a breach of duty of care, plaintiff's suit against [defendant] for NIED cannot be maintained.").

Moreover, plaintiff's NIED claim is premised on allegations of intentional – rather than negligent – conduct. Beyond the conclusory assertion that "[CCHS] negligently engaged in the aforementioned conduct against [plaintiff]," plaintiff's complaint recounts only *intentional* conduct on the part of CCHS. Indeed, plaintiff alleges: "[CCHS's] action[] toward [plaintiff] constitutes extreme and outrageous conduct which was *intended* to – and did in fact – cause her severe emotional distress." (Emphasis added.) The complaint elsewhere alleges that plaintiff became a "target" of her supervisor's "deliberate, vicious, malicious, and outrageous campaign and conspiracy of harassment . . . ."

Allegations of intentional conduct, such as these, even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim. *See Sheaffer v. County of Chatham*, 337 F.Supp.2d 709, 734 (M.D.N.C. 2004) ("Even taking all these allegations as true, they demonstrate intentional acts for which Plaintiff has made other claims; they do not show negligent acts required for a claim of negligent infliction of emotional distress."). Plaintiff, therefore, has failed to properly plead an element essential to her NIED claim.

In addition, in order to plead a valid NIED claim, a plaintiff must allege severe emotional distress, which has been defined as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. Here, the complaint merely asserts that CCHS's actions were the "direct and proximate cause of [plaintiff]'s severe emotional distress" – without any factual allegations regarding the type, manner, or degree of severe emotional distress she claims to have experienced. In the absence of such allegations, plaintiff's complaint fails to state a valid claim for NIED. *See Holleman v. Aiken*, 193 N.C. App. 484, 502, 668 S.E.2d 579, 591 (2008) (affirming dismissal of NIED claims where complaint did "not make any specific factual allegations as to [plaintiff's] 'severe emotional distress' ").

IV. Defamation Claim

Plaintiff's final argument is that the trial court improperly dismissed her claim for defamation. We conclude, however, that this claim is barred by the statute of limitations.

Pursuant to N.C. Gen. Stat. § 1-54(3) (2011), a defamation action must be commenced within one year from the date the action accrues, which is the date of the publication of the defamatory words – irrespective of the date of discovery by the plaintiff. *Philips v. Pitt County Mem'l Hosp. Inc.*, __ N.C. App. __, __, 731 S.E.2d 462, 472, *appeal dismissed and disc. review denied*, __ N.C. __, 734 S.E.2d 862-63 (2012). As plaintiff's complaint was filed on 17 April 2012, a defamation claim predicated on allegedly defamatory statements made prior to 17 April 2011 would be time-barred.

Plaintiff's complaint fails to identify the allegedly defamatory remarks made by CCHS or to specify when they were made. This lack of specificity is, by itself, a sufficient basis to support the dismissal of plaintiff's defamation claim. *See Stutts v. Duke Power Co.*, 47 N.C. App. 76, 84, 266 S.E.2d 861, 866 (1980) (holding that in order to withstand motion to dismiss defamation claim, "the words attributed to defendant [must] be alleged 'substantially' *in haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory"). However, even assuming – under a liberal construction of the complaint – that plaintiff is referring to the three instances where she was "written up" by her supervisor, which occurred on 21, 22, and 29 March 2011 and further assuming, without deciding, that these write-ups could be the subject of a defamation claim, all three write-ups occurred prior to 17 April 2011. Therefore, they cannot serve as the basis for plaintiff's defamation claim. *See Philips*, __ N.C. App. at __, 731 S.E.2d at 473 ("[B]ecause Plaintiff did not assert this claim until more than two years following [defendant]'s allegedly defamatory statement, this claim is barred by the one-year statute of limitations."). Accordingly, the trial court did not err in dismissing plaintiff's defamation claim.

V. Punitive Damages Claim

As we have concluded that the trial court properly dismissed all of plaintiff's substantive claims, she is precluded from recovering punitive damages since, "[a]s a rule[,] you cannot have a cause of action for punitive damages by itself." *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 134, 225 S.E.2d 797, 808 (1976). Consequently, plaintiff's claim for punitive damages was properly dismissed as well. *See White v. Cross Sales & Eng'g Co.*, 177 N.C. App. 765, 771, 629 S.E.2d 898, 902 (2006)

(holding trial court properly dismissed punitive damages claim where underlying substantive claim did not survive summary judgment).

Conclusion

For the reasons stated above, we affirm the trial court's order dismissing plaintiff's complaint.

AFFIRMED.

Judges McGEE and GEER concur.

IN RE S.D.W.

No. COA12-1362

Filed 2 July 2013

1. Appeal and Error—interlocutory orders and appeals—contested adoption—substantial right

An interlocutory order in a contested adoption case was immediately appealable where the order concluded that the consent of the biological father was not required for the adoption to proceed. The order deprived the father of a substantial right in that any parental rights he may have had would be terminated if the adoption proceeded to final decree.

2. Parties—intervention—adoption—biological father

The trial court correctly concluded that a biological father was entitled to intervene in an adoption proceeding only if he established at a hearing that his consent was necessary for the adoption to proceed.

3. Adoption—consent of biological father—not required

The trial court correctly concluded that a biological father's consent to adoption was not required under N.C.G.S. § 48-3-601 where the father did not fit into any of the provisions of N.C.G.S. § 48-3-601. He had never married or attempted to marry the mother and had not supported the mother or child before the filing of the petition.

4. Adoption—biological father—no knowledge of child's birth—assumption of parental responsibility—hearing

An adoption proceeding was remanded for a full hearing

concerning whether a biological father, who did not know of his child's birth until after the petition was filed, grasped the opportunity to act as a parent when that opportunity appeared. A biological father in those circumstances who promptly takes steps to assume parental responsibility upon discovering the existence of the child develops a constitutionally protected interest sufficient to require his consent where the adoption proceeding is still pending.

Appeal by appellant-father from Orders entered 17 February 2012 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 8 May 2013.

Thurman, Wilson, Boutwell & Galvin, P.A. by W. David Thurman, for petitioner-appellee.

Jonathan McGirt, for appellant-father Gregory Johns.

STROUD, Judge.

Gregory Johns ("father") appeals from orders entered 17 February 2012 denying his motion to intervene in the adoption proceedings concerning his biological son, denying his motion to dismiss the adoption petition, and granting the adoptive parents' ("petitioners") motion for summary judgment on the issue of whether father's consent was required for the adoption.

For the following reasons, we hold that N.C. Gen. Stat. § 48-2-601 may be unconstitutional as applied to father if he can show that he promptly attempted to grasp the opportunity of fatherhood once he discovered his son's existence, but the statute foreclosed that opportunity. We therefore reverse the trial court's orders granting petitioners' motion for summary judgment and denying his motion to intervene. Because there are factual issues that this Court cannot resolve, we remand this case to the trial court with instructions to conduct a hearing on that issue and enter an order with appropriate findings of fact and conclusions of law.

I. Background and Procedural History

Father dated the mother ("mother") of his biological son from approximately May 2009 to February 2010. During that time, they engaged in sexual intercourse. They broke up around February 2010, but continued engaging in sexual intercourse for several weeks. After about March 2010, mother and father stopped communicating with each

other until around 26 November 2010. There is no evidence that either mother or father attempted to communicate with each other during this time period. After they stopped dating, father continued to live and work at the same place at which he had previously lived and worked and his contact information, including his phone number, remained the same.

Mother gave birth to a baby boy ("Sean")[1] on 10 October 2010 in New Hanover County. Mother relinquished custody of Sean to Christian Adoption Services (CAS), an adoption agency in Mecklenburg County. The adoption agency interviewed mother and inquired about Sean's biological father. Mother told the agency that she did not know the address or phone number of father and had no way to contact him. She misidentified Sean's father as "Gregory Thomas James," rather than "Johns." The agency searched for "Gregory James," but did not find him.

CAS found a married Mecklenburg County couple interested in adopting Sean. They filed a petition to adopt Sean on 2 November 2010. Along with the adoption petition, the adoptive parents filed an Affidavit of Parentage, which again stated the biological father's name as Gregory James. Because the true identity of Sean's biological father was unknown to CAS and because they could not find "Gregory James," the agency filed a petition to terminate the father's rights on 16 November 2010 and stayed the adoption proceeding.

Around 20 April 2011, father learned through an acquaintance that mother may have been pregnant and had a baby that she placed for adoption. Father called mother around 25 April 2011 to ask her whether she had been pregnant. After initially denying the pregnancy, mother admitted that she had given birth to a baby and placed him for adoption. Mother gave father the information with which to contact CAS.

After mother called CAS to inform them of father's true identity and father got in contact with CAS, petitioners voluntarily dismissed the petition to terminate the parental rights of "Gregory James" on 2 May 2011 and removed the stay from the adoption proceeding on 5 May.

On 11 May 2011, notice of the adoption proceedings was served on Kyle Johns, Gregory Johns' brother. On 24 May 2011, father, *pro se*, responded to the notice and sent letters to the Mecklenburg County Clerk of Superior Court and to counsel for petitioners inquiring what he had to do to acquire custody, requesting a DNA test to prove that Sean

1. To protect the identity of the minor child and for ease of reading we will refer to him by pseudonym.

was his biological son, and asking that once the DNA test showed him to be the biological father the adoption proceeding be terminated.

On 9 June 2011, counsel for petitioners noted their intent to take father's deposition. On 23 June 2011, father, still *pro se*, was deposed by counsel for petitioners. In his deposition, father described his educational and employment background, his relationship with mother, and how he came to discover Sean's existence. On 24 June 2011, counsel for petitioners sent father the results of his DNA test, which showed that there was a 99.99% probability that he was Sean's biological father.

On 15 August 2011, father, now represented by counsel, moved to intervene, moved for disclosure of the adoption file, moved to dismiss the petition for adoption, petitioned to legitimate the child, and moved for custody.

Petitioners responded to father's motions and moved for summary judgment on the issue of whether his consent was required for the adoption to proceed. The District Court held a hearing on 24 October 2011 where it considered father's motion to intervene and motion for disclosure of the adoption file. On 10 November 2011, the trial court entered an order denying father's motion to intervene and allowing his motion for disclosure of the adoption file, with some limitations.[2]

The District Court then held a hearing on the remaining motions on 6 January 2012.[3] At the hearing, the court heard argument from father and petitioners on the motion for summary judgment, granted the motion, and then heard testimony from father relating to his motion to dismiss. The trial court also denied father's motion to dismiss the adoption petition. On 17 February 2012, the trial court entered one order amending its 10 November order and a second order making findings of fact and conclusions of law about the motions considered at the January hearing. In those orders, the court denied father's motion to intervene

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2. Father voluntarily dismissed his petition to legitimate Sean on 10 October 2011.

3. The trial court did not consider father's motion for custody—it had not been noticed for hearing and the court had already denied father's motion to intervene. We also note that on 4 January 2012, father commenced an action for custody of Sean pursuant to N.C. Gen. Stat. § 50-3.1 (2011) and requested an injunction against petitioners in this case preventing them from proceeding with the adoption. On 10 January 2012, petitioners herein moved to dismiss the Chapter 50 custody action for lack of subject matter jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2011), and failure to state a claim under Rule 12(b)(6), due to the prior pending adoption proceeding. We have addressed the Chapter 50 custody proceeding in *Johns v. Welker*, ___ N.C. App. ___, ___ S.E.2d ___ (2013) (2 July 2013) (No. COA12-1154).

and granted petitioner's motion for summary judgment on the basis that father's consent was not required for the adoption to proceed. Father filed timely written notice of appeal from these orders on 14 March 2012.

II. Appellate Jurisdiction

[1] As father acknowledges, this appeal is from an order that is not a final judgment since it does "not dispose of the case, but instead leave[s] it for further action by the trial court in order to settle and determine the entire controversy." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation and quotation marks omitted). Therefore, it is interlocutory. *Id.* Normally, interlocutory orders are not immediately appealable. *Id.* Nonetheless, an interlocutory order may be immediately appealed if it affects a substantial right. *Id.* "Essentially a two-part test has developed [to determine whether an interlocutory order affects a substantial right]—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted).

As will be described below, the order deprives father of the right to participate in the adoption proceeding concerning his biological child by concluding that his consent is not required for the adoption to proceed. Such a right is substantial. If the adoption proceeds to a final decree of adoption, any parental rights that father may have had would be terminated. N.C. Gen. Stat. § 48-1-106(c) (2011). Moreover, the adoption statute severely limits the avenues for challenging a final decree of adoption through appeal. N.C. Gen. Stat. § 48-2-607 (2011). Therefore, deprivation of the right to consent in this context could work irreparable damage to father's rights. Indeed, petitioners do not contest this issue. We conclude that the order at issue here affects a substantial right and is immediately appealable. Therefore, we have jurisdiction to consider the present appeal.

III. Standard of Review

Father appeals from orders denying a motion to dismiss, denying a motion to intervene, and granting a motion for summary judgment. The issue on appeal as to all of the motions is whether the trial court properly concluded that father's consent was not required under the adoption statutes and under the state or federal constitutions and whether the trial court properly interpreted the statutes at issue. Thus, the appeal from each order presents solely a question of law, which we review *de novo*. *City of Wilmington v. Hill*, 189 N.C. App. 173, 176, 657 S.E.2d 670, 672 (2008).

IV. Intervention

[2] Adoption is a special proceeding before the clerk of superior court. N.C. Gen. Stat. § 48-2-100(a) (2011). Special proceedings are governed by the Rules of Civil Procedure "except as otherwise provided." N.C. Gen. Stat. § 1-393 (2011). Thus, where the adoption statutes provide a procedure different than that set out in the Rules of Civil Procedure, the adoption statutes govern. *See* N.C. Gen. Stat. § 1A-1, Rule 1 (2011) (stating that the Rules of Civil Procedure apply "except when a differing procedure is prescribed by statute.").

Intervention of right under N.C. Gen. Stat. § 1A-1, Rule 24, is permitted

> (1) When a statute confers an unconditional right to intervene; or (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A-1, Rule 24(a) (2011). Once an intervenor becomes a party, he is entitled to participate as fully as any other party. *Harrington v. Overcash*, 61 N.C. App. 742, 744, 301 S.E.2d 528, 529 (1983).

The adoption statutes, however, define specifically who a party is and how non-parties are entitled to participate. A party to an adoption proceeding is defined as "a petitioner, adoptee, or any person whose consent to an adoption is necessary under this Chapter but has not been obtained." N.C. Gen. Stat. § 48-1-101(11)(2011). Some people not included as a party are nonetheless entitled to notice. *See* N.C. Gen. Stat. § 48-2-401 (2011). "Except as provided in G.S. 48-2-206(c), 48-2-206(d), and 48-2-207(d), a person entitled to notice whose consent is not required may appear and present evidence only as to whether the adoption is in the best interest of the adoptee." N.C. Gen. Stat. § 48-2-405 (2011).

Section 48-2-207(d), in turn, provides, "If the court determines that the consent of any individual described in G.S. 48-2-401(c)(3) is not required, such individual shall not be entitled to receive notice of, or participate in, further proceedings in the adoption." N.C. Gen. Stat. § 48-2-207(d) (2011). Thus, a person whose consent is not required is not a party, and if that person is described in section 48-2-401(c)(3), he is not entitled to appear and present best interest evidence, even if he was entitled to notice.

Section 48-2-401(c)(3) requires the petitioner to give notice to

> [a] man who to the actual knowledge of the petitioner claims to be or is named as the biological or possible biological father of the minor, and any biological or possible biological fathers who are unknown or whose whereabouts are unknown, but notice need not be served upon a man who has executed a consent, a relinquishment, or a notarized statement denying paternity or disclaiming any interest in the minor, a man whose parental rights have been legally terminated or who has been judicially determined not to be the minor's parent, or, provided the petition is filed within three months of the birth of the minor, a man whose consent to the adoption has been determined not to be required under G.S. 48-2-206.

N.C. Gen. Stat. § 48-2-401(c)(3)(2011).

Reading these statutes together, it becomes clear that a putative father whose consent is not required for the adoption is neither a party nor entitled to appear and present best interest evidence. By contrast, if a putative father's consent is required, he is a party and entitled to fully participate in the adoption proceeding. To determine whether a putative father who has been served notice and timely responded or who has intervened in the adoption proceeding is entitled to consent, the trial court must hold a hearing under N.C. Gen. Stat. § 48-2-207 (2011).

Thus, a putative father in Mr. Johns' position is entitled to have the trial court determine whether his consent is required and present evidence concerning that question. If the trial court determines that his consent is not required, he is not entitled to intervene or participate in any further capacity in the adoption proceeding. Therefore, although the language of the 10 November order was slightly confusing in that it could be read to deny father the right to have the issue of consent determined, the trial court correctly concluded that "[t]he father is entitled to intervene in this action as a party only if he establishes that his consent is necessary for this adoption to proceed" and held a hearing to determine whether his consent was, in fact, required.

V. Necessity of Father's Consent

[3] Father first argues that the trial court erred in concluding that his consent was not required under N.C. Gen. Stat. § 48-3-601. We hold that the trial court correctly interpreted N.C. Gen. Stat. § 48-3-601 in concluding that his consent was not required.

In North Carolina, all necessary consents must have been obtained in order for a trial court to grant an adoption petition. N.C. Gen. Stat. § 48-2-603(4) (2011). The consent of a man "who may or may not be the biological father of the minor" is required if he

1. Is or was married to the mother of the minor if the minor was born during the marriage or within 280 days after the marriage is terminated or the parties have separated pursuant to a written separation agreement or an order of separation entered under Chapters 50 or 50B of the General Statutes or a similar order of separation entered by a court in another jurisdiction;

2. Attempted to marry the mother of the minor before the minor's birth, by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and the minor is born during the attempted marriage, or within 280 days after the attempted marriage is terminated by annulment, declaration of invalidity, divorce, or, in the absence of a judicial proceeding, by the cessation of cohabitation;

3. *Before the filing of the petition*, has legitimated the minor under the law of any state;

4. *Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206*, has acknowledged his paternity of the minor and

    I. Is obligated to support the minor under written agreement or by court order;

    II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the

term of pregnancy, or with the minor, or with both; or

III. After the minor's birth but before the minor's placement for adoption or the mother's relinquishment, has married or attempted to marry the mother of the minor by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or

5. *Before the filing of the petition*, has received the minor into his home and openly held out the minor as his biological child; or

6. Is the adoptive father of the minor . . . .

N.C. Gen. Stat. § 48-3-601(2)(b) (emphasis added).

Mr. Johns argues that § 48-3-601 does not apply to him because § 48-3-603 is contrary to § 48-3-601 and more specific. We disagree.

Under N.C. Gen. Stat. § 48-3-603, "[c]onsent to an adoption of a minor is not required of a person or entity whose consent is not required under G.S. 48-3-601" or if one of eight categories applies. Reading these statutes together, it is clear that consent is only required of a person or entity listed in § 48-3-601. Even if a person or entity qualifies under § 48-3-601, however, his consent is not required if one of the § 48-3-603 categories applies. None of those categories applies here. Therefore, the only question is whether Mr. Johns' consent is required under § 48-3-601(2)(b).

The record shows, and the trial court found, that there was no genuine issue about the fact that Mr. Johns does not fit into any of the provisions of N.C. Gen. Stat. § 48-3-601. He has never married or attempted to marry the mother and had not supported mother or the minor child before the filing of the petition. Indeed, he did not become aware of the child's existence until after the petition had already been filed. Therefore, the trial court correctly concluded that his consent is not required under the statute.

VI. Due Process Claim

[4] Mr. Johns argues that applying N.C. Gen. Stat. § 48-3-601 to him under the facts disclosed in the present record violates his due process rights under the 14th Amendment to the United States Constitution and

Article I, Section 19 of the North Carolina Constitution. We agree that the application of the statute to Mr. Johns would violate his constitutional rights if the facts are as he alleges them. We cannot, however, find facts ourselves and must remand to the trial court for findings relevant to this issue.

The Fourteenth Amendment forbids "any state [from] depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. Similarly, Article I, Section 19 of the North Carolina Constitution states that "No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. "The 'law of the land' clause has the same meaning as 'due process of law' under the Federal Constitution." *Summey Outdoor Advertising, Inc. v. County of Henderson*, 96 N.C. App. 533, 541, 386 S.E.2d 439, 444 (1989), *disc. rev. denied*, 326 N.C. 486, 392 S.E.2d 101 (1990).

"In general, substantive due process protects the public from government action that unreasonably deprives them of a liberty or property interest. If that liberty or property interest is a fundamental right under the Constitution, the government action may be subjected to strict scrutiny." *Toomer v. Garrett*, 155 N.C. App. 462, 469, 574 S.E.2d 76, 84 (2002) (citations omitted), *app. dismissed and disc. rev. denied*, 357 N.C. 66, 579 S.E.2d 576 (2003). "Substantive due process protection prevents the government from engaging in conduct that . . . interferes with rights implicit in the concept of ordered liberty." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (citations and quotation marks omitted). "Applying the Due Process Clause is . . . an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter v. Department of Social Services of Durham County, N. C.*, 452 U.S. 18, 24-25, 68 L.Ed. 2d 640, 648 (1981).

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court. *Troxel v. Granvill*e, 530 U.S. 57, 65, 147 L.Ed. 2d 49, 56 (2000); *see Santosky v. Kramer*, 455 U.S. 745, 758-59, 71 L.Ed. 2d 599, 610 (1982) ("[A] natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." (citation and quotation marks omitted)). The question in this case is whether that right applies to Mr. Johns under the facts of this case. Stated otherwise, has he acted

inconsistently with the protected rights of a natural parent? *See Price v. Howard*, 346 N.C. 68, 83-84, 484 S.E.2d 528, 537 (1997).

The United States Supreme Court and the courts of this State have wrestled with the question of whether an unmarried biological father has a protected constitutional interest in the care and custody of his child.

In *Lehr v. Robertson*, the United States Supreme Court considered "whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth." *Lehr v. Robertson*, 463 U.S. 248, 249-50, 77 L.Ed. 2d 614, 619 (1983). The biological father in that case "had lived with [the mother] prior to Jessica's birth and visited her in the hospital when Jessica was born, but his name [did] not appear on Jessica's birth certificate." *Id.* at 252, 77 L.Ed. 2d at 620. Despite being aware of Jessica's birth, the biological father "did not live with [the mother] or Jessica after Jessica's birth, he has never provided them with any financial support, and he has never offered to marry [Jessica's mother]." *Id.* at 252, 77 L.Ed. 2d at 621.

The Court "noted that the rights of the parents are a counterpart of the responsibilities they have assumed." *Id.* at 257, 77 L.Ed. 2d at 624. On that ground, the Court distinguished "between a mere biological relationship and an actual relationship of parental responsibility." *Id.* at 259-60, 77 L.Ed. 2d at 625. Further, the Court expressly approved of Justice Stewart's observation that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id.* at 260, 77 L.Ed. 2d at 626 (citation, quotation marks, and emphasis omitted).

The Court went on to state,

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he acts as a father toward his children. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and

> from the role it plays in promoting a way of life through the instruction of children as well as from the fact of blood relationship.
>
> . . . .
>
> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Id. at 261-62, 77 L.Ed. 2d at 626-27 (citations, quotation marks, ellipses, and footnote omitted). The Court concluded that the New York statutes "adequately protected [his] inchoate interest in establishing a relationship with Jessica." *Id.* at 265, 77 L.Ed. 2d at 629.

The decision in *Lehr* hinged on the failure of the biological father to grasp the opportunity to develop a relationship with his daughter. The Supreme Court recognized that even if a biological father has not developed a relationship with his child so as to warrant "full-blown" parental rights, an unwed biological father has an interest in *the opportunity* to develop such a relationship—an "inchoate interest." *See id.* at 262, 265, 77 L.Ed. 2d at 627, 629. Further, the Court noted that "[t]here [was] no suggestion in the record that [the mother-petitioner and her husband] engaged in fraudulent practices that led [the biological father] not to protect his rights." *Id.* at 265, 77 L.Ed. 2d at 629 n.23.

In *Michael H. v. Gerald D.*, the United States Supreme Court reflected on its opinion in *Lehr* and noted that it had "observed that the significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring *and we assumed that the Constitution might require some protection of that opportunity.*" 491 U.S. 110, 128-29, 105 L.Ed. 2d 91, 109 (1989) (emphasis added). Yet, the Supreme Court has never defined the "inchoate interest" a biological father has in the opportunity to develop a relationship with his child.

The courts of this State have also not directly addressed this issue. Although father relies heavily on our Supreme Court's decision in

Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994), *Price* made clear that the presumption referred to in *Petersen* is not applicable if a parent's "conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child." *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

In *Price*, an unmarried mother had been sued for custody of her minor child by a man whom she had led to believe was the natural father of the child and who had acted as such, but who was not in fact the child's natural father. *Id.* at 71-72, 484 S.E.2d at 529-30. The trial court had awarded custody to the defendant-mother because of her paramount status as a natural parent, though it found that it was in the child's best interest for custody to be placed with the plaintiff. *Id.* at 72, 484 S.E.2d at 530. The Court, citing *Lehr*, held that "[a] parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child." *Id.* at 79, 484 S.E.2d at 534. Thus, our Supreme Court in *Price* placed the father's failure to grasp the opportunity to develop a relationship with his child in *Lehr* as one of those ways in which a natural parent may act inconsistently with his otherwise constitutionally protected status and thereby lose his parental rights. *See id.*

This Court has also considered similar issues. In *In re Adoption of Baby Girl Dockery*, we considered an equal protection and due process challenge to former N.C. Gen. Stat. § 48–6(a)(3) (1984), which only required the consent of an unmarried biological father to adoption if paternity had been judicially established, if he had acknowledged the child, or if he had financially supported and cared for the child and the mother. 128 N.C. App. 631, 633-34, 495 S.E.2d 417, 419 (1986). After a very brief analysis of the substantive due process issue, we concluded that the biological father had not established a protected relationship with his child. *Id.* at 635-36, 495 S.E.2d at 420. As appellees have highlighted, in considering the equal protection argument, we discounted the fact that the father was unaware of the child's existence. *Id.* at 634, 495 S.E.2d at 419. There was, however, no discussion in *Dockery* of what interest a biological father has in the opportunity to develop a relationship with his child.

Dockery is distinguishable from the present case. In *Dockery*, the biological father learned of the child's existence when the adoption agency contacted him and asked for his consent, approximately one month *prior* to the adoption petition being filed. *Id.* at 632, 495 S.E.2d at 418. Thus, under the facts of that case, the biological father had an opportunity, albeit a limited one, to develop a protected relationship

with his child by pursuing one of the methods outlined in the consent statute before the filing of the petition. He simply failed to grasp the opportunity in time.

The other North Carolina cases relied on by the parties are either no longer good law, *e.g.*, *In re Adoption of Clark*, 95 N.C. App. 1, 381 S.E.2d 835 (1989), *rev'd*, 327 N.C. 61, 393 S.E.2d 791 (1990), or address issues of statutory interpretation without reaching the constitutional issue under consideration here, *e.g.*, *In re Adoption of Byrd*, 354 N.C. 188, 194-98, 552 S.E.2d 142, 147-49 (2001) (considering whether a biological father's consent was required under the statute), *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 105-06, 630 S.E.2d 673, 678-79 (2006) (deciding that a father's parental rights could be terminated under the statute even though the mother lied to him about the existence of the child), *and In re T.L.B.*, 167 N.C. App. 298, 303, 605 S.E.2d 249, 252-53 (2004) (affirming the trial court's decision to terminate a biological father's parental rights under the statute even though he only failed to protect his rights because he did not know of the child's existence). No North Carolina case has addressed the constitutional question presented here under similar facts. Some of our sister states have, however, confronted similar constitutional issues.

In *In re Adoption of A.A.T.*, 196 P.3d 1180 (Kan. 2008), *cert. denied*, ___ U.S. ___, 173 L.Ed. 2d 1088 (2009), the Kansas Supreme Court considered an adoption case in which the mother had lied to the child's biological father about her pregnancy and to the court about the biological father's identity. In that case, the father knew that the mother had become pregnant, but the mother then "took extraordinary measures to prevent [the biological father] from knowing about the birth of his child," including lying to him about having had an abortion, and submitted an affidavit in which she lied about the last name of the child's putative father. *Id.* at 1185, 1188. Because the putative father could not be found (using the false last name), the adoption agency published newspaper notice to the father under the false name. *Id.* at 1186. When no father appeared in response to the notice, the court terminated the father's rights and finalized the adoption. *Id.* After six months, the mother told the biological father the truth and within six weeks he retained counsel and moved to set aside the adoption decree. *Id.*

In its review of cases from other states, the Kansas court noted that

> the cases conclude that as long as the state's statutes provide a process whereby most responsible putative fathers can qualify for notice in an adoption proceeding, the

> interests of the State in the finality of adoption decrees, as discussed in *Lehr*—providing a child stability and security early in life, encouraging adoptions, protecting the adoption process from unnecessary controversy and complication, and protecting other parties' privacy and liberty interests—justify a rule that a putative father's opportunity to develop a parenting relationship ends *with the finalization of a newborn child's adoption* even if the reason the father did not grasp his opportunity was because of the mother's fraud.

Id. at 1196 (emphasis added).

After lengthy analysis of the underlying constitutional principles, the Kansas Supreme Court concluded, over three dissents, that the father did not have a protected liberty interest because he failed to take any steps to protect his rights, such as filing a notice with the putative father registry immediately upon learning that the mother was pregnant, before she lied to him about having an abortion. *Id.* at 1195-96, 1203. The court reasoned that "the opportunity to assert his interest in parenting slipped away without any involvement of the State. The interests of the State and the adoptive family justify a conclusion that [the father's] opportunity to demonstrate his commitment to parenting passed without developing into a liberty interest." *Id.* at 1203.

New York appellate courts have considered several comparable cases. In *Robert O. v. Russell K.*, the New York Court of Appeals—that state's highest court—concluded that a biological father could not have a final order of adoption vacated because he did not have a constitutionally protected interest in his child when he failed to develop a relationship with that child, even though he failed to do so only because he was unaware of the child's existence. 604 N.E.2d 99, 103-04 (N.Y. 1992). The court noted, however, that in a prior case it had held that

> a father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his under-six-month-old child should have an equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship.

Id. at 103 (quoting *In re Raquel Marie X.*, 559 N.E.2d 418, 425 (N.Y. 1990)). The New York courts have limited the period in which a biological father

may grasp the opportunity to develop a relationship with his child to the six months prior to the child's placement for adoption, even in cases of newborn adoption. *Id.*

Other courts that have looked at the issue of the biological father's opportunity interest have also decided that it is not a due process violation when that opportunity has been extinguished by the actions of a private party, usually the birth mother. *See, e.g.*, *Petition of Steve B.D.*, 730 P.2d 942, 945-46 (Idaho 1986) (holding that there was no violation of the father's due process rights where the mother, not a state actor, hid the adoption proceedings from the father).

The South Carolina Supreme Court, by contrast, has held that where a biological father has "demonstrated sufficient prompt and good faith efforts to assume parental responsibility" his failure to literally comply with the adoption statutes may be excused. *Doe v. Queen*, 552 S.E.2d 761, 764 (S.C. 2001). In Doe, the biological father, Queen, had been living with the mother when she became pregnant. *Id.* at 762. The mother told Queen that she wanted an abortion and moved out. *Id.* She did not end up terminating the pregnancy and instead carried the child to term. *Id.* During the rest of her pregnancy, Queen had no contact with the mother. *Id.* Indeed, after she signed a warrant for assault, a trial court issued an order forbidding contact. *Id.*

After the child was born, she placed him for adoption. *Id.* Although she did not tell the adoptive parents the father's address, their attorney managed to track him down approximately two months later and asked him to consent to the adoption. *Id.* Queen refused to consent and filed pleadings at a hearing on the adoption eight months after he was informed of the child's birth. *Id.* In the interim, Queen prepared a nursery, opened a savings account in the child's name, and bought medical insurance for the child. *Id.* The trial court determined that the father's consent was required. *Id.* Under those facts, the South Carolina Supreme Court held that Queen had "demonstrated sufficient prompt and good faith efforts to assume parental responsibility" and that therefore his consent was required for the adoption, even though he did not qualify under the statute. *Id.* at 764.

Here, the trial court placed a great deal of responsibility on father to keep close tabs on his child's mother and appellees urge us to do the same. Appellees cite no binding case establishing such a duty.[4]

4. This Court has noted that "it is certainly not unreasonable to charge putative fathers with the responsibility to discover the birth of their illegitimate children." *In re Adoption of Clark*, 95 N.C. App. at 9, 381 S.E.2d at 840. Our opinion in *Clark*, however,

Father cannot be faulted for declining to constantly call and follow his ex-girlfriend or consistently inquire about a potential pregnancy. Indeed, a mother may well consider any such inquiries or observation to constitute harassment or stalking, if she has asked the father to stop communicating with her. He cannot force her to maintain a romantic relationship or even to accept his inquiries. Under appellees' argument, any efforts a father may make to inquire about the mother's pregnancy would be worthless if the mother rebuffs them. She, as much as he, is responsible for having sex outside of marriage and the associated consequences. Were we to hold as appellees urge, a mother could unilaterally terminate a father's rights by lying to him about her pregnancy, lying to the adoption agency about him, and lying to the court about her knowledge of the father with complete impunity. Under our statutes, there would be no remedy for the father and no way for him to assert his rights once the petition is filed, even if the petition is based upon outright fraud by the mother.

The circumstances of this case eliminated father's "inchoate interest" in developing a fully protected relationship with Sean before the petition was filed and cut off that interest immediately, despite the father's prompt actions to try to protect it. Under the plain language of N.C. Gen. Stat. § 48-3-601, once the petition was filed, any opportunity he had to protect his rights was gone solely as a result of the mother's decision not to inform him of her pregnancy and to provide an inaccurate name for the father to the adoption agency.

Our Supreme Court recognized in *Byrd* that giving the biological mother such unilateral power is inconsistent with fundamental fairness:

> We recognize the legislature's apparent desire for fatherhood to be acknowledged definitively regardless of biological link. We also recognize the importance of fixing parental responsibility as early as possible for the benefit of the child. Yet, fundamental fairness dictates that a man should not be held to a standard that produces unreasonable or illogical results. We also believe that the General Assembly did not intend to place the mother in total

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was reversed by the Supreme Court. *In re Adoption of Clark*, 327 N.C. 61, 393 S.E.2d 791 (1990). This duty has nonetheless been mentioned by this Court in *In re Baby Boy Dixon*, 112 N.C. App. 248, 251, 435 S.E.2d 352, 354 (1993), and in *In re T.L.B.*, 167 N.C. App. at 303, 605 S.E.2d at 252. Neither case, however, reached the constitutional question of whether the imposition of such a duty would be consistent with a biological father's constitutionally protected interest in the opportunity to develop a relationship with his child where the biological father has actually come forward to attempt to establish such a relationship.

> control of the adoption to the exclusion of any inherent rights of the biological father.

In re Byrd, 354 N.C. at 194, 552 S.E.2d at 146.

The adoption statutes as applied here have exactly the effect of placing "the mother in total control of the adoption to the exclusion of any inherent right of the" father. *Id.* The State's interest in establishing a permanent home for the minor child is undoubtedly a valid and important one. Yet, the State's interest in permanence is not fully established in this case where the adoption proceeding is still pending. This case is not one where the biological father is attempting to assert his rights after the adoption decree has been issued and a new family created. Additionally, this is not a case where the biological father seeks only to block the adoption without asserting his intention and plans to take full responsibility for the child. Instead, if the facts are as father has alleged them to be, he has demonstrated an interest and willingness "to shoulder the responsibilities that are attendant to rearing a child." *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

We hold that where a biological father, who prior to filing of the adoption petition was unaware that the mother was pregnant and had no reason to know of the pregnancy[5], promptly takes steps to assume parental responsibility upon discovering the existence of the child has developed a constitutionally protected interest sufficient to require his consent where the adoption proceeding is still pending. This holding does not prevent the termination of the parental rights of an unknown father who has failed to respond to notice of the imminent termination of his rights. *Cf. In re Baby Boy Dixon*, 112 N.C. App. at 251-52, 435 S.E.2d at 353-54 (holding that due process was not offended by terminating the parental rights of an unknown father who was given notice, but failed to respond).

The adoption petition here had been pending for only fourteen days prior to the filing of a petition to terminate parental rights on 16 November 2010. The adoption proceeding was stayed for the pendency of the termination proceeding. It was in the middle of that proceeding that Mr. Johns discovered the existence of Sean. Mr. Johns called Ms. Welker on 25 April 2011 after hearing from an acquaintance that Ms. Welker might have had a child. She confirmed that she had given

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5. We do not consider the basic biological fact that any act of sexual intercourse may result in pregnancy to be the same as "reason to know" that a particular woman may actually be pregnant. The father need not have actual knowledge, but he must have some knowledge that would lead a reasonable person to believe that the woman is pregnant.

birth to a child and told him the name of the adoptive parents and the adoption agency.

After Mr. Johns appeared in the termination proceeding and indicated that he would not consent to an adoption, the agency dismissed its termination petition on 2 May 2011. The stay on the adoption proceeding was lifted on 5 May 2011. On 11 May 2011, petitioners served notice on Mr. Johns' brother that the stay had been lifted. On 24 May 2011, Mr. Johns sent a letter to the Clerk of Superior Court and to counsel for the adoption agency stating that "I, Gregory Joseph Johns, am requesting a DNA test to prove that I am the biological father of [Sean]. Once the DNA test proves me to be the father of [Sean], I am requesting that the adoption be terminated and I take [Sean] into custody." On 15 August 2011, Mr. Johns filed a motion to intervene, motion for disclosure of file, motion to dismiss petition for adoption, petition to legitimate child, and motion for child custody. In response, petitioners filed a motion for summary judgment.

The trial court held a hearing concerning the motions to dismiss and for summary judgment. The trial court refused to take live testimony at the hearing on the summary judgment motion, but allowed Mr. Johns to testify in support of his motion to dismiss under N.C. Gen. Stat. § 48-2-102.

At the hearing, Mr. Johns claimed that since learning of his son's existence, he sent the child letters and presents, scheduled an appointment with a pediatrician, and set up a nursery in his home. He also testified that he attempted to contact the adoptive parents and set up a way to visit his son, but that these efforts were rebuffed. Nevertheless, we cannot make findings about the credibility of Mr. Johns' assertions. *See Godfrey v. Zoning Bd. of Adjustment of Union County*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986) ("Fact finding is not a function of our appellate courts."). We must remand this case to the trial court to make appropriate findings of fact and conclusions of law.

Because the trial court only analyzed the facts under the N.C. Gen. Stat. § 48-3-601, which would require father to take some action *before* the adoption petition was filed—in this case a practical impossibility—it concluded that there was no genuine issue of material fact and granted summary judgment. Having held that a biological father is entitled to the opportunity to develop a relationship with his child, we must remand to the trial court for a full hearing concerning the issue of whether Mr. Johns grasped the opportunity to act as a parent when that opportunity appeared. In other words, the trial court should determine what actions

Mr. Johns took after learning of the existence of his son. If the trial court finds that Mr. Johns in fact made reasonable and consistent efforts to "shoulder the responsibilities that are attendant to rearing a child," *Price*, 346 N.C. at 79, 484 S.E.2d at 534, after discovering Sean's existence, considering the fact that father had no legal means to have actual contact with the child due to the adoption petition, then he has developed a constitutionally protected interest and his consent is required for the adoption to be finalized. *See, e.g.*, *In re Adoption of K.A.R.*, 205 N.C. App. 611, 617, 696 S.E.2d 757, 761-62 (2010) ("Here, Alvarez did what the trial court found to be reasonable given his means and financial resources; he obtained items—a baby car seat, a baby crib mattress, and baby clothing—that could be used only for the support of the minor child."), *disc. rev. denied*, ___ N.C. ___, 706 S.E.2d 236 (2011).

VII. Conclusion

We hold that where a biological father, who prior to the filing of the petition was unaware that the mother was pregnant and had no reason to know, promptly takes steps to assume parental responsibility upon discovering the existence of the child has developed a constitutionally protected interest sufficient to require his consent where the adoption proceeding is still pending. In this case, the trial court did not have the opportunity to develop a complete record and make findings on that issue. Therefore, we must reverse the order granting petitioners' motion for summary judgment and denying father's motion to intervene. We remand for an evidentiary hearing and entry of a revised order.

REVERSED and REMANDED.

Judges HUNTER, Robert C. and ERVIN concur.

MICHAEL THOMAS JAMES, PLAINTIFF
v.
INTEGON NATIONAL INSURANCE COMPANY,
A MEMBER OF GMAC INSURANCE GROUP, DEFENDANT

No. COA12-1417

Filed 2 July 2013

Insurance—underinsured motorists coverage—affirmative defense—material misrepresentation

The trial court erred by granting plaintiff summary judgment in a declaratory judgment action involving plaintiff's right to collect underinsured motorists coverage under an automobile insurance policy issued by defendant. The trial court erred by treating defendant's affirmative defense as a defense of fraud rather than a defense of material misrepresentation and applied an incorrect standard of proof by requiring defendant to prove the element of scienter, which is not an element required to prove material misrepresentation. Furthermore, viewed in the light most favorable to defendant, the record demonstrated that there was a genuine issue of material fact as to whether the insured made a material misrepresentation on her insurance application.

Appeal by defendant from order entered 12 October 2012 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 27 March 2013.

Whitley Law Firm, by Ann C. Ochsner, for plaintiff-appellee.

Law Offices of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellant.

CALABRIA, Judge.

Integon National Insurance Company ("defendant") appeals from an order granting summary judgment in favor of Michael Thomas James ("plaintiff"). We reverse and remand.

I. Background

Natalie Williams ("Williams") applied for a North Carolina Personal Auto Insurance policy ("the policy") through Huff's Insurance & Realty, Inc. in September 2010. On the application, Williams listed two vehicles

to be covered under the policy and listed herself as the sole driver of both vehicles. On 18 April 2011, Williams added her mother as an additional driver on the policy. The policy provided Underinsured Motorist ("UIM") coverage in the amount of $50,000.00 per person and $100,000.00 per occurrence. On 12 October 2011, the policy was renewed for another year.

On 6 November 2011, plaintiff, Williams's fiancé, was involved in a motor vehicle accident. At the time, plaintiff was driving one of Williams's vehicles. As a result of the accident, plaintiff sustained serious bodily injuries, for which he incurred medical expenses in excess of $50,000.00. Following exhaustion of the minimum liability coverage on the other vehicle involved in the collision, plaintiff submitted a UIM claim to defendant. Defendant denied plaintiff's claim.

On 16 May 2012, plaintiff filed a complaint and subsequently an amended complaint for declaratory relief. Plaintiff sought, *inter alia*, "a declaration of the rights and obligations of the parties as to Integon National Insurance Company Policy Number 6616109, and in particular that the policy provides UIM coverage ... and that such UIM coverage is available for the [p]laintiff." Defendant filed an answer, claiming that prior to the time plaintiff was involved in the accident, Williams had made a material misrepresentation in her application for the insurance policy that barred plaintiff's recovery.

On 19 September 2012, plaintiff moved for summary judgment. On 12 October 2012, after a hearing, the trial court granted plaintiff's motion for summary judgment, finding that "there is no genuine issue of material fact that the [p]laintiff is an insured for the purpose of UIM coverage under the policy;" and that defendant "failed to come forward with admissible evidence establishing scienter by [] Williams necessary to establish the affirmative defense of fraud." Defendant appeals.

II. Standard of Proof

Defendant argues that the trial court erred by granting plaintiff summary judgment by applying the wrong standard of proof. We agree.

In the instant case, plaintiff's complaint sought a declaratory judgment that he was entitled to UIM coverage under Williams's policy. In its answer, defendant asserted the affirmative defense of material misrepresentation, alleging that Williams procured the policy by making a material misrepresentation in her insurance application and that, as a result, plaintiff was not covered by her policy. In its order granting summary judgment in favor of plaintiff, the trial court treated defendant's

affirmative defense as one of fraud, and found that defendant did not forecast sufficient evidence to establish scienter. Defendant contends that the trial court's determination was erroneous because evidence of scienter is not required to establish a material misrepresentation.

To prove fraud, a party must show that the defendant made a false "representation relating to some material past or existing fact." *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988)(citation omitted). However, in addition to proof of a material misrepresentation, establishing fraud also requires proof of the element of scienter. *Id.* "The term 'scienter' embraces both knowledge and an intent to deceive, manipulate or defraud." *Id.* Therefore, while both fraud and material misrepresentation involve a false representation by the insured, it is unnecessary to prove that the insured had an intent to deceive in order to prove material misrepresentation. Thus, defendant is correct that fraud and material misrepresentation represent different affirmative defenses.

However, plaintiff, relying on *Odum v. Nationwide Mut. Ins. Co.*, 101 N.C. App. 627, 401 S.E.2d 87 (1991), contends that "fraud is the correct affirmative defense to coverage in excess of the minimum required by" N.C. Gen. Stat § 20-279 *et seq*., the Financial Responsibility Act of 1953 ("FRA"). Based upon this contention, plaintiff argues that the trial court properly treated defendant's affirmative defense as a defense of fraud.

The issue in *Odum* was whether the insurer of an automobile liability policy could avoid liability after an injury had occurred on the ground that the policy was procured by the insured's deliberate and material misrepresentations on the application, *i.e.*, fraud. *Id.* at 631, 401 S.E.2d at 89. This Court held that fraud "is not a defense to the insurer's liability once injury has occurred." *Id.* at 634, 401 S.E.2d at 91. Fraud could not be a total affirmative defense under the FRA because pursuant to N.C. Gen. Stat. § 20-279.21(f)(1)(2011), insurance required by the FRA "shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs," and "no statement made by the insured ... and no violation of said policy shall defeat or void said policy."

However, the *Odum* Court further determined that its holding only applied to the minimum insurance coverage amounts required by the FRA. 101 N.C. App. at 634, 401 S.E.2d at 91. The Court based this determination on N.C. Gen. Stat. § 20-279.21(g), which states:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for

> a motor vehicle liability policy and *such excess or additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this section.*

N.C. Gen. Stat. § 20-279.21(g) (2011)(emphasis added). Because the coverage amounts in the policy at issue in *Odum* were greater than the statutory minimum, the Court held "that as to any coverage in *excess* of the statutory minimum, the insurer [was] not precluded by statute or public policy from asserting the defense of fraud." *Odum*, 101 N.C. App. at 635, 401 S.E.2d at 92; *see also Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 494, 473 S.E.2d 427, 430 (1996) (where this Court held the insurer was not precluded from seeking to avoid a claim for UIM coverage where the insureds fraudulently misrepresented or concealed material facts concerning their state of residence on which the insurance company reasonably relied in providing coverage).

In the instant case, plaintiff is only seeking to recover from the portion of Williams's policy which provided UIM coverage in the amount of $50,000.00 per person and $100,000.00 per occurrence. "[O]ur Courts have consistently interpreted [§ 20-279.21(b)(4)] to write UIM coverage into policies ... 'only if the policyholder has liability insurance in excess of the minimum statutory requirement....' " *Hartford*, 123 N.C. App. at 493-94, 473 S.E.2d at 430 (citation omitted). Therefore, any UIM coverage constitutes "coverage in excess of the statutory minimum." *Id.* at 494, 473 S.E.2d at 430.

The Courts in *Odum* and *Hartford* recognized that fraud was an acceptable affirmative defense to liability coverage in excess of the statutory minimum, but, contrary to plaintiff's assertions, neither case expressly limited an insurer's available affirmative defenses to fraud. *Odum*, 101 N.C. App. at 635, 401 S.E.2d at 92; *Hartford*, 123 N.C. App. at 494, 473 S.E.2d at 430. Since, pursuant to N.C. Gen. Stat. § 20-279.21(g), automobile liability coverage in excess of the statutorily required minimum is not subject to the FRA, we hold that the defense of material misrepresentation is also an acceptable affirmative defense to such coverage. *See* N.C. Gen. Stat. § 58-3-10 (2011) (emphasis added) ("All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, *unless material* or fraudulent, will not prevent a recovery on the policy."); *Bell v. Nationwide Ins. Co.*, 146 N.C. App. 725, 726, 554 S.E.2d 399, 401 (2001)(An insurer may avoid liability

on an insurance policy if it shows that the insured made material misrepresentations, "representations in his application that were material and false.").

Consequently, we find that the trial court erred by treating defendant's affirmative defense as a defense of fraud rather than a defense of material misrepresentation. The trial court applied an incorrect standard of proof by requiring defendant to prove the element of scienter, which is not an element required to prove material misrepresentation.

III. Summary Judgment

As we have determined that the trial court applied the wrong standard of proof, we must now decide whether it erred by granting plaintiff 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 omitted). Summary judgment shall be allowed "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) (2012). All facts asserted by the nonmoving party must be viewed in the light most favorable to that party. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)(citations omitted).

Our Supreme Court has held that "a representation in an application for an insurance policy is deemed material 'if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or *in fixing the rate of the premium*.' " *Goodwin v. Investors Life Ins. Co. of North America*, 332 N.C. 326, 331, 419 S.E.2d 766, 769 (1992 (citation omitted).

In the instant case, defendant offered a copy of both Williams's insurance application and her insurance policy, as well as affidavits from defendant's employees in opposition to plaintiff's motion for summary judgment. On the insurance application, Williams certified, with her signature, that "all persons age 15 years or older who live with me as well as all operators who regularly operate my vehicle and who are not residing in my household, are listed in this application." Defendant presented an affidavit by Sharon Dowell ("Dowell affidavit"), the Executive Customer

Relations Specialist for defendant, stating that "[i]t was determined after the November 5, 2011, accident involving Michael Thomas James that he was an adult driver living with Natalie Williams at all times relevant to the policy." Furthermore, defendant presented evidence that on 18 April 2011, Williams added her mother as an additional driver on the policy, which suggests that Williams understood the policy provisions regarding the necessity of adding to the policy all adults who either lived with her or operated her vehicles. Therefore, since Williams apparently understood the policy guidelines but did not add plaintiff to the policy, defendant provided some evidence that Williams made a material misrepresentation on her insurance application.

The Dowell affidavit also indicated that had plaintiff "been listed as a driver on the policy for all premium periods, the amount of the premium would have increased by a total of $5,995.00." This affidavit constitutes evidence that knowledge of plaintiff's status as a driver "would naturally influence the judgment of the insurer … in *fixing the rate of the premium*." *Id.* Thus, defendant offered evidence that Williams's misrepresentation was material. Viewed in the light most favorable to defendant, the record demonstrates, and we find, that there is a genuine issue of material fact as to whether Williams made a material misrepresentation on her insurance application. Because we find that there is a genuine issue of material fact, the trial court erred by granting summary judgment in favor of plaintiff.

IV. Conclusion

We reverse the trial court's grant of summary judgment in favor of plaintiff and remand this case to the trial court for a jury trial to determine whether Williams made a material misrepresentation on her application for insurance.

Reversed and remanded.

Judges ERVIN and DILLON concur.

JOHNS v. WELKER

[228 N.C. App. 177 (2013)]

GREGORY JOHNS, PLAINTIFF/FATHER
v.
LAURA MARSHBURN WELKER, DEFENDANT/MOTHER
v.
BENJAMIN AND HEATHER JONES, DEFENDANTS/PHYSICAL CUSTODIANS
v.
CHRISTIAN ADOPTION SERVICES, DEFENDANT/LEGAL CUSTODIAN

No. COA12-1154

Filed 2 July 2013

Child Custody and Support—adoption action pending—prior pending action doctrine inapplicable—custody action to be held in abeyance

The trail court erred by concluding that it did not have subject matter jurisdiction over plaintiff father's action for custody of plaintiff's minor son where there was already a pending adoption proceeding concerning the same child. The prior pending action doctrine did not preclude jurisdiction of the trial court as the parties to both actions were not the same and the relief requested in both actions was not the same. The dismissal of plaintiff's action was reversed and remanded with instructions that the trial court hold the custody action in abeyance for the duration of the adoption proceeding.

Appeal by plaintiff/father from Order entered 26 January 2012 by Judge Paige B. McThenia in District Court, Mecklenburg County. Heard in the Court of Appeals 24 April 2013.

Jonathan McGirt, for plaintiff-appellant father.

Thurman, Wilson, Boutwell & Galvin, P.A. by John D. Boutwell, for defendants-appellees.

STROUD, Judge.

Gregory Johns ("plaintiff") appeals from an order entered 26 January 2012 in District Court, Mecklenburg County, dismissing his action for custody of "Sean,"[1] a minor child and plaintiff's biological son. For the following reasons, we reverse and remand this case to the trial court.

1. To protect the privacy of the juvenile to the extent possible and for ease of reading, we will refer to him by pseudonym.

I. Background

The factual background to this case is laid out in the opinion in the companion adoption case, *In re Adoption of S.D.B.*, ___ N.C. App. ___, ___ S.E.2d ___ (2013) (2 July 2013) (COA12-1362). Thus, we will address only the relevant procedural history here.

Sean was born on 10 October 2010. On 2 November 2010, Mr. and Mrs. Jones ("defendants") filed a petition to adopt Sean, with the consent of his mother.[2] Plaintiff moved to intervene in and dismiss the adoption proceeding. Petitioners responded and moved for summary judgment on the grounds that plaintiff's consent was not required for the adoption to proceed. As a contested adoption proceeding, it was transferred to District Court, Mecklenburg County on 19 September 2011 pursuant to N.C. Gen. Stat. § 48-3-601(a1) (2011), and assigned to Judge Trosch. The trial court denied plaintiff's motions and granted defendants' motion for summary judgment on that ground by orders entered 17 February 2012.

On 4 January 2012, plaintiff commenced the present action for custody of Sean and requested the issuance of an injunction against defendants preventing them from proceeding with the adoption. On 10 January 2012, defendants moved to dismiss the custody action for lack of subject matter jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2011), and failure to state a claim under Rule 12(b)(6), due to the prior pending adoption proceeding. The District Court, Mecklenburg County, Judge McThenia presiding, granted defendants' motion to dismiss for lack of subject matter jurisdiction.

II. Motion to Dismiss

Plaintiff argues on appeal that the trial court erred in deciding that it was deprived of subject matter jurisdiction by the prior pending adoption proceeding. We agree that the trial court erred in deciding that it did not have subject matter jurisdiction. On remand, the trial court should hold the custody action in abeyance for the duration of the adoption proceeding.

A. Standard of Review

Although the court's order did not recite a rule of civil procedure as a basis for its decision, it is clear from the content of the order that it

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2. Normally we would not name the prospective adoptive parents. As the Joneses are named in the complaint, however, we see no way to adequately protect the privacy of their names.

was based on the absence of subject matter jurisdiction, which is properly addressed by motion under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). "The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*." *Fairfield Harbour Property Owners Ass'n, Inc. v. Midsouth Golf, LLC*, ___ N.C. App. ___, ___, 715 S.E.2d 273, 280 (2011) (citation and quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

B. Prior Pending Action

The trial court concluded that it did not have jurisdiction over the custody action because there was already a pending adoption proceeding concerning the same child. Plaintiff did not file a motion to consolidate the custody action with the adoption proceeding.

> Under the law of this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action. The "prior pending action" doctrine involves essentially the same questions as the outmoded plea of abatement, and is, obviously enough, intended to prevent the maintenance of a subsequent action that is wholly unnecessary. The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?

Shoaf v. Shoaf, ___ N.C. App. ___, ___, 727 S.E.2d 301, 305 (2012) (citations, quotation marks, and brackets omitted).

In *McKoy v. McKoy*, we considered the question of whether the district court had jurisdiction to enter a custody order over an incompetent adult after a guardianship petition had been filed concerning the same adult. 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). We concluded that "the district court obtains jurisdiction under § 50–13.8 to determine custody only when the disabled adult child at issue has not been declared incompetent and had a guardian appointed" and that because "the clerk in this case had exercised its jurisdiction under Chapter 35A—to the exclusion of the district court under N.C. Gen. Stat. § 50–13.8—it retained jurisdiction to resolve the parties' dispute regarding custody of [the incompetent adult]." *Id.* at 515, 689 S.E.2d

at 594. We reasoned that both the district court and the clerk of superior court had concurrent jurisdiction and applied the rule that "where there are courts of concurrent jurisdiction, the court which first acquires jurisdiction retains it." *Id.* (quoting *In re Greer*, 26 N.C. App. 106, 112, 215 S.E.2d 404, 408 (1975)).

The parties are not the same here as they are in the adoption action because Judge Trosch determined under N.C. Gen. Stat. § 48-1-101(11) that plaintiff was not a party to the adoption proceeding when she decided that his consent was not required and denied his motion to intervene. Additionally, the adoption proceeding and a custody action do not request precisely the same relief. The petitioner in an adoption proceeding requests the court to form a new legal family. *See* N.C. Gen. Stat. § 48-1-106(a) (2011) ("A decree of adoption effects a complete substitution of families for all legal purposes after entry of the decree."). The plaintiff in a custody action requests the authority to keep and care for a juvenile with whom there is some pre-existing connection. *See Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994) ("N.C.G.S. § 50-13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers."). Therefore, the prior pending action doctrine would not preclude jurisdiction of the trial court. *See Shoaf*, ___ N.C. App. at ___, 727 S.E.2d at 305.

Nevertheless, these two proceedings present the same fundamental question—who has the right to legal and physical custody of the minor child? Moreover, there is the distinct possibility that a court considering the best interests of the child under Chapter 50 may come to a different conclusion than a court following the specific custody provisions of Chapter 48. The court considering the adoption petition has the power to award custody of the juvenile to the petitioners or to the agency. *See* N.C. Gen. Stat. §§ 48-3-501 ("Unless the court orders otherwise, when a parent or guardian places the adoptee directly with the petitioner, the petitioner acquires that parent's or guardian's right to legal and continuing physical custody of the adoptee . . . ."), 48-3-502(a)(1) (stating that during an agency adoption proceeding, "[t]he agency retains legal but not physical custody of the adoptee until the adoption decree becomes final."), 48-3-607(b) (an executed consent "vests legal and physical custody of the minor in the prospective adoptive parents . . . ."), *and* 48-3-705(b) ("[T]he consent of a parent, guardian, or agency that placed a minor for adoption pursuant to Part 2 of this Article vests legal and physical custody of the minor in the prospective adoptive parent and empowers this individual to petition the court to adopt the minor."). Obviously,

a court considering a Chapter 50 custody action would have the power to award custody to a different party.

Custody also has a major impact on the adoption proceedings. Who has custody determines important, indeed, central, questions in an adoption, such as who may place a minor for an adoption. *See* N.C. Gen. Stat. § 48-3-201(3)(b) (requiring both parents to jointly place a minor for adoption if neither parent has both physical and legal custody).

The district court has jurisdiction over custody, N.C. Gen. Stat. § 7A-244 (2011), and jurisdiction over contested adoptions, N.C. Gen. Stat. §§ 7A-246, 48-2-601(1a) (2011). There is no statute specifying a procedure for concurrent adoption and custody proceedings, as there is for custody actions that coincide with juvenile proceedings under Chapter 7B, see N.C. Gen. Stat. §§ 48-2-102(b), 7B-200(c), (d) (2011). Yet, "[i]t is well established that one trial court judge may not overrule another trial court judge's conclusions of law when the same issue is involved. . . . The rationale for this rule is to discourage parties from judge shopping." *France v. France*, ___ N.C. App. ___, ___, 738 S.E.2d 180, 185 (2012) (citations and quotation marks omitted), *disc. rev. denied*, ___ N.C. ___, 740 S.E.2d 479 (2013). How can we resolve the potential for contrary and competing custody orders issued by courts which both have jurisdiction?

We have addressed this question once before, in *Griffin v. Griffin*, 118 N.C. App. 400, 456 S.E.2d 329 (1995). As the parties note, *Griffin* was decided before the major 1995 revisions of North Carolina adoption laws came into effect. Therefore, although it is relevant, it is not controlling. In *Griffin*, we were asked, "In the absence of . . . an order of consolidation and when the same child is the subject of a simultaneous custody and adoption proceeding, do both courts have continuing jurisdiction to fully adjudicate the respective issues before them?" 118 N.C. App. at 403, 456 S.E.2d at 332. We stated that "[t]he answer has to be no, because this would create an unresolvable conflict." *Id.* We went on to analyze the adoption and custody statutes in effect at that time, which vested the superior court with jurisdiction over adoption proceedings and the district court with jurisdiction over custody actions. *Id.* Under those statutes, the superior court was authorized to issue an "interlocutory decree of adoption," which gave "the care and custody of the child to the petitioners." *Id.* (citation and quotation marks omitted). We remanded for clarification of the record, but held that the jurisdiction of the district court was superseded by that of the superior court for the pendency of the adoption proceeding. *Id.* at 404-05, 456 S.E.2d at 332-33.

Unlike the result required by virtue of the prior statutes considered in *Griffin*, custody of the minor now goes to the agency or petitioner upon relinquishment, executed consent, or direct placement, unless the court orders otherwise. *See* N.C. Gen. Stat. §§ 48-3-501, 48-3-502(a)(1), 48-3-607(b), 48-3-705(b). There is no need under the current adoption statutes for the court to enter a decree awarding interim custody to the petitioners. Thus, custody is necessarily an issue in an adoption proceeding and the potential for conflicting orders concerning the same minor child is substantial.

We have addressed a similar situation of potential unresolvable conflict between two courts with jurisdiction in *Jessee v. Jessee*, ___ N.C. App. ___, 713 S.E.2d 28 (2011). In *Jessee*, the plaintiff-husband had commenced an action in Forsyth County alleging that the defendant-wife had fraudulently converted funds to her own use after the defendant had filed an action for equitable distribution in Alamance County. ___ N.C. App. at ___, 713 S.E.2d at 30-31. Because the claims brought in the Forsyth County action concerned acts which occurred after the date of separation and the equitable distribution action would only address what had occurred prior to separation, we concluded that the equitable distribution action did not deprive the superior court in Forsyth County of jurisdiction under the prior pending action doctrine. *Id.* at ___, 713 S.E.2d at 37-38. Nevertheless, because of the "clear interrelationship" between the two cases, we concluded that "the Forsyth County case should be held in abeyance pending resolution of the Alamance County domestic relations case." *Id.* at ___, 713 S.E.2d at 38 (citation and quotation marks omitted).

Here, the statutes do not provide a clear answer. Further, the relevant statutes have changed substantially since we issued our opinion in *Griffin*, so it is not directly controlling. The doctrine of prior pending action as articulated by this Court would not deprive the trial court of jurisdiction over the custody action. Nevertheless, we believe that in order to avoid unresolvable conflicts, the trial court must decline to exercise its jurisdiction in the custody action while a previously filed adoption proceeding is pending concerning the same child by holding the custody action in abeyance. *See id.*; *Keith v. Wallerich*, 201 N.C. App. 550, 558, 687 S.E.2d 299, 304 (2009) (holding that the trial court must hold a pursuit of trust claim in abeyance pending the resolution of a related equitable distribution action). Once the adoption petition is resolved, whether through a final decree of adoption or the denial or dismissal of the petition, the court may remove the stay and consider questions of custody of the minor under normal Chapter 50 rules.

As appellant-father acknowledges, the issue of the requested injunction "is entirely subsumed by the trial court's dismissal of [his] custody action." Because we conclude that the trial court must hold the custody action in abeyance, we do not reach the injunction issue.

III. Conclusion

The trial court erred in determining that it lacked subject matter jurisdiction over the custody action while the previously filed adoption proceeding was pending. Therefore, we reverse the trial court's order granting defendants' motion to dismiss and remand to the trial court. Nevertheless, because of the potential for unresolvable conflicts between the two proceedings, the trial court must hold the custody action in abeyance for the duration of the adoption proceeding.

REVERSED and REMANDED.

Judges HUNTER, Robert C. and ERVIN concur.

RAYMOND MALLOY AND LISA MALLOY, PLAINTIFFS
v.
E. MICHAEL PRESLAR AND KATHY N. PRESLAR, INDIVIDUALLY AND D/B/A PRESLAR FARMS, AND TYSON CHICKEN, INC., DEFENDANTS

No. COA12-1523

Filed 2 July 2013

1. Appeal and Error—interlocutory orders and appeals—substantial right

The issue of whether defendants Michael and Kathy Preslar were agents of defendant Tyson thus creating liability arising from the same transaction gave rise to a substantial right and was immediately appealable. With regard to plaintiffs' contentions that Tyson owed a duty to warn of a hazardous condition, and that Tyson owed plaintiff a duty based on their relationship, these claims did not impact a substantial right and were therefore were dismissed.

2. Agency—motion to dismiss—no liability for conditions on real property with no control

The trial court did not err by granting defendant Tyson's motion to dismiss the claim that Tyson was responsible for the hazards

on the land of defendants Michael and Kathy Preslar based upon agency. Even assuming the Preslars were the agents of Tyson, Tyson cannot be held liable for conditions on the real property of the Preslars over which it had no control.

Appeal by plaintiffs from order entered 1 October 2012 by Judge William R. Pittman in Anson County Superior Court. Heard in the Court of Appeals 11 April 2013.

The Law Offices of William K. Goldfarb, by William K. Goldfarb, and The Duggan Law Firm, PC, by Christopher M. Duggan, for plaintiffs-appellants.

McAngus, Goudelock & Courie, PLLC, by John E. Spainhour, for defendant-appellee Tyson Farms, Inc.

STEELMAN, Judge.

We allow plaintiff's appeal to the extent that it affects a substantial right. The portion of plaintiff's appeal that does not affect a substantial right is dismissed. Even assuming that the Preslars were the agents of Tyson, Tyson cannot be held liable for conditions on the real property of the Preslars over which it had no control.

I. Factual and Procedural Background

Raymond Malloy (plaintiff) was employed by Davis Mechanical to deliver feed for defendant Tyson Farms, Inc. (Tyson) to real property owned by Michael and Kathy Preslar, and their company, Preslar Farms (collectively, the Preslars). Plaintiff was required by Tyson to place a delivery ticket, stamped with a seal, in a designated box upon the Preslars' property. After plaintiff delivered the feed on 18 August 2008, he placed the ticket into the box and was stung numerous times by hornets. There was a hornets' nest on the back of the box which plaintiff apparently disturbed when he opened and closed the box. The hornets' stings triggered an allergic reaction, leading to plaintiff suffering respiratory arrest. Plaintiff continues to suffer seizures as a result of the hornets' stings.

On 17 August 2011, plaintiff filed this complaint against Tyson and the Preslars (collectively, defendants), asserting that the Preslars were agents of Tyson, and owed plaintiff a duty to warn of hazardous conditions on their property. Plaintiff seeks monetary damages for personal injuries that he contends were proximately caused by the

negligence of defendants. Plaintiff's wife seeks monetary damages for loss of consortium.

On 27 October 2011, Tyson filed answer to plaintiffs' complaint. On 17 August 2012, Tyson filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Apparently, the Preslars also moved for summary judgment.[1] On 5 October 2012, the trial court entered an order denying the Preslars' motion for summary judgment and dismissing plaintiffs' claims against Tyson. The order does not specify whether the dismissal was with or without prejudice.

Plaintiffs appeal.

II. Interlocutory Appeal

[1] The trial court's order did not dispose of all claims against all parties and is therefore interlocutory. We must first determine whether this interlocutory appeal is properly before us.

A. Standard of Review

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. 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. City of Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

"[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005).

"Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary

1. The Preslars' motion is not part of the record on appeal.

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." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

"Essentially a two-part test has developed – the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. at 726, 392 S.E.2d at 736.

B. Analysis

Plaintiffs contend that their claims against Tyson "involve the same overlapping factual issues that have to be determined in the remaining action against Defendants Preslars." Plaintiffs contend that there is a risk of inconsistent judgments that would affect a substantial right.

We have previously held that the dismissal of a claim "affects a substantial right to have determined in a single proceeding whether plaintiffs have been damaged by the actions of one, some or all defendants where their claims arise upon the same series of transactions." *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 524, 430 S.E.2d 476, 480 (1993). In *Driver*, plaintiff was injured when the aircraft in which he was a passenger lost power and crashed. Plaintiff brought suit against the aircraft's owner, Burlington Aviation, and later was granted leave to add the manufacturer, Cessna, as a third party defendant. Plaintiff's suit against defendants was based on negligence, gross negligence, breach of warranty, strict liability, and intentional and negligent infliction of emotional distress. *Id.* at 521-23, 430 S.E.2d at 479. The trial court granted Cessna's motion to dismiss the claim against it pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim. Plaintiff appealed this order. *Id.* at 523, 430 S.E.2d at 479. We held that the appeal was not premature, due to plaintiff's substantial right to have all matters arising from the crash settled in a single proceeding. *Id.* at 524, 430 S.E.2d at 480.

In the instant case, plaintiffs contend that (1) plaintiffs have stated a cause of action of negligence against Tyson, because Tyson knew of a hazardous condition and failed to warn plaintiff; (2) Tyson owed a duty to plaintiff, just as a contractor owes a duty to warn subcontractors of known dangers; and (3) plaintiffs alleged that the Preslars were agents of Tyson. Of these three contentions, only the third, that the Preslars were agents of Tyson, creates liability arising from the same transaction, which gives rise to a substantial right.

With regard to plaintiffs' contentions that Tyson owed a duty to warn of a hazardous condition, and that Tyson owed plaintiff a duty based on their relationship, we hold that the trial court's dismissal of these claims does not impact a substantial right, and therefore dismiss plaintiffs' appeal as to these claims. With regard to plaintiffs' claim that Tyson is responsible for the Preslars' actions based on a theory of agency, we hold that the trial court's dismissal did impact a substantial right, and address the merits of that portion of plaintiffs' appeal.

III. Agency

[2] In plaintiffs' third argument, plaintiffs contend that the Preslars were agents of Tyson, that Tyson was responsible for the hazards on the Preslars' land, and that the trial court erred in granting Tyson's motion to dismiss. We disagree.

A. Standard of Review

> 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). "[D]espite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6)." *Id.* at 204, 254 S.E.2d at 626.

"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 considering a motion to dismiss for failure to state a claim upon which relief can be granted, "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 613, 646 S.E.2d 826, 837 (2007) (quoting *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)).

B. Analysis

In *Lampkin v. Housing Management Resources, Inc.*, ___ N.C. App. ___, 725 S.E.2d 432, *disc. review denied*, ___ N.C. ___, 731 S.E.2d 147 (2012), the plaintiff, four years old and playing in a common area of defendants' apartment complex, passed through a broken section of fence on defendants' property, and crawled onto adjoining property that was not owned by defendants. There, plaintiff crawled onto a frozen pond. The ice broke, plaintiff fell into the pond, and plaintiff suffered serious and permanent injuries. Plaintiff's complaint alleged that defendants breached their duty to maintain a barrier between their property and the pond. Defendants moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6). The trial court granted defendants' motion. *Id.* at ___, 725 S.E.2d at 433-34. On appeal, we affirmed the ruling of the trial court:

> Plaintiffs contend that a similar, reciprocal duty should be imposed on landowners whose property abuts property on which a third party maintains a pond, *viz.*, where a landowner knows that children from his property are gathering and playing on or near a dangerous condition on neighboring property, the landowner has a duty to protect those children from injury by that condition. We disagree with Plaintiffs' contention that a landowner's duty of reasonable care extends to guarding against injury caused by a dangerous condition on neighboring property, and we conclude that the imposition of such a duty would be contrary to public policy and the established law of this State.

Id. at ___, 725 S.E.2d at 434. We further observed that:

> In our view, the foregoing authority clearly establishes that a landowner's duty to keep property safe (1) does not extend to guarding against injuries caused by dangerous conditions located off of the landowner's property, and (2) coincides exactly with the extent of the landowner's control of his property. As such, because Defendants did not control the pond on the adjacent property, their duty to keep their premises safe did not include an obligation to make the pond safe by preventing children on their land from accessing the pond. Rather, the adjacent landowner, with exclusive control over the pond, had the sole duty to keep the pond safe, the only obligation to act, and the only possible liability. *See Green*, 305 N.C. at 612, 290 S.E.2d at 599. Defendants' duty to keep Lampkin and other children

> safe could have only applied when those children were on Defendants' land and ended where Defendants' ownership and control of their property ended.

Id. at ___, 725 S.E.2d at 435-36 (footnotes omitted). We held that plaintiff's complaint failed to sufficiently allege that defendants breached a duty owed to plaintiff, and that plaintiff failed to allege a *prima facie* claim of negligence. The trial court's dismissal of plaintiff's complaint was affirmed. *Id.* at ___, 725 S.E.2d at 439.

In the instant case, plaintiffs' complaint states explicitly that the hazard which caused plaintiff's injury occurred on the Preslars' land, not on Tyson's. In accordance with our decision in *Lampkin*, any obligation Tyson had to keep its property safe ended where its ownership and control of its property ended. Tyson could not, under North Carolina law, be held liable for the Preslars' alleged failure to maintain their property. We hold that plaintiffs' complaint failed to allege a *prima facie* claim of negligence. The trial court did not err in granting Tyson's motion to dismiss the claim based upon agency.

This argument is without merit.

DISMISSED IN PART, AFFIRMED IN PART.

Judges ELMORE and STROUD concur.

MCKINNON v. CV INDUS., INC.

[228 N.C. App. 190 (2013)]

BOBBY E. MCKINNON, PLAINTIFF
v.
CV INDUSTRIES, INC., DEFENDANT

No. COA12-1165

Filed 2 July 2013

1. Pleadings—Rule 11—motion for attorney fees—denied

The trial court correctly denied plaintiff's motion for attorney fees under N.C.G.S. § 1A-1, Rule 11 in an action arising from plaintiff's departure from defendant's business and plaintiff's new business activities. Plaintiff's motion concerned defendant's counterclaim for breach of the severance agreement, which was dropped after plaintiff's reply referred to a letter releasing plaintiff from his agreement concerning certain patents. There were findings that the counterclaim was based on the company files and the severance agreement, that the letter had been forgotten, and those findings supported the trial court's conclusion.

2. Appeal and Error—preservation of issues—passing reference

Plaintiff abandoned issues concerning attorney fees under N.C.G.S. § 6-21.5 and N.C.G.S. § 1D-45 by making only a passing reference to those statutes in this brief rather than a specific argument.

3. Appeal and Error—preservation of issues—no specific argument

Defendant abandoned a challenge to the trial court's refusal to award attorney fees under N.C.G.S. § 1A-1, Rule 11 where defendants' briefs did not contain specific arguments challenging that determination.

4. Attorney Fees—incurred on appeal—not supported by statute

N.C.G.S. § 6-21.5 may only encompass attorney fees incurred at the trial level and could not support an award of attorney fees incurred in an appeal.

5. Attorney Fees—findings—not sufficient

An award of attorney fees under N.C.G.S. § 76-16.1(2) was remanded where the facts could be sufficient to award attorney fees, but the trial court did not make specific findings that the action was specific and malicious or on the reasonableness of the award.

6. Costs—miscalculated—remanded

An award of costs under N.C.G.S. § 6-20 was remanded where the court miscalculated the costs in a portion of its order.

Appeal by plaintiff and cross-appeal by defendant from order entered 11 June 2012 by Judge James L. Gale in Catawba County Superior Court. Heard in the Court of Appeals 26 February 2012.

C. Gary Triggs, P.A., by C. Gary Triggs, for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by William L. Rikard, Jr. and James C. Lesnett, Jr., for defendant-appellee.

DAVIS, Judge.

Plaintiff Bobby E. McKinnon ("plaintiff" or "McKinnon") appeals from the trial court's order denying his motion for attorney's fees and awarding attorney's fees and costs to defendant CV Industries, Inc. ("defendant" or "CVI"). Defendant cross-appeals. After careful review, we affirm in part and remand in part.

Factual Background

This case is before this Court for the second time. The facts surrounding this action are set out more fully in *McKinnon v. CV Indus., Inc.*, ___ N.C. App. ___, 713 S.E.2d 495 (2011) ("*McKinnon I*") but are summarized in pertinent part as follows:

CVI is a holding company comprised of Century Furniture, LLC ("Century") and Valdese Weavers, LLC ("Valdese"). Plaintiff is a former employee of CVI. He became president of Valdese in 1978 and continued in various managerial and executive capacities for CVI and its subsidiaries throughout his career. Plaintiff was serving as the president and CEO of CVI in 2000 when he announced his decision to resign in order to pursue a career opportunity at Joan Fabrics and Mastercraft.

After plaintiff announced his resignation, plaintiff and CVI negotiated a severance agreement entitling plaintiff to benefits from certain incentive plans that he had obtained throughout the course of his employment with CVI. Plan A of the severance agreement provided plaintiff with a type of benefits known as shadow equity benefits "once he disengaged from continuous competition with CVI, as long as CVI's ESOP [Employee Stock Ownership Program] stock price exceeded its 31 December 1999 price of $9.90 per share [on the date plaintiff

stopped competing with CVI]." *McKinnon I*, ___ N.C. App. at ___, 713 S.E.2d at 498.

The severance agreement also required plaintiff to refrain from acquiring the patents or research of Frank Land ("Land"), who was developing a fire-resistant yarn funded by Valdese. When Valdese discontinued funding for Land's research in October 2001, Land approached plaintiff about a potential joint business venture. Plaintiff requested — and obtained — a letter from CVI dated 20 November 2001 releasing him from his agreement to refrain from acquiring Land's patents or research. He then resigned from his position to begin a joint venture with Land in late 2001.

On 23 June 2008, plaintiff notified defendant that he intended to withdraw from continuous competition with CVI and acquire his Plan A benefits. Back in March 2002, CVI had hired outside auditors to examine its financial statements. The auditors determined at that time that defendant "no longer needed to categorize Plaintiff's Plan A benefits as a liability, since, after leaving Joan Fabrics, Plaintiff was no longer in continuous competition with CVI and at that time CVI's ESOP price had not exceeded its 31 December 1999 value." *Id.* at ___, 713 S.E.2d at 499. CVI, therefore, sent plaintiff a letter informing him that it did not owe him the Plan A benefits because plaintiff had previously ceased competition with CVI at a time when CVI's stock price was below its 31 December 1999 value.

On 11 March 2009, plaintiff filed a complaint in Catawba County Superior Court alleging that by failing to pay him the Plan A benefits under his severance agreement, defendant had (1) breached its contract with plaintiff; (2) engaged in fraud and misrepresentation; and (3) engaged in unfair and deceptive practices in violation of N.C. Gen. Stat. § 75-1.1 ("Chapter 75") based on fraud and misrepresentation. The matter was designated a complex business case and assigned to the Honorable Ben F. Tennille.

Defendant filed an answer denying plaintiff's allegations along with a counterclaim alleging that plaintiff had breached the severance agreement by acquiring patents owned by Land. Plaintiff submitted a reply in response to the counterclaim in which he referenced the 20 November 2001 letter releasing him from his agreement to forego acquiring Land's patents. Defendant subsequently filed an amended answer omitting its counterclaim.

After the parties engaged in discovery, defendant filed a motion for summary judgment with respect to all of plaintiff's claims, and the motion was granted in its entirety by Judge Tennille. Plaintiff appealed, and this Court affirmed Judge Tennille's order in *McKinnon I*. Plaintiff

then filed a petition for discretionary review with the Supreme Court of North Carolina, which was denied. *McKinnon v. CV Indus., Inc.*, 365 N.C. 353, 718 S.E.2d 376 (2011).

Both plaintiff and defendant subsequently filed motions in the trial court to recover attorney's fees and costs. After a hearing on the parties' cross-motions, the Honorable James L. Gale[1] issued an order on 11 June 2012 (1) denying plaintiff's motion for attorney's fees; (2) awarding CVI $40,000 in attorney's fees for fees incurred after Judge Tennille's entry of summary judgment; and (3) awarding CVI costs totaling $16,798.36. Both parties appealed Judge Gale's order.

Analysis

I. Denial of Attorney's Fees to Plaintiff

[1] Plaintiff contends that the trial court erred in determining that he was not entitled to attorney's fees pursuant to (1) Rule 11 of the North Carolina Rules of Civil Procedure; (2) N.C. Gen. Stat. § 1D-45; or (3) N.C. Gen. Stat. § 6-21.5.

A. Rule 11

Rule 11 states, in pertinent part, as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry that it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. R. Civ. P. 11(a). If a pleading, motion, or paper is signed in violation of Rule 11, "the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction, which may include an order to pay the other party . . . reasonable expenses . . . including a reasonable attorney's fee." *Id.*

1. Upon Judge Tennille's retirement, the case was reassigned to Judge Gale.

It is well established that analysis under Rule 11 is three-pronged, requiring the trial court to determine whether the pleading, motion, or paper is (1) factually sufficient; (2) legally sufficient; and (3) not filed for an improper purpose. *In re Will of Durham*, 206 N.C. App. 67, 71, 698 S.E.2d 112, 117 (2010). "A violation of any one of these requirements mandates the imposition of sanctions under Rule 11." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994).

Factual sufficiency is determined by conducting a two-step inquiry, whereby the court examines "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *McClerin v. R-M Indus., Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995).

Legal sufficiency also involves a two-step analysis. First, the court must ask if the pleading or motion is facially plausible. *Mack v. Moore*, 107 N.C. App. 87, 91, 418 S.E.2d 685, 688 (1992). If so, "the inquiry is complete, and sanctions are not proper." *Id.* If the document is not facially plausible, the trial court must then ask "(1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, [he] formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed." *Id.* "Rule 11 sanctions are appropriate where the offending party either failed to conduct a reasonable inquiry into the law or did not reasonably believe the paper was warranted by existing law." *Ward v. Jett Props., LLC*, 191 N.C. App. 605, 608, 663 S.E.2d 862, 864 (2008).

Finally, the trial court must determine whether the pleading or motion was filed for an improper purpose. "An improper purpose is any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689 (citation and quotation marks omitted).

Our Supreme Court has articulated the following standard of appellate review of a trial court's ruling on a Rule 11 motion:

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination,

> (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

Plaintiff contends that Rule 11 sanctions were appropriate in this case because CVI "knew or by reasonable diligence should have known of the existence of the [20 November 2001] letter specifically authorizing the involvement of the Plaintiff with Land." Plaintiff argues that CVI's counterclaim against him was frivolous and caused him to incur substantial legal expenses in combating defendant's assertions. The trial court determined that Rule 11 sanctions against CVI were not mandated based on the following findings of fact:

> [49] CVI admits that the letter existed but was not found prior to the counterclaim being filed. CVI's Chief Financial Officer, Richard Reese, stated in his deposition that he reviewed the Agreement and searched his files relating to McKinnon prior to filing the counterclaim. [Alexander] Shuford, the author of the letter to McKinnon, also stated in his deposition that he did not recall the letter as it had been written several years prior. Not having found anything releasing McKinnon from the clause in the Agreement prohibiting him from working with the Land Patent after reviewing files, CVI filed the counterclaim believing it had a basis to do so. The court concludes that CVI made a reasonable inquiry into the facts supporting their breach of contract counterclaim.
>
> [50] The counterclaim does not fail the legal sufficiency standard. It is plausible on its face. But for the letter, McKinnon's involvement with the Land Patent would plainly support a claim for breach of contract.
>
> [51] There is no evidence to support a finding that CVI filed its counterclaim for any improper purpose. The prompt dismissal after notice of the letter suggests otherwise.

These findings of fact are supported by competent evidence in the record. In his deposition, Reese, the chief financial officer of CVI,

testified that after reviewing his files and plaintiff's severance agreement, he based the counterclaim on the information contained therein — namely, the provision in the severance agreement forbidding plaintiff from acquiring Land's patents or research. Shuford, the current president and chief executive officer of CVI and the author of the 20 November 2001 letter, was also deposed. He testified that he had forgotten that the letter existed because it had been written eight or nine years earlier. He further testified that CVI "would not have filed the [counterclaim] if he — if we had known that letter was in existence." Furthermore, it is undisputed that upon plaintiff's filing of a reply to the counterclaim in which plaintiff referenced the 20 November 2001 letter from Shuford, defendant promptly filed an amended answer omitting the counterclaim.

We conclude that findings of fact 49-51 support the trial court's conclusions that defendant's counterclaim was (1) factually sufficient; (2) legally sufficient; and (3) not filed for an improper purpose. Moreover, these findings are based on competent evidence in the record. Accordingly, we affirm the trial court's denial of plaintiff's motion for attorney's fees under Rule 11.

B. N.C. Gen. Stat. § 6-21.5 and N.C. Gen. Stat. § 1D-45

[2] While attorney's fees may, in appropriate circumstances, also be awarded pursuant to N.C. Gen. Stat. § 6-21.5 and N.C. Gen. Stat. § 1D-45, the trial court declined to award such fees to plaintiff under either of these statutory provisions. Although plaintiff makes a passing reference to these statutes in his brief, he makes no specific argument that the trial court erred in denying his motion for attorney's fees under them. We therefore deem these issues abandoned. *See Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 402 n.2, 653 S.E.2d 181, 184 n.2 (2007) (treating issue referenced in brief but not argued as abandoned), *disc. review denied*, 362 N.C. 361, 663 S.E.2d 316 (2008); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.")

II. Award of Attorney's Fees and Costs to Defendant

[3] Plaintiff and defendant both raise arguments on appeal regarding the trial court's award to defendant of $40,000 in attorney's fees. Plaintiff argues that the trial court erred in awarding any attorney's fees at all to CVI. Defendant, conversely, claims that the trial court abused its discretion both in (1) limiting its recoverable attorney's fees solely to those incurred after the entry of summary judgment by Judge Tennille; and (2) awarding a sum substantially less than the total amount of attorney's fees incurred by CVI after summary judgment was entered.

In *McKinnon I*, we determined that the trial court properly granted defendant's motion for summary judgment as there were no genuine issues of material fact relating to any of plaintiff's claims against CVI. ___ N.C. App. at ___, 713 S.E.2d at 500. Specifically, we held that plaintiff was no longer "competing" with CVI when he began his business venture with Land because competition "entail[s] more than mutual existence in a common industry or marketplace; rather, it requires an endeavor among business entities to seek out similar commercial transactions with similar clientele." *Id.* at ___, 713 S.E.2d at 501.

Plaintiff's and Land's companies produced flame-resistant yarn for fabric manufacturing, and their clientele was made up of yarn and fabric manufacturers. CVI, conversely, produced jacquard fabric and finished furniture, and their clients consisted of furniture manufacturers and consumers. *Id.* at ___, 713 S.E.2d at 502. Thus, we concluded that "Plaintiff and CVI were not in competition as they did not seek to sell similar goods or provide similar services to similar clientele." *Id.* at ___, 713 S.E.2d at 502. As such, plaintiff was not entitled to the Plan A benefits because he had ceased continuous competition with defendant at a time when the stock price was below its 31 December 1999 value.

In its motion for attorney's fees and costs, defendant contended that an award of attorney's fees in its favor pursuant to Rule 11 was warranted because plaintiff's assertion that he was in continuous competition with CVI until 2008 was factually and legally baseless.

Although it characterized its decision as "a close call," the trial court ultimately declined to award sanctions under Rule 11. Defendant's briefs to this Court do not contain specific arguments challenging Judge Gale's determination under Rule 11, and we therefore deem that issue abandoned. N.C. R. App. P. 28(b)(6). The trial court determined, however, that an award of attorney's fees to defendant was appropriate under either N.C. Gen. Stat. § 6-21.5 or N.C. Gen. Stat. § 75-16.1 and explained its award using both statutory frameworks. Accordingly, we must analyze defendant's entitlement to attorney's fees under both of these statutes.

A. N.C. Gen. Stat. § 6-21.5

[4] When reviewing an award of attorneys' fees under section 6-21.5, this Court must review all relevant pleadings and documents of a case in order to determine if either: (1) the pleadings contain a complete absence of a justiciable issue of either law or fact, or (2) whether the losing party persisted in litigating the case after a point where he should reasonably

> have become aware that the pleading he filed no longer contained a justiciable issue.

Credigy Receivables, Inc. v. Whittington, 202 N.C. App. 646, 652, 689 S.E.2d 889, 893 (2010) (citation and quotation marks omitted).

In its order, the trial court determined that the award of attorney's fees to defendant became appropriate only after plaintiff continued to pursue this litigation after the entry of summary judgment against him. The trial court, therefore, purported to base its award on fees that were incurred by defendant (1) in connection with plaintiff's first appeal to this Court in *McKinnon I*; and (2) in opposing plaintiff's ensuing petition for discretionary review by the Supreme Court.

We have previously held, however, that the application of N.C. Gen. Stat. § 6-21.5 is "confined to the trial division" and that, consequently, awards of attorney's fees pursuant to § 6-21.5 may *only* encompass fees incurred at the trial level. *Hill v. Hill*, 173 N.C. App. 309, 321, 622 S.E.2d 503, 511 (2005) (holding that trial court committed reversible error in awarding attorney's fees pursuant to § 6-21.5 that were incurred by prevailing party in connection with plaintiff's prior appeal), *appeal dismissed and disc. review denied*, 360 N.C. 363, 629 S.E.2d 851 (2006). For this reason, we conclude that § 6-21.5 cannot support the trial court's award of attorney's fees to defendant on these facts.

B. N.C. Gen. Stat. § 75-16.1

[5] We next determine whether the award of attorney's fees was appropriate under the trial court's alternate statutory basis — N.C. Gen. Stat. § 75-16.1. N.C. Gen. Stat. § 75-16.1 authorizes an award of attorney's fees to the prevailing party in a suit alleging a Chapter 75 violation[2] if the trial court finds that either:

> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such a party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1(1)-(2) (2011).

---

2. While plaintiff asserted claims against defendant on several different theories, an award of attorney's fees pursuant to § 75-16.1 would apply only to plaintiff's Chapter 75 claim.

In the present case, the trial court's award was issued pursuant to § 75-16.1(2). As quoted above, this statutory provision allows a trial court to award attorney's fees to a prevailing defendant if the plaintiff knew, or should have known, the action was frivolous and malicious. N.C. Gen. Stat. § 75-16.1(2). "A claim is frivolous if a proponent can present no rational argument based upon the evidence or law in support of [it]. A claim is malicious if it is wrongful and done intentionally without just cause or excuse or as a result of ill will." *Blyth v. McCrary*, 184 N.C. App. 654, 663 n.5, 646 S.E.2d 813, 819 n.5 (2007) (internal citations and quotation marks omitted).

Unlike N.C. Gen. Stat. § 6-21.5, application of N.C. Gen. Stat. § 75-16.1 is not confined solely to the trial level, and a trial court may award attorney's fees under § 75-16.1 for "services rendered at all stages of the litigation[,]" including appeals. *Shepard v. Bonita Vista Prop., L.P.*, 191 N.C. App. 614, 627, 664 S.E.2d 388, 396 (2008) (citation and quotation marks omitted), *aff'd per curiam*, 363 N.C. 252, 675 S.E.2d 332 (2009).

> The decision whether or not to award attorney fees under section 75-16.1 rests within the sole discretion of the trial [court]. And if fees are awarded, the amount also rests within the discretion of the trial court . . . . *However, when awarding fees pursuant to N.C. Gen. Stat. § 75-16.1, the court must make specific findings of fact* . . . .

Blankenship v. Town & Country Ford, Inc., 174 N.C. App. 764, 771, 622 S.E.2d 638, 643 (2005) (emphasis added).

If, as here, the defendant is the prevailing party, the trial court must make findings that (1) the plaintiff "knew, or should have known, the action was frivolous and malicious"; and (2) the attorney's fee awarded is reasonable. N.C. Gen. Stat. § 75-16.1(2). *See Birmingham v. H & H Home Consultants & Designs, Inc.*, 189 N.C. App. 435, 443, 658 S.E.2d 513, 519 (2008) ("The standard for awarding attorney's fees under N.C. Gen. Stat. § 75-16.1(2) is that the plaintiff 'knew or should have known, the action was frivolous and malicious.' "); *Barbee v. Atl. Marine Sales & Serv., Inc.*, 115 N.C. App. 641, 648, 446 S.E.2d. 117, 122 (holding that when awarding attorney's fees under § 75-16.1 "[t]he court must make specific findings of fact . . . that the attorney's fee was reasonable"), *disc. review denied*, 337 N.C. 689, 448 S.E.2d 516 (1994).

Based on our review of the record, we agree that the facts presented here could be sufficient to support an award of attorney's fees under § 75-16.1(2). However, the trial court's order did not make specific findings — as it was required to do under § 75-16.1 — that plaintiff knew

or should have known that the action was frivolous and malicious. *Birmingham*, 189 N.C. App. at 443, 658 S.E.2d at 519.

Judge Gale's order noted that Judge Tennille had (1) "cautioned McKinnon that he was exposed to potential attorneys' fees by continuing to pursue a Chapter 75 claim when the only nexus to 'commerce' was the Agreement formed between a company and its employee"; and (2) determined that summary judgment was appropriate because Chapter 75 "does not reach 'conduct solely related to the internal operation of a single business.' "

Judge Gale further noted in his findings that (1) "[u]nquestionably . . . McKinnon was seeking to sail on a slender reed" and that "the claim for promissory fraud [upon which the Chapter 75 claim was based] was clearly a strained and weak one when it was first filed"; and (2) despite "being given every opportunity to do so through the summary judgment process, McKinnon could marshal no evidence that even colorably supported a promissory fraud or Chapter 75 claim." While these findings may be sufficient to support an ultimate finding that plaintiff knew or should have known that his Chapter 75 claim against defendant was frivolous and malicious, the trial court's order lacks such an ultimate finding.

Furthermore, in addition to lacking a finding on the ultimate issue of whether plaintiff knew or should have known that his Chapter 75 claim was frivolous and malicious, the order also lacks the requisite findings of fact regarding the reasonableness of the award. In order for this Court to review whether a trial court's award of attorney's fees was reasonable, the trial court must make findings supporting its award, including "findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney." *Shepard*, 191 N.C. App. at 626, 664 S.E.2d at 396 (citation and quotation marks omitted). "Failure to make findings of fact requires remand in order for the trial court to resolve any disputed factual issues [unless] the record reveals no evidence to support an award [under § 75-16.1]." *Blyth*, 184 N.C. App. at 664, 646 S.E.2d at 820 (citation and quotation marks omitted).

Here, the trial court's finding explaining its award of $40,000 in attorney's fees merely stated that

> [t]he court has carefully reviewed the time and extent of CVI's legal expenses. While the amount awarded is substantially less than the $322,151.07 CVI seeks . . . the court in its discretion concludes that CVI should be awarded

> $40,000 in fees. This again appears to be less than the amount CVI actually expended in defending the case after the entry of summary judgment.

The order does not address at all (1) the skill required to perform the services rendered; (2) customary fees for similar work; and (3) the experience or ability of defendant's attorneys. Furthermore, it addresses only superficially the time and labor actually expended by defendant's attorneys in defending the appeal in *McKinnon I*. "Without these findings, we are unable to determine the reasonableness of the trial court's award." *Printing Serv. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 82, 637 S.E.2d 230, 237 (2006), *aff'd per curiam*, 361 N.C. 347, 643 S.E.2d 586 (2007).

In concluding that the trial court's findings regarding the reasonableness of the award are insufficient and require remand, we are guided by our decisions in *Shepard* and *Printing Services of Greensboro*. In *Shepard*, we held that the findings contained in the trial court's order listing the hours expended by the prevailing party's counsel and stating that the award of attorneys' fees was reasonable "considering the time and labor expended, the skill required to perform the legal services that were rendered, and the experience and ability of [trial counsel]" were inadequate. *Shepard*, 191 N.C. App. at 626-27, 664 S.E.2d at 396. We directed the trial court to make more detailed findings regarding the reasonableness of the amount of fees awarded on remand – including findings as to the skill required to perform the legal services and the experience and ability of trial counsel. *Id.*

In *Printing Services of Greensboro*, we likewise remanded the trial court's order awarding attorney's fees for additional findings of fact as to the reasonableness of the award because the order's description of the prevailing party's attorney's hourly billing rates did not contain findings regarding the time actually expended, customary fees for like work, or the experience and ability of the party's attorney. *Printing Serv. of Greensboro*, 180 N.C. App. at 82, 637 S.E.2d at 237. As in *Shepard* and *Printing Services of Greensboro*, the trial court's order here must similarly be remanded in order for the trial court to make the requisite findings of fact regarding the reasonableness of the award of attorney's fees.

In sum, we conclude that (1) N.C. Gen. Stat. § 6-21.5 does not serve as a proper basis for the award of attorney's fees to defendant because that statute does not permit an award of fees incurred in connection with the appeal in *McKinnon I*; and (2) this case must be remanded for the trial court to (a) make an ultimate finding as to whether plaintiff

knew or should have known that the assertion — or continued prosecution after summary judgment was entered — of his Chapter 75 claim was frivolous and malicious so as to support the award of attorney's fees under N.C. Gen. Stat. § 75-16.1, and, if so, (b) make additional findings of fact concerning the reasonableness of the award of attorney's fees based on the criteria set out above.

III. Award of Costs to Defendant

[6] In addition to awarding attorney's fees to defendant, the trial court also awarded costs pursuant to N.C. Gen. Stat. § 6-20. Section 6-20 authorizes a trial court to award costs to a prevailing party — in the court's discretion — "subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d)." N.C. Gen. Stat. § 6-20 (2011). The expenses enumerated in § 7A-305(d) constitute a "complete and exhaustive" list. N.C. Gen. Stat. § 7A-305(d) (2011). Pursuant to these statutory provisions, the trial court awarded costs to defendant for expenses incurred in connection with deposition transcripts, transcripts of in-court proceedings, and mediator fees.

While we believe these costs are authorized under the above-referenced statutes, we note that the trial court appears to have made a mathematical miscalculation in its award of costs. It calculated awardable costs of $8,399.18 – an amount equal to the sum of $7,321.80 in court reporter fees for deposition transcripts, $377.38 in court reporter fees for the transcription of oral arguments, and $700 in mediator fees. Later, however, in the decretal portion of the order, the trial court ordered an award of $16,798.36 — a sum that is the total of $8,399.18, $7,321.80, $377.38, and $700. Thus, it appears that in this portion of the order, the trial court inadvertently treated the total allowable costs ($8,399.18) as a separate allowable cost rather than as the sum of each of the separately allowable costs. On remand, the trial court is directed to reexamine its calculation of costs accordingly.

Conclusion

For the reasons stated above, we affirm the trial court's order in part and remand in part.

AFFIRMED IN PART; REMANDED IN PART.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
COREY LEIGHANN NOLEN

No. COA13-132

Filed 2 July 2013

Probation and Parole—revocation of probation—Justice Reinvestment Act—revocation improper

The trial court erred by revoking defendant's probation in light of the changes wrought by the Justice Reinvestment Act (JRA). Defendant had not committed a new crime and was not subject to the new absconding condition codified by the JRA in N.C.G.S. § 15A-1343(b)(3a). Furthermore, defendant had served no prior confinements in response to violations (CRVs) under N.C.G.S. § 15A-1344(d2). The judgment entered upon revocation of defendant's probation was reversed.

Appeal by Defendant from judgment entered 26 September 2012 by Judge Hugh B. Lewis in Gaston County Superior Court. Heard in the Court of Appeals 24 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Phyllis Tranchese, for the State.

Don Willey for Defendant.

STEPHENS, Judge.

Background

Corey Leighann Nolen ("Defendant") appeals from a judgment entered upon revocation of her probation. Because the trial court lacked statutory authority to revoke Defendant's probation in response to the violation alleged in the probation officer's report, we reverse the judgment and remand for further proceedings.

On 13 April 2010, Defendant pled guilty to attempted trafficking in opiates by sale and attempted trafficking in opiates by delivery. The trial court consolidated the offenses for judgment, suspended a prison sentence of 14 to 17 months, and placed Defendant on supervised probation for 28 months. A violation report filed 29 June 2012 charged that Defendant violated the following regular condition of probation:

"Remain within the jurisdiction of the [c]ourt unless granted written permission to leave by the [c]ourt or the probation officer[.]" *See* N.C. Gen. Stat. § 15A-1343(b)(2) (2011). The report alleged that Defendant was not present at her last known address when her probation officer attempted a home contact on 15 June 2012 and that she had "made her whereabouts unknown to probation, therefore absconding supervision." A second violation report filed the same day charged Defendant with failure to satisfy the monetary conditions of probation.

At a hearing held 26 September 2012, Defendant admitted to the alleged violations and asked the court to "do some sort of CRV"[1] in lieu of revoking her probation. Instead, the court revoked Defendant's probation and activated her suspended sentence of 14 to 17 months of imprisonment.

Defendant filed timely notice of appeal from the judgment. Because her notice of appeal lacked proof of service upon the State, as required by our appellate rules, she has since filed a petition for a writ of *certiorari* in this Court as an alternative basis for appellate review, alleging that her notice of appeal was defective through no fault of her own. *See* N.C.R. App. P. 21(a)(1). Despite Defendant's failure to offer evidence of service of process, the State did not move to dismiss Defendant's appeal and has actively participated in this case — properly filing its brief after Defendant filed hers and responding to Defendant's petition for *certiorari* in a timely manner. In that response, the State further contends that "[w]hether to allow the [p]etition is within this Court's discretion." Therefore, we dismiss the petition and consider the merits of Defendant's direct appeal. *See Hale v. Afro-American Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (reversing dismissal of the defendant's appeal on grounds that the plaintiff "waived service of notice of appeal" by failing to raise the issue "by motion or otherwise and by participating without objection in the appeal").

Discussion

Defendant claims the trial court lacked statutory authority to revoke her probation based on the violations alleged by her probation officer. She notes that her violations occurred after the effective date of the Justice Reinvestment Act of 2011 ("JRA"), which placed limits on the court's authority to revoke probation for violations occurring on or

1. A CRV is a "confinement in response to violations" and is provided for in N.C. Gen. Stat. § 15A-1344(d2) (2011).

after 1 December 2011. *See* 2011 N.C. Sess. Laws 192, sec. 4. Defendant further asserts that the trial court erroneously found her in violation of a condition of probation enacted by the JRA in N.C. Gen. Stat. § 15A-1343(b)(3a), which "was not in existence when the trial court originally sentenced her in 2010."

The enactment of the JRA brought two significant changes to North Carolina's probation system. First, for probation violations occurring on or after 1 December 2011, the JRA limited trial courts' authority to revoke probation to those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of CRV under N.C. Gen. Stat. § 15A-1344(d2). *See* N.C. Gen. Stat. § 15A-1344(a). For all other probation violations, the JRA authorizes courts to alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or impose a CRV in accordance with N.C. Gen. Stat. 15A-1344(d2), but not to revoke probation. *Id.*

Second, "the JRA made the following a regular condition of probation: 'Not to abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer.' " *State v. Hunnicutt*, __ N.C. App. __, __, 740 S.E.2d 906, 910 (2013) (quoting N.C. Gen. Stat. § 15A-1343(b)(3a)).

> The JRA initially made both provisions effective for probation violations occurring on or after 1 December 2011. *See* 2011 N.C. Sess. Laws 192, sec. 4.(d). The effective date clause was later amended, however, to make the new absconding condition applicable only to *offenses* committed on or after 1 December 2011, while the limited revoking authority remained effective for probation violations occurring on or after 1 December 2011. *See* 2011 N.C. Sess. Laws 412, sec. 2.5.

Id. at __, 740 S.E.2d at 911 (emphasis in original).

The judgment entered by the trial court herein includes the finding that Defendant willfully violated probation as alleged in the violation reports. The court also found that revocation of probation was authorized "for the willful violation of the condition(s) that [Defendant] not commit any criminal offense, [N.C. Gen. Stat. §] 15A-1343(b)(1), or abscond from supervision, [N.C. Gen. Stat. §] 15A-1343(b)(3a)[.]" *See* 2011 N.C. Sess. Laws 192, sec. 4(b), (d). This finding is erroneous.

The State neither alleged nor proved that Defendant had committed a new crime. Further, the underlying offenses were committed in 2010 — when Defendant was not yet subject to the new absconding condition of probation set out in N.C. Gen. Stat. § 15A-1343(b)(3a). *See Hunnicutt*, __ N.C. App. at __, 740 S.E.2d at 910–11. Although the probation officer used the term "absconding" to describe Defendant's noncompliance with the regular condition of probation under N.C. Gen. Stat. § 15A-1343(b)(2) (requiring the defendant to "[r]emain within the jurisdiction of the Court unless granted written permission to leave"), the trial court's limited revoking authority under the JRA does not include this section 15A-1343(b)(2) condition.

The record establishes that Defendant violated only the condition of probation under N.C. Gen. Stat. § 15A-1343(b)(2) and the monetary conditions under N.C. Gen. Stat. § 15A-1343(b). She did not commit a new crime and was not subject to the new absconding condition codified by the JRA in N.C. Gen. Stat. § 15A-1343(b)(3a). In addition, the violation reports show that Defendant had served no prior CRVs under N.C. Gen. Stat. § 15A-1344(d2). Therefore, in light of the changes wrought by the JRA, her probation could not be revoked. *See* N.C. Gen. Stat. § 15A-1344(a).

The judgment entered upon revocation of probation is hereby reversed. We remand to the trial court for entry of an appropriate judgment for Defendant's admitted probation violations consistent with the provisions of N.C. Gen. Stat. § 15A-1344.

REVERSED and REMANDED for further proceedings.

Judges McGEE and ELMORE concur.

STATE v. HANIF

[228 N.C. App. 207 (2013)]

STATE OF NORTH CAROLINA
v.
KINGG ERIC MARKEE HANIF

No. COA12-1108

Filed 2 July 2013

1. Evidence—counterfeit controlled substance—visual identification

The trial court committed plain error in a prosecution involving a counterfeit controlled substance by admitting testimony from a forensic chemist about the identity of the substance where the testimony was based upon a visual inspection rather than a scientific, chemical analysis. There was no meaningful distinction between this case and *State v. Ward*, 364 N.C 133.

2. Drugs—counterfeit controlled substance—improper identification of substance—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss charges involving a counterfeit controlled substance for insufficient evidence, even though the identification of the substance was erroneously admitted, because the appellate court is required to consider both competent and incompetent evidence in evaluating the sufficiency of the evidence.

3. Evidence—common plan or scheme—counterfeit drug sales—additional uncharged substance

In a case decided on other grounds, there was no plain error in a prosecution involving counterfeit controlled substances in the admission of testimony about an additional rock-like substance for which defendant was not charged and which was determined to be Epsom salt. The Espom salt and an officer's testimony about his observations were relevant in that they had a tendency to make the existence of defendant's possession and sale of a counterfeit controlled substance more likely and were probative of defendant's intent, plan, scheme, and *modus operandi*.

4. Arrest—procedure—defendant's statements to magistrate—admissible

In a case decided on other grounds, there was no plain error in the admission of statements defendant made before a magistrate. Although defendant argued that the statements were presented to cast him in a negative light for his violent and disrespectful behavior,

the testimony described part of the arrest procedure and related to defendant's guilt of the offenses with which he had been charged.

Appeal by defendant from judgment entered 29 March 2012 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 27 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Phyllis Tranchese, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

Where we are unable to discern any meaningful distinction between *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), and the instant case, we are compelled to grant defendant a new trial.

On 26 September 2011, defendant was indicted on charges of selling and delivering a counterfeit controlled substance, namely tramadol hydrochloride, which defendant represented to be Vicodin, a Schedule III controlled substance.[1] Each of the charges stemmed from events, which occurred on 3 August 2011. Detectives with the Winston-Salem Police Department, assigned to the Special Investigations Division Vice/Narcotics Unit were working undercover when they were approached by defendant who asked one of the undercover detectives if he wanted to buy some Vicodin. A negotiation ensued, and defendant agreed to sell the detective two pills for four dollars. The detective later testified that defendant pulled from his pants pocket a prescription pill bottle, poured out two pills, and handed them to the detective. Incident to his arrest, defendant was searched and along with two prescription medication bottles – one containing defendant's personal prescription for tramadol hydrochloride – the officers discovered a clear plastic baggie containing a rock-like substance later determined to be Epsom salt.

Defendant filed a motion in limine to exclude the Epsom salt as well as statements he made before a magistrate, arguing that the baggie of Epsom salt and the statements were irrelevant to the charges and inadmissible at trial. Trial commenced during the 26 March 2012 Criminal Session of Forsyth County Superior Court, the Honorable Ronald E. Spivey, Judge presiding. Prior to impaneling the jury, the trial court held

1. Evidence was introduced at trial to show that tramadol hydrochloride is not a controlled substance.

a hearing concerning defendant's motion in limine. At the conclusion of the hearing, the trial court orally announced its ruling denying defendant's motion to exclude evidence regarding the Epsom salt; suppressing statements made regarding a law enforcement officer who died in an unrelated event; and admitting statements made by defendant to the officers and magistrate during his arrest.

Following the close of the evidence, the jury returned guilty verdicts on the charges of selling or delivering a counterfeit controlled substance and possession of a counterfeit controlled substance with intent to sell or deliver. The trial court entered judgment in accordance with the jury verdicts and sentenced defendant to consecutive active terms of nine to eleven months for each offense. Defendant appeals.

I

[1] Defendant argues that the trial court committed plain error by admitting evidence identifying a particular substance as tramadol hydrochloride based solely upon a visual inspection.[2] We agree.

"[P]lain error review in North Carolina is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted).

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

Id. at 516-17, 723 S.E.2d 333 (original emphasis).

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2. Our Supreme Court has held that this is an admissibility issue rather than a sufficiency of the evidence issue. In *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 637 (2000), and *State v. Nabors*, 365 N.C. 306, 718 S.E.2d 623 (2011), the Court pointed out that erroneously admitted evidence is still considered in determining whether the evidence is sufficient to support a conviction.

North Carolina General Statutes, section 90-95(a)(2) states that it is unlawful "[t]o create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance." N.C. Gen. Stat. § 90-95(a)(2) (2011). A conviction under this statute requires the State to prove "(1) that defendant possessed a counterfeit controlled substance, and (2) that defendant intended to sell or deliver the controlled substance." *State v. Williams*, 164 N.C. App. 638, 644, 596 S.E.2d 313, 317 (2004) (citations and quotations omitted).

Defendant was indicted and tried on charges of selling and delivering a counterfeit controlled substance and possession of a counterfeit controlled substance with intent to sell and deliver. As to both charges, defendant challenges the admission of evidence that the seized pills were counterfeit. Defendant cites *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), in support of his contention that the evidence was impermissibly admitted.

In *Ward*, the trial court admitted evidence identifying an alleged controlled substance as a controlled substance despite the defendant's objection. *Id.* at 138, 694 S.E.2d at 741. Our Supreme Court held that "the trial court abused its discretion by permitting the State's expert witness to identify certain pills when the expert's methodology consisted solely of a visual inspection process." *Id.* at 134, 694 S.E.2d at 739. The Court reasoned that expert testimony concerning whether a substance introduced at trial meets the technical, scientific definition of a controlled substance requires a chemical analysis. *Id.* Moreover, the Court explained that "a scientific, chemical analysis must be employed to properly differentiate between the real [controlled substance] and the counterfeit." *Id.* at 143, 694 S.E.2d at 745.

Here, State's witness Mr. Brian King, a forensic chemist with the North Carolina State Crime Lab, testified that after a visual inspection, he identified the pills as tramadol hydrochloride, a prescription medication. On direct examination, Mr. King testified as follows:

> Q. Okay. I'm going to hand you what's marked as State's 3 and 4. Have you seen these items before?
>
> A. Yes. I have.
>
> . . .
>
> Q. Okay. Let's start with the pills.
>
> . . .

Q. How did you process those when they came to your lab?

A. When I first removed them from the envelope, I noticed that they were tablets. And my first – since it was in a clear plastic bag, I was able to read the markings on the tablet. And the first thing I went to was my online database.

Q. Okay. How many times do you use that database?

A. For every tablet -- every pharmaceutical tablet case I've used.

Q. Okay. And what did -- what did that investigation yield?

A. The tablet markings – I'll refer to my worksheet -- tablet markings through our Micromedex online database resulted in tramadol hydrochloride.

Q. Okay. Now, have you ever encountered tablets of tramadol hydrochloride before as part of your job?

A. Yes I have.

Q. Is that a controlled substance?

A. No, sir.

Q. It's a prescription pill, right?

A. That's correct.

Q. But it's not a controlled substance?

A. Not from the North Carolina statutes, no.

On cross-examination, Mr. King testified as follows:

Q. So you spent time analyzing what everybody knew was not a controlled substance to prove that it was not a controlled substance as to the tramadol?

A. No. I did not analyze it. I visually inspected, but I did not analyze the tramadol.

Q. So there was no chemical analysis done to the tramadol whatsoever?

A. No, sir.

Mr. King used a two-step visual identification process to identify the pills as tramadol hydrochloride but performed no chemical analysis. While the State never tendered Mr. King to the trial court as an expert witness, the sole purpose of his testimony was to show that the tablets he examined were not a controlled substance and, therefore, counterfeit. In the absence of a scientific, chemical analysis of the purported controlled substance, Mr. King's visual inspection was insufficient to identify the composition of the pills. *See Id.* at 143, 694 S.E.2d at 745 ("By imposing criminal liability for actions related to counterfeit controlled substances, the legislature not only acknowledged that their very existence poses a threat to the health and well-being of citizens in our state, but that a scientific, chemical analysis must be employed to properly differentiate between the real and the counterfeit.").

Therefore, because we are unable to discern any meaningful distinction between *State v. Ward* and the instant case and because the admission of evidence as to the identity of a counterfeit controlled substance based solely upon a visual inspection constitutes plain error, *State v. Brunson*, 204 N.C. App. 357, 361, 693 S.E.2d 390, 393 (2010), we must grant defendant a new trial.[3]

II

Because the other issue defendant argues on appeal may again arise in a new trial, we review defendant's contention.

Defendant argues that the trial court committed plain error by admitting into evidence testimony regarding the Epsom salt found at the time of his arrest and testimony regarding defendant's statements and behavior directed towards the arresting officers and the magistrate. Defendant contends that such testimony amounted to impermissible character evidence under 404(b) and was irrelevant under Rule 401. We disagree.

While defendant filed a pre-trial motion in limine to exclude certain evidence, defendant failed to renew his objection at the time the evidence was offered during trial. *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 302 (1999) ("[a] motion in limine is insufficient to preserve

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3. **[2]** Although defendant argues that the trial court erred by denying his motion to dismiss the cases against him for insufficiency of the evidence, we conclude, given that the inadmissible evidence concerning the identity of the counterfeit controlled substance was admitted at trial and that we are required to consider both competent and incompetent evidence in evaluating the sufficiency of the evidence, *Israel*, 353 N.C. at 216, 539 S.E.2d at 637, that the trial court properly denied defendant's motion.

for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." (citation omitted)); *see also*, *State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007). Now, on appeal, defendant contends the admission of such evidence amounted to plain error.

Epsom Salt

[3] At the conclusion of the pre-trial hearing on defendant's motion in limine, the trial court announced its ruling as to each challenged statement and exhibit.

> First, as to the discovery of the items which were later identified as not a controlled substance and purportedly Epsom salts, the Court will treat evidence of those akin to 404(b).
>
> . . .
>
> The Court will find that the discovery of these items based upon their shape, size, packaging, and proximity to other items which in the officer's observations had just been sold to another detective would form the basis of proving possibly intent, knowledge, plan, scheme, modus operandi as to 404(b). The Court, in applying the 403 balancing test, will find the introduction of those items will be more probative than prejudicial. So the Court will deny the request for motion in limine as to those items.

Pursuant to Rule 404(b) of our Rules of Evidence,

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011).

This Court has held that the proper admission of evidence pursuant to Rule 404(b) involves a three-step test:

> First, is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried? Second, is that purpose relevant to an issue material to the pending case?

> Third, does the probative value of the evidence substantially outweigh the danger of unfair prejudice pursuant to Rule 403?

State v. Glenn, ___ N.C. App. ___, ___, 725 S.E.2d 58, 67 (citations omitted), *petitions for writ of supersedeas and disc. rev. denied, mot. to dismiss appeal allowed*, ___ N.C. ___, 734 S.E.2d 863 (2012).

In his brief submitted to this Court, defendant raises the following challenge:

> There can be no other purpose for the Epsom salt evidence other than to show that [it] was intended as a future counterfeit sale and [defendant's] possession of it was consistent with the offenses for which he was on trial – an impermissible purpose under Rule 404(b) and irrelevant under Rule 401.

We view this as a challenge to step one: "is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried?" *Id.* at ___, 725 S.E.2d at 67 (citation omitted).

"This Court reviews questions of relevancy *de novo*, but accords deference to the trial court's ruling." *Glenn*, ___ N.C. App. at ____, 725 S.E.2d at 67 (citing *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011) ("A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal.")).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401.

Defendant was indicted on charges of selling and delivering a counterfeit controlled substance and possession with intent to sell and deliver a counterfeit controlled substance. These charges were made after he sold two pills, which he claimed to be Vicodin, to an undercover police officer in exchange for four dollars. Incident to his arrest, defendant was searched. The officers discovered on his person two pill bottles and Epsom salt. We consider defendant's challenges to the admission of the Epsom salt along with testimony of an arresting officer.

> A. In his -- in the right pocket of his shorts I found two prescription medication bottles. Both bottles had his name; they were his prescriptions. I also found a clear

> plastic baggie that was tied off at the top, and that plastic baggie contained like a white rock-type substance.
>
> . . .
>
> It was basically an open-top bag, almost like an open-top sandwich bag, and it was just tied off at the top.
>
> . . .
>
> It is very similar -- in my experience, it's very similar to the appearance of crack cocaine, rock crack cocaine, which is often also carried inside of the open-top sandwich bags tied off at the top.

Q. Okay. Did you at first think that this might be cocaine?

A. Yes, sir. I did.

Q. Did you field test it?

A. Yes, sir. I did.

We note that the Epsom salt removed from defendant's person bore a similarity to "crack" cocaine in appearance and packaging sufficient to warrant the officer to conduct a field test to determine if the substance contained cocaine. *See State v. Mobley*, 206 N.C. App. 285, 292, 696 S.E.2d 862, 867 (2010) (where on the charge of conspiracy to sell a counterfeit controlled substance there was substantial evidence that the defendant intentionally represented a substance to be a controlled substance where undercover officers paid for crack cocaine and the defendant provided two rocks of a hard, white substance weighing 0.15 grams which two veteran narcotics officers took to be crack cocaine, packaged in " 'small corner [baggies]' a practice normally used to deliver crack cocaine."), *petition for disc. rev. denied*, 365 N.C. 75, 706 S.E.2d 229 (2011).

We find that the Epsom salt and the officer's testimony regarding his observations was relevant in that it had a tendency to make the existence of the fact that defendant sold and delivered a counterfeit controlled substance or possessed a counterfeit controlled substance with the intent to sell or deliver more probable than it would be without the evidence. *See* N.C. Evid. R. Rule 401. Moreover, we hold that the evidence is probative of defendant's intent, plan, scheme, and modus operandi and thus, relevant for some purpose other than to show defendant's propensity for selling his prescription medication. *See Glenn*, ___ N.C. App. at ___, 725 S.E.2d at 67. Therefore, where we discern no error in the admission of this relevant evidence, defendant's contention that

the admission of testimony regarding the Epsom salt amounts to plain error is overruled.

Statements made when appearing before the magistrate

Defendant contends that his statements made before a magistrate have no relevance to the charged offenses and their admission amounted to plain error. Specifically, defendant argues that "[t]he statements were gratuitously presented to cast [defendant] in a negative light and create a bias against [defendant] for his violent and disrespectful behavior towards officers of the law."

Following its pretrial hearing on defendant's motion in limine, the trial court made the following ruling:

> As to statements made at the magistrate's office, the Court will find as to those that some of the statements were directed toward court officials, that being the magistrate and the arresting officer. . . . they were part and parcel of the arrest procedure, and the Court will deny the motion in limine as to those.

At trial, the court admitted the following testimony by an arresting officer:

> Q. Okay. What happened once the two of you were at the magistrate's office?
>
> A. [Defendant] had asked me -- he asked me a couple times what he was charged with. I told him what he was [T. 100] charged with. . . . He kept making statements that he wasn't dealing narcotics and just had his pain medication. . . . When we got into the magistrate's office, the holding area inside the magistrate's office, [defendant] became very belligerent with us; started making very threatening comments towards myself and the other police officers that were in that holding area. He made comments about [sic] he was going to kick over the table where we were all sitting. He also told me on multiple occasions he wanted to choke me out.
>
> . . .
>
> Q. What happened then?
>
> A. I brought him before [the magistrate]. He was charged with sell and deliver of a counterfeit controlled

> substance and possession with intent to sell and deliver counterfeit controlled substance. [The magistrate] spoke to [defendant]; told him he had a $2,500 secured bond; explained to him how to pay that bond like they always do. When [the magistrate] was done, [defendant] responded to him by saying, quote, "Fuck you, motherfucker," end quote.

Notwithstanding defendant's desire to have this testimony excluded, it described a part of the arrest procedure and related to his guilt of the offenses with which he had been charged. *See* N.C. Gen. Stat. § 15A-501 (2) (entitled "Police processing and duties upon arrest generally." "Upon the arrest of a person . . . without a warrant, . . . a law-enforcement officer: . . . [m]ust . . . take the person arrested before a judicial official without unnecessary delay."); *e.g. State v. James*, ___ N.C. App. ___, 715 S.E.2d 884 (2011) (holding that the admission at trial of the defendant's voluntary statements made before a magistrate following his arrest by police did not violate defendant's rights and were not subject to being suppressed). Accordingly, this argument is overruled.

New trial.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
SHAWN ANTONIO HORSKINS, DEFENDANT

No. COA12-1489

Filed 2 July 2013

1. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—premeditation and deliberation

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder at the close of all evidence. There was sufficient evidence, taken in the light most favorable to the State, for a reasonable mind to find that defendant killed the victim with premeditation and deliberation.

2. Evidence—exclusion—victim a gang member—no prejudicial error

The trial court did not err in a first-degree murder case by excluding evidence that defendant was told the victim was a gang member. Defendant could not show that exclusion of this evidence constituted prejudicial error.

Appeal by defendant from Judgment entered on or about 18 May 2012 by Judge Walter H. Godwin Jr. in Superior Court, Pasquotank County. Heard in the Court of Appeals 22 May 2013.

Attorney General Roy A. Cooper III by Assistant Attorney General C. Norman Young Jr., for the State.

Law Offices of John R. Mills NPC by John R. Mills, for defendant-appellant.

STROUD, Judge.

Shawn Antonio Horskins ("defendant") appeals from the judgment entered on 18 May 2012 after a jury found him guilty of first-degree murder. Defendant argues on appeal that the trial court erred in denying his motion to dismiss the charge of first-degree murder at the close of all the evidence because there was insufficient evidence of premeditation and deliberation. Defendant further argues the trial court erred in excluding testimony that defendant had been told Antoine Williams, the decedent, was a gang member. For the following reasons, we conclude that there was no prejudicial error at his trial.

I. Background

On 19 January 2010, defendant was indicted for first-degree murder. Defendant pled not guilty on a theory of self-defense and proceeded to trial by jury in Superior Court, Pasquotank County.

The State's evidence at trial tended to show that Mr. Williams was killed in the parking lot of the Trios nightclub in Elizabeth City during the early morning hours of 1 January 2010. Defendant was an enlisted soldier in the United States Army stationed at Fort Lee, Virginia. Defendant met Everett "Booty" Bynum and Dominique Blunt while in training and associated with them while they were stationed at Fort Lee. On 30 December 2009, defendant, Mr. Bynum, and Mr. Blunt drove to Elizabeth City, Mr. Bynum's hometown.

On the evening of 31 December 2009, defendant and his friends were drinking and visiting local nightclubs. After leaving a club called "the Hut," Mr. Bynum drove defendant and Mr. Blunt to another nightclub called "Trios." On the way to Trios, Mr. Bynum handed defendant, who was riding in the front passenger seat, a nine millimeter pistol, which defendant kept by his feet.

Mr. Williams was celebrating the New Year that night with his sister, Triquita Williams, and her then-boyfriend Zarius Bohler. Ms. Williams drove the three of them to Trios, but they decided not to go in. As they were leaving the Trios parking lot, around 1 a.m., the car being driven by Mr. Bynum pulled in, blocking their way. Mr. Bynum immediately got out of his car and began yelling for his brother. Ms. Williams, who knew Mr. Bynum, yelled at him to move his car. He ignored her and continued yelling for his brother. Defendant got out of the passenger seat as Mr. Bynum was yelling.

At that point, Mr. Williams got out of his sister's car, walked toward Mr. Bynum's car, and yelled something to the effect of "You-all got to go, we trying to go home . . ." In response, defendant drew his pistol and fired one shot, after which Mr. Williams fell to the ground. Defendant then shot Mr. Williams six more times before he, Mr. Bynum, and Mr. Blunt got back in their car and left the scene.

As they were leaving the scene, defendant said "I think I just caught a body." Defendant, Mr. Bynum, and Mr. Blunt then went back to the house of Mr. Bynum's mother, retrieved their clothes, and started driving back to Fort Lee. They called a friend from Fort Lee to meet them in Petersburg, Virginia, to switch vehicles. On the way from Petersburg to Fort Lee, defendant used Mr. Blunt's jacket to wipe off the gun and then asked Mr. Blunt to throw the gun out of the window, which he did when they passed over the James River Bridge, near Fort Lee.

After the State rested its case-in-chief, defendant presented evidence to support his claim that he only shot Mr. Williams in self-defense. Defendant testified that when they got to Trios, Mr. Williams got out of his sister's car and said, "What's cracking?" to Mr. Bynum. In response, Mr. Bynum said, "What's popping?" Mr. Williams then said, "[Y]our slop ass needs to move this car out the way." Defendant testified that he recognized this exchange as gang-related. Officer Ervin Rodriguez, the gang coordinator for the Elizabeth City Police Department, testified that these phrases identified the speakers as members of the "Crips" gang and "Bloods" gang respectively and that a Crip calling a Blood "slop" was a grave insult.

After this exchange, Mr. Bynum told Mr. Williams they had a handgun with them. Mr. Williams responded, "[Y]ou not the only one with a forty" and then made a motion that looked to defendant like reaching for a gun. Defendant testified that he only fired at Mr. Williams when he saw that motion. He also testified that he did not shoot Mr. Williams after he fell.

At the close of all evidence, defendant moved to dismiss the charge of first-degree murder. The trial court denied the motion to dismiss. The charge of first-degree murder was submitted to the jury along with the lesser-included offenses of second-degree murder and voluntary manslaughter. The jury returned a verdict of guilty as to first-degree murder. The trial court accordingly sentenced defendant to life imprisonment without parole. Defendant gave oral notice of appeal in open court.

II. Sufficiency of the Evidence

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of first-degree murder at the close of all evidence when there was insufficient evidence of premeditation and deliberation. We disagree.

A. Standard of Review

> 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. Teague, ___ N.C. App. ___, ___, 715 S.E.2d 919, 923 (2011), *app. dismissed and disc. rev. denied*, ___ N.C. ___, 720 S.E.2d 684 (2012). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citations and quotation marks omitted).

B. Analysis

Here, it is uncontested that defendant shot Mr. Williams. The only question is whether there was substantial evidence of "each essential element of the offense charged". *Teague*, ___ N.C. App. at ___, 715 S.E.2d at 923.

"Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Robbins*, 275 N.C. 537, 542, 169 S.E.2d 858, 861 (1969). The elements of murder have been well established by the courts of this state. If the State proves beyond a reasonable doubt that the defendant unlawfully killed another with malice,

> [n]othing else appearing, the defendant would be guilty of murder in the second degree. . . . The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, must be established beyond a reasonable doubt, and found by the jury, before the verdict of guilty of murder in the first degree can be returned; and the burden of so establishing these additional elements of premeditation and deliberation rests and remains on the State.

State v. Propst, 274 N.C. 62, 71, 161 S.E.2d 560, 567 (1968) (citations omitted).

> Premeditation has been defined . . . as thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose. The intent to kill must arise from a fixed determination previously formed after weighing the matter.

State v. Corn, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981) (citations omitted).

> "Cool state of blood" does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional

> state at the time unless such anger or emotion was such as to disturb the faculties and reason.

State v. Britt, 285 N.C. 256, 262, 204 S.E.2d 817, 822 (1974) (citations omitted).

As with other mental states,

> premeditation and deliberation are not usually susceptible of direct proof and are therefore, susceptible of proof by circumstances from which the facts sought to be proven may be inferred. That these essential elements of murder in the first degree may be proven by circumstantial evidence has been repeatedly held by this court.

State v. Faust, 254 N.C. 101, 107, 118 S.E.2d 769, 772 (citations and quotation marks omitted), *cert. denied*, 368 U.S. 851, 7 L.Ed. 2d 49 (1961).

Our Supreme Court has outlined several factors relevant to the determination of whether the defendant acted with premeditation and deliberation:

> Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: Want of provocation on the part of deceased. The conduct of defendant before and after the killing. Threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased. The dealing of lethal blows after deceased has been felled and rendered helpless.

Id. at 107, 118 S.E.2d at 773 (citations omitted). Additional factors include "the nature and number of the victim's wounds," whether the defendant "left the deceased to die without attempting to obtain assistance for the deceased," whether he "disposed of the murder weapon," and whether the defendant later lied about what happened. *State v. Hunt*, 330 N.C. 425, 428-29, 410 S.E.2d 478, 481 (1991).

Here, the State's evidence showed that Mr. Bynum pulled his car into the Trios parking lot, preventing Ms. Williams' car from leaving. Ms. Williams yelled at Mr. Bynum and defendant to move their car, but they ignored her. Mr. Williams then got out of the car and yelled at Mr. Bynum and defendant to move their car. According to Ms. Williams and her ex-boyfriend, all her brother said was something to the effect of "You-all got to go, we trying to go home . . ." before defendant shot him. Mr. Williams

was unarmed and he did not reach for anything, engage defendant in a fight, or otherwise provoke a violent response.

According to several witnesses, Mr. Williams hit the ground after defendant's first shot, but defendant kept firing. The medical examiner found that Mr. Williams had seven gunshot wounds in total, including some that entered from his back. After shooting Mr. Williams, defendant and his friends got back into Mr. Bynum's car and drove away. They stopped at the house of Mr. Bynum's mother, picked up their clothes, and drove back toward Fort Lee, Virginia. On the way back, defendant said, "I think I just caught a body."

Before reaching Fort Lee, they met up with a friend in Petersburg, Virginia and switched cars. Defendant said that they had to get rid of the gun, so he wiped the gun off with Mr. Bynum's red coat, handed it to Mr. Blunt, and told him to throw it off the James River Bridge. When they reached the bridge, Mr. Blunt rolled down the window and tossed the gun into the river below.

When they got back to Fort Lee, defendant asked his friends to make up an alibi and lie to investigators about his whereabouts on the night of the shooting. When one of the detectives from Elizabeth City called defendant later on 1 January 2010, defendant lied and told him that he had not been to Elizabeth City on the night of the shooting. Before he was arrested, defendant told his First Sergeant that he had been involved in a shooting, but did not tell him any details.

Defendant contends that there was uncontroverted evidence that Mr. Williams had said to defendant "You ain't the only one with a gun," used well-known gang insults, and reached behind him as if to grab a gun. Defendant further argues that his post-traumatic stress disorder (PTSD) and Army training undermine any inference of premeditation and deliberation to be drawn from the nature and number of the wounds he inflicted on Mr. Williams. We disagree.

First, we note that the evidence of any gang-related statements made by Mr. Williams came only from defendant. Although the State's evidence was contradictory concerning what Mr. Williams said to defendant before defendant started firing, there was some evidence that he only told defendant and Mr. Bynum to move their car. Thus, any evidence that Mr. Williams said "You ain't the only one with a gun," reached behind him, or used the word "slop" contradicts some of the State's evidence and is properly disregarded in deciding a motion to dismiss. *See Abshire*, 363 N.C. at 328, 677 S.E.2d at 449. Second, although a

reasonable person could infer that defendant's reaction may have been influenced by his Army training and PTSD, the jury was not required to believe defendant's evidence or assign it the weight he deems appropriate. Moreover, the State's evidence does not need to "exclude[] every reasonable hypothesis of innocence" to withstand a motion to dismiss. *State v. Riffe*, 191 N.C. App. 86, 89, 661 S.E.2d 899, 902 (2008) (citation and quotation marks omitted).

Defendant relies mostly on *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981), and *State v. Williams*, 144 N.C. App. 526, 548 S.E.2d 802 (2001), *aff'd per curiam*, 355 N.C. 272, 559 S.E.2d 787 (2002), to support his arguments.

In *Corn*, our Supreme Court ordered a new trial because the State failed to present sufficient evidence of premeditation and deliberation to support the charge of first-degree murder. 303 N.C. at 298, 278 S.E.2d at 224. The shooting in *Corn* was

> brought on by some provocation on the part of the deceased. The evidence [was] uncontroverted that [the deceased] entered defendant's home in a highly intoxicated state, approached the sofa on which defendant was lying, and insulted defendant by a statement which caused defendant to reply "you son-of-a-bitch, don't accuse me of that." Defendant immediately jumped from the sofa, grabbing the .22 caliber rifle which he normally kept near the sofa, and shot Melton several times in the chest. The entire incident lasted only a few moments.

303 N.C. at 297-98, 278 S.E.2d at 223-24.

The decedent in *Corn* did not merely insult the defendant. There was also evidence that he also went "over to the couch on which defendant was lying, grabbed defendant, and began slinging him around and attempting to hit him." *Id.* at 295, 278 S.E.2d at 222. Although there was no history of threats or ill will between the decedent and the defendant, there was also "no evidence that any shots were fired after he fell or that defendant dealt any blows to the body once the shooting ended." *Id.* at 298, 278 S.E.2d at 224. Additionally, "[a]fter the shooting defendant walked across the street to his sister's house and called the Brevard Police Department. He then returned to his home and waited for law enforcement officers to arrive. Several officers testified that defendant was calm and cooperative during their investigation of the incident." *Id.* at 295, 278 S.E.2d at 222.

In *Williams*, two men began fighting in a nightclub. 144 N.C. App. at 527, 548 S.E.2d at 803. Defendant helped hold back the crowd to allow the two men to fight. *Id.* One man he was holding back punched defendant in the face. *Id.* at 527, 548 S.E.2d at 804. Defendant then drew his handgun and fatally shot the man in the neck. *Id.* Defendant fled the scene, but turned himself in the next day. *Id.* We concluded that the evidence did not support a charge of first-degree murder because there was insufficient evidence of premeditation and deliberation. *Id.* at 531, 548 S.E.2d at 805-06. We reasoned that there was no evidence the defendant knew the deceased before the shooting, the deceased had provoked defendant by punching him, and his actions before and after the shooting failed to show any "forethought." *Id.* at 530-31, 548 S.E.2d at 805.

Corn and *Williams* are distinguishable from this case because the State's evidence here showed no provocation on the part of Mr. Williams, there was evidence that defendant kept shooting after Mr. Williams fell, and he attempted to hide evidence from the shooting. Although defendant contends that he was provoked, in both *Williams* and *Corn* the provocation included a physical altercation. *See State v. Bass*, 190 N.C. App. 339, 345, 660 S.E.2d 123, 127 (noting that an argument between the deceased and the defendant "[did] not rise to the level of provocation such as the physical altercations that provoked the defendants in *Williams* and *Corn*."), *app. dismissed*, 362 N.C. 683, 670 S.E.2d 566 (2008). There was no such evidence here.

The State's evidence showed that Mr. Williams did nothing to provoke defendant. There was no fight. Mr. Williams did not attack or threaten defendant. According Mr. Williams' sister, all he did was tell defendant and Mr. Bynum to move their car. The State presented evidence that there was no "provocation by the deceased sufficient to disturb the defendant's ability to reason." *Hunt*, 330 N.C. at 428, 410 S.E.2d at 481.

Delivering "lethal blows after deceased has been felled and rendered helpless" also supports a finding of premeditation and deliberation. *Faust*, 254 N.C. at 107, 118 S.E.2d at 773. Here, there was substantial evidence that defendant felled Mr. Williams with one shot and then shot him another six times.

Further, although evidence of flight "may not be considered as tending to show premeditation and deliberation," *State v. Brewton*, 342 N.C. 875, 879, 467 S.E.2d 395, 398 (1996), a defendant's other actions after the shooting may be so considered, *Faust*, 254 N.C. at 107, 118 S.E.2d at 773. After the shooting, defendant did nothing to help Mr. Williams and

simply left him lying in the Trios parking lot. Indeed, after leaving the scene, defendant attempted to hide or destroy evidence, including the gun used. All of these factors support an inference of premeditation and deliberation. *See Hunt*, 330 N.C. at 428-29, 410 S.E.2d at 481; *Faust*, 254 N.C. at 107, 118 S.E.2d at 773.

Although the entire incident took place within a matter of minutes and the shooting within a matter of seconds, "no particular amount of time is necessary for the mental process of premeditation." *State v. Jones*, 342 N.C. 628, 630, 467 S.E.2d 233, 234 (1996) (citation and quotation marks omitted). "These mental processes must be prior to the killing, not simultaneous; but a moment of thought may be sufficient to form a fixed design to kill." *State v. Steele*, 190 N.C. 506, 511-12, 130 S.E. 308, 312 (1925) (citations and quotation marks omitted). The jury could have reasonably concluded that "there was sufficient time for the defendant to weigh the consequences of his act." *Hunt*, 330 N.C. at 429, 410 S.E.2d at 481.

Because there was sufficient evidence, taken in the light most favorable to the State, for a reasonable mind to find that defendant killed Mr. Williams with premeditation and deliberation, the trial court did not err in denying defendant's motion to dismiss the charge of murder in the first degree.

III. Gang Evidence

[2] Defendant next argues the trial court erred in excluding evidence Mr. Bynum told defendant that Mr. Williams was a gang member. While defendant was testifying, he had the following exchange with his trial counsel:

> [Defense Counsel]: Did Everett [Bynum] ever tell you that he and Antoine didn't get along?
>
> [Defendant]: Yes.
>
> [Defense Counsel]: Did he ever tell you Antoine Williams was in a gang?
>
> [Prosecutor]: Objection.
>
> THE COURT: Sustained.
>
> [Defense Counsel]: Did he ever tell you that Antoine Williams carried a gun?
>
> [Prosecutor]: Objection.
>
> THE COURT: Sustained.

"To prevail on a contention that evidence was improperly excluded, either a defendant must make an offer of proof as to what the evidence would have shown or the relevance and content of the answer must be obvious from the context of the questioning." *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996) (citation omitted), *cert. denied*, 522 U.S. 825, 139 L.Ed. 2d 43 (1997). Although he made no offer of proof, defendant contends that it is obvious he would have said yes and that this evidence was relevant to his self-defense claim.

Even assuming *arguendo* that the content and relevance of the answer is obvious, defendant cannot show prejudicial error.

> [E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial. The same rule applies to exclusion of evidence. Evidentiary error is prejudicial when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. Defendant bears the burden of showing prejudice.

State v. Jacobs, 363 N.C. 815, 825, 689 S.E.2d 859, 865-66 (2010) (citations and quotation marks omitted).

Defendant contends that this evidence is admissible as a pertinent character trait of the deceased. "Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness." *State v. Baldwin*, 125 N.C. App. 530, 536, 482 S.E.2d 1, 5 (citation and quotation marks omitted)), *disc. rev. dismissed as improvidently allowed*, 347 N.C. 348, 492 S.E.2d 354 (1997). We fail to see how membership in a gang meets that definition. Further, defendant did not attempt to introduce this supposed "character evidence" as reputation or opinion testimony or as testimony regarding specific instances of conduct. *See* N.C. Gen. Stat. § 8C-1, Rule 404(a)(1); N.C. Gen. Stat. § 8C-1, Rule 405 (2011).

Instead, it appears defendant was attempting to introduce the fact that he believed Mr. Williams to be in a gang as non-character evidence relevant to "the reasonableness of defendant's apprehension and use of force, which are essential elements of self-defense." *State v. Brown*, 120 N.C. App. 276, 277-78, 462 S.E.2d 655, 656 (1995) (citation omitted), *disc. rev. denied*, 342 N.C. 896, 467 S.E.2d 906 (1996).

Even assuming it would be otherwise relevant to defendant's self-defense claim, the fact that defendant thought Mr. Williams was in a

gang would be entirely irrelevant unless he knew that the man yelling at him to move the car was Mr. Williams. The evidence showed that defendant had never met Mr. Williams and there was no evidence that defendant could otherwise recognize decedent as Antoine Williams on the day in question. If defendant did not know the man yelling at him was Antoine Williams, then anything he knew about Antoine Williams' gang membership would be irrelevant to "the reasonableness of defendant's apprehension and use of force." *Brown*, 120 N.C. App. at 277-78, 462 S.E.2d at 656.

Additionally, defendant has failed to show that the jury would have reached a different result had they been informed that defendant thought Mr. Williams was in a gang. Both Mr. Blunt and defendant testified that Mr. Williams said something to the effect of "You ain't the only one with a gun." Defendant testified that he thought Mr. Williams was reaching for a gun when he shot him. Defendant also testified that Mr. Williams used a gang greeting when he and Mr. Bynum confronted each other. Officer Rodriguez, the Elizabeth City gang coordinator, confirmed that the phrase "What's cracking?" would identify the speaker, in this case Mr. Williams, as a member of the Crips gang. Given this testimony, we think it is unlikely that the jury would have come to a different conclusion on the basis of defendant's testimony that Mr. Bynum told him that Mr. Williams was in a gang. Therefore, defendant cannot show that exclusion of this evidence constituted prejudicial error. *See Jacobs*, 363 N.C. at 825, 689 S.E.2d at 865-66.

IV. Conclusion

The State introduced sufficient evidence to show that defendant acted with premeditation and deliberation. Therefore, the trial court did not err in denying defendant's motion to dismiss. Additionally, defendant has failed to show that the exclusion of testimony that Mr. Williams was in a gang constituted prejudicial error.

NO ERROR; NO PREJUDICIAL ERROR.

Judges HUNTER, Robert C. and ERVIN concur.

STATE OF NORTH CAROLINA
v.
WILLIAM CURTIS LOWERY

No. COA12-1129

Filed 2 July 2013

1. Assault—by strangulation—evidence sufficient

There was sufficient evidence to permit a reasonable juror to find defendant guilty of assault inflicting physical injury by strangulation where defendant conceded strangulation but contended that the State failed to show that the strangulation caused the injuries rather than the other forms of battery inflicted on the victim. The victim's testimony, testimony from a physician's assistant who treated the victim in the emergency room and who was accepted as an expert, and photographs of the victim's injuries provided sufficient evidence to determine that strangulation caused the victim's injuries.

2. Assault—by strangulation—elements—extensive injury not required

N.C.G.S. § 14-32.4(b) (assault by strangulation) does not require proof of physical injury beyond what is inherently caused by every act of strangulation. The elements of the offense are an assault inflicting physical injury by strangulation; the General Assembly is presumed to have intended its words to have their ordinary meaning. Requiring extensive physical injuries would frustrate the purpose of the General Assembly.

Appeal by defendant from judgment entered 15 February 2012 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 27 March 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tammy A. Bouchelle, for the State.

Glover & Peterson, P.A., by James R. Glover, for defendant-appellant.

BRYANT, Judge.

Where there was sufficient evidence to allow a reasonable juror to find Defendant guilty of assault inflicting physical injury by strangulation,

we hold the trial court did not err in failing to grant Defendant's motion to dismiss.

On 12 September 2011, defendant was indicted on charges of assault by strangulation, assault on a female, habitual misdemeanor assault, and attaining habitual felon status. The matters came on for trial on 13 February 2012 during the Criminal Session of Forsyth County Superior Court, the Honorable Richard L. Doughton, Judge presiding.

The State's evidence tended to show the following. William Curtis Lowry ("Defendant") met Erica Jacks ("Ms. Jacks") at Forsyth Technical Community College. Ms. Jacks testified that, while not dating, Defendant had stayed with her a few nights.

On 30 July 2011, defendant was visiting Ms. Jacks in an apartment that Ms. Jacks shared with her mother at Burke Ridge Apartments on Griffith Road, in Winston-Salem. At about six o'clock in the evening, after a few hours of arguing with defendant, Ms. Jacks stepped outside of the apartment to talk on her cell phone. Defendant followed Ms. Jacks outside and said, "You're always trying to sleep around with somebody. You're always talking to people on the phone." Ms. Jacks told Defendant to get his things and leave.

Ms. Jacks headed for a storage building located in the apartment complex. Ms. Jacks felt a push from behind her and upon turning around, realized Defendant had followed her to the storage unit. Ms. Jacks testified that Defendant then got on top of her and began to push and hit her around her face. Defendant then proceeded to strangle her. Ms. Jacks testified that she "couldn't breathe for a while[.]" When the pressure lessened, she flipped Defendant off of her. Ms. Jacks ran towards her mother's apartment, screaming, but tripped and fell about a foot away from the door. Ms. Jacks testified that when she tried to get up, Defendant shoved her back down, bit her, hit her in the face several more times, and again strangled her with his hands and attempted to drag her into the apartment. Ms. Jacks felt like she was losing consciousness and called out to a man walking nearby, asking him to call 911.

Officer B.R. Anderson of the Winston-Salem Police Department testified that when he arrived, Ms. Jacks was lying on the ground, in a fetal position in front of an apartment. Officer Anderson testified that Ms. Jacks was crying; she was very upset; she vomited blood and stomach acid twice; and she was having panic attacks. Officer Anderson testified that Ms. Jack's clothing was ripped, her face was swollen and bruised, she had scratch marks on her, bruises on her body, and a bite mark on her shoulder.

Ms. Jacks was transported by ambulance to the emergency department at Forsyth Medical Center. There, Ms. Jacks was treated by Sarah Santiago, a physician's assistant. At trial, Santiago testified to her observation of Ms. Jacks: multiple abrasions, swelling to her face and neck, and "Ecchymosis, which is bruising, the purplish color . . . over her collarbone areas." Several photographs depicting the injuries to Ms. Jacks' face and neck were used by Santiago during her testimony. Santiago also identified a human bite mark on Ms. Jacks' left scapula, the area of her shoulder blade. During the course of her testimony, Santiago was tendered and accepted as an expert "in the area of diagnosing patients, assault victims, in terms of the possibility of strangulation." When asked whether based upon a review of Ms. Jacks statement, the examination of Ms. Jacks' neck area, Santiago could make a determination as to whether her injuries were consistent with strangulation, Santiago testified as follows:

> Her injuries certainly were consistent with the story that she told me. Again, the ecchymosis, the purplish color, was along the clavicular area, which is the collarbone. Then she had the swelling and the abrasions to both sides of the neck. There is also a scratch on the back of the neck, although most of the injuries were to the anterior neck, which is the front of the neck.

On cross-examination, Santiago confirmed that the physical injuries sometimes seen after extreme cases of strangulation, such as damage to the hyoid bone or petechiae (the rupture of small blood vessels in the eyes), were not present in Ms. Jacks. Santiago testified that there is a continuum of varying degrees of choking and strangulation, wherein a victim could have "just the soft tissue swelling to the neck, all the way to, again, near death and serious damage to the trachea and esophagus."

Defendant made a motion to dismiss all charges at the close of the State's evidence, which was denied. Defendant rested without putting on any evidence and renewed his motion to dismiss. The motion was again denied. The jury found Defendant guilty of habitual misdemeanor assault, assault inflicting physical injury by strangulation, and attaining habitual felon status. Defendant appeals.

Defendant's sole issue on appeal is whether the evidence, viewed in the light most favorable to the State, was insufficient to permit a reasonable juror to find Defendant guilty of assault inflicting physical injury by strangulation.

> When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 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) (citations and quotations omitted).

The North Carolina General Statutes, regarding assault by strangulation, reads "any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony." N.C. Gen. Stat. § 14-32.4(b) (2011). This Court, in *State v. Braxton*, held that "evidence that defendant applied sufficient pressure to [the victim's] throat such that she had difficulty breathing," was sufficient to constitute strangulation under the statute. 183 N.C. App. 36, 43, 643 S.E.2d 637, 642 (2007). This Court in *State v. Little* noted that "cuts and bruises on [the victim's] neck" confirmed by photographic evidence was sufficient evidence to fulfill the physical injury element of assault by strangulation. 188 N.C. App. 152, 157, 654 S.E.2d 760, 764 (2008).

Defendant concedes that in this case there was sufficient evidence to prove strangulation. However, Defendant contends that the State failed to show that the act of strangulation, rather than the other forms of battery inflicted upon Ms. Jacks, caused her physical injuries. While Ms. Jacks did not testify that the bruising and redness on her neck were the result of the strangulation in particular, Ms. Jacks did testify that the injuries she received were the result of the assault that she described. Ms. Jacks further testified that during the assault, Defendant had strangled her twice, once in the area of the storage unit and again near her apartment door. Santiago, admitted as an expert in the diagnosis of assault victims, "in terms of the possibility of strangulation" testified that

> [Ms. Jacks'] injuries certainly were consistent with the story that she told me. Again, the ecchymosis, the purplish color, was along the clavicular area, which is the collarbone. Then she had the swelling and the abrasions to both sides of the neck. . . .
>
> Q. You're saying that would be consistent with force being applied to her neck?

A. Yes, sir.

The testimony by Ms. Jacks and the testimony by Ms. Santiago along with the photographic evidence depicting the bruising, abrasions, and bite mark on and around the neck of Ms. Jacks provide evidence sufficient for the finder of fact to determine that the act of strangulation caused the physical injuries to Ms. Jacks' neck.

[2] Defendant next contends that N.C. Gen. Stat. § 14-32.4(b) should be interpreted to require proof of physical injury beyond what is inherently caused by every act of strangulation. "In interpreting a statute, it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech." *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993). "When the plain meaning of a word is unambiguous, a court is to go no further in interpreting the statute." *Id.* (citations omitted). Here, the elements of assault by strangulation require proof that one: "(1) assaults another person (2) and inflicts physical injury (3) by strangulation." *State v. Williams*, 201 N.C. App. 161, 170, 689 S.E.2d 412, 416 (2009) (citing N.C. Gen. Stat. § 14-32.4(b)). In *Little*, where the victim was also sexually assaulted, our Court rejected the defendant's challenge to his strangulation conviction; our Court observed that the cuts and bruises on the victim's neck and strangulation during the assault which caused difficulty breathing, were deemed to be "sufficient evidence of each essential element of assault by strangulation." *Little*, 188 N.C. App. at 157, 654 S.E.2d at 764. Therefore, we reject defendant contention in the instant case.

Further, if Defendant's next assertion, that extensive physical injury should be a requirement for assault by strangulation, had merit, "the State would be required to show that a defendant strangled his or her victim to the point of death or close to it, in order to prove assault by strangulation. This type of conduct is provided for by other criminal offenses in our State's statutes." *Braxton*, 183 N.C. App. at 43, 643 S.E.2d at 642; *see e.g.*, *State v. People*s, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000) (stating elements for attempted first-degree murder (pursuant to N.C. Gen. Stat. § 14-17)); N.C. Gen. Stat. § 14-32 (Felonious assault with deadly weapon with intent to kill or inflicting serious injury); N.C. Gen. Stat. § 14-32.4(a) (Assault inflicting serious bodily injury) (2011). Therefore, interpreting N.C. Gen. Stat. § 14-32.4(b) to require extensive physical injuries would frustrate the purpose of the General Assembly in enacting this provision.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a jury could conclude that the act

of strangulation caused Ms. Jacks' physical injuries. The evidence was sufficient to permit a reasonable juror to find Defendant guilty of assault by strangulation. Therefore, the trial court properly denied Defendant's motion to dismiss. Accordingly, Defendant's argument is overruled.

No error.

Judges HUNTER, JR., Robert N., and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DEVONTE TERRELL PEMBERTON

No. COA12-1528

Filed 2 July 2013

1. Constitutional Law—effective assistance of counsel—admission of guilt

Defendant's ineffective assistance of counsel claim in a first-degree murder case stemming from his trial counsel's alleged admission of his guilt to first degree murder under the felony murder rule lacked merit. It was not necessary to decide whether the factual admissions made by defendant's trial counsel were tantamount to an admission of his guilt of first-degree murder on the basis of the felony murder rule given that defendant expressly consented to the strategy employed and the admissions made by his trial counsel.

2. Constitutional Law—effective assistance of counsel—reasonableness of defense theory

Defendant's ineffective assistance of counsel claim in a first-degree murder case stemming from his challenge to the reasonableness of the theory of defense adopted by his trial counsel was dismissed without prejudice to his right to assert that claim in a subsequent motion for appropriate relief. The trial court's sentence was vacated and remanded for resentencing.

3. Constitutional Law—cruel and unusual punishment—life imprisonment without parole—under 18 years old at time of crime

The trial court violated defendant's state and federal constitutional right to be free from cruel and unusual punishment in a

first-degree murder case by imposing a mandatory sentence of life imprisonment without the possibility of parole upon him despite the fact that he was under 18 years of age at the time of the murder. The trial court's sentence was vacated and remanded for resentencing defendant to life imprisonment with parole.

Appeal by defendant from judgment entered 12 October 2011[1] by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 22 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Brock, Payne & Meece, P.A., by C. Scott Holmes, for Defendant-Appellant.

ERVIN, Judge.

Defendant Devonte Terrell Pemberton appeals from a judgment sentencing him to life imprisonment without the possibility of parole based upon his conviction for first degree murder. On appeal, Defendant argues that he was deprived of his right to the effective assistance of counsel based upon the fact that his trial counsel admitted the existence of all of the elements of felony murder as the result of an apparent misunderstanding of the applicable law, that he was deprived of his right to the effective assistance of counsel based upon his trial counsel's decision to advance a theory of defense that lacked adequate support in the record or the applicable law, and that he was impermissibly subjected to cruel and unusual punishment stemming from the imposition of a mandatory sentence of life imprisonment without the possibility of parole despite the fact that he was less than eighteen years of age at the time that he committed the murder for which he was convicted. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant's ineffective assistance of counsel claim stemming from his trial counsel's alleged admission of his guilt to first degree murder under the felony murder rule lacks merit, that his ineffective assistance of counsel claim stemming from his challenge to the reasonableness of the theory of defense adopted by his trial counsel should be dismissed without prejudice to

1. The Judgment and Commitment is erroneously dated 4 October 2011. According to the transcript, judgment was entered on the same date that the verdict was rendered.

his right to assert that claim in a subsequent motion for appropriate relief, and that the trial court's sentence should be vacated and this case remanded to the Wake County Superior Court for resentencing.

I. Factual Background

A. Substantive Facts

On 9 May 2010, Dahshon Crudup and Damon Gresham were at Laquavis Jordan's house on Colleton Road and Oakwood Avenue in Raleigh. At that time, Mr. Crudup and Mr. Gresham discussed robbing Reginald Dunn, who was Mr. Crudup's "drug connect." During this discussion, Mr. Crudup suggested that they call Mr. Dunn for the purpose of setting up a drug transaction in order to lure Mr. Dunn to a spot at which they could rob him. After Mr. Gresham pointed out that the group did not have a gun for use in this enterprise, Mr. Jordan called over to Cordell Milbourne, who was standing outside his sister's house with Defendant and Telvin Burnette and asked if Mr. Milbourne knew where one could get a gun for use in a robbery. After contacting someone on his cell phone, Mr. Milbourne gave Mr. Jordan an affirmative answer.

At that point, Defendant, Mr. Crudup, Mr. Gresham, Mr. Milbourne, and Mr. Burnette drove to the residence of Mr. Milbourne's friend in Mr. Crudup's 1996 green Lexus ES300 for the purpose of retrieving the gun. The five men traveled in Mr. Crudup's Lexus to Walnut Terrace, where they parked near the basketball courts. Mr. Milbourne and Defendant got out of the car and went to the basketball courts, where they met with a man called "Savage." After encountering "Savage," Mr. Milbourne went to an apartment, where he remained for approximately ten minutes, to get the gun. At the time that he returned to the green Lexus, Mr. Milbourne carried a large, black revolver.

As the five young men drove away from Walnut Terrace, Mr. Dunn called Mr. Crudup's cell phone and arranged to meet him at the Melvid Court apartment complex. At approximately 4:00 p.m., the group arrived at Melvid Court. After noticing another green Lexus at Melvid Court and stating that Mr. Dunn would recognize his green Lexus, Mr. Crudup decided to drive across the street to another housing complex off of Dacian Road and park at that location. Mr. Crudup elected to park at the Dacian Road complex because he did not want Mr. Dunn to see the group of young men in the vehicle and realize that "something was up."

Although Mr. Crudup told Mr. Gresham to rob Mr. Dunn, Mr. Gresham expressed concern about doing so by himself. According to Mr. Crudup and Mr. Milbourne, Defendant agreed to accompany Mr. Gresham. At

that point, Mr. Milbourne testified that he passed the gun to Defendant, who exited the vehicle. Mr. Gresham took Mr. Crudup's cell phone with him so that he could keep in contact with Mr. Dunn. In addition, both Mr. Gresham and Defendant took one of Mr. Crudup's hats for the purpose of covering their hair and face. More specifically, Mr. Gresham took a Red Sox hat while Defendant took an Oakland A's hat.

At approximately 4:20 p.m., Defendant and Mr. Gresham walked over to Melvid Court. An individual named Zuri Twine had given Mr. Dunn a ride to Melvid Court. After receiving a call from Mr. Dunn, Mr. Gresham told Mr. Dunn to park by the green Lexus in the Melvid Court parking lot. As he pulled into that parking lot, Mr. Twine noticed a green Lexus and parked beside it. At the time that he arrived at Melvid Court, Mr. Twine observed two young African-American men sitting at the playground, both of whom were wearing hats. One of the two men was tall and light-skinned, like Defendant, and the other had a darker complexion, like Mr. Gresham.

After getting out of Mr. Twine's car, Mr. Dunn walked down the sidewalk and approached Defendant and Mr. Gresham, who were standing next to each other. At that point, Mr. Dunn inquired about Mr. Crudup. According to Mr. Gresham, Defendant pulled out the gun and started firing as Mr. Dunn turned to run away. Although the first shot hit the ground, the second shot struck Mr. Dunn in the back, causing him to fall. After Mr. Gresham turned to run, he heard two more shots. When Mr. Gresham looked back toward the scene of the shooting, Defendant was running behind him and Mr. Dunn was lying on the ground. As he and Defendant fled, Mr. Gresham lost Mr. Crudup's Red Sox hat.

After Defendant and Mr. Gresham returned to Mr. Crudup's green Lexus and entered the vehicle, the three other young men confirmed that they had heard three to five gunshots. Although Defendant admitted that he had shot Mr. Dunn, he expressed uncertainty as to whether Mr. Dunn was dead. At a later time, Defendant also told Mr. Milbourne, who is his cousin, that he had shot Mr. Dunn. When Mr. Milbourne inquired if Defendant and Mr. Gresham had taken any drugs or money from Mr. Dunn, the two men admitted that they had not obtained anything before fleeing the scene. During the drive back to Colleton Road, Defendant threw Mr. Crudup's Oakland A's hat out of the window between two wooded areas on a street off of New Bern Avenue. Upon their arrival at Colleton Road, Defendant gave the gun back to Mr. Milbourne and the group separated, with Mr. Milbourne, Mr. Burnette, and Defendant returning to Mr. Milbourne's sister's house.

A call seeking emergency assistance at Melvid Court was made at 4:23 p.m. Within two minutes, law enforcement officers and emergency medical personnel arrived at the scene. Although Mr. Dunn was rushed to the hospital, he died while undergoing surgery without having made any statement identifying who had shot him. The medical examiner determined that Mr. Dunn died as the result of gunshot wounds.

Although investigating officers did not find any drugs or money on Mr. Dunn's person, they did locate his cell phone and determined that the last several calls made and received on that phone had originated from or terminated to Mr. Crudup's phone. In addition, investigating officers determined that Mr. Crudup owned a green Lexus. The Red Sox hat that Mr. Gresham had been wearing was recovered at the scene of the shooting as well. Although investigating officers collected a small bag containing 3.86 grams of crack cocaine and a bullet from the Melvid Court area, there were no fingerprints on the baggie.

After calling the numbers stored in Mr. Dunn's phone, investigating officers located Mr. Twine, who told them that Mr. Dunn had planned to meet a male individual in a green Lexus at the time that he was killed. On the following day, the police found Mr. Crudup and placed him under arrest after finding unlawful controlled substances in his green Lexus. Although he initially denied having any knowledge of Mr. Dunn's murder, Mr. Crudup later provided investigating officers the names of some of the individuals involved in the commission of that offense. In addition, Mr. Crudup told investigating officers that Defendant had been wearing his Oakland A's hat and helped them locate it in the area where Defendant had thrown it out of Mr. Crudup's green Lexus. A DNA analysis indicated that DNA from both Mr. Gresham and Mr. Crudup was found on the Red Sox hat. Defendant's DNA constituted the predominant profile found on the Oakland A's hat, although Mr. Crudup's DNA could not be excluded from the material collected from that hat.

Detective Kevin Norman of the Raleigh Police Department interviewed Defendant on 12 May 2010. At that time, Defendant claimed to have been at Mr. Milbourne's house all day on 9 May 2010. In addition, Defendant denied knowing either Mr. Crudup or Mr. Gresham and denied having worn Mr. Crudup's Oakland A's hat. However, Defendant did volunteer, without any prompting, that he had heard about the murder in Melvid Court.

At trial, Mr. Crudup testified that he had received at least three letters from Defendant while the two of them were in custody awaiting trial. In one letter, Defendant wrote, "I mean a peter roll won't supposed to come

out, but sh*t, the n***** tried to run[.]" According to Mr. Crudup, this statement meant that a murder was not supposed to happen and that Mr. Dunn had been killed because he had tried to run away. In a second letter, Defendant accused Mr. Crudup of cooperating with the police and blamed his incarceration on Mr. Crudup's actions. Although Defendant acknowledged that Mr. Crudup had not pulled the trigger, he asserted that everyone knew that, when a robbery is being committed, someone "might have to shoot somebody" and stated that the entire group was "going down" if Mr. Crudup continued to cooperate with investigating officers. In the third letter, Defendant reiterated that he knew Mr. Crudup was cooperating with investigating officers and wrote that, "y'all is food now because of some s**t y'all know y'all won't supposed to say." By making this statement, Defendant was asserting that, although he and Mr. Crudup were members of different sets in the Bloods gang, the two men were not supposed to be informing on each other. At another point in the same letter, Defendant wrote, "I'm gonna take a plea. But if y'all trying to help bring me down, prepare to go to trial, and we all going down."

B. Procedural History

On 12 May 2010, a warrant for arrest was issued charging Defendant with the murder of Mr. Dunn. On 7 June 2010, the Wake County grand jury returned a bill of indictment charging Defendant with the first degree murder of Mr. Dunn. The charge against Defendant came on for trial before the trial court and a jury at the 3 October 2011 Criminal Session of Wake County Superior Court. On 12 October 2011, the jury returned a verdict convicting Defendant of first degree murder on the basis of the felony murder rule, with robbery with a dangerous weapon serving as the predicate felony. Based upon the jury's verdict, the trial court sentenced Defendant to life imprisonment without the possibility of parole. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Ineffective Assistance of Counsel

In his initial challenge to the trial court's judgment, Defendant asserts that he was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. U.S. Const. amend. VI; U.S. Const. amend. XIV; N.C. Const. Art. I, §§ 19, 23; *State v. Baker*, 109 N.C. App. 643, 644, 428 S.E.2d 476, 477, *disc. review denied*, 334 N.C. 435, 433 S.E.2d 180 (1993). More specifically, Defendant argues that he was deprived of the effective assistance of counsel (1) when

his trial counsel admitted the existence of each element of the offense of first degree murder based on the felony murder rule and (2) when the defense mounted by his trial counsel rested upon a theory of the case which lacked support in either the applicable law or the evidentiary record and upon evidence which Defendant's trial counsel promised to present and then never introduced. We do not believe that Defendant is entitled to relief on the basis of these ineffective assistance of counsel claims on direct appeal given that the first claim is without merit and that the second claim cannot be adequately evaluated without further development of the record.

1. Applicable Legal Principles

" 'In order to' obtain relief on the basis of an ineffective assistance of counsel claim, Defendant is required to demonstrate that his trial counsel's performance was deficient and that this deficient performance 'prejudiced the defense.' " *State v. Best*, ___ N.C. App. ___, ___, 713 S.E.2d 556, 562 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)), *disc. review denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). The United States Supreme Court has articulated a two-part test for use in determining if a defendant is entitled to relief on ineffective assistance of counsel grounds.

> 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.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693 (1984). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The adequacy of the representation provided by the defendant's counsel hinges upon "whether counsel's conduct so undermined the proper functioning of adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. The ultimate issue that must be resolved in determining whether any deficient performance by the defendant's trial counsel was sufficiently prejudicial to necessitate an

award of relief is whether "there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Banks*, 210 N.C. App. 30, 49, 706 S.E.2d 807, 821 (2011) (quoting *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Poindexter*, 359 N.C. 287, 291, 608 S.E.2d 761, 764 (2005) (citing *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471, 493 (2003) (quoting *Strickland*, 466 U.S. 694, 104 S. Ct. at 2068, 80 L. Ed. 2d 698)).

As a general proposition, reviewing courts do not second-guess the strategic or tactical decisions made by a defendant's counsel. *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 123 S. Ct. 1800, 155 L. Ed. 2d 681 (2003); *see also State v. Lesane*, 137 N.C. App. 234, 246, 528 S.E.2d 37, 45 (200) (stating that "[t]he decision whether or not to develop a particular defense is a tactical decision" that is not to be "second-guessed,"), *disc. review denied*, 352 N.C. 154, 544 S.E.2d 236 (2000). For that reason, in evaluating ineffective assistance claims stemming from challenges to strategic and tactical decisions made prior to and during trial, a defendant's trial counsel "is given wide latitude. . . and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 123 S. Ct. 184, 154 L. Ed. 2d 73 (2002). The deference shown to a defense attorney's strategic and tactical decisions stems from an acknowledgement that "[t]here are countless ways to provide effective assistance in any given case" and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 695. As a result, a reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Mason*, 337 N.C. 165, 178, 446 S.E.2d 58, 65 (1994) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 695).

The strategic and tactical decisions made by a defendant's trial counsel can, however, be so unreasonable as to result in the provision of constitutionally deficient representation. For example, in *State v. Moorman*, 320 N.C. 387, 400, 358 S.E.2d 502, 510 (1987), the Supreme Court held that the decision by the defendant's trial counsel to advance a theory of defense which had no basis in fact constituted deficient representation. In addition, according to well-established law, a defendant is entitled to relief on ineffective assistance of counsel grounds without a

showing of actual prejudice in the event that his or her trial counsel concedes the defendant's guilt of a criminal offense without consent. *State v. Harbison*, 315 N.C. 175, 180-81, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 106 S. Ct. 1992, 90 L. Ed. 2d 672 (1986). However, in the event that the "facts [in the record] must show, at a minimum, that defendant *knew* his counsel [was] going to make such a concession," counsel is entitled to concede his or her client's guilt of a criminal offense. *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004).

As a general proposition, an ineffective assistance of counsel claim should be asserted through the filing and litigation of a motion for appropriate relief, during the course of which an adequate factual record can be developed, rather than during the course of a direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553-56, 557 S.E.2d 544, 547-48 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002); *see also State v. Parmaei*, 180 N.C. App. 179, 185, 636 S.E.2d 322, 326 (2006), *disc. review denied*, 361 N.C. 366, 646 S.E.2d 547 (2007). The preference for the assertion of ineffective assistance of counsel claims in postconviction proceedings rather than on direct appeal inherent in numerous decisions by this Court and the Supreme Court stems from the fact that evidence concerning the nature and extent of the information available to the defendant's trial counsel at the time that certain decisions were made and the fact that information concerning any discussions that took place between the defendant and his or her trial counsel, while needed in evaluating the validity of the ineffective assistance of counsel claim under consideration, are generally not contained in the record presented to a reviewing court on direct appeal. In other words, when an ineffective assistance of counsel claim

> is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose . . . If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.

Massaro v. United States, 538 U.S. 500, 504-05, 123 S. Ct. 1690, 1694, 155 L. Ed. 2d 714, 720 (2003). As a result,

> 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." [However], 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) (quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed 2d 162 (2002)), *cert. denied*, 546 U.S. 830, 126 S. Ct. 48, 163 L. Ed. 2d 80 (2005). We will now utilize these basic legal principles to analyze Defendant's ineffective assistance of counsel claims.

2. *Harbison* Claim

[1] As we have already noted, Defendant contends that his trial counsel provided him with constitutionally deficient representation by conceding the existence of each of the elements which the State was required to establish in order to show his guilt of first degree murder under the felony murder rule. We do not believe that Defendant is entitled to relief on the basis of this contention.

Although Defendant's trial counsel never explicitly conceded her client's guilt of any offense during the course of the trial, she did make a number of factual concessions during the course of the trial proceedings, including admitting that Defendant had been present at the scene of the shooting of Mr. Dunn and that Defendant believed that he was participating in a plan to commit a robbery. However, we need not decide whether the factual admissions made by Defendant's trial counsel were tantamount to an admission of Defendant's guilt of first degree murder on the basis of the felony murder rule given that Defendant expressly consented to the strategy employed and the admissions made by his trial counsel.

After the State asserted that the admissions made by Defendant's trial counsel established his guilt of first degree murder under the felony murder rule, the trial court conducted an inquiry for the purpose of determining whether Defendant's trial counsel had made these admissions with the consent of her client. At that hearing, Defendant acknowledged an awareness that his trial counsel intended to admit that he had been present at the scene of the shooting, that he had been present when

the group went to get a gun, and that he had willingly exited Mr. Crudup's green Lexus with the belief that the group was going to be committing a robbery. However, the record also reflects that Defendant's trial counsel made these admissions in accordance with a trial strategy during which she planned to challenge certain self-serving statements made by the testifying co-defendants, assert that Defendant had not been the individual who fired the shots that killed Mr. Dunn, and argue that Defendant was not the shooter and that the chain of events which led to the death of Mr. Dunn was never, contrary to Defendant's belief, supposed to result in a robbery. In other words, Defendant's trial counsel intended to attempt to persuade the jury to refrain from convicting Defendant of first degree murder on the grounds that he did not intend to or actually kill Mr. Dunn and that, since the killing of Mr. Dunn resulted from a separate plan to murder him of which Defendant was not aware, the killing of Mr. Dunn had not occurred during the course of any felony which Defendant intended to commit. At the conclusion of this inquiry, Defendant stated that he had discussed this strategy with his trial counsel and agreed that the strategy in question should be the one employed in his defense. As a result, given that his trial counsel made the challenged admissions of fact with his consent, Defendant is not entitled to relief from the trial court's judgment on the basis of the principle enunciated in *Harbison* and its progeny.

3. Challenge to Trial Counsel's Defense Strategy

[2] Secondly, Defendant contends that his trial counsel provided him with deficient representation because the approach that she adopted in seeking to persuade the jury to refrain from convicting Defendant of any criminal offense lacked adequate factual and legal support. More specifically, Defendant contends that his trial counsel's decision to adopt a strategy of conceding that Defendant was present at the scene of Mr. Dunn's death and that he thought that he was supposed to be engaging in an effort to rob Mr. Dunn and of promising to present expert testimony concerning the effect of Defendant's involvement in gang-related activities constituted an unreasonable strategic choice for which there was no evidentiary or legal support. We do not believe that Defendant's challenge to the defense strategy adopted by his trial counsel, to which he consented during the course of the trial proceedings, is ripe for decision on direct appeal.

Although the parties expended considerable energy attempting to either attack or defend the strategic decisions that Defendant's trial counsel made in advance of and during Defendant's trial, we do not believe that we are currently in a position to adequately evaluate the extent, if any, to which those decisions resulted in the provision of constitutionally

deficient representation. Admittedly, the theory of defense adopted by Defendant's trial counsel is difficult to state in a simple and concise manner, particularly as applied to the issue of Defendant's guilt of first degree murder under the felony murder rule. On the other hand, the record does not provide sufficient information to permit us to evaluate the extent to which other strategic options were realistically available to Defendant and what considerations Defendant's trial counsel weighed in the course of determining that the strategy that she adopted, despite its obvious difficulties, was more likely to be successful than other available alternatives. In the absence of additional information concerning the nature and extent of the investigative activities and legal research undertaken by Defendant's trial counsel and the nature and strength of the alternative defense strategies realistically available to Defendant, we can do little more than speculate as to whether the defense presented at Defendant's trial amounted to constitutionally deficient representation or whether any deficiencies in the representation that Defendant did receive prejudiced him.

We should not, for obvious reasons, engage in such speculation. *State v. Al-Bayyinah*, 359 N.C. 741, 752-53, 616 S.E.2d 500, 509-10 (2005) (dismissing an ineffective assistance of counsel claim asserted on direct appeal without prejudice because "[t]rial counsel's strategy and the reasons therefor [were] not readily apparent from the record," necessitating the development of "more information . . . [in order] to [permit a] determin[ation as to whether] defendant's claim satisfies the *Strickland* test"), *cert. denied*, 547 U.S. 1076, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006); *State v. Campbell*, 359 N.C. 644, 693, 617 S.E.2d 1, 31 (2005) (dismissing an ineffective assistance of counsel claim asserted on direct appeal without prejudice because, from the record before the Court, it could only "speculate as to why defense counsel chose to argue self-defense"), *cert. denied*, 547 U.S. 1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006); *State v. Loftis*, 185 N.C. App. 190, 203, 649 S.E.2d 1, 10 (2007) (dismissing an ineffective assistance of counsel claim asserted on direct appeal without prejudice on the grounds that the Court lacked "sufficient information regarding trial counsel's strategy"). The inappropriateness of speculating about the suitability of trial counsel's theory of defense underlies the Supreme Court's acknowledgement that, in many cases, " 'defendants likely will not be in a position to adequately develop many [ineffective assistance of counsel] claims on direct appeal.' " *State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001) (quoting *Fair*, 354 N.C. at 167, 557 S.E.2d at 525). As a result, given our determination that we cannot adequately evaluate the merits of Defendant's challenge to the reasonableness of the strategy adopted by his trial counsel in the absence of additional information, including her failure to present expert testimony concerning the impact of gang involvement on Defendant's activities, we

conclude that this aspect of Defendant's ineffective assistance of counsel claim should be dismissed without prejudice to Defendant's right to assert this claim in a subsequent motion for appropriate relief.

B. Mandatory Life Without Parole Sentence

[3] Secondly, Defendant contends that the trial court violated his state and federal constitutional right to be free from cruel and unusual punishment by imposing a mandatory sentence of life imprisonment without the possibility of parole upon him despite the fact that he was under 18 years of age at the time of Mr. Dunn's murder. We agree.

The Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of cruel and unusual punishments upon convicted criminal defendants. U.S. Const. amend. VIII; U.S. Const. amend. XIV; *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183, 1190, 161 L. Ed. 2d 1, 15-16 (2005). Among other things, the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012). As a result of the fact that the United States Supreme Court's decision in *Miller* was announced while this case was pending on direct review, the principle enunciated in that decision applies to the resolution of this case. *Id.*

The trial court's judgment requiring that Defendant, who had not attained the age of 18 at the time that Mr. Dunn was killed, be imprisoned for the remainder of his life without the possibility of parole was imposed in accordance with N.C. Gen. Stat. § 14-17(a), which provides that an individual who was less than 18 years of age at the time of the crime for which he or she was convicted and was found guilty of first degree murder would automatically be sentenced to life imprisonment without the possibility of parole. The Supreme Court's decision in *Miller* clearly holds that such a mandatory life without parole sentence for an individual convicted of committing a crime which occurred before he or she turned 18 years of age constituted the imposition of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. *Id.*; U.S. Const. amend. VIII; N.C. Const. Art. I, § 27. As a result, the mandatory sentence of life imprisonment without the possibility of parole that the trial court imposed upon Defendant pursuant to N.C. Gen. Stat. § 14-17(a) cannot withstand constitutional scrutiny and must be vacated.

In the aftermath of the decision in *Miller*, the General Assembly enacted 2012 N.C. Sess. L. c. 148, which governs the sentencing of

individuals "under the age of 18 at the time of the offense" who would otherwise be subject to a mandatory sentence of life imprisonment without the possibility of parole in accordance with N.C. Gen. Stat. § 14-17(a). Pursuant to N.C. Gen. Stat. § 15A-1340.19B(a)(1), "[i]f the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole," which is defined in N.C. Gen. Stat. § 15A-1340.19A as "mean[ing] that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." According to 2012 N.C. Sess. L. c. 148, s.3, the statutory provisions enacted in 2012 N.C. Sess. L. c. 148 apply "to any resentencing hearings required by law for a defendant who was under the age of 18 years at the time of the offense, was sentenced to life imprisonment without parole prior to the effective date of this act, and for whom a resentencing hearing has been ordered." For that reason, since Defendant is entitled to be resentenced by virtue of *Miller* and since Defendant was convicted of first degree murder solely on the basis of the felony-murder rule, he must be resentenced to life imprisonment with parole in accordance with N.C. Gen. Stat. § 15A-1340.19B(a). As a result, the trial court's sentence should be vacated and this case should be remanded to the Wake County Superior Court for the entry of a judgment sentencing Defendant to life imprisonment with parole. *State v. Lovette*, __ N.C. App. __, __, 737 S.E.2d 432, 441-42 (2013) (holding that a defendant impermissibly sentenced to life imprisonment without the possibility of parole in violation of *Miller* should be awarded a new sentencing hearing to be conducted in accordance with the provisions of N.C. Gen. Stat. § 15A-1340.19B).

III. Conclusion

Thus, for the reasons set forth above, we hold that Defendant is not entitled to relief from the trial court's judgment based upon his trial counsel's alleged admission of guilt, that Defendant's challenge to the strategy adopted by his trial counsel has been prematurely asserted on direct appeal and should be dismissed without prejudice to his right to assert that claim in a future motion for appropriate relief, that the trial court's sentence should be vacated, and that this case should be remanded to the Wake County Superior Court for resentencing. As a result, the trial court's sentence is vacated and this case should be, and hereby is, remanded to the Wake County Superior Court for a new sentencing hearing.

NO ERROR IN PART; DISMISSED IN PART; VACATED AND REMANDED FOR RESENTENCING IN PART.

Judges ROBERT C. HUNTER and STROUD concur.

STATE OF NORTH CAROLINA
v.
TRACY ALLEN POOLE, DEFENDANT

No. COA12-1150

Filed 2 July 2013

1. Domestic violence—ex parte order—protective order—owning, possessing, purchasing, or receiving a firearm

The trial court erred by granting defendant's motion to dismiss the charge of owning, possessing, purchasing, or receiving a firearm in violation of a domestic violence protective order pursuant to N.C.G.S. § 14-269.8 (2011). The trial court erred in relying on *State v. Byrd*, 363 N.C. 214, 675 S.E.2d 323 (2009), because a protective order includes an *ex parte* or emergency order for purposes of N.C.G.S. §§ 14-269.8 and 50B-3.1.

2. Constitutional Law—due process—prosecution for violation of ex parte order

The trial court erred by granting defendant's motion to dismiss the charge of owning, possessing, purchasing, or receiving a firearm in violation of a domestic violence protective order pursuant to N.C.G.S. § 14-269.8 (2011). Prosecution of defendant for violation of an ex parte domestic violence protective order would not infringe his right to due process of law under the state and federal constitutions as these provisions fully comply with procedural due process requirements as applied to defendant.

Appeal by the State from Order entered 5 June 2012 by Judge Gary M. Gavenus in Superior Court, Buncombe County. Heard in the Court of Appeals 28 March 2013.

Attorney General Roy A. Cooper III, by Assistant Attorney General LaToya B. Powell, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellee.

STROUD, Judge.

The State appeals from an order entered 5 June 2012 dismissing an indictment charging Tracy Allen Poole ("defendant") with violating an

ex parte domestic violence protective order (DVPO) that required him to surrender his firearms. We conclude that the Supreme Court case relied upon by the trial court is not controlling on the issue presented here because of subsequent statutory amendments and that prosecution of defendant for violation of an *ex parte* order does not violate his procedural due process rights. Therefore, we reverse the trial court's order and remand for further proceedings.

I. Background

On 14 October 2011, defendant's wife, Tammy Lynn Poole, filed a complaint and motion for a domestic violence protective order, alleging that defendant had showed up at her house after making repeated phone calls and banged on her door. She further alleged that defendant possessed "several rifles and a handgun and lots of ammo" and that she felt "unsafe" and "frightened."

That same day, the trial court entered an *ex parte* DVPO. The trial court found that defendant had placed Tammy in fear of imminent bodily harm and continued harassment "to such a level as to inflict substantial emotional distress." The trial court also found that defendant had threatened to commit suicide. The trial court accordingly concluded that defendant had committed acts of domestic violence, that there "is a clear danger" of acts of domestic violence against Tammy, and that "[t]he defendant's conduct requires that he[] surrender all firearms, ammunition, and gun permits." The *ex parte* DVPO prohibited defendant from contacting Tammy and ordered defendant to surrender all "firearms, ammunition, and gun permits" to the sheriff who served him with the DVPO. The DVPO was in effect until 20 October 2011.[1]

On 17 October 2011 a sheriff served defendant with the DVPO. The next day, 18 October 2011, sheriffs returned to defendant's home and discovered a shotgun. Defendant was then arrested for violating the DVPO and indicted for "owning, possessing, purchasing, or receiving a firearm" in violation of a domestic violence protective order pursuant to N.C. Gen. Stat. § 14-269.8 (2011).

Defendant's case came on for trial on 21 May 2012. Prior to trial, defendant filed a motion to dismiss the charge, arguing that "[a]n ex parte hearing does not satisfy the hearing requirements for a valid protective

1. The record before the court does not include any order entered in the domestic violence action after the *ex parte* order, but the parties indicated at the 21 May 2012 hearing on defendant's motion to dismiss that there was still a valid protective order in effect at the time of the hearing.

order" and that "[a] valid protective order is required under N.C.G.S. §§ 50B-3.1(j) and 14-269.8 to convict a defendant of the offense [charged.]" At the hearing on defendant's motion to dismiss the trial court announced that it would grant the motion. On 5 June 2012, the trial court entered an order granting defendant's motion and dismissing all charges because (1) the DVPO "was not a protective order entered within the meaning of N.C.G.S. § 50B-1(c) and N.C.G.S. § 14-269.8" and (2) "prosecution of the defendant . . . under these facts and circumstances would be a violation of the defendant's constitutional right to due process." The State filed timely written notice of appeal to this Court.

II. Protective order

[1] The trial court relied primarily upon *State v. Byrd*, 363 N.C. 214, 675 S.E.2d 323 (2009), in concluding that an *ex parte* order entered under N.C. Gen. Stat. §§ 50B-2(c) and 50B-3.1(b) (2011) is not a "protective order" for purposes of N.C. Gen. Stat. § 14-269.8 (2011). In *Byrd*, the Supreme Court considered whether a Temporary Restraining Order (TRO) entered under N.C. Gen. Stat. § 1A-1, Rule 65, was a "valid domestic violence protective order under Chapter 50B" for purposes of a sentencing enhancement under N.C. Gen. Stat. § 50B-4.1(d). *Byrd*, 363 N.C. at 219, 675 S.E.2d at 325. The Supreme Court held that the TRO was not entered "pursuant to Chapter 50B" and then went on to note that even if it had been entered pursuant to Chapter 50B that it was not a "valid protective order" because it had been entered *ex parte*. *Id.* at 220-21, 675 S.E.2d at 327.

Here, the trial court concluded that the 2009 amendments to N.C. Gen. Stat. § 50B-4 and 50B-4.1 (2011), which appear to have been passed directly in response to *Byrd*, were inapplicable and that there is a distinction in Chapter 50B between a "protective order" and a "valid protective order." We disagree.

The amendments enacted by 2009 N.C. Sess. Laws 342 do change the application of these statutes and have corrected the situation created by *Byrd*, which left victims of domestic violence with limited penalties for violation of *ex parte* domestic violence orders. The 2009 amendments make it clear that an ex parte domestic violence order entered under Chapter 50B is a "valid protective order" and thus defendant would have been in violation of a "valid protective order" by his alleged possession of guns from 17 October 2011 to about 19 October 2011. Reading N.C. Gen. Stat. § 14-269.8 in light of the plain language of its companion 50B statute, N.C. Gen. Stat. § 50B-3.1, also supports this conclusion.

First, the portions of *Byrd* which the trial court relied on in making a distinction between a "protective order" and a "valid protective order" were *dicta*, as they were not necessary to the court's decision. *See Romulus v. Romulus*, ___ N.C. App. ___, ___, 715 S.E.2d 308, 321 (2011) ("[I]f the statement in the opinion was . . . superfluous and not needed for the full determination of the case, it is not entitled to be accounted a precedent, for the reason that it was, so to speak, rendered without jurisdiction or at least extra-judicial." (quoting *Hayes v. Wilmington*, 243 N.C. 525, 536–37, 91 S.E.2d 673, 682 (1956))).

The Supreme Court in *Byrd* held that a Rule 65 TRO was not sufficient to form the basis of a sentencing enhancement based on violation of a DVPO, since the TRO was not a DVPO entered under Chapter 50B. *Byrd*, 363 N.C. at 218-22, 675 S.E.2d at 325-27. The Court highlighted the significant procedural differences between a TRO under Rule 65 and a DVPO under Chapter 50B.

In addition to those procedural differences which were most relevant in the context of the *Byrd* case—discussed further below—Chapter 50B provides different enforcement mechanisms for DVPOs than are available for Rule 65 TROs. For example, N.C. Gen. Stat. § 50B-3(d) requires that

> The sheriff of the county where a domestic violence order is entered shall provide for prompt entry of the order into the National Crime Information Center registry and shall provide for access of such orders to magistrates on a 24-hour-a-day basis. Modifications, terminations, renewals, and dismissals of the order shall also be promptly entered.

N.C. Gen. Stat. § 50B-3(d) (2011).

Not only must copies of the DVPO be served on the parties, but they also must be provided to "the police department of the city of the victim's residence" or "the sheriff, and the county police department, if any, of the county in which the victim resides" and the principal of child's school if the order requires the defendant to stay away from the child as well. N.C. Gen. Stat. § 50B-3(c). The obvious purpose of providing copies of the DVPO to law enforcement agencies, the school, and entry of the domestic violence order information into the National Crime Information Center database is to permit prompt and effective enforcement of the order by law enforcement agencies.

After holding that a TRO entered under Rule 65 was not a valid protective order entered under Chapter 50B, which was sufficient to dispose

of the issues presented by *Byrd*, the Supreme Court went on to note that the TRO was entered *ex parte* and thus was not entered "upon hearing by the court or consent of the parties"—another requirement under N.C. Gen. Stat. § 50B-1(c) not included under Rule 65 because no adversarial hearing at which the defendant had a right to be present was held prior to issuance of the TRO. *Id.* at 223-24, 675 S.E.2d at 328.

The issue of whether an *ex parte* order entered under § 50B-2(c) was a valid protective order and enforceable by N.C. Gen. Stat. § 50B-4.1 was not actually presented to the Supreme Court in *Byrd*. *See Byrd*, 363 N.C. at 221, 675 S.E.2d at 327 ("[E]ven if the TRO had been entered under Chapter 50B, which we have held it was not . . . ." (emphasis added)). It is unclear whether the portion of the Supreme Court's opinion addressing the *ex parte* nature of the proceedings could constitute an independent ground for its holding or not. *See Romulus*, ___ N.C. App. at ___, 715 S.E.2d at 321 ("[W]here a case actually presents two or more points, any one of which is sufficient to support decision, but the reviewing Court decides all the points, the decision becomes a precedent in respect to every point decided." (quoting *Hayes*, 243 N.C. at 536–37, 91 S.E.2d at 682)).

Given the fact that the case did not actually present the issue of an *ex parte* order entered pursuant to the detailed procedures in Chapter 50B and the lack of a due process analysis, we believe that the Supreme Court did not intend the *ex parte* and due process discussion as an independent ground for its holding. *See Central Virginia Community College v. Katz*, 546 U.S. 356, 363, 163 L.Ed. 2d 945, 954 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. *If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. State of Virginia, 19 U.S. 264, 399-400, 5 L.Ed. 257, 290 (1821) (emphasis added). Therefore, we consider that discussion *obiter dicta*.

Second, if it is an independent ground and not *dicta*, that portion is nevertheless distinguishable from the present case because the 2009 amendments show that the Legislature disagreed with the Supreme Court's implication that an *ex parte* order is not a "valid protective order." Moreover, that discussion in *Byrd* only addressed N.C. Gen. Stat. § 50B-4.1, not § 3.1, which is at issue here.

We note that the Supreme Court emphasized the distinctive nature of the procedure and remedies provided under Chapter 50B:[2]

> Moreover, even if the TRO had been entered under Chapter 50B, which we have held it was not, it fails to meet the second prong of the definition of a valid domestic violence protective order in that it was not entered "upon hearing by the court or consent of the parties." N.C.G.S. § 50B-1(c). The State contends, and the Court of Appeals' majority agreed, that because an *ex parte* proceeding was held before the TRO was issued, the hearing requirement under N.C.G.S. § 50B–1(c) was satisfied. Again we disagree.
>
> The provisions of Chapter 50B demonstrate that in the domestic violence context, the Legislature contemplated two separate proceedings whereby two types of orders could be entered, a valid protective order and an *ex parte* order. N.C.G.S. §§ 50B–1(c), –2(c), –3(b) (2003). If exigent circumstances require immediate issuance, without notice to the other party, of an order to protect a party, the General Assembly has provided for an *ex parte* order. Under Chapter 50B when "[p]rior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party ... the court may enter such orders as it deems necessary to protect the aggrieved party ... from such acts." N.C.G.S. § 50B–2(c). A trial court entering an *ex parte* order under this subsection is also required to hold a "hearing ... within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later." *Id.* By

2. Although this is the portion of the opinion we consider dicta, it does clarify the Supreme Court's view of the statutory procedure and importance of the definition of the various types of orders and is thus useful to our analysis. In addition, the due process analysis also depends upon the definition of "valid protective order" which was corrected by the 2009 statutory amendments.

> definition a valid protective order must be upon hearing or by consent of the parties. N.C.G.S. § 50B–1(c). That the definition of a "protective order" permits entry of the order by consent also suggests that the enjoined party must have had notice with the opportunity to be heard. The record before this Court reveals that no such hearing was held by the trial court before it entered the TRO on 11 March 2004. A hearing was scheduled for 15 March 2004, but was continued, along with the TRO, until 24 March 2004. The order granting the TRO states that the "applicant's request for temporary restraining order comes on without notice to the Defendant." The circumstances surrounding its entry, as well as the language of the order itself, make clear that no hearing *of the type contemplated by N.C.G.S. § 50B–1(c)* was held in this case. Only a valid protective order entered under Chapter 50B can be used to enhance a defendant's sentence under N.C.G.S. § 50B–4.1(d).

Id. at 221-22, 675 S.E.2d at 327 (emphasis added).

Defendant relies upon *Byrd* in arguing that a "hearing" must be adversarial and that an *ex parte* hearing cannot be a "hearing" for purposes of N.C. Gen. Stat. § 50B-1(c). The Supreme Court noted that an *ex parte* hearing may be a type of hearing:

> We acknowledge that the term "hearing" is often used generically to refer to any proceeding before a court. See Black's Law Dictionary 737 (8th ed. 2004) (defining a hearing as "[a] judicial session ... held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying"). We cannot, however, agree that this generic definition comports with the statutory scheme in Chapter 50B, which, in our view, requires that a defendant be given notice and the opportunity to be heard before entry of a protective order.

Id. at 222, 675 S.E.2d at 327-28.

Byrd is correct to the extent that it is read as stating that a defendant must be given notice and the opportunity to be heard before entry of a protective order for one year under N.C. Gen. Stat. § 50B-3, but to read it as eviscerating the *ex parte* protective provisions of Chapter 50B goes too far. The 2009 amendment to N.C. Gen. Stat. § 50B-4.1 added subsection (h): "For the purposes of this section, the term 'valid protective order' shall include an emergency or ex parte order entered

under this Chapter." 2009 N.C. Sess. Laws 342, § 5. This enactment was clearly in response to the *dicta* in *Byrd* indicating that an *ex parte* order may not be a "valid protective order" under § 50B-4.1. The legislature responded by providing that a "valid protective order" is not a special kind of order; it is simply an order which is valid under the particular statutory scheme. In other words, the statute as amended clarifies that a "valid protective order" is an order valid under whichever statute it falls, whether an *ex parte* order (N.C. Gen. Stat. § 50B-2(c)), an emergency order (N.C. Gen. Stat. § 50B-2(b)), or an order effective for one year (N.C. Gen. Stat. § 50B-3). To read it otherwise is to assume that the 2009 amendments were intended to draw an illogical distinction between a "protective order" and a "valid protective order."[3]

Section 50B-1(c) provides that "As used in this Chapter [50B], the term 'protective order' includes any order entered pursuant to this Chapter upon hearing by the court or consent of the parties." N.C. Gen. Stat. § 50B-1(c). The "hearing" at which the *ex parte* domestic violence protective order was entered in this case was exactly a "hearing *of the type contemplated* by N.C. Gen. Stat. § 50B-1(c)." *Byrd*, 363 N.C. at 222, 675 S.E.2d at 327 (emphasis added). Any reading of Chapter 50B otherwise entirely ignores the most relevant statutory provisions for purposes of this case.

This *ex parte* order was entered under N.C. Gen. Stat. § 50B-3.1, which provides as follows:

> (a) Required Surrender of Firearms. – **Upon issuance of an emergency or ex parte order pursuant to this Chapter**, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:
>
> (1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.
>
> (2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.

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3. Indeed, the Supreme Court in Byrd used these two terms interchangeably. *See Byrd*, 363 N.C. at 222, 675 S.E.2d at 327.

> (3) Threats to commit suicide by the defendant.
>
> (4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.
>
> (b) **Ex Parte or Emergency Hearing. — The court shall inquire of the plaintiff, at the ex parte or emergency hearing,** the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.
>
> (c) Ten-Day Hearing. – The court, at the 10-day hearing, shall inquire of the defendant the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.

N.C. Gen. Stat. § 50B-3.1 (emphasis added).

This statute sets forth a specific procedure for entry of *ex parte* domestic violence orders which require surrender of firearms and directs what the court shall do at the *ex parte* hearing as well as at the ten-day hearing. This is the type of hearing contemplated under the statute because it is actually the procedure set forth by the statute and the statute refers to it as a "hearing." First, subsection (a) of the statute notes that surrender of firearms may be required in certain circumstances "upon issuance of an emergency or *ex parte order* pursuant to this Chapter." *Id.* Subsection (b) then goes on to direct the trial court to make certain inquiries *at either the emergency or ex parte hearing. Id.*

Defendant is correct that the *ex parte* hearing is not an adversarial hearing at which both parties are present, but that does not mean that it is not a "hearing" for purposes of N.C. Gen. Stat. § 50B-1(c), because N.C. Gen. Stat. § 50B-3.1(b) says that the *ex parte* hearing *is* such a hearing. Indeed, this Court has previously recognized that a "hearing" must be held prior to issuance of an *ex parte* protective order:

> A court may only issue an ex parte DVPO if "it clearly appears to the court from specific facts shown, that

> there is a danger of acts of domestic violence against the aggrieved party[.]" N.C. Gen. Stat. § 50B–2(c) (emphasis added). N.C. Gen. Stat. § 50B–2(c) does not provide that the trial court may issue an ex parte DVPO based solely upon the allegations of the complaint. N.C. Gen. Stat. § 50B–2(c) instead provides that
>
> [i]f an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule *an* e*x parte hearing* with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur.
>
> *Id.* (emphasis added).
>
> Therefore, N.C. Gen. Stat. § 50B–2 requires that a "hearing" be held prior to issuance of the ex parte DVPO. *See id.* If the ex parte DVPO could be issued based only upon the verified complaint, without having the aggrieved party appear for a hearing before a judge or magistrate, there would be no need to schedule a hearing; the judge or magistrate could simply read the verified complaint and decide whether to issue the ex parte DVPO. *See id.* (footnote omitted)

Hensey v. Hennessy, 201 N.C. App. 56, 59-60, 685 S.E.2d 541, 544-45 (2009).

The trial court noted the statutory amendment to N.C. Gen. Stat. § 50B-4.1 following *Byrd* but concluded that it was inapplicable. The trial court further observed that although a "valid protective order" under N.C. Gen. Stat. § 50B-4.1 now explicitly includes *ex parte* orders, § 50B-3.1 does not because it uses the phrase "protective order"—omitting the word "valid". The trial court concluded that there is, therefore, a difference between a "protective order" and a "valid protective order." This interpretation ignores the plain words of N.C. Gen. Stat. § 14-269.8, which defines the crime of "Purchase or possession of firearms by person subject to domestic violence order," and § 50B-3.1.

> *In accordance with G.S. 50B-3.1*, it is unlawful for any person to possess, purchase, or receive or attempt to possess, purchase, or receive a firearm, as defined in G.S. 14-409.39(2), machine gun, ammunition, or permits to purchase or carry concealed firearms if ordered by the court

> for so long as that *protective order or any successive protective order* entered against that person *pursuant to Chapter 50B of the General Statutes* is in effect.

N.C. Gen. Stat. § 14-269.8 (emphasis added).

As indicated by the phrases emphasized above, N.C. Gen. Stat. § 14-269.8 refers to the provisions of Chapter 50B and relies upon any form of protective order entered under Chapter 50B, in particular § 50B-3.1. The limitation of "for purposes of this section" in N.C. Gen. Stat. § 50B-4.1 (h) clarifies the law following *Byrd* regarding what is a "valid protective order," to the extent that it may be read, incorrectly in our opinion, as holding that an *ex parte* DVPO is essentially unenforceable except by contempt of court because it is entered prior to an adversarial hearing.

Finally, the plain language of N.C. Gen. Stat. § 50B-3.1 makes clear that an emergency or *ex parte* order is a "protective order" for purposes of N.C. Gen. Stat. §§ 14-269.8 and 50B-3.1. Section 50B-3.1 addresses not only orders entered after the "ten-day hearing," but also emergency or *ex parte* orders. *See* N.C. Gen. Stat. § 50B-3.1(a) ("Upon issuance of an emergency or ex parte order . . . ."). In various subsections, the statute refers to the relevant order either as "the emergency or ex parte order," *e.g.*, N.C. Gen. Stat. § 50B-3.1(a), "the order," *e.g.*, N.C. Gen. Stat. § 50B-3.1(d) ("Upon service of the order . . . ."), or "the protective order," *e.g.*, N.C. Gen. Stat. § 50B-3.1(d)(1) ("If the court orders the defendant to surrender firearms, ammunition, and permits, the court shall inform the plaintiff and the defendant of the terms of the *protective order*." (emphasis added)). Defendant would have us read these terms to mean different things.

The use of the term "protective order" in § 50B-3.1(d)(1) is particularly informative. N.C. Gen. Stat. § 50B-3.1(d) requires a defendant to surrender his firearms upon service of "the order" to that effect. N.C. Gen. Stat. § 50B-3.1(d) ("Upon service of the order . . ."). If the defendant does not have to surrender his firearms until service of "the order" and "the order" refers only to a "protective order" entered after a full hearing, there would be no point in requiring the court to order the surrender of firearms in an emergency or *ex parte* order when it finds one of the statutory factors. Therefore, the term "order" must include an *ex parte* order.

If we read "order" to include "emergency or *ex parte* order," then "protective order" must include those orders as well. Under subsection (d)(1) the court must inform the defendant of the terms of the "protective order" upon service of "the order." N.C. Gen. Stat. § 50B-3.1(d)(1). There is no reason to read the "order" referred to in subsection (d) as

different from that in subsection (d)(1). At the point an *ex parte* order is served on the defendant there has not been a full adversarial hearing. Therefore, if "protective order" means only an order entered after a full adversarial hearing, there would be no terms to inform the defendant of. This interpretation would render the statute illogical.

The most logical way to interpret the various provisions of § 50B-3.1 is to read "order" and "protective order" as including "emergency or ex parte order." N.C. Gen. Stat. § 50B-3.1(j) makes it a Class H felony to violate a court order directing the defendant to surrender his firearms "for so long as that protective order . . . is in effect." N.C. Gen. Stat. § 50B-3.1(j). That subsection cross-references N.C. Gen. Stat. § 14-269.8, which largely copies the language in § 50B-3.1(j) and criminalizes the violation of a protective order "entered against that person pursuant to Chapter 50B" requiring the surrender of firearms, "[i]n accordance with G.S. 50B-3.1." N.C. Gen. Stat. § 14-269.8(a). This particular statute refers specifically to § 50B-3.1, in which the proceeding before entry of an *ex parte* order is called a hearing and the term protective order includes *ex parte* orders.

In light of the 2009 amendments to Chapter 50B clarifying that a "valid protective order" includes *ex parte* orders and reading N.C. Gen. Stat. § 14-269.8(a) in conjunction with § 50B-3.1, we conclude that a "protective order" includes an *ex parte* or emergency order for purposes of N.C. Gen. Stat. §§ 14-269.8 and 50B-3.1.

III. Procedural due process

[2] The trial court concluded and defendant argues that prosecution of defendant for violation of the *ex parte* order would infringe his right to due process of law under the state and federal constitutions. We hold that these provisions fully comply with procedural due process requirements as applied to defendant.[4]

The Fourteenth Amendment to the United States Constitution forbids states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "[T]he Law of the Land Clause of the North Carolina Constitution, N.C. Const. art. I, § 19, is synonymous with due process of law as found in the Fourteenth

4. Although the trial court did not specify how it believed enforcement of an *ex parte* order would violate defendant's due process rights, the parties only briefed the issue of procedural, not substantive, due process. Therefore, we only address procedural due process.

Amendment to the Federal Constitution." *State v. Bryant*, 359 N.C. 554, 563, 614 S.E.2d 479, 485 (2005) (citation and quotation marks omitted).

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L.Ed. 2d 18, 32 (1976) (citation and quotation marks omitted). Generally, due process requires notice and a hearing before the government may deprive an individual of liberty or property. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53, 126 L.Ed. 2d 490, 503 (1993).

> The right to prior notice and a hearing is central to the Constitution's command of due process. . . . We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Id. (citations and quotation marks omitted). In *Mathews*, the United States Supreme Court announced a balancing test for deciding questions of procedural due process that it has since described as follows:

> [T]he process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of the risk of an erroneous deprivation of the private interest if the process were reduced and the probable value, if any, of additional or substitute procedural safeguards.

Hamdi v. Rumsfeld, 542 U.S. 507, 529, 159 L.Ed. 2d 578, 509 (2004) (citations and quotation marks omitted).

In applying the Law of the Land Clause to the deprivation of a property or liberty interest prior to notice and a hearing, our Supreme Court has articulated a slightly different test under the North Carolina Constitution:

> When the furtherance of a legitimate state interest requires the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state interest, the law of the land ordinarily requires no more than that before such action is undertaken, a judicial

> officer determine there is probable cause to believe that the conditions which would justify the action exist.

Henry v. Edmisten, 315 N.C. 474, 494, 340 S.E.2d 720, 733 (1986).

Here, defendant asserts two distinct liberty interests, though he does not distinguish them: first, his right to keep and bear arms, which he alleges is infringed by enforcement of the order requiring surrender of his firearms; second, his physical liberty, which he implies is infringed by his prosecution for violation of an *ex parte* order, as opposed to merely being subject to contempt sanctions.

The *dicta* in *Byrd* that the trial court relied on did not mention the balancing test for procedural due process under the Fourteenth Amendment, identify the interests at stake, or purport to balance those interests. *Byrd*, 363 N.C. at 223-24, 675 S.E.2d at 328.[5] The Supreme Court's failure to address these issues is an additional indication that its statements on this issue were *dicta*, and as noted above, we conclude this *dicta* is not controlling.

The right to keep and bear arms is a fundamental right protected by the Second Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment. *McDonald v. City of Chicago, Ill.*, ___ U.S. ___, ___, 177 L.Ed. 2d 894, 921 (2010). The State has not asserted that defendant is a convicted felon or otherwise in a class of people who do not have a liberty interest in possessing firearms. *See generally Johnston v. State*, ___ N.C. App. ___, 735 S.E.2d 859 (2012), *writ of supersedeas granted*, ___ N.C. ___, 738 S.E.2d 360 (2013). We assume for the purpose of the procedural due process analysis, without deciding, that an *ex parte* order that forbids a defendant from possessing firearms and subjects him to criminal prosecution or contempt sanctions for violation of that order deprives him of his right to keep and bear arms. Thus, we will proceed to consider the constitutional adequacy of the procedures at issue.

"[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered . . . ." *Mathews*, 424 U.S. at 341, 47 L.Ed. 2d at 37. In particular, "the possible length of wrongful deprivation . . . is an important factor in assessing the impact of official action on the private interests." *Id.* (citation and quotation marks omitted).

The degree of deprivation of that interest in this case is fairly minor because it is temporary and the period of deprivation prior to the full

5. This is not surprising, as neither party addressed due process issues in their briefs before the Supreme Court in *Byrd*.

hearing is extremely short. After the entry of an *ex parte* DVPO, the trial court must hold a hearing at which a defendant may appear within ten days of the issuance of the order or within seven days of service on the defendant, though it may be held sooner. N.C. Gen. Stat. § 50B-2(c). Here, the hearing was scheduled for six days after the *ex parte* order was issued and three days after the order was served on defendant.

Additionally, there is not a substantial risk of erroneous deprivation. To enter an *ex parte* order, the trial court must find that "it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child." N.C. Gen. Stat. § 50B-2(c). For a trial court to order a defendant to surrender his firearms upon an emergency or *ex parte* order, it must find one of the following factors:

1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.

2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.

3) Threats to commit suicide by the defendant.

4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

N.C. Gen. Stat. § 50B-3.1(a).[6] These findings may be made at an *ex parte* hearing, but are not simply based on the aggrieved party's written statement in the complaint. *See Hensey*, 201 N.C. App. at 60, 685 S.E.2d at 545.

At the ten-day hearing, someone accused of domestic violence would have the opportunity to present evidence and confront the evidence against him. If the court does not enter another protective order when the *ex parte* or emergency order expires, a defendant can retrieve his firearms unless he is otherwise precluded by law from owning them. N.C. Gen. Stat. § 50B-3.1(e). Additionally, after final disposition of pending criminal charges, the accused would be again able to possess firearms and he may move for the return of his firearms. N.C. Gen.

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6. The trial court that entered the *ex parte* order here found that defendant had threatened to commit suicide. Although defendant claims that the trial court did not have a sufficient basis for this finding, he did not appeal from the *ex parte* order and we have no jurisdiction to rule upon that order.

Stat. § 50B-3.1(f). When served with the *ex parte* order, a defendant is informed of both the potential penalties for violations of the order and instructed how he may request the return of his firearms. N.C. Gen. Stat. § 50B-3.1(d)(1).

> [W]hen prompt postdeprivation review is available for correction of administrative error, [the Supreme Court has] generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

Mackey v. Montrym, 443 U.S. 1, 13, 61 L.Ed. 2d 321, 331 (1979). The DVPO statutes as outlined above provide such a reasonably reliable basis for temporarily depriving a defendant of his firearms. Thus, the risk of any erroneous deprivation of a defendant's Second Amendment rights would be minimal.

The government's interest in this case is clear—the protection of domestic violence victims and preventing domestic violence from escalating to murder.[7] Defendant concedes that this is a "significant interest," but argues that that particular interest is not advanced by the *prosecution* of someone for the violation of the firearms provision of a DVPO. This argument is unconvincing.

An *ex parte* order would be of limited use if the violation of a provision forbidding the possession of a firearm could not be prosecuted. The Legislature has decided that potential violations of an *ex parte* order's firearm provisions are sufficiently serious to warrant criminal prosecution and not simply the threat of contempt sanctions. We cannot say that this choice is unreasonable or unjustified given the extraordinary potential for violence in the period between entry of an *ex parte* order and a full hearing, especially when firearms are present. It is reasonable for the Legislature to find that the threat of criminal penalty may be more effective deterrence than the threat of contempt sanctions.

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7. N.C. Gen. Stat. § 114-2.7 (2011) requires the Attorney General to file annual reports on domestic violence homicides with the Joint Legislative Committee on Domestic Violence. The Attorney General's most recent report indicates that there were 122 domestic violence related homicides in North Carolina last year. N.C. Dep't of Justice, Report on Domestic Violence Related Homicides Occurring in 2012 2 (2013), *available at* http://www.ncdoj.gov/Help-for-Victims/Domestic-Violence-Victims/Domestic-Violence-Statistics.aspx.

If a defendant believes that the *ex parte* order itself is unjustified, he can fully contest the issue less than two weeks after he is deprived of his firearms. The State's interest is not simply in protecting victims of domestic violence generally, but *effectively* protecting them at the point that the prosecuting witness first confronts her abuser through legal means. This interest is undeniably valid and important. Additional procedural safeguards, such as requiring a fully contested hearing before forbidding someone subject to an *ex parte* order from possessing firearms, would prevent the State from protecting victims of domestic violence at a time that those protections are most required. There is no way to protect victims of domestic violence that would provide a predeprivation hearing during the crucial period between service of the *ex parte* order and the ten-day hearing.

We hold that this situation is one of those "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after" the deprivation, *James Daniel Good Real Property*, 510 U.S. at 53, 126 L.Ed. 2d at 503 (citation and quotation marks omitted), and conclude that the provisions of N.C. Gen. Stat. §§ 50B-2(c) and 50B-3.1 are constitutional as applied to defendant under the Fourteenth Amendment.

For these same reasons, furtherance of the legitimate state interest in immediately and effectively protecting victims of domestic violence requires "the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state interest." *Henry*, 315 N.C. at 494, 340 S.E.2d at 733. An *ex parte* order may only be granted "if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child . . . ." N.C. Gen. Stat. § 50B-2. Additionally, to order a defendant to surrender his firearms, the court must find one of the statutory factors justifying that action. N.C. Gen. Stat. § 50B-3.1(a). Therefore, we hold that an order requiring the surrender of firearms after an *ex parte* hearing under Chapter 50B is also constitutional under the Law of the Land Clause of the North Carolina Constitution. *See Henry*, 315 N.C. at 494, 340 S.E.2d at 733; *Mackey*, 443 U.S. at 13, 61 L.Ed. 2d at 331.

Defendant implies that using criminal punishment rather than contempt sanctions to enforce an *ex parte* order infringes on his fundamental right to physical liberty without due process. Neither defendant nor the *dicta* in *Byrd* he relies on gives any reason that the enforcement of

such an order by criminal punishment would violate his right to due process while punishment by contempt sanctions would not.

Where a court punishes a party for violation of a past order, a contempt sanction is normally considered criminal contempt, rather than civil, which is usually used to force compliance with an order. *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985); *see Hodges v. Hodges*, 156 N.C. App. 404, 406, 577 S.E.2d 121, 123 (2003) (considering use of criminal contempt to punish violation of a DVPO). Both criminal sanctions under N.C. Gen. Stat. § 14-269.8 and criminal contempt under N.C. Gen. Stat. § 5A-11(a)(3) (2011) (willful disobedience of a court order) carry the possibility of confinement. *See* N.C. Gen. Stat. § 5A-12(a) (2011) (providing for imprisonment of up to thirty days for criminal contempt). We see no reason why imprisoning a defendant for failing to comply with the order under § 14-269.8 would violate his right to due process more than jailing him under the criminal contempt statute. *See O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373 (noting that "criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards.").

The provisions of N.C. Gen. Stat. § 50B-3.1 only apply once the defendant is served with the order by the sheriff. *See* N.C. Gen. Stat. § 50B-3.1(d). Thus, a defendant charged under § 14-269.8 is not unaware of the order. A defendant is given notice that he must surrender his firearms and is informed of the potential penalties for failing to do so. N.C. Gen. Stat. § 50B-3.1(d)(1). If charged with violating the order under N.C. Gen. Stat. § 14-269.8, he is given the same procedural protections as any other criminal defendant, and indeed, the same procedural protections as he would if he faced a criminal contempt sanction. *See O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373. Therefore, defendant's interest in physical liberty is adequately protected by N.C. Gen. Stat. § 14-269.8 and prosecution for violation of the *ex parte* order gives him all the process he is due.

Thus, there is no reason that defendant's prosecution for violation of the *ex parte* order might infringe his procedural due process rights other than the fact that it was entered prior to notice and an opportunity to be heard. As discussed above, the exigencies of the domestic violence context justify the use of a postdeprivation hearing as to that order. Thus, we hold that criminal prosecution for violation of an *ex parte* order requiring the surrender of defendant's firearms does not violate his due process rights.

IV. Conclusion

For the foregoing reasons, we conclude that an *ex parte* order is a "protective order" for purposes of N.C. Gen. Stat. §§ 14-269.8 and 50B-3.1. Additionally, we hold that the prosecution of defendant for violation of the *ex parte* order does not violate his procedural due process rights. Therefore, we reverse the trial court's order dismissing the indictment and remand for further proceedings.

REVERSED and REMANDED.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
ALONZO ARNOLD SHEPPARD, JR.

No. COA12-1435

Filed 2 July 2013

1. Larceny—from the person—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of larceny from the person. The victim's purse was within reach of the victim and the victim immediately realized the larceny as it occurred.

2. Sentencing—alternative felonies—larceny from the person—larceny of goods worth more than $1,000

The trial court erred by sentencing defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny since they are alternative ways to establish a Class H felony and judgment may only be entered for one larceny. However, either larceny conviction standing alone was sufficient to support defendant's status as an habitual felon. Further, the sentence imposed by the trial court was within the presumptive range for a single Class H felony larceny.

3. Indictment and Information—fatal variance—felony larceny of goods—value of goods

Defendant's conviction for felony larceny of goods worth more than $1,000 was vacated and remanded to the trial court for resentencing because the indictment stated the property was worth $1,000.

Appeal by defendant from judgment entered 12 July 2012 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 13 March 2013.

Attorney General Roy Cooper, by Assistant Attorney General Barry H. Bloch, for the State.

Kevin P. Bradley for defendant appellant.

McCULLOUGH, Judge.

Alonzo Arnold Sheppard, Jr., ("defendant") appeals from his convictions for larceny from the person and felony larceny of goods worth more than $1,000 and his classification as an habitual felon. For the following reasons, we vacate defendant's conviction for felony larceny of goods worth more than $1,000 and remand to the trial court for resentencing.

I. Background

Defendant was arrested without a warrant on 11 November 2010 for the theft of a purse from a shopping cart. On 7 March 2011, defendant was indicted by a Forsyth County Grand Jury on charges of financial card theft, larceny from the person, and felony larceny. Defendant was additionally indicted as an habitual felon on a separate bill of indictment.

Defendant's case came on for jury trial during the 9 July 2012 Criminal Session of Forsyth County Superior Court, the Honorable William Z. Wood, Jr., presiding. Testimony proffered by the victim tended to show the following: On 1 November 2012, the victim went to Harris Teeter to buy groceries. Upon entering the store, the victim got a shopping cart and placed her purse in the child's seat, next to the handle bar. After picking up several items on her list, the victim stopped to look at pickles. While looking at a jar of pickles she was holding, the victim noticed out of the corner of her eye someone pass by her shopping cart, which was "right beside [her]," within a "hand's reach away from [her]." The victim immediately glanced down into her shopping cart and noticed her purse was gone. The victim looked up the aisle and saw a man a few feet in front of her walking towards the exit. The man had the victim's purse in his hand. The victim followed the man. By the time the man reached

the exit, he was almost running. The victim yelled for someone to call the police as she reached the exit of the store.

At the close of the State's evidence, defendant moved to dismiss the charges for financial card theft, larceny from the person, and felony larceny. The trial court granted defendant's motion to dismiss the financial card theft charge.

On 11 July 2012, the jury returned verdicts finding defendant guilty of larceny from the person and felony larceny of goods worth more than $1,000. On 12 July 2012, the jury also returned a verdict finding defendant guilty of attaining the status of an habitual felon. The trial court consolidated the offenses for judgment and sentenced defendant to a single term of 110 to 141 months. Defendant was given credit for 610 days served awaiting trial. Defendant gave oral notice of appeal.

II. Analysis

Defendant raises the following issues on appeal: whether the trial court erred by (1) denying defendant's motion to dismiss the charge of larceny from the person; (2) sentencing defendant for both larceny from the person and felony larceny of goods worth more than $1,000 for a single larceny; and (3) sentencing defendant for felony larceny of goods worth more than $1,000 where the indictment alleged a different offense.

Motion to Dismiss

[1] Defendant's first argument on appeal is that the trial court erred in denying his motion to dismiss the larceny from the person charge because there was insufficient evidence to support the charge. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "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 essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002). When the property is taken "from the person," the larceny is a Class H felony without regard to the value of the property. N.C. Gen. Stat. § 14-72(b) (2011). "[F]or larceny to be 'from the person,' the property stolen must be in the immediate presence of and under the protection or control of the victim at the time the property is taken." *State v. Barnes*, 345 N.C. 146, 149, 478 S.E.2d 188, 190 (1996) (emphasis omitted) (citing *State v. Buckom*, 328 N.C. 313, 317-18, 401 S.E.2d 362, 365 (1991)). " '[I]t is not necessary that the stolen property be attached to the victim's person in order for the theft to constitute larceny from the person . . . .' " *State v. Wilson*, 328 N.C. 313, 691, 573 S.E.2d 193, 196 (2002) (quoting *State v. Barnes*, 121 N.C. App. 503, 505, 466 S.E.2d 294, 296, *aff'd*, 345 N.C. 146, 478 S.E.2d 188 (1996)).

In this case, defendant contends there was insufficient evidence that the victim's purse was "under the protection or control" of the victim at the time it was taken. Specifically, defendant contends the victim was looking at a jar of pickles she was holding and not protecting her purse. We do not agree.

Although the victim was looking at a jar of pickles she was holding, there is substantial evidence that the victim's purse was in the victim's immediate presence and under the victim's protection or control. The evidence at trial tended to show that at the time defendant took the victim's purse, the purse was in the child's seat of the victim's shopping cart, next to the handle bar. The shopping cart and purse were "right beside [the victim]" within a "hand's reach away from [the victim]." As the victim was looking at a jar of pickles, the victim noticed someone walk by out of the corner of her eye and immediately glanced down into her shopping cart and realized her purse was gone. The victim then looked up and saw defendant a few feet in front of her walking away with her purse. The victim then testified that she "pursue[d] [defendant] because it was [her] purse, and he had taken it from [her]."

Defendant argues that this case is indistinguishable from *State v. Lee*, 88 N.C. App. 478, 363 S.E.2d 656 (1988), in which we vacated the defendant's conviction for larceny from the person "because the record show[ed] that the larceny involved was not from the person of the complainant as charged in the bill of indictment, but was from an unattended grocery cart." *Id.* at 478, 363 S.E.2d at 656. We, however, find

the facts in the present case distinguishable. In *Lee*, the victim placed her shoulder handbag in her shopping cart and was shopping when an accomplice of the defendant asked the victim to help him find unsalted sweet peas. *Id.* at 479, 363 S.E.2d at 656. The victim then "took 'four or five' steps away from the cart and looked up and down the shelves and talked with [the accomplice] for 'a couple of minutes probably,' and during that time [the] defendant got the shoulder bag[] . . . and left the store with it." *Id.* The victim in *Lee* did not notice her purse had been taken until she returned to her shopping cart. *Id.* Although similar, the facts in the present case are distinguishable. The victim in this case did not walk away from her purse and shopping cart for a couple of minutes. Instead, the victim remained next to her shopping cart and purse, within a hand's reach, while looking at a jar of pickles. Furthermore, the victim immediately realized the larceny at the moment it occurred and pursued defendant as he fled the store.

Where larceny from the person does not require that the property taken be attached to the victim, but merely taken from the victim's presence while under the victim's protection or control, we find the evidence in this case, where the victim's purse was within reach of the victim and the victim immediately realized the larceny as it occurred, sufficient to support the charge of larceny from the person when viewed in the light most favorable to the State. *See State v. Boston*, 165 N.C. App. 890, 893, 600 S.E.2d 863, 865 (2004) (commenting that distance is relevant to "immediate presence" and awareness of the victim of the theft at the time of the taking is relevant to "protection and control"). Therefore, the trial court did not err in denying defendant's motion to dismiss.

Judgment and Sentencing

[2] Defendant's second argument on appeal is that the trial court erred in sentencing defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny. We agree.

After the jury returned verdicts finding defendant guilty of larceny from the person, larceny of goods worth more than $1,000, and attaining the status of an habitual felon, the trial court consolidated the three offenses for judgment and sentenced defendant to a single term of 110 to 141 months. We hold the trial court erred in entering judgment and sentencing defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny. "[T]he purpose of [N.C. Gen. Stat. §] 14–72 is to establish levels of punishment for larceny based on the value of the goods stolen, the nature of the goods stolen or the method by which stolen, not to create new offenses."

State v. Boykin, 78 N.C. App. 572, 576, 337 S.E.2d 678, 681 (1985). Thus, larceny from the person and larceny of goods worth more than $1,000 are not separate offenses, but alternative ways to establish that a larceny is a Class H felony. *See* N.C. Gen. Stat. § 14-72(a) & (b).

While it is proper to indict defendant on alternative theories of felony larceny and allow the jury to determine defendant's guilt as to each theory, where there is only one larceny, judgment may only be entered for one larceny. In this case, the trial court acknowledged that there was only one larceny, and therefore issued only one sentence. Nevertheless, it entered judgment for both larceny from the person and larceny of goods worth more than $1,000. As described above, the trial court erred.

Although the trial court erred in entering judgment on both larceny convictions, we note that either larceny conviction standing alone is sufficient to support defendant's status as an habitual felon. Furthermore, the sentence imposed by the trial court, 110 to 141 months, is within the presumptive range for a single Class H felony larceny considering defendant's status as an habitual felon elevates the Class H felony to a Class C for punishment and defendant is a prior record level IV. *See* N.C. Gen. Stat. § 15A-1340.17 (2011). Thus, the trial court's error was that it entered judgment and sentenced defendant for both larceny convictions, not that it imposed an improper sentence.

Defective Indictment

[3] Defendant's third argument on appeal is that the trial court lacked jurisdiction to sentence defendant for larceny of goods worth more than $1,000 because the indictment provided that "defendant . . . unlawfully, willfully and feloniously did steal, take, and carry away U.S. CURRENCY, the personal property of [the victim], such property having a value of $1,000.00." For purposes of appeal, we acknowledge the inconsistency, accept defendant's argument, and vacate defendant's conviction for felony larceny of goods worth more than $1,000.

As discussed above, defendant's conviction for larceny from the person was sufficient to support the sentence issued. Nevertheless, because we vacate defendant's conviction for felony larceny of goods worth more than $1,000, we must remand to the trial court for resentencing.[1]

1. We note that the sentence issued on remand is unlikely to differ from the sentence previously issued. As discussed above, the term of 110 to 141 months issued for the consolidated offenses is within the presumptive range for defendant's conviction for larceny from the person considering defendant's prior record level and status as an habitual felon.

III. Conclusion

For the reasons discussed above, we affirm the trial court's denial of defendant's motion to dismiss the larceny from the person charge, vacate defendant's conviction for felony larceny of goods worth more than $1,000, and remand to the trial court for resentencing.

Affirmed in part; vacated and remanded in part.

Judges BRYANT and HUNTER, JR. (Robert N.) concur.

STATE OF NORTH CAROLINA
v.
TYLER JAMES STORM

No. COA12-1498

Filed 2 July 2013

1. Homicide—first-degree murder—jury instructions—specific intent—diminished capacity—intoxication

The trial court did not err in a first-degree murder case by failing to instruct the jury in its final mandate that the jury should find defendant not guilty of first-degree murder if it had a reasonable doubt that he formed the specific intent to kill based upon his defenses of diminished capacity or intoxication. The trial court gave the instructions as requested by defendant, and the instructions did not constitute plain error.

2. Evidence—exclusion of lay opinion testimony—psychiatric diagnosis

The trial court did not abuse its discretion in a first-degree murder case by excluding the testimony from a licensed social worker, who worked with defendant's step-father, that defendant appeared noticeably depressed with flat affect when he was twelve years old. Defendant tendered the social worker as a lay witness and not as an expert, and lay witnesses may not offer a specific psychiatric diagnosis of a person's mental condition. Further, defendant could not demonstrate prejudice.

3. Criminal Law—prosecutor's argument—depression

The trial court did not err in a first-degree murder case by failing to intervene *ex mero motu* during the State's closing argument that depression might make you suicidal but it does not make you homicidal. The statement was not so grossly improper that it interfered with defendant's right to a fair trial.

Appeal by defendant from judgment entered 12 April 2012 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 22 May 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General H. Dean Bowman, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew J. DeSimone, for defendant-appellant.

STEELMAN, Judge.

By failing to object to the omission of diminished capacity and voluntary intoxication from the trial court's final mandate to the jury instructions on the charge of murder, defendant failed to preserve this issue for appellate review. The trial court did not commit plain error when it omitted jury instructions on diminished capacity and voluntary intoxication from its final mandate on the charge of murder. The trial court did not abuse its discretion when it prohibited a lay witness from testifying that defendant "appeared noticeably depressed with flat affect." The trial court was not required to intervene *ex mero motu* where the prosecutor's closing argument was not so grossly improper as to interfere with defendant's right to a fair trial.

I. Factual and Procedural Background

On 18 August 2010, the Buncombe County Sheriff's Department responded to a 911 call made by eighteen-year-old Tyler James Storm (defendant) stating that he had killed his younger brother. Deputies arrived at defendant's residence, arrested defendant, and transported him to the Sherriff's Department where he was interviewed. Defendant admitted that he killed his brother earlier that morning and stated that around midnight, he had consumed two cans of Four Loko beers, containing twelve percent alcohol. Defendant went into the bedroom where his brother was sleeping, and "chopped him up" with a sword.

On 11 July 2011, defendant was indicted for first-degree murder. During his trial, defendant presented evidence that defendant witnessed incidents of domestic violence between his mother and his step-father; that defendant suffered from panic attacks and had trouble sleeping; that defendant was diagnosed with an adjustment disorder with anxious mood in 2000; that defendant was diagnosed as having a generalized anxiety disorder in 2009; and that a doctor prescribed defendant medication in 2009 for that condition.

On 10 April 2012, the jury found defendant guilty of first-degree murder. The trial court sentenced defendant to life imprisonment without parole.

Defendant appeals.

II. Jury Instructions

[1] In his first argument on appeal, defendant contends that the trial court erred by failing to instruct the jury in its final mandate that "the jury should find [defendant] not guilty of first-degree murder if it had a reasonable doubt that he formed the specific intent to kill based upon his defenses of diminished capacity or intoxication." We disagree.

A. Preservation of the Issue at Trial

Defendant's request for jury instructions at trial included that the jury be instructed in accord with the following pattern jury instructions: "Section 305.11, Voluntary Intoxication, Lack of Mental Capacity-Premeditated and Deliberate First Degree Murder[;]" "Section 305.11, Diminished Capacity-Premeditated and Deliberate First Degree Murder[;]" and "Section 206.13, First Degree Murder Where a Deadly Weapon is Used, Not involving Self-Defense, covering all Lesser included Homicide Offenses[,] Lesser Included Offenses of Second Degree Murder and Voluntary Manslaughter." During the jury charge conference, the trial court denied defendant's request for an instruction on voluntary manslaughter and granted his requests for instructions in accord with Pattern Jury Instruction 305.11, diminished capacity and voluntary intoxication. The trial court explained where in the charge the defenses would appear, stating "I'll try to incorporate the two instructions on defense into that instruction [on the definition of intent], right before the final mandate." The instructions on diminished capacity and voluntary intoxication given by the trial court contained a mandate in their last paragraph, in accordance with Pattern Jury Instruction 305.11:

> Therefore, I charge that if, upon considering the evidence with respect to the defendant's lack of mental capacity,

> you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first-degree murder, you will not return a verdict of guilty of first-degree murder.
>
> . . . .
>
> Therefore, I charge that if, upon considering the evidence with respect to the defendant's intoxication, you have a reasonable double [sic] as to whether the defendant formulated the specific intent required for a conviction of first-degree murder, you will not return a verdict of guilty of first-degree murder.

At no time did defendant request that the final mandate for the offenses of first-degree murder and second-degree murder include voluntary intoxication and diminished capacity nor did defendant object to the placement of these two matters in the jury instructions. Further, Pattern Jury Instruction 305.11 does not suggest that the trial court incorporate the mandate portion of these two matters into the final mandate on the substantive offenses. Defendant failed to object to the trial court's instructions when the trial court gave counsel written copies of its proposed jury instructions before closing arguments, and defendant did not object after the trial court instructed the jury. Defendant was expressly given the opportunity to object on both occasions in accordance with the provisions of Rule 21 of the General Rules of Practice for the Superior and District Courts. The trial court gave the instructions as requested by defendant. Defendant has not properly preserved this issue for appellate review.

B. Plain Error

Defendant contends in the alternative that if we determine that this issue was not properly preserved, the trial court's failure to include not guilty by reason of diminished capacity and intoxication in the final mandate constitutes plain error. We disagree.

1. Standard of Review

Because defendant did not object to the jury instructions at trial, we review the trial court's instructions for plain error. *State v. Davis*, 177 N.C. App. 98, 102, 627 S.E.2d 474, 477 (2006). To demonstrate plain error, a defendant must show that a fundamental error occurred at trial, meaning "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*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted).

2. Analysis

In *State v. Pittman*, 332 N.C. 244, 420 S.E.2d 437 (1992), our Supreme Court held that the trial court did not err by denying defendant's request to include an instruction on diminished capacity in its final mandate. *Id.* at 258-59, 420 S.E.2d at 445. Examining the charge as a whole, the Supreme Court determined that the jury could not have been confused as to the State's burden of proof because "[t]he court included in its charge an instruction that the jury could consider defendant's mental condition in connection with his ability to formulate a specific intent to kill." *Id.* Similarly in *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), when the trial court gave the substance of the instruction defendant requested, the omission of a final mandate including a voluntary intoxication instruction did not constitute plain error. *Id.* at 516, 459 S.E.2d at 761.

While defendant cites several cases in support of his contention that the omission constituted plain error, none of the cases cited pertain to the defenses of diminished capacity or voluntary intoxication. The cases cited by defendant relate to self-defense and unconsciousness. *See State v. Dooley*, 285 N.C. 158, 165, 203 S.E.2d 815, 820 (1974) (holding that the trial court should have given "a specific instruction on self-defense . . . in [its] final mandate to the jury"); *State v. Tyson*, 195 N.C. App. 327, 339, 672 S.E.2d 700, 708 (2009) ("The trial court's failure to include 'not guilty by reason of unconsciousness' in the final mandate to the jury constitutes plain error[.]"). *But see State v. McNeil*, 196 N.C. App. 394, 404, 674 S.E.2d 813, 819 (2009) ("Although the trial court did not include 'not guilty by reason of self-defense' as a possible verdict in its final mandate, the jury instructions considered as a whole were correct."). Unlike the pattern jury instructions for self-defense, which direct the trial court to include self-defense in its final mandate on the substantive offense, the pattern jury instructions for voluntary intoxication and diminished capacity contain no such direction.

Examining the jury instructions as a whole, the trial court's instructions do not constitute plain error. Following the instructions on first-degree and second-degree murder, the trial court charged the jury on diminished capacity and voluntary intoxication. The trial court's instruction followed the pattern jury instructions and the trial court gave the instruction twice, once for diminished capacity and once for voluntary intoxication. The voluntary intoxication and diminished capacity

instructions each contained mandates, stating that if the jury "[had] reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first-degree murder," they were not to return a verdict of guilty of first-degree murder. These instructions appropriately state the law on diminished capacity and voluntary intoxication. *See State v. Carroll*, 356 N.C. 526, 539-40, 573 S.E.2d 899, 909 (2002) (finding no plain error where the trial court gave pattern jury instructions on diminished capacity). Based upon the facts of this case and considering the trial court's jury instructions as a whole, defendant cannot meet his high burden of showing that the trial court committed plain error.

This argument is without merit.

III. Lay Opinion

[2] In his second argument, defendant contends that the trial court erred by excluding the testimony from Susan Strain (Strain), a licensed social worker who worked with defendant's step-father, that defendant "appeared noticeably depressed with flat affect" when he was twelve years old. We disagree.

A. Standard of Review

We review the admissibility of lay opinion testimony for an abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). "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).

B. Analysis

The North Carolina Rules of Evidence permit lay witnesses to offer "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2011). Further, Rule 602 of the North Carolina Rules of Evidence provides that lay witnesses may not testify to a matter unless they have personal knowledge of the matter. N.C. Gen. Stat. § 8C-1, Rule 602 (2011). A lay witness who has had a reasonable opportunity to observe another may offer an opinion on the issue of mental capacity. *State v. Hammonds*, 290 N.C. 1, 5-6, 224 S.E.2d 595, 598 (1976). Lay witnesses who have personal knowledge of a person's mental state may also give an opinion as to an emotional state of another. *State v. Fullwood*, 343 N.C. 725, 736, 472 S.E.2d 883, 889 (1996). However, lay witnesses may not offer a specific psychiatric diagnosis of a person's mental condition.

State v. Davis, 349 N.C. 1, 30, 506 S.E.2d 455, 471 (1998). In *Davis*, a jail nurse could not offer a lay opinion that the defendant was "psychotic" based upon personal observations of the defendant because no foundation had been laid to show that the nurse had the expertise to make that diagnosis. *Id.*

In the instant case, defendant called Strain, a licensed clinical social worker, to testify. Strain worked with defendant's step-father for several years beginning in 1998 and testified that she occasionally saw defendant in the lobby of the facility where she worked. The State objected to Strain's proffered testimony that on one occasion in 2003, defendant "appeared noticeably depressed with flat affect." Following a *voir dire* hearing, the trial court allowed Strain to testify to her observation of defendant, but did not permit her to make a diagnosis of depression based upon her brief observations of defendant when he was twelve years old. Defendant tendered Strain as a lay witness and made no attempt to qualify her as an expert. Her opinion was thus limited to the issue of defendant's emotional state and she could not testify concerning a specific psychiatric diagnosis. *Compare Fullwood*, 343 N.C. at 736, 472 S.E.2d at 889, *with Davis*, 349 N.C. at 30, 506 S.E.2d at 471. The statement that defendant "appeared noticeably depressed with flat affect" is more comparable to a specific psychiatric diagnosis than to a lay opinion of an emotional state. Further, her testimony indicated she lacked personal knowledge of the matter because she only saw defendant on occasion in the lobby, her observations of defendant occurred seven years prior to the murder, she did not spend any appreciable amount of time with defendant, and defendant did not present any evidence to indicate Strain had any personal knowledge of defendant's mental state at that time. We cannot say the trial court's ruling limiting Strain's testimony to only her observation of defendant was so arbitrary that it could not have been the result of a reasoned decision. This argument is without merit.

Even assuming *arguendo* that the trial court erred by prohibiting Strain from testifying that defendant was depressed, defendant cannot demonstrate prejudice arising out of this ruling. *See* N.C. Gen. Stat. § 15A-1443(a) (2011) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). Defendant presented numerous witnesses at trial who testified concerning his depression and his mental condition: defendant's mother who testified that defendant began suffering from panic attacks when he was thirteen years old and that he had

trouble sleeping; two licensed clinical social workers who worked with defendant and testified that defendant was diagnosed with an adjustment disorder with anxious mood in 2000, that defendant was diagnosed as having a generalized anxiety disorder in 2009, and that a doctor prescribed defendant medication in 2009 for that condition; a provisionally licensed clinical social worker who testified that defendant had a history of violence, that he had a disregard for other people, and that he drank alcohol almost every night; a licensed marriage and family therapist who testified that defendant indicated he was seeking help to address his anger and frustration. Defendant cannot demonstrate that the exclusion of this testimony from Strain, who occasionally saw defendant in her building's lobby, that defendant "appeared noticeably depressed with flat affect" seven years prior to the murder constituted prejudice.

IV. Closing Argument

[3] In his third argument, defendant contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We disagree.

A. Standard of Review

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

B. Analysis

"A prosecutor must be allowed wide latitude in the argument of hotly contested cases and may argue all the facts in evidence and any reasonable inferences that can be drawn therefrom." *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995) (citation omitted). Prosecutorial

arguments are not viewed in isolation, but rather are considered within the context and overall factual circumstances in which they are made. *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994).

In the instant case, defendant did not object during closing argument, but on appeal contends that the following argument by the prosecutor required intervention by the court because it was unsupported by the evidence: "Depression might make you suicidal. Depression doesn't make you homicidal." During trial, defendant presented evidence from a forensic psychiatrist, Moira Artigues (Artigues), that it is "very common in depression for a person to have suicidal thoughts." The full context of the prosecutor's closing argument is as follows:

> [Artigues] talks about, well, he had a depression, and depression affects the way we think. Depression might make you suicidal. Depression doesn't make you homicidal. Dr. Artigues at one point says it doesn't make sense what he did; therefore, there must have been something wrong. In other words, well, because it doesn't make sense to her that someone would do this, that means there's something wrong. And I would submit to you that's, of course, what a mental health professional is going to think because that's their business, trying to figure out why people do what they do and what's wrong with them when they do it, because certainly committing first-degree murder is wrong, and we don't like to think that people will do that unless something is wrong. But just because it doesn't make sense to us doesn't mean that that's not what he intended to do; that he didn't have the specific intent to kill; that he didn't premeditate that intent and he didn't deliberate it.

It is clear the State was attacking the relevance, weight, and credibility of Artigues' testimony. Considering the context of the argument, Artigues' testimony at trial, and that the prosecutor only made this argument once, we cannot say the statement was so grossly improper that it interfered with defendant's right to a fair trial or the sanctity of the proceedings.

This argument is without merit.

NO ERROR.

Judges CALABRIA and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JULY 2013)

BARRETT v. SSC CHARLOTTE OPERATING CO., LLC No. 12-1271	Mecklenburg (11CVS17352)	Reversed
CONNOR v. JESCO CONSTR. CORP. No. 12-1390	Craven (02CVS960)	Affirmed
HESS v. HERMANN-HESS No. 12-1544	Henderson (07CVD1900)	Affirmed
IN RE A.P. No. 12-1429	Rowan (12JA31-33)	Affirmed
IN RE K.M. No. 12-1479	Cumberland (98JA575) (99JA558)	Affirmed
IN RE N.L. No. 12-1492	Mecklenburg (12JA331)	Reversed
IN RE A.G. & B.B. No. 13-27	Wake (10JT283-284)	Affirmed
IN RE A.N.M. No. 13-4	Jackson (11JT16)	Affirmed
IN RE B.P., B.P., B.P. No. 13-264	Buncombe (10JT251-252) (11JT275)	Affirmed as to Respondent-Father; Vacated and Remanded as to Respondent-Mother
IN RE E.K., E.K., E.K. No. 13-41	Mecklenburg (07JT156-158)	Affirmed
IN RE G.L.K. No. 13-92	Wilkes (11JT69)	Affirmed
IN RE M.I.B. No. 13-25	Forsyth (00JT147)	Affirmed
IN RE S.L.A. No. 13-257	Henderson (11JT51)	Affirmed
IN RE T.T. No. 13-139	Wake (11JT258)	Vacated and Remanded

MACK v. THE BD. OF EDUC. OF THE PUB. SCH. No. 13-51	Robeson (10CVS2133)	Affirmed
PARKS v. PETSMART, INC. No. 12-1511	Wake (12CVS1313)	Affirmed
RITCHIE v. RITCHIE No. 13-247	Stanly (04CVD927)	Affirmed
STATE v. COLSON No. 13-217	Robeson (08CRS57137)	No Error
STATE v. HARRIS No. 13-143	Guilford (09CRS94738) (10CRS24294-95)	Affirmed
STATE v. HAWKINS No. 13-16	Guilford (11CRS70417-18)	No Error
STATE v. KHAN No. 11-368-2	Wake (08CRS85094) (10CRS652)	No Error
STATE v. KITTRELL No. 13-98	Stokes (11CRS51470-71)	No Error
STATE v. NOBLES No. 13-60	Davidson (10CRS58178)	Affirmed
STATE v. RAMIREZ No. 13-213	Henderson (09CRS1338) (09CRS51859) (09CRS51865-66)	No Error
STATE v. RANDALL No. 12-1573	Wilson (11CRS55362)	Vacated
STATE v. THOMPSON No. 13-90	Durham (10CRS56975)	No error; remanded for clerical corrections
STATE v. BAILEY No. 12-1516	Cumberland (11CRS53960)	No error; remanded for clerical correction in judgment
STATE v. BROWN No. 12-1505	Mecklenburg (08CRS259632-33)	No Error

STATE v. WILLIAMS No. 12-1227	Mecklenburg (09CRS38741) (09CRS61949)	No Error
STATE v. WILSON No. 12-1233	Person (11CRS1762-63) (11CRS1765)	No Error
STATE v. WOMACK No. 12-1474	Alamance (11CRS51672) (11CRS51674) (11CRS51675-76)	No Error
STATE v. YOW No. 12-1473	Brunswick (08CRS52550-51)	No Error
TATE v. LOFTUS No. 12-1468	N.C. Industrial Commission (PH-2621) (W86208)	Affirmed
TD BANK, N.A. v. MCGEE No. 12-1412	Henderson (11CVS923)	Affirmed
YEAGER v. YEAGER No. 12-1379	Mecklenburg (08CVD10504)	Affirmed

GEORGE CHRISTIE AND DEBORAH CHRISTIE, PLAINTIFFS
v.
HARTLEY CONSTRUCTION, INC.; GRAILCOAT WORLDWIDE, LLC;
AND GRAILCO, INC., DEFENDANTS

No. COA12-1385

Filed 16 July 2013

Statutes of Limitation and Repose—defective building materials —express warranty

The trial court did not err in a case involving allegedly defective building materials by granting summary judgment in favor of defendants. Despite a twenty-year express warranty of the product, plaintiff had no cause of action for damages because the claim was brought outside the six-year statue of repose under N.C.G.S. § 1-50(a)(5).

HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

Appeal by Plaintiffs from order entered 13 August 2012 by Judge Gary E. Trawick in Orange County Superior Court. Heard in the Court of Appeals 10 April 2013.

Whitfield Bryson & Mason, LLP, by Daniel K. Bryson and Scott C. Harris, for plaintiff-appellants.

Ragsdale Liggett PLLC, by William W. Pollock and Angela M. Allen, for defendant-appellee Hartley Construction, Inc.

Conner Gwyn Schenck PLLC, by Andrew L. Chapin, for defendant-appellees Grailcoat Worldwide, LLC and GrailCo, Inc.

North Carolina Advocates for Justice, by Jonathan McGirt and Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, amicus curiae.

BRYANT, Judge.

Where the six-year statute of repose barred plaintiffs' action despite a twenty year express warranty, we affirm the order of the trial court.

Facts and Procedural History

Plaintiffs George and Deborah Christie filed a complaint against defendants Hartley Construction, Inc., (Hartley), GrailCoat WorldWide, LLC, (GrailCoat), and GrailCo, Inc. (GrailCo) (GrailCoat & GrailCo, collectively referred to as "GrailCoat") on 31 October 2011. The complaint alleged that in 2004, plaintiffs entered into an agreement for Hartley to construct a custom home ("Residence") for plaintiffs in Chapel Hill, North Carolina. Plaintiffs alleged that GrailCoat made representations and express warranties to plaintiffs and Hartley that its "direct-applied exterior finish system" - a coating and waterproofing material applied over SIPs (structural insulated panels) – was "well-suited to use over [SIPS]," "waterproof," "does not crack," "is fully warranted," and could last forty or fifty years if maintained properly. Plaintiffs alleged that GrailCoat's website expressly warranted their product for twenty years.

Plaintiffs contend that because of the design of GrailCoat's product and installation instructions provided by GrailCoat, water had leaked in causing the walls of the Residence "to rot and delaminate, compromising the structural integrity of the Residence." Plaintiffs also alleged that GrailCoat's product was inherently defective and in violation of North Carolina Building Codes and applicable industry standards.

Plaintiffs filed the following claims against Hartley on 31 October 2011: breach of contract, breach of implied warranty, negligence/negligence per se, gross or willful and wanton negligence, and unfair and deceptive trade practices. Against GrailCoat, plaintiffs filed a claim of breach of express warranties, breach of implied warranties of merchantability and fitness for a particular purpose, negligence, and unfair and deceptive trade practices. Plaintiffs sought to recover damages against Hartley and GrailCoat in an amount in excess of $10,000.00.

Following the filing of the complaint, Hartley filed an answer on 3 January 2012. GrailCoat filed its answer on 6 January 2012, alleging affirmative defenses along with a motion to dismiss and a motion for judgment on the pleadings. On 18 April 2012, the trial court entered an order denying Hartley[1] and GrailCoat's motion to dismiss and motion on the pleadings.

On 14 June 2012, Hartley filed a motion for summary judgment. Hartley's motion for summary judgment contended that "plaintiffs

1. Hartley's motion to dismiss and motion on the pleadings is not found in the record.

cannot forecast competent evidence of fraudulent or willful or wanton conduct, and therefore all claims of the plaintiffs are barred by North Carolina General Statute § 1-50(a)(5)[.]" On 19 June 2012, GrailCoat also filed a motion for summary judgment. On 9 July 2012, plaintiffs filed a motion for summary judgment against GrailCoat on plaintiffs' breach of express warranty claim.

Following a hearing at the 16 July 2012 session of Orange County Superior Court, the trial court entered an order on 13 August 2012: granting Hartley's motion for summary judgment as to all of plaintiffs' claims; granting GrailCoat's motion for summary judgment as to all of plaintiffs' claims; denying plaintiffs' motion for summary judgment against GrailCoat on plaintiffs' breach of express warranty claim; and dismissing Plaintiffs' complaint with prejudice. From this order, plaintiffs appeal.

Plaintiffs' sole issue on appeal is whether the trial court erred by granting summary judgment in favor of GrailCoat and GrailCo due to the expiration of the statute of repose.

> Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment [t]he trial court must consider the evidence in the light most favorable to the non-moving party.

Manecke v. Kurtz, __ N.C. App. __, __, 731 S.E.2d 217, 220 (2012) (citations and quotations omitted). However,

> the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: (1) Proving that an essential element of the opposing party's claim is nonexistent; or (2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim.

Fatta v. M&M Props. Mgmt., __ N.C. App. __ , __, 727 S.E.2d 595, 598 (2012) (citation omitted).

Here, the applicable statute of repose is set out in section 1-50(a)(5) of the North Carolina General Statutes, which states that

> [n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C. Gen. Stat. § 1-50(a)(5). "A statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit." *Dawson v. N.C. Dep't of Env't & Natural Res.*, 204 N.C. App. 524, 528, 694 S.E.2d 427, 430 (2010) (citation omitted). "Whether a statute of repose has run is a question of law. Summary judgment is proper if the pleadings or proof show without contradiction that the statute of repose has expired." *Glens of Ironduff Prop. Owners Ass'n v. Daly*, __ N.C. App. __, __, 735 S.E.2d 445, 447 (2012) (citations omitted).

Plaintiffs allege that they entered into an agreement with Hartley for the construction of their home in August 2004 (Hartley states in its Answer that the date of the agreement was April 2004), during which time Hartley installed GrailCoat's products. The Certificate of Occupancy for the Residence was issued on 22 March 2005, indicating the last act or omission of defendants giving rise to the cause of action.

In order to file a timely action under the statute of repose, N.C. Gen. Stat. § 1-50(a)(5), plaintiffs would have had to bring their action within six years, by 22 March 2011. Plaintiffs' complaint filed on 31 October 2011 was outside the statutory limit, and therefore, untimely. Plaintiffs argue, however, that GrailCoat made an express warranty of 20 years through their website, and therefore based on that warranty, their complaint is timely. We disagree.

Our Court's decision in *Roemer v. Preferred Roofing*, 190 N.C. App. 813, 660 S.E.2d 920 (2008), is instructive. In *Roemer*, on 23 November 1999, the plaintiff homeowner and the defendant roofing company entered into a contract to remove the existing roof on the plaintiff's home and replace it with a new roofing system which had an express lifetime warranty. *Id.* at 814, 660 S.E.2d at 922. "Several years after the project was completed, plaintiff discovered alleged defects with the roof including: (1) loose slate tiles; (2) separation of gutters from the house; and (3) rotten wood under the roof." *Id.* On 18 July 2007, seven years after "substantial completion of the improvement," the

plaintiff filed a complaint against the defendant claiming negligence, breach of contract, and breach of warranty, and seeking compensatory damages in excess of $10,000.00. *Id.* The defendant moved to dismiss all of the plaintiff's claims, and the trial court dismissed plaintiff's claim for damages or breach of warranty with prejudice based on the statute of repose. *Id.*

Our Court in *Roemer* upheld the trial court's ruling granting the defendant's motion to dismiss, and held that "[i]f the action is not brought within the specified period, the plaintiff literally has no cause of action. The harm that has been done is *damnum absque injuria* – a wrong for which the law affords no redress." *Id.* at 816, 660 S.E.2d at 923 (citation omitted). Furthermore, our Court noted that "[p]laintiff's remedy for breach of an alleged lifetime warranty claim that is 'brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement[,]' lies in specific performance, and not damages." *Id.* at 817, 660 S.E.2d at 923 (citations omitted).

In the present case, as in *Roemer*, defendant's last act or omission was more than six years before the action was brought. Id. at 814, 660 S.E.2d at 922. Despite an express lifetime warranty as in *Roemer*, or for twenty years as in the present case, a plaintiff whose action is not filed within the time set forth in the statute of repose has no cause of action for damages. *Id.* at 816, 660 S.E.2d at 923. Therefore, we hold that plaintiffs' action is barred by the statute of repose set forth in N.C.G.S. § 1-50(a)(5). *See Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985) (noting the effect of the statute of repose albeit under a different statute, as "an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue[.]"). Accordingly, the trial court's order dismissing plaintiffs' complaint is affirmed.

Affirmed.

Judge MCCULLOUGH concurs.

Judge HUNTER, JR., Robert N., concurs in part and dissents in part by separate opinion.

HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

I agree with the majority that the trial court correctly granted

summary judgment on all claims against Hartley and the claims against GrailCoat, with the exception of the breach of express warranties claim. I do not agree with the majority that *Roemer v. Preferred Roofing*, 190 N.C. App. 813, 660 S.E.2d 920 (2008), together with the routine application of the requirement that one panel of the court of appeals may not overrule another, *In Re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), dictates the result in this case regarding the breach of warranty claim. I would reverse on this claim.

Roemer involved the application of a warranty "of the dependability and reliability of the installation of [a] roof." 190 N.C. App. at 814, 660 S.E.2d at 922. The opinion did not state the terms of the warranty and did not provide reasoning for why specific performance would be the sole remedy under those terms, so I would presume that the warranty in that case required specific performance.

The present case involves a "full warranty." It would be a paradoxical that the statute of repose would void all claims where the parties have contractually agreed to a period of remedy that exceeds the statute of repose. I would limit *Roemer* to its facts and hold that a full warranty which exceeds the time period for the statute of repose is a waiver of the statute for all claims. If, however, the contract between the parties limits the remedies in some express fashion, then claims brought beyond the statute of repose would be limited to specific contractual relief as in *Roemer*.

Roemer is a case of poor pleading. I believe my approach reconciles *Roemer* with the jurisprudence of our courts pre-*Roemer*. By its decision, the majority expands *Roemer* to void all claims, a result the *Roemer* case does not require. I find the logic of Judge Boyle's decision in the post-*Roemer* case of *Hart v. Louisiana-Pacific Corp.*, Order, No. 2:08-CV-47-BO (E.D.N.C. Nov. 19, 2009), to be persuasive as I do the assessment of the authors of North Carolina Contract Law § 16-7 (2009 Cum. Supp.). To hold otherwise would unnecessarily impair the obligation of, and therefore the freedom to, contract. For those reasons, I would reverse as to the breach of warranty claim against GrailCoat.

IN RE ADOPTION OF C.E.Y.

[228 N.C. App. 290 (2013)]

MEREDITH LYNN FISHER, PETITIONER FOR THE ADOPTION OF C.E.Y.

No. COA13-65

Filed 16 July 2013

1. Appeal and Error—interlocutory orders and appeals—parental ability to withhold consent for adoption—substantial right

Respondent father's appeal from an interlocutory order in an adoption case was immediately appealable because a court's determination as to whether a putative father has sufficiently protected his ability to withhold consent for the adoption of his child affects a substantial right.

2. Jurisdiction—adoption case transferred to district court—court required to address motions

The trial court erred in an adoption case by concluding that respondent father's motions were not properly before it. Once the clerk transferred the matters to district court pursuant to N.C.G.S. § 1-301.2(b), the district court obtained jurisdiction and was required to address respondent's motions. The case was reversed and remanded for further proceedings.

Appeal by respondent from order entered 8 October 2012 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 22 May 2013.

Wake Family Law Group, by Katherine Hardersen King and Michael F. Schilaski, for petitioner.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for respondent.

HUNTER, Robert C., Judge.

Respondent Jason Young appeals from the district court order dismissing his appeal from the clerk's order finding his consent was not required to proceed with the adoption and his motion for equitable relief. After careful review, we reverse and remand for further proceedings.

Background

This appeal involves a petition for the adoption of the minor child C.E.Y., the child of respondent-appellant Jason Young ("respondent") who was convicted on 26 March 2012 for the first degree murder of his

wife Michelle Young. Respondent is currently serving a life sentence without the possibility of parole for Michelle's murder. Petitioner-appellee Meredith Fisher ("petitioner"), C.E.Y.'s maternal aunt, filed a petition for adoption ("adoption petition") and a petition for termination of parental rights ("TPR petition") in Wake County District Court on 25 May 2012. The TPR petition is not at issue in this appeal. On 30 May 2012, the sheriff personally served the adoption petition and notice of adoption on respondent at Alexander Correctional Institution. Respondent did not respond to the adoption petition.

Pursuant to N.C. Gen. Stat. § 48-3-603, petitioner filed a Motion to Determine Consent not Necessary on 9 July 2012. The matter came on for hearing before the Clerk of Wake County. On 11 July 2012, the clerk entered an order concluding that, because respondent was properly served with the adoption petition but failed to respond in a timely manner, his consent to the adoption was not necessary ("clerk's order"). Respondent, in an attempt to contest the clerk's order, appealed it on 13 July 2012. That same day, respondent filed a Motion to Set Aside the clerk's order ("Motion to Set Aside"). Specifically, respondent contended that the clerk's order should be set aside because he mistakenly believed that his attorney who was appointed to represent him in the TPR hearing would be handling the adoption petition as well. Respondent claimed that, after receiving the materials in prison, he sent both the TPR petition and the adoption petition to his court-appointed attorney without realizing that his attorney represented him in the TPR action only. Furthermore, respondent alleged that his court-appointed attorney did not notice the adoption petition he included with the TPR petition, and respondent did not realize his mistake until after the clerk had entered the order concluding his consent to the adoption was not required. Consequently, respondent requested the clerk to "exercise his/her power in equity and set aside the [o]rder ruling that his consent to his daughter's adoption is no longer required." In other words, only two days after the clerk entered the order, respondent promptly filed a motion explaining why he had not responded to the adoption petition and raised the equitable issue. Respondent stated that the grounds for his request for equitable relief were Rules 59 and 60 of the North Carolina Rules of Civil Procedure.

On 4 September 2012, the clerk issued an order transferring both respondent's appeal from the clerk's order and his Motion to Set Aside to district court pursuant to N.C. Gen. Stat. §§ 48-2-601 and 1-301.2. Both matters came on for hearing before the Honorable Debra Sasser who issued her order on 8 October 2012 ("district court order"). Relying on the language of Rule 60, the district court concluded that, because the clerk's order was not a final order, respondent was not entitled to have the order

set aside pursuant to Rule 60. Moreover, the district court concluded that the clerk's order cannot be appealed to district court pursuant to N.C. Gen. Stat. § 48-2-607(b) or § 1-301.2 because it was not a "final decree of adoption." Accordingly, the trial court dismissed both matters because they were "not properly before the Court." Respondent timely appealed the district court order.

Grounds for Appeal

[1] Initially, it should be noted that respondent's appeal is interlocutory. *In re Adoption of Anderson*, 165 N.C. App. 413, 415, 598 S.E.2d 638, 640 (2004), *rev'd on other grounds*, 360 N.C. 271, 624 S.E.2d 626 (2006). However, our Courts have held that "a court's determination as to whether a putative father has sufficiently protected his ability to withhold consent for the adoption of his child is a substantial right pursuant to N.C. Gen. Stat. § 1-277(a) (2003) and therefore capable of appellate review when the right is affected by order or judgment." *Id.*; *see also In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004). Thus, respondent is entitled to appellate review of the district court order pursuant to N.C. Gen. Stat. § 1-277(a).

Arguments

[2] Respondent argues on appeal that the trial court erred in dismissing his appeal from the clerk's order and his Motion to Set Aside. Because respondent raised an issue of fact and requested equitable relief in written motions filed in the adoption proceeding and because the clerk properly transferred the proceedings to district court pursuant to N.C. Gen. Stat. § 1-301.2(b) (2011), we agree.

Adoption proceedings are heard by the trial court without a jury. N.C. Gen. Stat. § 48–2–202 (2011). Accordingly, our review of a trial court's order in an adoption proceeding is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *In re Adoption of S.K.N.*, __ N.C. App. __, __, 735 S.E.2d 385, 385 (2012) (quoting *Schuler*, 162 N.C. App. at 330, 590 S.E.2d at 460), *appeal dismissed and disc. review denied*, __ N.C. __, __ S.E.2d __ (No. 7P13) (June 12, 2013).

In dismissing respondent's challenge to the clerk's order and his Motion to Set Aside, the trial court relied on the language of N.C. Gen. Stat. § 1-301.2(e), which states, in pertinent part, "a party aggrieved by an order or judgment of a clerk *that finally disposed of a special proceeding*, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing *de novo*." (Emphasis added). The trial

court reasoned that because the clerk's order concluding that respondent's consent was not necessary was not a "final order," respondent had no statutory right to appeal it pursuant to § 1-301.2(e). Furthermore, the trial court concluded that respondent was not entitled to relief from the clerk's interlocutory order based on the express language of Rule 60.

However, the trial court erred in relying on the statutory language of § 1-301.2(e) in addressing whether the matters were properly before it. Although respondent characterized his challenge to the clerk's order as an "appeal" and purportedly based his Motion to Set Aside on Rules 59 and 60, our review of the substance of these motions indicates that they do not comport with the labels respondent gave them. "A motion is properly treated according to its substance rather than its label." *Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981). Thus, while respondent alleged that the basis for his Motion to Set Aside was Rules 59 and 60, this motion was actually a request for equitable relief. Furthermore, respondent's purported "appeal" was his attempt to contest the clerk's conclusion that his consent was not required in the adoption. N.C. Gen. Stat. § 1-301.2(b) states that "when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk shall transfer the proceeding to the appropriate court." The clerk recognized that respondent was raising issues of fact and asserting a request for equitable relief, as noted in its order, and properly transferred all matters to district court pursuant to N.C. Gen. Stat. § 1-301.2(b), regardless of the labels respondent used. Thus, the district court obtained its jurisdiction to address respondent's motions not by N.C. Gen. Stat. § 1-301.2(e), which addresses an appeal from a clerk's order, but by N.C. Gen. Stat. § 1-301.2(b), which governs the transfer of issues by the clerk of court to district court. Once the clerk transferred the matters to district court pursuant to N.C. Gen. Stat. § 1-301.2(b), the district court obtained jurisdiction and was required to address respondent's motions. Consequently, the trial court erred in concluding that respondent's motions were not properly before it, and we reverse the trial court's order and remand for further proceedings consistent with this opinion.

Conclusion

Based on the foregoing reasons, we reverse the district court order and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges STROUD and ERVIN concur.

MAST, MAST, JOHNSON, WELLS & TRIMYER, P.A.
v.
KEITH LANE

No. COA12-1378

Filed 16 July 2013

Attorney Fees—no showing of reasonableness required—account stated

The trial court did not err in a case involving a dispute over attorney fees by entering summary judgment in favor of plaintiff law firm even though there had been no showing as to the reasonableness of the fees to be collected. The trial court's determination that the account was stated foreclosed the issue concerning the reasonableness of the attorney fees.

Appeal by defendant from order entered 4 June 2011 by Judge Albert A. Corbett, Jr., in Johnston County District Court. Heard in the Court of Appeals 27 March 2013.

Mast, Mast, Johnson, Wells & Trimyer, by George B. Mast and Ron L. Trimyer, Jr., for plaintiff appellee.

Haithcock, Barfield, Husle & Kinsey, PLLC, by Worth T. Haithcock, II, for defendant appellant.

McCULLOUGH, Judge.

Keith Lane ("defendant") appeals from the trial court's entry of an order for summary judgment. For the following reasons, we affirm.

I. Background

Defendant retained the law firm of Mast, Schulz, Mast, Mills & Stem, P.A., now doing business as Mast, Mast, Johnson, Wells & Trimyer, P.A. ("plaintiff"), in November of 2000 to represent him in a legal dispute over money paid to Lane Farms, of which defendant was a partial owner. At that time, defendant executed plaintiff's Minimum Fee Employment Agreement (the "Fee Agreement"), whereby defendant agreed to pay plaintiff "a minimum reasonable fee of $205.00 per hour[.]" The Fee Agreement further provided:

> (5) Client(s) understands that THIS IS NOT A CONTINGENCY FEE CONTRACT and that client(s) will

> pay the fee charged by attorneys regardless of the outcome or results obtained in these legal matters.
>
> (6) Client(s) understands that a bill representing the amount owed attorneys for services rendered pursuant to this contract will be mailed to client on or about the first day of each month. Client(s) agrees to pay the outstanding balance shown on this bill within thirty days of its receipt. Statements of account mailed to client(s) will be deemed conclusive of the account if client(s) does not object in writing within ten days after the statement of account is mailed to client(s).

Since the rendition of legal services began in November of 2000, plaintiff has submitted monthly invoice statements of defendant's account to defendant in accordance with the Fee Agreement.

In 2001, defendant received a bill from plaintiff for about $4,000.00 and was concerned about how he would be able to pay it. In contradiction with the terms of the Fee Agreement, defendant swore in his affidavit that George Mast, of plaintiff, informed him that the fees would be paid from money plaintiff recovered on his behalf. Thereafter, defendant sought additional legal services from plaintiff in 2004 concerning the recovery of a ring. The fees resulting from these services were added to the monthly invoice statements.

After the rendition of legal services to recover the ring, defendant made payments to plaintiff over the course of three years, from 2005 to 2008, totaling $290.00. During the course of these payments, defendant sent plaintiff a letter dated 25 September 2006, apologizing for the lateness of his reply but stating he would continue to make payments "as often as possible to pay off [his] balance." Defendant's last payment on the account was on 26 November 2008. Following the 26 November 2008 payment, the account reflected an outstanding balance of $43,470.86 owed to plaintiff.

By letter dated 19 January 2011, plaintiff informed defendant that defendant owed $43,470.86. The letter also informed defendant of the North Carolina State Bar's fee dispute resolution program and that plaintiff would institute legal action for collection of the fees if payment was not received, some alternative arrangement was not agreed upon, or defendant had not sought mediation under the fee dispute resolution program by 21 February 2011. After no response from defendant, plaintiff instituted this action to collect the $43,470.86 in outstanding attorney fees by complaint filed 14 March 2011. An alias and pluries summons

was issued on 17 November 2011. Defendant responded by answer filed 30 January 2012. In his answer, defendant asserted the statute of limitations and laches as affirmative defenses.

Plaintiff moved for summary judgment on 24 April 2012 and the motion came on for hearing at the 4 June 2012 Civil Session of Johnston County District Court before the Honorable Albert A. Corbett, Jr. Following the hearing, the trial court entered an order granting summary judgment in favor of plaintiff. In the order, the trial judge found that the $43,470.86 owed to plaintiff by defendant for legal services was an account stated on the basis that "[d]efendant failed to protest or object to the statement of account within a reasonable period of time after receiving the statements[.]" Defendant appeals.

II. Analysis

The sole issue on appeal is whether the trial court erred by entering summary judgment in favor of plaintiff where there had been no showing as to the reasonableness of the attorney fees to be collected. "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Defendant specifically argues that summary judgment was not appropriate in this case because there is a genuine issue of material fact regarding the reasonableness of the attorney fees sought to be recovered by plaintiff that was not foreclosed by the trial court's determination that the account rendered had become an account stated. We do not agree.

"An account stated is by nature a new contract to pay the amount due based on the acceptance of or failure to object to an account rendered." *Carroll v. Industries, Inc.*, 296 N.C. 205, 209, 250 S.E.2d 60, 62 (1978). "It is an agreement between parties that an account rendered by one of them to the other is correct. Once this agreement is made the account stated constitutes a new and independent cause of action superseding and merging the antecedent cause of action." *Mahaffey v. Sodero*, 38 N.C. App. 349, 351, 247 S.E.2d 772, 774 (1978). There are four basic elements to an account stated cause of action: "(1) a calculation of the balance due; (2) submission of a statement to [the party to be charged]; (3) acknowledgment of the correctness of that statement by [the party to be charged]; and (4) a promise, express or implied, by [the

party to be charged] to pay the balance due." *Carroll*, 296 N.C. at 209, 250 S.E.2d at 62.

Although defendant does not directly challenge the trial court's determination that the account at issue in this case was stated, we feel it necessary to address the issue because we hold the determination of a valid action on an account stated is the critical inquiry and forecloses the issue as to the reasonableness of attorney fees.

It is evident that the first and second elements for an account stated cause of action are satisfied in the present case. Plaintiff sent defendant monthly invoice statements beginning November 2000 and a letter dated 19 January 2011 demanding action on the account. In regard to the third and fourth elements, an acknowledgment of the correctness of an account by the party to be charged and a promise to pay the account by the party to be charged may be express or implied. *Id.*

In the present case, there is evidence of both an express agreement and an implied agreement.

> "An account becomes stated and binding on both parties if after examination the part(y) sought to be charged unqualifiedly approves of it and expresses his intention to pay it. . . . The same result obtains where one of the parties calculates the balance due and submits his statement of account to the other who expressly admits its correctness or acknowledges its receipt and promises to pay the balance shown to be due. . . ."

Id. (quoting *Little v. Shores*, 220 N.C. 429, 431, 17 S.E.2d 503, 504 (1941)). Here, defendant made payments on the account between 2005 and 2008. Furthermore, in a letter to plaintiff dated 25 September 2006, defendant "apologize[d] [for] the lateness of [his] reply" and stated that "[he would] send an amount [he could] afford as often as possible to pay off [his] balance."

"[An] agreement may be . . . implied by failure [of the party to be charged] to object within a reasonable time after the other party has calculated the balance and submitted a statement of the account." *Mazda Motors v. Southwestern Motors*, 36 N.C. App. 1, 18, 243 S.E.2d 793, 804 (1978), *aff'd in part and rev'd in part*, 296 N.C. 357, 250 S.E.2d 250 (1979). Generally, what constitutes a reasonable amount of time is a question for the jury. *Nello L. Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 532, 126 S.E.2d 500, 508 (1962); *see also Mahaffey*, 38 N.C. App. at 351, 247 S.E.2d at 774 ("The retention by the defendant of the account did not

of itself create a cause of action. It is a jury question as to whether the defendant by the retention of the statement of the account agreed that it was correct and agreed to pay it."). Therefore, summary judgment is generally inappropriate. However, in *Paine, Webber, Jackson & Curtis, Inc. v. Stanley*, 60 N.C. App. 511, 299 S.E.2d 292 (1983), this Court upheld a grant of summary judgment in favor of the party owed in an account stated action where the agreement between the parties required the person to be charged to object to the account in writing within 10 days of receipt of the account statement and the party to be charged failed to do so. *Id.* at 515, 299 S.E.2d at 295. In *Paine*, we reasoned that there was no question of reasonableness for the jury to decide where the terms of the agreement established the time for objection.

Although the *Paine* decision dealt with an unpaid balance on a commodity futures account and not attorney fees, we find the reasoning in *Paine* instructive. The Fee Agreement in this case specifically provided that "[c]lient(s) agrees to pay the outstanding balance shown on this bill within thirty days of its receipt. Statements of account mailed to client(s) will be deemed conclusive of the account if client(s) does not object in writing within ten days after the statement of account is mailed to client(s)." Furthermore, in accordance with the Fee Agreement, plaintiff sent monthly invoices to defendant beginning November 2000. Not only did defendant not object to the reasonableness of the fees within the period set forth in the Fee Agreement, defendant did not object to the reasonableness of the fees until after plaintiff instituted this action to collect the fees over ten years after plaintiff began sending defendant account statements. Additionally, defendant took no action in response to the 19 January 2011 letter from plaintiff demanding payment on the account; defendant did not make any payments, did not seek an alternative agreement for payments, and did not seek mediation pursuant to North Carolina State Bar's fee dispute resolution program.

As a result of defendant's payments on the account, defendant's promise to continue making payments as he could afford, defendant's failure to object to the account rendered within a reasonable time, and defendant's failure to take action after receiving notice from plaintiff regarding the fee dispute resolution program sponsored by the North Carolina State Bar, we uphold the trial court's determination that the account was stated.

Having determined that the account was stated, the only remaining issue is whether defendant's challenge to the reasonableness of the attorney fees is foreclosed by the determination that the account is stated. Defendant argues that the reasonableness of attorney fees

should not be foreclosed where North Carolina Rule of Professional Conduct 1.5(a) mandates that "[a] lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses." N.C. R.P.C. 1.5(a) (2003). Rule 1.5 further provides factors to be considered when determining the reasonableness of attorney fees. *See id.*

We have found no North Carolina case law addressing whether the reasonableness of attorney fees is foreclosed by a determination that an account rendered has become stated. Furthermore, our research reveals that other jurisdictions have come to different conclusions. *See In re Marriage of Angiuli*, 134 Ill. App. 3d 417, 480 N.E.2d 513 (Ill. App. Ct. 1985) (Holding an account stated is not conclusive when an attorney sues a client for fees.); *Hinkle*, *Cox*, *Eaton*, *Coffield & Hensley v. Cadle Co. of Ohio*, *Inc.*, 115 N.M. 152, 848 P.2d 1079 (1993) (Affirming summary judgment on the ground that, absent fraud or mutual mistake, client could not challenge the reasonableness of attorney fees following payment because payment established the client's assent to the amount and established an account stated.). The divergence on the issue is even more apparent considering that different appellate courts in New York have come to different conclusions. *See Collier*, *Cohen*, *Crystal & Bock v. MacNamara*, 237 A.D.2d 152, 655 N.Y.S.2d 10 (1997) (vacating summary judgment in account stated action where there was evidence of an objection to the account rendered and issues concerning the reasonableness of attorney fees remained); *O'Connell and Aronowitz v. Gullo*, 229 A.D.2d 637, 638, 644 N.Y.S.2d 870, 871 (1996) ("It is not necessary to establish the reasonableness of the [attorney] fee since the client's act of holding the statement without objection will be construed as acquiescence as to its correctness[.]"). Nevertheless, based on the facts of this case, the nature of account stated causes of action, and the fact that a timely objection by defendant to the reasonableness of the attorney fees in question would have prevented the account from becoming stated, we hold that the determination that the account was stated foreclosed the issue concerning the reasonableness of the attorney fees sought to be collected by plaintiff.

III. Conclusion

For the reasons discussed above, we find no genuine issue of material fact and determine plaintiff is entitled to judgment as a matter of law. Thus, we affirm the order of summary judgment entered by the trial court.

Affirmed.

Judges BRYANT and HUNTER, JR. (Robert N.) concur.

GINGER A. McKINNEY (NOW GINGER L. SUTPHIN), PLAINTIFF
v.
JOE A. McKINNEY, DEFENDANT

No. COA12-1152

Filed 16 July 2013

1. Attorney Fees—child custody—instructions on remand—expert witness fees

The trial court erred in a child custody case by awarding expert witness fees for time spent by the expert in attending court but not actually testifying. The Court of Appeals' instructions to the trial court on remand were to assess costs for time actually spent testifying under N.C. Gen. Stat. § 7A-305(d)(11). The trial court was bound by these specific instructions.

2. Attorney Fees—child custody—child support—appeal—within court's discretion

The trial court did not err in a child custody case by awarding attorney fees to plaintiff for defendant's previous appeal in the matter where plaintiff did not seek them from the appellate court and they were not mentioned in the Court of Appeals' remand instruction. The trial court's award of appellate attorney's fees was not contrary to the Court of Appeals' remand instruction and the award of appellate attorney's fees in matters of child custody and support, as well as alimony, is within the discretion of the trial court.

Appeal by defendant from order entered 20 January 2012 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 13 February 2013.

Wyatt Early Harris Wheeler, by A. Doyle Early, Jr. and Lee C. Hawley, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for defendant-appellant.

STEELMAN, Judge.

Where our prior opinion directed the trial court to award fees for the time that an expert witness actually spent testifying in court, but not for time spent preparing for trial, the trial court erred in awarding additional

fees based upon the time that the expert spent waiting in court. The trial court did not err in awarding attorney's fees to plaintiff for the first appeal in a case involving child support and custody.

I. Factual and Procedural Background

The underlying facts of this case can be found in our previous decision on this matter, *McKinney v. McKinney*, ___ N.C. App. ___, 720 S.E.2d 29 (2011) (unpublished). In that matter, defendant appealed several orders of the trial court that awarded attorney's fees to plaintiff in connection with plaintiff's motion for modification of child support. We affirmed in part, and vacated and remanded in part those orders. As to the portion of the attorney's fees award representing time that plaintiff's expert witness, Mr. Boger, spent in preparation for trial in the amount of $3,055.00, we held that this was improperly awarded under the case of *Peters v. Pennington*, 210 N.C. App. 1, 707 S.E.2d 724 (2011). That portion of the award was vacated. We remanded this matter to the trial court to "determine how much of the remaining $6,240.00 attorney's fees award was awarded for time Mr. Boger spent preparing for trial. Any such amount shall be deducted from the new order." *Id.*

On remand, on 22 January 2012, the trial court found that Mr. Boger spent "approximately one and one-half hours providing actual testimony." The court also found that he spent a total of 13 hours in court. The court awarded plaintiff $390.00 in expert witness fees for the time Mr. Boger spent testifying, and $2,990.00 for time he spent in court, for a total award of $3,380.00.

On 1 February 2012, plaintiff filed a motion seeking attorney's fees incurred in connection with the original appeal. On 29 March 2012, the trial court awarded $25,980.51 to plaintiff for attorney's fees on appeal.

Defendant appeals.

II. Standard of Review

"Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal." *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011).

III. Arguments

A. Expert Witness Fees for Time Waiting in Court

[1] In his first argument on appeal, defendant contends that the trial court erred in awarding expert witness fees for time spent by the expert

in attending court but not actually testifying, where instructions on remand were to assess costs for time actually spent testifying. We agree.

A mandate of an appellate court "is binding upon [the trial court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. We have held judgments of Superior [C]ourt which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court ... to be unauthorized and *void*." *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) (quotations and citations omitted). A trial court has "no authority to modify or change in any material respect the decree affirmed." *Id.* at 700, 374 S.E.2d at 868 (quoting *Murrill v. Murrill*, 90 N.C. 120, 122 (1884)).

On remand, a trial court is free to reconsider the evidence and to enter new findings of fact, provided that they are not inconsistent with those findings upheld by this Court. *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393-94, 545 S.E.2d 788, 793 *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).

In our prior opinion, we analyzed the expert witness fees to which plaintiff was entitled under N.C. Gen. Stat. § 7A-305. The statute reads, in relevant part:

> The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20:
>
> . . .
>
> Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.

N.C. Gen. Stat. § 7A-305(d)(11) (2009). We determined that this statute enabled the trial court to assess costs for time spent by an expert testifying, but not time spent preparing to testify.

On remand, the trial court awarded plaintiff $390.00 for the actual time Mr. Boger spent testifying, in accordance with N.C. Gen. Stat. § 7A-305(d)(11). However, the trial court then awarded an additional $2,990.00 "in the discretion of the court" under N.C. Gen. Stat. § 7A-314. That statute provides, in relevant part:

> An expert witness . . . shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize.

N.C. Gen. Stat. § 7A-314(d) (2011). The trial court determined that, "[d]ue to the complexity of the defendant's financial statements . . . it is reasonable that the plaintiff be reimbursed" both for the amount of time Mr. Boger spent testifying and for the time he spent in attendance in court.

The trial court was bound by our specific instructions to award costs to plaintiff under N.C. Gen. Stat. § 7A-305(d)(11). The trial court's award is "inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed" our mandate, and is therefore void. We affirm the award of $390.00 for time Mr. Boger spent actually testifying, but vacate the award of $2,990.00 for time spent waiting in court.

B. Attorney's Fees on Appeal

[2] In his second argument, defendant contends that the trial court erred in awarding attorney's fees to plaintiff for the previous appeal where plaintiff did not seek them from the appellate court and they were not mentioned in our remand instruction. We disagree.

We have previously held that "an award of attorney's fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse." *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981).

N.C. Gen. Stat. § 50-13.6, dealing with child support payments, provides that:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, 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. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order

> payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6. In the instant case, the trial court found that plaintiff's motion for modification of custody and support was filed in good faith, that defendant was paying "an inadequate amount of child support[,]" that defendant had refused to mediate the issue, and that plaintiff had insufficient means to defray the expense of the suit. Defendant does not challenge these findings on appeal, and they are therefore binding upon this court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Because the trial court made the necessary findings required by statute, it was within its discretion to order payment of reasonable attorney's fees.

We have previously held that:

> Because G.S. 50-13.6 allows for an award of *reasonable* attorney's fees, cases construing the statute have in effect annexed an additional requirement concerning reasonableness onto the express statutory ones. Namely, the record must contain additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers.

Cobb v. Cobb, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986) (citations omitted). In the instant case, the trial court made the required findings with regard to the attorneys involved and the work that they performed, and noted that defendant had stipulated that their rates were reasonable. The trial court then found that the fees sought were reasonable. Again, defendant does not challenge this finding, and it is binding upon this Court.

The question presented, however, is whether the trial court's authority to award attorney's fees extends to awarding attorney's fees for the appeal of a matter involving child custody and support. Defendant first contends that the trial court was without power to award anything beyond that which was discussed in our mandate. Defendant contends that because the mandate was silent as to appellate attorney's fees, the trial court lacked the authority to award them.

When the matter was previously before this Court, the issue of appellate attorney's fees was not raised. Our mandate did not address

that issue. Because we did not address appellate attorney's fees, the trial court's award of appellate attorney's fees was not "inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed" our mandate, and the trial court did not violate our mandate by awarding them.

Defendant further contends that, in the absence of an explicit mandate from this Court, the trial court was without authority to award appellate attorney's fees. Defendant cites to our decision in *Hill v. Hill*, in which we held that "attorney's fees and costs incurred in defending an appeal may only be awarded under N.C. R. App. P. 34 by an appellate court." *Hill v. Hill*, 173 N.C. App. 309, 318, 622 S.E.2d 503, 509 (2005) *writ denied*, *review denied*, *appeal dismissed*, 360 N.C. 363, 629 S.E.2d 851 (2006) and *writ denied*, 362 N.C. 235, 657 S.E.2d 892 (2008). However, *Hill* dealt with attorney's fees awarded pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. In *Hill*, we held that, while the trial court may award attorney's fees at trial as a sanction under Rule 11, only the appellate courts may award attorney's fees on appeal as a sanction under Rule 34 of the Rules of Appellate Procedure. In the instant case, attorney's fees are not being awarded as a sanction, but as a discretionary award pursuant to § 50-13.6 of the General Statutes. The reasoning in *Hill* is not applicable.

Plaintiff cites to our decision in *Fungaroli*, as well as our Supreme Court's decision in *Whedon v. Whedon*, 313 N.C. 200, 328 S.E.2d 437 (1985), for the proposition that the trial court may grant appellate attorney's fees in an alimony case pursuant to N.C. Gen. Stat. § 50-16.4. Both of these cases dealt with alimony, not child support. However, we find the reasoning in these cases to be compelling.

Both cases dealt with N.C. Gen. Stat. § 50-16.4, which provides that:

> At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or postseparation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony.

N.C. Gen. Stat. § 50-16.4. We held in *Fungaroli* that both this statute and § 50-13.6 serve the North Carolina policy that "there is nothing in our statutory or case law that would suggest that a dependent spouse in North Carolina is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only." *Fungaroli*, 53 N.C. App. at 273, 280 S.E.2d at 790.

In *Fungaroli*, plaintiff was ordered by the District Court to pay alimony. After multiple appeals, defendant sought appellate attorney's fees from the trial court. Plaintiff appealed the award of fees, and we held that "an award of counsel fees is appropriate whenever it is shown that the spouse is, in fact, dependent, is entitled to the relief demanded, and is without sufficient means whereon to subsist during the prosecution and defray the necessary expenses thereof." *Id.*

In *Whedon*, plaintiff appealed the trial court's initial order granting alimony and counsel fees. We remanded to modify alimony. Defendant later moved to hold plaintiff in contempt for failure to pay alimony, for modification of the alimony award in view of this Court's opinion on appeal, for appellate attorney's fees, and for costs incurred in preparing the motion. Plaintiff moved to dismiss these claims. The trial court dismissed defendant's claims for contempt and costs incurred, granted defendant's motion to amend the previous alimony award, and denied defendant's motion for appellate attorney's fees. Plaintiff appealed to this Court, and defendant made cross-assignments of error. We held that the trial court erred in dismissing defendant's request for appellate attorney's fees without prejudice. *Whedon*, 313 N.C. at 200-02, 328 S.E.2d at 438.

Our Supreme Court granted *certiorari*. The Court held that the trial court's dismissal without prejudice was not a ruling on the merits. *Id.* at 209, 328 S.E.2d at 442. The Court did not make an explicit holding with regard to the trial court's ability or inability to award appellate attorney's fees. However, the Court stated:

> In making its determination of the proper amount of counsel fees which are to be awarded a dependent spouse as litigant *or appellant* the trial court is under an obligation to conduct a broad inquiry considering as relevant factors the nature and worth of the services rendered, the magnitude of the task imposed upon counsel, and reasonable consideration for the parties' respective conditions and financial circumstances.

Id. at 208, 328 S.E.2d at 442 (emphasis added); *see also Adams v. Adams*, 167 N.C. App. 806, 606 S.E.2d 458 (2005) (unpublished) (holding that where a plaintiff sought appellate attorney's fees from the Court of Appeals, remand was appropriate to conduct an inquiry as outlined in *Whedon*). This language makes clear that, while the issue of the trial court's authority to award counsel fees was not before the Supreme Court, it considered such a determination to be within the trial court's authority. This language also makes clear that it is the place of the trial

court, and not of the appellate courts, to make the detailed factual findings necessary to award attorney's fees.

Based upon the aforementioned precedent, particularly the rationale of *Fungaroli*, we hold that the award of appellate attorney's fees in matters of child custody and support, as well as alimony, is within the discretion of the trial court. This holding applies to any appeal of a child custody or support order, whether the order is interlocutory or final.

This argument is without merit.

IV. Conclusion

The trial court's award of $390.00 for time Mr. Boger spent testifying is affirmed. The trial court's additional award of $2,990.00 for time Mr. Boger spent preparing in court is vacated. The trial court's award of attorney's fees for the first appeal in this matter is affirmed.

AFFIRMED IN PART, VACATED IN PART.

Judges GEER and HUNTER, Robert N., JR. concur.

SUMMER NOWLIN AND JOEL NOWLIN, PLAINTIFFS
v.
MORAVIAN CHURCH IN AMERICA, SOUTHERN PROVINCE AND LAUREL RIDGE CAMP, CONFERENCE AND RETREAT CENTER, DEFENDANTS

No. COA12-1290

Filed 16 July 2013

1. Negligence—assault on camper by counselor—duty of care

Camps and their employees have a duty to their campers to exercise the same standard of care that a person of ordinary prudence, charged with the duty of supervising campers, would exercise under the same circumstances. This duty of care is relative to each camper's maturity; thus, the foreseeability of harm to the individual camper is the relevant test which defines the extent of the duty to safeguard campers from the dangerous acts of others.

2. Negligence—camper assaulted by counselor—safe environment during game—summary judgment for defendants

Camp owners did not breach their duty of care to a camper by failing to maintain a safe environment for a last-night activity known

as the Game, during which the camper was sexually assaulted. Defendants' procedural safeguards adequately established that defendants acted reasonably in their supervision of the Game, particularly in light of the maturity level of the participants.

3. Negligence—assault on camper by counselor—training and supervision of counselor

Summary judgment was properly entered for defendant camp owners in a case arising from a sexual assault against a camper by a counselor. The undisputed evidence demonstrated as a matter of law that defendants acted reasonably in the training and hiring of the counselor and that the counselor's conduct was unforeseeable by defendants.

4. Appeal and Error—brief—post-sexual assault conduct—lack of value

In an action arising from a sexual assault against a camper by a counselor, the Bar was encouraged to consider carefully the relevance on appeal of information such as the camper's post-assault conduct, given its potential harm and lack of value.

Appeal by plaintiffs from order entered 12 July 2012 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 27 March 2013.

Elliot Pishko Morgan, P.A., by David Pishko and Lauren Weinstein, for plaintiff-appellants.

Davis and Hamrick, L.L.P., by H. Lee Davis, Jr., Ann C. Rowe, and Katherine M. Barber, for defendant-appellees.

CALABRIA, Judge.

Summer Nowlin ("Summer") and her father, Joel Nowlin, (collectively "plaintiffs") appeal from an order granting summary judgment in favor of Moravian Church in America, Southern Province and Laurel Ridge Camp, Conference and Retreat Center (collectively "defendants"). We affirm.

I. Background

In July 2008, sixteen-year-old Summer attended a summer camp owned and operated by defendants. On 18 July, the last night of camp, an activity called "the Game" was conducted. The purpose of the Game was

for campers to sneak around camp staff members through a wooded area, in the dark, and ring a bell located at the top of a hill. The Game was restricted to senior high campers and players were required to play with partners for safety purposes.

Summer's partner in the Game was her friend Molly. At some point, Summer and Molly met with camp staff members Raj Crawford ("Crawford") and Wes Harrison. Smith and Harrison then left together, leaving Summer alone with Crawford.

According to Summer, once she and Crawford were alone, he kissed her, pushed her down on her back, held her down, and had sexual intercourse with her. After the incident was completed, Summer returned to a dining hall. She did not report her encounter with Crawford to anyone at the camp or lodge any complaint regarding the alleged sexual assault until several months later. When confronted with the allegation, Crawford initially denied the sexual encounter but later claimed the encounter was consensual.

Plaintiffs filed a complaint and an amended complaint against defendants in Forsyth County Superior Court alleging negligence. Plaintiffs' complaint alleged, *inter alia*, that defendants were negligent in their hiring, retention, and supervision of Crawford. In addition, the complaint alleged that defendants negligently failed to provide Summer with a safe environment when it conducted the Game. Plaintiffs also alleged as a result of defendants' negligence, Summer suffered severe emotional distress.

Defendants filed an answer and a motion for summary judgment. The trial court granted defendants' motion on 12 July 2012, finding that no issues of material fact existed and that defendants were entitled to judgment as a matter of law. Plaintiffs appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Negligence

Plaintiffs argue the trial court erred by granting summary judgment in favor of defendants because there was a genuine issue of material fact

as to whether defendants negligently created an unsafe environment for Summer. We disagree.

In order to prevail on a negligence claim, a plaintiff must prove "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995).

A. Duty of Care

[1] In the instant case, there is no dispute that defendants owe Summer a duty of care. Instead, the issue in this case is the extent of that duty of care. Both parties agree that there are no North Carolina cases that address the duty a camp owes to its campers. However, there are cases which examine the duty owed by individuals supervising minor children in other contexts. Thus, in order to determine the duty of care defendants owed to Summer, we look to *Pruitt v. Powers*, 128 N.C. App. 585, 495 S.E.2d 743 (1998) and *Royal v. Armstrong*, 136 N.C. App. 465, 524 S.E.2d 600 (2000) for guidance.

In *Pruitt*, a mother brought a negligence action against a daycare center owner for injuries her three year old sustained when he fell at day care as a result of playful pushing with classmates. 128 N.C. App. at 586, 495 S.E.2d at 744. This Court found that the defendant had been notified of similar pushing incidents and knew and appreciated the danger that someone could be hurt if the pushing incidents continued. This Court analogized the duty owed by daycare providers to the duty owed to school children by teachers and held that daycare providers with children under their supervision "have a duty to abide by that standard of care which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances." *Id.* at 590, 495 S.E.2d at 747 (internal quotations and citations omitted). The Court further explained that

> [t]he amount of care due a student increases with the student's immaturity, inexperience, and relevant physical limitations. Day care providers, however, cannot be expected to anticipate the myriad of unexpected acts which occur daily in and about schools, and are not insurers of the safety of the children in their care. The foreseeability of harm to pupils in the class or at the school is the test of the extent of the [day care provider's] duty to safeguard her pupils from dangerous acts of fellow pupils....

Id. at 591, 495 S.E.2d at 747 (internal citations and quotations omitted).

In *Royal*, the plaintiff's eight-year-old grandson attended a pool party at the home of the defendants. 136 N.C. App. at 467, 524 S.E.2d at 601. While the children at the party were being supervised by a parent, the plaintiff's grandson drowned. *Id.* at 468, 524 S.E.2d at 601-02. Relying on *Pruett*, the Royal Court determined that "adult hosts or supervisors have a duty to the children to exercise a standard of care that a person of ordinary prudence, charged with similar duties, would exercise under similar circumstances. As with students, 'the amount of care due . . . increases with the student's immaturity, inexperience, and relevant physical limitations.' " *Id.* at 471, 524 S.E.2d at 603-04 (quoting *Payne v. N.C. Dept. of Human Resources*, 95 N.C. App. 309, 314, 382 S.E.2d 449, 452 (1989)).

We find that the relationship between a camp and its campers is analogous to the relationships at issue in *Pruitt* and *Royal*. Thus, consistent with those cases, we hold that camps and their employees have a duty to their campers to exercise the same standard of care that a person of ordinary prudence, charged with the duty of supervising campers, would exercise under the same circumstances. Moreover, as noted in both cases, this duty of care is relative to the camper's maturity. Thus, the foreseeability of harm to the individual camper is the relevant test which defines the extent of the duty to safeguard campers from the dangerous acts of others. *Pruitt*, 128 N.C. App. at 591, 495 S.E.2d at 747.

B. Breach

[2] Having defined the applicable duty of care, we must now determine whether there is any genuine issue of material fact as to whether defendants breached their duty to Summer. Plaintiffs first argue that defendants breached their duty by "negligently failing to maintain a safe environment for [Summer] while she played [t]he Game." Specifically, plaintiffs cite the following undisputed evidence that they claim create a genuine issue of material fact: (1) the Game occurred in a wide, heavily wooded area; (2) the Game occurred late at night; (3) adult camp staff participated in the Game with minor campers; and (4) the executive director, assistant director, and camp director did not supervise the Game.

However, plaintiffs overlook several other undisputed facts which are relevant to our inquiry. At the time the Game was played, Summer was sixteen years old. Defendants specifically restricted the Game to senior high campers and required them to be with a partner while playing the Game for safety purposes. In addition, adult camp counselors and staff members were present as participants in and supervisors of

the Game. These procedural safeguards adequately establish that defendants acted reasonably in their supervision of the Game, particularly in light of the maturity level of the senior high campers who participated in it. Thus, defendants did not breach their duty to Summer by conducting the Game.

[3] Plaintiffs also contend defendants were negligent and thus liable for Crawford's actions because they failed to adequately train him. Specifically, plaintiffs allege that defendants (1) failed to have written rules prohibiting relationships between staff and campers; (2) failed to teach Crawford and the staff that they should never be alone with a camper; and (3) failed to communicate that certain types of interactions with campers were prohibited.

To support their allegations at the hearing on the motion for summary judgment, plaintiffs submitted an affidavit from Scott Arizala ("Arizala"), a summer camp consultant and author of a book explaining the best practices for camp staff. Arizala stated in his affidavit that:

> the policies and procedures [of defendants' camp] are below the standard of care applicable to a summer camp . . . and do not conform to industry best practices. They do not include a clear statement prohibiting a staff member from being alone with a camper, and they demonstrate a disregard for the principle that at least two staff members must be present when working with campers.
>
> There was a clear lack of training and ongoing culture of improving and learning with an emphasis on the safety of children or the inappropriateness of staff to camper relationships.

Arizala's opinion was based solely on his review of the camp's written policies and procedures. However, several of defendants' staff members testified in their depositions that they were *orally* instructed that two staffers must be present at all times when dealing with campers and that they were also warned to be very careful about any physical or romantic relationships with campers. Most importantly, Crawford submitted an affidavit in which he averred that he knew his conduct with Summer was "against camp policies," and "inappropriate and prohibited." Thus, while Arizala's affidavit may create an issue of fact regarding whether defendants had an adequate written policy regarding sexual relationships between camp staff and campers, it does not establish that no such policy existed. On the contrary, the undisputed evidence is that

Crawford and other camp staff members were made aware that sexual relationships with campers were prohibited.

It is also undisputed that prior to his employment in 2008, Crawford provided a personal disclosure indicating that he had not had any criminal convictions, that he had never been dismissed, suspended or asked to resign from a job, and that he had never had a complaint lodged against him for sexual molestation, abuse or harassment. Additionally, defendants checked the National Sex Offender Registry to ensure that Crawford was not disqualified from employment. Defendants also received a favorable recommendation in a telephone interview with a trusted reference. Finally, Crawford was hired in 2007 and his employment was very positive that summer. Based on the prior investigation and his positive performance in 2007, Crawford was re-hired for the summer of 2008. Taken together, this undisputed evidence demonstrates as a matter of law that defendants acted reasonably in its training and hiring of Crawford and that Crawford's conduct which harmed Summer was unforeseeable by defendants.

We therefore conclude that defendants presented substantial evidence that they adhered to the standard of care required for camp supervisors safeguarding campers from danger, taking into the consideration the maturity and experience levels of the senior high campers. Defendants were not negligent in either their planning and supervision of activities such as the Game or their training and supervision of their employees. Since there was no evidence that defendants breached their duty to Summer, the trial court correctly determined that defendants were entitled to summary judgment. This argument is overruled.

IV. Contents of Defendants' Brief

[4] In both the fact and argument sections of their brief, defendants included a description of evidence concerning certain post-incident activities in which Summer engaged for the apparent purpose of arguing that, since Summer's parents did not have full knowledge of and control over those activities, defendants could not have been expected to control her prior activities either. In view of the fact that the evidence, when taken in the light most favorable to plaintiffs, indicates that Summer was the victim of a sexual assault and the fact that defendants' argument in reliance on the information concerning Summer's post-incident activities appears to assume a consensual encounter, we have difficulty seeing how this information was relevant to the issues before the Court in this case, which involved an appeal from the trial court's decision to grant summary judgment. In view of the potential harm to individuals in

Summer's position from the inclusion of this sort of information in filings before this Court and the fact that such information is of no value to the Court for purposes of appellate review of an order such as this one, we encourage the Bar in this State to consider carefully whether such information is really relevant to the issues being litigated on appeal before including such information in their filings with this Court.

V. Conclusion

Defendants did not breach their duty of care to Summer by failing to maintain a safe environment at the camp. There was no evidence which would have allowed defendants to anticipate Crawford's actions towards Summer or take additional reasonable steps to prevent them. Since there are no genuine issues as to any material facts, the trial court properly granted defendants' motion for summary judgment.

Affirmed.

Judges ERVIN and DILLON concur.

PARADIGM CONSULTANTS, LTD, Plaintiff
v.
BUILDERS MUTUAL INSURANCE CO., Defendant/Third Party Plaintiff
v.
CHARLES G. RAYMOND and KIMBERLY G. RAYMOND, Third-Party Defendants

No. COA12-1576

Filed 16 July 2013

Appeal and Error—interlocutory orders and appeals—duty to defend prior action—coverage for claims—no substantial right

Defendant insurance company's appeal and plaintiff contractor's cross-appeal from an interlocutory order in a case arising from construction claims was dismissed because the prior litigation was concluded and there was no substantial right involving the question of whether defendant had a duty to defend the prior action or whether there was coverage for the claims raised in the prior action.

Appeal by defendants from order entered 2 October 2012 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 8 May 2013.

Shumaker, Loop & Kendrick, LLP, by Andrew S. Culicerto, Christian H. Staples & Michael G. Sanderson, for plaintiff-cross-appellant.

Nelson Levine de Luca & Hamilton, by John I. Malone, Jr. & David L. Brown, for defendant-appellants.

STEELMAN, Judge.

Where the trial court granted summary judgment to plaintiff as to one of defendant's defenses, but denied summary judgment as to the balance of the issues raised by plaintiff and defendant, the order of the trial court is interlocutory. Where the prior litigation was concluded, there is no substantial right to have the interlocutory appeal heard on the questions of whether defendant had a duty to defend the prior action or whether there was coverage for the claims raised in the prior action.

I. Factual and Procedural Background

On 18 August 2008, Paradigm Consultants, Ltd. ("Paradigm") brought suit against Charles and Kimberly Raymond ("the Raymonds"), seeking payment for construction work performed by Paradigm on the Raymonds' residence. On 20 November 2008, the Raymonds filed an answer and counterclaim, alleging breach of contract, breach of a duty of workmanlike performance, unfair and deceptive trade practices, breach of implied warranty of workmanship, and negligence. On 21 November 2008, a copy of the answer and counterclaim was faxed to Matthew Collins ("Collins"), owner and president of Paradigm. On 13 March 2009, Collins contacted Paradigm's insurer, Builders Mutual Insurance Co. ("BMI"), and advised BMI of a dispute with the Raymonds, but did not advise BMI that a counterclaim had been filed against Paradigm.

On 15 December 2009, the Raymonds amended their counterclaim to add subcontractors who worked on their residence as third party defendants. On 19 February 2010, BMI received a copy of the Raymonds' Second Amended Answer and Counterclaim from a subcontractor's insurer. On 29 March 2010, BMI sent a reservation of rights letter to Paradigm, stating that BMI understood the following: that Paradigm had sought recovery from the Raymonds, who had filed counterclaims; that BMI had not previously been made aware of the counterclaims; that the claim originated from work commenced in 1998 and 1999 and continued until 2008; that BMI's insurance coverage was only for the time period from 28 August 2002 through 28 March 2008; that the policy did not cover anything outside of that time period;

and that there was no written contract prior to suits between Paradigm and the Raymonds. BMI concluded that there was no coverage for the Raymonds' claims against Paradigm, pursuant to Exclusion L of the policy; that Exclusions J(5) and J(6) excluded from coverage any damage for work performed by Paradigm and its subcontractors; that neither the indemnity nor the defense clauses of the policy were triggered; that Paradigm should contact its current insurance carrier; and further that BMI was not promptly notified of the Raymonds' counterclaims as required by the policy. The letter explicitly reserved BMI's rights under the policy, and stated that it was referring the issue to outside counsel to determine whether any indemnity or defense duties existed under the insurance policy. On 21 October 2010, BMI's outside counsel confirmed that BMI had no duty to indemnify or defend Paradigm with respect to the Raymonds' claims.

The Raymonds and Paradigm subsequently entered into a settlement agreement that Paradigm would agree to pay the Raymonds $2.5 million in settlement of all claims. The Raymonds agreed to pay Paradigm $220,000.00 to address another dispute between the parties. The Raymonds further agreed to forego enforcement and collection of the $2.5 million if Paradigm agreed to seek coverage for the settlement amount from BMI. The Raymonds agreed to finance the litigation and have their attorneys represent Paradigm in the action against BMI, with the stipulation that the first $150,000.00 of any settlement with BMI would be paid to the Raymonds, and any other funds received would be divided 92.5% to the Raymonds and 7.5% to Paradigm.

On 24 May 2011, Paradigm brought this action against BMI, alleging breach of contract, bad faith, and unfair and deceptive trade practices. On 12 August 2011, BMI filed motions to dismiss, to transfer venue, to strike the portions of the complaint stating the amount of relief sought, and an answer. On 20 June 2012, Paradigm filed an amended complaint. On 10 July 2012, BMI answered the amended complaint, and on 6 August 2012, BMI filed a third-party complaint against the Raymonds. On 15 August 2012, Paradigm filed a motion for partial summary judgment on three issues: (1) that BMI breached its duty to defend Paradigm, (2) that BMI had waived the contractual exclusions it alleged in its answer, and (3) on BMI's champerty and maintenance defense. On 16 August 2012, BMI filed a motion for summary judgment on all issues. On 10 October 2012, the trial court entered an order denying BMI's motion for summary judgment and granting Paradigm's motion for summary judgment as to BMI's defense of champerty and maintenance. The balance of Paradigm's motion for summary judgment was denied.

On 15 October 2012, the trial court stayed further proceedings pending appeal. The trial court did not certify its order on summary judgment as a final order pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

BMI appeals. Paradigm cross-appeals.

II. Interlocutory Appeal

We must first determine whether any appeal from the trial court's interlocutory order is properly before us.

A. Standard of Review

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. 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. City of Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

"[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005).

"The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009). "Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. 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." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

B. Analysis

BMI contends that the trial court's interlocutory order affects a substantial right because it involves a liability insurer's duty to defend its

insured. BMI contends that the issue of whether an insurer has a duty to defend the insured in an underlying action affects substantial rights that may be lost absent immediate appeal. BMI further contends that the trial court's order dismissed BMI's affirmative defense of champerty and maintenance that would have rendered void the settlement agreement which supplies the basis for Paradigm's claims against BMI. Paradigm contends that the trial court's order affected Paradigm's right to be defended by BMI, and is therefore immediately appealable.

The parties cite to our decision in *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 527 S.E.2d 328 (2000), in which we held that "the order of partial summary judgment on the issue of whether Allstate has a duty to defend LRI in the underlying action affects a substantial right that might be lost absent immediate appeal." *Id.* at 4, 527 S.E.2d at 331. We hold that *Lambe* is not controlling based on the facts of the instant case.

In *Lambe*, the plaintiff filed a declaratory judgment action against its insurer, Allstate, seeking a judicial determination that Allstate owed a duty to defend it and to indemnify it. Underlying that case was a pending action filed by the Kippes against Lambe, "asserting claims for breach of contract, negligence, breach of warranty, breach of implied covenant of quiet enjoyment, constructive eviction, and unfair and deceptive trade practices." *Id.* at 2, 527 S.E.2d at 330. The Kippes had contracted with Lambe to move the Kippes' mobile home and secure it on a foundation at a new site. According to the complaint in the underlying action, Lambe moved the home but "left it in an uninhabitable position." When Lambe refused to do any further work, the Kippes undertook to reposition the home themselves, resulting in severe damage to the home. *Id.* The Kippes filed a complaint. Lambe notified its insurer, Allstate. Allstate determined that Lambe's policy excluded coverage, and Lambe brought a declaratory judgment action against Allstate to determine Allstate's duty to defend. On summary judgment, the trial court held that Allstate owed such a duty. *Id.* at 3, 527 S.E.2d at 330. On appeal, we held that the duty of an insurer to defend the insured was a substantial right. *Id.* at 4, 527 S.E.2d at 330-31. This substantial right supported an interlocutory appeal by Allstate.

The *Lambe* case and the instant case are factually distinguishable. In *Lambe*, the declaratory judgment action was brought against the insurer during the pendency of the Kippes' action against Lambe. As a result, it was clear that a determination by the trial court as to whether Allstate had a duty to defend Lambe would impact a substantial right. In the instant case, however, Paradigm brought its action against BMI after

the litigation with the Raymonds had been concluded. A determination that BMI does or does not owe a duty to Paradigm will not change the resolution of the prior case. Thus, in the instant case, as opposed to *Lambe*, Paradigm's right to be defended by its insurer is not a substantial right under either N.C. Gen. Stat. § 1-277 or N.C. Gen. Stat. § 7A-27(d) which would give rise to the right to bring an interlocutory appeal.

Further, in the instant case, we are not dealing with the trial court's determination as to whether BMI owed a duty to defend Paradigm or the scope of Paradigm's coverage. We are dealing with the trial court's rulings: (1) that BMI's defense of champerty and maintenance was dismissed, and (2) that there were genuine issues of material fact rendering summary judgment inappropriate as to the remaining issues before the court on summary judgment. The trial court's order did not address the ultimate issue of whether BMI owed Paradigm a duty to defend and indemnify. We hold that this case is distinguishable from *Lambe*. BMI has failed to demonstrate a substantial right affected by the trial court's order.

In its cross-appeal, Paradigm contends that the trial court erred in denying its motion for summary judgment as to BMI's duty to defend in the prior lawsuit and that BMI waived any conditions contained in its policy. Paradigm also relies upon *Lambe* as a basis for a substantial right. As discussed above, the instant case does not involve other pending litigation, and therefore the holding in *Lambe* is not applicable.

Where multiple claims are raised and only one or some are addressed in an order, that order is interlocutory and ordinarily is not appealable. *See White v. Carver*, 175 N.C. App. 136, 139, 622 S.E.2d 718, 720 (2005). Where one or more issues remain before the trial court, the trial court may certify the matter for appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. *See Wilkerson v. Norfolk S. Ry. Co.*, 151 N.C. App. 332, 336, 566 S.E.2d 104, 107 (2002); *Yordy v. N.C. Farm Bureau Mut. Ins. Co.*, 149 N.C. App. 230, 231, 560 S.E.2d 384, 385 (2002); N.C. R. Civ. P. 54(b). In the instant case, however, the trial court did not certify the matter for appeal.

We hold that neither BMI nor Paradigm has demonstrated the existence of a substantial right that would support this Court hearing their interlocutory appeals. The appeal of BMI and the cross-appeal of Paradigm are dismissed.

DISMISSED.

Judges CALABRIA and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
IBN RAHSHAAN KORNEGAY, DEFENDANT

No. COA13-52

Filed 16 July 2013

Probation and Parole—revocation—jurisdiction—notice

A trial court order revoking defendant's probation and activating his sentence was vacated and remanded where the trial court lacked jurisdiction because defendant did not receive proper notice that his probation might be terminated. This case was indistinguishable from *State v. Tindall* (COA 12-1145, 2013). The trial revoked defendant's probation for committing a subsequent offense, but the violation report alleged only violation of drug and firearms conditions and did not allege a criminal offense.

Appeal by defendant from judgments entered on or about 27 August 2012 by Judge Wayland J. Sermons, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 6 June 2013.

Attorney General Roy A. Cooper, III by Assistant Attorney General Lora C. Cubbage, for the State.

Michelle FormyDuval Lynch, for defendant-appellant.

STROUD, Judge.

Ibn Rahshaan Kornegay ("defendant") appeals from a judgment revoking his probation and activating his sentence. We vacate the judgment of the trial court for lack of jurisdiction and remand.

I. Background

On 17 August 2009, defendant pled guilty to two felony counts of possession with intent to sell and deliver cocaine. As part of a plea agreement, he was placed on supervised probation for thirty months. His probationary term was to run at the expiration of his sentence in a prior case.[1]

1. Neither that prior judgment nor anything indicating when he might have completed his sentence on the prior conviction was included in the record. Based on the violation reports, it appears that defendant's probation may have been extended at one point, but there is no order in the record doing so.

On 6 July 2012, defendant consented to a warrantless search of his home by a probation officer, Officer Johnson. During this search, Officer Johnson found a loaded revolver, a large knife with a brass-knuckle hilt, what he believed to be drugs, and a scale. Defendant's identification card and clothes were in the same bedroom where Officer Johnson found the revolver and knife.

Subsequently, the State brought charges against defendant for possession of this contraband, filed two probation violation reports, and requested that the court revoke his probation. The new charges were (1) possession with intent to sell and deliver marijuana and (2) possession of a firearm by a felon. The violation reports alleged that defendant broke three conditions of his probation: (1) that he "not be in possession of any drug paraphernalia" (original in all caps), (2) that he "[p]ossess no firearm ... or other deadly weapon," and (3) that he "[n]ot use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it. . . ."

At the probation revocation hearing in Pitt County Superior Court, Officer Johnson testified about the contraband that he found within defendant's home. Defendant did not offer any evidence at the hearing. At the time of the probation hearing, defendant had not been convicted of any of the new charges. Based on Officer Johnson's testimony, the trial court found that defendant "committed a subsequent criminal offense," revoked defendant's probation, and activated his sentences in the underlying felonies. Defendant objected to this finding in court and gave oral notice of appeal.

II. Trial Court Jurisdiction

Defendant has not raised the issue of jurisdiction in this case. Nevertheless, "subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." *Obo v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009) (citation omitted).

"A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001).

> Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond

> these limits is in excess of its jurisdiction. If the court was without authority, its judgment is void and of no effect.

State v. Gorman, ___ N.C. App. ___, ___, 727 S.E.2d 731, 733 (2012) (citations, quotation marks, and ellipses omitted).

Recently, this Court held that where a probationer does not receive notice that the State intends to prove that she violated a condition of probation that could result in the revocation of probation, the trial court does not have jurisdiction to find a violation of that condition. *State v. Tindall*, ___ N.C. App. ___, ___, 742 S.E.2d 272, 275, (2013).

In *Tindall*, the probationer, Ms. Tindall, was receiving treatment at a substance abuse facility as required by a plea agreement. *Id.* at ___, 272 S.E.2d at 273. However, Ms. Tindall was "caught partying" with other residents of the facility. *Id.* (quotation marks omitted). When speaking with her probation officer about the incident, Ms. Tindall admitted to snorting cocaine. *Id.* at ___, 742 S.E.2d at 273-74. In response, the State filed violation reports alleging that she broke two conditions of her probation: (1) that she "[n]ot use, possess or control any illegal drug" and (2) that she "participate in further evaluation, counseling, treatment or education programs . . . and comply with all further therapeutic requirements. . . ." *Id.* at ___, 742 S.E.2d at 275. It did not allege that she violated the condition that she commit no criminal offense. *See id.*

At Ms. Tindall's probation revocation hearing, the trial court reviewed the evidence and ruled that she "did unlawfully willfully without legal justification violate[] the terms and conditions of her probation as alleged in the violation reports, and . . . that she [] *committed a subsequent offense* while on probation." *Id.* at ___, 742 S.E.2d at 274. (emphasis added). The trial court revoked her probation and activated her sentence. *Id.*

We noted that:

> Prior to revocation of probation, the court must hold a hearing, "unless the probationer waives the hearing. . . ." N.C. Gen. Stat. § 15A–1345(e) (2011). The State must give the probationer notice of the [probation revocation] hearing and its purpose, including a statement of the violations alleged." *Id.* "The notice, unless waived by the probationer, must be given at least 24 hours before the hearing." *Id.* The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act.

Id. at ___, 742 S.E.2d at 274 (citation and quotation marks omitted). Because Ms. Tindall did not receive notice of a violation of the "commit no criminal offense" condition and she did not waive notice, we concluded that the trial court did not have jurisdiction to consider that violation and "improperly revoked her probation." *Id.* at ___, 742 S.E.2d at 275.

This holding is significant because under the Justice Reinvestment Act of 2011 it is no longer true that "[any] violation of a valid condition of probation is sufficient to revoke defendant's probation." *State v. Crowder*, 208 N.C. App. 723, 726, 704 S.E.2d 13, 15 (2010) (citation and quotation marks omitted). Under the Justice Reinvestment Act, only when a probationer "[c]ommit[s] [a] criminal offense" or "abscond[s] by willfully avoiding supervision" is his probation subject to revocation, unless he has been subject to two prior periods of "Confinement in Response to Violation". *See* N.C. Gen. Stat. § 15A-1344(a) ("The court may *only* revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. § 15A-1343(b)(3a), except as provided in G.S. 15A-1344(d2).") (emphasis added); N.C. Gen. Stat. § 15A-1344(d2). A trial court may not otherwise revoke probation simply for a violation of the general requirement that a probationer "[n]ot use, possess, or control any illegal drug. . . ." N.C. Gen. Stat. § 15A-1343(b) (15) (2011); *see* N.C. Gen. Stat. § 15A-1344(a). Thus, although the same conduct could fall under both N.C. Gen. Stat. § 15A-1344(b)(1) and (b)(15), the potential consequences for violating each condition are quite different. Under *Tindall*, which violation is alleged dictates whether the trial court has the jurisdiction to revoke a defendant's probation or not.

The present case is indistinguishable from *Tindall*. We are bound by it and apply it here. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989). Here, the State did not allege that defendant "[c]ommit[ted] [a] criminal offense" in its violation reports. Instead, it alleged that that defendant had (1) been "in possession of [] drug paraphernalia" (original in all caps), (2) "[p]ossess[ed] [a] firearm. . . or other deadly weapon," and (3) "use[d], possess[ed] or control[ed] [an] illegal drug or controlled substance. . . ." Defendant did not receive proper notice that his probation might be terminated for violating § 1343(b)(1). Yet, the trial court revoked defendant's probation because he "committed a subsequent criminal offense."

As in *Tindall*, we conclude that the trial court lacked jurisdiction to revoke defendant's probation. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is 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 and quotation marks omitted). Thus, we vacate the trial court's order revoking defendant's probation and activating his sentence. We remand for further proceedings as appropriate.

III. Conclusion

In order to revoke a defendant's probation, a court must have jurisdiction to do so. To establish jurisdiction over specific allegations in a probation revocation hearing, the defendant either must waive notice or be given proper notice of the revocation hearing, including the specific grounds on which his probation might be revoked. Here, defendant did not waive notice, and the trial court revoked defendant's probation for violation of a condition not included in the State's violation reports. Therefore, it did not have jurisdiction to revoke defendant's probation and activate his sentence. Accordingly, we vacate the trial court's order revoking defendant's probation and activating his sentence and remand.

VACATED and REMANDED.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA
v.
BOBBY CURTIS LEE

No. COA13-95

Filed 16 July 2013

Sentencing—Structured Sentencing Act—improper retroactive application of 2009 amendments

The trial court erred in a felony breaking or entering case by retroactively applying the 2009 amendments to the Structured Sentencing Act and resentencing defendant to a term of 76 to 101 months' imprisonment for offenses committed on 5 February 2005 and 6 June 2005. The trial court's amended judgment was vacated and remanded so that it could enter judgments in accordance with the sentencing provisions in effect at the time of the offenses.

Appeal by the State from order and amended judgment entered 24 September 2012 by Judge Kevin M. Bridges in Stanly County Superior Court. Heard in the Court of Appeals 22 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State appellant.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for the defendant appellee.

McCULLOUGH, Judge.

The State appeals from the trial court's order granting defendant's motion for appropriate relief ("MAR") and the trial court's entry of an amended judgment. For the following reasons, we vacate the amended judgment.

I. Background

On 6 June 2005, defendant was indicted by a Stanly County Grand Jury for felony breaking or entering, felony larceny, felony possession of stolen goods, and for having attained the status of an habitual felon. Thereafter, on 27 April 2006, defendant pled guilty to felony breaking or entering and to attaining the status of an habitual felon as part of a plea agreement whereby all other charges pending against defendant in Stanly County were dismissed. The plea agreement further provided that defendant would "receive an active sentence at the bottom of the mitigated range as a Class C felon, record level 5."

The Honorable Kimberly S. Taylor entered judgment and sentenced defendant on 27 April 2006. The judgment reported 5 February 2005 as the offense date for felony breaking or entering and 6 June 2005 as the offense date for attaining the status of an habitual felon. In accordance with the terms of the plea agreement, defendant was sentenced to a term of 90 to 117 months' imprisonment, a term at the bottom of the mitigated range for a prior record level V felon committing a Class C offense under the 2005 version of the structured sentencing grid (the "2005 grid"), effective for offenses committed on or after 1 December 1995, but before 1 December 2009. See N.C. Gen. Stat. § 15A-1340.17(c) (2005).[1]

On 4 April 2012, defendant filed a *pro se* MAR seeking to be resentenced. In the MAR, defendant argued in favor of retroactive application

1. The trial judge determined defendant to have 16 prior record points and to be a prior record level V for sentencing. Defendant then stipulated to the accuracy of the trial judge's determinations. The judgment entered on 27 April 2006, however, indicates that the trial court determined defendant had 5 prior record points and was a prior record level III for sentencing. The entries on the judgment are merely clerical errors.

of changes to structured sentencing under the 2009 amendments to the Structured Sentencing Act ("SSA") and the Justice Reinvestment Act of 2011 ("JRA"). By order filed 1 August 2012, the Honorable Kevin M. Bridges appointed defendant counsel, ordered the State to file an answer, and scheduled the MAR for an evidentiary hearing during the Criminal Session of Stanly County Superior Court beginning 17 September 2012.

The State filed a response to defendant's MAR on 30 August 2012 and Judge Bridges presided over the scheduled evidentiary hearing on 20 September 2012.

On 24 September 2012, an order was filed allowing defendant's MAR in part. The judge concluded that the 2009 version of the structured sentencing grid under the SSA (the "2009 grid") should be retroactively applied to defendant's case. Conversely, the judge also concluded that the changes to the habitual felon laws under the JRA did not retroactively apply to defendant's case. On the same date, an amended judgment was filed modifying defendant's sentence to a term of 76 to 101 months' imprisonment, a term at the bottom of the mitigated range for a prior record level V felon committing a Class C offense under the 2009 grid, effective for offenses committed on or after 1 December 2009, but before 1 December 2011. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2009).[2]

On 4 October 2012, the State gave notice of appeal from the order granting defendant's MAR and from the amended judgment modifying defendant's sentence. By orders issued 16 October 2012 and 19 October 2012, respectively, this Court granted the State's motion for a temporary stay and allowed the State's petition for writ of supersedeas. As a result, the amended judgment was stayed pending this appeal. Additionally, the State submitted a petition for writ of certiorari ("PWC") to this Court on 18 October 2012. Following a response by defendant, this Court denied the State's PWC by order filed 2 November 2012.

II. Analysis

On appeal, the State contends that the trial court erred by retroactively applying the 2009 amendments to the SSA Act and resentencing defendant to a term of 76 to 101 months' imprisonment for offenses committed on 5 February 2005 and 6 June 2005. We agree.

As noted above, pursuant to the terms of the plea agreement, defendant was originally sentenced to a term of 90 to 117 months'

2. The amended judgment includes the same clerical errors as the original judgment, described in detail in footnote 1.

imprisonment, the lowest term of imprisonment authorized under the 2005 grid for a Class C offense committed by felon with a prior record level V. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2005). In 2009, the N.C. General Assembly amended the structured sentencing grid, lowering the minimum term of imprisonment for a prior record level V felon committing a Class C offense. Under the 2009 grid, the minimum term of imprisonment was reduced to 76 to 101 months. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2009). However, while amending the structured sentencing grid, the General Assembly noted that "[t]his act becomes effective December 1, 2009, and applies to offenses committed on or after that date." N.C. Sess. Laws 2009-556, sec. 2. Thus, it is clear that the General Assembly did not intend for the 2009 grid to apply retroactively to offenses committed prior to 1 December 2009.

In addition, we find our Supreme Court's opinion in *State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012), instructive in this case. In *Whitehead*, the defendant pled guilty to second-degree murder with an offense date of 25 August 1993. *Id.* at 444, 722 S.E.2d at 493. Pursuant to the Fair Sentencing Act ("FSA"), which governed sentencing for felonies committed between 1 July 1981 and 1 October 1994, the trial court imposed a life sentence, the maximum aggravated term authorized for second-degree murder under the FSA. *Id.* at 444-45, 722 S.E.2d at 493. Years later, on 2 December 2010, the defendant filed an MAR seeking to be resentenced under the SSA, which "supersede[d] the FSA for offenses committed on or after the SSA's effective date, 1 October 1994." *Id.* at 445, 722 S.E.2d at 494. The trial court granted defendant's MAR and retroactively applied the SSA, modifying the defendant's life sentence to a term of 157 to 198 months' imprisonment. *Id.*

Upon review pursuant to the State's petition for writ of certiorari, our Supreme Court determined that the trial court erred by retroactively applying the SSA to resentence the defendant to a lesser term. *Id.* at 447, 722 S.E.2d at 495. The Court noted that "[t]he General Assembly clearly and unambiguously provided the [SSA] may not be applied retroactively: 'This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date.' " *Id.* (quoting ch. 24, sec. 14, 1993 N.C. Sess. Laws (Extra Sess. 1994) at 96). Furthermore, "[t]rial courts are required to enter criminal judgments in compliance with the sentencing provisions in effect at the time of the offense." *Id.* (citing *State v. Roberts*, 351 N.C. 325, 327, 523 S.E.2d 417, 418 (2000).

Although the present case deals solely with the SSA, the reasoning in *Whitehead* applies with equal force. The General Assembly clearly and unambiguously provided that the 2009 grid "becomes effective

December 1, 2009, and applies to offenses committed on or after that date." N.C. Sess. Laws 2009-556, sec. 2. Accordingly, where the trial court must enter judgments in accordance with the sentencing provisions in effect at the time of the offenses, the trial court erred in retroactively applying the 2009 grid to resentence defendant for offenses dated 5 February 2005 and 6 June 2005.

On appeal, defendant acknowledges the language in the N.C. Session Laws and the holding in *Whitehead*. Moreover, defendant agrees that the State has a right to appeal the amended judgment. *See* N.C. Gen. Stat. § 15A-1445(a)(3) (2011). Nevertheless, instead of arguing in favor of retroactive application of the 2009 grid, defendant argues that the trial court's order granting his MAR is not subject to appellate review. As a result, defendant contends the trial court's conclusion that the 2009 grid "should have retroactive application to [] [d]efendant's case[,]" is binding and not subject to challenge on appeal. Thus, defendant asserts that our review of the amended judgment must start with the premise that the 2009 grid applies retroactively. We disagree.

In this opinion we only address the amended judgment and hold the amended judgment is properly before this Court for review pursuant to N.C. Gen. Stat. § 15A-1445(a)(3) (providing the State a right of appeal where the sentence imposed "[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level[.]") Here, the amended judgment reflects the offense dates of 5 February 2005 and 6 June 2005, at which time 90 to 117 months' imprisonment was the lowest term authorized under the 2005 grid in the mitigated range for a Class C offense committed by a felon with a prior record level V. Where, as discussed above, the 2009 grid does not apply retroactively and where it is clear from the face of the amended judgment that the term of imprisonment imposed on resentencing is unauthorized by law, we vacate the amended judgment.

III. Conclusion

For the reasons discussed above, we vacate the amended judgment resentencing defendant under the 2009 grid.

Vacate amended judgment.

Judges CALABRIA and STEELMAN concur.

STATE v. GAMEZ

[228 N.C. App. 329 (2013)]

STATE OF NORTH CAROLINA
v.
OSMAN GAMEZ

No. COA12-1488

Filed 16 July 2013

1. Appeal and Error—preservation of issues—expert testimony—hearsay—failure to move to strike—failure to assert plain error

Defendant failed to preserve for appellate review the argument that the trial court erred in a statutory rape, statutory sex offense, and indecent liberties with a minor case by admitting into evidence statements made by the alleged victim to an expert witness about what the alleged victim's brother had said. Defense counsel made no motion to strike the testimony. Additionally, defendant failed to assert plain error on appeal.

2. Evidence—expert testimony—sexual offenses—victim suffered from post-traumatic stress disorder

The trial court did not err in a statutory rape, statutory sex offense, and indecent liberties with a minor case by admitting an expert's opinion that the alleged victim suffered from post-traumatic stress disorder (PTSD). Defendant's assignment of error was reviewed under the previous version of Rule 702 as the bill of indictment in this case was filed on 17 May 2010, before the 1 October 2011 date that the amendments to Rule 702 were effective. Given the expert's education, experience, and testimony concerning the basis of her opinion, the trial court did not abuse its discretion in allowing the expert to give an opinion that the alleged victim suffered from PTSD.

Appeal by defendant from judgment entered 14 June 2012 by Judge Michael J. O'Foghuldha in Wake County Superior Court. Heard in the Court of Appeals 24 April 2013.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, for defendant-appellant.

STEELMAN, Judge.

Where the State's witness testified concerning statements made to the victim by the victim's brother and defendant failed to make a motion to strike that testimony, defendant did not preserve the issue for appellate review. For purposes of applying the recent amendment to Rule 702 of the North Carolina Rules of Evidence in criminal proceedings, the operative date is the date that the indictment was filed. The trial court did not abuse its discretion in admitting the expert opinion that the victim suffered from post-traumatic stress disorder when a licensed clinical social worker was tendered as an expert in social work and routinely made mental health diagnoses of sexual assault victims.

I. Factual and Procedural Background

On 17 May 2010, Osman Gamez (defendant) was indicted for statutory rape, four counts of statutory sex offense, and two counts of indecent liberties with a minor. This conduct was alleged to have taken place with G.F., the daughter of defendant's girlfriend. G.F. turned thirteen in August of 2009 and at that time was living with her mother, brother, and defendant. On 12 December 2011, defendant was also indicted for the felonious restraint of G.F. The State dismissed the four counts of statutory sex offense and the remaining charges were joined for trial pursuant to N.C. Gen. Stat. § 15A-926.

The State's witnesses included: G.F.; Lauren Rockwell (Rockwell), who was tendered as an expert in the field of psychology; and Cindy Frye (Frye), who was tendered as an expert in licensed clinical social work. Rockwell conducted a child and family evaluation of G.F., where she interviewed G.F., her mother, and her brother. Frye conducted trauma focus cognitive behavioral therapy with G.F. and testified that G.F. had been diagnosed as having post-traumatic stress disorder (PTSD).

After the close of the State's evidence, the trial court dismissed the two counts of indecent liberties with a minor. Defendant did not present any evidence. On 14 June 2012, a jury found defendant guilty of statutory rape and not guilty of felonious restraint. The trial court sentenced defendant as a Level I offender to 215 to 267 months imprisonment.

Defendant appeals.

II. Hearsay

[1] In his first argument, defendant contends that the trial court erred in admitting Rockwell's testimony of statements made to her by G.F. about what G.F.'s brother had said. We disagree.

"Where inadmissibility of testimony is not indicated by the question, but appears only in the witness' response, the proper form of objection is a motion to strike the answer, or the objectionable part of it, made as soon as the inadmissibility is evident." *State v. Goss*, 293 N.C. 147, 155, 235 S.E.2d 844, 850 (1977). When counsel objects after a witness has answered the question and fails to make a motion to strike, the objection is waived. *State v. Curry*, 203 N.C. App. 375, 387, 692 S.E.2d 129, 138 (2010).

In the instant case, the transcript reflects several references to statements made by G.F.'s brother in Rockwell's testimony. In response to the State's question about G.F.'s therapy sessions, the following took place at trial:

> [ROCKWELL]: . . . I said do you have your own room or share a room, and she said I share a room with my brother. I said does he ever hear or see anything, and she said once he saw me, my step-dad was in there touching me and my brother was in the room, *my brother sat up and screamed because he was mad, he was crying*, my step-dad Osman kept say [sic] why are you crying like a crazy little dude, and *he said because you're touching my sister*. My mom heard it and came in and said what's going on and Osman just said he's just being a crazy little dude and then they left. *We told her though that he was touching me* but she didn't say anything. After they left my brother --
>
> [DEFENDANT'S COUNSEL]: Well, I'm going to object to what she claimed the brother said.
>
> THE COURT: Overruled.
>
> [ROCKWELL]: *After they left my brother said why is he touching you?* And I said I just don't -- I just said I don't know. *My brother said you should take care of yourself, but we promised we wouldn't tell anybody about it. . . .*

(emphasis added). Defense counsel made no motion to strike the testimony and therefore did not preserve this issue for appellate review. Additionally, we note that defendant failed to assert plain error in his appellate brief. *See* N.C.R. App. P. 10(a)(4) (stating that in order to preserve an argument pursuant to plain error defendant must "specifically and distinctly contend[]" it amounted to plain error).

This argument is without merit.

III. Expert Testimony

[2] In his second argument, defendant contends that the trial court erred in admitting Frye's expert opinion that G.F. had been diagnosed with PTSD. We disagree.

A. Amendment to Rule 702

The North Carolina General Assembly amended Rule 702 of the North Carolina Rules of Evidence adopting language similar to the corresponding Federal Rule of Evidence. 2011 N.C. Sess. Law ch. 283, § 1.3; *see also State v. King*, 366 N.C. 68, 72 n.2, 733 S.E.2d 535, 538 n.2 (2012). The North Carolina General Assembly enacted Session Law 2011-283 amending Rule 702 on 17 June 2011 and the Governor signed the bill on 24 June 2011. 2011 N.C. Sess. Law ch. 283. This Session Law states that the amendments to Rule 702 became "effective October 1, 2011, and applies to actions commenced on or after that date." 2011 N.C. Sess. Law ch. 283, § 4.2. A separate Session Law enacted the same day, rewrites the effective date provision of Session Law 2011-283 stating:

> SECTION 1.1. If House Bill 542 of the 2011 Regular Session of the General Assembly becomes law, then Section 4.2 of House Bill 542 [Session Law 2011-283] reads as rewritten:
>
> 'SECTION 4.2. Section 4.1.(a) of this act is effective when it becomes law. The remainder of this act becomes effective October 1, 2011, and applies to actions *arising* on or after that date.'

2011 N.C. Sess. Law. ch. 317, § 1.1 (emphasis added). Session Law 2011-317 was signed by the Governor on 27 June 2011. Based upon the amendment to Session Law 2011-283, the amendments to Rule 702 became effective 1 October 2011 and apply to actions arising on or after that date.

Under North Carolina law, there are two kinds of actions, civil and criminal. N.C. Gen. Stat. § 1-4 (2011). A criminal action arises when the defendant is indicted. *See State v. Williams*, 151 N.C. 660, 660, 65 S.E. 908, 909 (1909) (noting that the indictment "marks the beginning of the prosecution and arrests the running of the statute of limitations"); *State v. Underwood*, 244 N.C. 68, 70, 92 S.E.2d 461, 463 (1956) ("[T]he date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations."). The bill of indictment also gives the court jurisdiction to try a criminal defendant and gives the defendant notice as to the nature of the crime charged. *State v. Burroughs*, 147 N.C. App. 693, 695-96, 556 S.E.2d 339, 342 (2001). While a footnote in an

unpublished opinion of this Court suggests the trigger date for applying the amended version of Rule 702(a) is the start of the trial, we hold that a criminal action arises on the date that the bill of indictment was filed.

In the instant case, defendant was indicted for statutory rape, four counts of statutory sex offense, and two counts of indecent liberties with a minor on 17 May 2010, before the 1 October 2011 date that the amendments to Rule 702 were effective. While there was a second bill of indictment filed on 12 December 2011 that was subsequently joined for trial, this criminal proceeding arose on the date of the filing of the first indictment. The amendments to Rule 702 do not apply in this case and we review defendant's assignment of error under the earlier version of Rule 702.

B. Standard of Review

We review the ruling of a trial court concerning the admissibility of expert opinion testimony for abuse of discretion. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). "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).

C. Analysis

Defendant contends that Frye's expert opinion that G.F. suffered from PTSD "was not based on sufficient facts or data, it was not the product of reliable principles and methods, and [Frye] did not reliably apply the criteria in the DSM-IV[1] to the facts of the case." On appeal, this challenge to Frye's opinion is based upon the revised version of Rule 702. N.C. Gen. Stat. § 8C-1, Rule 702 (2011) (requiring that an expert may testify to their opinion if the following apply: "(1) The testimony is based upon sufficient facts or data[;] (2) The testimony is the product of reliable principles and methods[;] (3) The witness has applied the principles and methods reliably to the facts of the case.").

Under the applicable version of Rule 702, when "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

1. The DSM-IV is the Diagnostic Statistical Manual Revision IV. It contains a list of certain symptoms that are indicative of PTSD.

702(a) (2010). There is a "three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (internal citations omitted). The proponent of the expert witness, in this case the State, has " 'the burden of tendering the qualifications of the expert' and demonstrating the propriety of the testimony under this three-step approach." *State v. Ward*, 364 N.C. 133, 140, 694 S.E.2d 738, 742 (2010) (quoting *Crocker v. Roethling*, 363 N.C. 140, 144, 675 S.E.2d 625, 629 (2009)).

"Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Howerton*, 358 N.C. at 459, 597 S.E.2d at 687. We have previously held that an expert's opinion that a prosecuting witness is suffering from PTSD is admissible for corroborative purposes and "to assist the jury in understanding the behavioral patterns of sexual assault victims." *State v. Chavis*, 141 N.C. App. 553, 565, 540 S.E.2d 404, 413-14 (2000).

In the instant case, the record reveals that the State tendered Frye as an expert in licensed clinical social work without objection from defendant. Frye was a licensed clinical social worker and made mental health diagnoses as part of her treatment model. Further, Frye testified that she began working with G.F. in July of 2010 and that G.F. suffered from flashbacks, nightmares, irritability, and difficulty concentrating at school. Defendant objected to the State's question eliciting Frye's opinion of "an initial diagnosis as to any sort of mental health diagnoses." On *voir dire*, Frye testified that she was familiar with the DSM-IV, that she provided counseling to numerous sexual assault victims, and that she routinely made mental health diagnoses using the DSM-IV. Following the *voir dire* hearing, the trial court admitted Frye's opinion that G.F. suffered from PTSD. Such testimony was relevant to corroborate G.F.'s testimony and to help explain her actions and behavior after the assault occurred. *See State v. Hall*, 330 N.C. 808, 822, 412 S.E.2d 883, 891 (1992). Given Frye's education, experience, and testimony concerning the basis of her opinion, we cannot say the trial court abused its discretion in allowing Frye to give an opinion that G.F. suffered from PTSD.

We note that in *Hall*, our Supreme Court held that where an expert testifies the victim is suffering from PTSD, the testimony must be limited to corroboration of the victim and could not be "admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact

occurred." *Id.* "The rule, however, in this State has long been that an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction." *State v. Quarg*, 334 N.C. 92, 101, 431 S.E.2d 1, 5 (1993). In the instant case, defendant did not request a limiting instruction.

This argument is without merit.

NO ERROR.

Judges CALABRIA and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
CARLOS JEROME GORDON, DEFENDANT

No. COA12-1318

Filed 16 July 2013

1. Appeal and Error—inadequate notice of appeal—writ of certiorari

A writ of *certiorari* was issued by the Court of Appeals where defendant's attorney did not give oral notice of appeal at trial and then gave a written notice that did not comply with the Rules of Appellate Procedure.

2. Evidence—prior offense—sufficiently similar—admissible

The trial court did not err in a prosecution for common law robbery and assault on a female when it admitted evidence of a previous purse-snatching crime committed by defendant. The common locations, victims, type of crime, and proximity in time were sufficiently similar that the evidence was properly admitted under N.C.G.S. § 8C-1, Rule 404(b).

On writ of certiorari to review judgment entered 30 April 2012 by Judge Christopher W. Bragg in Iredell County Superior Court. Heard in the Court of Appeals 4 June 2013.

Roy Cooper, Attorney General, by Sharon Patrick-Wilson, Special Deputy Attorney General, for the State.

Winifred H. Dillon, for defendant–appellant.

MARTIN, Chief Judge.

Defendant Carlos Jerome Gordon appeals his conviction of common law robbery and assault on a female. We find no error.

The evidence at trial tended to show that on or about 18 July 2009 in mid-afternoon, Patricia Jackson was in the Mooresville Wal-Mart parking lot, loading groceries into her vehicle. Ms. Jackson—who was sixty-five years old at the time of trial—had parked her car "in one of the furtherest [sic] rows out" in an effort to "get her exercise." Ms. Jackson was carrying her purse with its strap across her chest and over her opposite shoulder. Ms. Jackson noticed "a tall, thin, nicely dressed young black man with short hair" approaching her "[r]apidly" and in an "aggressive way." The man "grabbed [her] purse and yanked," but the strap did not immediately break. Ms. Jackson pushed her attacker, prompting him to strike her in the face, knocking her glasses off. The attacker "pulled the purse again" causing the strap to break and "then took the purse and ran and jumped in his car and drove away." Several eyewitnesses testified consistently with Ms. Jackson's account of the assault and purse-snatching.

Detective John Vanderbilt of the Mooresville Police Department investigated the incident. After compiling information from various witness statements, Detective Vanderbilt entered the information into a computerized system which allows law enforcement agencies to share information that may be of "investigative significance." Detective Vanderbilt entered information concerning the suspect's description, his vehicle's description and his "M.O."[1] The "M.O." Detective Vanderbilt entered for this incident was: "Wal-Mart parking lot, daylight, lone female loading groceries into the car, purse stolen, and an assault took place." The Statesville Police Department responded to the information entered by Detective Vanderbilt with information about an incident that occurred six weeks earlier where a suspect was apprehended. Based on the similarities in the two events, Detective Vanderbilt included a photo of the suspect from the Statesville incident in a photo lineup. One of the eyewitnesses to the 18 July 2009 Mooresville incident made a positive identification of the Statesville suspect as the perpetrator of the Mooresville crime. The photo was of defendant.

At trial, the State presented evidence from Jesse Harding, pursuant to N.C.G.S. § 8C-1, Rule 404(b). Harding testified that on or about 3 June

1. Typically "M.O." stands for *modus operandi*, a "method of operating or a manner of procedure; esp. a pattern of criminal behavior so distinctive that investigators attribute it to the work of the same person." *Black's Law Dictionary* 1026 (8th ed. 2004).

2009, he was in his car in the parking lot between the Cracker Barrel and Golden China in Statesville, North Carolina. The parking lot is situated near the Wal-Mart in Statesville, sharing "the same parking area." Harding was on his cell phone when he heard a woman screaming and noticed a person he identified as defendant running by his car carrying a purse. Harding gave chase in his car and eventually "jumped out and got [defendant]." Harding physically restrained defendant until the police arrived.

A jury found defendant guilty on both charges. The trial court arrested judgment on the assault charge because the offenses occurred at the same time and share common elements. Defendant was sentenced to not less than sixteen and not more than twenty months imprisonment. Defendant appeals.

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[1] Defendant seeks review by petition for writ of certiorari. Defendant's petition was occasioned by defendant's trial counsel failing to give oral notice of appeal at trial and then providing written notice of appeal that does not comply with the requirements of North Carolina Rule of Appellate Procedure 4. "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 . . . ." N.C.R. App. P. 21(a)(1). "Appropriate circumstances" may include when a defendant's right to appeal has been lost because of a failure of his or her trial counsel to give proper notice of appeal. *See State v. Hammonds*, __ N.C. App. __, __, 720 S.E.2d 820, 823 (2012) (granting certiorari when it was "readily apparent" that defendant lost his right to appeal "through no fault of his own, but rather as a result of sloppy drafting of counsel" and because not issuing a writ of certiorari would have been "manifestly unjust"). As the circumstances in this case are similar to those in *Hammonds*, we exercise our discretion and allow defendant's petition for writ of certiorari pursuant to North Carolina Rule of Appellate Procedure 21(a)(1).

[2] Defendant's sole argument on appeal is that the trial court erred when it admitted evidence under N.C.G.S. § 8C-1, Rule 404(b) of the previous purse-snatching crime committed by defendant. Specifically, defendant contends the evidence was erroneously admitted because "[t]he proffered other crimes evidence in this case does not have the 'substantial evidence of similarity' required in order for [the] testimony to be admissible under Rule 404(b)."

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C.

127, 130, 726 S.E.2d 156, 159 (2012). N.C.R. Evid. 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011). However, the evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* The enumerated list of permissible purposes in the rule is not exclusive, *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988), and, in fact, "other crimes, wrongs, or acts" evidence need only be "relevant to any fact or issue other than the character of the accused" to be admissible. *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986). Even if relevant, 404(b) evidence is also "constrained by the requirements of similarity and temporal proximity." *State v. Al–Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002), *appeal after new trial*, 359 N.C. 741, 616 S.E.2d 500 (2005). "A prior act or crime is sufficiently similar to warrant admissibility 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 crimes." *State v. Sokolowski*, 351 N.C. 137, 150, 522 S.E.2d 65, 73 (1999) (internal quotation marks omitted). The similarities need not "rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

In this case, the trial court announced findings from the bench concerning the similarities between the two crimes:

> [E]ach of these incidents occurred in or in the vicinity of a Wal-Mart parking lot; that each of the victims in this matter were female and alone; that each of the incidents involved a common law robbery, the purse snatching, a grab and dash type of crime; that these incidents occurred within six weeks of one another, one in Statesville, one in Mooresville, which are approximately 20 miles apart; and in each incident, the alleged perpetrator of the crime in each incident was a black male.

The trial court then concluded:

> The court in this matter is going to find that the crimes and the elements, facts and circumstances surrounding the crimes are significantly similar enough to one another that the state's purpose or intent to use the

404-B evidence is to identify the defendant and showed a common scheme or plan in this matter.

Defendant contends that the similarities in the two incidents are "nothing more than the characteristics inherent in most purse-snatching type robberies, and the court ignored substantial differences between the two crimes." Defendant cites escaping on foot versus by car and the fact that the perpetrator wore a "do-rag" in the first incident versus being bareheaded in the second. We disagree.

In this case, the common locations, victims, type of crime, and proximity in time are sufficiently similar that the 404(b) evidence was properly admitted. We believe the facts present in both crimes amount to "particularly similar acts which would indicate that the same person committed both crimes." *See Sokolowski*, 351 N.C. at 150, 522 S.E.2d at 73. Defendant's contention that the perpetrator's lack of a "do-rag" during the second crime prevents the crimes from being substantially similar amounts to requiring the facts "rise to the level of the unique and bizarre," which our case law does not require. *See Green*, 321 N.C. at 604, 365 S.E.2d at 593. Therefore, defendant's argument is without merit.

No error.

Judges ELMORE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
MICHAEL IVER PETERSON

No. COA12-1047

Filed 16 July 2013

1. Appeal and Error—appealability—motion for appropriate relief—appeal by State

The appealability of criminal judgments by the State, including trial court orders granting motions for appropriate relief, is governed by N.C.G.S. § 15A-1445 (2011), and the State in this case had the right to appeal a motion for appropriate relief that was based, in part, on newly discovered evidence. A petition for certiorari was not necessary to confer jurisdiction.

2. Criminal Law—newly discovered evidence—new trial—standard of review

The standard of review in a criminal case for a decision to grant a new trial based on newly discovered evidence is abuse of discretion.

3. Criminal Law—motion for appropriate relief—newly discovered evidence—expert witness—misrepresentations of qualifications

In a first-degree murder trial, misrepresentations by a State's witness of his qualifications as an expert in bloodstain pattern analysis met all seven requirements needed to prevail on a motion for appropriate relief based on newly discovered evidence. The agent's testimony was crucial and necessary to the jury's verdict and the order granting defendant a new trial was manifestly supported by reason.

4. Criminal Law—motion for appropriate relief—introduction of new evidence

The trial court did not err at a hearing on a motion for appropriate relief based on newly discovered evidence by prohibiting the State from calling expert witnesses who did not testify at defendant's original trial. The State may not try to minimize the impact of newly discovered evidence by introducing evidence not available to the jury at trial.

Appeal by the State from order entered 9 May 2012 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 24 April 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery and Assistant Attorney General Derrick C. Mertz, for the State.

Womble Carlyle Sandridge & Rice, LLP, by James P. Cooney III, for defendant.

HUNTER, Robert C., Judge.

The State appeals from the order granting defendant's motion for appropriate relief, vacating defendant's conviction, and granting him a new trial. On appeal, the State argues that the trial court erred by granting defendant a new trial because the evidence was cumulative,

constituted nothing more than impeachment evidence, and had no probable impact on the jury's verdict. In the alternative, the State also contends that the trial court erred by not allowing the State to ask questions or present evidence related to materiality at the motion for appropriate relief hearing. After careful review, we conclude that the evidence concerning Agent Deaver's qualifications constitutes newly discovered evidence entitling defendant to a new trial. Thus, we affirm the trial court's order.

Background

Defendant Michael Peterson was convicted of the first degree murder of his wife Kathleen Peterson in 2003. Defendant appealed his conviction, and this Court, in *State v. Peterson*, 179 N.C. App. 437, 470, 634 S.E.2d 594, 618 (2006), a divided panel found no prejudicial error had occurred at defendant's trial. Our Supreme Court affirmed this Court's decision in *State v. Peterson*, 361 N.C. 587, 609, 652 S.E.2d 216, 231 (2007). While the vast majority of the underlying facts of defendant's case need not be discussed in order to address the issues raised in this appeal, what is undeniable is that expert witness testimony played a determinative role in the outcome of defendant's original trial. This type of testimony was particularly important due to the conflicting theories of the case presented at trial. The State contended that defendant intentionally killed Ms. Peterson by striking her repeatedly with a fireplace blowpoke, causing her to fall down a winding staircase. In contrast, defendant alleged that Ms. Peterson died as a result of an accidental fall.

One of the State's most important expert witnesses was then SBI Agent Duane Deaver ("Agent Deaver"), who testified as a expert in bloodstain pattern analysis. In particular, Agent Deaver testified that Ms. Peterson was struck a minimum of four times with a blowpoke prior to falling down the stairs. Furthermore, Agent Deaver stated that, based on his bloodstain analysis, defendant attempted to clean up the scene, including his pants, prior to police arriving and that defendant was in close proximity to Ms. Peterson when she sustained her injuries.

After deliberating for nearly four days, the jury returned a verdict finding defendant guilty of first degree murder. The decision to find defendant guilty of homicide indicates that the jury relied heavily on the reliability and credibility of the State's witnesses and the conclusions they reached, particularly those of Agent Deaver. Defendant was sentenced to life in prison.

On 14 February 2011, defendant filed a motion for appropriate relief ("MAR"), which is the subject of this appeal.[1] The matter came on for hearing before the Honorable Orlando F. Hudson, Jr., the judge who presided over defendant's criminal trial, on 6 December 2011 (the "MAR hearing"). The hearing lasted until 15 December 2011. At the end of the hearing, Judge Hudson announced in open court that defendant was entitled to a new trial. Judge Hudson indicated that the grounds for his decision were the following: (1) defendant proved that Agent Deaver misled the court; (2) defendant proved that Agent Deaver misled the jury; (3) Agent Deaver's false and misleading testimony was material; and (4) defendant was entitled to relief based upon "*newly-discovered evidence*, due process violations and for perjured testimony." In his written order filed 9 May 2012 ("MAR order"), the trial court concluded that, pursuant to N.C. Gen. Stat. § 15A-1415(b)(3), defendant was entitled to a new trial based on three types of evidence: (1) evidence concerning Agent Deaver's misrepresentations about his education, knowledge, training, and experience; (2) evidence of Agent Deaver's bias in favor of the prosecution; and (3) misrepresentations Agent Deaver made with regard to the scientific basis for and acceptability of his opinions, methods, and experiments. The State appealed.

Grounds for the Order Granting Defendant's MAR

Initially, we must determine upon what grounds the trial court granted defendant's MAR since Judge Hudson's oral and written orders seem to indicate that they are based on different grounds. As noted, in open court, Judge Hudson stated that he was granting the MAR based on constitutional violations as well as newly discovered evidence. While a great deal of his written MAR order focuses on *Brady* violations, it also relies on evidence obtained after defendant's trial—specifically, information obtained in 2007 and 2010, well after defendant's trial, which could not serve as the basis for a *Brady* violation. Thus, it appears as though both grounds, *Brady* violations and newly discovered evidence, served as the basis for the trial court's decision to grant defendant a new trial.

Grounds for Appeal

[1] The appealability of criminal judgments by the State, including trial court orders granting motions for appropriate relief, is governed by N.C.

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1. Prior to defendant's 2011 MAR, defendant had also filed two earlier MARs—one in 2008 and one in 2009. Both of these earlier MARs were denied by Judge Hudson. We note that they did not address the specific issues related to Agent Deaver raised by the MAR which is the subject of this appeal.

Gen. Stat. § 15A-1445 (2011). Pursuant to N.C. Gen. Stat. § 15A-1445, the State may appeal an order granting a motion for a new trial "on the ground of newly discovered or newly available evidence but only on questions of law." Accordingly, because the trial court granted defendant's MAR based, in part, on newly discovered evidence, the State had the right to appeal the MAR order. We note that the State, in case we found that the MAR order was based solely on *Brady* violations, filed a petition for writ of *certiorari*. Since *certiorari* is not necessary to confer jurisdiction on this Court, we dismiss the State's petition.

Standard of Review

[2] Our review of a trial court's ruling on a defendant's MAR is "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982); *see also State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005). "The decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court's discretion and is not subject to review absent a showing of an abuse of discretion." *State v. Stukes*, 153 N.C. App. 770, 773, 571 S.E.2d 241, 244 (2002) (quoting *State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993)). "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).

Arguments

I. Granting the MAR

[3] The State contends that defendant was not entitled to a new trial because defendant failed to establish all of the prerequisites needed to prevail on a motion for appropriate relief based on newly discovered evidence. We disagree.

A motion for appropriate relief must be based on the grounds listed in N.C. Gen. Stat. 15A-1415 (2011). This statute provides, in pertinent part, that:

> [A] defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material

> bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence. A motion based upon such newly discovered evidence must be filed within a reasonable time of its discovery.

N.C. Gen. Stat. § 15A-1415(c). To prevail on a motion for appropriate relief based on newly discovered evidence, a defendant must establish the following:

> (1) that the witness or witnesses will give newly discovered evidence, (2) that such newly discovered evidence is probably true, (3) that it is competent, material and relevant, (4) that due diligence was used and proper means were employed to procure the testimony at the trial, (5) that the newly discovered evidence is not merely cumulative, (6) that it does not tend only to contradict a former witness or to impeach or discredit him, (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

State v. Hall, 194 N.C. App. 42, 48-49, 669 S.E.2d 30, 35 (2008).

With regard to the first type of evidence the trial court cited as entitling defendant to a new trial, Agent Deaver's misrepresentations concerning his qualifications, we conclude that this newly discovered evidence meets all seven requirements.

At trial, Agent Deaver testified that he was hired by the SBI in 1985. He received training and supervision from senior SBI Agent Spittle. At the time of defendant's trial, Agent Deaver claimed that he had written approximately 200 reports involving bloodstain analysis in cases he investigated. Overall, Agent Deaver alleged he participated in 500 cases involving bloodstain analysis. Furthermore, he stated that he had personally investigated crime scenes involving alleged falls 15 times. Based on this proffered experience and training, despite numerous objections made by defendant and motions to exclude his testimony, the trial court allowed Agent Deaver to testify as an expert witness in bloodstain pattern analysis.

At the MAR hearing, defendant presented a substantial amount of evidence establishing that Agent Deaver misrepresented his qualifications. Based on this evidence, the trial court found that: (1) Agent Deaver had not been mentored by Agent Spittle, contrary to Agent Deaver's testimony at trial; (2) Agent Deaver had only participated in 54 cases involving bloodstain analysis, not over 500; (3) Agent Deaver

only wrote 36 reports in cases involving bloodstain analysis, not 200; (4) before defendant's case in 2001, Agent Deaver had not conducted any bloodstain analysis at a potential crime scene since 1997; (5) Agent Deaver had not been qualified as an expert witness in bloodstain analysis 60 times; (6) Agent Deaver had never been to a potential crime scene involving an alleged accidental fall prior to the crime scene at defendant's house; and (7) although Agent Deaver testified that he "typically" performed bloodstain experiments, he had only done so in 3 cases other than defendant's. On appeal, the State does not contend that these findings are not supported by evidence. In fact, the State notes that these findings "arguably are supported by competent evidence." Moreover, the State did not present any evidence discrediting defendant's evidence at the hearing. Accordingly, we conclude that the trial court's findings are supported by evidence and are binding on appeal.

With regard to the first two requirements, that a witness or witnesses will provide newly discovered evidence and that the evidence is probably true, we find both are met. Numerous witnesses testified at the MAR hearing regarding Agent Deaver's misrepresentations about his qualifications and the manner in which this evidence was discovered after defendant's conviction, and this evidence was not contested by the State, either at the MAR hearing or on appeal.

Next, the evidence concerning Agent Deaver's qualifications was competent, material, and relevant. As stated, there was a substantial amount of evidence presented at the hearing supporting defendant's claim that Agent Deaver misrepresented his qualifications. Moreover, we conclude that this evidence is relevant and material in that it is logically related to issues at defendant's trial—specifically, Agent Deaver's testimony and, relatedly, his credibility. Thus, the evidence presented at the MAR hearing, which undermined that credibility, had a direct bearing to issues at trial.

Additionally, the record clearly establishes that defendant attempted to procure this testimony at trial. Over 600 pages of the trial transcript are devoted to Agent Deaver's *voir dire* at trial. Specifically, defendant attempted to impeach Agent Deaver's qualifications by asking about his supervision by SBI Agent Spittle, his coursework in bloodstain analysis, his accreditations by professional associations, and whether he had undergone any proficiency testing in serology. In fact, defendant attempted to test Agent Deaver's own knowledge of bloodstains on the stand by showing him pictures of different bloodstain patterns. During *voir dire*, defendant specifically argued to Judge Hudson that he did not believe that Agent Deaver was qualified to give opinions concerning

blood spatter. As noted, despite this *voir dire* and numerous objections to Agent Deaver's testimony at trial, the trial court still allowed Agent Deaver to testify as an expert witness.

Next, we find that the evidence concerning Agent Deaver's qualifications is not cumulative because defendant was unable to demonstrate this evidence at trial. The State seems to contend that because defendant attempted to impeach Agent Deaver at trial, any later new evidence concerning his misrepresentations would be cumulative. However, it is illogical to argue that this evidence is cumulative when defendant was unsuccessful in eliciting it at trial because of the witness's own false testimony.

Finally, with regard to the sixth and seventh elements, the State contends that "the evidence [relied upon by the trial court in granting defendant's MAR] tends only to impeach or discredit a former witness." Moreover, the State argues that this evidence did not affect "the ultimate opinion of homicide" and that the evidence of defendant's guilt was so overwhelming that this evidence would not have had a probable impact on the jury's verdict. We disagree.

While, generally, impeachment evidence, by itself, may be insufficient to warrant granting a defendant a new trial based on newly discovered evidence, this evidence constitutes much more than impeachment evidence. Due to the importance of Agent Deaver's testimony, the evidence concerning his qualifications would have completely undermined the credibility of the State's entire theory of the case. While the State offered other expert testimony concerning Ms. Peterson's death, the testimony of Agent Deaver was central to the State's case. He was the only witness to describe to the jury how he believed defendant killed his wife. Moreover, Agent Deaver was the only witness to testify that the bloodstains indicated that defendant had tried to not only clean up the scene but was also close to Ms. Peterson at the time she sustained injuries. Thus, because his testimony was crucial and necessary to the jury's verdict of murder, evidence of his misrepresentations goes well beyond simply impeaching a single witness.

We also conclude that it is probable that this evidence concerning Agent Deaver's qualifications would cause a jury to reach a different result at another trial. As discussed, while we recognize that Agent Deaver was not the only witness to testify for the State, we find that the importance of his testimony was such that, had it been undermined, the jury would probably not have unanimously agreed on a guilty verdict based on this evidence.

Based on the foregoing reasons, we find that the evidence concerning Agent Deaver's qualifications met all the requirements stated in *Hall*, 194 N.C. App. at 48-49, 669 S.E.2d at 35, to support the award of a new trial. Consequently, we hold that the trial court's order granting defendant a new trial based on this newly discovered evidence was manifestly supported by reason, and we affirm the trial court's order with regard to this issue. Accordingly, as we have found that the newly discovered evidence of Agent Deaver's qualifications entitles defendant to a new trial, it is not necessary for us to address the other two bases upon which the trial court granted relief—specifically, Agent Deaver's bias and his experiments and opinions—or reach the issue of whether any *Brady* violations occurred at trial.

II. Remand for a New MAR Hearing

[4] Next, the State argues that if the Court does not reverse the MAR order, it should, in the alternative, remand this case for a new hearing. Specifically, the State contends that the trial court's failure to allow the State to ask specific questions of defendant's experts and the trial court's granting of defendant's motion in limine regarding specific experts the State intended to call constituted error. We disagree.

"Motions for appropriate relief generally allow defendants to raise arguments that could not have been raised in an original appeal, such as claims based on newly discovered evidence and claims based on rights arising by reason of later constitutional decisions announcing new principles or changes in the law." *State v. Riley*, 137 N.C. App. 403, 407, 528 S.E.2d 590, 593 (2000) (quoting *State v. Price*, 331 N.C. 620, 630, 418 S.E.2d 169, 174 (1992), *judgment vacated on other grounds*, 506 U.S. 1043, 122 L. Ed. 2d 113 (1993)). At the MAR hearing, the State attempted to call expert witnesses, who did not testify at defendant's original trial, to present testimony that Ms. Peterson was murdered. In other words, the State was trying to collaterally establish that the jury would have reached the same verdict based on evidence not introduced at trial. The trial court properly excluded this evidence because it was beyond the scope of the MAR hearing. Defendant's newly discovered evidence concerned Agent Deaver, arguably, the State's most important expert witness. Thus, the State could have offered its own evidence regarding Agent Deaver's qualifications, lack of bias, or the validity of his experiments and conclusions. Furthermore, the State was properly allowed to argue that the evidence at trial was so overwhelming that the newly discovered evidence would have no probable impact on the jury's verdict. However, the State may not try to minimize the impact of this newly discovered evidence by introducing evidence not available to the

jury at the time of trial. Thus, the trial court did not err in prohibiting the introduction of this evidence at the MAR hearing.

Conclusion

With regard to Agent Deaver's misrepresentations about his qualifications, this newly discovered evidence met all requirements to warrant granting defendant's MAR and ordering a new trial, so we affirm the trial court's order on this issue. Based on this conclusion, it is not necessary for us to address the other two bases upon which the trial court granted the MAR or determine whether any *Brady* violations occurred at trial. Finally, we conclude that the trial court did not err in excluding evidence at the MAR hearing that the State attempted to introduce concerning Ms. Peterson's cause of death.

AFFIRMED.

Judges STROUD and ERVIN concur.

STATE OF NORTH CAROLINA
v.
LEO ROMERO

No. COA12-1499

Filed 16 July 2013

Appeal and Error—preservation of issues—confinement in response to violation—no statutory right of appeal—failure to raise issue at revocation hearing

Defendant's appeal in a drugs case from the trial court's orders modifying the terms of his probation and imposing confinement in response to violation (CRV) for a period of 90 days was dismissed. Defendant did not have a statutory right to appeal from the trial court's imposition of CRV. Further, defendant waived the issue of the validity of the community service requirement since he failed to contest it at any point during the revocation hearing.

Appeal by Defendant from orders entered 13 August 2012 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 10 April 2013.

Attorney General Roy Cooper, *by Assistant Attorney General Micheal E. Butler*, *for the State.*

Appellate Defender Staples Hughes, *by Assistant Appellate Defenders John F. Carella and Benjamin Dowling-Sendor*, *for Defendant.*

DILLON, Judge.

Leo Romero (Defendant) appeals from the trial court's orders modifying the terms of his probation and imposing Confinement in Response to Violation (CRV) for a period of 90 days pursuant to N.C. Gen. Stat. § 15A-1344(d2) (2011). We hold that Defendant has no right to appeal from these orders, and, accordingly, we dismiss Defendant's appeal for lack of jurisdiction.

I. Factual & Procedural Background

On 23 September 2011, Defendant pled guilty pursuant to a plea agreement to two counts of trafficking in opiates and one count of maintaining a place to keep controlled substances. The court sentenced Defendant to 18 to 22 months imprisonment for the opiate trafficking convictions and to an additional 6 to 8 months imprisonment for the remaining conviction. Both sentences were suspended, however, and Defendant was placed on supervised probation for a period of 24 months, including 6 months of intensive supervision. As part of the intensive supervision, Defendant was required by the Division of Community Corrections to perform 50 hours of community service.

On 14 June 2012, Defendant's probation officer filed reports alleging that Defendant had violated the terms of his probation. Following a hearing on 6 August 2012, the trial court determined that Defendant had "willfully and without valid excuse" violated two conditions of his probation; namely, that (1) Defendant had failed to comply with his community service requirement and that (2) Defendant had failed to report to meetings with his probation officer. As a consequence of these violations, the trial court entered orders requiring that Defendant be incarcerated for a period of 90 days. From these orders, Defendant appeals.

II. Analysis

The State has filed a motion to dismiss this appeal, contending that Defendant has no statutory right to appeal from an order modifying the terms of probation and imposing CRV. Defendant counters that the trial

court's orders are final judgments and are thus appealable under N.C. Gen. Stat. § 7A-27(b) (2011), a provision which permits an appeal "of right" to this Court "[f]rom any final judgment of a superior court."

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002). N.C. Gen. Stat. § 15A-1347 (2011) grants a defendant the right to appeal from a determination that he has violated the terms of his probation where either (1) his sentence is activated or (2) special probation is imposed:

> When a superior court judge, as a result of a finding of a violation of probation, *activates a sentence* or *imposes special probation*, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27.

Id. (emphasis added). Construing this provision, this Court has held that a defendant does not have the right to appeal from an order that merely modifies the terms of probation where the "[d]efendant's sentence was neither activated nor was it modified to 'special probation.' " *State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 353 (2004). The issue presented is whether the trial court's imposition of CRV pursuant to section 15A-1344(d2) constituted an activation of Defendant's sentence, thereby triggering a right to appeal under section 15A-1347.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). "[W]here a statute is ambiguous or unclear as to its meaning, we must interpret the statute to give effect to the legislative intent." *N.C. Dept. of Rev. v. Hudson*, 196 N.C. App. 765, 767, 675 S.E.2d 709, 711 (2009).

Section 15A-1344(d2) was enacted in 2011 as part of the Justice Reinvestment Act. Under this Act, for probation violations other than those in which a defendant commits a criminal offense or "abscond[s], by willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer[,]" the trial court may not revoke probation, but instead may impose CRV for a period of 90 days for a felony offender or "up to 90 days" for a misdemeanor offender. *Id.*; N.C. Gen. Stat. § 15A-1343(b)(1),(3a) (2011). If a defendant has already received two CRV's, then the trial court may revoke probation. N.C. Gen. Stat. § 15A-1344(d2). Notably, however, the Act does not explicitly provide for a right to appeal from an order imposing CRV. We

must, therefore, determine whether our General Assembly intended for the imposition of CRV to be appealable under section 15A-1347.

Section 15A-1347 is entitled "Appeal from revocation of probation or imposition of special probation upon violation." This plain language indicates that the General Assembly did not intend to provide for a right to appeal under section 15A-1347 upon the imposition of confinement unless the confinement was an activation of the defendant's sentence resulting from a "revocation of probation" or the confinement was part of the imposition of special probation. The mandate set forth in section 15A-1344(d2) that a trial court is not empowered to revoke probation – with limited exceptions not applicable here – until after a defendant has received two CRV's plainly indicates that CRV in and of itself is not to be considered a revocation of probation.[1]

Further, we do not believe that the General Assembly intended that an imposition of CRV be considered the imposition of special probation. The language which provides for the imposition of CRV is set forth in a separate subsection from the language which provides for the imposition of special probation. Specifically, the language providing for the imposition of CRV is found in subsection (d2) of N.C. Gen. Stat. § 15A-1344 with the heading "Confinement in Response for Violation," whereas the language providing for the imposition of special probation is found in subsection (e) with the heading "Special Probation in Response to Violation." Accordingly, we hold that Defendant does not have a statutory right to appeal from the trial court's imposition of CRV, and the instant appeal must be dismissed.

Additionally, we note that Defendant puts forth an argument, which, in substance, contends that the community service condition of his probation was never properly imposed and, therefore, could not have served as a basis for the court's finding that he had violated his probation. Our review of the record, however, reveals that Defendant did not contest the validity of the community service requirement at any point during the revocation hearing. Defendant has, therefore, waived

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1. We note that N.C. Gen. Stat. § 15A-1344(d2) provides, in part, that "[i]f the time remaining on the defendant's maximum imposed sentence is less than 90 days, then the term of confinement is for the remaining period of the sentence." Citing this language, Defendant points out that if he had had less than 90 days remaining on his sentence at the time of his confinement, then the CRV would have constituted a *de facto* revocation of his probation, thereby "activating" his sentence and triggering a right to appeal under N.C. Gen. Stat. § 15A-1347. We decline to express any opinion on the issue of whether CRV under such a circumstance would constitute a *de facto* revocation, as the time remaining on Defendant's maximum imposed sentence far exceeds 90 days.

this challenge. *State v. Cooper*, 304 N.C. 180, 183, 282 S.E.2d 436, 439 (1981) (holding that a defendant seeking to challenge the validity of a probation condition must do so "no later than the hearing at which his probation is revoked"); *State v. Tozzi*, 84 N.C. App. 517, 520, 353 S.E.2d 250,252 (1987) (recognizing that "defendants may not raise an initial objection to a condition of probation . . . on appeal").

Accordingly, this Court lacks jurisdiction over Defendant's appeal.

DISMISSED.

Judges CALABRIA and ERVIN concur.

STATE OF NORTH CAROLINA
v.
WESLEY DELAND STEVENS

No. COA12-1394

Filed 16 July 2013

1. Indictment and Information—contributing to the delinquency and neglect of a minor—not fatally defective

An indictment for contributing to the delinquency and neglect of a minor was not fatally defective where neither certain factual statements in the body of the indictment nor the caption of the indictment rendered the indictment fatally defective. Furthermore, the offense charged did not require a parental or caretaker relationship between a defendant and a juvenile.

2. Child Abuse, Dependency, and Neglect—contributing to the delinquency and neglect of a minor—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charge of contributing to the delinquency and neglect of a minor. There was sufficient evidence of each element of the charge.

3. Indictment and Information—contributing to the delinquency and neglect of a minor—instruction on intent—theory not supported by indictment

The trial court erred in a contributing to the delinquency and neglect of a minor case by permitting the jury to convict defendant on a theory which was not supported by the indictment. The trial

court's reinstruction on the legal definition of intent permitted the jury to convict defendant on a criminal negligence theory of assault, a theory not alleged in the indictment.

4. Child Abuse, Dependency, and Neglect—contributing to the delinquency and neglect of a minor—expert testimony

The trial court did not commit plain error in a contributing to the delinquency and neglect of a minor case by failing to *sua sponte* instruct the jury that an expert witness's testimony could be considered only for corroborative purposes. The rule in *State v. Hall*, 330 N.C. 808, that evidence of post-traumatic stress syndrome may not be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred is inapplicable to a charge defined in N.C.G.S. § 14-316.1.

Appeal by Defendant from judgments entered 1 March 2012 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 7 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

Gerding Blass, PLLC, by Danielle Blass, for Defendant.

McGEE, Judge.

Wesley Deland Stevens (Defendant) was convicted of assault on a child under twelve years of age and contributing to the delinquency and neglect of a minor. Defendant appeals.

I. Indictment for Contributing to the Delinquency and Neglect of a Minor

[1] Defendant argues the indictment for contributing to the delinquency and neglect of a minor was fatally defective. We disagree.

"On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). A criminal pleading must contain 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).

Defendant was charged with contributing to the delinquency and neglect of a minor, defined as follows:

> Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7B-101 and G.S. 7B-1501 shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-316.1 (2011).

The indictment read:

> [O]n or about the 16th day of June 2011, in the county named above, [Defendant] named above knowingly and willfully caused or encouraged or aided D.F. (dob 12/02/2002), a juvenile within the jurisdiction of the Court, to be in a place or condition whereby D.F. could be adjudicated[] [dependent], neglected[,] or undisciplined as defined in N.C.G.S. Chapter 7B. This act was done in violation of N.C. Gen. Stat. § 14-316.1.

Defendant contends the indictment "contains no factual statements, other than the date of birth of the juvenile, to apprise [Defendant] of the conduct which was the subject of the accusation." 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." *State v. Barnett*, ___ N.C. App. ___, ___, 733 S.E.2d 95, 98 (2012). The indictment lists the date upon which Defendant is alleged to have caused, encouraged, or aided the juvenile such that the juvenile could be adjudicated neglected, gives the juvenile's initials and date of birth, and tracks the statutory language of the offense. These factual statements do not render the indictment fatally defective.

Defendant also contends "the caption states the alleged crime as 'contributing to the delinquency of a minor[,'] when in fact the State proceeded on contributing to the neglect of a juvenile[.]" The caption is not part of an indictment and "can neither enlarge nor diminish the offense charged in the body of the indictment." *State v. Billinger*, ___ N.C. App. ___, ___, 714 S.E.2d 201, 207 (2011). The caption referring to delinquency cannot diminish the offense charged in the body of an indictment referring to neglect. The caption of the indictment in the present case does not render the indictment fatally defective.

Defendant further contends the indictment should have alleged "a factual statement that [Defendant] had a parental or caretaker relationship or that he failed to obtain necessary medical treatment for [the juvenile] for an eye injury." Defendant cites no authority supporting his contention that the indictment "needed to have alleged more[.]" N.C.G.S. § 14-316.1 does not require a parental or caretaker relationship between a defendant and a juvenile.

"Any person" who causes a juvenile to be in a place or condition where the juvenile could be adjudicated neglected is guilty of a Class 1 misdemeanor. N.C.G.S. § 14-316.1. A neglected juvenile is a "juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care[.]" N.C. Gen. Stat. § 7B-101(15) (2011). Defendant need only be a person who causes a juvenile to be in a place or condition where the juvenile does not receive proper care from a caretaker or is not provided necessary medical care. The indictment in the present case is not fatally defective.

II. Sufficiency of the Evidence of Contributing to the Delinquency and Neglect of a Minor

[2] Defendant argues the trial court erred in denying Defendant's motion to dismiss for insufficient evidence of contributing to the delinquency and neglect of a minor. We disagree.

We review the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The "trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* The "trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *Id.* "All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Id.* (internal citations and quotation marks omitted).

> Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as

> defined by G.S. 7B-101 and G.S. 7B-1501 shall be guilty of a Class 1 misdemeanor.

N.C.G.S. § 14-316.1. We note that this offense requires two different standards of proof. First, the State must show, beyond a reasonable doubt, that Defendant knowingly or willfully caused, encouraged, or aided the juvenile to be in a place or condition whereby the juvenile could be adjudicated neglected. Second, adjudication of neglect requires the State to show, by clear and convincing evidence, that a juvenile is neglected. *See* N.C. Gen. Stat. § 7B-805 (2011).

Defendant argues that the State presented no evidence that Defendant was a "parent, guardian, custodian, or caretaker[.]" As previously discussed, Defendant need not be a parent or caretaker in order to violate N.C.G.S. § 14-316.1. Defendant need only be a person who causes a juvenile to be in a place or condition where the juvenile does not receive proper care from a caretaker or is not provided necessary medical care.

Defendant further contends the State presented insufficient evidence the juvenile was neglected, citing *In re Huber*, 57 N.C. App. 453, 291 S.E.2d 916 (1982), to argue that the juvenile's eye injury did not fall below a normative standard of care. Trial testimony shows the following. The juvenile was eight years old at the time of the offense. While the juvenile was riding his bicycle in his neighborhood, Defendant was riding a bicycle as well. Defendant "got in front of [the juvenile]," and then roped the juvenile's handlebars to Defendant's bicycle seat. Defendant did not answer the juvenile's question about the use of the rope.

The juvenile found it difficult to ride with the bicycles tied together because Defendant was "going a little bit too fast for [the juvenile's] legs to go." The juvenile tried to stop Defendant by pulling on the bicycle brakes, but gave up after his hands started to hurt. Eventually, the juvenile was injured.

> [Juvenile]. [Defendant] got up and took off his belt because he was talking to someone else who got beat up and [Defendant] swang his belt and it hit a window and then it hit my eye. . . .
>
> [State]. And when the belt hit the window, what happened?
>
> A. The metal piece came off and hit my eye. . . .
>
> Q. What about when your eye got hit, what did [Defendant] say?

A. Nothing.

Q. Did you tell him that you had gotten hit in the eye?

A. Yes.

Q. And he didn't say anything?

A No.

Defendant and the juvenile bicycled to a store. On the way, Defendant began drinking from a "grey can with white words." Defendant and the juvenile stopped "near some bushes that were in the middle of the parking lot." The juvenile asked to go home, but Defendant "didn't say anything." While Defendant continued to drink, the juvenile fell asleep. When he woke up, Defendant was gone.

Considering the evidence in the light most favorable to the State, this constitutes sufficient evidence that Defendant put the juvenile in a place or condition whereby the juvenile could be adjudicated neglected. This Court has held that a mother's "delay in seeking necessary medical care" for a child supported the conclusion of law that the child was neglected. *In re C.P., L.P. & N.P.*, 181 N.C. App. 698, 704, 641 S.E.2d 13, 17 (2007). The "determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent; the fact that the parent loves or is concerned about [the] child will not necessarily prevent the court from making a determination that the child is neglected." *Id.* (alterations in original).

In the present case, Defendant took the juvenile away from the area near the juvenile's home. When the juvenile became injured, Defendant apparently ignored him. Defendant then abandoned the sleeping juvenile in a parking lot. Defendant put the juvenile in a place or condition where the juvenile could be adjudicated neglected because he could not receive proper supervision from his parent. The trial court did not err in denying Defendant's motion to dismiss the charge of contributing to the neglect of a juvenile.

III. Assault on a Child under Twelve Years of Age

[3] Defendant next argues the trial court erred in permitting the jury to convict Defendant on a criminal negligence theory of intent, which was not alleged in the indictment. We agree.

"It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some

abstract theory not supported by the bill of indictment." *State v. Hines*, 166 N.C. App. 202, 206, 600 S.E.2d 891, 895 (2004).

In the present case, the indictment for assault on a child under twelve years of age read as follows:

> [D]efendant named above unlawfully and willfully did assault D.F., a child under the age of 12, to wit: hitting him in the face by swinging about his belt. This was done in violation of N.C.G.S. § 14-33(c)(3).

Initially, the trial court did not instruct the jury on criminal negligence. After the jury asked for clarification on the "legal definition of intent[,]" the trial court reinstructed the jury, as follows:

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proven 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.
>
> That definition of intent applies as well to the assault on a child, and I will instruct you in addition that the state must prove – with respect to assault on a child under 12, the state most prove that intent – that the defendant intentionally assaulted the victim by hitting him with a belt and that that intent must either be, number one, actual intent or intent or it can be inferred from a showing of culpable negligence.
>
> Culpable negligence is conduct of a willful, gross and flagrant character evincing reckless disregard for the safety of others.

The instruction permitted the jury to convict Defendant on a criminal negligence theory of assault, a theory not alleged in the indictment. *See Hines*, 166 N.C. App. at 207, 600 S.E.2d at 896. The trial court erred in denying Defendant's motion to dismiss. Because of this holding, we need not reach Defendant's argument regarding the sufficiency of the evidence of assault on a child under twelve years of age.

IV. Jury Instruction

[4] Defendant argues that the trial court committed plain error in failing to *sua sponte* instruct the jury that an expert witness's testimony could be considered only for corroborative purposes. We disagree.

Defendant did not request a limiting instruction at the time the evidence was admitted. We review only for plain error. *State v. Demos*, 148 N.C. App. 343, 348-49, 559 S.E.2d 17, 21 (2002). Defendant cites a rule that evidence of post-traumatic stress syndrome may not "be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred." *State v. Hall*, 330 N.C. 808, 822, 412 S.E.2d 883, 891 (1992). However, this rule does not apply here. *Hall* specifically applies to rape or sexual abuse cases. The present case involves no rape or sexual abuse. Defendant cites no authority that the rule applies to a charge defined in N.C.G.S. § 14-316.1, and our research reveals no such case. The trial court did not commit plain error by failing to *sua sponte* instruct the jury.

In conclusion, we must reverse the conviction for assault of a child under twelve years of age due to error in the trial court's jury instructions. Defendant's remaining arguments reveal no error in the trial court.

No error in part; reversed in part.

Judges STEPHENS and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JULY 2013)

BENNETT v. HOUSE No. 13-64	Wake (11CVS9167)	Affirmed
BREEDE v. BREEDE No. 12-1585	Wake (12CVS2153)	Affirmed
BRITT v. WEST No. 12-1519	Harnett (07CVS1010)	Affirmed in part; Vacated in part
IN RE THOMAS EARL WILLIAMS, JR. No. 13-178	Wake (12SPC28)	Reversed and Remanded
MOUNTAIN 1ST BANK & TRUST v. GALDENA, LCC No. 12-1322	Henderson (11CVS1771)	Affirmed
RIDER v. ADERHOLD No. 13-57	Henderson (11CVS88)	Affirmed
SALMONY BANK OF AM. CORP. No. 12-1414	Wake (10CVS12939)	Affirmed
SMITH v. SMITH No. 13-151	Gates (06CVD58)	Affirmed
STATE v. COOK No. 13-33	McDowell (12CR051145)	Affirmed
STATE v. CORE No. 13-49	Wayne (09CRS56146)	No Error
STATE v. HARRIS No. 13-68	Johnston (10CRS51781)	NO ERROR, in part; VACATED and REMANDED, in part.
STATE v. HOLLIDAY No. 12-1401	Pitt (09CRS61135)	Affirmed
STATE v. JIGGETTS No. 12-1172	Robeson (07CRS57931-40) (07CRS58186-88)	No Error
STATE v. JOHNSON No. 12-1248	Martin (09CRS1137-38) (09CRS51497)	No Error

STATE v. JORDAN No. 12-1264	Mecklenburg (12CRS25054)	Affirmed
STATE v. SEAGLE No. 12-1267	Lincoln (09CRS53127-28)	Affirmed
STATE v. WILLIAMS No. 12-1376	Pitt (11CRS3649-50)	No error in part, reversed in part, judgment arrested in part and remanded in part
WHITSON v. CAMDEN CNTY. BD. OF COMM'NERS No. 12-1282	Camden (11CVS43)	Affirmed
WILLIAMSON v. WILLIAMSON No. 12-1467	Catawba (07CVD3914)	Affirmed in Part, Vacated in Part, Remanded in Part

BARKER v. BARKER

[228 N.C. App. 362 (2013)]

JAMESIA HICKS BARKER, PLAINTIFF
v.
JOSEPH DAVID BARKER, DEFENDANT

No. COA12-1551

Filed 6 August 2013

1. Contempt—civil—divorce consent judgment—college expenses—diligent application to education

The trial court did not err by finding defendant in contempt where defendant had agreed in a divorce consent judgment to pay 90% of his daughter's (Holly's) college expenses as long as she diligently applied herself, Holly initially encountered difficulties, and defendant stopped paying, but the consent judgment did not include an objective measurement.

2. Contempt—civil—failure to comply with consent judgment—college expenses for daughter

The trial court did not err by holding defendant in civil contempt for failing to pay his daughter's college expenses pursuant to a consent judgment where defendant argued there was no evidence that he was able to comply, but defendant testified that he withheld payment to "leverage" his daughter to improve her grades and not because of any inability to pay on his part. Defendant did not raise or argue an issue regarding ambiguity in the language of the agreement.

Judge DILLON concurring in part and dissenting in part.

Appeal by defendant from order entered 17 July 2012 by Judge F. Warren Hughes in Avery County District Court. Heard in the Court of Appeals 10 April 2013.

Nancy M. Rivenbark, and Hedrick Kepley, PLLC, by Jeffery M. Hedrick, for plaintiff-appellee.

Respess & Jud, by W. Wallace Respess, Jr., and Marshall Hurley, PLLC, by Marshall Hurley, for defendant-appellant.

CALABRIA, Judge.

Joseph David Barker ("defendant") appeals from an order finding him in civil contempt for willful failure to comply with an order directing him to pay his child's educational costs. We affirm.

I. Background

Defendant and Jamesia Hicks Barker ("plaintiff") (collectively "the parties") were married in November 1987. The parties had two children: Holly Elizabeth Barker ("Holly") and Alexander Joseph Barker ("Alex") (collectively "the children") who were still minors in 2001 when the parties separated. Plaintiff filed an action for post separation support, divorce, alimony, equitable distribution, child custody, and child support. On 20 August 2003, the parties signed a consent order ("Stipulations and Order") resolving all their disputes and agreeing to a payment schedule. The parties agreed, *inter alia*, defendant would pay 90% and plaintiff 10% of the tuition, room and board costs ("college expenses") for the children's college education as long as they diligently applied themselves to the pursuit of education.

In the Fall of 2010, Holly enrolled as an undergraduate student at Milligan College in Johnson City, Tennessee. At the end of Holly's first semester of college, her grade point average ("GPA") was 1.955. Holly was placed on academic probation and remained on it when her cumulative GPA for the 2010-2011 academic year was a 1.908. Defendant paid 90% of Holly's college expenses for the 2010-2011 school year.

For the Fall 2011 semester, Holly was enrolled in 16.5 hours but earned only 7.5 hours of credit for the semester after her best friend died unexpectedly. Although Holly was treated for depression and was prescribed medication and therapy, she finished with a 1.000 GPA and a cumulative GPA of 1.658. However, Holly finished the Spring 2012 semester with a 2.907 GPA and her cumulative GPA improved to a 2.000. Defendant decided he would not pay Holly's tuition for the 2011-2012 school year until he saw a transcript of her grades. Defendant notified Holly and plaintiff that he would not pay her college expenses.

On 18 April 2012, plaintiff filed a Motion to Show Cause, seeking the issuance of an order requiring defendant to show cause as to why he should not be held in contempt for violating the Stipulations and Order. After a hearing, the trial court found defendant had the ability to comply but refused to do so. The court also found defendant's daughter diligently applied herself to the pursuit of her education at Milligan College. The trial court found that defendant was in willful civil contempt since he had the means to comply but refused to do so. The trial court found

defendant could purge his contempt by paying $15,150.00, the amount he owed plaintiff for the 2011-2012 school year. Defendant appeals.

II. Standard of Review

On appeal, the standard of review when the trial court sits without a jury is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Findings of fact made in a non-jury trial are conclusive on appeal if there is evidence to support them, but conclusions of law are reviewed *de novo*. *Id.* "Findings of fact to which no error is assigned 'are presumed to be supported by competent evidence and are binding on appeal.' " *Pascoe v. Pascoe*, 183 N.C. App. 648, 650, 645 S.E.2d 156, 157 (2007) (citation omitted).

III. Defendant's Obligations

Defendant argues that the trial court erred by finding that Holly was diligently applying herself to the pursuit of her education when she was on academic probation for the first three semesters with a cumulative GPA of 1.658 and that her poor academic performance relieved him of his contractual duty to pay for her education. We disagree.

It is well-established that " 'a parent can assume contractual obligations to his child greater than the law otherwise imposes ... [i.e.,] a parent may expressly agree to support his child after emancipation and beyond majority, and such agreements are binding and enforceable.' " *Ross v. Voiers*, 127 N.C. App. 415, 417, 490 S.E.2d 244, 246 (1997) (citation omitted). Consent judgments are contracts. *Yount v. Lowe*, 288 N.C. 90, 96, 215 S.E.2d 563, 567 (1975). " 'Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution.' " *Gilmore v. Garner*, 157 N.C. App. 664, 666, 580 S.E.2d 15, 18 (2003) (citation omitted). Where a contract's language is clear and unambiguous, a court must interpret it as it is written and may not reject its terms or insert what was omitted. *Corbin v. Langdon*, 23 N.C. App. 21, 25, 208 S.E.2d 251, 254 (1974). An undefined term in a contract is to be given its ordinary significance. *E. L. Scott Roofing Co. v. State*, 82 N.C. App. 216, 223, 346 S.E.2d 515, 520 (1986).

"In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement. A promise, or the making of a contract, may be conditioned upon the act or will of a third person."

Fed. Reserve Bank v. Neuse Mfg. Co., 213 N.C. 489, 493, 196 S.E. 848, 850 (1938). " 'Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability.' " *In re Foreclosure of C and M Invs.*, 346 N.C. 127, 132, 484 S.E.2d 546, 549 (1997) (citation omitted).

In the instant case, the parties entered into an agreement regarding their children's college expenses in Paragraph 5 of the August 2003 Stipulations and Order which provides that:

> Plaintiff shall pay ten percent (10%) and Defendant shall pay ninety percent (90%) to or for the benefit of each child of the tuition, room and board, and books for a four-year college education at whatever institution the respective child has been accepted and shall elect to attend as herein specified in a timely fashion sufficiently in advance of the due date to allow for proper enrollment at each successive semester or quarter ... Plaintiff's and Defendant's obligation to educate the children as set forth herein shall continue as long as he/she shall continue his/her education and diligently apply himself/herself to the pursuit of such education and in any event shall terminate upon the expiration of four (4) years following the date of each child's initial matriculation unless interrupted unavoidably by reason of military service, illness or other condition beyond the control of the child....

Holly enrolled in college in the Fall of 2010 and defendant satisfied his obligation to pay for 90% of Holly's college expenses for the 2010-2011 school year. However, when it appeared that Holly's grades were less than stellar, he believed that he was relieved of his duty to pay any amount of college expenses for the 2011-2012 school year. At the show cause hearing, the trial court heard evidence regarding defendant's obligations under the Stipulations and Order.

After a hearing, the trial court found as fact:

> 4. That [Holly] received numerous scholarships to assist her in her academic career including a Student Leadership Scholarship.
>
> 5. That [Holly] enrolled in 15.5 hours her first semester, three of which were upper level courses. That in addition she had a 3 hour per week internship ...

> 6. That she attempted and completed 14 credit hours for the Spring 2011 semester .... In spite of still being on academic probation, [Holly] received a Student Leadership Scholarship.
>
> 7. That for the Fall 2011 semester, [Holly] attempted 16.5 hours. That shortly after beginning the fall semester, [Holly] received notice that her best friend had died unexpectedly of a sudden heart attack.
>
> 8. That [Holly] assisted in the planning and execution of her friend's funeral.
>
> 9. That after [Holly] was treated for depression she was prescribed medication along with therapy and managed to finish the semester with a 1.00 GPA ... she remained on academic probation.
>
> 10. That for the Spring 2012 semester, [Holly], attempted 14 hours. Her GPA improved for the Spring semester with a 2.907 and her cumulative GPA improved to 2.000.
>
> 11. That [Holly] took heavy course loads each semester in an effort to graduate in three years.
>
> 12. That she continues to receive academic scholarships and is no longer on academic probation.
>
> . . .
>
> 30. ... that [Holly] diligently applied herself to the pursuit of her education at Milligan College.

Defendant contests the trial court's finding of fact 30 because he believes it is not supported by competent evidence and is thus insufficient to support the trial court's judgment. Despite being designated as a finding of fact, the trial court's finding that Holly diligently applied herself represents an inference drawn from other facts and is, for that reason, tantamount to a conclusion of law and will be reviewed as such. *See Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (a finding of fact is "more properly classified a conclusion of law" when the "determination requir[es] the exercise of judgment...").

When the parties agreed to pay the children's college expenses, a condition precedent to whether or not the parties were relieved of their obligation to pay was included in the Stipulations and Order. The words used as a condition precedent were that the children must "diligently

apply" themselves. However, the condition that defendant pay the children's college expenses as long as they "diligently appl[ied]" themselves does not use an objective standard to measure the children's actions. Specifically, there were no GPA requirements, nor any provisions included in the order that mention guidelines, such as, that the children must maintain good academic standing in college. Since the parties did not define what encompassed "diligently apply," the words are to be given their ordinary significance. *See E. L. Scott*, 82 N.C. App. at 223, 346 S.E.2d at 520.

Black's Law Dictionary (9th ed. 2009) defines "diligent" as "[c]areful; attentive; persistent in doing something." The trial court found that Holly consistently took heavy course loads, had an internship, received a scholarship for student leadership, and improved her cumulative GPA to 2.000 at the end of the Spring 2012 semester, despite the death of her best friend in the Fall. Defendant does not dispute these findings, and therefore they are binding on appeal. *See Pascoe*, 183 N.C. App. at 650, 645 S.E.2d at 157.

While we agree with defendant that Holly's grades were not outstanding during her first three semesters and "academic probation" is some indication that she was not diligently applying herself, the unchallenged findings of fact support the trial court's conclusion. These findings show that despite setbacks, Holly was persistent in continuing her studies. Noticeably, she was determined to stay in school, remained attentive and improved her academic performance. Since there was competent evidence to support the trial court's findings regarding Holly's diligent pursuit of her education, and since those findings support the trial court's conclusion that she was diligently applying herself, the conclusion was proper. *See Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845. Because the trial court properly determined that Holly diligently applied herself, defendant was not excused from performance under the contract.

IV. Civil Contempt

Defendant argues that the trial court erred by holding him in civil contempt because there was no evidence that he was able to comply with the Stipulations and Order's requirements or that his failure to do so was willful in nature. We disagree.

A person is in civil contempt for failure to comply with a court order when:

(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). "Willful has been defined as disobedience which imports knowledge and a stubborn resistance, and as something more than an intention to do a thing. It implies doing the act purposely and deliberately, indicating a purpose to do it, without authority . . . ." *Ross*, 127 N.C. App. at 418, 490 S.E.2d at 246 (quotation marks and citation omitted).

In the instant case, defendant contends the evidence presented did not support the trial court's conclusion that his noncompliance with the Stipulations and Order was willful. However, defendant testified that he withheld payment in order to "leverage" Holly to improve her grades. This purpose motivated his deliberate disobedience of the order. In addition, the trial court found that defendant "decided" not to pay and that defendant "unilaterally decided that [Holly] was not diligently applying herself." The trial court's finding and conclusion that his noncompliance with the Stipulations and Order was willful were therefore supported by the evidence.

Defendant also challenges the court's finding that he was able to comply with the Stipulations and Order. Defendant contends there was no evidence to support this finding and that the court relied on his status as a physician to make its determination. The trial court made unchallenged findings that defendant satisfied his obligation for the 2010-2011 school year, that he "decided" not to pay for the 2011-2012 school year and that after seeing Holly's Spring 2012 grades "he was willing to pay from this point forward." Further, defendant testified that the reason he did "not pay for the Spring semester was because [he] did not feel like she ... was making satisfactory academic progress ... that was the only leverage that [he] had against Holly to get her to do what she needed to do." Defendant testified that he was "willing to pay from this point forward based on the agreement that we have with *no problems whatsoever*." (emphasis added). It is reasonable to infer that if defendant made payments for the 2010-2011 academic year and is willing and able to make payments going forward, that he was capable of making payments

for the 2011-2012 academic year. Further, defendant testified that he did not make payments because of Holly's performance, not because of any inability to pay on his part.

The trial court's findings of fact were supported by evidence, and these findings support the trial court's conclusion that defendant had the ability to pay but willfully refused to do so. Therefore, it was not error to hold defendant in civil contempt.

We are precluded from deciding cases on grounds which have not been raised or argued by the parties. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (stating that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant."). As the dissent recognizes, defendant did not expressly claim his lack of willfulness was due to the ambiguity of the Stipulations and Order. Therefore, since defendant did not raise or argue the issue regarding the ambiguity, we cannot address it on appeal.

V. Conclusion

There was competent evidence to support the trial court's findings that Holly diligently applied herself to her studies, that defendant was able to pay for her college expenses, and that defendant's nonpayment was willful. Therefore, we affirm the trial court's judgment holding defendant in civil contempt and ordering him to pay $15,150.00.

Affirmed.

Judge ERVIN concurs.

Judge DILLON concurs in part and dissents in part in a separate opinion.

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

Because I believe there was competent evidence to support the trial court's findings regarding Holly's diligent pursuit of her education, I concur with Section III of the majority's opinion. However, I do not believe that the trial court's findings support a conclusion that Defendant's actions were willful; and, therefore, I dissent from Section IV of the majority's opinion affirming the trial court's adjudication of civil contempt against Defendant.

In the case *sub judice*, the trial court held Defendant in civil contempt because he failed to comply with the Stipulations and Order dated

20 August 2003 (the 2003 order) that required him to pay a share of his daughter's college expenses "as long as [she] shall continue [her] education and diligently apply [herself] to the pursuit of such education."

Generally, a "judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the Court[,]" *Yount v. Lowe*, 288 N.C. 90, 96, 215 S.E.2d 563, 567 (1975), and that it can be enforced by the filing of "an independent action for a declaratory judgment regarding the interpretation of the contract underlying the judgment" or through a contempt proceeding, *Fucito v. Francis*, 175 N.C. App. 144, 148, 622 S.E.2d 660, 663 (2005). However, our Supreme Court has held that in the domestic law context, once an agreement is incorporated into a consent order, it is *no longer* considered a contract between the parties, but rather a court-ordered judgment, *Walters v. Walters*, 307 N.C. 381, 386-87, 298 S.E.2d 338, 342 (1983); and we have held, in this context, that it is appropriate for a trial court to construe a consent order in a contempt proceeding, but not through a declaratory judgment action. *Fucito*, 175 N.C. App. at 150, 662 S.E.2d at 664. Therefore, it was appropriate for the trial court to construe the language in the 2003 order in the context of the contempt proceeding.

Defendant, however, argues that his "non-compliance with [the 2003 order] was [not] willful in nature." We have held that though a trial court has the authority in the context of domestic law to construe the terms of a prior order in a contempt proceeding, it may not adjudicate a party to be in civil contempt unless the party's noncompliance of the court order is willful. *Ross v. Voiers*, 127 N.C. App. 415, 418, 490 S.E.2d 244, 246, *disc. review denied*, 347 N.C. 402, 496 S.E.2d 387 (1987) (holding defendant's failure to pay for a child's college expenses pursuant to a consent order entered in a domestic action must be willful to support an adjudication of contempt).

"[W]illful[ness]" is defined as "disobedience which imports knowledge and a stubborn resistance, and as something more than an intention to do a thing." *Id.* (citation and quotation mark omitted) Our Court has held that if a prior order "is ambiguous such that a defendant could not understand his . . . obligations under the order, he cannot be said to have 'knowledge' of that order for purposes of contempt proceedings[,]" and his actions, therefore, are not willful. *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000). Thus, if the prior order is ambiguous, a reversal of the trial court's adjudication of civil contempt "[d]ue to the ambiguity" of the prior order may be proper. *Blevins*, 137 N.C. App. at 103, 527 S.E.2d at 671.

In this case, the trial court found that Holly's cumulative GPA for her first two semesters of college was 1.9; that in her third semester, Holly only earned 7.5 credit hours out of 16.5 hours attempted, finishing the semester with a 1.0 GPA and a combined GPA of 1.658, which resulted in her being placed on academic probation; that she did pull her cumulative GPA up to a 2.0 by the end of her fourth semester; that Defendant had paid for two of his daughter's first four semesters but did not believe he was obligated to pay any more towards Holly's first four semesters; and that he indicated a willingness to begin paying support again for future semesters. I believe that based on these findings, the 2003 order was *ambiguous* as to whether Defendant had an obligation to provide support for his daughter's initial four semesters beyond the two semesters for which he had already provided support.[1] *DeRossett v. Duke Energy Carolinas, LLC*, 206 N.C. App. 647, 656, 698 S.E.2d 455, 462 (2010) (holding that "[t]he extent to which a consent judgment is ambiguous is a question of law").

Further, the trial court made other findings which do not support a conclusion that Defendant acted out of "disobedience" or a "stubborn resistance" to the 2003 order, as is required to sustain an adjudication of contempt. Rather, the trial court *specifically found* that "Defendant refused to pay tuition for the [third] semester *because . . . he did not feel like his daughter was 'diligently' applying herself*." (emphasis added). The trial court further found that the Defendant's noncompliance "was willful in that Defendant unilaterally decided that [his daughter] was not diligently applying herself" in her studies. In other words, the trial court found that Defendant acted willfully, not because he was acting stubbornly in refusing to meet his obligations under the terms of the 2003 order, but rather because he honestly believed that the terms of the 2003 order did not require him to provide for his daughter's education during her time of poor academic performance. Therefore, I believe the trial court's findings do not support its adjudication of contempt.

I note that Defendant does not *expressly* state his lack of willfulness was due to the ambiguity of the 2003 order and that generally our review is limited to the arguments presented. *See* N.C. R. App. P. 28(b)(6). However, to support his contention that his actions were not "willful," Defendant argues that he had attempted to determine "whether

1. The trial court, however, made other findings and concluded that, based on its interpretation of the 2003 order, Holly was being diligent in the pursuit of her education and that, therefore, Defendant was obligated to pay his share of Holly's educational expenses for all four of her initial semesters.

[Holly] was applying herself diligently"; that "[w]hen he learned of her poor performance, . . . he sought further verification"; and that "[b]ased upon the information he had, he withheld payment." Further, it is clear from Defendant's arguments throughout his brief that he did not agree with the trial court's interpretation of the 2003 order. Therefore, based on Defendant's brief, I believe "we are able to determine the issues in this case on appeal," *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 192, 614 S.E.2d 396, 400 (2005), including whether Defendant's actions were willful where he based his actions on an interpretation of the 2003 order that was different from the trial court's interpretation.

In conclusion, I would affirm the trial court's order insofar as it resolved the ambiguity in the 2003 order regarding Defendant's support obligations for his daughter's educational expenses; however, I would reverse the trial court's adjudication of civil contempt.

CARLA HAMILTON, PLAINTIFF
v.
LATEEF JOHNSON, DEFENDANT

No. COA13-63

Filed 6 August 2013

1. Appeal and Error—untimely appeal—writ of certiorari granted

The Court of Appeals exercised its discretion and treating defendant's untimely appeal in a child custody and support case as a petition for writ of *certiorari* in order to review the matter on its merits.

2. Appeal and Error—interlocutory orders and appeals—sufficiency of service of process—contempt for willful failure to pay child support

Although defendant's challenge to the sufficiency of service of process in a child custody and support case was procedural and thus interlocutory in nature, the Court of Appeals held the matter was properly before it under *Willis*, 291 N.C. 19, and N.C.G.S. § 1-277(b). Absent its review, defendant risked extradition, imprisonment, or could otherwise be required to comply with the temporary child support order that he believed was erroneously entered.

3. Process and Service—child custody and support—service on concierge—requirement of delivering to addressee

The trial court erred in a child custody and support case by finding that defendant father was properly served with process under N.C.G.S. § 1A-1, Rule 4 prior to entering a temporary child support order. It could not be concluded that service on an alleged concierge satisfied Rule 4(j)(1)(d)'s requirement of "delivering to the addressee."

4. Jurisdiction—in personam—due process—insufficient minimum contacts

The trial court erred in a child custody and support case by failing to make sufficient findings of fact that its exercise of personal jurisdiction did not violate due process. Defendant father's conduct and connection with North Carolina was not such that he should reasonably anticipate the court's exercise of *in personam* jurisdiction on him.

On certiorari to review orders entered 22 October 2011, 18 January 2012, 7 February 2012, 25 April 2012, and 29 June 2012 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 4 June 2013.

Yolanda M. Troutman for plaintiff.

HORACK TALLEY PHARR & LOWNDES, P.A., by Christopher T. Hood and Gena Graham Morris, for defendant.

ELMORE, Judge.

Lateef Johnson (defendant) seeks review of a temporary child support order entered 22 October 2011, show cause orders entered 18 January 2012, 7 February 2012, and 25 April 2012, and an order for arrest entered 29 June 2012. After careful consideration, we vacate the temporary child support order. Additionally, because the temporary child support order was void *ab initio*, all subsequent orders entered are likewise void.

I. Background

On 29 April 2011, Carla Hamilton (plaintiff) filed a complaint for child custody and child support in Mecklenburg County against defendant. The parties are the biological parents of one minor child born in Charlotte on 28 December 2010. The minor child has resided with

plaintiff in North Carolina since birth. Defendant is a citizen and resident of Houston, Texas. Plaintiff served the complaint for child custody and child support on defendant via certified mail, restricted delivery, return receipt requested, deliver to addressee only, to defendant's last known address in Texas. The certified mail was returned unclaimed.

Thereafter, plaintiff hired detective David Pazda of Pazda & Associates Private Investigators to confirm defendant's Texas address and attempt personal service on him. However, defendant lives in a residential building with controlled access to individual residences – a concierge monitors visitors and accepts packages on the residents' behalf. As such, detective Pazda was unable to personally serve defendant because he was denied access to the residence.

On 13 July 2011, plaintiff retransmitted the civil summons and complaint "via Federal Express, DIRECT SIGNATURE, deliver to addressee only, addressed to the last known address of 5925 Almeda Drive Unit 10715, Houston, TX 77004-7602." On 16 July 2011, an individual identified as "KKPOINI" signed for the documents. On 18 August 2011, plaintiff retransmitted the pleadings and a copy of the summons to defendant via UPS Ground Residential, SIGNATURE REQUIRED, deliver to addressee only[.]" This time, the documents were signed for on 23 August 2011 by an individual identified as "Washington."[1]

On 26 September 2011, Judge Mann presided over plaintiff's temporary child support claim. Defendant did not appear. At the hearing, plaintiff submitted an Affidavit of Service to the trial court, and Judge Mann found that service of process upon defendant was proper pursuant Rule 4(j)(d) of the North Carolina Rules of Civil Procedure. Thereafter, Judge Mann ordered that defendant pay a support obligation of $2,050.00 per month and $4,250.00 in child support arrears. On 31 October 2011, a copy of the temporary child support order was mailed to defendant.

On 18 January 2012, plaintiff filed a motion for contempt, alleging that defendant willfully failed to pay $7,650.00 in support payments per the temporary order. Plaintiff served defendant with the contempt motion and a show cause order directing defendant to appear on 7 February 2012. On 23 January 2010, an individual identified as "C Emanuel" signed for the documents. At the 7 February 2012 show cause hearing, counsel for defendant made a limited appearance to raise the issue of ineffective

1. The temporary child support order includes no findings of fact regarding the 23 August 2011 delivery. The trial court relies on the 16 July 2011 delivery in finding that defendant was properly served.

service of process on defendant. At that time, Judge Mann declined to rule on plaintiff's contempt motion; instead, she continued the matter to the 29 February 2012 court session. On 24 February 2012, defendant filed a motion to dismiss and vacate the temporary child support order. Defendant asserted, *inter alia*, that Texas had jurisdiction and that he had not been properly served with notice for the 26 September 2011 temporary child support hearing.

Judge Mann denied plaintiff's contempt motion and defendant's motion to dismiss. In denying defendant's motion to dismiss, Judge Mann stated that she was "comfortable on the personal jurisdiction part . . . the child was born here, that he's visited here with the child, that [defendant's] business account is here[.]" She acknowledged that "[t]he only hitch in the get-along is this Rule 4(j)(1)d. [sic] addressed to the party to be served, delivering to the addressee and obtaining a delivery receipt. . . . Delivering to the addressee. And that's the – [t]hose four words, delivering to the addressee, those are my three words that I get hung up on."

On 25 April 2012, plaintiff filed a second contempt motion, alleging that defendant now owed $11,000.00 in support payments. Defendant did not appear at the 26 June 2012 show cause hearing. Accordingly, Judge Mann issued a verbal order for his arrest and directed plaintiff to memorialize it. Plaintiff drafted the order for arrest but did not serve defendant with a proposed copy as required by local rule 19.3. Defendant was unaware that the order had been issued until he was contacted on 26 July 2012 by a warrant officer from the Harris County Texas Constable's Department.

On 7 August 2012, defendant filed a motion for order vacating the order for arrest, motion for sanctions, and motion for protective order. Judge Mann denied the motions. On 13 August 2012, defendant appealed the 29 June 2012 order for arrest. On 16 August 2012, defendant filed an amended notice of appeal with this Court; he now appeals from the entry of the temporary child support order entered 22 October 2011 and all orders stemming therefrom, including the 29 June 2012 order for arrest and the show cause orders entered 18 January 2012, 7 February 2012, and 25 April 2012. A final child support order has not been entered in this matter.

II. Analysis

A. Timely Appeal

[1] At the outset we note that Rule 3(c) of the Rules of Appellate Procedure allow a party thirty days to file notice of appeal in a civil case.

"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). Here, defendant did not file a notice of appeal until 13 August 2012, more than 30 days after the order for arrest was issued and nearly nine months after the temporary child support order was entered. Thus, defendant failed to comply with Rule 3(c), and we have no jurisdiction to hear his appeal.

However, because plaintiff neglected to serve defendant with a copy of the order for arrest and failed to submit Form CCF-7, "Verification of Consultation with Opposing Attorney/Party," as required by local Rule 19.3, defendant was unaware of the entry of the order until 26 July 2012. Moreover, defendant did not actually receive a copy of the order for arrest from plaintiff until 3 August 2012. Thus, we are inclined to exercise our discretion in treating defendant's appeal as a petition for writ of certiorari. Having done so, we allow certiorari and review the matter on its merits.

B. Interlocutory Order

[2] In the instant appeal, defendant challenges (1) the trial court's exercise of *in personam* jurisdiction over him, and (2) the sufficiency of service of process pursuant to Rule 4 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1-277(b) provides: "Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." N.C. Gen. Stat. § 1-277(b) (2011). This statute has been interpreted to allow an immediate appeal only for substantive "minimum contacts" jurisdictional questions rather than to adverse rulings on service and process. *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982). As such, the issue of whether defendant's "minimum contacts" within the North Carolina were sufficient to warrant jurisdiction is immediately appealable under N.C. Gen. Stat. § 1-277(b). However, defendant's challenge to the sufficiency of service of process is procedural, and thus does not fall within the domain of N.C. Gen. Stat. §1-277(b). Accordingly, this issue is interlocutory in nature.

Generally, there is no right of appeal from an interlocutory order. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011). However, "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted). In *Willis v. Duke Power Co.*, our Supreme Court examined a contempt order that imposed a purging condition compelling discovery and held:

> Not to entertain this appeal would force defendant either (1) to risk being punished by fine or imprisonment or (2) to comply with an order which it contends and which we believe to be erroneously entered. Should defendant comply with the purging conditions to avoid punishment, the important legal questions it seeks to raise on this appeal and tried to raise in the trial court would be rendered moot. Under these circumstances the contempt order affects a substantial right and is appealable[.]

Willis v. Duke Power Co., 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976) (quotation omitted). In the instant case, the trial court found defendant to be in contempt of court for his willful failure to pay child support. Accordingly, the trial court issued an order for arrest directing that defendant be arrested and jailed in Texas, extradited to Mecklenburg County, and held until he is either brought before the trial court or pays $15,200.00 in child support arrears. Absent our review, defendant risks extradition, imprisonment, or may otherwise be required to comply with the temporary child support order that he believes was erroneously entered. Thus we hold, under the authority of *Willis* and N.C. Gen. Stat. §1-277(b), that this matter is properly before us for review.

C. Service of Process

[3] Defendant first avers that the trial court erred in finding that he was properly served with process per Rule 4 of the North Carolina Rules of Civil Procedure prior to entering the temporary child support order. We agree.

Our Supreme Court has held: "Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent. Rule 4 of the North Carolina Rules of Civil Procedure provides the methods of service of summons and complaint necessary to obtain personal jurisdiction over a defendant, and the rule is to be strictly enforced to insure that a defendant will receive actual notice of a claim against him." *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) (citation omitted). "Challenges to sufficiency of process and service do not concern the state's fundamental power to bring a defendant before its courts for trial; instead they concern the means by which a court gives notice to the defendant and asserts jurisdiction over him." *Love* at 579-80, 291 S.E.2d at 145. "[U]nless the specified requirements are complied with, there is no valid service." *Broughton v. Dumont*, 43 N.C. App. 512, 515, 259 S.E.2d 361, 363 (1979) (citation omitted).

In its order, the trial court found that defendant was a natural person domiciled within the state of Texas and "was properly served with this Complaint for child custody and child support on July 16, 2011." A review of the transcript indicates that Judge Mann specifically found that service of process was proper under Rule 4(j)(1)(d), which provides that service may be made:

> By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, **delivering to the addressee**, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(d) (2011) (emphasis added).

Again, an individual identified as "KKPOINI" signed for the delivery of the summons and complaint. On appeal, plaintiff avers that "KKPOINI" is the concierge and argues that service on the concierge constitutes proper service of process on defendant because the concierge is authorized via the lease agreement to sign for packages. In support, plaintiff relies on our holding in *Lewis Clarke Associates v. George P. Tobler*, where we concluded that Rule 4(j)(9)(b) created a presumption of service of process when copies of the summons and complaint were delivered to the addressee, via registered or certified mail, and signed for by a person of reasonable age and discretion on the addressee's behalf. 32 N.C. App. 435, 438, 232 S.E.2d 458, 459 (1977).

Plaintiff's reliance on *Tobler* and Rule 4(j)(9)(d) is both misplaced and outdated. First, the trial court found that defendant was served with process under Rule 4(j)(1)(d), not Rule 4(j)(9)(b). Second, Rule 4(j)(9)(b) is no longer in effect. When our legislature redrafted Rule 4(j) in 2001, the statutory presumption set forth in Rule 4(j)(9)(b) and discussed in *Tobler* was codified as part of Rule 4(j2)(2) and is only applicable in default judgments. *See* N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2)(2011). In redrafting, the legislature elected not to include any statutory presumption of valid service under Rule 4(j)(1)'s methods of service of process. Absent any statutory presumption, plaintiff bore the burden of proving that "KKPONI" was defendant's agent, authorized by law to accept service of process on his behalf.

Here, the trial court's order is devoid of any findings as to whether "KKPOINI" was an agent authorized to accept service of process on defendant's behalf. In fact, it is unclear how "KKPONI" was employed

in the building -- if an employee at all. Thus, we cannot conclude that service on "KKPONI," an alleged concierge, satisfies Rule 4(j)(1)(d)'s requirement of "delivering to the addressee."

B. Personal Jurisdiction

[4] Defendant also argues that the trial court failed to make sufficient findings of fact that its exercise of personal jurisdiction did not violate due process. We agree.

> When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry -- whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process. In order to satisfy the requirements of the Due Process Clause, the pivotal inquiry is whether the defendant has established certain minimum contacts with [the forum state] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Replacements, Ltd. v. Midwesterling, 133 N.C. App. 139, 143, 515 S.E.2d 46, 49 (1999) (citation and quotations omitted). The factors used in determining the existence of minimum contacts include the "(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties." *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 632, 394 S.E.2d 651, 655 (1990) (citation omitted). "[A] state does not acquire personal jurisdiction over the defendant simply by being the 'center of gravity' of the controversy or the most convenient location for the trial of the action." *Miller v. Kite*, 313 N.C. 474, 477, 329 S.E.2d 663, 665 (1985) (citation omitted). Additionally, the "presence of the child and one parent in North Carolina might make this State the most convenient forum for the action. This fact, however, does not confer personal jurisdiction over a non-resident defendant." *Id.* at 480, 329 S.E.2d at 667 (citation omitted).

In the case *sub judice*, the trial court concluded that it had jurisdiction over defendant based on the following findings of fact:

> 5. The minor child has lived permanently with the Plaintiff-Mother. The Defendant-Father visited the minor child 3 times. The Defendant-Father last visited with the minor child on March 18, 2011.

> 6. The minor child has extensive connections with the State of North Carolina having resided in North Carolina since birth.
>
> 12. The Plaintiff properly subpoenaed and entered into evidence the Defendant's personal and business accounts at Wells Fargo, NA. The Defendant is self employed as a Consultant. The name of his company is Next Gen Consulting, L.L.C. The Defendant's bank statements list an address of 505 East 6th Street, Suite 1306. Charlotte, North Carolina. 28202. The Defendant's personal and business expenses are reflected in the single account for Next Gen Consulting, L.L.C.

These contacts are insufficient to justify the exercise of *in personam* jurisdiction; defendant's conduct and connection with North Carolina is not such that he should reasonably anticipate being haled into our courts. *See Id.* (holding that the defendant-father, a permanent resident of California, had not purposefully availed himself of the protections and privileges of the laws of this State to justify the exercise of *in personam* jurisdiction over him based on contacts that consisted of: 1) his daughter resided with the plaintiff-mother in North Carolina for nine years, 2) he sent child support payments to the plaintiff-mother at her North Carolina residence, and 3) he visited his daughter approximately six times.). "A contrary result could prevent the exercise of the visitation privileges of non-custodial parents." *Id.* Accordingly, the temporary child support order was void *ab initio* for want of personal jurisdiction.

III. Conclusion

In sum, given the lack of competent evidence of service of process on defendant, the trial court erred in finding that he was properly served with the summons and complaint for child custody on 16 July 2011. Furthermore, the trial court erred in concluding that it had *in personam* jurisdiction over defendant. Accordingly, we vacate the trial court's 22 October 2011 temporary child support order and all subsequent orders entered in reliance upon it.

Vacated.

Chief Judge MARTIN and HUNTER, JR., Robert N., concur.

IN RE D.E.G.

[228 N.C. App. 381 (2013)]

IN THE MATTER OF D.E.G.

No. COA13-279

Filed 6 August 2013

1. Termination of Parental Rights—DSS absolved from reunification efforts—sufficiency of findings of fact

The trial court did not abuse its discretion in a termination of parental rights case by concluding that the Department of Social Services was absolved from any further responsibility to reunite respondent father with the minor child. The uncontroverted evidence and the trial court's unchallenged findings of fact supported the determinations that respondent challenged.

2. Constitutional Law—right to counsel—withdrawal of trial counsel—no notice—no continuation of case

The trial court erred in a termination of parental rights case by allowing respondent father's appointed counsel to withdraw from representation without either providing notice to respondent or continuing the termination hearing. The termination order was vacated, and remanded to the trial court for further proceedings.

Appeal by respondent from orders entered 23 April 2012 by Judge Richlyn D. Holt and 19 October 2012 by Judge Richard K. Walker in Haywood County District Court. Heard in the Court of Appeals 1 July 2013.

Rachael J. Hawes, for Haywood County Department of Social Services, petitioner-appellee.

Leslie Carter Rawls for respondent-appellant.

Parker Poe Adams & Bernstein LLP, by Kiah T. Ford IV, for guardian ad litem.

ERVIN, Judge.

Respondent-Father Preston H. appeals from orders (1) terminating any obligation on the part of the Haywood County Department of Social Services to attempt to reunify D.E.G.[1] with Respondent-Father

1. D.E.G. will be referred to throughout the remainder of this opinion as David, a pseudonym used for ease of reading and to protect the juvenile's privacy.

and changing the permanent plan for David to one of adoption and (2) terminating Respondent-Father's parental rights in David. On appeal, Respondent-Father contends that Judge Holt erred by authorizing DSS to cease attempting to reunify him with David and that Judge Walker erred by excusing his trial counsel from appearing on his behalf at the termination hearing. After careful consideration of Respondent-Father's challenges to Judge Holt's and Judge Walker's orders in light of the record and the applicable law, we conclude that, while the permanency planning order should be affirmed, the termination order must be vacated and this case must be remanded to the Haywood County District Court for further proceedings necessitated by the erroneous excusal of Respondent-Father's trial counsel from any obligation to represent him at the termination hearing.

I. Factual Background

On 4 November 2010, DSS filed a petition alleging that three-year-old David was a neglected and dependent juvenile. On 9 February 2011, the court entered a consent adjudication order determining that David was a neglected and dependent juvenile. At the conclusion of a review hearing held on 14 December 2011, the court permitted DSS to cease reunification efforts with David's mother, Tyshanna C.

Respondent-Father was incarcerated in the custody of the North Carolina Department of Correction from 1 June 2011 to 18 January 2012. After a hearing held on 3 April 2012, at which Respondent-Father and his attorney were present, Judge Holt entered an order on 23 April 2012 allowing DSS to cease efforts to reunify David with Respondent-Father and changing David's permanent plan from reunification to adoption.

On or about 7 June 2012, DSS filed a petition to terminate the parental rights of both of David's parents pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), N.C. Gen. Stat. § 7B-1111(a)(2) (failure to make reasonable progress), and N.C. Gen. Stat. § 7B-1111(a)(3) (failure to pay a reasonable portion of the cost of David's care). Respondent-Father was served with a summons and the petition on 18 June 2012. The summons served upon Respondent-Father stated, among other things, that, "[i]f you are represented by a lawyer appointed previously in an abuse, neglect or dependency case, that lawyer will continue to represent you unless the Court orders otherwise;" that, if Respondent-Father did not have a lawyer and wanted court-appointed counsel, he should contact the attorney named in the summons who had been temporarily assigned to represent him; and that, "[a]t the first hearing, the Court will determine whether you qualify for a court-appointed lawyer." The summons

served upon Respondent-Father named the same individual who had been representing Respondent-Father during the underlying neglect and dependency proceeding as Respondent-Father's counsel.

On 27 June 2012, Respondent-Father entered the DART-Cherry substance abuse program. As a result of the fact that Respondent-Father was attending the DART-Cherry program, the court entered an order on 7 August 2012 continuing the termination hearing until 9:30 a.m. on 1 October 2012. After completing the program on 26 September 2012, Respondent-Father "was released back into the community."

At the time that this case was called for hearing at 10:34 a.m. on 1 October 2012, the counsel for DSS informed Judge Walker that the issue before the court on that occasion was whether the parental rights of David's parents should be terminated. In addition, counsel for DSS stated that the case had also been calendared for a permanency planning review, which she requested to be heard after the conclusion of the termination hearing on the grounds that such a hearing would not be necessary in the event that the parental rights of David's parents were terminated. After the courtroom clerk called out the names of both of David's parents and received no response, counsel for DSS told Judge Walker that she had spoken with the attorneys for both parents earlier in the day and that both of them indicated that they had had no contact with their clients. In addition, counsel for DSS stated that Respondent-Father's attorney, "via me," had asked to be excused from serving as Respondent-Father's attorney at the termination hearing. In response, Judge Walker stated, "All right. Counsel for both respondent parties will be excused for absence or [sic] contact with their clients," and proceeded to conduct a special hearing held pursuant to N.C. Gen. Stat. § 7B-1108(b) and the adjudication and dispositional portions of the termination hearing without further inquiry into the validity of the request made by Respondent-Father's attorney to be excused from attending or participating in the hearing. All of the proceedings held in this case on 1 October 2012 had concluded by 11:08 a.m.

On 19 October 2012, Judge Walker entered an order finding that Respondent-Father's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), N.C. Gen. Stat. § 7B-1111(a)(2) (failure to make reasonable progress), and N.C. Gen. Stat. § 7B-1111(a)(3) (failure to pay a reasonable portion of the cost of David's care) and that the termination of Respondent-Father's parental rights in David would be in David's best interests.[2] Respondent-Father

2. Judge Walker also terminated the parental rights of David's mother, Tyshanna C., in

noted an appeal to this Court from Judge Walker's termination order and Judge Holt's permanency planning order in a timely manner.

II. Substantive Legal Analysis

A. Cessation of Reunification Efforts

[1] As an initial matter, Respondent-Father contends that Judge Holt erred by authorizing the cessation of efforts to reunify him with David. More specifically, Respondent-Father argues that the findings of fact that Judge Holt made in support of this determination lacked adequate evidentiary support, that Judge Holt's findings of fact did not support Judge Holt's conclusions of law, and that Judge Holt's findings and conclusions did not support a determination that DSS should be authorized to cease attempting to reunite David and Respondent-Father. We do not find Respondent-Father's arguments persuasive.

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citation omitted). Findings of fact which are not challenged on appeal as lacking adequate evidentiary support are deemed supported by competent evidence and are binding for purposes of appellate review. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (internal quotations omitted).

In his brief, Respondent-Father challenges the sufficiency of the evidentiary support for Judge Holt's determinations that (1) it is not possible for David to be returned to the home immediately or within the next six months; (2) since David's return to the home within the next six months is unlikely, adoption should be pursued; (3) DSS should no longer be required to make reasonable efforts to reunify David with Respondent-Father because those efforts would clearly be futile or inconsistent with David's health and safety and with his need for a safe, permanent home; and (4) the conditions that led to David's removal from the home continue to exist. According to Respondent-Father, these determinations are

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the 19 October 2012 order. Since Tyshanna C. has not sought appellate review of either the permanency planning order or the termination order, she is not a party to the proceedings before this Court.

contrary to the evidence presented at the permanency planning hearing because he is addressing his substance abuse issues, which constituted a principal reason for David's removal from the home and which led to his incarceration, by enrolling in an intensive substance abuse program which was scheduled to begin shortly after the permanency planning hearing. Respondent-Father's argument does not, however, adequately consider the voluminous additional evidentiary support for Judge Holt's decision to authorize DSS to cease attempting to reunify Respondent-Father with David.

In his brief, Respondent-Father has not challenged Judge Holt's findings that David had been in DSS custody since 3 November 2010; that Respondent-Father had been continuously incarcerated in either the Haywood County Jail or the North Carolina Department of Correction from 2 February 2011 to the date of the permanency planning hearing; that Respondent-Father was awaiting trial on a new set of criminal charges which could have resulted in the imposition of an active sentence of three to five years at the time of the permanency planning hearing; that, during the first three months of the period during which David was in DSS custody, Respondent-Father, who was not incarcerated at that time, only visited with David on three of the twelve opportunities that were made available to him; that, during these three visits, Respondent-Father had to be assisted by a visitation monitor; that Respondent-Father last visited with David on 31 December 2010; and that, during the period of his incarceration, Respondent-Father did not correspond with David. In addition, Judge Holt's unchallenged findings indicate that David has exhibited behavioral problems, which necessitated his removal from one therapeutic foster home to another, and has significant mental health needs. Moreover, the record reflects that, during the time that he was incarcerated in the North Carolina Department of Correction from 1 June 2011 to 18 January 2012, Respondent-Father was approved for participation in the GED program, work release, counseling and substance abuse treatment. However, Respondent-Father did not participate in work release, did not complete the GED program (although he did complete two classes), and did not complete any other programs or classes. During that same period of time, Respondent-Father committed infractions on four different occasions, resulting in more restrictive confinement for a period of time and the loss of a certain amount of " 'good' time." A careful examination of Judge Holt's undisputed findings of fact discloses that Respondent-Father failed to do anything of consequence to improve his ability to parent and care for David or to show love and affection for his son. As a result of the fact that Judge Holt noted that, "[a]t the present time, it looks like [Respondent-Father]

will have a 90-day stint in the DART Program and then be eligible for release," she clearly considered Respondent-Father's decision to enter substance abuse treatment in the course of deciding to authorize the cessation of efforts to reunify Respondent-Father with David. However, the record provides no assurance that the substance abuse treatment in which Respondent-Father was about to participate was likely to be successful. As a result, we hold that the uncontroverted evidence and Judge Holt's unchallenged findings of fact support the determinations which Respondent-Father has challenged and Judge Holt's conclusion that DSS should be absolved from any further responsibility for attempting to reunite Respondent-Father with David and that these findings and conclusions adequately support Judge Holt's determination that no further efforts to reunite Respondent-Father with David should be made.

B. Excusal of Respondent-Father's Counsel

[2] Secondly, Respondent-Father contends that Judge Walker erred by allowing his appointed counsel to withdraw from his representation of Respondent-Father without having appeared in court, notified Respondent-Father of his intention to withdraw, or shown good cause for the allowance of his request. Respondent-Father's contention has merit.

"Parents have a right to counsel in all proceedings dedicated to the termination of parental rights." *In re L.C.*, *I.C.*, *L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (citation and quotations omitted), *disc. review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007); *see also* N.C. Gen. Stat. § 7B-1101.1. The right to counsel in a termination of parental rights proceeding includes the right to the effective assistance of counsel. *In re Dj.L.*, *D.L. & S.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (citation omitted). After making an appearance in a particular case, an attorney may not cease representing his or her client in the absence of "(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965) (citation omitted). "The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citation omitted). However, "[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion" and "must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Williams and Michael v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984). As a result, before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when

the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected. *In re S.N.W.*, 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010).

The record presented for our review clearly shows that Respondent-Father's counsel did not appear at the termination hearing, effectively precluding Judge Walker from determining what efforts, if any, he had made to contact Respondent-Father and let Respondent-Father know of his intention to seek leave of court to withdraw from his representation of Respondent-Father. As a result, the record contains absolutely no indication tending to show that Respondent-Father's counsel had made any effort to notify, much less actually notified, Respondent-Father of his intention to seek leave of court to withdraw from his representation of Respondent-Father and only minimal information bearing on the issue of whether Respondent-Father's trial counsel had a justifiable basis for his request for leave to withdraw.[3] Even so, Judge Walker excused Respondent-Father's trial counsel from any obligation to appear at the termination hearing without continuing the termination hearing until another date. As a result, we conclude that Judge Walker erred by excusing Respondent-Father's trial counsel from attending and participating in the termination hearing.

In seeking to persuade us to reach a different result, DSS and David's guardian *ad litem* argue that Judge Walker did not commit any error of law by excusing Respondent-Father's trial counsel from appearing at the termination hearing because he was required by N.C. Gen. Stat. § 7B-1101.1(a) to discharge Respondent-Father's trial counsel given Respondent-Father's failure to appear at the termination hearing.[4] The

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3. Admittedly, Respondent-Father's trial counsel purportedly told counsel for DSS that he had not had any contact with Respondent-Father in advance of the termination hearing. However, the record reflects that Respondent-Father had been involved in the earlier neglect proceeding to a considerable degree. For example, we note that Respondent-Father, accompanied by his trial counsel, attended every hearing in this matter prior to the termination hearing except for one of four non-secure custody hearings. Respondent-Father attended the last permanency planning review hearing on 3 April 2012 and noted an appeal from the order entered as a result of that hearing. Moreover, Respondent-Father had only been released from the custody of the North Carolina Department of Correction for four days prior to the date upon which the termination hearing was scheduled to begin. Under this set of circumstances, we believe that some inquiry into the steps which had been taken by Respondent-Father's trial counsel to make contact with his client and to provide Respondent-Father with notice of his intention to seek leave to withdraw from his representation of Respondent-Father was clearly called for.

4. DSS and David's guardian *ad litem* also argue that, instead of allowing Respondent-Father's trial counsel to withdraw, Judge Walker simply excused Respondent-Father's

argument advanced by DSS and the guardian *ad litem* rests upon the basic legal principle that termination proceedings are independent from any underlying abuse, neglect or dependency proceeding, *In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 497 (2005), and assumes that Respondent-Father was represented by provisional counsel at the beginning of the termination hearing. Although N.C. Gen. Stat. § 7B-1101.1(a) does provide for the appointment of provisional counsel to represent a parent in a termination proceeding and requires the trial court to dismiss the parent's provisional counsel for a number of different reasons, including the parent's failure to "appear at the hearing," N.C. Gen. Stat. § 7B-1101.1(a)(1), the appointment of provisional counsel is unnecessary in the event that "the parent is already represented by counsel." As the summons served upon Respondent-Father clearly indicated, Respondent-Father's trial counsel, who had represented Respondent-Father throughout the underlying neglect and dependency proceeding, would continue to represent him in the termination proceeding. Therefore, Respondent-Father was not represented by provisional counsel.[5] Thus, the trial court was not, as DSS and David's guardian *ad litem* contend, excused from the necessity for compliance with the usual procedures required prior to the entry of an order allowing a parent's counsel to withdraw in this case by virtue of the provisions of N.C. Gen. Stat. § 7B-1101.1(a).[6]

As a result, in light of the trial court's erroneous decision to excuse Respondent-Father's trial counsel from any obligation to continue

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trial counsel from appearing at the termination hearing. We believe that this argument rests upon a distinction without a difference given that Respondent-Father was entitled to the effective assistance of counsel at the termination proceeding and would have been deprived of that right in the event that his trial counsel were excused from appearing at and participating in the termination hearing under circumstances and for reasons that would not have justified the allowance of a withdrawal motion. *S.N.W.*, 204 N.C. App. at 557-58, 698 S.E.2d 77 (applying the same rules applicable to a challenge to the entry of a withdrawal order to a challenge to a trial court order allowing a parent's counsel to refrain from participating in a particular proceeding).

5. The fact that Respondent-Father was advised that the attorney who had represented him in the prior neglect proceeding would continue to represent him in the termination proceeding precludes acceptance of the additional argument advanced by DSS and the guardian *ad litem* to the effect that Respondent-Father waived counsel by failing to appear at the termination hearing.

6. Although DSS and the guardian *ad litem* urge us to uphold the termination order on non-prejudice grounds even if we determine that Judge Walker erred by excusing Respondent-Father's counsel from appearing on his behalf at the termination proceeding, we are unwilling to accept that suggestion in the absence of any information tending to show the extent, if any, to which Respondent-Father's trial counsel attempted to contact him prior to the hearing in question.

representing his client without any evidence that Respondent-Father had been notified of trial counsel's intentions and without granting a continuance, we conclude that the termination order should be vacated and this case remanded to the Haywood County District Court for further proceedings. On remand, the trial court should, after providing Respondent-Father with adequate notice, conduct a hearing for the purpose of determining the extent, if any, to which Respondent-Father's trial counsel had attempted to notify Respondent-Father of his intentions to seek leave of court to withdraw from his representation of Respondent-Father and whether he had justifiable cause for making that request. In the event that adequate notice was given to Respondent-Father and in the event that Respondent-Father's trial counsel had justifiable cause for being relieved of any obligation to continue representing Respondent-Father, the trial court should allow the withdrawal motion and reinstate the termination order, with Respondent-Father having the right to seek appellate review of the trial court's determination with respect to his trial counsel's withdrawal motion by noting an appeal from the reinstated termination order. If the trial court determines that Respondent-Father's trial counsel did not provide his client with adequate notice of his intention to seek leave of court to withdraw from his representation of Respondent-Father or that Respondent-Father's trial counsel failed to show adequate justification for the allowance of that request, the trial court should conduct a new termination hearing and enter a new order addressing the issues raised by the DSS termination petition.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, while none of Respondent-Father's challenges to Judge Holt's permanency planning order have merit, Judge Walker erred by allowing Respondent-Father's trial counsel to withdraw without either providing notice to Respondent-Father or continuing the termination hearing. As a result, the permanency planning order should be, and hereby is, affirmed and the termination order should be, and hereby is vacated, with this case being remanded to the Haywood County District Court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges GEER and STEPHENS concur.

INTEGON NATIONAL INSURANCE COMPANY, PLAINTIFF
v.
ELIZABETH CHRISTINA VILLAFRANCO, RAMSES VARGAS, BY AND THROUGH HIS GUARDIAN AD LITEM DONALD S. HIGLEY, TYLER WICK, BY AND THROUGH HIS GUARDIAN AD LITEM ASHLEY COLEY, GARY SLY AND HUNTER EUGENE STRICKLAND, BY AND THROUGH THEIR GUARDIAN AD LITEM RICHARD GRIFFIN, AND CHRISTOPHER COLE WILLIAMS, BY AND THROUGH HIS GUARDIAN AD LITEM JAIME MOLES, DEFENDANTS

No. COA13-82

Filed 6 August 2013

1. Appeal and Error—interlocutory orders and appeals—insurer's duty to defend—partial summary judgment

An appeal from an interlocutory order was properly before the Court of Appeals where the action arose from a car accident with several injured passengers, the insurance company filed a declaratory judgment action to determine coverage, and the trial court entered summary judgment in favor of two of the passengers. Partial summary judgment on the issue of an insurer's duty to defend a claim against its insured affected a substantial right that might be lost absent immediate appeal.

2. Insurance—insured—fourteen-year-old son residing in household

The fourteen-year old son of the insured, who was driving her car when an accident occurred, was himself an insured under the terms of her policy, which included any family member residing in her household. While there was an exclusion for an insured using a vehicle without a reasonable belief that he was entitled to do so, that exclusion did not apply to family members.

3. Appeal and Error—factual statement—reference to record required

Although an insurance company argued that there had been a material misrepresentation by the insured and that the amount of coverage was affected, the assertion did not refer to any portion of the record. There could be no material misrepresentation with no factual basis in the record for the insurer's assertion.

Appeal by plaintiff from order entered 23 August 2012 by Judge Clifton W. Everett, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 22 May 2013.

Bennett & Guthrie, P.L.L.C., by Rodney A. Guthrie and Kimberly S. Shipley, for plaintiff-appellant.

Hardee & Hardee, LLP, by Charles R. Hardee and Moulton B. Massey, IV, for defendant-appellees.

STEELMAN, Judge.

Where the plain language of the auto insurance policy provides coverage to the driver of the covered vehicle, the insurance carrier is liable for injuries to passengers for which that driver is legally responsible. Where there is no evidence in the record showing that an additional driver would have increased the premiums for the policy of insurance, there can be no material misrepresentation.

I. Factual and Procedural Background

On 9 April 2011, fourteen-year-old Ramses Vargas (Vargas) lost control of his mother's 1998 Buick, causing the vehicle to overturn. The vehicle was insured by Integon National Insurance (plaintiff), through a policy issued to Vargas' mother, Elizabeth Villafranco (Villafranco). Deborah Stallings (Stallings), a person unrelated to and not residing in the Villafranco household, had been the primary driver of the vehicle for about six months prior to the accident. Gary Sly (Sly), Hunter Strickland (Strickland), Tyler Wick (Wick), and Christopher Cole Williams (Williams) were passengers in the vehicle and were injured in the accident.

On 3 October 2011, plaintiff filed a declaratory judgment action seeking a determination as to whether plaintiff provided liability insurance coverage for the personal injury claims arising from the accident. On 19 January 2012, default was entered as to Villafranco. On 4 June 2012, plaintiff filed a motion for summary judgment. On 23 August 2012, the trial court entered summary judgment in favor of defendants Wick and Williams pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure. This order held that "plaintiff's Policy No. SAN 9981473 does provide liability coverage of $50,000 per person and $100,000 per accident for defendants Wick and Williams' personal injury claims." On 24 September 2012, the trial court certified its order pursuant to Rule 54(b) of the Rules of Civil Procedure.

Plaintiff appeals.

II. Interlocutory Appeal

[1] We must first determine whether this appeal is properly before us. An interlocutory order is an order that does not dispose of the entire controversy at hand. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Since the trial court's order only dealt with Wick and Williams, but not with Sly and Strickland, the order is not a final order, and is interlocutory.

A trial court declaring its order a "final judgment" does not automatically qualify an order as a final judgment for the purposes of Rule 54(b). *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). When multiple parties are involved, as in this case, a final judgment can be entered as to fewer than all of the parties "if there is no just reason for delay and it is so determined in the judgment." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011). In order to support an interlocutory appeal, the appellant must demonstrate that the decision of the trial court affects a substantial right. N.C. Gen. Stat. § 1-277 (2011); N.C. Gen. Stat. § 7A-27(d) (2011). Plaintiff's complaint indicates that Wick, Williams, Strickland, and Sly contended that they suffered personal injuries as a result of the operation of Villafranco's motor vehicle by Vargas. While the complaint does not state whether the passengers have instituted suit, it appears that these claims have not yet been resolved. This Court held in *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 527 S.E.2d 328 (2000) that where there is a pending claim or suit, a partial summary judgment on the issue of an insurer's duty to defend a claim against its insured "affects a substantial right that might be lost absent immediate appeal." *Id.* at 4, 527 S.E.2d at 331.

We hold that plaintiff's appeal is properly before us.

III. Standard of Review

Orders of summary judgment are reviewed de novo by this Court and the evidence is reviewed in the light most favorable to the non-moving party. *N.C. Farm Bureau Mut. Ins. Co. v. Jenkins*, 207 N.C. App. 506, 510, 700 S.E.2d 434, 436 (2010). In this case, the parties stipulated to the trial court that there were no genuine issues as to any material fact.

IV. Insured Drivers

[2] In its first argument, plaintiff contends that the trial court erred in granting summary judgment in favor of defendants Wick and Williams and in denying plaintiff's motion for summary judgment. Plaintiff contends that Vargas was not an insured under the terms of Villafranco's insurance policy. We disagree.

"A party seeking benefits under an insurance contract has the burden of showing coverage." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 430, 526 S.E.2d 463, 467 (2000). Part A of plaintiff's policy states:

> We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident.
>
> . . . .
>
> "Insured" as used in this Part means:
>
> 1. You or any family member for the ownership, maintenance or use of any auto or trailer.
>
> 2. Any person using your covered auto.

In the policy's "Definitions" section, "you" and "your" are defined as "the 'named insured' shown in the Declarations;" "family member" is defined as "a person related to you by blood, marriage or adoption who is a resident of your household[;]" and "covered auto" is defined as "[a]ny vehicle shown in the Declarations." "Insurance contracts are construed according to the intent of the parties, and in the absence of ambiguity, we construe them by the plain, ordinary and accepted meaning of the language used." *Integon Gen. Ins. Corp. v. Universal Underwriters Ins. Co.*, 100 N.C. App. 64, 68, 394 S.E.2d 209, 211 (1990).

"Elizabeth Villafranco" was the named insured in the policy and her 1998 Buick was a covered auto. Vargas is Villafranco's son and was a resident of Villafranco's household at the time of the accident. We hold that Vargas was an insured under the terms of the policy.

Plaintiff further asserts that the following exclusion, contained in the policy, is applicable to Vargas:

> We do not provide Liability Coverage for any insured:
>
> . . . .
>
> 8. Using a vehicle without a reasonable belief that that [sic] insured is entitled to do so.
>
> This Exclusion A.8. does not apply to a family member using your covered auto which is owned by you.

The exception to exclusion A.8 (which states that the exclusion does not apply to a family member) was added to the policy in 2005. Prior to the addition of the exception, our Supreme Court held that a family member who does not have a reasonable belief that he is entitled to

use the insured vehicle is excluded from automobile liability coverage. *Newell v. Nationwide Mut. Ins. Co.*, 334 N.C. 391, 401-402, 432 S.E.2d 284, 288-89 (1993). Plaintiff contends that the addition of this exception should not affect the *Newell* holding.

Following a determination that the insurance policy affords coverage for a particular claim or injury, "the burden then shifts to the insurer to prove that a policy exclusion excepts the particular [claim] from coverage." *Hobson Constr. Co. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984). Plaintiff cites a number of cases involving the question of insurance coverage for drivers who were not listed by name on the insurance policy. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Bustos-Ramirez*, 212 N.C. App. 225, 227-28, 710 S.E.2d 408, 410-11, *review denied*, 365 N.C. 367, 719 S.E.2d 44 (2011); *Nationwide Mut. Ins. Co. v. Baer*, 113 N.C. App. 517, 520-22, 439 S.E.2d 202, 204 (1994); *Ins. Co. of N. Am. v. Aetna Life & Cas. Co.*, 88 N.C. App. 236, 242-43, 362 S.E.2d 836, 837 (1987). None of these cases involved a driver whose status as a family member made them an "insured" under the terms of the policy. The holdings in these cases are based on the minimum requirements for liability insurance coverage set forth in the North Carolina Financial Responsibility Act. *See* N.C. Gen. Stat. §§ 20-279.1 to 20-279.39 (2011). The terms of the North Carolina Financial Responsibility Act are included in every automobile insurance policy written in North Carolina. N.C. Gen. Stat. § 20-279.21(b)(2) states:

> (b) Such owner's policy of liability insurance:
>
> . . . .
>
> > (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle. . . .

N.C. Gen. Stat. § 20-279.21(b)(2) (2011).

While these are the minimum standards of automobile liability coverage, the coverage provided in an insurance policy can exceed that provided by statute. N.C. Gen. Stat. § 20-279.21(g) states:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for

> a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this section.

N.C. Gen. Stat. § 20-279.21(g) (2011).

By including the family member exception to the reasonable belief exclusion, plaintiff explicitly extended coverage to family members using the covered vehicle even when they do not have a reasonable belief that they were entitled to use the covered motor vehicle. This Court has previously held that "[i]n interpreting any insurance policy, the most fundamental rule of construction is that the language of the policy controls." *Baer*, 113 N.C. App. at 519, 439 S.E.2d at 204. The language of this policy, specifically the exception to the A.8 exclusion, indicates that Vargas was in fact an insured under the terms of the policy.

Further, "the avowed purpose of the Financial Responsibility Act . . . is to compensate the innocent victims of financially irresponsible motorists." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989). Insurance policies "must be construed liberally so as to provide coverage, whenever possible by reasonable construction." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). In this case, the reasonable interpretation of the plain language of the policy is that Vargas was an insured under the policy. Further, plaintiff bears the burden of proving that an exclusion to coverage is applicable to the facts of this case. Based upon the clear and unambiguous language of the exception to exclusion A.8 plaintiff cannot meet this burden. The trial court correctly determined that plaintiff's policy of insurance provided coverage for the claims of Wick and Williams.

This argument is without merit.

V. Material Misrepresentation

[3] In its second argument, plaintiff contends that even if the policy does provide coverage to Vargas for the claims of Wick and Williams, any coverage beyond the statutory minimum coverage is void because of a material misrepresentation made by Villafranco. We disagree.

Plaintiff cites to the following language in the policy, asserting that its coverage is limited to the minimum amount required by the Financial Responsibility Act:

> We do not provide coverage for any insured
>
> > 1. who has made a fraudulent statement or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy; or
> >
> > 2. if a named insured made a material misrepresentation in the application for this policy of insurance.
>
> This provision applies to Part A – Liability Coverage to the extent that the limits of liability exceed the minimum limits required by the Financial Responsibility Law of North Carolina. . . .

In North Carolina, a misrepresentation on an insurance application is material "if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of premium." *Goodwin v. Investors Life Ins. Co. of N. Am.*, 332 N.C. 326, 331, 419 S.E.2d 766, 769 (1992) (emphasis omitted) (quoting *Tolbert v. Ins. Co.*, 236 N.C. 416, 418-19, 72 S.E.2d 915, 917 (1952)).

Plaintiff contends that Villafranco failed to advise it that Stallings would be the primary driver of the 1998 Buick motor vehicle. It further contends that had plaintiff known of this fact, it would have charged a higher premium for the insurance policy. Therefore, plaintiff asserts that this was a material misrepresentation.

At the summary judgment hearing, the trial court had before it the affidavits of Deborah Stallings and Sharon Dowell, an employee of plaintiff. Stallings' affidavit noted her use of the 1998 Buick motor vehicle and that she was the primary driver. Dowell's affidavit certified a copy of the policy of insurance and contained no information concerning whether Stallings' use of the vehicle would have resulted in higher premiums. In addition, there were the depositions of Villafranco and Vargas. These depositions do not discuss whether Stallings' use of the vehicle would have resulted in higher premiums. The only place where this assertion that Stallings' use of the vehicle would increase the premium is found is in plaintiff's brief: "Integon would have charged a higher premium for having Ms. Stallings listed as an additional insured." This assertion does not reference any portion of the record or supplement to the record where this alleged fact is to be found. Rule 28(b)(5) of the Rules of Appellate Procedure states that factual statements should be "supported

by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." N.C.R. App. P. 28(b)(5).

Because there is no factual basis for plaintiff's assertion in the record, there can be no material misrepresentation. We hold that the trial court properly found the appropriate amount of liability coverage in this case.

This argument is without merit.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

ROBERT A. IZYDORE, PETITIONER
v.
CITY OF DURHAM (DURHAM BOARD OF ADJUSTMENT), RESPONDENT, AND
SUN RIVER BUILDERS SIGNATURE HOMES, INC., STACY A.
CRABTREE, RESPONDENTS/NECESSARY PARTIES

No. COA12-1284

Filed 6 August 2013

Attorney Fees—denial of petition—local governmental units—not agencies

The trial court did not err in a case regarding respondents' issuance of building permits by denying petitioner's petition to recover attorney fees from respondents under N.C.G.S. § 6-19.1. Based on the plain language of the statute, our case law interpreting the statute, and other provisions of the General Statutes, local governmental units, such as respondents in this case, do not constitute "agencies" for purposes of § 6-19.1.

Appeal by petitioner from order entered 8 May 2012 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 26 March 2013.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for petitioner-appellant.

Office of the City Attorney, by Emanuel D. McGirt, Senior Assistant City Attorney, for respondents-appellees City of Durham, Durham

City-County Board of Adjustment, and Durham City-County Planning Department.

DAVIS, Judge.

Petitioner Robert A. Izydore ("petitioner") appeals from the trial court's order denying his petition to recover attorney's fees from respondents City of Durham ("the City"), Durham City-County Board of Adjustment ("the Board"), and Durham City-County Planning Department ("the Department") (collectively "respondents"). After careful review, we affirm.

Factual Background

On 18 May 2009, petitioner filed a protest with the Department, challenging its issuance of building permits allowing his neighbor, Stacy A. Crabtree ("Crabtree"), to divide her lot into two smaller lots and to allow Sun River Builders Signature Homes, Inc. to build separate houses on each lot. After the Department rejected his protest, petitioner appealed to the Board. The Board considered petitioner's appeal during a hearing held on 28 July 2009 and issued a decision on 22 September 2009 rejecting his appeal.

By writ of *certiorari*, petitioner obtained judicial review of the Board's decision, and the trial court remanded the matter to the Board on 28 June 2010 for a new hearing. On remand, the Board again rejected petitioner's appeal in a decision issued 7 December 2010. The trial court issued a second writ of *certiorari* on 5 January 2011 to review the Board's 7 December 2010 decision. In an order and judgment entered 15 September 2011, the trial court remanded the case to the Board with instructions to revoke the building permits pertaining to Crabtree's property. None of the parties sought post-judgment relief from the 15 September 2011 order and judgment, and no appeal was taken.

On 16 November 2011, petitioner filed a petition, along with supporting affidavits, seeking the recovery of attorney's fees from respondents pursuant to N.C. Gen. Stat. § 6-19.1. The trial court, after conducting a hearing, issued an order on 8 May 2012 denying the petition on the ground that it lacked authority to award attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1. Petitioner appealed to this Court.[1]

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1. Because Sun River Builders Signature Homes, Inc. and Crabtree were not parties to the proceeding regarding petitioner's entitlement to attorney's fees, they are not parties to the present appeal.

Analysis

N.C. Gen. Stat. § 6-19.1 provides, in pertinent part, as follows:

> (a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> > (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
> >
> > (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

N.C. Gen. Stat. § 6-19.1(a)(1)-(2) (2011).

Here, the trial court – in interpreting § 6-19.1 – concluded that

> [t]he Respondent City, Durham City/County Planning Department and the Durham City/County Board of Adjustment are "local governmental units" and are *not* agencies within the meaning of the term in N.C.G.S. 6-19.1 or 150B-43, and their decisions do *not* constitute "State action pursuant to G.S. 150B-43 or any other appropriate provisions of law," pursuant to G.S. 6-19.1.

(Emphasis in original.)

Petitioner contends that the trial court erred in concluding that respondents are not "agencies" and that their decisions do not constitute "State action" for purposes of § 6-19.1. Issues regarding statutory interpretation are questions of law and, as such, are subject to *de novo* review on appeal. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009).

"The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 485, 687 S.E.2d 690, 694 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010). Thus, as a general rule, courts should give "the language of the statute its natural and ordinary meaning unless the context requires otherwise." *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988).

We are also mindful of the principle that because statutes authorizing the award of attorney's fees are in derogation of the common law, they must be strictly construed. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991). As such, "everything [should] be excluded from [the statute's] operation which does not clearly come within the scope of the language used . . . ." *Harrison v. Guilford County*, 218 N.C. 718, 722, 12 S.E.2d 269, 272 (1940) (citation and quotation marks omitted); *accord N.C. Baptist Hosps., Inc. v. Crowson*, 155 N.C. App. 746, 750, 573 S.E.2d 922, 924, *aff'd per curiam*, 357 N.C. 499, 586 S.E.2d 90 (2003).

Neither § 6-19.1 nor Chapter 6 of the General Statutes in its entirety provides a definition of the terms "agency" or "State action." Section 6-19.1 does, however, twice reference Chapter 150B of the North Carolina General Statutes, which contains North Carolina's Administrative Procedure Act ("APA"). Although the APA nowhere defines the phrase "State action," it does define the term "agency" as follows:

> "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. *A local unit of government is not an agency.*

N.C. Gen. Stat. § 150B-2(1a) (2011) (emphasis added).

Thus, because counties and municipalities are considered local units of government, they do not constitute "agencies" for purposes of the APA. *See Coomer v. Lee County Bd. of Educ.*, __ N.C. App. __, __, 723 S.E.2d 802, 803 (holding that county board of education was not "agency" under APA), *disc. review denied*, __ N.C. __, 731 S.E.2d 428 (2012); *Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Ctr.*, 153 N.C. App. 176, 179, 568 S.E.2d 883, 885 (2002) (concluding that city human relations department was not "agency" for purposes of APA).

Petitioner concedes that respondents do not fall within the APA's definition of an "agency." Nevertheless, he argues – without citing any

supporting authority – that despite § 6-19.1's multiple references to the APA, § 6-19.1's use of the term "agency" should be read "without qualification" to include "all levels" of government within our State, including local governmental units. Based on the plain language of § 6-19.1, our caselaw interpreting the statute, and other provisions of the General Statutes, we conclude that local governmental units – such as respondents in this case – do not constitute "agencies" for purposes of § 6-19.1.

N.C. Gen. Stat. § 6-19.1's limitation of attorney's fees to those civil actions with "State" involvement coupled with its repeated references to the APA strongly suggest that the legislature intended for the statute to apply to entities falling within the APA's definition of the term "agency" as set out in N.C. Gen. Stat. § 150B-2(1a).[2] This interpretation of the statute is supported by our Supreme Court's decision in *Crowell Constructors, Inc. v. State ex rel. Cobey*, 342 N.C. 838, 467 S.E.2d 675 (1996), where the Court illuminated the purpose behind § 6-19.1, stating as follows: "Our legislature, in enacting N.C.G.S. § 6–19.1 in order that a prevailing party may recover its reasonable attorney's fees when a *State* agency has pressed a claim against that party 'without substantial justification,' obviously sought to curb unwarranted, ill-supported suits initiated by *State* agencies." *Id.* at 844, 467 S.E.2d at 679 (emphasis added). This language reflects the Supreme Court's recognition of the General Assembly's intent that § 6-19.1 apply only in those civil actions involving actual agencies of the State.

An examination of other cost-shifting provisions in Chapter 6 of the General Statutes further confirms our conclusion that local governmental

2. The only case identified by petitioner recognizing an exception to this rule is *Early v. County of Durham Dep't of Soc. Servs.*, 172 N.C. App. 344, 616 S.E.2d 553 (2005), *disc. review improvidently allowed*, 361 N.C. 113, 637 S.E.2d 539 (2006). In *Early*, this Court affirmed the trial court's award of attorney's fees under § 6-19.1 in favor of a former employee of a county department of social services against the department. *Id.* at 365, 616 S.E.2d at 567. *Early* does not expressly address the question of whether the General Assembly intended to include a local department of social services within its use of the term "agency" in § 6-19.1. However, the Court in *Early* stated that § 6-19.1 "authorizes a superior court to award fees to [an] employee of a county Department of Social Services *who has prevailed under the [State Personnel Act]*." *Id.* (emphasis added). Thus, *Early* stands at most for the proposition that the award of attorney's fees against a local department of social services under § 6-19.1 is permissible in connection with a contested case filed by an aggrieved employee under the State Personnel Act. *See Cunningham v. Catawba County*, 128 N.C. App. 70, 72, 493 S.E.2d 82, 84 (1997) (observing that while local social services departments "are not agencies within the meaning of the [APA]," their employees are "subject to the provisions of the [State Personnel Act]" and thus are entitled to " 'commence a contested case under [the APA]'" (quoting N.C. Gen. Stat. § 150B–23(a) and citing N.C. Gen. Stat. § 126–37(a)). *Early*, however, does *not* stand for the much broader proposition, advanced by petitioner, that attorney's fees may be awarded under § 6-19.1 against *any* unit of local government.

units – such as respondents – are not "agencies" for purposes of § 6-19.1. Most notably, N.C. Gen. Stat. § 6-21.7 (captioned "Attorneys' fees; cities or counties acting outside the scope of their authority"), provides as follows:

> In any action in which a *city or county* is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs.

N.C. Gen. Stat. § 6-21.7 (2011) (emphasis added).

By its plain language, § 6-21.7 substantially parallels § 6-19.1, but instead of applying to State agencies, it expressly applies to cities and counties. Moreover, rather than addressing State action, it instead encompasses action by local governments. Were we to adopt petitioner's reading of § 6-19.1 – that all local governmental units are "agencies" for purposes of § 6-19.1 – then § 6-21.7 would be rendered superfluous. Such an interpretation would run afoul of the well-established principle of statutory construction that "[s]tatutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and *harmonized to give effect to each*." *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980) (internal citations omitted and emphasis added); *see HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990) (rejecting interpretation of statute that rendered portion redundant).

While petitioner attempts to rely on our Supreme Court's decision in *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 459 S.E.2d 626 (1995), *Able* does not support his position. Petitioner reads *Able* as standing for the proposition that attorney's fees are recoverable under § 6-19.1 from any governmental entity so long as there is a statutory provision allowing judicial review of the entity's final decisions. Contrary to petitioner's contention, however, the Court in *Able* did not hold that attorney's fees are recoverable under § 6-19.1 whenever judicial review is provided by statute. Rather, the Court held that when a statute authorizes a *de novo* hearing in the trial court as a means of judicial review of an administrative decision, the court also possesses subject matter jurisdiction to consider a petition for attorney's fees at that same time. *Id.* at 171, 459 S.E.2d at 628.

Nevertheless, under § 6-19.1, the trial court may award attorney's fees only in those "instances" set out in the statute. *Id.* at 170, 459 S.E.2d at 628. *Able* does not change the fact that § 6-19.1's requirements for the recovery of attorney's fees must still be satisfied; the Court simply clarified that the trial court has the *jurisdiction* to determine whether those requirements have been met as part of the trial court's determination of the entire case upon judicial review. As the issue in the present case is not whether the trial court had jurisdiction under § 6-19.1, but rather, whether the substantive elements of the statute have been satisfied, we find *Able* inapplicable.

Conclusion

In sum, we conclude that the City of Durham, the Durham City-County Board of Adjustment, and the Durham City-County Planning Department are not "agencies" for purposes of N.C. Gen. Stat. § 6-19.1. Consequently, the trial court properly denied petitioner's petition for attorney's fees.[3]

AFFIRMED.

Judges McGEE and GEER concur.

LENDINGTREE, LLC, PLAINTIFF
v.
DAVID N. ANDERSON, DEFENDANT

No. COA12-1266

Filed 6 August 2013

1. Appeal and Error—interlocutory orders and appeals—venue—immediate appeal of right

Defendant had an immediate appeal of right from a venue determination because the right to venue established by statute is substantial. However, a decision regarding a motion to amend did not affect a substantial right.

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3. Because we conclude that respondents are not "agencies" for purposes of § 6-19.1, we need not address whether their actions constitute "State action" under the statute.

2. Appeal and Error—interlocutory orders and appeals—venue—standard of review

A ruling on a motion to change venue will be reviewed on appeal for abuse of discretion. A *de novo* review is applied to whether a party waived an improper venue defense as a matter of law.

3. Venue—waiver—factors

A defendant in an action arising from an alleged kickback scheme involving mortgages waived his venue defense because he did not unambiguously raise and press his objection, subsequently participated in litigation, and delayed pursuing his defense for almost three years.

Appeal by defendant from order entered 17 April 2012 by Judge Calvin E. Murphy in the North Carolina Business Court. Heard in the Court of Appeals 13 March 2013.

K&L Gates LLP, by John H. Culver III and Glenn E. Ketner, III, for plaintiff-appellee.

Erwin, Bishop, Capitano & Moss, P.A., by J. Daniel Bishop, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

David N. Anderson ("Defendant") appeals a trial court order: (i) denying his application for improper venue; (ii) denying his motion to dismiss; and (iii) granting Plaintiff's motion for leave to amend complaint. Upon *de novo* review, we affirm.

I. Facts & Procedural History

LendingTree, Inc. ("LendingTree") is a licensed, multi-state mortgage broker headquartered in Mecklenburg County. Defendant, a Union County resident, is a former employee of LendingTree.

In early 2007, federal authorities investigated Jarrod Beddingfield, one of Defendant's co-defendants in this action, for violation of federal regulations involving insider trading. As part of the investigation, Beddingfield turned over his bank records and tax returns to LendingTree's legal department. In spring 2008, as LendingTree reviewed these documents, it discovered fee referral arrangements between others, Defendant, and co-defendant Beddingfield.

On 21 April 2008, LendingTree filed a complaint against Defendant, Beddingfield, and others claiming: (i) breach of fiduciary duty; (ii) unauthorized access in violation of the Computer Fraud and Abuse Act; (iii) trafficking in passwords in violation of the Computer Fraud and Abuse Act; (iv) computer trespass; (v) trespass to chattels; (vi) conversion; (vii) unfair and deceptive trade practices; (viii) accounting; and (ix) injunctive relief. The complaint alleged generally the Defendants participated in "kickback" schemes.

On 22 April 2008, Chief Justice Parker designated the action a mandatory complex business case. *See* N.C. Gen. Stat. § 7A-45.4 (2011). On 22 May 2008 Defendant moved for and received an extension of time to file an answer on the basis that counsel needed additional time to investigate the facts so that he could plead his case.

Later, on 11 June 2008, the Business Court entered an order requiring a Joint Case Management Conference ("the Conference") on or before 20 June 2008; and (ii) a Joint Case Management Report ("the Report") within fifteen days of the Conference. *See* N.C. Bus. Ct. R. 17.1. In compliance with the order, the parties held a teleconference on 18 June 2008 and submitted a report on 20 June 2008. The Report, signed by counsel for all parties, stated, "The parties stipulate that venue is proper in this action." However, the Report also noted that "[n]othing in this Report is intended to waive any of the objections or defenses Defendants may raise."[1]

On 26 June 2008, Defendant's counsel applied for a second extension of time to investigate the facts of the case so that he could plead his defenses. Based on the stipulations contained in the Report, on 26 June 2008 Judge Calvin E. Murphy entered an order establishing that "[v]enue is proper in this action." This order appears final and contains none of the limiting language contained in the Report. Nothing in the record indicates any of the parties ever objected to this order, sought its modification or amendment, or have noticed this order for appeal or made it the subject of a writ of certiorari.

On 16 July 2008, Beddingfield moved for a stay of discovery because he "[was] the target in a federal criminal investigation related to the alleged computer or internet-facilitated conduct that gave rise to the instant civil action." Based on the request of the Assistant U.S.

1. North Carolina Business Court Rule 17.1(m) states that "[t]he parties' Case Management Meeting should cover . . . [a]n identification of any disputes concerning personal jurisdiction, subject matter jurisdiction, or venue, or a stipulation that no such controversies exist at the time of the Case Management Meeting." N.C. R. Bus. Ct. 17.1(m) (2011).

Attorney in charge of Beddingfield's criminal case, LendingTree did not oppose Beddingfield's motion.

On 23 July 2008, Defendant filed an answer alleging, *inter alia*, improper venue. Defendant's answer specifically stated "[v]enue is improperly laid pursuant to the forum selection provision in Anderson's Employment Agreement." The forum selection clause in Anderson's Employment Agreement states:

> Any and all disputes between the parties which may arise pursuant to this Agreement will be heard and determined solely before an appropriate federal court in Delaware, or, if not maintainable therein, then in an appropriate Delaware state court. The parties acknowledge that such courts have jurisdiction to interpret and enforce the provisions of this Agreement, and the parties consent to, and waive any and all objections that they may have as to, personal jurisdiction and/or venue in such courts.

Based on this forum selection clause, Defendant requested "[d]ismissal of the Complaint and all claims therein as against him." The same day, Defendant noticed depositions of two LendingTree employees. The depositions were scheduled for 5 August 2008. Additionally, Defendant submitted interrogatories and a document request to LendingTree.

On 4 August 2008, the Business Court ordered a stay "until the ongoing criminal investigation of Beddingfield is resolved." It also ordered Beddingfield to file written 60-day updates "as to the status of the federal criminal investigation." Due to the Business Court's stay: (i) the scheduled 5 August 2008 depositions did not occur; and (ii) LendingTree did not respond to Defendant's interrogatories until 7 January 2011.

The discovery stay lasted for over two years until 28 September 2010. During this time, Beddingfield filed timely status updates. On 16 December 2010, LendingTree dismissed its claims against Beddingfield with prejudice.

On 2 February 2011, LendingTree moved to amend its complaint. Specifically, it wanted to: (i) add more facts; (ii) join Anderson's wife (Vivienne Anderson), Keith Brent, and Brent's wife (Christine Brent); and (iii) add additional claims of relief for breach of employment contract, civil conspiracy, and constructive fraud.

On 11 March 2011, Defendant objected to LendingTree's motion to amend and applied for a determination as to his improper venue defense. *See* N.C. R. Civ. P. 12(d). Defendant's application included a

motion to dismiss under North Carolina Rules of Civil Procedure 12(b)(3) and 12(b)(6). On 24 October 2011, the Business Court held a hearing. On 17 April 2012, the Business Court entered an order: (i) denying Defendant's motion to dismiss for improper venue; and (ii) granting LendingTree's motion to amend. On 11 May 2012, Defendant filed timely notice of appeal to this Court of the court's order of 17 April 2012 only.

II. Jurisdiction & Standard of Review

[1] This Court has jurisdiction to hear Defendant's appeal of the Business Court's venue determination pursuant to N.C. Gen. Stat. § 7A-27(d) (2011). 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). Consequently, 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), Defendant has an appeal of right under N.C. Gen. Stat. § 7A-27(d)(1) (2011) because he appeals 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[.]" However, we do not have jurisdiction to review the Business Court's decision granting LendingTree's motion to amend its complaint since that decision does not affect a substantial right. *See Howard v. Ocean Trail Convalescent Ctr.*, 68 N.C. App. 495, 496, 315 S.E.2d 97, 99 (1984); *Funderburk v. Justice*, 25 N.C. App. 655, 656–57, 214 S.E.2d 310, 311 (1975). Consequently the part of Defendant's appeal regarding the order to amend is dismissed.

[2] Generally, a trial court's denial of a motion to change venue "will not be disturbed absent a showing of a manifest abuse of discretion." *Carolina Forest Ass'n, Inc. v. White*, 198 N.C. App. 1, 10, 678 S.E.2d 725, 732 (2009) (quotation marks and citation omitted). Similarly, we apply abuse of discretion review to "a trial court's decision concerning clauses on venue selection." *Gary L. Davis, CPA, P.A. v. Hall*, __ N.C. App. __, __, 733 S.E.2d 878, 880 (2012) (quotation marks and citation omitted). Nonetheless, North Carolina precedent has engaged in a fact-based *de novo* inquiry into whether a party waives an improper venue defense as a question of law. *See generally Hawley v. Hobgood*, 174 N.C. App. 606, 622 S.E.2d 117 (2005); *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978); *Jones v. Brinson*, 238 N.C. 506, 78 S.E.2d 334 (1953). Therefore, although we apply abuse of discretion review to general venue decisions, we apply *de novo* review to waiver arguments. *See id.* " 'Under a

de novo review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Analysis

[3] Defendant's appeal hinges on whether the forum selection clause in his Employment Agreement renders North Carolina venue improper. To this effect, Defendant makes three arguments: (i) the Business Court erred by determining he waived his improper venue defense; (ii) the forum selection clause rendered venue improper; and (iii) without proper venue, the Business Court did not have jurisdiction to allow LendingTree to amend its complaint.

Under North Carolina's General Statutes, actions "must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement." N.C. Gen. Stat. § 1-82 (2011). This is a default provision which is applied when the parties have provided no pre-dispute agreement for the place of a trial. However, a contractual forum selection clause can modify this default venue rule. *See Printing Services of Greensboro, Inc. v. Am. Capital Group, Inc.*, 180 N.C. App. 70, 74, 637 S.E.2d 230, 232 (2006). To this effect, our courts clarify that:

> [t]he general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive. Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as 'exclusive' or 'sole' or 'only' which indicate that the contracting parties intended to make jurisdiction exclusive.

Id.

As a result, our courts generally enforce mandatory forum selection clauses. *See, e.g., Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 403, 553 S.E.2d 84, 86 (2001) (enforcing a mandatory forum selection clause where the clause provided: "The parties . . . stipulate that the State courts of North Carolina shall have sole jurisdiction . . . and that venue shall be proper and shall lie exclusively in the Superior Court of Pitt County, North Carolina").

Still, defendants must affirmatively raise a venue objection to enforce a forum selection clause. Specifically, our courts describe that:

> [i]f the county designated for [venue] in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

N.C. Gen. Stat. § 1-83 (2011). When "demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. The provision in N.C. [Gen. Stat.] § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.' " *Miller*, 38 N.C. App. at 97, 247 S.E.2d at 279 (internal citations omitted).

Defendants can assert a venue objection in either: (i) a responsive pleading; or (ii) a motion to dismiss under N.C. R. Civ. P. 12(b)(3). *See* N.C. R. Civ. P. 12(b) ("No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."). If a defendant fails to object "by timely motion or answer the defense is waived." *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 154, 203 S.E.2d 769, 775 (1974).

Even if defendants properly raise a venue objection, they can impliedly waive the defense through their "actions or conduct." *Id.* at 154, 203 S.E.2d at 775–76; *see also Miller*, 38 N.C. App. at 97, 247 S.E.2d at 279 ("However, since venue is not jurisdictional it may be waived by express or implied consent, and a defendant's failure to press his motion to remove has been found to be a waiver." (internal citation omitted)). Factors indicating waiver include: (i) failure to unambiguously raise and pursue a venue objection; (ii) participation in litigation; and (iii) unnecessary delay. We now address each of these factors in turn.

First, parties must unambiguously raise and press venue objections. *See* 14D Charles A. Wright et al., *Federal Practice and Procedure* § 3826, at 549 (3d ed. 2007) ("Since an objection to venue is a personal privilege of the defendant, the burden is on the defendant to object in a proper and timely fashion if he thinks venue is improper. The failure to raise the objection properly is a waiver of the defense."); *id.* at 553 ("[A venue objection] "must be done with specificity."). Parties' failure to unambiguously raise and press threshold Rule 12(b) objections such as venue does not serve the interest of judicial economy. *See Centura Bank v. Miller*, 138 N.C. App. 679, 683, 532 S.E.2d 246, 249 (2000). Thus, a party's failure to unambiguously raise and press a venue objection constitutes a factor indicating waiver.

Second, precedent from both North Carolina and other jurisdictions holds defendants can waive a venue defense by participating in subsequent litigation. *See Shaw v. Stiles*, 13 N.C. App. 173, 175, 185 S.E.2d 268, 269 (1971); *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (holding that when defendants "participated in discovery, filed various motions, participated in a five day trial, and filed post-trial motions," they waived their venue objection).

Third, defendants may waive a venue defense by failing to expeditiously pursue their initial objection. *See* 14D Charles A. Wright et al., *Federal Practice and Procedure* § 3826, at 549 (3d ed. 2007); *see also Miller*, 38 N.C. App. at 98, 247 S.E.2d at 280. For instance, in *Miller*, almost a year passed between the defendant's Rule 12(b)(3) motion and the subsequent hearing. *Miller*, 38 N.C. App. at 98, 247 S.E.2d at 280. The defendant sought a continuance at the first hearing and did not even appear at the second hearing five months later. *Id.* There, we held the defendant waived her venue objection by delaying for over a year. *Id.*

Precedent from both North Carolina and other jurisdictions also indicates defendants' delay can constitute waiver when they simply seek to take advantage of the statute of limitations. For instance, in *Spearman v. Sterling S.S. Co.*, 171 F. Supp. 287 (E.D. Pa. 1959), a federal district court held the defendant waived his Rule 12(b) objection because "[a] delay in filing of fifteen months, especially when the statute of limitations has run, is not . . . using the keys to the courthouse door promptly." *Id.* at 289. Moreover, North Carolina precedent addresses this issue in an equitable estoppel context. *See generally Duke Univ. v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987) (holding equitable estoppel bars a statute of limitations defense when the defendant's attorney misled the plaintiff into delaying legal action); *Friedland v. Gales*, 131 N.C. App. 802, 509 S.E.2d 793 (1998) (holding equitable estoppel prevents a statute of limitations defense where the defendant in a wrongful death case intentionally concealed his identity).

In the present case, Defendant argues he did not waive his venue objection because: (i) his subsequent participation in the case was minimal; and (ii) the lengthy delay was largely due to a court-imposed stay. We disagree.

First, Defendant did not unambiguously raise and press his venue objection. In fact, Defendant *created* ambiguity at the early stages of litigation. In the Report, Defendant stipulated that "venue is proper in this action," but then immediately stated "[n]othing in this Report is intended to waive any of the objections or defenses Defendants may raise." To

make his objection clear and unambiguous, Defendant should not have stipulated that "venue is proper" in the Report, but instead should have noted his objection. *See* N.C. R. Bus. Ct. 17.1(m) ("The parties' Case Management Meeting should cover at least the following subjects: . . . An identification of any disputes concerning . . . venue, or a stipulation that no such controversies exist at the time of the Case Management Meeting.); N.C. R. Bus. Ct. 17.2 ("If the parties disagree on any issues in the Case Management Report, they shall nonetheless file a single Case Management Report that, in any areas of disagreement, states the views of each party.").

Additionally, Defendant did not press his venue objection by contesting the joint case management order holding "[v]enue is proper in this action." We acknowledge the Business Court entered the joint case management order before Defendant filed his answer. *See* N.C. R. Civ. P. 12(b) (stating that parties should raise venue objections in responsive pleadings). Nonetheless, if Defendant believed the Business Court erred in making a venue determination before he had the opportunity to file his answer, he should have sought immediate relief.

For instance, Defendant could have moved for relief under N.C. R. Civ. P. 60. Alternatively, Defendant could have immediately appealed the joint case management order to this Court. *See Gardner*, 300 N.C. at 719, 268 S.E.2d at 471 ("[T]here can be no doubt that a right to venue established by statute is a substantial right. Its grant or denial is immediately appealable." (internal citation omitted)). Consequently, Defendant's failure to unambiguously raise and press his venue objection is one factor indicating waiver.

The failure of Defendant to seek review of the Case Management Order in this appeal is problematic for him. Because he has not asked for relief from this order by notice of appeal or by writ, even if we agreed with Defendant, which we do not, we are not able to afford him the relief he seeks. If we were to reverse the trial court, this action would leave in place two conflicting orders on the same issue.

Second, Defendant argues his subsequent participation in discovery does not rise to the level of waiver. After Defendant filed his answer, he noticed two depositions and submitted several interrogatories and a document request to LendingTree. The depositions never occurred due to the subsequent stay. Defendant did not receive a response to his interrogatories and document request until after the Business Court lifted the stay in 2011.

In his appellate brief, Defendant cites several federal cases holding that limited discovery participation does not necessarily constitute waiver. *See Broad. Co. of the Carolinas v. Flair Broad. Corp.*, 892 F.2d 372, 374 (4th Cir. 1989) (holding that "participat[ion] in limited discovery, primarily the exchange of interrogatories and the noticing of depositions" does not waive a venue objection), *superseded by statute on other grounds*, 28 U.S.C. § 1391; *Jockey Int'l, Inc. v. M/V "Leverjusen Express"*, 217 F. Supp. 2d 447, 456 (S.D.N.Y. 2002) (holding that filing a cross-claim, impleading a third party, and participating in limited discovery does not waive a venue defense based on a forum-selection clause); *Shaw v. United States*, 422 F. Supp. 339, 341 (S.D.N.Y. 1976) (holding a venue objection was not waived when asserted six months after completion of discovery). However, Defendant's reliance on these cases is not persuasive for several reasons.

Notably, "with the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State." *Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001) (quotation marks and citation omitted); *see also Shepard v. Ocwen Federal Bank, FSB*, 172 N.C. App. 475, 479, 617 S.E.2d 61, 64 (2005) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive."). Also, North Carolina case law generally indicates that participation in litigation can waive a venue objection. *See Shaw*, 13 N.C. App. at 175, 185 S.E.2d at 269.

Furthermore, even if we consider the non-binding persuasiveness of the federal cases Plaintiff cites, federal case law makes clear that although discovery participation does not constitute waiver *per se*, it can constitute a factor supporting a waiver determination. *See Yeldell*, 913 F.2d at 539; *Fairhope Fabrics, Inc. v. Mohawk Carpet Mills*, 140 F. Supp. 313, 316 (D. Mass. 1956) (holding that when the defendant "availed itself of the power of discovery under the Federal Rules, by taking depositions, and maintaining the entire conduct of the proceedings," the defendant waived his venue objection); *Spearman*, 171 F. Supp. at 289 (recognizing that although taking depositions does not necessarily waive a venue objection, the court "was not laying down a general rule that a defendant may take depositions . . . without waiving his privilege."). Therefore, while we do not base our instant decision solely on Defendant's discovery participation, we recognize that his limited discovery participation is one factor indicating waiver.

Next, Defendant argues the Business Court improperly assigned him responsibility for "almost three years" of delay despite a court-imposed stay for the majority of that time. We disagree.

Given Defendant's argument, we first examine the scope of the Business Court's stay. On 16 July 2008, Beddingfield filed a "Motion to Stay Pending Deadlines and Memorandum in Support." In the motion, he requested the Business Court "stay all Court-imposed and discovery deadlines in the instant matter until the federal criminal investigation of Mr. Beddingfield is resolved." Alternatively, he requested the Business Court "issue protective orders and impose conditions which will serve to protect his interests in the instant matter and preserve his privilege against self-incrimination."

On 4 August 2008, the Business Court granted Beddingfield's motion. The order, in its entirety, reads:

> **THIS MATTER** is before the Court upon the Motion of Defendant Jarrod Beddingfield to stay all Court-imposed and discovery deadlines in the above-captioned case until the federal criminal investigation of Beddingfield is resolved.
>
> **IT APPEARS** to the Court that good cause exists to grant Defendant's Motion and that no party objects to the Motion.
>
> **WHEREFORE**, Defendant's Motion to Stay is **GRANTED**. This case is hereby stayed until the ongoing criminal investigation of Beddingfield is resolved. Beddingfield is **ORDERED** to update the Court in writing every 60 days (or sooner if circumstances warrant) as to the status of the federal criminal investigation.

Defendant now contends that because the order's decree states "[t]his case is hereby stayed," he could not pursue his venue objection during the stay. We do not find this argument convincing.

Reading the 4 August 2008 order in conjunction with Beddingfield's 16 July 2008 motion, we determine the order did not preclude Defendant from pursuing his venue objection. Specifically, Beddingfield's motion only contemplates a stay of discovery, not the entire case. Additionally, in its 17 April 2012 order denying Defendant's application for improper venue, the Business Court expressly stated, "While this Court stayed discovery in the case on August 4, 2008, the stay did not prevent Defendant from bringing and prosecuting his Application for Improper Venue." Lastly, we note that the Business Court often issues stays limited to discovery proceedings. *See*, *e.g.*, *Novo Nordisk Pharm. Indus.*, *Inc. v. Carolina Power and Light Co.*, No. 05 CVS 154, 2008 WL 4234091, at

*1 (N.C. Bus. Ct. 15 Sept. 2008); *Silverdeer, LLC v. Berton*, No. 11 CVS 3539, 2013 WL 1792524, at *1 (N.C. Bus. Ct. 24 Apr. 2013). Consequently, we view the language stating "[t]his case is hereby stayed" as a clerical oversight. *See* N.C. R. Civ. P. 60(a).

Although the language in the Business Court's stay order may have created confusion as to the stay's scope, this confusion does not relieve Defendant of his burden to expeditiously pursue his venue objection. During the stay's pendency, Defendant could have either: (i) filed his Rule 12(d) application; or (ii) objected to the Business Court's 26 June 2008 Joint Case Management Order stating "[v]enue is proper in this action." If the Business Court intended its 4 August 2008 order to stay *all* proceedings, it would have simply dismissed Defendant's application or motion as untimely. Unfortunately, Defendant did not pursue either of these courses of action.

Therefore, we determine Defendant delayed pursuing his venue objection from 21 July 2008 (when he filed his answer) until 11 March 2011 (when he filed his application for improper venue), a delay of almost three years. We now analyze whether this delay constitutes waiver.

Our previous case law provides some guidance in this endeavor. In *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E.2d 464 (1975),[2] and *Hawley*, 174 N.C. App. 606, 622 S.E.2d 117,[3] we held that delays of four months and nine months, respectively, did not constitute waiver. In *Johnson v. Hampton Industries, Inc.*, 83 N.C. App. 157, 349 S.E.2d 332 (1986),[4] and *Miller*, 38 N.C. App. 95, 247 S.E.2d 278,[5] we held that delays of ten months and over a year, respectively, did constitute waiver. While we decline to now establish a precise point at which delay rises to the

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2. In *Swift & Co.*, the defendants waited four months after filing their answer to file a subsequent notice of hearing on change of venue. *Id.* at 494, 216 S.E.2d at 465.

3. In *Hawley*, the defendant simultaneously filed an answer and motion for change of venue on 18 December 2003. *Id.* at 607, 622 S.E.2d at 118. He then filed a Notice of Hearing for Motion to Change Venue on 22 September 2004. *Id.* There, we reversed the trial court's ruling that the defendant waived his venue defense because "[t]he nine month delay, standing alone, does not constitute an implied waiver." *Id.* at 610, 622 S.E.2d at 120.

4. In *Johnson*, the defendant moved for a change of venue in his answer, but the motion was not heard until ten months later. *Id.* at 158, 349 S.E.2d at 333. Since the defendant could have obtained a hearing at several court sessions over the intervening months, we affirmed the trial court's decision that the defendant waived his venue defense. *Id.*

5. In *Miller*, almost a year passed between the defendant's Rule 12(b) motion and the hearing date. *Miller*, 38 N.C. App. at 98, 247 S.E.2d at 280. The defendant sought a continuance and failed to appear at the second hearing five months later. *Id.* There, we held the defendant waived her venue objection through inaction. *Id.*

level of waiver, these cases make clear that Defendant's delay of almost three years undoubtedly indicates waiver.

Lastly, we note the likelihood that Defendant, having delayed pursuing his venue objection for almost three years, now simply intends to take advantage of the statute of limitations in his desired venue. For instance, LendingTree's claims of breach of fiduciary duty, trespass to chattels, and conversion all have three-year statutes of limitations in both North Carolina and Delaware. *See* N.C. Gen. Stat. § 1-52 (2011); 10 Del. C. § 8106. Therefore, upholding Defendant's waiver objection could deprive LendingTree of any substantive remedy. *See Spearman*, 171 F. Supp. at 289; *Stainback*, 320 N.C. at 341, 357 S.E.2d at 693; *Friedland*, 131 N.C. App. at 809, 509 S.E.2d at 798.

Consequently, we determine Defendant waived his venue defense when he delayed pursuing his objection for almost three years. Given this conclusion, we decline to address Defendant's other arguments regarding venue.

IV. Conclusion

Defendant waived his venue defense because: (i) he did not unambiguously raise and press his objection; (ii) he subsequently participated in litigation; and (iii) he delayed pursuing his defense for almost three years. Therefore, the Business Court's order is

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

JOSEPH LENTZ, PLAINTIFF
v.
PHIL'S TOY STORE AND UTICA NATIONAL INSURANCE, DEFENDANTS

No. COA12-1395

Filed 6 August 2013

1. Workers' Compensation—jurisdiction of Commission—occupational disease claim—six years old—no medical opinion

The Industrial Commission had jurisdiction over a six-year-old workers' compensation claim where plaintiff contended that his right to bring an occupational disease claim did not begin until he obtained a medical opinion that the disease was work-related. Obtaining the advice of a competent medical professional starts the two-year time frame in which a claim must be brought, but a claimant is not precluded from filing a claim prior to receiving competent medical advice.

2. Workers' Compensation—failure to prosecute claim—dismissal

The Industrial Commission did not err by dismissing a six-year old workers' compensation claim with prejudice where plaintiffs claimed that the delays were reasonable because he did not have competent medical authority. Plaintiff failed to appear at hearings, failed to obtain competent medical authority, and failed to prosecute his claim. Defendants were prejudiced by spending considerable time and resources in defense of the claim, and there was no sanction short of dismissal that would suffice because defendants were entitled to a resolution of the case.

Appeal by plaintiff from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission filed 3 July 2012. Heard in the Court of Appeals 27 March 2013.

Charles D. Mast for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Kari A. Lee, Matthew J. Carrier, & M. Duane Jones, for defendant-appellants.

BRYANT, Judge.

Where the North Carolina Industrial Commission had subject matter jurisdiction over plaintiff's workers' compensation claim, and where

plaintiff failed to prosecute his claim, we affirm the Commission's dismissal of plaintiff's claim with prejudice.

Facts and Procedural History

This claim arose on or about 18 September 2006, when Joseph Lentz ("plaintiff") filed a Form 18 with the North Carolina Industrial Commission requesting workers' compensation, alleging an occupational disease due to exposure during his employment to the chemical toluene. Plaintiff alleged that the last date of injurious exposure was 31 May 2005.[1] Phil's Toy Store and Auto – plaintiff's employer, and their insurer, Utica National Insurance, (collectively "defendants") responded by filing a Form 61 Denial of Workers' Compensation claim on 2 October 2006.

Defendants filed a motion to dismiss in 2007, which was denied by the Commission in an order dated 23 October 2007. This 23 October 2007 order allowed plaintiff 60 days to update defendants as to his intention to pursue the claim. On 16 April 2008, defendants filed a motion to dismiss plaintiff's claim with prejudice. Plaintiff filed a Form 33 request for a hearing on 22 April 2008, to which defendants responded by filing a Form 33R on 30 April 2008. On 18 September 2008, plaintiff filed a motion for voluntary dismissal without prejudice, noting that plaintiff's expert, Dr. Darcey stated, "it is more likely than not that plaintiff's symptoms did not result from toluene exposure[.]" Plaintiff further stated that he could not go forward without expert testimony and would need a year to obtain a witness capable of providing such. The Commission allowed plaintiff's motion on 24 October 2008, leaving plaintiff one (1) year to re-file his claim.

On 28 July 2009, ten months after plaintiff's claim was voluntarily dismissed without prejudice, plaintiff filed another Form 33 request for hearing. Defendants filed another Form 33R on 3 August 2009. The case, scheduled for hearing on 21 October 2009, was temporarily removed from the docket to allow plaintiff time to retain counsel and to obtain the medical opinion of another doctor. On 25 November 2009, defendants filed a Form 33 request for a hearing and a motion to dismiss plaintiff's claim with prejudice. Upon motion of plaintiff's new counsel, Deputy Commissioner Robert Rideout issued an order on 15 February 2010 stating that the matter was to be removed from the regular hearing docket and reset on the Special Set docket.

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1. Throughout the record and briefs are references to March 2005 as the last date of exposure. However, plaintiff's Form 18 has "5/31/2005" as the last date of exposure.

On 29 April 2010, a hearing on the matter was held before Deputy Commissioner George Glenn. Plaintiff's counsel appeared, however plaintiff was not present. Defendants, defendants' counsel, and a representative from the employer who was available to testify, were also present. Plaintiff's counsel requested a 90-day extension of time to obtain a medical opinion, which was granted, and defendants' motion to dismiss with prejudice was denied. Thereafter, plaintiff requested and received two additional extensions of time. On 15 November 2010, defendants renewed their motion to dismiss with prejudice. At the Special Set hearing on 16 May 2011, defendants appeared with counsel and argued their motion to dismiss. Plaintiff's counsel appeared, again without plaintiff, and argued that the Industrial Commission did not have subject matter jurisdiction over this case. In an order filed 18 July 2011, plaintiff's claim was dismissed by Deputy Commissioner George Glenn.

Plaintiff appealed to the Full Commission (the Commission), which filed an Opinion and Award on 3 July 2012, affirming the opinion of Deputy Commissioner Glenn and dismissing plaintiff's claim with prejudice. Plaintiff appeals to this Court.

On appeal, plaintiff raises the following issues: (I) whether the Commission had subject matter jurisdiction over plaintiff's claim; and (II) whether the Commission erred by dismissing plaintiff's claims with prejudice.

Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citation omitted).

However, as to a jurisdictional question, this Court is not bound by the findings of fact of the lower tribunal. This Court has the duty to make its own independent facts as to jurisdiction. *Richards v. Nationwide Homes*, 263 N.C. 295, 303, 139 S.E.2d 645, 651 (1965).

I

[1] First, we consider plaintiff's initial question and determine whether the Commission had subject matter jurisdiction over plaintiff's occupational disease claim.

Within the meaning of the Workers' Compensation Act, included in the occupational diseases is the following:

> [a]ny disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. Stat. § 97-53(13) (2011). "The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be." N.C. Gen. Stat. § 97-58(c) (2011).

Plaintiff contends that his right to bring an occupational disease claim is controlled by the statute of limitations in section 97-58(c) and does not begin until he has been advised by competent medical authority of the work-related cause of his disease or injury, and since he had not been able to obtain such advice, the Commission lacked subject matter jurisdiction over his claim. In support of his contention plaintiff cites to the following statement in *McCubbins v. Fieldcrest Mills, Inc.*:

> Though the two year time limit for timely filing is a jurisdictional requisite, without which the Industrial Commission may not consider a workers' compensation claim, the time does not begin to run against occupational disease claims until the employee is informed by competent medical authority of the nature and work-related cause of the disease.

79 N.C. App. 409, 412, 339 S.E.2d 497, 498 (1986) (citation omitted). Plaintiff's contention is based on the faulty premise that his *right* to bring an occupational disease claim does not begin until he has obtained a medical opinion that the disease is work related. In other words, plaintiff is contending that a valid occupational disease claim cannot begin until a medical opinion affirming causation is obtained. However, while, as all parties acknowledge, it is "difficult to imagine a scenario in which a claimant would actually prevail" absent a medical opinion on causation, such medical opinion is not required prior to filing an occupational disease claim. Obtaining the advice of a competent medical professional as contemplated by section 97-58(c) starts the two-year time frame in which a claim must be brought or the claimant risks losing the opportunity to do so. A claimant is not precluded from filing a claim prior to receiving competent medical advice, which plaintiff should know as that

is exactly what plaintiff did; he filed his claim before receiving competent medical advice regarding causation of his occupational disease, and in so doing invoked the jurisdiction of the Commission.

Our Supreme Court has stated, "[w]e have previously explained the context of the workers' compensation claim: 'The claim is the right of the employee, *at his election*, to demand compensation for such injuries as result from an accident.' " *Gore v. Myrtle/Mueller*, 362 N.C. 27, 34, 653 S.E.2d 400, 406 (2007) (quoting *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953)) (emphasis added). Once plaintiff elected to file his claim, "the jurisdiction of the Commission, as a judicial agency of the State, is invoked." *Id.* at 35, 653 S.E.2d at 406. A statute of limitations is not designed to prohibit a plaintiff from bringing a claim at its outset, rather it "is to afford security against stale demands[.]" *Raftery v. Wm. C. Vick Const. Co.*, 291 N.C. 180, 191, 230 S.E.2d 405, 411 (1976) (citations omitted).

It is noteworthy that in his reply brief, plaintiff acknowledges the "Commission can assert its jurisdiction over the claim that plaintiff has already filed prior to obtaining a competent medical opinion, even though such claim may not be valid." Plaintiff goes on to assert that unless he files a valid claim (which he maintains can only be done after obtaining a competent medical opinion) the Commission cannot assert jurisdiction over nor bar the new and separate claim.

Plaintiff's main concern appears to center around the right to bring a new claim upon receipt of a competent medical opinion. However, because that issue is not squarely before us, we do not decide whether, upon receipt of competent medical authority, plaintiff would be allowed to bring another occupational disease claim against defendants in the Industrial Commission. As to the question squarely before us: whether the Commission had jurisdiction over plaintiff's instant claim, the answer is yes.

As the Commission stated in its order, "[p]laintiff has brought this claim before the Industrial Commission [six] years ago, and has repeatedly affirmed, submitted to, and taken advantage of the jurisdiction of the Commission." Based on our review of the facts in the record, we affirm the Commission's ruling that it had jurisdiction over plaintiff's claim. Accordingly, plaintiff's attempt to turn the statute of limitations on its head to support his jurisdictional question is overruled.

II

[2] Plaintiff next argues that, assuming the Commission had jurisdiction, it nonetheless erred by dismissing plaintiff's claim with prejudice.

"While '[t]he Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act,' they may provide guidance in the absence of an applicable rule under the Workers' Compensation Act. *Harvey v. Cedar Creek BP*, 149 N.C. App. 873, 875, 562 S.E.2d 80, 81 (2002) (quoting *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985)); *see e.g.*, *Lee v. Roses*, 162 N.C. App. 129, 132, 590 S.E.2d 404, 407 (2004) ("Neither the Workers' Compensation Act nor the Industrial Commission Rules provide further direction as to when a finding of failure to prosecute is proper and what types of sanctions are appropriate under the circumstances. Thus, this Court looks to G.S. § 1A–1, Rule 41(b) for guidance."). Civil Procedure Rule 41(b) allows a defendant to move for dismissal of a case for failure of plaintiff to prosecute, and requires a determination that "plaintiff or his attorney 'manifest[s] an intent to thwart the progress of [the] action' or 'engage[s] in some delaying tactic." *Lee*, 162 N.C. App. at 132, 590 S.E.2d at 407 (quoting *Spencer v. Albemarle Hospital*, 156 N.C. App. 675, 678, 577 S.E.2d 151, 153 (2003)).

> Before a civil case may be involuntarily dismissed with prejudice for failure to prosecute pursuant to N.C. Gen. Stat. § 1A–1, Rule 41(b) (2003), the trial court must address the following three factors in its order:
>
> > (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant [caused by the plaintiff's failure to prosecute]; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.

Id. at 132-33, 590 S.E.2d at 407 (citation omitted). A trial court's findings of fact on these factors are conclusive on appeal if there is competent evidence to support the findings. *Id.* at 132, 590 S.E.2d at 407.

In its order dismissing plaintiff's claim the Commission entered numerous findings of fact, most of which are related in the Facts and Procedural History portion of this opinion. In addition, the Commission entered the following pertinent findings of fact:

> 13. Plaintiff never raised a jurisdictional issue at any time prior to the May 16, 2011 Special Set Hearing. Instead, plaintiff has invoked the jurisdiction of the Industrial Commission by filing his claim, filing motions, and receiving extensions of time in response to those motions.

14. Despite multiple extensions and continuances, plaintiff has failed to prosecute or otherwise substantiate his workers' compensation claim since filing his Form 18 on September 27, 2006.

15. Plaintiff has failed to comply with prior Orders of the Industrial Commission requiring him to substantiate his claim.

16. The Industrial Commission file is replete with motions, correspondence, and hearing transcripts documenting the time and effort defendants have expended related to defending plaintiff's claim and preparing for multiple hearings. Witnesses for defendants have been present at two hearings in Durham, North Carolina. Plaintiff did not attend these hearings, and none of the hearings went forward, despite the fact that defendants and the Deputy Commissioner were ready to hear this contested claim on the merits.

And, the following pertinent conclusions of law:

4. Plaintiff has deliberately and unreasonably failed to prosecute his claim. He has had an ample opportunity to address his failure to prosecute claim and pursue a hearing on the merits. Defendants have participated in the defense of this claim since plaintiff's Form 18 was filed, and have prepared for two hearings prompted by two Form 33s filed by (or on behalf of) plaintiff. Given the long procedural history of this claim, the prior Orders of the Industrial Commission, and the fact that plaintiff has failed to appear at two Special Set Hearings (after his counsel requested a hearing in such a forum), the Full Commission finds and concludes that plaintiff has deliberately and unreasonably failed to prosecute his claim, despite requiring the attention, time, and expense of defendants and the Industrial Commission.

5. Plaintiff's jurisdictional argument, first raised on May 16, 2011, has no merit. Plaintiff filed multiple Form 33 Requests for Hearing. Plaintiff brought this claim before the Industrial Commission five years ago, and has repeatedly affirmed, submitted to, and taken advantage of the jurisdiction of the Commission. The Industrial

Commission has subject matter jurisdiction over plaintiff and his claim in accordance with section 97-58 of the Workers' Compensation Act, and can therefore render any judgment that is proper.

6. Plaintiff's failure to prosecute this claim has resulted in prejudice to defendants, who have expended considerable time and resources attempting to defend the claim. They have repeatedly prepared for hearing and appeared at hearings with witnesses, and plaintiff has failed to appear, even when ordered to appear.

7. Given the procedural history of this claim and plaintiff's failure to comply with prior Orders of the Commission, there is no sanction short of dismissal with prejudice that will suffice in this case. If this claim is not dismissed with prejudice, defendants will continue to be prejudiced by costs associated with defending a claim that plaintiff has not prosecuted for the past six years, and these costs could continue indefinitely. Defendants are entitled to a resolution of this claim, and have participated reasonable and actively to reach a resolution by dismissal or by a hearing on the merits.

8. Following notice and an opportunity to be heard, plaintiff failed to show the Commission any reason why his claim should not be dismissed.

On this record, we determine that the Commission's findings of fact were supported by competent evidence and its conclusions of law were supported by its findings of fact. In making this determination we review the factors that comprise the *Lee* test.

We find plaintiff's argument on appeal that any delays in prosecuting this claim were because plaintiff did not have competent medical authority who had advised him of a work related medical condition and therefore such delays were reasonable, to be wholly without merit. Plaintiff's claim was first filed in September of 2006, and plaintiff failed to appear at the two hearings that he requested, whereas defendants were present and prepared to litigate the claim on both occasions. Plaintiff has had *over six years* since filing his claim to find competent medical authority to provide information to support his claim. Plaintiff's failure to appear at hearings, failure to obtain competent medical authority regarding his claim, and failure to prosecute his claim for six years is sufficient competent evidence to support the findings of fact and the conclusions of

law of the Commission that plaintiff has unreasonably delayed the matter, satisfying the first prong of the *Lee* test.

The second prong of the *Lee* test examines prejudice to the defendants. Here, defendants have spent considerable time and resources in defense of this claim. Defendants have filed multiple documents and have appeared at multiple hearings per plaintiff's request. Whereas, plaintiff has failed to appear, even when so ordered. Competent evidence in the record supports the Commission's finding that the file in plaintiff's case is "replete with motions, correspondence, and hearing transcripts documenting the time and effort defendants have expended related to defending plaintiff's claim and preparing for multiple hearings." This finding supports the conclusion of the Commission that defendants have been prejudiced due to plaintiff's unreasonable delay.

The last prong of the *Lee* test requires a reason that sanctions other than dismissal would not suffice. *Id.* at 133, 590 S.E.2d at 407. The Commission's conclusion that "[g]iven the procedural history of this claim and plaintiff's failure to comply with prior Orders of the Commission, there is no sanction short of dismissal with prejudice that will suffice" is supported by competent evidence in the record. This Court agrees with the Commission that defendants are entitled to a resolution in this case; defendants have been and will continue to be prejudiced if this claim, which they have been defending for nearly seven years, is allowed to continue indefinitely. Therefore, no sanction other than dismissal will suffice. As all three prongs of the *Lee* test are satisfied, showing plaintiff has deliberately or unreasonably failed to prosecute his claim, we affirm the order of the Commission dismissing plaintiff's claim with prejudice.

Affirmed.

Judges HUNTER, Jr., Robert N., and McCULLOUGH concur.

VIRGINIA SIMMONS, PLAINTIFF
v.
KROSS LIEBERMAN & STONE, INC., DEFENDANT

No. COA13-10

Filed 6 August 2013

1. Unfair Trade Practices—unfair debt collection—collection agency

Plaintiff consumer's unfair debt collection practices claim was reviewed under Chapter 58 because it specifically alleged that defendant was a collection agency permitted and licensed by the N.C. Department of Insurance.

2. Unfair Trade Practices—unfair debt collection—actual damages—civil penalty

Plaintiff consumer failed to state a claim for actual damages under N.C.G.S. § 58-70-130(a) in an unfair debt collection practices case, and the trial court properly dismissed that portion of plaintiff's complaint. However, plaintiff sufficiently stated a claim for a civil penalty under N.C.G.S. § 58-70-130(b), and the trial court's dismissal of that portion of plaintiff's complaint was reversed.

Appeal by Plaintiff from order entered 16 August 2012 by Judge Orlando Hudson in Durham County Superior Court. Heard in the Court of Appeals 25 April 2013.

Law Office of Robert B. Jervis, P.C., by Robert B. Jervis, for Plaintiff.

Hans H. Huang, PLLC, by Hans H. Huang, for Defendant.

DILLON, Judge.

Virginia Simmons (Plaintiff) appeals from the trial court's order dismissing her claim for unfair debt collection practices against Kross Lieberman & Stone, Inc. (Defendant) for failure to state a claim upon which relief may be granted. We affirm in part and reverse in part.

I. Factual & Procedural Background

Plaintiff, a consumer, filed this action against Defendant, a debt collection agency, to recover both actual damages and civil penalties pursuant to N.C. Gen. Stat. § 58-70-130 (2011).

In 2010, Plaintiff contracted with Home Design Studio, LLC (Home Design) to perform certain renovations on her home in Durham County. When the renovations had been completed, Plaintiff refused to pay Home Design the amount reflected in the final invoice for the project. As a result, Home Design engaged Defendant to collect this amount from Plaintiff. Plaintiff engaged an attorney to represent her in the matter.

Subsequently, Plaintiff and Home Design became involved in a lawsuit concerning the final invoice and other matters pertaining to their contract. Plaintiff and Home Design ultimately reached a settlement through mediation and voluntarily dismissed all of their claims and counterclaims with prejudice on 3 June 2011.

On 12 September 2011, Plaintiff commenced the present action against Defendant, alleging in her complaint that Defendant had engaged in "unfair practices" in violation of N.C. Gen. Stat. § 58-70-115(3) by contacting Plaintiff on Home Design's behalf after being informed that Plaintiff was represented by counsel. The complaint alleges, *inter alia*, the following:

> 7. On November 23, 2010 plaintiff's attorney notified defendant that he represented plaintiff and requested that any further communication regarding the debt be made through her attorney. . . .
>
> 8. On January 24, 2011, ignoring plaintiff's attorney's previous letter, defendant sent plaintiff another demand for payment. . . . Defendant's conduct violates the provisions of N.C.G.S. 58-70-115(3).
>
> 9. As a proximate result of defendant's unfair practice, plaintiff is informed and believes that her actual damages will exceed $1,000.00. Plaintiff will file at a later date a statement of monetary relief sought in this action . . . .
>
> 10. As a proximate result of defendant's unfair practice, plaintiff is entitled to recover a civil penalty of at least $500.00 from defendant.

On 14 November 2011, Defendant filed a Rule 12(b)(6) motion to dismiss Plaintiff's complaint for failure to state a claim upon which relief may be granted. The matter came on for hearing in Durham County Superior Court on 11 July 2012. On 16 August 2012, the trial court entered an order granting Defendant's motion to dismiss. From this order, Plaintiff appeals.

II. Analysis

The following standard governs our review of the trial court's order dismissing Plaintiff's complaint:

> A motion to dismiss under N.C. R. Civ. P. 12(b)(6) is the usual and proper method of testing the legal sufficiency of the complaint. In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. Dismissal is proper, however, 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.

Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 784, 618 S.E.2d 201, 203-04 (2005) (citations and quotation marks omitted).

[1] As a threshold matter, we note that the parties dispute which provisions of our General Statutes govern Plaintiff's unfair practices claim. While Plaintiff alleges that she is entitled to relief under Article 70, Chapter 58 of our General Statutes, Defendant counters that "Chapter 58, Article 70 of the North Carolina General Statutes is not applicable when pursuing a claim covered by the North Carolina Debt Collection Act [hereinafter, the NCDCA]." We believe that Defendant's contention is incorrect.

The NCDCA is codified in Article 2, Chapter 75 and applies to the debt collection efforts of "any person engaging, directly or indirectly, in debt collection from a consumer *except those persons subject to the provisions of Article 70, Chapter 58 of the General Statutes*." N.C. Gen. Stat. § 75-50(3) (2011) (emphasis added). Article 70, Chapter 58 specifically governs debt collection practices undertaken by any entity operating as a "*collection agency*" as defined under N.C. Gen. Stat. § 58-70-15 (2011). Thus, the NCDCA regulates the debt collection activities of all entities except collection agencies regulated under Chapter 58. Here, Plaintiff's complaint specifically alleges that Defendant is "a collection agency permitted and licensed by the N.C. Department of Insurance as

requred [sic] by Chapter 58 of the N.C. General Statutes." Accordingly, we review Plaintiff's unfair practices claim under Chapter 58.

[2] Turning to the sufficiency of the complaint, Plaintiff alleges that Defendant engaged in unfair practices in violation of N.C. Gen. Stat. § 58-70-115(3) (2011), which defines "unfair practices" to include any communication by a debt collection agency "with a consumer whenever the collection agency has been notified by the consumer's attorney that he represents said consumer." *Id.* Specifically, the complaint alleges that Plaintiff's attorney notified Defendant by letter dated 23 November 2010 that Plaintiff was represented by counsel and "that any further communication regarding the debt be made through her attorney." The complaint further alleges that notwithstanding this notification Defendant sent Plaintiff a letter demanding payment on 24 January 2011.[1] We conclude that these allegations are sufficient to state a claim for unfair practices under N.C. Gen. Stat. § 58-70-115(3).

With respect to Plaintiff's requested relief, Plaintiff's complaint seeks both actual damages under N.C. Gen. Stat. § 58-70-130(a) and a civil penalty under N.C. Gen. Stat. § 58-70-130(b). Although N.C. Gen. Stat. § 58-70-130(a) permits a claimant to recover actual damages as a result of a collection agency's violation of N.C. Gen. Stat. § 58-70-115(3), the only allegation in Plaintiff's complaint concerning actual damages is that "[a]s a proximate result of defendant's unfair practice, plaintiff is informed and believes that her actual damages will exceed $1,000.00."[2] This allegation consists of merely a legal conclusion, which we do not accept as true for purposes of reviewing a Rule 12(b)(6) dismissal. *See Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). Plaintiff does not allege *any* facts indicating how she was injured or otherwise incurred damages as a result of Defendant's conduct. This shortcoming renders Plaintiff's complaint insufficient to state a claim for actual damages under N.C. Gen. Stat. § 58-70-130(a), and we conclude that the trial court correctly dismissed this portion of Plaintiff's complaint.

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1. We note Defendant's contention that this communication was a permissible form of contact under N.C. Gen. Stat. § 75-55(3) (2011), a provision of the NCDCA which authorizes a creditor to communicate with a consumer – even after receiving notice that the consumer is represented by counsel – if the communication qualifies as a "statement of account used in the normal course of business." *Id.* As previously discussed, however, the NCDCA does not govern Plaintiff's unfair practices claim, and Article 70, Chapter 58 provides no such exception for debt collection agencies.

2. We note that Plaintiff's complaint also provides that "Plaintiff will file at a later date a statement of monetary relief in this action." Based upon the record before us, however, there is no indication that such a statement was ever filed.

The question remains whether the absence of actual injury forecloses Plaintiff's ability to recover a civil penalty under N.C. Gen. Stat. § 58-70-130(b), which provides as follows:

> Any collection agency which violates Part 3 of this Article with respect to any debtor shall, in addition to actual damages sustained by the debtor as a result of the violation, also be liable to the debtor for a penalty in such amount as the court may allow, which shall not be less than five hundred dollars ($500.00) for each violation nor greater than four thousand dollars ($4,000) for each violation.

N.C. Gen. Stat. § 58-70-130(b) (2011).

In *Reid v. Ayers*, 138 N.C. App. 261, 531 S.E.2d 231 (2000), upon which Defendant relies, we held that a plaintiff's claim for relief under the NCDCA will not survive absent proof of actual injury. *Id.* at 266, 531 S.E.2d at 234-35. Whether this same principle applies to a claim brought against a collection agency under Chapter 58, however, appears to be a question of first impression for this Court.[3] The *Reid* court concluded that our General Assembly intended for NCDCA claims - brought under Article 2, Chapter 75 – to be subject to the same general requirements that apply to unfair and deceptive trade practices (UDTP) claims brought under Article 1, Chapter 75. *Reid*, 138 N.C. App. at 266, 531 S.E.2d at 234-35. In so holding, we reasoned as follows:

> Although our legislature does not specifically state that [NCDCA claims are] subject to the more generalized requirements of section 75-1.1, we conclude that was their intent. The final section [of the NCDCA] states:
>
> The specific and general provisions of this Article [(the NCDCA)] shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article. Notwithstanding the provisions of G.S. 75-15.2 and G.S. 75-16, in private

3. We note that federal courts addressing this precise issue have allowed for recovery of statutory damages under N.C. Gen. Stat. § 58-70-130(b) notwithstanding the claimant's failure to prove actual damages. *See, e.g.*, *Barnett v. Creditors Specialty Serv., Inc.*, 2013 WL 1629090 (W.D.N.C. Apr. 16, 2013); *In re Baie*, 2011 WL 1257148 (Bankr. E.D.N.C. Mar. 30, 2011). We recognize that although these decisions are not binding on this Court, *Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001), they have persuasive value for purposes of our analysis in the present case. *See Huggard v. Wake County Hosp. Sys., Inc.*, 102 N.C. App. 772, 775, 403 S.E.2d 568, 570 (1991) (recognizing that a federal court's interpretation of North Carolina law has value as persuasive authority).

> actions or actions instituted by the Attorney General, civil penalties in excess of two thousand dollars ($2,000) shall not be imposed, nor shall damages be trebled for any violation under this Article.
>
> N.C. Gen. Stat. § 75-56 (1999). By specifically referencing [in section 75-56] the generalized proscription in section 75-1.1, we conclude the legislature intended that Article 2 be limited by the same requirements applicable to those proscriptions. Furthermore, had our legislature not intended for Article 2 to be governed by the generalized provisions of Article 1, it would not have needed to refer to Article 1's allowance for treble damages when limiting the remedy for Article 2 violations to $2000. Thus, we conclude that once the three threshold requirements in section 75-50 are satisfied, a claim for unfair debt collection practices must then meet the three generalized requirements found in section 75-1.1:(1) an unfair act (2) in or affecting commerce (3) *proximately causing injury*.

Id. at 265-66, 531 S.E.2d at 234-35 (emphasis added) (citation omitted). N.C. Gen. Stat. § 58-70-130, the provision under which Plaintiff seeks a civil penalty in the instant case, includes the following language:

> The specific and general provisions of Part 3 of this Article shall constitute unfair or deceptive acts or practices proscribed herein or by G.S. 75-1.1 in the area of commerce regulated thereby; provided, however, that, notwithstanding the provisions of G.S. 75-16, the civil penalties provided in this section shall not be trebled. Civil penalties in excess of four thousand dollars ($4,000) for each violation shall not be imposed.

N.C. Gen. Stat. § 58-70-130(c) (2011). We recognize the similarities between the language in this provision and that set forth in N.C. Gen. Stat. § 75-56, which served as the basis for our holding in *Reid*. There are, however, two key distinctions: First, N.C. Gen. Stat. § 75-56 provides that the provisions of Chapter 75, Article 2 "shall *exclusively* constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article[,]" while N.C. Gen. Stat. § 58-70-130(c) omits the word "exclusively." Second, N.C. Gen. Stat. § 58-70-130(c) provides that violations of Article 70, Chapter 58 "shall constitute unfair or deceptive acts or practices *proscribed herein* or by G.S. 75-1.1 . . . [,]" while N.C. Gen. Stat. § 75-56 provides that a

violation of the NCDCA shall "exclusively" constitute a violation of N.C. Gen. Stat. § 75-1.1. Thus, we do not believe that our General Assembly intended that a claimant be required to prove the prerequisites for a UDTP claim under Article 1, Chapter 75 – including actual injury – to recover the civil penalty described under N.C. Gen. Stat. § 58-70-130(b). This distinction, we believe, is indicative of our General Assembly's intent to hold debt collection agencies regulated under Chapter 58 to a higher standard in undertaking their debt collection practices than the standard to which other entities engaged in debt collection are held under the NCDCA. Accordingly, we hold that Plaintiff's failure to allege actual injury does not preclude her from recovering a civil penalty under N.C. Gen. Stat. § 58-70-130(b), and, therefore, that the trial court erred in dismissing this portion of Plaintiff's complaint.[4]

III. Conclusion

For the foregoing reasons, we hold that Plaintiff has failed to state a claim for actual damages under N.C. Gen. Stat. § 58-70-130(a), and we affirm the trial court's dismissal of that portion of Plaintiff's complaint. We further hold, however, that Plaintiff has sufficiently stated a claim for a civil penalty under N.C. Gen. Stat. § 58-70-130(b), and we accordingly reverse the trial court's dismissal of that portion of Plaintiff's complaint.

AFFIRMED IN PART; REVERSED IN PART.

Judges ELMORE and GEER concur.

4. We note Defendant's contention that the settlement between Plaintiff and Home Design precluded Plaintiff from bringing this action because there was no longer a valid "debt" as required in order to seek relief under the NCDCA. *Davis Lake Cmty. Ass'n, Inc. v. Feldmann*, 138 N.C. App. 292, 295, 530 S.E.2d 865, 868 (2000); *see also* N.C. Gen. Stat. § 75-50(2) (2011) (defining "debt" for purposes of the NCDCA). As previously discussed, however, the NCDCA does not apply to Plaintiff's claim against Defendant, and we reject this contention as meritless.

STATE OF NORTH CAROLINA
v.
EVAN MACNAUGHTON BACON, JR.

No. COA12-1486

Filed 6 August 2013

1. Sentencing—aggravating factor—same element supporting involuntary manslaughter charge

The trial court erred in an involuntary manslaughter case by using the aggravating factor under N.C.G.S. § 15A-1340.16(d)(8), knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, to sentence defendant in the aggravated range. The evidence used to support the aggravating factor was the same evidence used to support an element of the charge. The case was remanded for a sentencing hearing.

2. Sentencing—mitigating factors—good character and reputation—positive employment history

The trial court did not commit reversible error in an involuntary manslaughter case by not finding the existence of statutory mitigating factors under N.C.G.S. § 15A-1340.16(e)(12), good character and good reputation in the community, and N.C.G.S. § 15A-1340.16(e)(19), positive employment history.

Appeal by defendant from judgment entered 27 August 2012 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

David Belser for defendant-appellant.

HUNTER, Robert C., Judge.

Evan Bacon ("defendant") appeals from the judgment entered upon his guilty plea to involuntary manslaughter. Defendant contends that the trial court erred in finding one statutory aggravating factor and in not finding the existence of two statutory mitigating factors. After careful review, we find no error in the trial court's decision in not finding the

existence of mitigating factors N.C. Gen. Stat. §§ 15A-1340.16(e)(12) and (e)(19), but we reverse the trial court's finding of the aggravating factor and remand for resentencing.

Background

On 18 January 2012, defendant was the cause of a high-speed automobile collision. The investigating officers determined that defendant was driving between 84 and 95 m.p.h. in a 50 m.p.h. zone when he collided with another vehicle, which then struck the car of Dennis Ray Stauffer, who died at the scene. Blood testing revealed that defendant was not impaired at the time of the collision. Defendant was charged with involuntary manslaughter, to which he pled guilty on 13 July 2012.

At the sentencing hearing, defendant's counsel provided evidence of defendant's work history and life in the community. Defendant was 62 years old, married, and retired from G.E. where he had worked for 29 years. He and his wife cared for a mentally challenged, 58-year-old man, James, who resided in their home. Defendant presented several letters to the trial court that attested to defendant's good reputation and character, including a letter from the agency that placed James in defendant's care.

Defendant stipulated to the existence of one aggravating factor, that "the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C. Gen. Stat. § 15A-1340.16(d)(8) (2011). The trial court found the existence of two mitigating factors: (1) "at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer"; and (2) "[t]he defendant has accepted responsibility for the defendant's criminal conduct." N.C. Gen. Stat. §§ 15A-1340.16(e)(11) and (e)(15). Concluding that the aggravating factor outweighed the mitigating factors, the trial court sentenced defendant in the aggravated range, imposing a term of 17 to 30 months imprisonment. Defendant appeals.

Discussion

I. Aggravating Factor

[1] Defendant contends that the trial court erred in using the aggravating factor, N.C. Gen. Stat. § 15A-1340.16(d)(8), to sentence defendant in the aggravated range because the evidence used to support the aggravating factor was the same evidence used to support an element of the involuntary manslaughter charge. We agree.

The State incorrectly asserts that defendant's stipulation to the aggravating factor precludes him from seeking appellate review of the alleged error. *See State v. Khan*, __ N.C. __, __, 738 S.E.2d 167, 172 (2013) (reviewing the sufficiency of the evidence supporting the defendant's aggravated sentence after the Court concluded that the defendant had stipulated to the finding of the aggravating factor underlying the sentence). As to our standard of review, defendant makes the conclusory assertion that the trial court committed plain error, but gives no explanation, and cites no legal authority, as to how the trial court's action constituted plain error. Furthermore, as the State contends, plain error review is reserved for alleged errors in jury instructions and evidentiary matters. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). However, despite defendant's failure to object at his sentencing hearing, or properly seek plain error review on appeal, he is not precluded from arguing on appeal that the sentence was unsupported by the evidence. *State v. Jeffery*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 674 (2004) (noting that failure to object at sentencing does not preclude review of an alleged error on appeal).

This Court reviews alleged sentencing errors for "whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *Id.* at 578, 605 S.E.2d at 674 (citation omitted). Under N.C. Gen. Stat. § 15A-1340.16(a), a trial court must consider evidence of aggravating or mitigating factors, but the decision to depart from the presumptive range is within the trial court's discretion. "The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury . . . ." N.C. Gen. Stat. § 15A-1340.16(a1). "If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range . . . ." *Id.* § 15A-1340.16(b). However, "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." *Id.* § 15A-1340.16(d).

The aggravating factor that the trial court found, and to which defendant stipulated, provides that "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." *Id.* § 15A-1340.16(d)(8). While operating an automobile may not necessarily be hazardous within the meaning of section 15A-1340.16(d)(8), the manner in which an automobile is driven, i.e. at a high rate of speed, can serve as an appropriate basis for finding the aggravating factor in section 15A-1340.16(d)(8) when the operation of the vehicle

results in a vehicular-related death. *See State v. Speight*, 186 N.C. App. 93, 97-98, 650 S.E.2d 452, 455 (2007) (finding that defendant's speeding, intoxication, and weaving in traffic qualified as "normal use" within the meaning of section 15A-1340.16(d)(8)).

"The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997). "Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Phelps*, 242 N.C. 540, 544, 89 S.E.2d 132, 135 (1955) (citation and quotation marks omitted).

In the instant case, defendant was not impaired at the time of the accident, but he stipulated to the existence of the aggravating factor, and he stipulated to allowing the State to summarize the facts and evidence supporting the plea. In its summary of the facts at trial, the State noted: "Normal speed, this collision would not happen. The officers in their report come [sic] to the idea that when this happened the defendant was driving at a high rate of speed, and with that, that's what caused this collision. That shows you that the speed was a significant factor."

The State cites *State v. Garcia-Lorenzo*, 110 N.C. App. 319, 430 S.E.2d 290 (1993), for its conclusory assertion that there is a difference in the evidence necessary to prove involuntary manslaughter and the evidence necessary to prove the aggravating factor in section 15A-1340.16(d)(8). However, we find *Garcia-Lorenzo* to be distinguishable from the present case. In *Garcia-Lorenzo*, the defendant was convicted of driving while impaired and involuntary manslaughter for a vehicular-related homicide. *Id.* at 324, 430 S.E.2d at 293. We rejected the defendant's argument that the aggravating factor found by the trial court——that the automobile was a device knowingly used by the defendant to create a great risk of death to more than one person——was an element of the underlying offense of which he was convicted. *Id.* at 335, 430 S.E.2d at 299. The trial court arrested defendant's conviction for driving while impaired because the jury instruction for the involuntary manslaughter charge required the jury to find that defendant was driving while impaired. *Id.* at 336, 430 S.E.2d at 299-300. We concluded that the defendant's reckless driving of his automobile in a neighborhood was not an element of the involuntary manslaughter charge and instead supported the aggravating factor. *Id.* at 336, 430 S.E.2d at 300. As a result, we held that the trial court did not err in finding the aggravating factor because the evidence

used to support the aggravating factor was distinct from the evidence used to support an element of the offense. *Id.*

Here, defendant was not impaired when the accident occurred, and defendant's speed is the only evidence that would support the aggravating factor that he used a device in a manner normally hazardous to the lives of more than one person. Because the evidence of defendant's speed was required to prove the charge of involuntary manslaughter and the finding of the aggravating factor, the trial court erred in sentencing defendant in the aggravated range, and we must remand the case to the trial court for resentencing. *See State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983) ("[I]n every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing."). Because we remand for resentencing, we do not reach defendant's argument that there was insufficient evidence to support the trial court's finding of the aggravating factor.

II. Mitigating Factors

[2] Defendant also argues that the trial court committed reversible error in not finding the existence of statutory mitigating factors N.C. Gen. Stat. § 15A-1340.16(e)(12), good character and good reputation in the community, and section 15A-1340.16(e)(19), positive employment history, because defendant contends that the evidence supporting each of the factors was uncontradicted and manifestly credible. We disagree.

"[A] trial judge is given wide latitude in determining the existence of mitigating factors, and the trial court's failure to find a mitigating factor is error only when no other reasonable inferences can be drawn from the evidence." *State v. Mabry*, __ N.C. App. __, __, 720 S.E.2d 697, 702 (2011) (citations omitted). "An appellate court may reverse a trial court for failing to find a mitigating factor only when the evidence offered in support of that factor 'is both uncontradicted and manifestly credible.' " *Id.* The North Carolina Supreme Court has held that even in the absence of a specific request by a defendant, "the sentencing judge has a duty to find a statutory mitigating factor when the evidence in support of a factor is uncontradicted, substantial and manifestly credible." *State v. Spears*, 314 N.C. 319, 321, 333 S.E.2d 242, 244 (1985) (citations omitted).

A. Good Character and Reputation in the Community

The evidence presented by defendant in support of his argument that he had a good reputation and character in the community included statements about his volunteer work, details about caring for a

mentally-challenged man, and letters from members of the community concerning his character and reputation.

"Where testimony is not overwhelmingly persuasive on the question of defendant's good character or good reputation in the community, it is not manifestly credible and there is no requirement to find a mitigating factor." *State v. Wells*, 104 N.C. App. 274, 278, 410 S.E.2d 393, 396 (1991). "[I]t [is] within the prerogative of the trial court to accept or reject the opinions set forth in the [character and reputation] letters." *State v. Murphy*, 152 N.C. App. 335, 346, 567 S.E.2d 442, 449 (2002) (holding that the credibility determination of letters written by individuals in support of the defendant's character was within the trial court's discretion). Although defendant asserts that the letters submitted in support of his good reputation and character are a part of the record on appeal, they do not appear in the record. "It is the duty of counsel to present to the appellate division a correct record of the trial proceedings." *State v. Sink*, 31 N.C. App. 726, 728, 230 S.E.2d 435, 436 (1976). Without any evidence as to the nature of these letters, we cannot say that the trial court erred in not finding the existence of the mitigating factor for good character and reputation. *See Murphy*, 152 N.C. App. at 345, 567 S.E.2d at 449 (after reviewing 24 letters provided by the defendant concerning his reputation and character, this Court concluded that the evidence did not rise to the level of being manifestly credible and that the trial court did not err in failing to find the mitigating factor under section 15A-1340.16(e)(12)). Thus, the letters cannot be deemed manifestly credible, and we cannot conclude that the trial court erred in not finding the existence of the mitigating factor.

Furthermore, we conclude the evidence concerning defendant's care for a mentally-challenged individual and defendant's volunteer work is not so overwhelmingly persuasive as to his good reputation and character in the community that this Court can conclude the trial court erred in not finding the existence of the mitigating factor in section 15A-1340.16(e)(12). Defendant's argument is overruled.

B. Positive Employment History

In support of defendant's contention that the trial court should have found the mitigating factor in section 15A-1340.16(e)(19), defendant only offered that he had worked at G.E. for 29 years. A trial court is not required to find a mitigating factor concerning positive employment history when a defendant has only presented evidence of jobs held, but provides no other evidence of positive employment history. *See State v. Hughes*, 136 N.C. App. 92, 101-02, 524 S.E.2d 63, 69 (1999) (concluding

that the trial court did not err in not finding the mitigating factor in section 15A-1340.16(e)(19) where the defendant only offered evidence of his employment history, which did not show positive or gainful employment), *superseded on other grounds by statute as stated in State v. Orellana*, 211 N.C. App. 647, 712 S.E.2d 745 (2011). In the present case, defendant merely stated the number of years he had been employed at G.E. before retiring. Without further proof that such employment was positive, the trial court did not err in not finding the existence of the mitigating factor. *Compare id. and Mabry*, __ N.C. at __, 720 S.E.2d at 704 (concluding that the trial court did not err by not finding the mitigating factor for positive employment history in section 15A-1340.16(e)(19) where the defendant gave evidence of the time periods during which she was employed, but gave no evidence that she had a positive employment history) *with State v. Wilkes*, __ N.C. App. __, __, 736 S.E.2d 582, 588 (2013) (finding that the trial judge erred in not finding the mitigating factor for positive employment in section 15A-1340.16(e)(19) where evidence of awards and commendations were offered along with employment history). The trial court did not err by not finding the existence of the mitigating factor under section 15A-1340.16(e)(19), and defendant's argument is overruled.

Conclusion

We conclude that the trial court erred in using the same evidence for defendant's involuntary manslaughter conviction as was used to find the aggravating factor. We must remand this case for a new sentencing hearing. We further conclude that the trial court did not err in not finding the existence of mitigating factors regarding defendant's good character and reputation in the community or his positive employment history.

REVERSED in part, NO ERROR in part, and REMANDED for resentencing.

Judges GEER and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DENNIS O'KEITH BLACKWELL

No. COA12-1472

Filed 6 August 2013

1. Jury—deliberations—deadlocked—no coerced verdict

The trial court did not coerce the jury into reaching a verdict in a drugs case in violation of defendant's right to a unanimous jury verdict under Article I, Section 24 of the North Carolina Constitution. Defendant failed to cite any authority suggesting that a jury's indication that it may be deadlocked required the trial court to immediately declare a mistrial.

2. Constitutional Law—effective assistance of counsel—due process—denial of motion for continuance

The trial court did not violate defendant's constitutional rights to due process and effective assistance of counsel in a drugs case by denying his motion for a continuance. Defendant failed to explain how a period of approximately two months was insufficient time to prepare for a second trial based on the same straightforward facts.

3. Sentencing—habitual felon—not cruel and unusual punishment

Defendant's enhanced sentence as a habitual felon did not constitute cruel and unusual punishment.

Appeal by defendant from judgment entered 23 May 2012 by Judge Paul C. Ridgeway in Person County Superior Court. Heard in the Court of Appeals 22 April 2013.

Roy Cooper, Attorney General, by David J. Adinolfi II, Special Deputy Attorney General, for the State.

Brock, Payne & Meece, P.A., by C. Scott Holmes, for defendant-appellant.

DAVIS, Judge.

Dennis O'Keith Blackwell ("defendant") appeals from the trial court's judgment entered on his convictions for two counts of possession with

intent to sell or deliver cocaine, two counts of selling cocaine, and his guilty plea to having attained habitual felon status. After careful review, we find no error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 22 July 2008, Detective Cathy Owens ("Detective Owens"), a detective with the Reidsville Police Department, was working undercover with a narcotics unit. She and a confidential informant drove to defendant's residence in Roxboro, North Carolina. Detective Owens met defendant inside a barn beside his house and asked to purchase $20 worth of cocaine. When Detective Owens handed over the money, defendant gave her a small plastic baggie containing a substance that appeared to be powder cocaine. After two or three minutes inside the barn, Detective Owens and the informant left the property.

Later that same day, Detective Owens spoke with defendant on the telephone about buying more cocaine. Defendant told her that instead of meeting again at his house, they should meet at Runt's Bar. Later that night, defendant sold Detective Owens $40 worth of cocaine in the parking lot of the bar.

Defendant was subsequently charged with two counts of possession with intent to sell or deliver cocaine, two counts of selling cocaine, and one count of having attained habitual felon status. At his first trial, defendant was found guilty of all the drug-related charges, and he pled guilty to being a habitual felon. On appeal, however, this Court granted defendant a new trial due to the State's failure to provide defendant with proper notice of its intent to introduce the laboratory reports documenting the results of the tests performed on the substances "sold" by defendant to Detective Owens during the controlled purchases. *See State v. Blackwell*, 207 N.C. App. 255, 699 S.E.2d 474 (2010).

On remand, the prosecutor filed and served on 7 May 2012 notice of the State's intent to use the laboratory reports. The following day, defendant's newly appointed attorney filed a motion for a continuance, requesting additional time to prepare for trial. The trial court denied defendant's motion, and the case proceeded to trial. The jury found defendant guilty of all the drug-related charges, and defendant subsequently pled guilty to having attained habitual felon status. The trial court sentenced defendant as a Class C felon to a presumptive-range term of 107 to 138 months imprisonment with credit for 603 days of prejudgment confinement. Defendant gave notice of appeal in open court.

Analysis

I. Jury Instruction Pursuant to N.C. Gen. Stat. § 15A-1235

[1] Defendant first contends that the trial judge coerced the jury into reaching a verdict in violation of his right to a unanimous jury verdict under Article I, Section 24 of the North Carolina Constitution. As an initial matter, we note that although defendant failed to raise this issue at trial, this argument is nonetheless preserved for appellate review. *See State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009) ("While the failure to raise a constitutional issue at trial generally waives that issue for appeal, where the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel.") (internal citation omitted).

The jury began its deliberations in this case at 2:48 p.m. on Tuesday, 22 May 2012. Approximately 30 minutes later, the trial judge brought the jury back into the courtroom in order to discuss a note received from the jury.[1] Because the note apparently did not contain any specific request for guidance or assistance, the judge explained to the jurors that he wanted to make sure that they "understood the process" and that if they had any questions or specific requests, he "could work with [them] on th[e] matter . . . ." The jury then returned to the jury room and continued its deliberations until 3:30 p.m., at which time it sent a note requesting to review certain evidence from the trial. The jury returned to the courtroom and, after being advised that some of the evidence could be viewed in the jury room and that other evidence was not available for review, the jury went back to the jury room at 3:43 p.m.

At 3:59 p.m., approximately 70 minutes after they had begun deliberations, the jury sent a third note to the judge, stating: "What can we do if we have a verdict of 11 saying guilty but 1 that says not guilty and will not change their mind? And does not want to convince the other 11 to vote otherwise . . . ." The trial judge brought the jury back into the courtroom and provided the following instruction:

> THE COURT: Ladies and gentlemen, I received a note from you, and I'm going to read it. It does reflect that, and I'm not going to say which way that vote is going. So, I'm going to paraphrase that part. This is what you indicated to me. It says, "What can we do if we have a verdict of 11

1. Neither the note itself nor a description of its contents is provided in the record on appeal.

to 1, and the one will not change their mind and does not want to convince the other 11 to vote otherwise?" Um, so I understand that you do have a division among yourselves that is preventing you from reaching a unanimous verdict, and I know what we ask of you is very difficult, asking twelve people who have never met to reach a unanimous consensus on a matter such as this is a difficult task and is not common to the experience of most people.

I do want to remind you, though, that through the process of selecting you as jurors for this case, the lawyers and the court have carefully considered your qualifications to be on this jury, and while we recognize we have put great responsibility on you by selecting you to serve, we have also signified a great faith in you that you twelve citizens are well suited to hear this evidence, to listen to the arguments of counsel, to follow the law, and to render a verdict reflecting the truth.

Were this matter to be tried again, it's unlikely that we would find another group of twelve citizens to serve as jurors who would be any more capable than yourselves to reason together in this matter in an effort to reach a unanimous verdict. I want to remind you that it is your duty to do whatever you can to reach a unanimous verdict. You should reason this matter over together as reasonable men and women in an effort to reconcile your differences, if you can, without the surrender of your conscientious convictions. No juror should surrender an honest conviction as to the weight or effect of the evidence solely upon the opinion of other fellow jurors or for the mere purposes of returning a verdict, but I will ask you to return to your deliberations and continue in your efforts to reach a verdict. I'll let you know that we're going to continue. Right now you've been deliberating for a little bit over an hour, about an hour and 15 minutes. That's certainly not an unusually long time for a jury to deliberate.

I will continue until five o'clock today, and then if you're unable to reach a unanimous verdict, we'll resume tomorrow morning at 9:30. So, you have plenty of time to deliberate. Don't feel that you need to rush yourselves in this process. It's important that every view of the jury be considered, and that you deliberate in good faith among

> yourselves. I'll ask you to return to your deliberations and continue this process.

At this point, the jury went back to the jury room and resumed deliberations for approximately one more hour. At 5:03 p.m., the jury announced that it had reached a unanimous verdict of guilty on each drug charge.

Defendant argues that the trial judge coerced the verdict by giving the jury an *Allen* charge[2] when the jury's note "clearly stated" that one juror would not change his or her mind. North Carolina's Criminal Procedure Act expressly provides for the use of *Allen* charges in N.C. Gen. Stat. § 15A-1235, which states in full:

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> > (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
> >
> > (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
> >
> > (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
> >
> > (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (c) *If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue*

2. The term "*Allen* charge" is derived from the case of *Allen v. United States*, 164 U.S. 492, 501–02, 41 L.Ed. 528, 530–31 (1896), where the United States Supreme Court approved the use of jury instructions that encourage the jury to reach a verdict, if possible, after the jury has requested additional instructions from the trial court.

> *its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.*
>
> (d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C. Gen. Stat. § 15A-1235 (2011) (emphasis added).

Defendant fails to cite any authority suggesting that a jury's indication that it may be deadlocked requires the trial court to immediately declare a mistrial. To the contrary, "[t]he plain language of the statute provides that the trial court '*may* give or repeat the instructions provided in subsections (a) and (b).' " *State v. Fernandez*, 346 N.C. 1, 22, 484 S.E.2d 350, 363 (1997) (quoting N.C. Gen. Stat. § 15A-1235(c)) (emphasis in original).

Adoption of defendant's argument would essentially mean that any time the jury expresses difficulty in reaching a verdict, the trial court would be required to declare a mistrial. Such a rule would clearly conflict with the plain language of the statute and our caselaw interpreting it. *See id.* at 23, 484 S.E.2d at 364 (holding that trial court has discretion to reinstruct jury "in situations where the trial court perceives the jury may be deadlocked or may be having some difficulty reaching unanimity"); *see also State v. Patterson*, 332 N.C. 409, 416, 420 S.E.2d 98, 101 (1992) (holding that trial court did not coerce verdict by instructing jury pursuant to N.C. Gen. Stat. § 15A-1235 despite "clear" indication by jury that it was "hopelessly deadlocked"); *State v. Baldwin*, 141 N.C. App. 596, 609, 540 S.E.2d 815, 824 (2000) (finding no coercion where trial judge gave *Allen* charge and directed jury to continue deliberations after jury sent note to judge indicating that it was at an " 'impass[e]' " and that there was " 'no way' " two of the jurors would " 'ever change their mind[s]' ").

Defendant also argues that the trial judge's instruction was coercive because he threatened that if the jury did not reach a verdict that day (Tuesday), he would bring the jury back the next day (Wednesday) to continue deliberations. Our Supreme Court has held that "a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous." *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364 (1978). In determining whether the trial court's instructions "forced a verdict or merely served as a catalyst for further deliberation,"

our courts consider the totality of the circumstances under which the instructions were made and the probable impact of the instructions on the jury. *Id.* at 593, 243 S.E.2d at 364–65. One relevant factor in making this determination is "whether the trial court threatened to hold the jury until it reached a verdict." *State v. Boston*, 191 N.C. App. 637, 644, 663 S.E.2d 886, 892, *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008).

In *State v. Whitman*, 179 N.C. App. 657, 635 S.E.2d 906 (2006), the trial judge, after noting that it was 4:35 p.m., told the jurors that he wanted to "give [them] 'an opportunity to deliberate' " until 5:00 p.m. *Id.* at 671, 635 S.E.2d at 915. The judge also noted that he would call the jurors back into the courtroom at 5:00 p.m. if they had not reached a verdict by that time so that he could discuss with them how they wanted to continue deliberations in light of forecasted inclement weather. *Id.* at 672, 635 S.E.2d at 915. Despite the jury coming back with a verdict 18 minutes later, this Court concluded that no coercion had occurred because it "[did] not read these remarks of the trial judge, discussing practical aspects of deliberating late in the day in the face of potential inclement weather, as risking a coerced verdict." *Id.*

Here, after receiving the jury's note at approximately 4:00 p.m., the trial judge brought the jurors back into the courtroom and told them that although their note indicated that there was "a division among [them]," they had been deliberating for only approximately 75 minutes. The judge explained that he was going to have the jurors continue to deliberate for the remainder of the afternoon and that, if they needed more time, they could resume deliberations the next day. The trial judge further emphasized that the jurors should not rush themselves in the deliberation process and reminded them that it was "important that every view of the jury be considered, and that you deliberate in good faith among yourselves."

As in *Whitman*, these statements by the trial judge to the jury cannot reasonably be construed as coercive. The judge never intimated that the jury was required to reach a verdict or that it would be forced to deliberate until it had reached one. To the contrary, in a conscientious manner, the trial judge asked the jury, which had been deliberating for only 75 minutes, to continue to deliberate until 5:00 p.m. and instructed the jurors that they would resume deliberations the next morning if needed. The trial judge's statements were merely intended to apprise the jury of the practical aspects of deliberating late in the day. *See also State v. Macon*, 6 N.C. App. 245, 254, 170 S.E.2d 144, 150 (1969) (finding no coercion in statement by trial judge that if jurors did not reach verdict by 9:00 p.m. he would then discuss with them whether they wanted to continue

deliberating that night or return the next day), *aff'd*, 276 N.C. 466, 173 S.E.2d 286 (1970). Defendant's argument is, therefore, overruled.

II. Motion for Continuance

[2] Defendant next argues that the trial court violated his constitutional rights to due process and effective assistance of counsel by denying his motion for a continuance. A trial court's ruling on whether to grant or deny a motion for a continuance is ordinarily reviewed under an abuse of discretion standard. *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, 535 U.S. 934, 152 L.Ed.2d 221 (2002). When, however, the motion implicates a constitutional right, the trial court's ruling "involves a question of law which is fully reviewable by an examination of the particular circumstances of [the] case." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). In such situations, the denial of the motion to continue warrants a new trial "only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

In order to establish a constitutional violation in this context,

> a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. To demonstrate that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.

State v. Tunstall, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993) (internal citations and quotation marks omitted).

Defendant contends that the denial of his motion for a continuance violated his constitutional rights because (1) defense counsel had been appointed only 54 days prior to the beginning of trial; (2) defense counsel had just become aware of material witnesses that might testify favorably for defendant; and (3) the State, on the Friday before the Monday the trial was scheduled to begin, had turned over statements from the confidential informant involved in the drug purchases.

We note that this was defendant's second trial on the same charges – albeit with different attorneys representing him in the two trials. Although defense counsel in the second trial was appointed 54 days prior to trial, the underlying facts in this case are, as the State points out, fairly straightforward: "two hand to hand, face to face drug sales to

an undercover police officer." Defendant fails to explain how a period of approximately two months was insufficient time to prepare for a second trial based on the same, straightforward facts. *See State v. Bullock*, 183 N.C. App. 594, 597, 645 S.E.2d 402, 405 (holding that 56 days was a reasonable time for defense counsel – who had not represented defendant at trial – to prepare for resentencing after remand), *appeal dismissed and disc. review denied*, 361 N.C. 570, 650 S.E.2d 817 (2007); *State v. Bunch*, 106 N.C. App. 128, 132, 415 S.E.2d 375, 377 (finding no constitutional violation where "counsel had approximately 55 days to prepare for trial" in which State called only two witnesses and defendant presented no evidence), *disc. review denied*, 332 N.C. 149, 419 S.E.2d 575 (1992); *State v. Martin*, 64 N.C. App. 180, 182, 306 S.E.2d 851, 852-53 (1983) (holding that appointment of counsel "six working days" prior to trial was adequate to prepare defense in case involving "relatively simple legal and factual issues").

With respect to newly discovered witnesses, our Supreme Court has held that a continuance

> is proper if there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts. But a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term.

State v. Tolley, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (citation, quotation marks, and emphasis omitted).

Defendant fails to explain (1) why he was unable to find these witnesses in the more than three years since his indictment on these charges; and (2) why their testimony was material. *See State v. T.D.R.*, 347 N.C. 489, 504, 495 S.E.2d 700, 708-09 (1998) (finding no error when defendant failed to explain to trial court why more than three months was insufficient time to secure any necessary evidence and defendant submitted no affidavits indicating what facts might be proven by witness if continuance had been granted).

Defendant further argues that the trial court should have granted a continuance because defense counsel needed more time to review recorded witness statements by a confidential informant, which, defendant contends, were not provided by the State until the last business day before trial. The State argues on appeal, as it did before the trial court in opposing defendant's motion, that defendant already had copies of the witness statements because it was *defendant's* investigator who interviewed the witness and recorded the statements. Because the discovery

materials are not included in the record, we cannot determine with which party they originated. Nor, for the same reason, can we assess their materiality.

Defendant has, therefore, failed to establish that the trial court erred in denying his motion for a continuance based on the alleged lack of adequate time to review the materials. *See Tunstall*, 334 N.C. at 331, 432 S.E.2d at 338 (finding it "impossible . . . to determine whether additional time to review any [discovery] materials provided to the defendant on the morning [after trial began] would have benefitted the defendant" where "record d[id] not reveal what information actually was provided to the defendant"); *State v. Bearthes*, 329 N.C. 149, 158, 405 S.E.2d 170, 175 (1991) ("We hold that the trial court properly denied the defendant's motion to continue because defendant failed to show that the content of the discovery provided to the defendant two days prior to trial was of such a nature as to require additional time for the preparation of his defense.").

Ultimately, even assuming *arguendo* that the trial court erred in denying defendant's motion to continue, the "defendant still has the burden of demonstrating that he suffered prejudice as a result of any alleged error." *State v. Banks*, 210 N.C. App. 30, 47, 706 S.E.2d 807, 820 (2011). Defendant's entire argument regarding prejudice is the conclusory statement in his brief that the denial of his motion to continue "prejudiced [him] in that he was unable to put on a defense in violation of his Constitutional rights . . . ." Such conclusory and unsubstantiated assertions are insufficient to establish prejudice resulting from the denial of a motion for a continuance. *See Whitman*, 179 N.C. App. at 666-67, 635 S.E.2d at 912 (holding that defendant "failed to establish prejudice" where he made "no argument explaining . . . how his defense would have been better prepared or more persuasive had the continuance been granted"); *State v. Jones*, 172 N.C. App. 308, 312, 616 S.E.2d 15, 19 (2005) (finding no error when "defendant failed to articulate, either at trial or on appeal, how a continuance would have helped him").

In sum, defendant has failed to make any specific argument as to how he would have been better prepared at trial if his motion had been granted or how he was materially prejudiced as a result of the denial of his motion. Consequently, we conclude that the trial court did not err in denying defendant's motion for a continuance.

III. Cruel and Unusual Punishment

[3] Defendant's final argument on appeal is that his enhanced sentence as a habitual felon constitutes cruel and unusual punishment. This exact

argument has been considered and expressly rejected by the courts of this State. *See*, *e.g.*, *State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985) (rejecting "outright" the argument that "our legislature is constitutionally prohibited from enhancing punishment for habitual offenders as [a] violation[] of [the] constitutional stricture[] dealing with . . . cruel and unusual punishment"); *State v. Cummings*, 174 N.C. App. 772, 776, 622 S.E.2d 183, 185–86 (2005) (observing that "[t]his Court and the North Carolina Supreme Court have consistently rejected Eighth Amendment challenges to habitual felon sentences"), *disc. review denied*, 361 N.C. 172, 641 S.E.2d 306 (2006), *cert. denied*, 550 U.S. 963, 167 L.Ed.2d 1140 (2007).

In this case, defendant was sentenced to 107 to 138 months imprisonment not only because of the 22 July 2008 drug offenses but also due to his significant criminal history. We conclude that defendant's sentence is not unconstitutional. *See State v. Hargrave*, 198 N.C. App. 579, 589-90, 680 S.E.2d 254, 262 (2009) (holding that enhanced sentence of 120 to 153 months imprisonment as habitual felon for non-violent offenses did not violate prohibition against cruel and unusual punishment).

Conclusion

For the reasons stated above, we find that defendant received a fair trial free from error.

NO ERROR.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
GREGORY R. CHAPMAN

No. COA11-229-2

Filed 6 August 2013

Homicide—first-degree murder—born-alive rule—viability of twins—jury issue

The trial court's order dismissing indictments for two counts of first-degree murder was vacated. A jury, not the trial court, should have been charged with deciding whether the twins, who were in

a pregnant woman's stomach when she was shot, met the requirements under the born-alive rule.

Appeal by the State from dismissal order entered 23 December 2010 by Judge Russell J. Lanier, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 13 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant.

ELMORE, Judge.

This case is before us on remand from the North Carolina Supreme Court pursuant to the granting of the State's petition for writ of certiorari for consideration of the merits. The State appeals from an order dismissing two counts of capital first-degree murder against Gregory R. Chapman (defendant). In an opinion dated 7 February 2012, we dismissed the State's appeal on procedural grounds. Upon review once more, we vacate the order dismissing the indictments for first-degree murder.

The facts as established in our 7 February opinion are as follows: On 26 May 2008, defendant shot Lisa Wallace once in her left upper abdomen. Wallace was nineteen weeks and four or five days pregnant with twins. The bullet did not enter Wallace's uterus. Wallace was taken to Pitt County Memorial Hospital, where she had emergency surgery; following the surgery, Wallace underwent a spontaneous abortion of both twins. Wallace survived. Following the spontaneous abortion, both twins had heartbeats, and they were each assigned an Apgar score of one; neither twin scored on the other four factors that comprise an Apgar score – respiration, color, movement, and irritability. The first twin was delivered at 4:42 p.m., weighed 336 grams, and was pronounced dead at 5:10 p.m. when his heartbeat stopped. The second twin was delivered at 4:49 p.m., weighed 323 grams, and was pronounced dead at 5:20 p.m. when her heartbeat stopped.

Certificates of live birth were issued for each twin. Death certificates were also issued, and both the death certificates and the medical examiner's report listed the immediate cause of death for each twin as "previable prematurity." The medical experts who testified at the habeas corpus hearing all agreed that a previable newborn cannot maintain life outside

of the mother's womb, regardless of medical intervention. No medical expert opined that the twins were viable at their gestational age or weight.

Defendant was charged capitally with two counts of first-degree murder for the death of the twins, who were named as the victims on the indictment. He was also charged with possession of a firearm by a felon, assault with a deadly weapon with the intent to kill inflicting serious injury, and discharging a weapon into occupied property. Under the pretrial release order for the two first-degree murder charges, defendant's release on bond was not authorized. However, under the pretrial release orders for the other three charges, bond was set at $2.5 million.

On 23 November 2009, defendant applied for a pre-trial writ of habeas corpus, seeking "to remove the restraint of his liberty with respect to his being held unlawfully without bond since July 2, 2008 on two charges of first degree murder." Defendant essentially argued that "the only criminal offense for which a defendant may be held without bond is capital murder, and because [he] ha[d] not been properly and lawfully charged with the murder of any living person, his restraint without bond [was] illegal and unlawful."

Judge Gary E. Trawick issued a writ of habeas corpus on 1 December 2009 and ordered an evidentiary hearing to resolve the issues raised by defendant in his application.

On 8 November 2010, Judge Russell L. Lanier, Jr., held the evidentiary hearing pursuant to the writ of habeas corpus. During the hearing, the trial court heard testimony from a number of experts, including the obstetrician who was present and attending when the twins were delivered, the surgical pathologist who conducted the post-mortem examination of the twins, a professor of pathology who was the medical examiner in this case, the labor and delivery nurse who prepared the twins' delivery report, an expert in obstetrics and gynecology who reviewed the medical records and reports for the defense, and an expert in preventative medicine and obstetrics and gynecology.

Judge Lanier found all of the witnesses to be highly credible and noted that there was no material conflict in their testimony. At the end of the hearing, Judge Lanier concluded that the twins were never alive, under the law, and thus they could not have been murdered. Following that ruling, Judge Lanier granted defendant's motion to dismiss the murder charges under N.C. Gen. Stat. § 15A-954.

On 28 December 2010, the trial court entered the relief order whereby it concluded that the named victims in the murder indictments "did not

meet any of the three requirements under the common law born-alive rule. They were not viable. They were not born alive as defined under the common-law rule. They did not die as a result of injuries inflicted upon them *in utero* prior to birth." Because the named victims in the murder indictments were not alive, they could not lawfully be the victims of any homicide offense. "As a result, the murder indictments in this case do not properly charge any offense, and they *confer no jurisdiction* on any court to establish conditions of pretrial release." Thus, the trial court concluded, defendant's "current detention without bond based on pretrial release orders denying the availability of bond on the basis that [defendant] is charged with capital offenses is unlawful under N.C. Gen. Stat. § 17-1 and [defendant] is entitled to immediate relief from this unlawful restraint." Finally, the trial court concluded that the appropriate remedy was "to have the no-bond pretrial release orders in the murder cases vacated, and for [defendant] to be remanded to the custody of the Sheriff of Duplin [C]ounty under the authority of the pretrial release orders in his non-capital cases, which are unaffected by this order and remain valid."

In its 28 December 2010 order, the trial court incorporated the relief order and concluded that its ruling in the habeas proceeding "constitutes an adjudication in the defendant's favor of factual and legal issues that are essential to a successful prosecution in this case."

The State argues that the trial court erred in dismissing both first-degree murder indictments upon concluding: (1) that viability is a component of the common law born-alive rule, and (2) that it is impossible for a previable fetus to be born alive. For the reasons set forth below, we are unable to address the merits of the State's argument.

Habeas corpus is a procedure that allows a person to challenge an imprisonment or a restraint on his or her liberty "for any criminal or supposed criminal matter, or on any pretense whatsoever." N.C. Gen. Stat. § 17-3 (2011); N.C. Const. art. I, § 21.[1] "In habeas corpus proceedings, the court has jurisdiction to discharge petitioner only when the record discloses that the court which imprisoned him did not have jurisdiction of the offense or of the person of defendant, or that the judgment was not authorized by law." *In re Burton*, 257 N.C. 534, 541, 126 S.E.2d 581, 586 (1962). Thus, "the sole question for determination at habeas corpus hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully restrained of his liberty." *Id.* at 540, 126 S.E.2d at 586.

1. Art. I, § 21 concerns the writ of habeas corpus, but it does not contain this quoted language.

The trial court has jurisdiction to discharge a petitioner only when the record discloses that the court which imprisoned him did not have jurisdiction of the offense or of the person of defendant. *Id.* at 541, 126 S.E.2d at 586. Here, Judge Lanier found that the trial court (and all courts) lacked jurisdiction over defendant because the murder indictments failed to charge a proper crime. In making such determination, Judge Lanier found that the twins "were previable and incapable of survival separate and apart from their mother, the fact that they exhibited post-delivery heartbeats does not establish that they were born alive for the purposes of qualifying as proper subjects of a homicide prosecution." Accordingly, Judge Lanier concluded that the twins failed to meet any of the three requirements under the common law born-alive rule: "They were not viable. They were not born alive as defined under the common-law rule. They did not die as a result of injuries inflicted upon them *in utero* prior to birth."

We have previously concluded that "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Clark*, 159 N.C. App. 520, 524, 583 S.E.2d 680, 683 (2003) (citation omitted). Thus, a jury should have been charged with deciding whether the twins met the requirements under the born-alive rule. However, in the case *sub judice*, a jury trial was not conducted; thus, no jury was afforded an opportunity to weigh the evidence. Instead, the record indicated that Judge Lanier weighed the sufficiency of the evidence and erroneously dismissed the charges under the guise of a lack of jurisdiction.

However, pursuant to the grand jury's indictment, the trial court was afforded proper jurisdiction over both defendant and the capital offenses charged. Thus, the trial court had proper jurisdiction to imprison defendant while awaiting trial. The trial court exceeded its authority in dismissing the charges against defendant; such dismissal essentially served as a ruling on the merits. Ultimately, only a jury shall be charged with weighing the sufficiency of the evidence; the trial court cannot usurp this duty in a habeas proceeding. Accordingly, we conclude that the trial court's 28 December 2010 order and the relief order incorporated therein are void.

Vacated and remanded.

Judges McGEE and HUNTER, JR., Robert N., concur.

STATE v. EVANS

[228 N.C. App. 454 (2013)]

STATE OF NORTH CAROLINA
v.
ROGER LEE EVANS, JR.

No. COA13-17

Filed 6 August 2013

1. Appeal and Error—preservation of issues—plain error review—mandate—failure to object

Appellate review was limited to plain error where the defendant in a prosecution for felony murder, attempted armed robbery, and assault contended that the trial court did not include self-defense in the mandate of certain charges. The trial court instructed the jury in accordance with the discussions at the jury charge conference, defendant did not object at the conference, and defendant did not object when the charge was delivered by the trial court.

2. Homicide—felony murder—self-defense—final mandate

The trial court did not err in a prosecution for attempted robbery and other charges, including first-degree murder, by omitting self-defense from its mandate concerning felony murder. Defendant could not plead self-defense to a robbery he had attempted to commit himself. As for the remaining bases for felony murder, the trial court included self-defense in the final mandate for the assault charges, but not the specific final mandate for felony murder based upon the assault charges. Reviewed contextually, there was no error, much less plain error.

3. Appeal and Error—preservation of issues—sufficiency of evidence—issue waived by presenting evidence—preserved by renewing motion to dismiss

Defendant properly preserved the issue of the sufficiency of the evidence in an attempted armed robbery prosecution where he waived review of his motion to dismiss at the conclusion of the State's evidence by presenting evidence, but renewed the motion to dismiss at the close of all of the evidence.

4. Robbery—attempted—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon where defendant contended that the State failed to present evidence of an attempted taking of property. When the evidence was taken in the light most favorable to the State, it showed that defendant had the

intent to rob the victim and performed an overt act intended to carry out that plan. An actual demand for the victim's property was not required; defendant's plan together with his brandishing of the firearm was sufficient evidence for the case to be submitted to the jury.

Appeal by defendant from judgments entered 11 June 2012 by Judge William Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals 4 June 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Phillip K. Woods, for the State.

Sue Genrich Berry for defendant-appellant.

STEELMAN, Judge.

Where self-defense was not applicable to the charges of attempted robbery with a dangerous weapon, the trial court did not err in omitting any reference to self-defense from the mandate for the felony murder charge based upon the robberies. Where the trial court gave complete self-defense instructions concerning the assault charges, and referenced those instructions in the felony murder charge based upon the assault charges, the trial court did not err in omitting any reference to self-defense from the mandates for those felony murder charges. Where there was substantial evidence that defendant had the intent to rob Cantera and performed an overt act, the trial court properly denied defendant's motion to dismiss the charge of attempted robbery as to Cantera.

I. Factual and Procedural Background

In the early hours of 28 June 2010, Roger Lee Evans, Jr., (defendant) and Tracey Elliott (Elliott) planned to rob Francisco Cantera (Cantera) in order to purchase drugs. Elliott entered Cantera's apartment and sent defendant a text message, notifying him that there were two males sleeping in the living room and that she was in the back bedroom with Cantera. Defendant asked if Cantera was naked. Defendant then entered the apartment and walked directly to Cantera's room with his handgun drawn. Defendant told Elliott to leave and she feigned surprise, pleading with him to not go forward with the robbery. At that point, the two males sleeping in the living room, brothers Mariano (Mariano) and Marcelino (Marcelino) Moreno, awakened. Defendant directed Cantera into the living room with the handgun pointed to his head and demanded money from the Moreno brothers. The brothers struggled with defendant.

Defendant fired his handgun multiple times, killing Cantera, paralyzing Marcelino, and wounding Mariano.

Defendant was indicted for the murder of Cantera, the robbery with a dangerous weapon of Cantera, the attempted robbery with a dangerous weapon of Marciano, the attempted robbery with a dangerous weapon of Marcelino, conspiracy to commit robbery with a dangerous weapon with Elliott, first-degree burglary, conspiracy to commit first-degree burglary with Elliott, possession of a firearm by a felon, assault with a deadly weapon with intent to kill inflicting serious injury as to Marciano, and assault with a deadly weapon with intent to kill inflicting serious injury as to Marcelino.

The case was tried before a jury at the 28 May 2012 session of Criminal Superior Court for Durham County. At the close of the State's evidence, the trial court denied defendant's motion to dismiss all charges, but reduced the charge of robbery with a dangerous weapon of Cantera to attempted robbery with a dangerous weapon.

Defendant testified at trial. He contended that he did not form a plan with Elliott to rob Cantera, but rather claimed that the events resulted from a drug deal gone awry. Defendant testified that after he entered the apartment to make a sale of marijuana, Cantera took the drugs but would not pay for them. Defendant demanded either his marijuana or payment. Defendant denied brandishing his handgun. As the Moreno brothers woke up, defendant turned to leave and took ten dollars from a wallet. The brothers then attacked him, one wielding a knife, causing defendant to stumble. The Morenos and Cantera piled on top of defendant, who pulled out his handgun and fired multiple shots in order to defend himself. He then fled from the residence.

At the close of all the evidence, the trial court denied defendant's motion to dismiss all charges, including the charge of attempted robbery with a dangerous weapon of Cantera.

On 11 June 2012, the jury found defendant guilty of first-degree murder under both the theories of malice, premeditation, and deliberation, and felony murder. The jury also found defendant guilty of three counts of attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, first-degree burglary, conspiracy to commit first-degree burglary, and possession of a firearm by a felon. As to the two assault charges, the jury found defendant guilty of the lesser charge of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to life imprisonment for the murder charge [10CRS056219]. The remaining charges were consolidated into

four judgments that imposed consecutive sentences of 84-110 months [10CRS006133; 10CRS006134], 84-110 months [10CRS006132], 33-49 months [10CRS007219-51], and 33-49 months [10CRS007219-52].

Defendant appeals.

II. Jury Instructions

In his first argument, defendant contends that the trial court's final mandate contained numerous deficiencies amounting to reversible error. We disagree.

A. Preservation of the Issue on Appeal

[1] On appeal, defendant contends that the trial court agreed at the jury charge conference, to charge the jury in accordance with certain specific pattern jury instructions. Defendant contends that the trial court failed to do what was agreed upon, namely failing to include self-defense in the mandate of certain charges. As a result, defendant contends that this alleged error is preserved for appellate review, and that he is not limited to plain error review on appeal, citing *State v. Keel*, 333 N.C. 52, 56, 423 S.E.2d 458, 461 (1992) and *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988).

At the charge conference it was agreed that the trial court would use a combination of N.C.P.I. Criminal 206.14 and 206.10 in addressing the murder charge and any lesser included offenses. The trial court also agreed that the jury would be charged concerning self-defense. However, the trial court expressly stated that self-defense would not be a defense to felony murder, but "may be a defense to the underlying felony of felonious assault and the lesser-included underlying offense." Defendant made no objection to the proposed charge at the jury charge conference. The trial court charged the jury on first-degree murder. The jury was instructed that a felony murder conviction could be based upon any of the three attempted robbery with a dangerous weapon charges or the two assault charges. The jury subsequently found that defendant was guilty of first-degree murder based upon each of the five underlying felonies.

On appeal, defendant concedes that the trial court correctly gave the self-defense mandate as to the charge of first-degree murder based upon premeditation and deliberation. However, defendant contends that the trial court omitted self-defense from the mandate relating to first-degree felony murder to each of the five underlying felonies. Defendant further contends that the trial court omitted self-defense from the mandate concerning the charges for the lesser-included offenses of second-degree murder and voluntary manslaughter.

We hold that the trial court instructed the jury in accordance with the proposed discussions at the jury charge conference. The trial court made it plain that self-defense was not a defense to felony murder *per se*, but might be a defense as to the underlying felony. The jury was so charged. Since defendant failed to object at the jury charge conference and also following the actual charge delivered by the trial court, our review is limited to plain error.

B. Standard of 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) (alteration in original) (citations omitted).

C. Final Mandate on Self-Defense

[2] "Long-standing precedent in this Court explains that the charge to the jury will be construed contextually, and segregated portions will not be viewed as error when the charge as a whole is free from objection." *State v. Haire*, 205 N.C. App. 436, 441, 697 S.E.2d 396, 400 (2010). It is therefore necessary to review the portions of the trial court's charge that bear upon defendant's arguments pertaining to giving a final mandate relating to self-defense. We do not discuss the jury instructions as to the two conspiracy charges, the first-degree burglary charge, or the possession of a firearm by a felon charge, since none of these charges was a basis for a first-degree felony murder conviction.

The trial court first charged the jury concerning the three charges of attempted robbery with a dangerous weapon. None of these charges contained a self-defense instruction. Similarly, when the trial court gave the charge concerning felony murder based upon the three attempted robbery charges, there was no instruction as to self-defense. On appeal, defendant contends that it was error to omit self-defense from the first-degree felony murder instruction based upon the three attempted robberies. It was not error to omit self-defense from the mandates based upon the robberies. In fact, it was not error to completely omit self-defense from the felony murder instructions based upon the three robberies.

In *State v. Jacobs*, 363 N.C. 815, 689 S.E.2d 859 (2010), our Supreme Court held: "As to felony murder, self-defense is available only to the extent that it relates to applicable underlying felonies. We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself." *Id.* at 822, 689 S.E.2d at 864 (citation omitted). Based upon *Jacobs*, the trial court did not err, much less commit plain error, in omitting self-defense from its mandate concerning the first-degree murder charge based upon the three attempted robberies with a dangerous weapon. Since we have held that the trial court did not err in its jury instructions as to three of the five bases for felony murder, it may well not be necessary for us to discuss the remaining two bases for felony murder. However, for the sake of completeness, we elect to do so.

The two remaining bases of felony murder were the assault charges pertaining to Mariano and Marcelino. Prior to the charge on felony murder, the trial court charged the jury concerning the assault charges, instructing the jury that they could find defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, guilty of assault with a deadly weapon inflicting serious injury, or not guilty. On each charge, the jury found defendant guilty of the lesser charge of assault with a deadly weapon inflicting serious injury. As to each assault charge, the trial court charged the jury concerning self-defense and included self-defense in the final mandate for each charge. On appeal, defendant makes no complaint about these instructions. In instructing the jury on felony murder based upon the assault charges, the trial court told the jury:

> In making your determination as to whether the Defendant committed Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury or Assault with a Deadly Weapon Inflicting Serious Injury upon the alleged victim, [Mariano], you are to recall and apply my previous instructions to you as to the definition and elements of the offenses of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury and Assault with a Deadly Weapon Inflicting Serious Injury, *and my related instructions as to the law of self-defense*.

(emphasis added).

As to the assault charge pertaining to Marcelino, the same instructions were given. Neither of the instructions concerning felony murder based upon the assault charges contained a specific final mandate relating to self-defense.

Our review of jury instructions requires us to look at the charge contextually, as a whole. *Haire*, 205 N.C. App. at 441, 697 S.E.2d at 400. The trial court gave full self-defense instructions with respect to the assault charges. The trial court referenced these instructions, and specifically the self-defense instructions, in its instructions concerning felony murder based upon the assault charges. Taken as a whole, these felony murder instructions did not constitute error, much less plain error.

Finally, defendant complains that the trial court failed to include a self-defense mandate with respect to the lesser offenses of second-degree murder and voluntary manslaughter. Since the jury convicted defendant of first-degree murder based upon premeditation and deliberation and defendant acknowledges that the trial court gave a final mandate concerning self-defense as to this charge, this ends our inquiry. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 ("To establish plain error, defendant must show that the erroneous jury instruction . . . had a probable impact on the jury verdict.").

All of defendant's arguments pertaining to the lack of an instruction relating to self-defense in the final mandates are without merit.

III. Motion to Dismiss the Charge of Attempted Robbery with a Dangerous Weapon

Defendant next argues that the trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon of Cantera at the close of all the evidence because the State failed to present evidence of an attempted taking of Cantera's property. We disagree.

A. Standard of Review

The denial of a motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "[T]he 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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Evidence is substantial if it is relevant, not seeming or imaginary, and a reasonable mind might accept it as adequate to support a conclusion." *State v. Beam*, 201 N.C. App. 643, 646-47, 688 S.E.2d 40, 43 (2010). The trial court must view the direct and circumstantial evidence in the light most favorable to the State when considering the defendant's motion, giving the State the benefit of every reasonable inference therein. *Id.* at 647, 688 S.E.2d at 43. "Contradictions and

discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990).

B. Analysis

[3] Defendant contends that the trial court should not have submitted the attempted robbery with a dangerous weapon charge to the jury because the evidence was insufficient to support a conviction based upon that charge. Defendant argues that this error affects not only the attempted robbery with a dangerous weapon charge, but also the felony murder conviction based upon the attempted robbery of Cantera. Defendant moved to dismiss at the conclusion of the State's evidence and again after all the evidence had been presented. By presenting evidence, we note that defendant waived review of the motion to dismiss at the conclusion of the State's evidence. N.C.R. App. P. 10(a)(3). However, by renewing the motion to dismiss at the close of all the evidence, defendant properly preserved the issue of the sufficiency of the evidence for purposes of appellate review. *State v. Morganherring*, 350 N.C. 701, 732, 517 S.E.2d 622, 640 (1999). We review this argument based upon all of the evidence presented.

[4] "An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987). An overt act is more than mere preparation and must sufficiently approach the completion of the offense " 'to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.' " *State v. Miller*, 344 N.C. 658, 668, 477 S.E.2d 915, 921 (1996) (quoting *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971)). "A defendant may attempt robbery with a dangerous weapon even when the defendant neither demands nor takes money from the victim." *State v. Taylor*, 362 N.C. 514, 539, 669 S.E.2d 239, 261 (2008). When a defendant "is convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony does not merge with the murder conviction and the trial court is free to impose a sentence thereon." *State v. Bell*, 338 N.C. 363, 394, 450 S.E.2d 710, 727 (1994).

In *Miller*, the defendant was indicted for murder and attempted armed robbery after shooting his next-door neighbor. 344 N.C. at 662-63, 477 S.E.2d at 918. The defendant admitted that prior to shooting the

victim twice and leaving without taking the victim's wallet, he pointed a pistol at the victim and pulled the trigger without firing. *Id.* at 665, 477 S.E.2d at 920. The defendant also informed his cousin before the shooting that "if he did not get any money . . . he was going to kill his next-door neighbor[.]" *Id.* at 666, 477 S.E.2d at 920. The defendant argued the attempted armed robbery charge should have been dismissed because the State failed to present sufficient evidence of his advancing beyond mere preparation to commit the robbery. *Id.* at 667, 477 S.E.2d at 921. Our Supreme Court, in overruling the assignment of error, found that the defendant's plan showed his intent and that attempting to shoot the victim constituted the overt act necessary for attempted robbery. *Id.* at 668-69, 477 S.E.2d at 922.

In the instant case, all of the evidence, when taken in the light most favorable to the State, substantially shows that defendant had the intent to rob Cantera and performed an overt act intended to carry out that plan. Elliott's testimony at trial was that defendant planned the robbery with her; that defendant waited in the vehicle until Elliott sent him a text message with the location of each individual within the apartment; that defendant entered the apartment and went directly to Cantera's bedroom; and that defendant proceeded to wield his firearm in a threatening manner towards Cantera.

While there was no testimony that defendant made a specific demand of Cantera for money, an actual demand for the victim's property is not required. *Taylor*, 362 N.C. at 539, 669 S.E.2d at 261. Elliott's testimony showed that defendant had progressed well beyond mere preparation and sufficiently approached the completion of the robbery. The defendant's plan together with his brandishing of the firearm was sufficient evidence for the case to be submitted to the jury. *See Miller*, 344 N.C. at 668-69, 477 S.E.2d at 922.

Since defendant presented evidence, we do not consider defendant's evidence denying a plan to rob Cantera except to the extent that it does not contradict the State's evidence and is favorable to the State. *Franklin*, 327 N.C. at 172, 393 S.E.2d at 787.

The trial court properly denied defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon. Moreover, since defendant was convicted of first-degree murder based upon premeditation and deliberation, the trial court was not required to arrest judgment on the conviction for the attempted robbery with a dangerous weapon of Cantera. *Bell*, 338 N.C. at 394, 450 S.E.2d at 727.

This argument is without merit.

IV. Conclusion

We hold that defendant received a fair trial, free from error.

NO ERROR.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
SCOTT ALLEN FISHER

No. COA12-1404

Filed 6 August 2013

1. Homicide—involuntary manslaughter—culpable negligence—foreseeability

There was sufficient evidence for foreseeability in an involuntary manslaughter prosecution where, after a party, defendant left the injured, intoxicated, and partially clothed victim outside on a cold night. Defendant might not have foreseen that his action would result in the victim's death, but some injury to the victim was foreseeable.

2. Homicide—involuntary manslaughter—instructions—foreseeability omitted—no plain error

There was no plain error in an involuntary manslaughter prosecution where the trial court did not instruct the jury that foreseeability was an essential element of proximate cause, but the State presented overwhelming evidence of foreseeability and it was not probable that the jury would have reached a different result had a proper instruction been given.

Appeal by defendant from judgment entered 18 May 2012 by Judge Bradley B. Letts in Henderson County Superior Court. Heard in the Court of Appeals 24 April 2013.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

Duncan B. McCormick for Defendant-appellant.

ERVIN, Judge.

Defendant Scott Allen Fisher appeals from a judgment sentencing him to a term of 19 to 23 months imprisonment based upon his conviction for involuntary manslaughter. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss for insufficiency of the evidence and committed plain error by failing to instruct the jury that "foreseeability was an essential element of proximate cause where the decedent froze to death." After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

Sixteen year old Michael Scott Rogers died on or about 20 February 2010 after attending a party hosted by Defendant at the residence in which he lived with his parents. Krista Rickards, who had known Defendant for several years, was at the party with several of her friends. Although she was under-aged, Ms. Rickards consumed mixed drinks at the party. Another guest, eighteen year old Brittany Phillipson, recalled that the guests were drinking and using marijuana in addition to "pills and other stuff."

According to Ms. Rickards, Mr. Rogers was "very intoxicated" and belligerent, telling his fellow guests that he had been in two mental institutions and that he was addicted to drugs. While she was at the party, Ms. Phillipson saw Mr. Rogers on the floor and bleeding as a result of the fact that Defendant had "kicked or stomped" his face. At the time of her departure, Ms. Phillipson noticed that Mr. Rogers was "kind of coming in and out of consciousness" and that one of her friends was cleaning his face.

At around 11:00 p.m., Mr. Rogers made two calls to his mother. During the first call, his speech was slurred and he asked for his mother and stepfather, Robert Leonard, to come pick him up. At the time that he called back a few minutes later, Mr. Rogers was crying. When Ms. Leonard asked him where he was, Mr. Rogers replied "I don't know. They done beat the hell out of me. I'm laying here and I'm bleeding all over, and I just pray to God they don't come back and kill me." After receiving this information and learning where Mr. Rogers was,

Mr. Leonard arranged to pick Mr. Rogers up at Blantyre Baptist Church, which is located on Kings Road, a short distance from the site of the party and near the dividing line between Henderson and Transylvania Counties. After speaking with Mr. Rogers, Ms. Leonard called 911 and asked someone from the Sheriff's Department to meet them at the church. At about this time, the remaining guests concluded that investigating officers would soon arrive at the party and dispersed.

The night on which the party occurred was very cold, with temperatures in the 20s. Mr. and Ms. Leonard, as well as Mr. Rogers' father, Brian Rogers, arrived at Blantyre Baptist Church a few minutes after speaking with Mr. Rogers. However, Mr. Rogers never appeared at that location. As a result, the Leonards and Brian Rogers checked nearby houses and waited at the church for several hours.

In light of Mr. Rogers' failure to appear at the Blantyre Baptist Church, a number of law enforcement officers began searching for him. Sergeant Chris Hawkins of the Transylvania County Sheriff's Department spoke with someone who been guest at the party and who led him to Defendant's house, which was located about a quarter mile from Blantyre Baptist Church. At the time that he arrived at Defendant's residence, Sergeant Hawkins observed blood droplets in front of the house. In the meantime, after listening to a conversation between Mr. Rogers and a 911 dispatcher, Lieutenant Kevin Holden of the Transylvania County Sheriff's Department decided that Mr. Rogers needed to be found quickly so that he could be "provide[d with] immediate medical attention." After meeting Sergeant Hawkins at Defendant's house and examining the blood drops that Sergeant Hawkins had detected outside that structure, Lieutenant Holden determined that exigent circumstances justified the making of an entry into the house for the purpose of determining whether Mr. Rogers was inside. Although they did not find anyone in the residence, the investigating officers did observe a bloodied towel during their attempt to find Mr. Rogers. Deputy Terrell Scruggs and Detective John Nicholson of the Transylvania County Sheriff's Department took possession of items found at Defendant's house and noted that the outside temperature was approximately 28 degrees Fahrenheit shortly before 5:00 a.m.

After determining that Mr. Rogers was not in Defendant's house, Lieutenant Holden talked with Defendant's father, Shawn Fisher, by telephone and asked him to contact Defendant for the purpose of ascertaining if Defendant knew where Mr. Rogers was. A short time later, Mr. Fisher called back and reported that Defendant had told him that he had dropped Mr. Rogers off at the end of the Fisher's driveway. Although

investigating officers searched the area in question, they did not find Mr. Rogers.

At that point, Lieutenant Holden had a second conversation with Mr. Fisher, who suggested that Defendant might be with a woman named Ashley who drove a silver Volkswagen and lived in an apartment on King Street in Brevard. As a result, investigating officers went to the King Street address, arriving shortly after 3:00 a.m. Upon arriving at the King Street apartment, they located the silver Volkswagen, upon which and in which Deputy Scruggs observed "blood spatter spots" and bloodstains.

After entering Ashley's apartment, the investigating officers spoke with several people, including Defendant. Richard Thomas, who was one of the persons present in the apartment, told Lieutenant Holden that he had been at the party at Defendant's house; that he had gotten into a fight with Mr. Rogers; that, after the party had come to an end, they had driven Mr. Rogers a short distance; that Mr. Rogers had exited the car at the intersection of Highway 64 East and King Road and walked towards the bridge; and that the group had not seen him since that time. Defendant told Lieutenant Holden that he had been driving when Mr. Rogers left the car.

After conversing with Mr. Thomas and Defendant, Sergeant Hawkins and Deputy Scruggs went to the intersection of King Road and Highway 64. At that point, the weather was "[f]reezing cold." Upon reaching the intersection, Sergeant Hawkins searched a boat access area near Grove Bridge Road, which was just across the Henderson County line. After securing the silver Volkswagen, Lieutenant Holden joined the search.

At approximately 4:00 a.m., investigating officers found a broken taillight lens and more blood drops. In addition, the investigating officers observed oil near the blood spots and ascertained that the blood and oil which they discovered on the ground coincided with the locations of an oil leak and blood spots that were detected on the silver Volkswagen. Upon determining that they had crossed the county line, the investigating officers contacted Henderson County law enforcement officials. As a result, Corporal Breena Williams of the Henderson County Sheriff's Department was dispatched to the Grove Bridge boat access area at around 7:00 a.m. on 21 February 2010, at which point she collected physical evidence, including blood swabbings and pieces of a taillight lens.

After agreeing to speak with investigating officers, Defendant was interviewed by Brian Kreigsman, who was, at that time, the chief

detective for the Transylvania Sheriff's Department. Initially, Defendant told Detective Kreigsman that, when the party broke up, he gave Mr. Rogers a ride to the intersection of Highway 64 and King Road and that he had last seen Mr. Rogers walking from that location towards the Grove Bridge. As a result of the fact that investigating officers had found evidence at the boat access area, Detective Kreigsman challenged the truthfulness of Defendant's account. In response, Defendant "admit[ted] that, yes, they had gone to the bridge"; that Defendant had been "driving the car"; that, when they parked at the bridge, he "couldn't get [Mr. Rogers] out of the car"; that Mr. Rogers "was spitting, wanting to fight"; and that "they fought back and . . . punched and kicked him." However, Defendant claimed that Mr. Rogers "was still breathing" at the time that Defendant got back into the car. In addition, Defendant provided a written statement in which he stated that "I was chillin with some friends, and my next thing I know people hit [Mr. Rogers] a bunch. And we took him to the bridge and left, and I threw him out." Detective Kreigsman took "a picture of [Defendant's] hand showing abrasions, bruising on his knuckles."

In the meantime, investigating officers continued to search for Mr. Rogers. Shortly before noon on 21 February 2010, Lieutenant Holden, while using binoculars to scan the area, saw Mr. Rogers' body, in "jeans and no shirt, lying on his back in the field" about a hundred yards from the boat access. The field in which Mr. Rogers' body was found was used to pasture pigs, which were precluded from interfering with his body by a guard dog. Agent Casey Drake of the State Bureau of Investigation, who assisted in the processing of the area where Mr. Rogers' body was found, observed that the field in question contained "pigs of all sizes, miniature horses, [and] goats" and was enclosed by two fences. An examination of Mr. Rogers' body revealed the presence of "dried blood around his mouth and nose and face and bruises and scrapes all over him."

During the course of their investigation, investigating officers took a statement from Ms. Rickards, who indicated that Defendant was angry at having to take Mr. Rogers to the church to meet his parents because he had been drinking and did not want to drive. Ms. Rickards spoke with Defendant by telephone several hours after the party ended, at which point he told her that "he had taken [Mr. Rogers] out into the middle of nowhere and beat the s**t out of him." When Ms. Rickards asked Defendant "what he thought would happen when [Mr. Rogers] woke up, [Defendant] told [her] that he didn't know if he would."

Dr. Donald Jason, M.D., an expert in forensic pathology who performed an autopsy on Mr. Rogers' body, noted "many abrasions and

bruises over [Mr. Rogers'] face, chest, the back and the arms and the legs." However, Dr. Jason determined that Mr. Rogers did not have any fractures or internal injuries and characterized the abrasions and bruises as "superficial." Although toxicology reports indicated that Mr. Rogers had consumed alcohol, no traces of illegal drug use were detected. An internal examination revealed the presence of hemorrhaging to the stomach lining that was consistent with death resulting from exposure. According to Dr. Jason, Mr. Rogers "died of hypothermia" "because he was in a cold environment for a period of time[.]"

2. Defendant's Evidence

On 20 February 2010, Defendant was nineteen years old and lived with his parents. Defendant's parents were working out of town, so he asked some friends to come over to his residence. Defendant did not know Mr. Rogers and had not invited him to come to his home. At the time that Mr. Rogers arrived with Coley Hall, one of Defendant's friends, Mr. Rogers was acting "wild." In addition, Defendant was intoxicated, having drunk about ten shots of vodka and smoked marijuana during the party.

As the party progressed, several female guests made complaints to Defendant about Mr. Rogers' behavior. In response to those complaints, Defendant and Mr. Thomas took Mr. Rogers aside and asked him to "calm down." At that point, Mr. Rogers became aggressive and had a brief fight with Mr. Thomas, which Defendant broke up after Mr. Rogers suffered a cut lip. Once the fight was over, Defendant took Mr. Rogers inside, cleaned his injury, and suggested that he rest in Defendant's bedroom before rejoining the party.

About twenty minutes later, Mr. Rogers reappeared and announced that he had "called the cops on you-all." Defendant was angered by Mr. Rogers' action given that he was on probation for felonious possession of marijuana. After Mr. Rogers spit in Defendant's face, Defendant "threw the first punch," at which point the two men "got into a little scuffle." As soon as Mr. Rogers fell, Defendant "hit him two to three more times" and then "got up and walked outside." Although Defendant admitted having struck Mr. Rogers several times, he denied having kicked or stomped him in the face.

After his fight with Mr. Rogers, Defendant asked everyone to leave. In light of that request, the party began to break up. Several minutes later, Mr. Rogers emerged from Defendant's house, took off his shirt, and "proceeded to beat on his chest." At that time, Mr. Rogers was bleeding from the "lip and nose area." Although he was angry, Defendant told

Mr. Rogers that he would take him home after his great-uncle "calmed [him] down." Upon receiving this information, Mr. Rogers got into a silver vehicle owned by Defendant's friend Ashley and driven by Mr. Hall. In the car, Defendant occupied the front seat while Mr. Rogers and two girls were seated in the back seat.

After leaving Defendant's residence, the group traveled past Blantyre Baptist Church and turned onto King Road. As they drove down the road, Mr. Rogers was beating Defendant and Mr. Hall on the back of the head. Since Mr. Rogers wanted to get out of the car, Defendant directed Mr. Hall to drive to the boat access area near the Grove Bridge. Defendant selected this location because he knew that the area was lighted and because he was intoxicated and felt that the group was less likely to encounter law enforcement officers on a side road as compared to a principal highway.

As the group reached the boat access parking lot, Mr. Rogers, who was continuing to shout, got out of the car. Neither Defendant nor Mr. Hall fought with Mr. Rogers at the time they that let him out of the car. As they left the parking lot, Defendant, who had assumed responsibility for driving, backed the car into a telephone pole before taking the group to Brevard.

Subsequently, Defendant received a phone call from his father, who inquired about Mr. Rogers' whereabouts. Defendant told his father where the group had let Mr. Rogers out of the car. Defendant denied knowing how blood got onto the car, that there was any plan to leave Mr. Rogers at Blantyre Baptist Church, conversing about the incident with Ms. Rickards, or speaking with Lieutenant Holden. However, Defendant did admit that he never called 911 in order to seek assistance for Mr. Rogers despite the fact that Mr. Rogers was intoxicated, shirtless, and had been in a fight at the time that they dropped him off at the boat access.

At around 11:30 p.m. on 20 February 2010, Mr. Fisher and his wife were driving their tractor-trailer rig in Pennsylvania, when Mr. Fisher received a phone call from his uncle, who lived next door to the family residence. Upon learning that there was a "loud party" at his residence, Mr. Fisher asked his uncle to break up the function. A few minutes later, Mr. Fisher spoke by phone with Lieutenant Holden, who told him that investigating officers were looking for Mr. Rogers. Mr. Fisher authorized investigating officers to look for Mr. Rogers in his house and then called Defendant, who told him that they had "set [Mr. Rogers] out at the end of our road."

About thirty minutes later, Mr. Fisher received another call from Lieutenant Holden, who told him that they had been unable to locate Mr. Rogers and asked him to contact Defendant again for the purpose of obtaining more specific directions. As a result, Mr. Fisher called Defendant and told him that the investigating officers were "getting concerned about [Mr. Rogers] and [] needed to know exactly where [the group] had set him out." At that point, Defendant told his father that they had let Mr. Rogers out of the car at the boat access. Upon obtaining this information, Mr. Fisher passed it along to Lieutenant Holden. According to Mr. Fisher, Defendant sounded intoxicated.

B. Procedural History

On 19 January 2011, the Henderson County grand jury returned a bill of indictment charging Defendant with involuntary manslaughter. The charge against Defendant came on for trial before the trial court and a jury at the 14 May 2012 criminal session of the Henderson County Superior Court. On 18 May 2012, the jury returned a verdict convicting Defendant as charged. At the conclusion of the ensuing sentencing hearing, the trial court entered a judgment sentencing Defendant to a term of 19 to 23 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Sufficiency of the Evidence

In his first challenge to the trial court's judgment, Defendant contends that the trial court erred by denying his motion to dismiss the involuntary manslaughter charge that had been lodged against him. More specifically, Defendant contends that the trial court erred by denying his dismissal motion on the grounds that "the evidence did not show that [Defendant] committed a culpably negligent act or omission that proximately caused [Mr. Rogers] to freeze to death." We do not find this argument persuasive.

1. Standard of Review

The standard of review utilized in reviewing challenges to the denial of a motion to dismiss for insufficiency of the evidence is well established:

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense.

> Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State. Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight, which is a matter for the jury. Thus, if there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied."

State v. Abshire, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009) (citations and quotation marks omitted). "When reviewing a defendant's motion to dismiss, this Court determines only whether there is substantial evidence of (1) each essential element of the offense charged and of (2) the defendant's identity as the perpetrator of the offense. Whether the evidence presented at trial is substantial evidence is a question of law for the court." *State v. Miles*, __ N.C. App __, __, 730 S.E.2d 816, 822 (2012) (citing *State v. Lowry*, 198 N.C. App. 457, 465, 679 S.E.2d 865, 870, *cert. denied*, 363 N.C. 660, 686 S.E.2d 899 (2009)), and *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982)), *aff'd*, __ N.C. __, __ S.E.2d __, 2013 N.C. LEXIS 342 (2013). "Appellate review of a denial of a motion to dismiss for insufficient evidence is *de novo*." *State v. Boozer*, 210 N.C. App. 371, 374-75, 707 S.E.2d 756, 761 (2011) (citing *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008)), *disc. review denied*, __ N.C. __, 720 S.E.2d 667 (2012). We will now proceed to apply this standard of review in evaluating Defendant's challenge to the denial of his dismissal motion.

2. Correctness of Trial Court's Ruling

[1] "The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997) (citing *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985)). "Proximate cause is a cause that produced the result in

continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. Foreseeability is an essential element of proximate cause. This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected. *State v. Powell*, 336 N.C. 762, 771-72, 446 S.E.2d 26, 31 (1994) (quoting *Williams v. Boulerice*, 268 N.C. 62, 68, 149 S.E.2d 590, 594 (1966) (other citations omitted)). The ultimate issue raised by Defendant's challenge to the denial of his dismissal motion is whether the record contains sufficient evidence to permit a reasonable jury to conclude that Defendant committed a culpably negligent act which proximately resulted in Mr. Rogers' death.

The record, when considered in the light most favorable to the State, contains evidence from which a reasonable jury might find (1) that Defendant became angry at Mr. Rogers during his party and "kicked or stomped" his face, leaving Mr. Rogers semi-conscious; (2) that Defendant was irritated that Mr. Rogers had arranged to meet his parents at Blantyre Baptist Church and at the necessity for him to be involved in taking Mr. Rogers there; (3) that, instead of taking Mr. Rogers at the church to meet his parents, Defendant drove Mr. Rogers to an isolated parking area at the boat access, at which point he "beat the s**t out of" Mr Rogers; (4) that Defendant abandoned Mr. Rogers at the boat access despite knowing that the temperature was in the 20s and that Mr. Rogers had been beaten, was intoxicated, and was not wearing a shirt; (5) that Defendant realized that his actions had placed Mr. Rogers in jeopardy, as evidenced by his statement to Ms. Rickards that he did not think Mr. Rogers would wake up and by his statement to Detective Kreigsman that Mr. Rogers was "still breathing" when Defendant left him at the boat access area; and (6) that, even after being directly informed by his father that Mr. Rogers was missing and that investigating officers were concerned about him, Defendant lied about where he had last seen Mr. Rogers, effectively hindering the efforts being made to locate Mr. Rogers and to obtain medical assistance for him. We have no difficulty in concluding that the record contains sufficient evidence to permit a determination that Defendant's actions were culpably negligent and that "[D]efendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." *Powell*, 336 N.C. at 771-72, 446 S.E.2d at 31. As a result, we conclude that the record contained sufficient evidence to

support the submission of the issue of Defendant's guilt of involuntary manslaughter to the jury.

In seeking to persuade us to reach a contrary conclusion, Defendant argues that, while he "may have struck, punched, and kicked" Mr. Rogers, his assault on Mr. Rogers did not constitute a "culpably negligent act" because the "blows did not cause the death." Although Mr. Rogers did not die as the result of the injuries that he received during the assault that Defendant committed upon him, this fact does not justify a decision to overturn the trial court's judgment given that the culpably negligent act which Defendant committed and which led to Mr. Rogers' death was his action in putting Mr. Rogers out of the car in an injured, intoxicated, and under-clothed condition on a very cold night. Similarly, Defendant's contention that, despite the fact that he "let [Mr. Rogers] out of the car on a very cold night and left him at the river access knowing that [Mr. Rogers] was intoxicated and knowing he was not wearing a shirt," "it was not reasonably foreseeable [that Mr. Rogers] would wander into a muddy pig field and die of hypothermia," is not persuasive given that Defendant's argument overlooks the fact that the foreseeability requirement "does not mean that the defendant must have foreseen the injury in the exact form in which it occurred[.]" *Id.* Although Defendant might not have foreseen that his decision to leave Mr. Rogers outside on a cold night in an injured, intoxicated, and partially clothed condition would result in his death, it is hard to reach any conclusion other than that some injury to Mr. Rogers was foreseeable, if not almost preordained, in light of that decision.

The deficiency in the logic upon which Defendant[1] relies is illustrated in our recent decision in *State v. Pierce*, __ N.C. App __, 718 S.E.2d 648 (2011), *disc. review denied*, 365 N.C. 560, 723 S.E.2d 769, *cert. denied*, __ U.S. __, 133 S. Ct. 378, 184 L. Ed. 2d 223 (2012), in which the defendant drove away from a law enforcement officer's attempt to initiate a traffic stop. Another officer, who responded to the original officer's radio request for assistance, lost control of his car and died as a result of injuries sustained in a crash while driving to the assistance of his colleague. Defendant was convicted, among other things, of second degree murder as a result of his involvement in this incident. On appeal, Defendant argued that "there was insufficient evidence that his flight

1. Although Defendant argues both that his conduct was not culpably negligent and that his conduct was not a proximate cause of Mr. Rogers' death, the essential thrust of his argument with respect to both of these issues is that Mr. Rogers' death was not a foreseeable consequence of his conduct. As a result, Defendant ultimate makes only one, instead of two, arguments in support of his challenge to the denial of his dismissal motion.

from [the original law enforcement officer] was the proximate cause of [the assisting officer's] death." We rejected this argument, stating that:

> [T]he evidence, viewed in the light most favorable to the State, shows that [Defendant] fled from [the arresting officer's] attempted lawful stop[;] . . . that [the assisting officer] . . . sped to provide assistance and apprehend [Defendant]; [and] that on his way, [the assisting officer] . . . perished after unsuccessfully attempting to avoid [an] obstruction. In our view, this evidence was sufficient to allow a reasonable jury to conclude (1) that [the assisting officer's] death would not have occurred had [Defendant] remained stopped after [the arresting officer] pulled him over, and (2) that an injurious result such as [the assisting officer's] death was reasonably foreseeable under the circumstances. . . . [W]e overrule [Defendant's] argument that . . . there was insufficient evidence to show that [Defendant's] flight proximately caused [the assisting officer's] death.

Pierce, __ N.C. App at __, 718 S.E.2d at 652-53. As a result, we held in *Pierce* that the State did not need to prove that it was foreseeable that another officer would decide to assist the original arresting officer and then die in a vehicular accident while coming to that other officer's aide in order for a guilty verdict to be properly returned; instead, we only required that it be foreseeable that "an injurious result," such as the assisting officer's death, was foreseeable. On the basis of similar logic, we conclude that "an injurious result" such as Mr. Rogers' death from hypothermia or some similar injurious result was reasonably foreseeable as a result of Defendant's decision to leave Mr. Rogers at the boat access area under the circumstances described above.[2]

Although Defendant cites several cases in his brief addressing the sufficiency of the evidence of a defendant's guilt of involuntary manslaughter, each of these decisions involves accidental conduct on the part of the defendant, such as the defendant's involvement in a hunting accident. The present record is, however, devoid of any indication that Mr. Rogers' death stemmed from accidental or unintentional conduct on Defendant's part. Instead, the State's evidence tends to show that Mr.

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2. As an aside, we note that the record contains evidence tending to show that Defendant did in fact foresee the possibility that the consequences of his actions would result in Mr. Rogers' death given his statement to Ms. Rickards that he did not think that Mr. Rogers would "wake up."

Rogers' death resulted from intentional conduct, including Defendant's decisions to beat Mr. Rogers until he was semi-conscious; to leave him at an isolated location in freezing weather and in an injured, intoxicated, and shirtless condition; and to lie to the investigating officers who were searching for Mr. Rogers. In other words, the culpable negligence that underlies Defendant's conviction stems from intentional, rather than unintentional, conduct on Defendant's part. Thus, we do not find cases addressing death caused by inadvertent or accidental actions to be particularly relevant, much less controlling, in addressing the issue that Defendant has brought forward for our consideration.[3] As a result, we conclude that there was sufficient evidence to support the submission of the issue of Defendant's guilt of involuntary manslaughter to the jury and that the trial court did not err by denying Defendant's dismissal motion.

B. Foreseeability Instruction

[2] Secondly, Defendant argues that the trial court "committed plain error by failing to instruct the jury that foreseeability was an essential element of proximate cause[.]" More specifically, Defendant contends that "the court's failure to instruct the jury that foreseeability was an element of proximate cause is error so fundamental as to amount to a miscarriage of justice and error which probably resulted in the jury reaching a different verdict than it otherwise would have reached." We do not believe that Defendant's argument has merit.

" 'A trial judge is required . . . to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime. . . . Failure to instruct upon all substantive or material features of the crime charged is error.' " *State v. Aguilar-Ocampo*, __ N.C. App __, __, 724 S.E.2d 117, 124 (2012) (quoting *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989)). As Defendant correctly observes, " '[f]oreseeability is an essential element of proximate cause[.]' " *State v. Leonard*, __ N.C. App __, __, 711 S.E.2d 867, 871 (quoting *Powell* at 771-72, 446 S.E.2d at 31), *disc. review denied*, 365 N.C. 353, 717 S.E.2d 746 (2011). For that reason, a trial judge should, as a general proposition, incorporate a foreseeability instruction into its discussion of the issue of proximate cause when the record reflects the existence of a genuine

3. In addition, Defendant directs our attention to cases from other jurisdictions addressing manslaughter charges that had been lodged against a defendant in a variety of factual contexts. "[T]hese cases from other jurisdictions are certainly not controlling on this Court," *Skinner v. Preferred Credit*, 361 N.C. 114, 126, 638 S.E.2d 203, 212 (2006), *disc. review denied*, 361 N.C. 371, 643 S.E.2d 591 (2007), and we are not persuaded by their holdings that Defendant is entitled to relief given the well-established principles of North Carolina law discussed in the text.

issue as to whether the injury which resulted from a defendant's allegedly unlawful conduct was foreseeable. *See State v. Hall*, 60 N.C. App. 450, 455, 299 S.E.2d 680, 683 (1983) (holding that, in a case in which the defendant was charged with involuntary manslaughter based on an accidental shooting which occurred while the defendant was hunting, the trial court erred by denying the defendant's request for an instruction concerning foreseeability).

At trial, Defendant did not request an instruction concerning the foreseeability issue or object to the absence of a foreseeability instruction from the trial court's jury charge. In cases in which "a defendant fails to request an instruction, 'we will review the record to determine if the instruction constituted plain error. . . .' " *State v. Ramseur*, __ N.C. App __, __, 739 S.E.2d 599, 606 (2013) (quoting *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000) (internal citations and quotation marks omitted), *cert. denied*, 534 U.S. 840, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001)), *disc. review denied*, __ N.C. __, __ S.E.2d __, 2013 N.C. Lexis 605 (2013). "For error to constitute plain error, a defendant must demonstrate 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*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskil*l, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d 513 (1982)).

> The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C. [Gen. Stat.] § 15A-1443 upon defendants who have preserved their rights by timely objection.

State v. Walker, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986) (citing *Odom*, 307 N.C. at 661, 300 S.E. 2d at 378-79, and quoting *State v. Black*, 308 N.C. 736, 741, 303 S.E. 2d 804, 806-07 (1983)). As a result of the fact that Defendant did not request the trial court to instruct the jury on the foreseeability issue or object to the omission of such an instruction from the trial court's charge, we review Defendant's challenge to the trial court's instructions using a plain error standard of review.

An outcome is foreseeable when "a person of ordinary prudence would reasonably have foreseen [it] as the probable consequence of his acts." *Bogle v. Power Co.*, 27 N.C. App. 318, 321, 219 S.E.2d 308, 310 (1975) (citing *Luther v. Contracting Co.*, 268 N.C. 636, 642, 151 S.E. 2d 649, 653-54 (1966)), *disc. review denied*, 289 N.C. 296, 222 S.E.2d 695 (1976). As we have previously discussed, the foreseeability component of the proximate cause requirement "does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." *Powell*, 336 N.C. at 771-72, 446 S.E.2d at 31. At trial, Defendant admitted that he had fought with Mr. Rogers. In addition, the undisputed evidence established that Defendant left Mr. Rogers at a relatively isolated boat access late at night in below-freezing weather despite his knowledge that Mr. Rogers was bleeding, intoxicated, and shirtless. Even if the jury chose not to believe the evidence tending to show that Defendant had "kicked or stomped" Mr. Rogers' face and that he opined that Mr. Rogers might never "wake up," we conclude that the State presented overwhelming evidence tending to show that Defendant "might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." *Id.* In addition, given the substantial and largely uncontradicted evidence tending to show that Defendant's actions were culpably negligent and the overwhelming evidence tending to show that "some injurious result" was foreseeable as a result of Defendant's conduct, we conclude that it is not probable that the jury would have reached a different result had a proper foreseeability instruction been given. As a result, Defendant has failed to establish that the omission of a discussion of the issue of foreseeability from the trial court's instructions constituted plain error, so Defendant is not entitled to relief based on this argument.

III. Conclusion

Thus, for the reasons set forth above, we conclude that neither of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges ROBERT C. HUNTER and STROUD concur.

STATE OF NORTH CAROLINA
v.
EDWARD JAY HARWOOD

No. COA12-1301

Filed 6 August 2013

1. Appeal and Error—standard of review—purely legal—de novo

Appellate review was *de novo* where the ultimate issue to be resolved was purely legal on an appeal from the denial of a motion for appropriate relief.

2. Appeal and Error—retroactive application of decision—motion for appropriate relief

The trial court did not err in a motion for appropriate relief from convictions for possession of firearms by a felon by concluding that *State v. Garris*, 191 N.C. App. 276, should not apply retroactively. A decision which merely resolves a previously undecided issue without either actually or implicitly overruling or modifying a prior decision cannot serve as the basis for an award of appropriate relief pursuant to N.C.G.S. § 15A-1415(b)(7).

3. Constitutional Law—double jeopardy—waiver—guilty plea

Defendant waived the right to assert double jeopardy on direct appeal and in subsequent postconviction litigation by pleading guilty to the underlying charges of possession of a firearm by a felon.

Certiorari review of order entered 15 August 2012 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals on 27 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Amanda S. Zimmer, for Defendant-Appellant.

ERVIN, Judge.

Defendant Edward Jay Harwood challenges an order denying a motion for appropriate relief in which he sought to have eighteen of the nineteen convictions for possession of a firearm by a felon resulting

from a plea of guilty which he entered on 24 July 2007 vacated. In his brief, Defendant argues that this Court should reverse the trial court's order and afford him relief from eighteen of his nineteen convictions on the basis that those convictions are inconsistent with our decision in *State v. Garris*, 191 N.C. App. 276, 663 S.E.2d 340, *disc. review denied*, 362 N.C. 684, 670 S.E.2d 907 (2008), which held that a defendant who had previously been convicted of a felony could only be convicted of and sentenced one time for the simultaneous possession of multiple firearms on a single occasion and on the grounds that, in light of *Garris*, the challenged judgments violate the state and federal constitutional provisions against placing a criminal defendant in jeopardy twice for the same offense. After careful consideration of Defendant's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 16 March 2007, agents from the Buncombe County Anticrime Taskforce went to Defendant's home in Fairview for the purpose of investigating complaints that Defendant had been selling marijuana and crack cocaine. As the agents approached his home, they encountered Defendant in his yard. Following a brief conversation with the agents, Defendant consented to a search of his residence. During the course of the ensuing search, Defendant told the agents that he had a small amount of marijuana in the home and showed it to them. At that point, Agent T.R. Goodridge asked Defendant if he had any weapons in the home. Although Defendant responded in the affirmative, he stated that he believed that he was legally entitled to have them in his possession. In reply, Agent Goodridge informed Defendant that, given his status as a convicted felon, he could not lawfully possess any firearms or ammunition. As a result, the investigating officers seized the marijuana and the nineteen firearms which they found in Defendant's residence. Agent Goodridge also cited Defendant for possessing marijuana.

On 23 March 2007, warrants for arrest were issued charging Defendant with nineteen counts of possession of a firearm by a felon. On 4 June 2007, the Buncombe County grand jury returned bills of indictment charging Defendant with nineteen counts of possession of a firearm by a felon. On 24 July 2007, Defendant entered a plea of guilty to nineteen counts of possession of a firearm by a felon and one count of misdemeanor possession of marijuana, with these guilty pleas having been tendered on the understanding that Defendant's convictions would be consolidated for judgment into "2 class G felonies." After accepting Defendant's guilty pleas, Judge Ronald K. Payne sentenced Defendant to

a term of 16 to 20 months imprisonment based upon his conviction for one count of possession of a firearm by a felon, suspended Defendant's active sentence for 30 months, and placed Defendant on supervised probation subject to a number of terms and conditions. In addition, Judge Payne consolidated Defendant's convictions for possession of marijuana and eighteen counts of possession of a firearm by a felon for judgment and sentenced Defendant to a consecutive term of 16 to 20 months imprisonment, with this sentence suspended for the same period and subject to the same terms and conditions as was the case with respect to Defendant's other conviction for possession of a firearm by a felon.

On 24 September 2007, Defendant was charged with violating the terms and conditions of his probation. At approximately the same time, Defendant was also charged with possession of cocaine with the intent to sell and deliver, maintaining a dwelling place for the purpose of using controlled substances, two counts of possession of a firearm by a felon, two counts of conspiracy to traffic in opium or heroin, four counts of trafficking in opium or heroin, possession of a Schedule IV controlled substance with the intent to sell or deliver, and having attained habitual felon status. On 4 February 2008, Defendant entered pleas of guilty to these additional charges and consented to the revocation of his probation and the activation of his suspended sentences on the condition that certain of his convictions would be consolidated for judgment, that he would be imprisoned for a term of least 102 to 132 months stemming from certain of these additional charges, that he would be sentenced to a concurrent term of at least 70 to 84 months for the remaining additional charges, and that his activated suspended sentences would be served concurrently with his sentences for these new convictions. Judge James Baker entered judgments consistent with Defendant's negotiated plea on the same date. Defendant completed serving these sentences on 21 September 2010.

On 15 July 2008, this Court issued its decision in *Garris*, in which we construed N.C. Gen. Stat. § 14-415.1(a) to permit only one conviction for the simultaneous possession of multiple firearms by a convicted felon. *See Garris*, 191 N.C. App. at 285, 663 S.E.2d at 348. As we explained in our opinion in that case:

> In the instant case, a review of the applicable firearms statute shows no indication that the North Carolina Legislature intended for N.C. Gen. Stat. § 14-415.1(a) to impose multiple penalties for a defendant's simultaneous possession of multiple firearms. Here, defendant was not

> only convicted twice for possession of a firearm by a felon but was also sentenced twice . . . . Upon review, we hold that defendant should be convicted and sentenced only once for possession of a firearm by a felon based on his simultaneous possession of both firearms.

Id. In light of this Court's decision in *Garris*, Defendant filed a motion for appropriate relief on 1 July 2011 seeking to have eighteen of his nineteen convictions for possession of a firearm by a felon vacated.[1] More specifically, Defendant asserted in his motion for appropriate relief that he was entitled to the requested relief because our decision in *Garris* constituted a significant change in law that should be given retroactive effect and because his convictions for multiple counts of possession of a firearm by a felon arising from the simultaneous possession of multiple firearms violated his state and federal constitutional right not to be placed in jeopardy twice for the same offense. On 20 February 2012, Judge Sharon Tracey Barrett entered an order requiring the State to file an answer to Defendant's motion for appropriate relief. On 13 March 2012, the State filed an answer to Defendant's motion for appropriate relief in which the State argued that *Garris* should not be applied retroactively and that Defendant's motion for appropriate relief should be denied. On 15 March 2012, Judge Barrett entered an order setting Defendant's motion for appropriate relief for hearing at the 16 April 2012 criminal session of the Buncombe County Superior Court for the purpose of determining "what additional motions, if any, may need to be addressed with respect to the Defendant" and "for the Court to hear and consider legal argument concerning the present Motion."

Defendant's motion for appropriate relief came on for hearing before the trial court at the 11 June 2012 criminal session of the Buncombe County Superior Court.[2] On 15 August 2012, the trial court entered an order denying Defendant's motion for appropriate relief. In its order, the trial court made findings of fact which are essentially consistent with the substantive and procedural summary set out above and then "concluded" that:

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1. In his motion for appropriate relief, Defendant only challenged eighteen of his nineteen convictions for possession of a firearm by a felon as reflected in the trial court's 24 July 2007 judgments. He did not, however, challenge any of the 4 February 2008 judgments in that filing.

2. The record does not explain why Defendant's motion for appropriate relief was apparently not heard and considered at the 16 April 2012 session in accordance with Judge Barrett's order. However, neither party has objected to the fact that the ultimate ruling on Defendant's motion for appropriate relief was made by the trial court rather than by Judge Barrett.

> 8. The purpose and effect of the *Garris* decision was to clarify what the court found to be an uncertainty in the literal language of [N.C. Gen. Stat. §] 14-415.14 [sic] as to whether it provided for multiple convictions of the offense for simultaneous possession of multiple firearms. Finding no indication that the legislature intended such a result, and applying the rule of lenity, the court held that a defendant can only be convicted once for simultaneous possession of multiple firearms.
>
> [9]. Between 2004 and 2008, the provisions of N.C. [Gen. Stat. §] 14-415.1 were applied in the 28th Prosecutorial District and no doubt statewide to multiple convictions for simultaneous acts of possession of firearms by felons. Although the court does not know the exact number of such cases the court concludes that such knowledge is not essential to a determination as to whether a retroactive application of *Garris* is appropriate.
>
> [10]. To apply *Garris retroactively* could easily disrupt the orderly administration of our criminal law. It would cast doubt upon verdicts of guilty and pleas of guilty in all cases involving multiple convictions for simultaneous possession of multiple firearms which occurred between 2004 and 2008. It further would cast doubts upon sentences imposed upon these individuals for subsequent crimes where the multiple convictions were applied in determining sentencing points. And all of these individuals could each seek either release or new trials in post-conviction proceedings.

On 6 August 2012, Defendant filed a petition seeking the issuance of a writ of *certiorari* authorizing review of the trial court's order by this Court.[3] On 16 August 2012, this Court granted Defendant's *certiorari* petition.

II. Legal Analysis

A. Standard of Review

[1] "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent

3. The trial court's order did not explicitly address Defendant's double jeopardy claim. However, the trial court did conclude that "[t]he *Garris* decision does not amount to a constitutional reform, and therefore its application does not mandate retroactivity."

evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citing *State v. Pait*, 81 N.C. App. 286, 288-89, 343 S.E.2d 573, 575 (1986); *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). Although Defendant has argued that certain of the statements made in the trial court's order should be treated as conclusions which lack adequate record support, the ultimate issue that we must resolve in this case is a purely legal question which requires us to conduct *de novo* review.

B. Substantial Change in Law

[2] In his initial challenge to the trial court's order, Defendant contends that the trial court erroneously concluded that this Court's decision in *Garris* should not be applied retroactively. In support of this contention, Defendant notes that state law decisions like *Garris* "are generally presumed to operate retroactively," *State v. Rivens*, 299 N.C. 385, 390, 261 S.E.2d 867, 870 (1980) (citing *Mason v. Nelson Cotton Co.*, 148 N.C. 492, 510, 62 S.E. 625, 632 (1908)), and "are given solely prospective application only when there is a compelling reason to do so," *Id.*, with this determination to be made based upon an analysis of "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *State v. Harris*, 281 N.C. 542, 550, 189 S.E.2d 249, 254 (1972) (citing *Stovall v. Denno*, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970, 18 L. Ed. 2d 1199, 1203 (1967), *overruled in Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 3d 649 (1987)); *see also Faucette v. Zimmerman*, 79 N.C. App. 265, 271, 338 S.E.2d 804, 808 (1986).[4] Although the parties have expended considerable time and energy debating the retroactivity question, we do not believe that it is necessary for us to reach that issue given that Defendant's motion for appropriate relief was subject to denial because the fundamental legal principle upon which Defendant relies in seeking relief from his possession of a firearm by a felon convictions does not constitute a significant change in the substantive or

4. According to the Supreme Court's decision in *State v. Zuniga*, 336 N.C. 508, 513, 444 S.E.2d 443, 446 (1994), the retroactivity of changes in federal law for purposes of evaluating claims asserted in motions for appropriate relief is governed by the standard enunciated by the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288, 310-12, 109 S. Ct. 1060, 1075-76, 103 L. Ed. 2d 334, 356-57 (1989). As a result of the fact that *Garris* involved the proper construction of a state statute, the retroactive effect of the principle enunciated in that decision would be governed by *Rivens* rather than *Teague* in the event that we were to reach the retroactivity question.

procedural law applied during the proceedings leading up to the entry of the challenged judgments.

A motion for appropriate relief made more than ten days after the entry of a challenged judgment is intended to provide a vehicle for "the identification of those errors in a trial which are so basic that one should be able to go back into the courts at any time, even many years after conviction, and seek relief," Official Comment to N.C. Gen. Stat. § 15A-1415 (2011), and is not intended to serve as an alternative to review on direct appeal. *See State v. Jackson*, __ N.C. App. __, __, 727 S.E.2d 322, 328 (2012) (discussing the appropriate application of the statutory procedural default rule precluding consideration of claims that could have been brought on direct appeal in a motion for appropriate relief filed more than ten days after the entry of judgment). According to N.C. Gen. Stat. § 15A-1415(b), a convicted criminal defendant is entitled to seek relief from his or her convictions by means of a motion for appropriate relief filed more than ten days after the entry of judgment on certain specifically enumerated grounds. *See* N.C. Gen. Stat. § 15A-1415(b). In view of the fact that N.C. Gen. Stat. § 15A-1415(b) clearly provides that the eight specific grounds listed in that statutory subsection are "the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after the entry of judgment," a trial court has no authority to grant a request for relief from a criminal conviction based upon a request made more than ten days after the entry of judgment unless the defendant's request falls within one of the eight categories specified in N.C. Gen. Stat. § 15A-1415(b).[5] For that reason, a trial court lacks jurisdiction over the subject matter of a claim for postconviction relief which does not fall within one of the categories specified in N.C. Gen. Stat. § 15A-1415. *State v. Petty*, __ N.C. App __, 711 S.E.2d 509, 513 (2011) (stating that "[s]ubject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it" rather than the way in which "that power may be exercised in order to comply with the terms of a statute") (quoting *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. rev. denied*, 354 N.C. 217, 554 S.E.2d 338 (2001) (internal citations omitted).

Defendant contends that his motion for appropriate relief was properly before the trial court and is properly before this Court on the grounds that "[t]here has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction

5. A defendant may also obtain relief more than ten days after the entry of judgment on newly discovered evidence grounds pursuant to N.C. Gen. Stat. § 15A-1415(c).

or sentence, and retroactive application of the changed legal standard is required." N.C. Gen. Stat. § 15A-1415(b)(7). A fundamental premise underlying Defendant's contention is that our decision in *Garris* represents a significant change in substantive law sufficient to afford an award of relief pursuant to N.C. Gen. Stat. § 15A-1415(b)(7). We do not believe that Defendant's premise represents a correct understanding of applicable law.

At the time that this Court decided *Garris*, no reported decision of this Court or the Supreme Court had addressed the issue of whether the possession of multiple firearms by a convicted felon constituted a single violation or multiple violations of N.C. Gen. Stat. § 14-415.1(a). For that reason, our decision in *Garris* resolved an issue of first impression in this jurisdiction. *State v. Gaines*, 332 N.C. 461, 464, 421 S.E.2d 569, 570 (1992) (stating that "[t]he issue presented by this case has not been addressed by this Court and thus is one of first impression in North Carolina"), *cert. denied*, 507 U.S. 1038, 113 S. Ct. 1866, 123 L. Ed 2d 486 (1993). Instead of working a change in existing North Carolina law, *Garris* simply announced what North Carolina law had been since the enactment of the relevant version of N.C. Gen. Stat. § 14-415.1(a). *See Bousley v. United States*, 523 U.S. 614, 625, 118 S. Ct. 1604, 1612, 140 L. Ed. 2d 828, 841 (1998) (Stevens, J., concurring in part and dissenting in part) (explaining that "[t]his case does not raise any question concerning the possible retroactive application of a new rule of law . . . because our decision in *Bailey v. United States* did not change the law;" instead, the Court's decision "merely explained what [the statute] had meant ever since the statute was enacted" (citations omitted)). As a result, a decision which merely resolves a previously undecided issue without either actually or implicitly overruling or modifying a prior decision cannot serve as the basis for an award of appropriate relief made pursuant to N.C. Gen. Stat. § 15A-1415(b)(7). *State v. Chandler*, 364 N.C. 313, 319, 697 S.E.2d 327, 331-32 (2010) (holding that "an application of this Court's existing case law on expert opinion evidence" did not constitute "a significant change in the law" for purposes of N.C. Gen. Stat. § 15A-1415(b)(7)); *State v. Bates*, 140 N.C. App. 743, 745-46, 538 S.E.2d 597, 599 (2000) (holding that the Supreme Court's decision in *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), which "overruled a long line of cases," constituted a substantial change in law for purposes of deciding a motion for appropriate relief filed on appeal pursuant to N.C. Gen. Stat. § 15A-1415(b)(7)), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 19 (2001); *State v. Honeycutt*, 46 N.C. App. 588, 590, 265 S.E.2d 438, 439-40 (1980) (stating that the Supreme Court's decision in *State v. Haywood*, 295 N.C. 709, 730, 249 S.E.2d 429, 442 (1978), worked a significant change in law for purposes of N.C. Gen. Stat. § 15A-1415(b)(7)).

As Defendant conceded in his motion for appropriate relief, the extent to which state law did or did not permit multiple convictions for possession of a firearm by a felon stemming from the simultaneous possession of more than one firearm was unsettled at the time that he entered his guilty plea. Had he elected to do so, Defendant, like the defendant in *Garris*, could have contested this issue in the Superior Court and, if unsuccessful, made it the basis for an appellate challenge to any resulting convictions. Instead, however, he chose to enter a negotiated plea, an action which resulted in the entry of the judgments that he now seeks to challenge. Although our decision in *Garris* did settle the question which was unsettled at the time that Defendant entered his guilty plea, it did not effect a "significant change in law" cognizable in a motion for appropriate relief filed pursuant to N.C. Gen. Stat. § 15A-1415(b)(7). For that reason, we conclude that the trial court lacked jurisdiction to grant relief on the grounds upon which Defendant has relied before the trial court and in this Court, obviating the necessity for us to decide whether the principle enunciated in *Garris* is entitled to retroactive application in this instance. As a result, given that "the question before this Court is 'whether the ruling of the court below was correct, and not whether the reason given therefor is sound or tenable' " and given that " 'a correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned,' " *State v. Dewalt*, 190 N.C. App. 158, 165, 660 S.E.2d 111, 116 (2008) (quoting *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)), *disc. review denied*, 362 N.C. 684, 670 S.E.2d 906 (2008) we conclude that the trial court's decision to deny Defendant's motion for appropriate relief based upon our decision in *Garris* was correct and should be affirmed.

C. Double Jeopardy

[3] Secondly, Defendant contends that the effect of the judgments which he seeks to challenge in his motion for appropriate relief was to punish him multiple times for a single offense in violation of the double jeopardy provisions of the state and federal constitutions. *See* U.S. Const. amend. V; N.C. Const. art. I, § 19. In support of this assertion, Defendant directs our attention to *State v. Whitaker*, 201 N.C. App. 190, 208-09, 689 S.E.2d 395, 406 (2009), *aff'd*, 364 N.C. 404, 700 S.E.2d 215 (2010), in which we stated, in the course of discussing our decision to vacate a number of convictions with respect to which the trial court had already arrested judgment, that:

> [T]his Court's language and mandate in *Garris* indicates that multiple convictions for simultaneous possession of firearms by a felon is reversible error. Furthermore, "[t]he

> legal effect of arresting judgment is to vacate the verdict and sentence. [However,] [t]he State may proceed against the defendants if it so desires, upon new and sufficient bills of indictment." As the State could issue new indictments against defendant upon the arrested judgments, defendant could be placed in double jeopardy.

Id. at 208-09, 689 S.E.2d at 406 (citations omitted). As a result of the fact that N.C. Gen. Stat. § 15A-1415(b)(3) authorizes a convicted criminal defendant to seek relief if "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina," the trial court did have jurisdiction to consider the validity of this aspect of Defendant's challenge to his convictions. However, despite the fact that the trial court's order does not directly address Defendant's double jeopardy claim, we conclude that the trial court did not err by denying Defendant's request for relief on double jeopardy grounds given that he waived the right to assert any such claim by entering pleas of guilty to the underlying possession of a firearm by a felon charges.

Subject to certain exceptions, "a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *State v. Tyson*, 189 N.C. App. 408, 416, 658 S.E.2d 285, 291 (2008) (quoting *Mabry v. Johnson*, 467 U.S. 504, 508, 104 S. Ct. 2543, 2546-47, 81 L. Ed. 2d 437, 443 (1984)) (internal quotation marks omitted). The double jeopardy provisions of the state and federal constitutions "protect[] against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969); *State v. Murray*, 310 N.C. 541, 547, 313 S.E.2d 523, 528 (1984), *disapproved on other grounds in State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 820 (1988)). A defense such as double jeopardy can be waived by a defendant. *State v. McGee*, 175 N.C. App. 586, 587, 623 S.E.2d 782, 784 (stating that, "[b]y knowingly and voluntarily pleading guilty, an accused waives all defenses other than the sufficiency of the indictment"), *disc. review denied*, 360 N.C. 489, 632 S.E.2d 768 (2006). Thus, as the Supreme Court explicitly held in *State v. Hopkins*, 279 N.C. 473, 476, 183 S.E.2d 657, 659 (1971), a plea of guilty waives a defendant's right to seek dismissal on double jeopardy grounds. By pleading guilty to all nineteen counts of possession of a firearm by a felon, Defendant waived his right to challenge those convictions on double jeopardy grounds on both direct appeal

and in subsequent postconviction litigation. As a result, the trial court did not err by failing to grant Defendant's request for relief from his possession of a firearm by a felon convictions on the basis of double jeopardy considerations.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by denying Defendant's motion for appropriate relief. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA
v.
WILLIE MACK McCOY, JR., DEFENDANT

No. COA12-1210

Filed 6 August 2013

1. Evidence—internal police investigation report—not material

The trial court did not err in an assault and rape case by refusing to provide to defense counsel, during trial, an internal investigation report prepared by the Fayetteville Police Department's Office of Professional Standards and Inspections regarding a lead detective in the investigation. The information contained in the report was not material as it could not reasonably have been taken to put the whole case in such a different light as to undermine confidence in the verdict.

2. Evidence—prior violent conduct by third-party—too attenuated—not inconsistent with defendant's guilt

The trial court did not err in an assault and rape case by excluding evidence that a third party who knew the victim in this case had previously assaulted a person other than the victim. The evidence was too attenuated to directly implicate the third-party in the physical assaults committed on the victim and the evidence was not inconsistent with defendant's own guilt.

STATE v. McCOY

[228 N.C. App. 488 (2013)]

Appeal by defendant from judgments entered 8 December 2011 by Judge Thomas Lock in Cumberland County Superior Court. Heard in the Court of Appeals 22 April 2013.

Roy Cooper, *Attorney General*, *by Anne M. Middleton*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Andrew DeSimone*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Defendant Willie Mack McCoy, Jr. ("defendant") appeals from his convictions for assault inflicting physical injury by strangulation, simple assault, and second-degree rape. After careful review, we find no error.

Factual Background

The State's evidence at trial tended to establish the following facts: Defendant and D.R. ("Dana")[1] lived together, off and on, for approximately eight and a half years and had two children together. Defendant was physically abusive during their relationship, and Dana ultimately decided to leave him in May 2009. She called Teresa Brown ("Brown") for assistance and subsequently began living with Brown in Fayetteville, North Carolina. Brown and Dana had become friends earlier when Dana called to explore the possibility of obtaining a job at Brown's escort service. Brown did not employ Dana as an escort because she believed Dana "was not cut out for th[at] kind of work." However, Dana would sometimes accompany "Kaitlyn Rose," a woman employed by Brown as an escort, on her calls to collect money from customers.

On 1 August 2009, Brown took Dana and Kaitlyn Rose to a Courtyard Marriot hotel to meet a client. Dana was walking toward the door of the hotel when defendant suddenly appeared and began to kick and punch her to the ground. He then dragged Dana to his car, forced her inside, and drove away. Bryan King ("King"), a customer of the escort service, observed this incident.

Defendant continued to assault Dana while he drove her to a friend's house. While they were in the car, defendant hit her with a glass bottle and choked her until she lost consciousness. Defendant then took Dana

1. Pseudonyms are used throughout this opinion to protect the privacy of the individuals and for ease of reading.

to a hotel room in Dunn, North Carolina. Several days later, defendant moved her to a hotel room in Smithfield. During this time period, defendant would not allow her to leave and forced her to have sex with him.

Police officers — who had spoken with Brown and hotel staff at the Courtyard Marriot — tracked defendant's cell phone and found him and Dana in the Smithfield hotel room. Defendant was arrested, and Dana was taken to the hospital, where she was treated for injuries and contusions to her face, chest, arms, and legs. Medical personnel also observed broken blood vessels and bleeding in Dana's eyes and redness around her neck. An investigation into these crimes was initiated by the Fayetteville Police Department. A sexual assault examination was performed on Dana which revealed bruising and inflammation to her vagina. A semen sample collected from her vaginal smear matched defendant's DNA profile.

Defendant was subsequently charged with first-degree kidnapping, assault inflicting physical injury by strangulation, first-degree forcible rape, assault with a deadly weapon, communicating threats, five counts of second-degree rape, second-degree sexual offense, and crime against nature. A jury trial was held, and at the close of the State's evidence, the trial court dismissed two counts of second-degree rape and the charge of communicating threats. The trial court also reduced the charge of first-degree forcible rape to second-degree rape. The jury found defendant guilty of assault inflicting physical injury by strangulation, simple assault (a lesser-included offense of assault with a deadly weapon), and one count of second-degree rape and acquitted him of an additional count of second-degree rape. The jury was unable to reach a verdict on the remaining two counts of second-degree rape and the charges of first-degree kidnapping, second-degree sexual offense, and crime against nature. The trial court declared a mistrial on these charges.

Defendant was sentenced to consecutive presumptive-range terms of 116-149 months for second-degree rape and 10-12 months in a consolidated judgment for the assault inflicting physical injury by strangulation and simple assault offenses. Defendant gave notice of appeal in open court.

Analysis

I. Internal Investigation Report

[1] Defendant's first argument is that the trial court erred in refusing to provide to defense counsel, during trial, an internal investigation report prepared by the Fayetteville Police Department's Office of Professional Standards and Inspections ("OPSI Report") regarding Detective Michael

Baldwin ("Detective Baldwin"), a lead detective in the investigation. For the reasons set out below, we disagree.

During the trial, prosecutors were made aware — and proceeded to inform the trial court and defense counsel — of an ongoing internal investigation of Detective Baldwin by the Fayetteville Police Department's Office of Professional Standards and Inspections. After learning of the internal investigation, the State decided not to call Detective Baldwin as a witness. The trial court obtained a copy of the OPSI Report and, based on defense counsel's request that he be provided with a copy of the report, conducted an examination of the report *in camera*. After reviewing the document, the trial court issued the following oral ruling:

> The Court has reviewed the 24-page report prepared by Sergeant Christopher Joyce of the Fayetteville Police Department Office of Professional Standards and Inspections, which report is dated 14 September 2011, and which report summarizes the findings of an Internal Affairs investigation conducted by the Fayetteville Police Department as a result of a complaint or report received by the department in June of 2011 concerning a problem that Detective Michael Baldwin might be experiencing in his personal life. The Internal Affairs report is presently pending before the appropriate reviewing agency or committee of the Fayetteville Police Department, but has not yet been acted upon. The nature of the problem investigated is such that it could have affected Detective Baldwin's job performance at times. However, there is no evidence that Detective Baldwin was experiencing this problem at the time of his investigation of the crimes presently before the Court. The Internal Affairs report also suggests that Detective Baldwin may have provided false, deceptive, or misleading information concerning the nature or extent of his personal problem to officers conducting the Internal Affairs investigation. The Court makes no finding as to whether or not any information provided by Detective Baldwin during the Internal Affairs – during the Internal Affairs investigation was in fact false, deceptive or misleading. The Court does find specifically that there is no evidence that Detective Baldwin's work in the case before the Court was tainted in any respect at all by any personal problems that Detective Baldwin may have been experiencing earlier this year or that Detective Baldwin's work

> in this case was tainted to any extent at all by any information, even if false, deceptive or misleading, that Detective Baldwin may have provided to Internal Affairs investigators concerning the complaint leading to the – this Internal Affairs investigation. The Court concludes that the internal affairs report provided to the Court this day pursuant to an order of this Court is a part of the office [sic] of his personnel file and shall remain - should remain and shall remain confidential. The Court concludes that no statutory or constitutional rights, either federal or state, of the defendant in this case compels disclosure of that report to the defendant. The Internal Affairs report shall be placed, by the clerk of Superior Court in Cumberland County, under seal and shall be placed in the Court file in this case and shall remain under seal unless ordered unsealed and opened later by this Court or by some other court of competent jurisdiction . . . .

The trial proceeded to completion with neither the prosecution nor the defense being made aware of the contents of the OPSI Report. Detective Baldwin was never called as a witness.

During the preparation of the record on appeal, defendant's appellate counsel requested and obtained a copy of the sealed OPSI Report from the trial court. The trial court ordered appellate counsel "not [to] disseminate the sealed documents except as necessary in connection with the appeal."[2]

Defendant argues on appeal that the trial court's refusal to disclose the OPSI Report's contents to his trial counsel violated his due process rights. Our task on appeal is to "examine the [OPSI Report] to determine whether [it] contain[s] information that is favorable and material to [defendant's] guilt or punishment." *State v. Thompson*, 187 N.C. App. 341, 353, 654 S.E.2d 486, 494 (2007). In so doing, we review the trial court's determination *de novo*. *State v. Scott*, 180 N.C. App. 462, 463, 637 S.E.2d 292, 293 (2006), *disc. review denied*, 361 N.C. 367, 644 S.E.2d 560 (2007). "If the sealed record[] contain[s] evidence which is both favorable and material, defendant [was] constitutionally entitled to disclosure of this evidence." *State v. McGill*, 141 N.C. App. 98, 102, 539 S.E.2d 351, 355 (2000) (citation and quotation marks omitted).

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2. Copies of the OPSI Report were filed under seal with this Court as were the portions of the parties' briefs specifically referencing the contents of the OPSI Report.

The crux of defendant's argument is that if the defense had been provided with the report at trial, it could have called Detective Baldwin as a defense witness and utilized the information within the report to (1) discredit Detective Baldwin; (2) attack the integrity of the investigation; and (3) support the defense's theory that law enforcement "rushed to judgment" in charging defendant.

It is well established that favorable evidence includes both (1) evidence which tends to exculpate defendant; and (2) evidence that undermines the credibility of the State's witnesses. *State v. Thaggard*, 168 N.C. App. 263, 280, 608 S.E.2d 774, 785 (2005). Such evidence is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 94 L.Ed.2d 40, 57 (1987). A reasonable probability "is a probability sufficient to undermine confidence in the outcome" and the defendant bears "the burden of showing that the undisclosed evidence was material and affected the outcome of the trial." *State v. Tirado*, 358 N.C. 551, 589-90, 599 S.E.2d 515, 540-41 (2004) (citation and quotation marks omitted), *cert. denied*, 544 U.S. 909, 161 L.Ed.2d 285 (2005).

After a careful review of the OPSI Report, we conclude that the trial court did not violate defendant's constitutional rights by refusing to disclose the contents of the report to his trial counsel. In our view, the information contained therein does not meet the materiality test set out above.

In asserting the argument that the report was material, defendant analogizes this case to *Kyles v. Whitley*, 514 U.S. 419, 131 L.Ed.2d 490 (1995). However, we find *Kyles* distinguishable from the present case. In *Kyles*, the prosecution failed to disclose statements made by a police informant who was never called to testify in the defendant's trial. *Id.* at 425, 131 L.Ed.2d at 500. The informant's statements were self-incriminating, indicated the informant's personal interest in the defendant's arrest for the crime, and significantly weakened the testimony of the prosecution's key eyewitnesses. *Id.* at 442, 131 L.Ed.2d at 510. The informant's statements were also rife with inconsistencies, and the Supreme Court determined that had the defense obtained these statements, it could have attacked "not only the probative value of crucial physical evidence . . . but the thoroughness and even good faith of the investigation, as well." *Id.* at 445, 131 L.Ed.2d at 512-13.

Despite defendant's assertions to the contrary, the evidence contained in the OPSI Report of Detective Baldwin is not analogous to the

withheld statements in *Kyles*. We cannot agree with defendant's contention that the evidence of problems Detective Baldwin may have been experiencing in his personal life, or his description of those problems to officers with the Office of Professional Standards and Inspections, would have been likely to (1) undercut the integrity or good faith of the investigation into the crimes committed against Dana; or (2) cause the jury to doubt Dana's testimony simply because Detective Baldwin remained in periodic contact with her in the months prior to trial.

As such, we do not believe that this evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435, 131 L.Ed.2d at 506. *See State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense.") (citation and quotation marks omitted).

Here, as stated above, the prosecution chose not to call Detective Baldwin as a witness after learning that he was the subject of a pending investigation by the Office of Professional Standards and Inspections. Instead, the State proceeded to prove its case using the testimony of several other law enforcement officers directly involved in the investigation of the crimes committed against Dana, namely Detective Jeffrey Hoedemaker ("Detective Hoedemaker"), a primary investigator in the case. Detective Hoedemaker testified extensively on numerous aspects of the investigation, including the procedures he used to track defendant's cell phone to the hotel in Smithfield, his collaboration with the U.S. Marshals Service to serve arrest warrants on defendant, and his interviews with the managers of the Dunn and Smithfield hotels. The State also relied on the testimony of Lieutenant Robert Powell of the Smithfield Police Department; William Brady, a former lieutenant with the Dunn Police Department; and several forensic investigators with the Dunn and Fayetteville Police Departments to establish its case.

We are, therefore, unable to conclude that the OPSI Report was "material[] in the constitutional sense" when the State was able to prove its case through the testimony of other law enforcement officers and without Detective Baldwin ever taking the stand. For all of these reasons, defendant's arguments on this issue are overruled.

II. Admissibility of Evidence of Prior Violent Conduct by Brown

[2] In his second argument, defendant contends that the trial court erred in excluding evidence that Brown had previously assaulted Kaitlyn Rose. Defendant asserts that the exclusion of this evidence violated his

constitutional right to present his defense, "which include[s] the right to present relevant evidence tending to show that someone else might have committed the crime with which the defendant was charged." We disagree.

The admissibility of evidence suggesting the potential guilt of a third party is governed by the general principle of relevancy set out in Rule 401 of the North Carolina Rules of Evidence. *State v. Bullock*, 154 N.C. App. 234, 241, 574 S.E.2d 17, 22 (2002).

> Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend both to implicate another *and* be inconsistent with the guilt of the defendant.

State v. Cotton, 318 N.C. 663, 667, 351 S.E.2d 277, 279-80 (1987) (emphasis in original) (internal citations omitted). However, "[e]vidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded." *State v. Brewer*, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989) (citation and quotation marks omitted), *cert. denied*, 495 U.S. 951, 109 L.Ed.2d 541 (1990).

We note that defendant has properly preserved this issue for our review by making an offer of proof — by means of an examination of Brown outside the presence of the jury — as to what the proffered evidence would have shown. *See State v. Reid*, 204 N.C. App. 122, 127, 693 S.E.2d 227, 231 (2010) ("In order for this Court to rule on the trial court's exclusion of evidence, a specific offer of proof is required unless the significance of the excluded evidence is clear from the record.") (citation and quotation marks omitted). However, we believe that the trial court's exclusion of this evidence was not erroneous because the evidence defendant sought to offer regarding Brown's alleged prior violence against Kaitlyn Rose (1) raises nothing more than sheer conjecture that Brown — rather than defendant — could have inflicted the injuries on Dana; and (2) is not inconsistent with defendant's guilt.

During the offer of proof, Brown testified that she had previously been involved in a physical altercation with Kaitlyn Rose. Brown explained that the assault had occurred because the two were

involved in a romantic relationship — not because Kaitlyn Rose was her employee. Brown further testified that she never argued with or physically assaulted Dana.

We are of the view that evidence that Brown previously assaulted *Kaitlyn Rose* is too attenuated to directly implicate her in the physical assaults committed on *Dana*. Moreover, we believe that such evidence is not inconsistent with defendant's own guilt given the testimony from both Dana, who testified that defendant beat and raped her over the course of several days, and King, an eyewitness who corroborated Dana's testimony about being punched in the face and thrown into a car outside the Courtyard Marriot hotel. *See State v. McNeil*, 326 N.C. 712, 721-22, 392 S.E.2d 78, 84 (1990) (holding that evidence of third party's theft of cigar box from murder victim's home was properly excluded because it did not implicate him of murder or exculpate defendant). Accordingly, defendant's argument on this issue lacks merit.

Conclusion

For the reasons stated above, we conclude that defendant received a fair trial free from error.

NO ERROR.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
MICHAEL PAUL MILLER

No. COA13-81

Filed 6 August 2013

1. Search and Seizure—fruit of the poisonous tree—illegal search of dresser—subsequent legal search of closet

The fruit of the poisonous tree doctrine did not require exclusion of marijuana found in a closet in a house being searched for intruders where the exigent circumstances justified entry into the house and a K-9 indicated that someone might be hiding in a closet. There was no support for defendant's contention that the officers could not resume a lawful search after an unconstitutional search of a dresser drawer before the closet was opened.

2. Search and Seizure—plain view—trash bags inside closet—conflict in evidence

A ruling that marijuana found in trash bags in a closet was in plain view was remanded to resolve a conflict in the evidence as to whether the bags were open when officers opened the door or whether a K-9 caused them to partially open by sniffing inside them.

Appeal by defendant from judgment entered 23 May 2011 by Judge Joseph N. Crosswhite in Rowan County Superior Court. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

William Trippe McKeny for defendant.

HUNTER, Robert C., Judge.

Defendant Michael Paul Miller appeals from the judgment entered against him after he pled guilty to possession with intent to sell and/or deliver marijuana, maintaining a dwelling house for marijuana, and carrying a concealed gun. On appeal, defendant argues that the trial court erred in denying his motion to suppress the marijuana found in his hallway closet because: (1) the marijuana constituted fruit of the poisonous tree; and (2) the trial court erred in concluding that it was in plain view. After careful review, we remand to the trial court for further proceedings consistent with this opinion.

Background

Defendant Michael Miller was indicted on 3 August 2009 on charges of possession with intent to sell or deliver marijuana; maintaining a dwelling house for keeping, storing, using and/or selling marijuana; and carrying a concealed handgun in his vehicle. Defendant filed a motion to suppress all the evidence seized during the search of his house. The matter came on for hearing on 4 April 2011. The evidence presented at the hearing tended to establish the following: On 4 May 2011, at approximately 1:05 a.m., Officer Brian Hill ("Officer Hill"), a police officer with the Spencer Police Department, responded to a call that a burglar alarm was going off at 404 South Baldwin Avenue in Spencer, N.C. After arriving at the house, Officer Hill was making his way around the house and found two large ziploc bags of what appeared to be marijuana sitting on concrete steps that led to a side door. He took possession of the bags and

placed them in his car. Then, Officer Hill resumed his search of the outside of the home and noticed that a window at the back of the house was broken; he testified that "it appeared entry had been made." Believing that someone had entered the home and that a suspect may still be inside, Officer Hill requested additional units assist him in searching the residence. Officer Hill contacted the Salisbury Police Department with his request and specifically requested a K-9 unit respond. Officer Jason Fox ("Officer Fox"), an officer with the East Spencer Police Department, arrived on scene with "Jack," his canine. Jack is trained not only to detect narcotics but also to search for suspects. Shortly thereafter, Ms. Weant, defendant's mother, showed up at the house. After ascertaining that she had a key to defendant's home, Officer Hill explained the situation to her, and Ms. Weant gave the officers permission to enter the home.

After unlocking the front door, Officer Fox and Officer Hill announced that they were law enforcement and warned that they had a canine unit with them to deploy inside the home. After the announcements, Officer Fox released Jack into the premises. Initially, Jack went into a bedroom on the right side of the house. Officer Hill testified that when he and Officer Fox walked into the bedroom, a dresser drawer was open, and they could see a large quantity of brick marijuana laying in the top drawer. In contrast, Officer Fox testified that after entering the bedroom, he noticed Jack was sitting and staring at the dresser, indicating that it contained narcotics. Officer Fox then opened the dresser drawer, found the marijuana, and showed the marijuana to Officer Hill.

Since they still had not finished clearing the residence, Officer Fox redeployed Jack to check the rest of the house for a possible intruder. Jack stopped in front of a closet door in the hallway of the home and began barking at the closet door. Officer Fox testified that, generally, barking indicates that Jack has located a suspect. Based on their concern that someone was hiding in the closet, the officers opened the closet door and saw two large trash bags, partially opened, containing marijuana. Officer Fox testified that he and Officer Hill did not have to manipulate the trash bags in order to see the marijuana; it was visible when they looked in the closet. However, Officer Fox did note that when they opened the closet door, Jack began sniffing the plastic bags, causing them to partially open up. They did not do anything with the marijuana at that time but continued searching the rest of the residence for suspects.

After clearing the house, Officer Hill contacted Sergeant Eric Ennis ("Sergeant Ennis"), his investigator, in order to obtain a search warrant. At that point, defendant arrived on the scene. Officer Hill asked

defendant whether there was anything in his vehicle that he needed to know about; defendant told Officer Hill he had a handgun under the front seat. After Sergeant Ennis obtained his search warrant, he took possession of the bags of marijuana from the closet and the marijuana from the dresser.

At the end of the hearing, the trial court concluded that the officers deviated from their search for suspects by opening the dresser drawer. Accordingly, the trial court held that opening the drawer violated defendant's constitutional rights, and it granted the motion to suppress with regard to the marijuana found in defendant's dresser. With regard to the marijuana in the closet, the trial court concluded that it was discovered when the officers had resumed their search for suspects and was in plain view, even though Officer Fox testified that the bag may have been closed until Jack stuck his nose in it. Thus, the trial court denied defendant's motion to suppress with regard to the marijuana found in the hallway closet.[1]

After the motion to suppress was denied in part, defendant entered an *Alford* plea as to all charges. The trial court sentenced defendant to a minimum of five months to a maximum of six months imprisonment for the charges of maintaining a dwelling for the keeping or selling of controlled substances and carrying a concealed handgun. However, the trial court suspended his sentence and placed defendant on 24 months of supervised probation. Defendant appealed.[2]

Arguments

[1] First, defendant argues that, pursuant to the fruit of the poisonous tree doctrine, the trial court erred in denying his motion to suppress

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1. The trial court also denied defendant's motion to suppress with regard to the gun in his car and the marijuana found on the back steps. Specifically, the trial court concluded that defendant was not in custody when he voluntarily told the officer about the gun in his vehicle. Moreover, the trial court held that the marijuana on the back steps was in plain view. On appeal, defendant does not challenge the denial of his motion to suppress with regard to these two pieces of evidence. Thus, these issues are deemed abandoned on appeal, N.C. R. App. P. 28(b)(6) (2012), and we will not determine whether the trial court erred in denying defendant's motion to suppress with regard to them.

2. Prior to the current appeal, defendant unsuccessfully attempted to appeal the denial of his motion to suppress. In an unpublished case, this Court dismissed defendant's appeal for failing to include the judgments entered upon his guilty plea in the record on appeal and for failing to indicate on his notice of appeal which final judgment he was appealing. *State v. Miller*, __ N.C. App. __, 723 S.E.2d 584 (April 17, 2012) (COA11-1177) (unpublished). However, after the opinion was filed, defendant filed a Petition for Writ of *Certiorari* (P12-717) on 22 August 2012 which was allowed to review the judgments entered against defendant on 23 May 2011.

with regard to the marijuana in the closet after it found the officers violated his constitutional rights by opening the dresser drawer. In other words, defendant contends that once officers violated his constitutional rights by opening the dresser drawer, their subsequent discovery of the drugs in the closet is inadmissible as fruit of the poisonous tree. We disagree.

"The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982) (citations omitted). To determine whether exigent circumstances existed such that an officer was authorized to conduct a warrantless search, the Court must look at the totality of the circumstances. *State v. Nowell*, 144 N.C. App. 636, 643, 550 S.E.2d 807, 812 (2001), *aff'd per curiam*, 355 N.C. 273, 559 S.E.2d 787 (2002).

Based on the circumstances of the present case, the officers' warrantless entries into defendant's home did not violate the Fourth Amendment because they were justified to enter based on exigent circumstances. Prior to *State v. Woods*, 136 N.C. App. 386, 391, 524 S.E.2d 363, 366 (2000), our Courts had not considered whether "under the exigent circumstances exception to the warrant requirement of the Fourth Amendment law enforcement officers may enter a home without a warrant for the purpose of investigating a probable burglary." In *Woods*, we recognized the general consensus from other states and federal jurisdictions that "where an officer reasonably believes that a burglary is in progress or has been recently committed, a warrantless entry of a private residence to ascertain whether the intruder is within or there are people in need of assistance does not offend the Fourth Amendment." *Id.* This Court concluded that the officers were justified in entering the defendant's home without a warrant under the exigent circumstances doctrine because the security alarm was sounding, officers found a back door ajar, a window was broken, and officers had a reasonable belief that the intruders or a victim could be inside. *Id.*

Here, as in *Woods*, based on the exigent circumstances exception, the officers' warrantless entry into defendant's home did not violate the Fourth Amendment. Officers Hill and Fox had an objective reasonable belief that a burglary or breaking and entering was in process and that a suspect or suspects may still be in defendant's home. Officer Hill testified that the Spencer Police Department had received a burglar alarm report concerning a suspected breaking and entering

at defendant's home. Once he arrived and began his inspection, he noticed that a back window was broken such that a person could have entered defendant's home. Moreover, because all the doors remained locked, Officer Hill reasonably believed that the intruder could have still been in the home. Accordingly, probable cause and exigent circumstances existed which justified the warrantless entry into and subsequent search of defendant's home.

Even though the initial entry into defendant's home was constitutional, we must determine whether the scope of their search inside the home was reasonable. *Woods*, 136 N.C. App. at 393, 524 S.E.2d at 367. In *Woods*, this Court noted that "the ensuing search is reasonable under the circumstances only in so far as it furthers the stated purpose for entering." *Id.* In other words, "the scope of a warrantless search must be strictly circumscribed by the exigencies which justify its initiation." *Id.* (internal quotation marks omitted). Here, the scope of the officers' search was confined to places where an individual could hide, and the issue becomes whether the search of the closet furthers the purpose of the officers' search: their belief that an intruder could still be in defendant's house.

Based on the totality of the circumstances, the search of the hallway closet was justified. Both Officer Hill and Fox testified that Jack indicated that someone may be hiding in the closet. Moreover, Officer Hill testified that the closet was large enough for someone to hide in. Thus, the closet could have contained an intruder, and their search of it clearly furthered their purpose for entering defendant's home without a warrant. Therefore, their discovery of the marijuana in the closet was the result of constitutional conduct.

Defendant argues that since the officers acted unconstitutionally in discovering the marijuana in the dresser, as the trial court concluded, "there is no returning to legal conduct." Based on their unconstitutional conduct of opening the dresser drawer, defendant contends that the fruit of the poisonous tree doctrine would require exclusion of the evidence found in the hallway closet. We disagree.

Our Supreme Court has noted that:

> The "fruit of the poisonous tree doctrine," a specific application of the exclusionary rule, provides that [w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the "fruit" of that unlawful conduct should be suppressed. Only evidence discovered as

> a result of unconstitutional conduct constitutes fruit of the poisonous tree.

State v. McKinney, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) (internal citations and quotation marks omitted). Here, the evidence discovered as a result of that search was not "fruit of the poisonous tree" because it was found as a result of constitutional conduct. There is no support for defendant's contention that Officers Hill and Fox could not have resumed their lawful search after discovering the drugs in the bedroom. Defendant's argument is without merit.

[2] Next, defendant argues that the trial court erred in concluding that the marijuana in the closet was in plain view since Jack opened the bag with his nose. Because the trial court failed to resolve the conflict in the evidence as to whether Jack opened the bag, we remand this matter back to the trial court.

Our Court has noted that:

> One exception to the warrant requirement is the plain view doctrine, under which police may seize contraband or evidence 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) (citing *State v. Mickey*, 347 N.C. 508, 495 S.E.2d 669, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998)).

As discussed, due to exigent circumstances, Officers Hill and Fox were lawfully present in defendant's house at the time the marijuana in the hallway was discovered, and they discovered the marijuana inadvertently while searching for suspects. However, it is unclear from the record whether the marijuana in the bag was actually in plain view given that Jack may have exposed the marijuana that otherwise would have remained hidden from Officer Hill's and Fox's view.

This is a case of first impression in North Carolina. A few federal courts have addressed the issue. In *United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998), the Sixth Circuit concluded that a dog sniff in the interior of an apartment that revealed contraband was constitutional even where the dog may have moved a dresser drawer in conducting its sniff that exposed the contraband to plain view, noting that other courts have held that "the instinctive acts of trained canines, such as trying

to open a container containing narcotics, does not violate the Fourth Amendment." Likewise, the Eighth Circuit adopted a similar reasoning in *United States v. Lyons*, 957 F.2d 615, 617 (8th Cir. 1992), holding that a "dog's instinctive actions" such as tearing open a package containing narcotics does not violate the Fourth Amendment.

However, we decline to adopt the reasoning of the Sixth and Eighth circuits. Here, there is a reasonable probability that the trash bag was opened as a result of Jack sniffing it. Had Officer Hill or Fox manipulated or opened the trash bag in such a way that the marijuana, which was initially hidden from view, became exposed, the marijuana would not have been in plain view, and their action would constitute a search which must be justified under the Fourth Amendment. *See Arizona v. Hicks*, 480 U.S. 321, 324-25, 94 L. Ed. 2d 347, 354 (1987) (holding that the police officer's act of moving stereo equipment "did constitute a 'search' separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment . . . . [and that] taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry"). Jack was an instrumentality of the police, and his actions, regardless of whether they are instinctive or not, are no different than those undertaken by an officer. If he opened the bags and exposed the otherwise hidden marijuana, it would not be admissible under the plain view doctrine.[3]

In concluding that a canine sniff that exposes hidden contraband would not be admissible under the plain view doctrine, we recognize that there was conflicting testimony presented at the hearing regarding whether the trash bag was partially open at the time the officers opened the closet door. While the trial court acknowledged that "Officer Fox [indicated] that the bag may have been closed until his K-9 stuck his nose in the bag[,]" and noted the conflicting testimony of Officer Fox regarding whether the trash bag was opened by Jack, it did not issue any definitive factual conclusion on this matter. Therefore, we must remand this matter to the trial court to resolve this conflict in the evidence. As discussed above, if the trial court finds that the bag was already partially opened so that the marijuana could be seen by the officers, then the plain view doctrine would apply, and the marijuana in the hallway

3. We note that Jack's alert on the bag may have provided the officers probable cause to obtain a search warrant to open the trash bag in the closet. However, here, the officers did not do so prior to Jack allegedly opening the bag and exposing the marijuana.

closet would be admissible. In contrast, if the trial court determines that the bag was opened by Jack in his attempt to sniff the bags' contents, the marijuana would not have been in plain view of the officers, and the marijuana should have been suppressed. Consequently, defendant would be entitled to a new trial.

Conclusion

Because exigent circumstances existed as to allow Officer Hill and Fox to search defendant's house without a warrant and they resumed their constitutional search after opening the dresser, the fruit of the poisonous tree doctrine does not require exclusion of the marijuana in the hallway closet. However, because there is a conflict in the evidence regarding whether the marijuana in the closet was in plain view, we remand this matter back to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges GEER and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
JOHN LEWIS WRAY, JR.

No. COA12-1406

Filed 6 August 2013

1. Constitutional Law—appointed counsel—capacity to proceed evaluation—not a critical point of trial

The trial court did not err by failing to appoint counsel for defendant after a remand from defendant's first trial and before he was ordered to submit to a capacity to proceed evaluation. There was no potential for substantial prejudice and this was not a critical stage of his trial.

2. Sentencing—greater sentence after retrial—conviction of more serious offense

The trial court did not err by imposing a higher sentence following a remand where defendant was found guilty of a more serious offense at the second trial.

Appeal by defendant from judgment entered 13 June 2012 by Judge Timothy S. Kincaid in Cleveland County Superior Court. Heard in the Court of Appeals 8 May 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.

Charlotte Gail Blake, for defendant-appellant.

CALABRIA, Judge.

John Lewis Wray, Jr. ("defendant") appeals from a judgment entered upon jury verdicts finding him guilty of possession with intent to sell or deliver ("PWISD") cocaine, sale of cocaine, and attaining the status of an habitual felon. We find no error.

I. Background

In 2007, defendant was arrested and indicted for PWISD cocaine, sale of cocaine and for attaining the status of an habitual felon. At trial in Cleveland County Superior Court, although the trial court had appointed "three of the best lawyers in Cleveland County," appointed yet another attorney ("the fourth attorney") to represent defendant. After defendant told the court that he did not want to be represented by the fourth attorney, the court reminded defendant of the possible prison sentence he faced and asked him whether he was certain that he wanted to represent himself. The trial court found that defendant had forfeited his right to counsel and defendant proceeded to trial *pro se*. The jury was unable to reach a verdict on the sale of cocaine charge but found defendant guilty of PWISD cocaine and attaining the status of an habitual felon. The trial court sentenced defendant to a minimum of 136 months and a maximum of 173 months to be served in the North Carolina Department of Correction. Defendant appealed. This Court concluded that defendant might not have been competent to proceed *pro se* and "that the trial court erred by granting defense counsel's motion to withdraw and in ruling that [d]efendant had forfeited his right to counsel." *State v. Wray*, 206 N.C. App. 354, 371, 698 S.E.2d 137, 148 (2010) ("*Wray* I"). As a result, this Court reversed and remanded the case. *Id.*

On 10 May 2011, the trial court filed a motion and ordered defendant's commitment to Central Regional Hospital for a period not to exceed sixty (60) days for observation and treatment to determine his capacity to proceed. In its order, the court included the reason for the commitment, stating "[t]he North Carolina Court of Appeals has

determined that there is an issue concerning this defendant's capacity to proceed." On 7 June 2011, defendant was examined and submitted to a capacity to proceed evaluation. Subsequently, a forensic psychiatrist determined defendant was capable to proceed on the pending charges. Since defendant was not represented by an attorney on 29 August 2011, the trial court appointed an attorney for defendant and modified his bond to $500.00, secured. On 9 April 2012, the Court found defendant was competent to proceed.

At the second trial, the State produced evidence that law enforcement officers worked with Philip West ("West"), a paid informant, on 27 September 2006, making controlled drug buys. Since West wore a recording device, the officers could hear what occurred when he made a purchase from defendant. When West returned to the officers, they downloaded a video of the interaction. The State played the video at trial. The State also produced evidence that West paid defendant $20.00 for less than 0.1 grams of cocaine.

The jury returned verdicts finding defendant guilty of PWISD cocaine, sale of cocaine, and attaining the status of an habitual felon. The trial court consolidated the offenses of PWISD cocaine and sale of cocaine and sentenced defendant to a minimum of 142 months and a maximum of 180 months in custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Defendant's Right to Representation Prior to Capacity Evaluation

[1] Defendant argues that the trial court erred by failing to appoint counsel to represent him after *Wray* I and before ordering defendant to submit to a capacity to proceed evaluation. Specifically, defendant argues that that time period was a critical stage of his trial that required defendant to be appointed counsel. We disagree.

The United States Supreme Court has held that "[t]he presumption that counsel's assistance is essential require[d them] to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657, 668 (1984). Our Supreme Court has determined that "[w]hether a critical stage has been reached depends upon an analysis of whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *State v. Detter*, 298 N.C. 604, 620, 260 S.E.2d 567, 579 (1979) (internal quotation marks and citation omitted). Furthermore, "[a] critical stage has been reached when constitutional rights can be

waived, defenses lost, a plea taken or other events occur that can affect the entire trial." *Id.*

A capacity to proceed evaluation is conducted to determine "whether [defendant] has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed." *State v. Nobles*, 99 N.C. App. 473, 475, 393 S.E.2d 328, 329 (1990) (quotation marks and citation omitted). Our Supreme Court has held that a "defendant had no constitutional right to have counsel present during his competency evaluation." *State v. Davis*, 349 N.C. 1, 20, 506 S.E.2d 455, 465 (1998).

In the instant case, the trial court ordered defendant to undergo an evaluation at Central Hospital on his capacity to proceed in accordance with its interpretation of the Court of Appeals' opinion. At the evaluation, the psychiatrist only asked defendant questions regarding his mental capacity to proceed. Furthermore, since defendant's evaluation was performed by a psychiatrist at Central Hospital while he had been released on bond, he did not waive his constitutional rights, lose any of his potential defenses, and he certainly could not enter any type of a plea during a hospital commitment. In addition, because he was not in custody at the time of the evaluation, we hold there was no potential for substantial prejudice and this was not a critical stage.

Defendant cites *Estelle v. Smith* for the proposition that a defendant must be able to consult with an attorney prior to submitting to a competency hearing. 451 U.S. 454, 101 S. Ct. 1866, 68 L.Ed.2d 359 (1981). However, *Estelle* is distinguishable because in that case, the defendant had already been appointed an attorney, was already in custody and the competency evaluation was conducted in the defendant's jail cell. *Id.* at 469-71, 101 S. Ct. at 1876-77, 68 L.Ed.2d at 373-74. Furthermore, the State used the psychiatrist's testimony at the penalty stage of the trial to prove future dangerousness and the Court held that because the defendant's counsel was not notified of the interview and given the opportunity to advise his client on whether to submit to it, information secured from the defendant could not be used by the State at trial. *Id.* at 471, 101 S.Ct. at 1877, 68 L.Ed.2d at 374.

In the instant case, defendant was not in custody, but rather had been released from incarceration. Although defendant was not appointed an attorney until after the competency evaluation occurred, the trial court appointed an attorney on 29 August 2011. Approximately eight months later, on 9 April 2012 the attorney represented defendant

at a court hearing and the trial court determined that he was competent to proceed. We hold that the trial court's order committing defendant to a competency evaluation was not a critical stage and defendant was not denied his Sixth Amendment right to counsel.

III. Sentencing

[2] Defendant argues that the trial court erred by sentencing defendant in violation of N.C. Gen. Stat. § 15A-1335 because after successfully appealing his original sentence, defendant received a higher sentence at his new trial. We disagree.

Pursuant to statute,

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335 (2011). When the court consolidates multiple offenses for judgment, the "judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense...." N.C. Gen. Stat. § 15A-1340.15(b) (2011); *see State v. Mack*, 188 N.C. App. 365, 381, 656 S.E.2d 1, 13 (2008).

In the instant case, defendant was indicted for sale of cocaine, PWISD cocaine and attaining the status of an habitual felon. At his first trial, defendant was found guilty of PWISD cocaine, a Class H felony, and attaining the status of an habitual felon and was sentenced to a minimum of 136 and a maximum of 173 months. Defendant appealed the judgment and was granted a second trial. At the second trial, the jury found defendant guilty of sale of cocaine, a class G felony, PWISD cocaine and attaining the status of an habitual felon. The trial court consolidated for judgment the offenses of sale of cocaine and PWISD cocaine and sentenced defendant to a minimum of 142 months and a maximum of 180 months. Since defendant was found guilty of attaining the status of an habitual felon at both trials, the trial courts sentenced defendant as an habitual felon, thus elevating his sentence to a Class C felony. N.C. Gen. Stat. § 14–7.6 (2009).[1]

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1. N.C. Gen. Stat. § 14–7.6 was amended in 2011 and became effective for all offenses committed on or after 1 December 2011. Since the offense date for defendant's charges was 27 September 2006, the older version of the statute applies to the instant case.

When the trial court consolidated defendant's felony convictions after the second trial, according to N.C. Gen. Stat. § 15A-1340.15(b) defendant was sentenced under the most serious offense. Although the trial court sentenced defendant as a Class C felon at both trials, at the second trial the court sentenced defendant for the sale of cocaine because the sale of cocaine is a more serious offense than PWISD cocaine. Defendant was not found guilty of, nor sentenced for, the sale of cocaine at the first trial. Therefore, when the trial court sentenced defendant for the sale of cocaine at the second trial, it was the first time defendant received a sentence for the sale of cocaine. N.C. Gen. Stat. § 15A-1335 does not apply here because the trial court did not impose a more severe sentence "for the same offense[.]" N.C. Gen. Stat. § 15A-1335 (2011).

Relying on *State v. Skipper*, defendant contends that because he was sentenced as an habitual felon at both his first and second trials, "the trial court ... had no choice but to enter [] sentence[s] for a single Class C felony pursuant to § 15A–1340.15(b)." *Skipper*, __ N.C. App. __, ___, 715 S.E.2d 271, 273 (2011). Therefore, according to defendant, he should not have received a higher sentence after his second trial, even though the jury returned a verdict finding him guilty of the additional charge of sale of cocaine. Defendant is mistaken.

In *State v. Gardner*, this Court declined to follow *Skipper*, and instead relied on the principles in *State v. Vaughn*. *Gardner*, __ N.C. App. ___, __, 736 S.E.2d 826, 832 (2013). Citing *Vaughn*, this Court found that "the term 'prior felony conviction' refers only to 'a prior adjudication of the defendant's guilt ... [t]he term ... does *not* refer to the sentence imposed for committing a prior felony' " and therefore "the fact that a defendant has been '*sentenced as* a Class C felon,' ... does not mean that the actual underlying offense is transformed into a Class C felony." *Id.* (citing *State v. Vaughn*, 130 N.C. App. 456, 460, 503 S.E.2d 110, 113 (1998)). Therefore, the fact that defendant was sentenced as a Class C felon at both the first and second trials does not mean that the underlying offenses were transformed into Class C felonies. Despite the fact the convictions were raised to Class C felonies for the purpose of punishment, the trial court sentenced defendant for the most serious offense at each trial. *See Gardner*, __ N.C. App. at __, 736 S.E.2d at 832. Since defendant was found guilty of a more serious offense at the second trial, the trial court sentenced defendant accordingly. Therefore, we hold that the trial court did not err when it sentenced defendant to a more severe sentence.

IV. Conclusion

We hold that the trial court did not err by not appointing an attorney for defendant prior to his competency evaluation because the trial court's order committing defendant to a competency evaluation was not a critical stage. We also find that the trial court did not violate N.C. Gen. Stat. § 15A-1335.

No error.

Judges STEELMAN and McCULLOUGH concur.

TIME WARNER ENTERTAINMENT ADVANCE/NEWHOUSE PARTNERSHIP, PLAINTIFF
v.
TOWN OF LANDIS, NORTH CAROLINA, DEFENDANT

No. COA 13-22

Filed 6 August 2013

Jurisdiction—subject matter—justiciable controversy—failure to reach agreement

The Business Court erred by dismissing plaintiff's complex business case based on lack of subject matter jurisdiction. The justiciable controversy was the parties' failure to reach an agreement within 90 days. The case was remanded for further proceedings.

Appeal by plaintiff from order entered 2 October 2012 by Judge Calvin E. Murphy in the North Carolina Business Court. Heard in the Court of Appeals 23 April 2013.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Reid Phillips, and Hogan Lovells US LLP, by Gardner Gillespie and Paul Werner, for plaintiff-appellant.

Poyner Spruill LLP, by Andrew H. Erteschik, for defendant-appellee.

Nelson Mullins Riley & Scarborough, by Joseph W. Eason, Christopher J. Blake, and Phillip A. Harris, Jr., for the North Carolina Association of Electric Cooperatives, amicus curiae.

David M. Barnes, for ElectriCities of North Carolina, Inc., amicus curiae.

HUNTER, JR., Robert N., Judge.

Time Warner Entertainment Advance/Newhouse Partnership ("TWEAN") appeals a trial court order dismissing its case for lack of subject matter jurisdiction. Upon review, we reverse and remand.

I. Facts & Procedural History

In 1979, Vision Cable Communications, Inc. ("Vision") began providing cable television services in the Town of Landis ("Landis"). On 16 June 1984, Vision and Landis entered into a written pole attachment agreement (the "1984 Agreement"). Under the terms of the 1984 Agreement, Landis granted Vision a license to attach transmission cables to Landis' utility poles for $3 per pole per year.[1] Landis charged an additional $1 per year for each metered power supply attachment. The 1984 Agreement required semi-annual payments and was for a period of "not less than one (1) year." After one year, either party could terminate the Agreement by giving six months' written notice.

TWEAN subsequently acquired Vision and became successor-in-interest to the 1984 Agreement. TWEAN delivers cable television and broadband services to businesses and residents in Landis. Nothing in the record indicates Vision, TWEAN, or Landis ever terminated the 1984 Agreement.

In 2008, Landis hired McGavran Engineering, led by Larry McGavran, to: (i) conduct an audit of its pole inventory; and (ii) negotiate a new pole attachment agreement with TWEAN. McGavran completed the audit in November 2008. According to McGavran's audit, Landis had 3,000 utility poles. TWEAN had 2,100 attachments on 1,594 of these poles. The audit stated TWEAN's attachments had 946 safety or technical violations.

While completing the audit, McGavran also drafted a new proposed pole attachment agreement (the "Proposed Agreement") for Landis and TWEAN. On 6 October 2008, McGavran submitted a preliminary draft of the Proposed Agreement to Landis. Between October 2008 and August 2009, McGavran revised the Proposed Agreement. In July 2009, McGavran submitted his revised Proposed Agreement to Landis Town Administrator Reed Linn and Landis Director of Public Works Steve Rowland.

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1. The rate in the 1984 Agreement is comparable to rates in other areas of North Carolina. For instance, TWEAN contends it pays an average of $5.91 per pole per year to North Carolina investor-owned utilities companies and $4.05 per pole per year to North Carolina telephone companies.

Under the Proposed Agreement, TWEAN would pay $18 per cable for its first rental year (2009), and the rate would increase by $1.40 per year until 2014. TWEAN usually operated two cables per pole. Thus, at the final 2014 rate, TWEAN would pay $50 per pole under the Proposed Agreement.[2] After the first rental year, either party could terminate the Proposed Agreement by providing written notice 90 days prior to the current term's end. The Proposed Agreement also included a $10 per pole permit fee and a $15 per day penalty for failure to comply with applicable safety requirements.

Meanwhile, McGavran also drafted a proposed amendment to Landis' municipal pole attachment ordinance. The proposed amendment authorized Landis to impose a default pole attachment rate of $50 per year for any "telecommunications and cable television provider" that did not sign a "Town approved contract to maintain attachments to the same poles" by 9 April 2009. On 9 March 2009, Landis adopted this amendment.

On 3 August 2009, McGavran sent the Proposed Agreement to TWEAN. He also included a letter stating that "[the Town] expect[s] [the Proposed Agreement] to be executed within 30 days of receipt of this letter. If this does not occur, we will charge you the default rate as stated in our pole attachment ordinance passed last spring." The letter also explained that the change from a per-pole rate to a per-cable rate was "in line with standard procedures within the industry for those attaching entities that do not own poles." Lastly, McGavran promised to send TWEAN the results of an inventory of "poles, attachments, violations and other items" by 17 August 2009. McGavran sent the inventory to TWEAN on 27 August 2009.

On 31 August 2009, TWEAN Senior Director of Construction for the Carolinas Nestor Martin sent a letter to Linn, Landis' Town Administrator, advising Landis to "treat this letter as a request under Section 62-[350] (b) to negotiate a new pole agreement, to include a just, reasonable and non-discriminatory rate." Martin also requested certain cost and valuation data to better evaluate the increased attachment rate. TWEAN then deleted the increased attachment rates from the Proposed Agreement and sent the new version back to Landis.

Over the next few months, TWEAN and Landis negotiated, but failed to reach an agreement. Nothing in the record indicates TWEAN ever

2. The $50 proposed rate constitutes a 1,566% increase from the rate in the 1984 Agreement. TWEAN contends that some adjustment may be necessary, but until a consensus is reached it should continue to pay only $3 per pole, the rate from the 1984 Agreement.

paid the increased pole attachment rate in the Proposed Agreement. On 5 January 2010, TWEAN sent Landis a letter requesting mediation. Landis did not respond.

On 19 April 2010, TWEAN filed a complaint in Rowan County Superior Court under N.C. Gen. Stat. § 62-350 for: (i) refusal to negotiate; (ii) violation of the statute's non-discrimination requirement; and (iii) other "issues in dispute." As to its third claim, TWEAN enumerated three specific issues in dispute: (i) Landis' proposed rental rate of $18 per attachment is unreasonable and unjust; (ii) Landis' proposed charge *per cable* rather than *per pole* is unreasonable and unjust; and (iii) Landis' proposed fines for non-conforming attachments are unreasonable and discriminatory.

On 21 April 2010, Chief Justice Parker designated the action a mandatory complex business case. The following day, it was assigned to the North Carolina Business Court. On 4 June 2010, Landis filed an answer.

On 20 December 2010, Landis filed a motion for partial summary judgment as to TWEAN's claims for: (i) refusal to negotiate; and (ii) discrimination. On 9 February 2011, TWEAN filed a reply brief. On 17 February 2011, the Business Court heard Landis' arguments. On 30 June 2011, the Business Court entered an order: (i) granting Landis' motion to dismiss TWEAN's claim for refusal to negotiate; but (ii) denying Landis' motion to dismiss the discrimination claim.

From 18 July to 21 July 2011, the Business Court conducted a bench trial on: (i) the discrimination claim; and (ii) the "issues in dispute." At the close of TWEAN's evidence, the Business Court denied Landis' motion for directed verdict for the other "issues in dispute," but reserved its ruling on the discrimination claim.

On 19 June 2012, the Business Court *sua sponte* raised two concerns about the case: (i) the justiciability of the "issues in dispute;" and (ii) the constitutionality of N.C. Gen. Stat. § 62-350. To this effect, the Business Court requested supplemental briefs discussing: (i) whether TWEAN had standing; (ii) whether there was a "case or controversy;" and (iii) whether N.C. Gen. Stat. § 62-350 violates the separation of powers doctrine and/or is an unlawful delegation of legislative authority. The parties briefed the court on these issues. On 2 October 2012, the Business Court entered an order determining it did not have subject matter jurisdiction because TWEAN did not satisfy the controversy requirement. The Business Court then dismissed the case without prejudice. On 12 October 2012, TWEAN filed timely notice of appeal.

II. Standard of Review

"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). "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) (quotation marks and citation omitted).

III. Analysis

On appeal, TWEAN argues the Business Court erred in dismissing its case for lack of subject matter jurisdiction because: (i) N.C. Gen. Stat. § 62-350 authorizes TWEAN to enforce its statutory pole attachment rights; or alternatively, (ii) TWEAN faces imminent harm. Plaintiff then argues the trial court's decision improperly nullified N.C. Gen. Stat. § 62-350. Upon review, we reverse and remand.

"Jurisdiction is '[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789–90 (2006) (quoting *Black's Law Dictionary* 856 (7th ed. 1999))(alteration in original). "If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *Sarda v. City/County of Durham Bd. of Adjustment*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) (quotation marks and citation omitted). A party may not waive [subject matter] jurisdiction." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (2000).

To satisfy jurisdictional requirements, courts must have both personal jurisdiction and subject matter jurisdiction. *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790. First, courts "must have personal jurisdiction over the parties to bring [them] into [the] adjudicative process." *Id.* (quotation marks and citation omitted)(first alteration in original). "More importantly for our purposes, the court must also have subject matter jurisdiction, or [j]urisdiction over the nature of the case and the type of relief sought." *Id.* (quotation marks and citation omitted)(alteration in original). "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citing N.C. Const. art. I, § 18).

Two aspects of subject matter jurisdiction are: (i) the standing requirement; and (ii) the controversy requirement. We now discuss each of those in turn.

"Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issue he wants adjudicated." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 165, 552 S.E.2d 220, 225 (2001). In *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 574 S.E.2d 48 (2002), our Court elaborated on North Carolina's "standing" doctrine:

> [Standing] refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter. *Sierra Club v. Morton*, 405 U.S. 727, 731–32, 92 S.Ct. 1361, 1364–65, 31 L.Ed.2d 636, 641 (1972). The "irreducible constitutional minimum" of standing contains three elements:
>
> (1) "injury in fact" —— an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan* [*v. Defenders of Wildlife*], 504 U.S. [555,] 560–61 [(1992)].
>
> North Carolina courts are not constrained by the "case or controversy" requirement of Article III of the United States Constitution. Our courts, nevertheless, began using the term "standing" in the 1960s and 1970s to refer generally to a party's right to have a court decide the merits of a dispute. *See, e.g.*, *Stanley, Edwards, Henderson v. Dept. of Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973).

Id. at 114, 574 S.E.2d at 51–52.

The controversy requirement, on the other hand, focuses on the issue being adjudicated rather than the party seeking adjudication. *See Creek Pointe Homeowner's Ass'n*, 146 N.C. App. at 165, 552 S.E.2d at 225. Although "North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution," *Neuse River Foundation, Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52, our courts still require "the existence of a justiciable . . . controversy." *Prop. Rights Advocacy Group v. Town of Long Beach*, 173 N.C. App. 180, 182, 617 S.E.2d 715, 717 (2005) (quotation marks and citation omitted); *see also Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d

876, 881 (2006); *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942).

A justiciable controversy entails "an actual controversy between parties having adverse interests in the matter in dispute." *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984). To satisfy this requirement:

> [T]he plaintiff shall allege in his complaint and show at the trial that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities . . . exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure.

Carolina Power & Light Co. v. Iseley, 203 N.C. 811, 820, 167 S.E. 56, 61 (1933). "Legal rights and liabilities must rest upon some reasonably settled basis, fixed either by the common law or by statute." *Briscoe v. Henderson Lighting & Power Co.*, 148 N.C. 396, 413, 62 S.E. 600, 607 (1908).

Thus, allegations based on statutory rights can satisfy the controversy requirement. *See Carolina Power & Light Co.*, 203 N.C. at 820, 167 S.E. at 61 (acknowledging that "legal rights and liabilities" can arise "under a statute"); *Briscoe*, 148 N.C. at 413, 62 S.E. at 607. Still, "[o]ur caselaw generally holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute." *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 339 n.2, 511 S.E.2d 41, 44 n.2 (1999), *overruled on other grounds by Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000).

North Carolina's Declaratory Judgment Act expands the controversy requirement by establishing that trial courts not only have jurisdiction over alleged prior violations of rights, but also when litigation over a potential violation "appear[s] unavoidable." *Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 61. However, the"[m]ere apprehension or the mere threat of an action or a suit is not enough." *Id.* at 234, 316 S.E.2d at 62. "Thus the Declaratory Judgment Act does not 'require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.' " *Id.* (quoting *Town of Tryon*, 222 N.C. at 204, 22 S.E.2d at 453).

In the present case, TWEAN argues the Business Court has subject matter jurisdiction because TWEAN's allegations satisfy the controversy requirement. We agree.

Since TWEAN's claim arises under N.C. Gen. Stat. § 62-350, we preliminarily discuss the legislative intent behind that statute as part of North Carolina's Public Utilities Act. *See Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) ("The principal goal of statutory construction is to accomplish the legislative intent."). When our legislature drafted the Public Utilities Act, it established, *inter alia*, the following goals: (i) "[t]o provide fair regulation of public utilities in the interest of the public;" and (ii) "[t]o provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices." N.C. Gen. Stat. § 62-2(a)(1) and (4) (2011). Thus, the Public Utilities Act endorses regulatory intervention to promote "just and reasonable rates." *See id.*

In light of this legislative intent, we now examine the contours of N.C. Gen. Stat. § 62-350. First, N.C. Gen. Stat. § 62-350(a) establishes that "[a] municipality . . . that owns or controls poles, ducts, or conduits shall allow any communications service provider to utilize its poles, ducts, and conduits at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements." N.C. Gen. Stat. § 62-350(a) (2011).

The statute also allows communications service providers like TWEAN to require municipalities to negotiate for "just, reasonable, and non-discriminatory" pole attachment rates:

> Following receipt of a request from a communications service provider, a municipality or membership corporation shall negotiate concerning the rates, terms, and conditions for the use of or attachment to the poles, ducts, or conduits that it owns or controls. Following a request from a party to an existing agreement made pursuant to the terms of the agreement or made within 120 days prior to or following the end of the term of the agreement, the communications service provider and the municipality or membership corporation which is a party to that agreement shall negotiate concerning the rates, terms, and conditions for the continued use of or attachment to the poles, ducts, or conduits owned or controlled by one of the parties to the agreement.

N.C. Gen. Stat. § 62-350(b) (2011).

Lastly, the statute allows communications service providers to bring suit in Business Court if the parties fail to reach an agreement:

> In the event the parties are unable to reach an agreement within 90 days of a request to negotiate pursuant to subsection (b) of this section, or if either party believes in good faith that an impasse has been reached prior to the expiration of the 90-day period, either party may bring an action in Business Court in accordance with the procedures for a mandatory business case set forth in G.S. 7A-45.4, and the Business Court shall have exclusive jurisdiction over such actions.

N.C. Gen. Stat. § 62-350(c) (2011).

Next, we discuss the types of justiciable controversies N.C. Gen. Stat. § 62-350 contemplates. To this end, we interpret N.C. Gen. Stat. § 62-350 to establish several judicially-enforceable statutory rights. *See Carolina Power & Light Co.*, 203 N.C. at 820, 167 S.E. at 61; *Briscoe*, 148 N.C. at 413, 62 S.E. at 607. For instance, N.C. Gen. Stat. § 62-350 creates a statutory right for both communications service providers and municipalities to establish "just, reasonable, and nondiscriminatory" pole attachment rates within 90 days of a request to negotiate. *See* N.C. Gen. Stat. § 62-350(c) (2011).

Furthermore, the statute expressly creates a private cause of action to enforce these rights. *See Vanasek*, 132 N.C. App. at 338 n.2, 511 S.E.2d at 44 n.2. Specifically, it allows "either party [to] bring an action in Business Court in accordance with the procedures for a mandatory business case." N.C. Gen. Stat. § 62-350(c). Thus, communications service providers satisfy the controversy requirement when they "allege in [their] complaint and show at the trial that a real controversy, arising out of [these statutory rights] . . . exists." *Carolina Power & Light Co.*, 203 N.C. at 820, 167 S.E. at 61; *Briscoe*, 148 N.C. at 413, 62 S.E. at 607.

Here, the Business Court determined it did not have subject matter jurisdiction because TWEAN did not satisfy the controversy requirement. Specifically, the Business Court held TWEAN did not allege: (i) a prior violation of its rights; or (ii) the imminent threat of a violation. Upon review, we conclude the Business Court erred because TWEAN showed a controversy exists under N.C. Gen. Stat. § 62-350.

To this effect, TWEAN alleged a prior violation of its statutory right to establish "just, reasonable, and nondiscriminatory" pole attachment rates within 90 days of a request to negotiate. *See* N.C. Gen. Stat. § 62-350(c). It then presented evidence supporting its allegation. First, TWEAN submitted a request to negotiate to Landis on 31 August 2009. Next, TWEAN negotiated with Landis for more than 90 days. In fact, the

Business Court implicitly acknowledged the parties negotiated when it dismissed TWEAN's refusal to negotiate claim. Despite these negotiations, the parties failed to reach an agreement. Once 90 days had passed, TWEAN filed its complaint under N.C. Gen. Stat. § 62-350.

Contrary to the Business Court's determination, the controversy here is not the future possibility of increased pole attachment rates. Instead, the controversy arises from the parties' failure to reach an agreement within 90 days. This failure violated TWEAN's right to establish "just, reasonable, and nondiscriminatory" pole attachment rates within 90 days of a request to negotiate. While we make no determination as to whether the pole attachment rates in the Proposed Agreement are "just, reasonable, and nondiscriminatory," we determine there exists a justiciable controversy.

Consequently, the Business Court erred in determining it did not have subject matter jurisdiction. Because we base our decision on TWEAN's first argument, we decline to address its other arguments.

IV. Conclusion

For the foregoing reasons, we: (i) reverse the trial court's determination that it did not have subject matter jurisdiction; and (ii) remand for further proceedings.

REVERSED and REMANDED.

Judges McGEE and STEPHENS concur.

WARRENDER v. GULL HARBOR YACHT CLUB, INC.

[228 N.C. App. 520 (2013)]

JOHN W. WARRENDER, ET. AL., PLAINTIFFS
v.
GULL HARBOR YACHT CLUB, INC., ET. AL., DEFENDANTS

BRAXTON BROOKS, ET. AL., PLAINTIFFS
v.
GULL HARBOR YACHT CLUB, INC., ET. AL., DEFENDANTS

No. COA12-1038

Filed 6 August 2013

1. Deeds—restrictive covenants—marina

The trial court properly concluded that a marina (GHYC) was subject to restrictive covenants. The fact that the GHYA parcel was conveyed many years after the residential parcels did not alter the fact that the marina was included as part of the recorded map of that portion of the covenants specifically governing the use of the marina by lot owners.

2. Deeds—restrictive covenants—boat slips

A marina (GHYC) did not violate restrictive covenants by entering into 99 year leases for boat slips with non-property owners even though the marina was restricted to the owners of lots in the subdivision. There was an exception when lot owners did not take advantage of their rights to boat slips and, while the leases did not include language allowing the non-property owners to be displaced when property owners wanted a slip and none were available, there was no instance of that scenario having occurred. The mere length of the leases did not transform them into sales.

3. Deeds—restrictive covenants—marina user fee

There was no genuine issue of material fact that a marina (GHYC) violated restrictive covenants when it denied access to lot owners until they paid a $200.00 annual user fee. Permitting GHYC to collect this user fee would defeat the purpose of a provision in the restrictions explicitly limiting the maximum amount of maintenance costs to be contributed by the lot owners.

4. Damages and Remedies—breach of restrictive covenants—status quo

The trial court erred in part in the relief granted for breach of restrictive covenants where it was held that there was no underlying breach. Moreover, the relief granted for an improper fee went far beyond simply restoring the *status quo* and was vacated.

5. Contracts—tortious interference—direct breach

The trial court erred in granting summary judgment to plaintiffs on a tortious interference with contract claim arising from a dispute between a subdivision and a marina where the marina breached the restrictive covenants directly.

6. Judgments—consent—scope

A consent judgment arising from a larger restrictive covenants dispute did not adjudicate a claim for riparian rights nor was such a determination necessary to that judgment. The consent judgment involved accessing boat slips without trespassing on the land area of a particular lot.

7. Pleadings—complaint—issues included

Despite defendant Gull Harbor Yacht Club's contention that the issue of plaintiff Warrander's riparian rights was not stated in the complaint, it was necessary for the trial court to determine whether plaintiff validly possessed riparian rights in order to fully adjudicate the claim that a marina was trespassing.

8. Pleadings—after joinder—not required—united in interest with other plaintiffs

The trial court properly considered the Youngs' riparian rights claim when the trial court granted the Youngs' motion to join as plaintiffs in an action concerning a development and a marina. In granting the motion, the trial court necessarily determined that the Youngs were united in interest with the other plaintiffs who had already filed claims and there was no authority requiring the Youngs to file a separate pleading after joinder.

9. Waters and Adjoining Lands—riparian rights—owner of bulkhead—issue of fact

A grant of summary judgment to an individual defendant on a riparian rights claim involving a subdivision, a marina, and restrictive covenants was reversed where there was a genuine issue of fact as to the ownership of a bulkhead adjacent to certain lots in the subdivision.

10. Statutes of Limitation and Repose—restrictive covenants—contractual in nature

The trial court properly granted summary judgment in favor of a homeowner's association (GHHA) as to a marina's (GHYC's) counterclaims based on the statute of limitations. Restrictive covenants are contractual in nature and the statute of limitations for a breach

of contract claim is three years. The undisputed evidence was that both parties ceased to perform their duties under the restrictive covenants outside of that limitation.

11. Parties—necessary—property owners not yet joined as plaintiffs—standing of defendants to object

In an action arising from a dispute between a homeowner's association and a marina, the individual defendants could not properly challenge a partial summary judgment based on an assertion that necessary plaintiffs had not yet been joined when the summary judgment was granted. The missing parties were lot owners who became plaintiffs, the property rights of the lot owners were enforced rather than extinguished, and an opposing party which sought to impair the lot owner's rights did not have standing to argue that they were not joined when required.

12. Associations—restricted access to marina—individual defendants—ownership interest in marina not present

The trial court erred by granting summary judgment to plaintiffs on their violation of restrictive covenants claim against the individual defendants in an action arising from a dispute between a development and a marina. The individual defendants did not possess the necessary ownership interest in the marina which would provide the authority to restrict access.

13. Contracts—tortious interference—restrictive covenants—defendants not third parties inducing breach

The trial court erred by granting summary judgment in favor of plaintiffs on a claim against the individual defendants for tortious interference arising from a dispute between a subdivision and a marina. It was previously determined that the marina directly breached the restrictive covenants and that any actions by the individual defendants which could be considered a breach of those covenants were undertaken in their role as members of the marina. They cannot be considered third parties that induced the marina to breach the covenants.

14. Attorney Fees—reversal of underlying determination—reversal of award necessitated

The reversal of a determination that the individual defendants violated restrictive covenants also necessitated the reversal of attorney fees awarded to plaintiffs.

WARRENDER v. GULL HARBOR YACHT CLUB, INC.

[228 N.C. App. 520 (2013)]

Appeal by defendants from order entered 12 March 2010 by Judge W. Allen Cobb, Jr., orders entered 31 October 2011 and 15 November 2011, and orders and judgments entered 31 October 2011 and 15 and 16 November 2011 by Judge Arnold O. Jones, II in Carteret County Superior Court. Heard in the Court of Appeals 9 January 2013.

Emanuel & Dunn, PLLC, by Charles J. Cushman, for plaintiff-appellees John Warrender, Braxton Brooks, Marion Brooks, Bob Alberti, Grace Bodenstedt, Vernon Jones, Annette Jones, Chris Knight, Heather Knight, Harry Murphy, Martha Murphy, Fred Myers, Linda Myers, Walter Phillips, Pam Phillips, Wallace Shook, Nora Shook, Stanley Warlen, and Judy Warlen.

Chesnutt, Clemmons & Peacock, P.A., by Gary H. Clemmons, for plaintiff-appellees Gull Harbor Homeowners Association, Inc., Elizabeth Sims, Carl D. Wheeler, Jeffrey B. Schmucker, Ann M. Schmucker, Donald Kirby, Lee Kirby, Barbara J. Erickson, Ralph E. Willard, Martha S. Willard, Allen Causey, Debra Causey, Faye S. Brewer, Al Wagner, Doris V. Wagner, John Bolt, Jo Anne Bolt, Laurie Brown, Thomas Kriehn, Elizabeth Kriehn, Gordon J. Slaughter, F. Darline Brady, Dorothy Dorsett, Jennifer A. Ulz, Patricia S. Foster, Karen Z. McGuiness, James R. McGuiness, Jr., Shara C. Livingston, William H. Livingston, Walter Tesch, Betty Tesch, Benton Paschall, Joan Paschall, Michael P. Soucie, Jennifer Soucie, Brian Huckle, Mary Huckle, Ronald R. Spivey, Albert Fleming, Nancy Fleming, Kenneth Ghelli, Janice Moore, Jamie Pitts, Yvonne Pitts, Bruno Retecki, and Joanne Retecki.

Ennis, Baynard and Morton, by Ron Medlin, Jr., for plaintiff-appellee Gull Harbor Homeowners Association, Inc.

Howard, Stallings, From & Hutson, P.A., by Richard P. Leissner, Jr., for plaintiff-appellees Wayne and Barbara Young.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles E. Coble, for defendant-appellant Gull Harbor Yacht Club, Inc.

Phillip H. Hayes, for defendant-appellants Graham Braswell, Hugh Etheridge, Ken Etheridge, Billy Ray McLeod, William Moller, John Painter, Scott Rice, William Roche, Peter Schirm, Harry Schoenagel, Lee Shreve, Brad Sutton, William Wallin, Richard Willenbrock, Phil Nelson, and Amy Nelson.

CALABRIA, Judge.

Defendants appeal from multiple orders and judgments entered by the trial court in favor of plaintiffs on claims involving the restrictive covenants governing the Gull Harbor subdivision ("Gull Harbor"). We affirm in part, reverse in part, vacate in part, and remand.

I. Factual and Procedural Background

On 11 April 1972, developer Walton W. Smith ("Smith") acquired a large tract of land in Carteret County, North Carolina, intending to develop it into Gull Harbor. Gull Harbor included a marina ("the marina"), which was created by digging a basin and a channel from a portion of the land in Gull Harbor to Bogue Sound. Smith subdivided the remainder of Gull Harbor into lots for single-family homes.

On 19 December 1972, Smith recorded a "General Plan" for Gull Harbor ("the General Plan"), which included several restrictive covenants. The General Plan applied to "[t]hat area described as Blocks A, B, C, of Section 1, of Gull Harbor as shown on the map described above in Map Book 9, at Page 28." Under the terms of the General Plan, all residents of Gull Harbor were required to join a homeowners association, which was "responsible for the maintenance of the marina, the channel from the marina to deep water, and all streets unless or until the maintenance of said streets is assumed by a state or municipal governmental agency." Each property owner was required to pay the homeowners association $36.00 per year to fund this maintenance. On 10 August 1974, the "Gull Harbor Home-Owner's Association, Inc." ("GHHA") filed Articles of Incorporation with the North Carolina Secretary of State and began operating as the homeowners association for Gull Harbor.

The General Plan also provided that "[t]he yacht basin and boat ramp shall be for the exclusive use of Gull Harbor lot owners and their house guests[.]" However, Smith, as developer of Gull Harbor, specifically reserved the right to rent boat slips in the marina to other individuals "unless or until said slips are needed by Gull Harbor lot owners who will then be given preference on a first come first serve basis." The General Plan was valid "until January 1, 1998, after which time said covenants shall be automatically extended for successive periods of ten years unless a majority of the then owners of the land described in the map change said covenants in whole or in part."

In January 1973, Smith conveyed the majority of Gull Harbor to Gull Harbor, Inc. However, Smith retained ownership of the marina,

"together with its appurtenances, launching ramp, docks, bulkheading and channelization." On 25 June 1987, Smith sold the marina to Thomas M. Foley ("Foley") and John Robert Vakiener ("Vakiener"). The deed conveying the marina to Foley and Vakiener also conveyed "all improvements located thereon, including but not limited to bulkheading, docks and finger piers, and electrical and water installations." The deed specifically was made subject to the "[r]ights of owners in lots in the Gull Harbor Subdivision to use of that portion of the property designated as 'Gull Harbor Marina' as set out in [the] General Plan . . . ."

In 1983, a dispute arose between Smith and Gull Harbor property owners John W. Warrender ("Warrender") and Diane Poole Warrender regarding six boat slips located near Warrender's lot. The dispute was litigated and subsequently settled by consent judgment on 18 May 1984 ("the Smith-Warrender consent judgment"). Specifically, the Smith-Warrender consent judgment ensured that the lessees of those six boat slips were not to trespass upon Warrender's "lawn or land area" and were to respect Warrender's "privacy and property rights." In addition, the use of the slips was to be of such a nature that Warrender would not be "duly or unreasonably disturbed."

On 3 February 1988, a majority of Gull Harbor property owners executed and filed a "Revision and Restatement" of the General Plan ("the Revision"), which amended many of the covenants included in the General Plan. Under the terms of the Revision, the GHHA increased the annual $36.00 per lot assessment to $60.00 per lot, but limited its contributions for maintenance of the marina to $3,000.00 per calendar year. Neither Foley nor Vakiener executed the Revision.

On 3 February 2000, the marina was conveyed to Byron T. Unger ("Unger") and his wife, Anna Monique Kent. The deed to Unger described the marina as including the same improvements referenced in the 25 June 1987 deed to Foley and Vakiener and was explicitly subject to the "[r]ights of owners in the Gull Harbor Subdivision, if any, to use of that portion of the property designated as 'GULL HARBOR MARINA' as set out in [the] General Plan. . . ."

On 27 February 2000, Unger sent a letter to all Gull Harbor residents indicating that he intended to lease boat slips in the marina for 99-year terms. Unger proceeded to enter into 99-year leases for twenty-two of the marina's thirty boat slips. Eight of the leases were with individuals who were not lot owners in Gull Harbor ("the non-owners"). In addition, Unger executed two promissory notes, secured by deeds of trust on the marina, in the amounts of $220,000.00 and $80,000.00. Unger

subsequently defaulted on both promissory notes and foreclosure proceedings were initiated.

On 1 March 2005, the individuals who had entered into 99-year boat slip leases with Unger filed Articles of Incorporation for the non-profit corporation Gull Harbor Yacht Club ("GHYC"). GHYC purchased the two promissory notes and corresponding deeds of trust on the marina for $165,000.00. GHYC then continued with the foreclosure proceedings and ultimately purchased the marina at the ensuing foreclosure sale.

Several portions of the marina had been neglected by Unger and required extensive repairs. These repairs, which totaled $200,012.23, included replacing the boat ramp, dredging the marina basin and channel, and repairing the marina bulkheads. In 2007, GHYC changed the lock that secured the chain across the entrance to the marina and informed all Gull Harbor lot owners that it would begin charging them a "user fee" of $200.00 per year to access the marina boat ramp. In addition, lot owners would be required to pay $20.00 in order to receive a key to the locked chain.

On 13 September 2007, Warrender initiated an action against GHYC in Carteret County Superior Court. On 2 September 2008, Warrender filed an amended complaint against GHYC as well as the individual members of GHYC ("the individual defendants")(collectively "defendants"). The amended complaint included claims for, *inter alia*, violation of restrictive covenants, tortious interference with a contract ("tortious interference"), trespass, nuisance, unfair and deceptive trade practices, and injunctive relief. That same day, eighteen other Gull Harbor property owners (collectively with Warrender, "the original plaintiffs") filed a companion action against GHYC and the individual defendants, asserting similar claims. On 29 October 2008, the two cases were consolidated.

On 2 October 2008, defendant Wayne Young ("Young"), a Gull Harbor property owner who had entered into a 99-year lease with Unger, filed a motion to dismiss the original plaintiffs' complaint as to their claims against him. On 31 October 2009, defendants filed an answer to the original plaintiffs' complaint which raised several affirmative defenses, including the statute of limitations and laches. Additionally, defendants included in their answer a motion to dismiss for failure to join necessary parties. On 18 February 2009, the original plaintiffs voluntarily dismissed their claims against Young without prejudice.

On 6 October 2009, the original plaintiffs moved for partial summary judgment on their claims for violation of restrictive covenants and tortious interference. Defendants filed a cross-motion for summary

judgment on all of the original plaintiffs' claims. After a hearing, the trial court entered an order on 12 March 2010 granting partial summary judgment in favor of the original plaintiffs on their claims for breach of restrictive covenants and tortious interference. The trial court also granted defendants' summary judgment motion as to plaintiffs' unfair and deceptive trade practices claim, but denied defendants' motion as to plaintiffs' remaining claims and defendants' affirmative defenses. Finally, the trial court ordered "[t]hat the Gull Harbor Home Owners Association, Inc., and all current property owners in the Gull Harbor subdivision are hereby joined, *ex mero motu*, as necessary parties to this action."

On 7 February 2011, GHHA and several Gull Harbor lot owners formally moved to be joined as plaintiffs, and the trial court granted this motion on 5 April 2011. On 2 June 2011, four additional property owners moved to be joined as plaintiffs, and the trial court granted this motion on 23 June 2011.[1] On 10 February 2011, Young and his wife, Barbara Young (collectively "the Youngs"), moved to join the case as plaintiffs, and the trial court granted their motion on 17 June 2011. After they joined the instant case, none of the joinder plaintiffs filed a new complaint asserting their own causes of action against defendants.

On 2 February 2011, GHYC filed claims against GHHA and all Gull Harbor lot owners, seeking, *inter alia*, an extinguishment of GHHA's right to access the marina due to GHHA's failure to adequately contribute to the costs of the marina's maintenance. GHYC also filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (2011) to set aside the trial court's 5 March 2010 partial summary judgment order.

GHHA and the joinder plaintiffs filed motions for summary judgment as to GHYC's claims on 6 and 8 June 2011. On 1 July 2011, the original plaintiffs filed motions for summary judgment on their remaining claims. On 15 July 2011, the joinder plaintiffs filed a similar summary judgment motion. On 17 August 2011, the Youngs filed a motion for summary judgment seeking a declaration that they possessed riparian rights and that their 99-year lease was valid.

After a hearing on these various motions, the trial court entered an "Amended Order and Judgment" on 15 November 2011, which granted plaintiffs substantially all of the relief they sought. In particular, the trial

1. GHHA and the Gull Harbor property owners formally joined by the trial court as plaintiffs on 5 April and 23 June 2011 are represented by the same counsel. These property owners will collectively be referred to as "the joinder plaintiffs." The original plaintiffs, the joinder plaintiffs, the Youngs, and GHHA will be referred to collectively as "plaintiffs."

court denied GHYC's Rule 60(b) motion,[2] granted plaintiffs' motions for summary judgment against all defendants for both plaintiffs' original claims and defendants' claims, and granted plaintiffs declaratory and injunctive relief. The trial court voided the 99-year leases with the non-owners and ejected those lessees from their boat slips, declared that Warrender and the Youngs possessed riparian rights, and ordered GHHA to "exercise dominion and control over the docks and boat slips at the Gull Harbor Marina, . . . and to establish rules and regulations for the Gull Harbor Marina."

On 15 November 2011, the trial court entered an "Order and Judgment" which awarded GHHA $39,755.73 in attorneys' fees and costs against the individual defendants. Finally, on 16 November 2011, the trial court entered an "Order and Judgment" awarding the original plaintiffs $154,335.67 in attorneys' fees and costs against the individual defendants. GHYC and the individual defendants separately appeal.

II. Gull Harbor Yacht Club

GHYC raises multiple arguments on appeal, including: (1) that the trial court erred by granting summary judgment in favor of plaintiffs on their violation of restrictive covenants claim; (2) that the trial court erred by granting summary judgment in favor of plaintiffs on their tortious interference claim; (3) that the trial court erred in the relief granted for GHYC's violation of the restrictive covenants; (4) that the trial court erred in declaring that Warrender and the Youngs possessed riparian rights; and (5) that the trial court erred in dismissing GHYC's claims against GHHA.

A. Restrictive Covenants

GHYC first argues that the trial court erred by granting summary judgment in favor of plaintiffs on their violation of restrictive covenants claim. Specifically, GHYC contends that (1) the restrictive covenants in the General Plan and its Revision did not apply to GHYC; (2) that GHYC did not engage in any conduct that would violate the restrictive covenants; and (3) that any claim for violation should have been barred by the doctrine of laches. We disagree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is

2. The trial court entered a separate "Amended Order and Judgment" which contained findings of fact and conclusions of law that supported its denial of the Rule 60(b) motion.

entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)(quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

> In addressing a motion for summary judgment, the trial court is required to view the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.

Pine Knoll Assn., v. Cardon, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997).

1. Application of Restrictive Covenants

[1] GHYC first contends that the restrictive covenants which were contained in the General Plan and the Revision were not binding upon it. We disagree.

> Restrictive covenants may be enforced by and against any grantee where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement . . . . Restrictions under a general plan of development may be enforced against subsequent purchasers of the land who take with notice of the restriction. The test for determining whether a general plan of development exists is whether substantially common restrictions apply to all similarly situated lots.

Medearis v. Trs. of Myers Park Baptist Church, 148 N.C. App. 1, 5-6, 558 S.E.2d 199, 203 (2001)(internal quotations and citations omitted). In the instant case, Smith and his wife, who were the record owners of the entire Gull Harbor property, recorded a "General Plan of Subdivision Section I Gull Harbor" which applied to "[t]hat area described as Blocks A, B, C, of Section 1, of Gull Harbor as shown on the map described above in Map Book 9, at Page 28." Smith subsequently conveyed the vast majority of residential lots in Gull Harbor to Gull Harbor, Inc. That conveyance was "subject to the Restrictive Covenants of Record pertaining to said Section One[.]" When Smith later sold the marina to Foley and Vakiener in 1987, the deed similarly noted that it was made subject to the "[r]ights of owners in lots in the Gull Harbor Subdivision to use of that portion of the property designated as 'Gull Harbor Marina' as set out in General Plan of Subdivision, Section 1, Gull Harbor . . . ." This language

continued to appear in all future conveyances of the marina, including the conveyance to Unger, until GHYC received its deed. GHYC's deed omitted any explicit reference to the restrictions.

GHYC contends that the language in the deed from Smith to Foley and Vakiener created a personal covenant that would have been enforceable only by Smith. In making its argument, GHYC relies upon the principle that

> in the *absence* of indications that the land was subdivided and first conveyed as part of a general plan by the original grantor to impose uniform restrictions upon all the parcels conveyed, [a covenant in a deed] would stand merely as an obligation personal to and enforceable only by the original grantor.

Hawthorne v. Realty Syndicate, Inc., 300 N.C. 660, 665, 268 S.E.2d 494, 497 (1980) (citing *Stegall v. Housing Authority*, 278 N.C. 95, 178 S.E.2d 824 (1971) and *Sheets v. Dillon*, 221 N.C. 426, 20 S.E.2d 344 (1942)).

However, contrary to GHYC's assertions, the restrictive covenants at issue clearly apply to the marina under the quoted language in *Hawthorne*. Smith and his wife originally owned the entirety of Section I of Gull Harbor. During their ownership, they recorded the restrictions at issue as part of a general plan that governed that section, including the marina, and they included specific provisions regarding access to and maintenance of the marina in the General Plan. Smith subdivided the property and sold portions of it to different grantees, and Smith's conveyances, including the eventual conveyance of the marina, consistently noted that they were subject to the previously recorded General Plan. Thus, there were definitive "indications that the land was subdivided and first conveyed as part of a general plan by the original grantor to impose uniform restrictions upon all the parcels conveyed . . . ." *Id.*

The fact that the marina parcel was conveyed many years after the residential parcels does not alter the fact that the marina was included as part of the recorded map of Section I of Gull Harbor and that portions of the General Plan specifically governed the use of the marina by Gull Harbor lot owners. The General Plan burdened the owner of the marina by requiring the owner to provide access to the marina and the boat slips therein to the residents of Gull Harbor, and benefited the owner of the marina by requiring Gull Harbor residents to contribute monetarily to the marina's maintenance. If, as GHYC suggests, the marina was not subject to the General Plan, Gull Harbor lot owners would have no remedy at law if the marina owners denied them their right to access the marina

as provided by the General Plan, while leaving them with the burden of providing monetary support to the marina owner.

Ultimately, the language of the General Plan and Smith's subsequent conveyances conclusively indicate that Smith intended for the General Plan to govern all of Gull Harbor Section I, including the marina property, and "the primary purpose of a court when interpreting a covenant is to give effect to the original intent of the parties[.]" *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 555, 633 S.E.2d 78, 85 (2006). Moreover, GHYC had notice of the restrictions via the language noting that the marina property was subject to the General Plan which was included in multiple deeds in the marina's chain of title. Accordingly, the trial court properly concluded that the marina was subject to the General Plan and its Revision, which was adopted in compliance with the General Plan. This argument is overruled.

2. Breach of Restrictive Covenants

GHYC next contends that, even if the restrictive covenants in the General Plan and the Revision were binding upon GHYC as the owner of the marina, GHYC did not breach those covenants. We disagree.

"[T]his Court has held that restrictive covenants are contractual in nature, and that acceptance of a valid deed incorporating covenants implies the existence of a valid contract with binding restrictions." *Moss Creek Homeowners Ass'n, Inc. v. Bissette*, 202 N.C. App. 222, 228, 689 S.E.2d 180, 184 (2010).

> Because covenants originate in contract, the primary purpose of a court when interpreting a covenant is to give effect to the original intent of the parties; however, covenants are strictly construed in favor of the free use of land whenever strict construction does not contradict the plain and obvious purpose of the contracting parties.

Armstrong, 360 N.C. at 555, 633 S.E.2d at 85.

> [A]lthough real property covenants are typically construed in favor of free use of land, such construction must be reasonable and this canon should not be applied in such a way as to defeat the plain and obvious purposes of a restriction. In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions.

Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 363 N.C. 590, 595-96, 683 S.E.2d 366, 369 (2009)(internal quotations and citations omitted). In the instant case, plaintiffs asserted that GHYC breached the restrictive covenants in the General Plan and the Revision by (1) entering into 99-year leases with the non-owners and (2) charging Gull Harbor residents a $200.00 annual user fee for use of the marina.

a. 99-Year Leases

[2] When seeking summary judgment below, plaintiffs first alleged that the 99-year leases with the non-owners breached the restrictive covenants. Under the terms of the Revision,

> [t]he yacht basin and the boat ramp shall be for the exclusive use of Gull Harbor lot owners and their house guests, except that the owners of the marina property reserve the right to rent boat slips to others unless or until said slips are needed by Gull Harbor lot owners who will then be given preference on a first come-first served basis.

This language indicates that it was the intention of the parties who enacted the Revision to have the marina operate exclusively for the benefit of Gull Harbor lot owners. However, the parties also explicitly agreed to an exception to this exclusive use if the lot owners declined to take advantage of their rights in the boat slips. The parties disagree as to whether the 99-year leases to the non-owners were appropriate under this exception.

Plaintiffs do not dispute that GHYC could enter into leases for boat slips with individuals who did not own a lot in Gull Harbor. Rather, plaintiffs contend that the 99-year leases violated the above language from the Revision because "the 99 year leases constitute effective sales." However, plaintiffs do not cite to any authority for this proposition and we have found none in North Carolina. In general, the term of a lease is established by the parties in the executed lease agreement and only limited by the term the parties agreed upon. Our Supreme Court has suggested that even perpetual leases would be permissible, so long as certain requirements are met. *See Lattimore v. Fisher's Food Shoppe, Inc.*, 313 N.C. 467, 473, 329 S.E.2d 346, 349-50 (1985) (adopting a bright line rule that "provisions allegedly granting perpetual leases or rights to perpetual renewals" must contain "the terms 'forever', 'for all time', 'in perpetuity' or words *unmistakably* of the same import" in order for the leases to be upheld). Thus, contrary to plaintiffs' assertions, the mere length of the leases to the non-owners is insufficient to alter the

character of the leases and transform them into sales. Since the Revision permits the owner of the marina to "rent boat slips to others," GHYC did not violate that restrictive covenant merely by entering into 99-year leases with the non-owners.

However, GHYC's authority to lease boat slips to outside individuals only exists "unless or until said slips are needed by Gull Harbor lot owners . . . ." Plaintiffs contend that the 99-year leases render GHYC unable to comply with this limitation because they do not contain language which would permit GHYC to dispossess the non-owners from their leases if a Gull Harbor lot owner desired a boat slip prior to the expiration of the non-owners' leases and no other slips were available. While plaintiffs appear to be correct that GHYC would be in breach of this provision in the Revision if it failed to provide a boat slip to a Gull Harbor lot owner that desired a slip, they presented no evidence to the trial court that this scenario had ever occurred.

The Revision specifically acknowledges GHYC's right to rent boat slips to outsiders and places no restrictions on that right "unless or until said slips are needed by Gull Harbor lot owners who will then be given preference on a first come-first served basis." Absent evidence that Gull Harbor lot owners have sought boat slips in the marina and been unable to obtain them from GHYC, which is all that is required by the covenant at issue, there is no basis for concluding that GHYC breached that covenant by entering into 99-year leases with the non-owners. Thus, the trial court erred by concluding that GHYC breached the covenants by merely entering into the 99-year leases with the non-owners. Since we have determined that the 99-year leases do not, standing alone, breach the restrictive covenants, we do not address GHYC's argument that the doctrine of laches bars challenges to the 99-year leases.

b. User Fee

[3] Plaintiffs also alleged that GHYC violated the restrictive covenants by charging all Gull Harbor lot owners a $200.00 annual user fee to access the marina. Under the General Plan,

> [GHHA] shall be responsible for the maintenance of the marina [and] the channel from the marina to deep water . . . . In order to accomplish same, and to have funds in hand therefor, each property owner shall be required to make an annual deposit of $36.00 per lot, . . . to be held in escrow and used at such times as maintenance, upkeep, repair, or deepening of the channel or marina is deemed

> necessary. The amount of this annual fee may be changed only if deemed necessary by [GHHA] and this shall be accomplished by a two-thirds vote of its members.

In the section of the Revision entitled "Community Expenses," the Revision amended this provision and established GHHA's new responsibilities regarding the marina as follows:

> All amounts expended by [GHHA] to assist the owner in maintenance of the marina, the ramp, and the channel to deep water, shall be limited to a maximum of $3,000.00 per calendar year, with any unused portion from any year being available for use in future years, if needed, unless otherwise authorized by the membership by a 2/3 vote . . . . Nothing herein contained shall be construed to pledge the credit of [GHHA] for such repairs.

Thus, under the terms of the Revision, GHHA was no longer solely responsible for the maintenance of the marina. Instead, GHHA would only be required to assist the owner of the marina in maintaining the marina in an amount not to exceed $3,000.00 per year. Nonetheless, beginning in 2007, GHYC restricted access to the marina to only those Gull Harbor lot owners that paid a $200.00 annual user fee. The undisputed evidence is that the purpose of this fee was "so that those who wanted to use the marina could help pay for its maintenance . . . ."

Permitting GHYC to collect this user fee would defeat the purpose of the specific provision in the Revision regarding the payment of maintenance costs by Gull Harbor lot owners, which explicitly limited the maximum amount of maintenance costs to be contributed. Thus, GHYC could not, without violating the terms of the Revision, attempt to collect further maintenance costs above and beyond that which are specified in that document. Accordingly, there is no genuine issue of material fact that GHYC violated the restrictive covenants in the Revision when it denied access to the marina by Gull Harbor lot owners until they paid a $200.00 annual user fee. Therefore, the trial court properly granted summary judgment in favor of plaintiffs on this issue. This argument is overruled.

c. Relief Granted by Trial Court

[4] GHYC argues that the trial court erred in the relief it granted to plaintiffs for GHYC's violation of the covenants. "When enforcing a restrictive covenant and restoring the status quo, a mandatory injunction is the proper remedy." *Buie v. High Point Assocs. Ltd. P'ship*, 119 N.C. App. 155, 160, 458 S.E.2d 212, 216 (1995).

> The issuance of such an injunction depends upon the equities of the parties and such balancing is clearly within the province of the trial court. Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused.

Id. at 161, 458 S.E.2d at 216 (internal quotations and citations omitted).

In the instant case, the trial court's final judgments and orders granted the following relief for GHYC's breach of restrictive covenants: (1) the trial court invalidated the 99-year leases of the non-owners and ordered the summary ejectment of the non-owners from their boat slips; (2) the trial court ordered that "the GHHA shall be put in possession of [the non-owners' boat slips] for the purpose of determining which lot owners shall be allowed to lease said slips," the terms of which were to be consistent with the Revision; and (3) the trial court ordered that "[GHHA] shall exercise dominion and control over the docks and boat slips at the Gull Harbor Marina, . . . and . . . establish rules and regulations for the Gull Harbor Marina."

It is apparent from the record that the first and second forms of relief, and at least portions of the third form of relief, which were granted by the trial court were premised upon a determination that GHYC breached the restrictive covenants by entering into 99-year leases with the non-owners. Since we have determined that the mere entry into these leases did not violate the covenants, we must vacate the portion of the trial court's orders and judgments which ejected the non-owners from their boat slips and awarded control of those slips to GHHA.

Moreover, GHYC's actual violation of the covenants, which consisted of denying Gull Harbor lot owners their right to access the marina unless they paid a $200.00 annual user fee, does not support either the trial court's award of dominion and control of the marina to GHHA or the court granting GHHA the power to establish rules and regulations for the marina, as GHHA has no ownership interest in the marina under the Revision or any other instrument. There is nothing in the Revision which would provide a basis for granting GHHA either possession of or control over the marina. Instead, the Revision provides GHHA and Gull Harbor lot owners unfettered *access* to the marina, and the trial court's remedy must be consistent with ensuring that that access is not impeded by GHYC. Since the trial court's relief went far beyond simply restoring

the status quo required by the Revision, allowing all Gull Harbor lot owners to access the marina without the payment of an additional maintenance fee, the relief granted constitutes an abuse of discretion. Thus, we must vacate the entirety of the relief granted to plaintiffs as a result of GHYC's breach of the Revision and remand for the entry of relief which appropriately restores the status quo in accordance with the terms of the Revision.

B. Tortious Interference

[5] GHYC argues that the trial court erred by granting plaintiffs' motion for summary judgment as to their tortious interference claim. We agree.

The elements of a tortious interference claim are:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988).

In the instant case, plaintiffs' contract claims were limited to enforcing their rights under the covenants contained in the General Plan and the Revision. We have already determined that GHYC was bound by the covenants contained in those documents and that, by its conduct, GHYC directly breached those covenants. Since GHYC directly breached the covenants, rather than inducing a third party's breach, a tortious interference claim cannot be applicable to it. Accordingly, the trial court erred in granting summary judgment to plaintiffs on this claim. We reverse this portion of the trial court's order and remand for the entry of summary judgment in favor of GHYC on plaintiffs' tortious interference claim.

C. Riparian Rights

GHYC argues that the trial court erred when it granted summary judgment in favor of Warrender and the Youngs for their claims that they possessed riparian rights. GHYC contends that (1) these claims were not properly before the trial court; and (2) that the evidence demonstrated that Warrender and the Youngs did not actually possess riparian rights.

1. Warrender's Claim

i. *Res Judicata*

[6] GHYC first contends that Warrender was barred by the doctrine of *res judicata* from asserting his riparian rights claim, since that claim is foreclosed by the prior Smith-Warrender consent judgment.

> Under the doctrine of res judicata or claim preclusion, a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies. The doctrine prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (internal quotations and citations omitted). In the instant case, the Smith-Warrender consent judgment does not appear to have adjudicated a claim by Warrender for riparian rights nor does it appear that such a determination was necessary to that judgment. Instead, the judgment declared that lessees of six boat slips near Warrender's property would access those slips without trespassing upon "the lawn or land area" of Warrender's lot. Therefore, *res judicata* would not bar Warrender's claim that GHYC trespassed upon Warrender's riparian rights in the instant case.

ii. Warrender's Complaint

[7] GHYC also contends that Warrender was not entitled to a determination of his claim for riparian rights because he did not seek that relief in his complaint. However, as part of Warrender's trespass claim in his complaint, he specifically alleged that his "property is immediately adjacent to the public trust waters known as Gull Harbor marina and is riparian property under the laws of North Carolina; therefore, [GHYC] has been continuously trespassing on [Warrender]'s property and usurping [Warrender]'s riparian rights since its inception." Moreover, in his claim for relief, Warrender specifically sought "injunctive relief allowing [Warrender], his family, and Gull Harbor residents, . . . to assert their lawful rights as owner of the riparian land immediately adjacent to the North Carolina Public Trust waters known as the Gull Harbor marina[.]"

Thus, in order to fully adjudicate Warrender's claim that GHYC was trespassing upon his riparian rights, it was necessary for the trial court to determine whether Warrender validly possessed those rights in the first place. *See Singleton v. Haywood Elec. Membership Corp.*, 357 N.C.

623, 627, 588 S.E.2d 871, 874 (2003) ("[A] claim of trespass requires: (1) *possession of the property by plaintiff when the alleged trespass was committed*; (2) an unauthorized entry by defendant; and (3) damage to plaintiff." (emphasis added and internal quotation and citation omitted)). Accordingly, the trial court properly addressed Warrender's riparian rights claim. This argument is overruled.

2. The Youngs' Claim

[8] GHYC also contends that the Youngs were not entitled to a determination of their claim for riparian rights because they did not file a separate complaint after they were joined as parties to this action. In their formal motion to join the instant case as plaintiffs, the Youngs alleged that they had "riparian rights to the Marina, the channel from the Marina, and Bogue Sound." They further alleged that "[GHYC]'s assertion of riparian rights are or may be found to be in direct conflict with Young's assertion of riparian rights." In their motion for summary judgment, the Youngs sought for the trial court "to enter a judgment providing that Wayne and Barbara Young have riparian rights to the Marina, the channel from the Marina and Bogue Sound, the right to construct wharfs, piers, or landings to enjoy their riparian rights . . . ." However, the Youngs acknowledge that they never filed a formal pleading after they were joined as plaintiffs.

Rule 19 of the North Carolina Rules of Civil Procedure merely requires that "those who are united in interest must be joined as plaintiffs or defendants." N.C. Gen. Stat. § 1A-1, Rule 19(a) (2011). It does not specifically require the joined parties to file a separate pleading. Nor have our Courts imposed such a requirement. Our Supreme Court has acknowledged that a necessary party joined as a plaintiff is permitted to file a separate pleading. *See Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978) ("Absence of necessary parties does not merit a nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead."). However, that Court has also acknowledged that a necessary party joined as a plaintiff may choose to file nothing. *See Terrace, Inc. v. Indemnity Co.*, 243 N.C. 595, 599, 91 S.E.2d 584, 588 (1956) (remanding the case so that a necessary party could be joined as a plaintiff "with leave either to adopt the complaint or file a new complaint" but also acknowledging that the newly joined plaintiff could "elect to refuse to file any pleadings").

In the instant case, when the trial court granted the Youngs' motion to join as plaintiffs, it necessarily determined that the Youngs were united in interest with the other plaintiffs who had already filed claims.

Both the Youngs' motion to join and motion for summary judgment reflect that their riparian rights claim was based on substantially the same allegations as the claim brought by Warrender in his complaint. We find no authority in either the Rules of Civil Procedure or in our caselaw which would have required the Youngs to file a separate pleading after their joinder when their claims were reasonably represented by the claims already before the court at the time the Youngs were joined. Thus, we hold that the trial court properly considered the Youngs' riparian rights claim. This argument is overruled.

3. Evidence Pertaining to Riparian Rights Claims

[9] Finally, GHYC argues that the trial court erred by granting summary judgment to Warrender and the Youngs because the undisputed evidence actually reflects that they possess no riparian rights. "Riparian rights are vested property rights that . . . arise out of ownership of land bounded or traversed by navigable water." *In re Protest of Mason*, 78 N.C. App. 16, 24-25, 337 S.E.2d 99, 104 (1985).

> [R]iparian rights are available to the owners of property that are adjacent to or encompass bodies of water that are navigable in fact. The riparian rights available to the owners of property bounded or traversed by water are derived from two distinct properties: 1) the principal estate of land extending to the shoreline of [the body of water in question], and 2) the appurtenant estate of submerged land in [the body of water in question] benefitting the principal estate. According to well-established North Carolina law, riparian owners have a qualified property in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers, or landings . . . .

Newcomb v. Cty. of Carteret, 207 N.C. App. 527, 541-42, 701 S.E.2d 325, 336 (2010) (internal quotations and citations omitted). In the instant case, the parties dispute whether Warrender and the Youngs or GHYC owns the bulkhead on the outer portion of the marina. This bulkhead constitutes the land which is "adjacent to . . . [a] bod[y] of water that [is] navigable in fact" and provides the basis for any riparian rights claim. *Id.* at 541, 701 S.E.2d at 336.

Warrender and the Youngs contend that the bulkhead represents the boundary line of their respective properties. In support of this

contention, Warrender and the Youngs cite the recorded map of Section I of Gull Harbor from 1972, which shows the property lines for their respective lots going directly through the bulkhead. In addition, they rely on a portion of the metes and bounds description of the marina in the deed from Smith to Foley and Vakiener which they argue demonstrates that the bulkhead constitutes their respective property lines:

> . . . thence S 73°23' W 131.38 feet to a point *in the bulkhead of the Gull Harbor Marina*; thence with the outside edge of the said bulkhead the following courses and distances: N 01°55'50" W 88.14 feet; N 13°45'07" W 128.26 feet; S 76°19'45" W 80.90 feet; N 13°40'15" W 306.83 feet; N 76°19'45" E 149.31 feet; S 13°23'05" E 128.16 feet *to a PK nail in the bulkhead*;

(Emphasis added). Finally, Warrender testified in a deposition that the Department of Coastal Management had previously recognized his riparian rights.

In opposition to Warrender and the Youngs' evidence, GHYC cites several pieces of evidence which it contends unequivocally demonstrate that the bulkhead belongs to GHYC. First, GHYC notes that Smith's deed to Foley and Vakiener states that it conveyed "all improvements located thereon, including but not limited to bulkheading, docks and finger piers, and electrical and water installations." This language was included in all deeds in the marina's chain of title, including the deed to GHYC. GHYC also contends that the metes and bounds description of the marina quoted above, specifically the portion referencing the marina property running "with the outside edge of the said bulkhead," indicates that GHYC owns the bulkhead. In addition, GHYC notes that Warrender's property is subject to a fifteen- foot maintenance easement to allow it to keep the bulkhead in good repair, and reasons that its duty to maintain the bulkhead provides additional evidence that GHYC owns the bulkhead itself. Finally, GHYC contends that other surveys in the record indicate that GHYC owns both the bulkhead and a narrow strip of land between the bulkhead and Warrender and Youngs' respective lots.

Considering the evidence presented by both parties in the light most favorable to GHYC, as required for our review of a summary judgment motion, there is a genuine issue of material fact as to the ownership of the bulkhead adjacent to the Warrender and Young lots. Since it is necessary to determine this ownership in order to resolve Warrender and the Youngs' riparian rights claims, summary judgment was inappropriate. We must reverse the trial court's grant of summary judgment to

Warrender and the Youngs as to this issue and remand the case for a trial to determine the true ownership of the bulkhead and its accompanying riparian rights.

D. Counterclaims

[10] Finally, GHYC argues that the trial court erred by granting summary judgment in favor of GHHA on its counterclaims. We disagree.

In the instant case, GHYC's counterclaims were based upon allegations that GHHA failed to contribute to the maintenance of the marina as required by the General Plan. According to GHYC's allegations, "[t]hrough 2004 GHHA paid some, not all, and not nearly enough money to the various owners of the Marina to maintain it." GHYC further alleged that "[i]n 2007, GHYC largely 'gave up' in its attempt and expectations that GHHA would ever pay substantial amount for maintenance of the Marina. GHYC renounced its relationship with GHHA and protected the use of the boat ramp by changing the lock on the chain across the Marina boat ramp."

As previously noted, "restrictive covenants are contractual in nature . . . ." *Moss Creek*, 202 N.C. App. at 228, 689 S.E.2d at 184. The statute of limitations for a breach of contract claim is three years. N.C. Gen. Stat. § 1-52(1) (2011). The undisputed evidence is that both parties ceased to perform their duties under the restrictive covenants in 2007, and, as a result, no breach of the restrictive covenants could occur after that time. However, GHYC did not file its counterclaims until 2 February 2011,[3] which was more than three years after the last possible breach and thus beyond the statute of limitations. Accordingly, the trial court properly granted summary judgment in favor of GHHA as to GHYC's counterclaims. This argument is overruled.

III. Individual Defendants

The individual defendants also raise multiple issues on appeal, including: (1) that the trial court erred by entering a partial summary judgment order prior to the joinder of all necessary parties; (2) that the trial court erred by granting summary judgment to plaintiffs on their claim against the individual defendants for violation of restrictive covenants; (3) that the trial court erred by failing to grant summary judgment to the individual defendants on their affirmative defense of laches;

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3. GHYC's counterclaims do not relate back to the filing of the original plaintiffs' complaint. *See Pharmaresearch Corp. v. Mash*, 163 N.C. App. 419, 426-27, 594 S.E.2d 148, 153-54 (2004).

(4) that the trial court erred by granting summary judgment to plaintiffs for their tortious interference claim against the individual defendants; and (5) that the trial court erred by awarding attorneys' fees to plaintiffs.

A. Necessary Parties

[11] The individual defendants first argue that the trial court erred by granting summary judgment to the original plaintiffs on their claims for breach of restrictive covenants and tortious interference with a contract because, at the time the summary judgment order was entered, all necessary parties had not been joined in the case. We disagree.

"A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence." *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 451-52, 183 S.E.2d 834, 837 (1971). Thus, pursuant to N.C. Gen. Stat. § 1A-1, Rule 19(a) (2011), necessary parties "must be joined as plaintiffs or defendants[.]"

In the instant case, the trial court entered an order granting partial summary judgment to the original plaintiffs on their claims for breach of restrictive covenants and tortious interference. Simultaneously, the court ordered that "the Gull Harbor Home Owners Association, Inc., and all current property owners in the Gull Harbor subdivision are hereby joined, *ex mero motu*, as necessary parties to this action." The individual defendants contend that the trial court's failure to join all necessary parties prior to the entry of this partial summary judgment order invalidates that order.

This Court has previously explained that "[a] judgment which is *determinative of a claim arising in an action* to which one who is 'united in interest' with one of the parties has not been joined is void." *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272 (1979) (emphasis added). In *Ludwig*, the Court held that the specific "portion of the judgment" entered without the joinder of a party necessary to that claim was void. *Id.* However, the Court did not invalidate the remaining portion of the judgment, but instead reviewed the parties' arguments involving the remaining claims. *Id.* at 190-92, 252 S.E.2d at 272-74. Thus, consistent with *Ludwig* and Rule 19, we must analyze each individual claim decided by the trial court and determine whether the full adjudication of that particular claim required additional necessary parties.

In the instant case, the individual defendants argue only that the trial court failed to join all necessary parties before it granted summary judgment in favor of plaintiffs on their claim that GHYC and the

individual defendants violated the restrictive covenants contained in the General Plan and its Revision. To support their argument, the individual defendants rely upon our Supreme Court's decision in *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 527 S.E.2d 40 (2000). In *Karner*, the plaintiffs owned property in a residential subdivision in which each lot was governed by a restrictive covenant which limited the lot to residential use. *Id.* at 434, 527 S.E.2d at 41. The defendants intended to demolish residential properties on three lots and replace them with commercial properties. *Id.* The plaintiffs sought an injunction to block the demolition and construction. *Id.* The defendants answered the plaintiffs' complaint, asserting the affirmative defense "that a change of circumstances had occurred making use of the lots for residential purposes no longer feasible." *Id.* The plaintiffs then moved to join all other property owners in the subdivision, and the trial court denied the motion. *Id.* at 435, 527 S.E.2d at 41. The trial court ultimately granted a directed verdict in favor of the defendants based upon the statute of limitations. *Id.* at 435, 527 S.E.2d at 42. On appeal, our Supreme Court reversed the trial court's denial of the plaintiffs' motion to require joinder. *Id.* at 440, 527 S.E.2d at 45. The Court held that all property owners in the subdivision were necessary parties because

> if the residential restrictive covenant is abrogated as to the lots owned by defendants, each property owner within the subdivision would lose the right to enforce that same restriction. Unless those parties are joined, they will not have been afforded their day in court. *An adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a valid judgment.* For this reason, we conclude the non-party property owners . . . are necessary parties to this action because the voiding of the residential-use restrictive covenant would extinguish their property rights.

Id. at 440, 527 S.E.2d at 44 (emphasis added and internal quotations and citations omitted).

The individual defendants contend that since this case, like *Karner*, involves the enforcement of restrictive covenants, all Gull Harbor lot owners were required to be joined prior to the trial court's determination that the individual defendants violated the covenants. However, *Karner* is inapplicable to the instant case. In *Karner*, the trial court entered a judgment against the plaintiff lot owners after denying joinder to the remaining non-party lot owners. *Id.* As a result, the non-joined lot owners had their property rights extinguished "without giving the

property owner an opportunity to be heard . . . ." *Id.* By necessity, the parties raising the issue on appeal were the plaintiff lot owners who had lost before the trial court.

In contrast, the lot owners in the instant case prevailed in the trial court's partial summary judgment order. The court upheld and enforced their property rights, and, thus, unlike the non-joined lot owners in *Karner*, their rights were not extinguished without providing them an opportunity to be heard. Nothing in *Karner* suggests that an *opposing party* which seeks to *impair* the opposing lot owners' property rights has standing to protect the rights of non-party lot owners by arguing on appeal that they were not joined when required. Accordingly, we hold that the individual defendants cannot properly raise this argument to challenge the trial court's partial summary judgment order. This argument is overruled.

B. Violation of Restrictive Covenants

[12] The individual defendants next argue that the trial court erred in granting summary judgment to plaintiffs on their violation of restrictive covenants claim against the individual defendants. We agree.

As previously noted, plaintiffs' claims for violation of the General Plan and its Revision were based upon two acts: (1) the entry into 99-year boat slip leases with the non-owners and (2) the erection of a chain and requirement of a $200.00 annual user fee from any Gull Harbor lot owner that wished to access the marina. Since we have already determined that the 99-year boat slip leases to the non-owners do not currently violate the covenants, we will limit our analysis to a determination of the individual defendants' liability for the imposition of the $200.00 annual user fee. The individual defendants contend that they cannot be individually liable for this act.

It is undisputed that GHYC is a nonprofit corporation governed by Chapter 55A of our General Statutes. Furthermore, there is no dispute that the individual defendants are all members of GHYC. Under the statutes which govern nonprofit corporations, "[a] member of a corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations of the corporation." N.C. Gen. Stat. § 55A-6-22 (2011).

In the instant case, the individual defendants did not possess the necessary ownership interest in the marina which would provide the authority to restrict access to it, outside of their capacity as agents of GHYC. Only GHYC, by virtue of its ownership of the marina, possessed the right to exclude plaintiffs from the marina as a whole. *See generally*

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 73 L. Ed. 2d 868, 882, 102 S. Ct. 3164, 3176 (1982)("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." (footnote omitted)). The individual defendants all had a leasehold interest in an individual boat slip within the marina which provided the power to exclude others from that boat slip. Nonetheless, nothing in the lease agreements could be construed so broadly as to permit the individual defendants to exclude other individuals from the entirety of the marina.

Therefore, since the individual defendants did not possess any individual permanent ownership interest in the marina, they could not be individually liable for the imposition of the $200.00 annual user fee, the act which supported the trial court's determination that the restrictive covenants in the Revision had been breached. Their status as lot owners in Gull Harbor does not alter their liability, since any actions that they may have taken to breach the covenants were in their capacity as members of GHYC, rather than in their individual capacity. Ultimately, the individual defendants' only liability in the instant case would be for actions for which they cannot be personally liable. N.C. Gen. Stat. § 55A-6-22 (2011). Consequently, the trial court erred by granting plaintiffs' motion for summary judgment against the individual defendants on this claim. That portion of the trial court's order must be reversed and remanded for the entry of summary judgment in favor of the individual defendants. Since we have ruled in favor of the individual defendants on this claim, it is unnecessary to address their remaining arguments regarding it.

C. Tortious Interference

[13] The individual defendants additionally argue that the trial court erred by granting summary judgment in favor of plaintiffs for their claim of tortious interference. It has previously been determined that GHYC directly breached the restrictive covenants in the Revision and that any actions by the individual defendants which could be considered a breach of those covenants were undertaken in their role as members of GHYC. Since any actions which the individual defendants undertook to breach the covenants would have been undertaken in their capacity as members of GHYC, they could not be considered third parties that induced GHYC to breach the covenants. Thus, the trial court erred by granting summary judgment in favor of plaintiffs on this claim against the individual defendants. That portion of the trial court's order must also be reversed and remanded for entry of summary judgment in favor of the individual defendants.

D. Attorneys' Fees

[14] Finally, the individual defendants claim that the trial court erred by awarding plaintiffs attorneys' fees. The trial court awarded attorneys' fees pursuant to N.C. Gen. Stat. § 47F-3-120, which allows for the award of reasonable attorneys' fees "in an action to enforce provisions of the articles of incorporation, the declaration, bylaws, or duly adopted rules or regulations" of a planned community. N.C. Gen. Stat. § 47F-3-120 (2011). Since the award of attorneys' fees was based upon the trial court's determination that the individual defendants violated the restrictive covenants contained in the Revision in their individual capacities, our reversal of that determination also necessitates the reversal of the attorneys' fee award. Therefore, we reverse the trial court's award of attorneys' fees against the individual defendants.

IV. Conclusion

GHYC, as the owner of the marina, was subject to the restrictive covenants contained in the General Plan and the Revision. There was no genuine issue as to any material fact regarding whether GHYC breached those restrictive covenants by charging a $200.00 annual user fee to Gull Harbor lot owners for access to the marina, and, as a result, the trial court properly granted summary judgment in favor of plaintiffs and against GHYC on that claim. That portion of the trial court's order is affirmed.

However, GHYC did not breach the restrictive covenants by entering into the 99-year leases with the non-owners, as there was no evidence presented that a Gull Harbor lot owner attempted to rent a boat slip in the marina and was denied due to the unavailability of slips. Thus, the trial court erred by granting any relief to plaintiffs based upon the 99-year leases constituting a breach of the covenants. Moreover, the trial court abused its discretion in the relief it ordered to remedy GHYC's attempts to limit access to the marina by imposition of a $200.00 annual user fee, because the relief granted exceeded merely restoring the status quo required by the Revision. Instead, the trial court granted plaintiffs rights which were not supported by the Revision. Consequently, the trial court's relief is vacated and remanded for the entry of relief consistent with ensuring plaintiffs' right of access to the marina under the Revision.

The trial court erred by granting summary judgment in favor of plaintiffs on their tortious interference claim, as GHYC directly breached the covenants, but did not induce a third party to breach. That portion of the trial court's order is reversed and remanded for entry of summary judgment in favor of GHYC.

The trial court properly considered the riparian rights claims of Warrender and the Youngs. However, the trial court erred in granting summary judgment in favor of those individuals because there are genuine issues of material fact regarding the ownership of the bulkhead which provides the basis for any riparian rights. The trial court's summary judgment order is reversed and remanded for trial on the issue of the riparian rights claims of Warrender and the Youngs.

The individual defendants cannot challenge whether the trial court's partial summary judgment order was properly entered prior to the joinder of necessary parties, because they have no standing to assert the rights of any non-party Gull Harbor lot owners in a determination of whether defendants breached the restrictive covenants in the General Plan and its Revision. However, since the actions of the individual defendants which the trial court found to breach the restrictive covenants were carried out in the individual defendants' capacity as members of GHYC, the trial court erred in determining that they were liable for the breach in their individual capacities. Therefore, the portion of the trial court's order granting summary judgment in favor of plaintiffs on plaintiffs' claim for breach of restrictive covenants against the individual defendants is reversed and remanded for the entry of summary judgment in favor of the individual defendants. The trial court additionally erred by granting summary judgment in favor of plaintiffs on their tortious interference claim against the individual defendants. That portion of the trial court's order is also reversed and remanded for the entry of summary judgment in favor of the individual defendants. Since the individual defendants were not liable for the violation of the restrictive covenants in their individual capacity, the trial court erred by awarding plaintiffs costs and attorneys' fees against the individual defendants. That portion of the trial court's judgment is reversed.

Affirmed in part, reversed in part, vacated in part, and remanded.

Judges BRYANT and GEER concur.

WATKINS v. WATKINS

[228 N.C. App. 548 (2013)]

ANNE KIMMEL WATKINS, PLAINTIFF
v.
RAYMOND D. WATKINS, DEFENDANT

No. COA12-1135

Filed 6 August 2013

1. Divorce—equitable distribution—IRAs—classification and valuation

The trial court erred in an equitable distribution and spousal support action in its classification and valuation of two investment retirement accounts, a pension rollover IRA, and a 401(k) Rollover IRA. The trial court was not required to apply the coverture ratio to determine the marital portion of an IRA except to the extent that the IRA was funded through a deferred compensation plan or was otherwise brought within the purview of N.C.G.S. § 50-20.1.

2. Divorce—equitable distribution—valuation of investment accounts—competent supporting evidence

In an action involving equitable distribution and spousal support, there was competent evidence to support the trial court's valuation of plaintiff's investment accounts.

3. Divorce—equitable distribution—valuation of IRA—transposition error—not prejudicial

The trial court did not err in an action for equitable distribution and spousal support in valuing plaintiff's 401(k) account and associated divisible property. The transposition error posited by defendant would have benefited defendant, and the credibility of testimony about a loss was exclusively within the province of the trial court.

4. Divorce—equitable distribution—rental properties—separate property

The trial court did not err in an action for equitable distribution and spousal support by not characterizing two rental properties as marital. Plaintiff's testimony established that the properties were her separate properties, although defendant contended that he had contributed sweat equity and that one of the properties was acquired during the marriage.

5. Appeal and Error—preservation of issues—no comprehensible argument

An issue was deemed abandoned where the Court of Appeals could discern no comprehensible legal argument in defendant's brief concerning the issue.

6. Divorce—equitable distribution—watch—gift from employer

The trial court did not err in an action for equitable distribution and spousal support by classifying a Rolex watch as plaintiff's separate property. Plaintiff presented evidence that the watch was a gift from her employer while defendant presented no evidence that the watch was compensation.

Appeal by Defendant from judgments and orders entered 7 February 2012 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 13 March 2013.

Gum, Hillier & McCroskey, P.A., by Patrick S. McCroskey, for Plaintiff.

Thomas D. Roberts PLLC, by Thomas D. Roberts, for Defendant.

DILLON, Judge.

Raymond D. Watkins (Defendant) appeals from an equitable distribution judgment and order filed on 7 February 2012 and from a post-separation support, alimony, and attorneys' fees judgment and order also filed on 7 February 2012. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Factual & Procedural Background

Plaintiff and Defendant were married on 22 April 1995 and separated on or about 2 February 2010. On 10 May 2010, Plaintiff filed a complaint in Buncombe County District Court seeking, *inter alia*, an equitable distribution of the parties' assets. On 21 May 2010, Defendant filed an answer and counterclaims seeking post-separation support, alimony, and attorneys' fees. On 18 June 2010, Plaintiff filed a reply in which she denied that she was the supporting spouse.

These matters came on for hearing in Buncombe County District Court on 16 November 2011. Three days of hearings ensued, during

which the trial court received testimony and heard arguments from both parties. On 7 February 2012, the trial court entered two separate orders (1) addressing the issue of equitable distribution; and (2) addressing the issues of post-separation support, alimony, and attorneys' fees. Regarding equitable distribution, the court concluded that "an equal distribution of the marital estate is equitable and it would not be equitable to grant an unequal distribution in [] favor of the plaintiff or the defendant." The trial court also denied Defendant's claims for spousal support and attorneys' fees. Defendant filed his notice of appeal from the 7 February 2012 orders on 7 March 2012.

II. Analysis

Defendant presents 20 issues on appeal, challenging the trial court's equitable distribution order and its order denying Defendant's counterclaims for spousal support and attorneys' fees.[1] We address these issues in turn.

A. Equitable Distribution

Defendant's first 15 issues on appeal pertain to the trial court's equitable distribution order. Our review is limited to determining "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Stovall v. Stovall*, 205 N.C. App. 405, 407, 698 S.E.2d 680, 683 (2010). The trial court's findings of fact are binding on appeal "as long as competent evidence supports them, despite the existence of evidence to the contrary." *Id.*

"The initial obligation of the trial court in any equitable distribution action is to identify the marital property in accordance with G.S. 50–20 and the appropriate case law." *Cornelius v. Cornelius*, 87 N.C. App. 269, 271, 360 S.E.2d 703, 704 (1987). "The trial court must classify and identify property as marital or separate 'depending upon the proof presented to the trial court of the nature' of the assets." *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991) (citation omitted). Further,

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1. We note that Defendant also raises a 21st issue, challenging the trial court's order denying his motion for additional trial time. The trial court did not address this motion in its 7 February 2012 orders, but instead denied it by written order entered 18 May 2012. The notice of appeal included in the appellate record, however, references only the trial court's 7 February 2012 orders. Thus, we do not have jurisdiction over Defendant's challenge to the 18 May 2012 order, *see Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) (providing that "[w]ithout proper notice of appeal, this Court acquires no jurisdiction"); N.C.R. App. P. 3(c) (2013), and we do not address this issue.

> [t]he burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate. A party may satisfy her burden by a preponderance of the evidence.

Id. (citations omitted).

> If both parties meet their burdens, then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property.
>
> If the party claiming the property to be marital does not meet his burden of showing that the property was acquired during the course of the marriage, the property does not immediately become, as a matter of law, separate property. The party claiming the property as his separate property must meet the burden of establishing by the preponderance of the evidence that the property was "acquired by [him] before marriage . . ." or acquired by him after separation with his own separate funds[.]

Id. at 206-07, 401 S.E.2d at 788 (citations omitted) (first alteration and ellipsis in original).

1. Defendant's Investment Retirement Accounts

[1] Defendant contends that the trial court erred in classifying and valuing two of his investment retirement accounts (IRAs). We agree and remand to the trial court to enter an order classifying and valuing Defendant's IRAs in a manner consistent with this opinion.

In 2000 – during the parties' marriage – Defendant opened the following two IRAs at issue at or about the time that he separated from his employment with BASF: (1) an IRA which was funded entirely with proceeds from his BASF defined pension plan (the Pension Rollover IRA); and (2) an IRA funded by rolling over a 401(k) account which he had contributed to while employed at BASF (the 401(k) Rollover IRA). In determining the marital and separate components of Defendant's IRAs, the trial court expressly relied upon the testimony of Plaintiff's expert, CPA Foster Shriner. Mr. Shriner concluded that the IRAs had a combined value of $273,312.00 as of the parties' date of separation, with the marital component valued at $188,344.00 and the separate component valued at

$88,968.00.[2] In determining these values, Mr. Shriner calculated the separate component by (1) using the combined value of Defendant's IRAs as of the date of marriage – which represented Defendant's separate property – and then (2) assuming that this separate property component increased in value each year during the marriage – until the date of separation – at the same rate as the S&P 500 index for each of those years.[3]

Defendant argues that the trial court erred by applying Mr. Shriner's method of valuation instead of the coverture fraction method, which, Defendant contends, was the required method of valuation under N.C. Gen. Stat. § 50-20.1 (2011) and this Court's precedent.

N.C. Gen. Stat. § 50-20.1 requires that the marital portion of a "pension, retirement, or other deferred compensation benefits" be calculated as follows:

> The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment.

Id. For instance, if a spouse has participated in a pension benefit plan for twenty years as of the date of separation and if the spouse had been married for fifteen of those years, then, applying the coverture fraction, 75 percent of the value of the pension would be considered marital property and the remaining 25 percent would be considered the working spouse's separate property.

In the case *sub judice*, Defendant posits that N.C. Gen. Stat. § 50-20.1 *required* the trial court to apply the coverture ratio because Defendant's

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2. The trial court's findings accurately reflect Mr. Shriner's conclusion regarding the separate component; however, the order states that Mr. Shriner arrived at a marital component of $188,164.00, reflecting a discrepancy of $180.00.

3. We note that the trial court's finding relevant to its valuation of Defendant's IRAs cites Mr. Shriner's testimony that "the coverture ratio *is* the proper method to determine the value of these accounts." (Emphasis added). However, this appears to be a typographical error, as Mr. Shriner clearly testified that the coverture fraction was *not* the proper method of valuation in this case, stating that the coverture fraction methodology was "designed for defined-benefit plans" and is "fraught with mechanical error" when used to value accounts such as Defendant's IRAs. Furthermore, the remaining portion of the aforementioned finding cites with approval Mr. Shriner's method of valuation, which was not based upon the coverture fraction approach, but rather upon the parties' date of marriage and performance of the S&P 500 during the marriage.

IRAs are "defined contribution plans." Defendant relies upon *Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004), in support of this contention. As discussed in detail below, we believe that neither N.C. Gen. Stat. § 50-20.1 nor our holding in *Robertson requires* that a trial court apply the coverture ratio to determine the marital portion of an IRA, except to the extent that the IRA is funded through a deferred compensation plan or is otherwise brought within the purview of N.C. Gen. Stat. § 50-20.1.

N.C. Gen. Stat. § 50-20.1 was enacted in 1997 and, as previously stated, applies to "pension, retirement, or *other* deferred compensation benefits." N.C. Gen. Stat. §§ 50-20.1(a) and (b) (2011) (emphasis added). Prior to the enactment of N.C. Gen. Stat. § 50-20.1, defined contribution plans and defined benefit plans were largely thought of as plans which provided deferred benefits rather than as plans whose value was subject to immediate withdrawal or transfer. *See generally Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986). In *Seifert*, this Court described the differences between a defined contribution plan and a defined benefit plan as follows:

> Most pension and retirement plans can be described as falling within two categories: defined contribution plans and defined benefit plans. A defined contribution pension is essentially an annuity funded by periodic contributions. At retirement the funds purchase an annuity for the rest of the employee's life . . . . A defined contribution pension may be nominally funded by the employee, the employer or both.
>
> . . . .
>
> In a defined benefit plan the employee's pension is determined without reference to contributions and is based on factors such as years of service and compensation received.

Id. at 332-33, 346 S.E.2d at 505-06 (citations omitted). In other words, both defined contribution plans and defined benefit plans were thought of as vehicles for providing a "deferred compensation benefit," i.e., periodic payments to retired employees. Since the enactment of N.C. Gen. Stat. § 50-20.1, however, IRAs and 401(k) accounts have become more common methods for employees to fund retirement. Unlike the funds in a defined pension plan, the funds in an IRA do not represent a *deferred* compensation benefit because they belong to the employee and are accessible to the employee at any time.

A 401(k) account is more complex in that a *portion* of the account may represent a *deferred* compensation benefit provided by the employer. An employee's 401(k) account typically consists of both employee contributions and employer contributions. The employee contributions, which can be withdrawn by the employee at any time, clearly do not represent a "deferred compensation benefit"; thus, N.C. Gen. Stat. § 50-20.1 does not apply to these contributions. Similarly, 401(k) plans which provide for immediate vesting of employer contributions do not provide "deferred compensation benefits," as there is no deferral of benefits under such plans. We note that there are certain 401(k) plans pursuant to which employer contributions vest over a designated period of time and that employer contributions in these instances might be construed as "deferred compensation benefits"; however, this precise question is not before us in the instant case, as there was no evidence presented at trial indicating that Defendant's 401(k) account – with which he funded his 401(k) Rollover IRA – consisted of any employer contributions which did not immediately vest at the time of contribution.

In *Robertson*, the plan at issue was neither an IRA nor a 401(k) account; it was a defined contribution plan that provided company stock as a deferred compensation benefit, which was contributed each year by the employer to an account maintained for the benefit of the defendant-husband in the future. *Robertson*, 167 N.C. App. at 572, 605 S.E.2d at 670. The plaintiff-wife appealed the trial court's application of N.C. Gen. Stat. § 50-20.1 to her husband's plan, arguing that that provision was intended to apply only to defined pension plans. This Court held that "[n]othing in N.C. Gen. Stat. § 50-20.1 indicates that the coverture fraction is to be applied only to defined benefit plans." *Id.* We recognize that this language – upon which Defendant relies – could be construed to require application of N.C. Gen. Stat. § 50-20.1 to *all* defined contribution plans, irrespective of whether such plans involve deferred compensation benefits; indeed, this Court approved the utilization of the coverture fraction to determine the marital and separate components of a 401(k) plan in a recent unpublished opinion, *Curtis v. Curtis* __ N.C. App. __, 725 S.E.2d 472 (2012), a case in which neither party argued that the coverture fraction should not be utilized.[4] We believe from our careful review of *Robertson*, however, that our holding in that case was simply that N.C. Gen. Stat. § 50-20.1 applied to *deferred* compensation benefits, regardless of whether such benefits were derived from a "defined benefit

4. Unpublished opinions from this Court do "not constitute controlling legal authority." N.C. R. App. P. 30(e)(3) (2011).

plan" or a "defined contribution plan." *Robertson*, 167 N.C. App. at 572, 605 S.E.2d at 670.

The defined contribution plans at issue in *Robertson* and *Seifert* each provided for deferred compensation, whereas an IRA, in contrast, permits the employee immediate access to any funds that have been contributed. We believe that to extend application of N.C. Gen. Stat. § 50-20.1 to IRAs would lead to grossly inequitable results where, for example, significant amounts of property earned during the marriage could be treated as separate property, as the value of these accounts is largely, if not entirely, determined by contributions from the owner and not on the number of years of service to a particular company. For example, suppose that an individual opens an IRA and contributes a total of $6,000.00 to the account over a nine-year period. Assume that after these nine years the individual marries, and, because the spouse is a wage-earner, the individual is able to contribute $42,000.00 to the account during three years of marriage. If the parties separate after these three years and the trial court is required to apply the coverture ratio to the IRA, then only $12,000.00 – or 25 percent of the $48,000.00 balance – would be considered marital property – since the individual was married only 25 percent of the time he funded the account, even though $42,000.00 of the account was funded by the individual's earnings during the marriage.

In the case *sub judic*e, Defendant's 401(k) Rollover IRA was funded entirely through Defendant's 401(k) plan with BASF. There is no evidence that any portion of this 401(k) plan included deferred compensation from an employer contribution. Thus, we do not believe that the trial court was required to apply N.C. Gen. Stat. § 50-20.1 to this particular account; and Defendant does not present any additional argument challenging the propriety of Mr. Shriner's methodology. Applying his methodology, Mr. Shriner determined that the separate portions of the IRAs grew in value from $35,000.00 as of the date of marriage[5] to $84,968.00 as of the date of separation. Since Defendant's handwritten notations indicate that $20,000.00 of this $35,000.00 represents the

5. Defendant contends that Mr. Shriner should have assigned a value of $45,000.00, instead of $35,000.00, as the combined value of Defendant's IRAs as of the date of marriage. However, Defendant did not provide any evidence in the form of account statements or other documents or testimony to demonstrate the value of these accounts as of the date of marriage. The only evidence presented consists of Defendant's handwritten statement that the pension was worth $15,000.00 and the 401(k) was worth $30,000.00 as of the date of marriage, for a combined value of $45,000.00. However, Defendant's handwritten notations also reflect that loans had been taken out against the 401(k) in the amount of $10,000.00, thus constituting competent evidence supporting Mr. Shriner's $35,000.00 valuation.

starting value of the 401(k) Rollover IRA, then, applying Mr. Shriner's methodology, the separate portion of the 401(k) Rollover IRA alone as of the date of separation is 20/35 of $84,968.00, or $48,553.00. The remaining $151,271.00 of the 401(k) Rollover IRA is marital.

The Defendant's Pension Rollover IRA, however, was funded entirely from Defendant's defined pension, which, we believe, *is* subject to N.C. Gen. Stat. § 50-20.1. Thus, we conclude that the trial court erred in relying on Mr. Shriner's methodology, which failed to apply the coverture fraction to derive the marital and separate components of this account. Defendant argues, and the record reflects, that he earned the pension over 272 months of employment at BASF, of which 65 months were during the marriage. Plaintiff does not dispute this on appeal. Accordingly, only 65/272 or 23.9 percent of the pension value used to fund the Pension Rollover IRA is properly classified as marital property. Applying the coverture ratio, the marital portion of the Pension Rollover IRA would be 23.9 percent of $73,488.00 (the value at separation), or $17,564.00. The separate portion would be $55,924.00.

In sum, the separate property portions of Defendant's IRAs would total $104,477.00 (the sum of $48,553.00 and $55,924.00), not $84,968.00, as found by the trial court.[6] The marital portion of the IRAs would total $168,835.00, not $188,164.00, as found by the trial court. Therefore, the trial court's error was prejudicial, and we remand to the trial court to modify its order in a manner consistent with the foregoing.

2. Plaintiff's Parsec Investment Accounts

[2] Defendant next argues that the trial court erred in valuing the separate, marital, and divisible components of Plaintiff's Parsec investment accounts. We disagree.

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6. Defendant asserts that he made withdrawals from his IRAs for marital purposes – specifically, for the marital business – and requests that we instruct the trial court on remand "as to whether early withdrawals used for marital purposes from the defendant's retirement plans can change the marital and separate components of the two plans after the coverture fraction has been properly applied." At the hearing below, Defendant presented evidence that he claims reflects loans made to the marital business through early withdrawals from his IRAs. However, the fact that the trial court did not make a specific finding regarding this evidence does not indicate that the trial court failed to consider it. The trial court was required only to make "sufficient specific findings to enable [this Court] to review the decision and test the correctness of the judgment," and was not otherwise required to provide "a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts[.]" *Quick v. Quick*, 305 N.C. 446, 451-52, 290 S.E.2d 653, 658 (1982). We believe that the trial court complied with this standard, and, accordingly, we decline to provide the requested instruction on remand.

The trial court made the following findings relating to Plaintiff's Parsec accounts:

> Plaintiff's Parsec account[s]: The plaintiff obtained Parsec investment accounts prior to the date of the marriage and contributed to the account after the date of marriage. The classification of the Parsec accounts is mixed with both a marital and a separate component. Based upon credible evidence presented at trial, that the marital component of this account was $21,000 as of the date of separation, however, due to passive loss in the markets, the fair market value of this account has been reduced to $19,311. The $1,689 loss is divisible property, having been derived from the passive market activity.

Our review of the record reveals competent evidence in support of the trial court's valuation of Plaintiff's three Parsec accounts. Mr. Shriner testified concerning the marital and separate components of the accounts based upon his review of account statements, which were submitted to the trial court as exhibits and have been included in the appellate record. Defendant argues that Mr. Shriner used 30 November 2010 as an "arbitrary" date of separation for purposes of determining the marital and separate components of the Parsec accounts. A careful reading of Mr. Shriner's testimony, however, reveals that Shriner did not use 30 November 2010 as the parties' date of separation, but rather as the date that he last reviewed the value of the Parsec accounts. For instance, Mr. Shriner testified that Plaintiff's separate component of the accounts as of 30 November 2010, *including the earnings accrued post-separation*, was approximately $56,168.93, whereas the value as of the date of separation was approximately $59,984.00. Defendant also argues that there was no evidence of a divisible loss of $1,689.00 associated with the Parsec accounts. However, Plaintiff's testimony that the value of these accounts declined over the course of the two years prior to trial served as competent evidence in support of this finding, and the trial court properly characterized this loss as divisible under N.C. Gen. Stat. § 50-20(b)(4)(a) (2011) (providing that divisible property includes all appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution). Finally, we note Defendant's contention that "[t]he court also erred by calculating a divisible loss based upon asset values more than one year prior to the date of judgment." Defendant fails to provide any argument or authority in support of this assertion, and we accordingly deem it abandoned. *See* N.C.R. App. P. 28(b)(6) (2013).

3. Plaintiff's 401(k) Account

[3] Defendant next argues that the trial court erred in valuing Plaintiff's 401(k) account and the divisible property associated with this account. We disagree.

The trial court valued Plaintiff's 401(k) account at $221,519.00 as of the parties' date of separation. Defendant cites financial statements indicating that the account had a value of $212,518.64 on the date of separation and posits that the trial court may have transposed the first two digits of that figure in arriving at its valuation. Any such error, however, would have *increased* the marital component of the account, thereby benefiting Defendant; thus, Defendant cannot show prejudice, and this contention fails. *See In re A.D.L.*, 169 N.C. App. 701, 706, 612 S.E.2d 639, 643 (2005) (providing that "[i]n order to obtain relief from an order due to a clerical or technical violation, the complaining party must demonstrate how she was prejudiced or harmed by the violation").

The trial court also found that a $17,380.00 loss associated with Plaintiff's 401(k) account had occurred and classified the loss as divisible property. Defendant argues that Plaintiff's testimony as to this loss "was not reliable enough to be used as credible evidence." Questions of witness credibility, however, are exclusively within the province the trial court. *Cornelius v. Helms*, 120 N.C. App. 172, 175, 461 S.E.2d 338, 340 (1995) (explaining that "[a]s fact finder, the trial court is the judge of the credibility of the witnesses who testify" and that "[t]he trial court determines what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom"). This contention is accordingly overruled.

4. Real Property

[4] Defendant contends that the trial court "erred in failing to characterize the Aspen Way and Greenwood Forest Road properties as marital or having substantial marital components." We disagree.

a. The Aspen Way Property

The trial court made the following pertinent findings with respect to the real property situated on Aspen Way in Asheville:

> The plaintiff owned this property prior to the date of marriage to the defendant. It was re-financed during the marriage but it was maintained at all times as the plaintiff's separate property. The title to the property was never transferred from the plaintiff to the defendant or to the

> plaintiff and defendant as tenants by the entirety. The property was a rental property during the marriage and the rental income generated from this property paid the mortgage, taxes, insurance and repairs on the property. The plaintiff managed the rental property during the marriage. That property and the income from the property was the plaintiff's separate property.

Defendant admits that Plaintiff acquired Aspen Way prior to their marriage, but argues that the trial court should have classified Aspen Way as "entirely marital" because Plaintiff "failed to produce any evidence as to the amount or source of funds she claims to have been her separate property[.]" However, Plaintiff's testimony, as reflected in the trial court's findings, *supra*, established that Aspen Way was Plaintiff's separate property and maintained as such throughout the marriage. Moreover, Defendant's contention that mortgage payments made during the marriage gave rise to a "substantial marital interest in the property" fails in light of the fact that Plaintiff made those payments using the rental income generated by Aspen Way, which itself was Plaintiff's separate property. *See* N.C. Gen. Stat. § 50-20(b)(2) (providing that "income derived from separate property shall be considered separate property").

Finally, we are not persuaded by Defendant's contention that he contributed to an "active" increase in the value of Aspen Way through performance of work on the property such as painting the walls and installing a sheetrock ceiling. Defendant had the burden of proving beyond a preponderance of the evidence that the increases in the value of the property were marital property. *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 465-66, 409 S.E.2d 749, 752 (1991). However, per the trial court's findings – which are supported by competent evidence – any increase in the value of the Aspen Way property was derived through Plaintiff's maintenance and rental of the property to third parties. Moreover, Defendant's reference to his trial testimony that he helped manage Aspen Way does not further his position, as the trial court was the sole judge of the credibility and weight afforded to the testimony presented at trial, *Cornelius*, 120 N.C. App. at 175, 461 S.E.2d at 340, and this Court is entitled to determine only whether there is competent evidence *in support of* the trial court's findings, *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984).

b. The Greenwood Forest Drive Property

The trial court made the following pertinent findings with respect to the real property situated on Greenwood Forest Drive:

> On December 4, 2002, the plaintiff borrowed approximately $78,550 from the equity in her separate residence located [on] Aspen Way. On the same day, December 4, 2002, the plaintiff purchased [Greenwood]. Title to [Greenwood] was placed in the plaintiff's name alone and has remained in her sole name since that date. The plaintiff used her separate funds to purchase this asset, put the title in her separate name, and advised the defendant that this property would remain her separate property. This property was rented throughout the remainder of the marriage and the rental income was used to make the payments, including taxes, insurance and maintenance on this property. The plaintiff managed this property during the marriage. The Defendant contends that there is sweat equity in the home, but there is insufficient evidence to determine the fair market value, if any, of a marital interest in the property. The fair market value of this property was $159,300 on the date of separation and there was a mortgage debt of $89,492 so the net fair market value on the date of separation was $69,808.

These findings reflect Plaintiff's testimony establishing that Plaintiff acquired and has maintained Greenwood as her separate property. Plaintiff used her separate property – her equitable interest in Aspen Way – to borrow funds to acquire Greenwood, and she has maintained it much as she has maintained Aspen Way. While Defendant correctly avers that he carried his burden of proving that Plaintiff acquired Greenwood during the marriage – and that Greenwood was therefore presumed to be marital property – Defendant's insistence that Plaintiff failed to then carry her ensuing burden of showing that the property was in fact her separate property is undermined by Plaintiff's testimony and by the trial court's findings, supra. Thus, we conclude that the trial court's findings are supported by competent evidence, so Defendant's contention is overruled.

5. Valuation of Personal Property

[5] Defendant next argues that the trial court erred in valuing various personal properties. We discern no comprehensible legal argument in Defendant's brief concerning this issue, and we accordingly deem the issue abandoned. *See* N.C.R. App. P. 28(a) (2013).

6. The Rolex Watch

[6] Defendant next argues that the trial court erred in classifying as Plaintiff's separate property a Rolex watch given to Plaintiff by her

employer. Defendant argues that this watch constituted compensation, not a gift, and thus should have been characterized by the trial court as marital property. However, Plaintiff presented evidence at trial that her employer was generous and often gave gifts to employees, and Defendant presented no evidence demonstrating that the watch was intended as a form of compensation, i.e., that it was not given out of "detached and disinterested generosity" or "out of affection, respect, admiration, charity or like impulses." *See Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960) (citations and quotation marks omitted). Accordingly, we discern no error in the trial court's classification of the Rolex watch as Plaintiff's separate property.[7]

7. Remaining Equitable Distribution Issues

We have carefully reviewed Defendant's remaining challenges to the trial court's equitable distribution order and conclude that in each instance competent evidence supports the court's findings, which, in turn, support the court's conclusions of law. These contentions are accordingly overruled.

B. Spousal Support & Attorneys' Fees

Defendant's issues 16 through 20 on appeal consist of challenges to the trial court's order denying his claims for spousal support and attorneys' fees. We have carefully reviewed the record and conclude that, with respect to these challenges, the trial court's findings are supported by competent evidence – which, in some instances, includes Defendant's own testimony – and that these findings support the trial court's conclusions of law. Defendant's arguments concerning these issues are overruled.

III. Conclusion

In light of the foregoing, we reverse the portion of the trial court's equitable distribution order relating to the classification and valuation of Defendant's IRAs and remand for a modification of the order consistent with this opinion. We affirm the trial court's judgments and orders in all other respects.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges CALABRIA and ERVIN concur.

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7. Defendant also argues that the trial court erred in assigning a value of $500.00 to the watch. While we believe that this argument is moot in light of our determination that the watch was properly classified as separate property, we note that the record reveals competent evidence in support of this valuation.

CAROL YEAGER, NG HOLDINGS, LLC., PLAINTIFFS
v.
DOUG YEAGER; FIRST LENDING GROUP, INC., DEFENDANTS

No. COA13-86

Filed 6 August 2013

Pleadings—mootness—deeds of trust—canceled in another proceeding

The trial court properly dismissed a complaint as moot where the declaratory judgment complaint involved deeds of trust for two pieces of land that had been cancelled through the efforts of the receiver in an equitable distribution action. Yet another declaration that the deeds of trust were void and of no effect would not have any practical effect on the existing controversy.

Appeal by plaintiffs from Order of Dismissal entered 1 June 2012 by Judge Robert T. Sumner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 6 June 2013.

Aylward Family Law by Dr. Ilonka Aylward, for plaintiff-appellant.

Leonard G. Kornberg, Esq., for defendant-appellee, Doug Yeager.

No brief filed for defendant-appellee, First Lending Group, Inc.

STROUD, Judge.

The case before us on appeal is an action for declaratory judgment and to quiet title as to two parcels of real property in Mecklenburg County, which we will refer to as "the marital home" and "the warehouse." But some factual background is required to understand the procedural posture and issue presented by this action.

Carol Yeager ("plaintiff") and Doug Yeager ("defendant")[1] were married to one another in 1972, separated in 2007, and divorced in August of 2008. Continuously since 6 May 2008, when plaintiff filed a complaint for alimony, equitable distribution, and attorney's fees against defendant, the parties have been engaged in a course of incessant litigation

1. Defendant's name was listed on the complaint as "George D. Yeager," but on the order being appealed from he was listed as "Doug Yeager." We will refer to him as the order under consideration does.

in several inter-related lawsuits in Mecklenburg County which have thus far resulted in numerous court orders addressing various issues including interim distribution, appointment of a receiver, contempt, sanctions, equitable distribution, and no less than eleven appeals to this Court, excluding the many petitions filed with this Court.

This litigation has been particularly rancorous—as an illustration, we note that at one point plaintiff filed a petition for certiorari with this Court requesting that we make the trial court punish defendant's counsel for "making threatening and derogatory comments regarding Petitioner and her counsel," including comments that plaintiff's counsel is "responsible for the general public's view of attorneys as 'leg-chewing Sharks' and 'used-car salespersons.' "[2] Since only two significant items of property were in dispute—the martial home, which was ultimately distributed to plaintiff in the equitable distribution order, and a warehouse, which was determined in the equitable distribution order to be the separate property of defendant, one may wonder why this case has been so protracted and contentious.[3]

The genesis of most of the disputation is two deeds of trust executed by plaintiff on 10 June 2009 (well after the date of separation and during the pendency of the equitable distribution action): one on the warehouse in the amount of $274,000 and one on the marital home in the amount of $270,000. Both deeds of trust were for the benefit of a Nevada company known as First Lending Group, Inc., also a named defendant herein. Much mystery surrounds First Lending—perhaps it is an alter ego of plaintiff herself, or perhaps it does not even exist—but it was served with the summons and complaint in this action, it has not claimed that it does not exist,[4] and thus we will assume for purposes of this case that it does. In any event, First Lending failed to answer or appear, and to this day seems to be the only party to any of the Yeager lawsuits who has stood entirely silent.[5]

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2. We denied this petition for certiorari on 23 August 2012.

3. Excluding some financial accounts and various items of personal property such as guns, ammunition, cars, household appliances, lawn and garden equipment, books, pictures, and wall hangings, which were also distributed in the equitable distribution judgment and are, thankfully, not yet the subject of additional litigation.

4. We recognize that it would be impossible for a company which does not exist to assert its non-existence, but we also assume that a nonexistent party would probably not mind having a judgment entered against it.

5. Except for the cancellation of the deeds of trust by Ms. Reed, as a representative of First Lending, as procured by the referee in Mecklenburg County File No. 08-CVD-10504.

All of these issues have been addressed *ad nauseum* in the equitable distribution action. In fact, the receiver in the equitable distribution action was appointed to accomplish the cancellation of the two deeds of trust and he in fact did so. Yet, despite the receiver's successful efforts, which extended over a period of a year and a half and ultimately cost the parties over $90,000, plaintiff filed this action. In the lawsuit now before us on this appeal, plaintiff brought claims for a declaratory judgment and to quiet title in the Superior Court, with the stated object of obtaining a declaratory judgment that the two deeds of trust to First Lending are "invalid and void" and that they do not encumber the marital home and the warehouse.

Upon First Lending's failure to answer or appear, Plaintiff filed a motion for entry of default against First Lending, and later filed a motion for entry of default judgment against it, though there is no indication in the record that plaintiff sought a ruling upon her motion for entry of default judgment or that default judgment was entered. The stated object of this action is to obtain a declaratory judgment that the two deeds of trust to First Lending are "invalid and void" and that they do not encumber the real properties. This goal was actually already accomplished by the receiver's tenacious efforts in the equitable distribution action (08-CVD-10504).

After plaintiff filed her complaint, defendant filed a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 12(b)(1), on the grounds of mootness, lack of standing, and failure to state a claim. The trial court denied defendant's motion to dismiss under Rule 12(b)(6) by order entered 28 February 2012, but did not rule on his motion to dismiss under 12(b)(1), and only considered whether the complaint stated a claim on its face. After the motion was denied, defendant filed an answer and renewed his motion to dismiss for lack of subject matter jurisdiction. He argued that the subject matter of this action was moot, that plaintiff lacked standing, and that this subject matter was "already part of the ongoing Chapter 50 case" and thus subject to dismissal under the prior pending action doctrine, noting that the receiver had already procured cancellation of the very same deeds of trust in the prior equitable distribution action. The trial court agreed with defendant and granted defendant's motion to dismiss. We agree with the trial court.

On appeal, the sole issue presented by plaintiff is whether the trial court erred by dismissing her action with prejudice. Her arguments are long, convoluted, and difficult to follow, but the gist seems to be that the documents which establish the extinguishment of the deeds of trust are "illusory" or somehow unreliable or fraudulent and that somehow the

real estate is still encumbered.[6] These arguments are addressed quite simply by the order entered by Judge Mann in the equitable distribution action on 13 December 2011, which finds as follows:

> 13. On 16 August 2011 Receiver/Referee caused Satisfactions of Security Instruments to be recorded with the Mecklenburg County Register of Deeds to terminate the post-Complaint encumbrances that had theretofore negatively affected the value of the parties' marital estate in this Equitable Distribution proceeding.
>
> 14. Because of the Receiver/Referee's tenacity and follow-through, these encumbrances have been extinguished and the Court and Parties can now be satisfied that the marital estate is no longer going to be valued at approximately $544,000 less than when this litigation was initiated.

This order was entered by the District Court in the equitable distribution action and is not subject to review in this appeal. The Superior Court found that based upon the cancellation of the deeds of trust procured by the Receiver/Referee, plaintiff's action is moot.

Although defendant did not indicate which subsection of Rule 12(b) he was relying on, he did properly raise mootness as an issue of subject matter jurisdiction. Because a moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim, mootness is properly raised through a motion under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). *See McAdoo v. University of North Carolina at Chapel Hill*, ___ N.C. App. ___, ___, 736 S.E.2d 811, 814-15, *disc. rev.*

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6. Plaintiff herself executed the deeds of trust after the parties' separation, so to the extent that the marital home which was distributed to her might be encumbered, it is so encumbered because she encumbered it. Additionally, although it appears that plaintiff no longer has any interest in the warehouse, which the district court decreed is defendant's separate property, we note that it appears that defendant had transferred the property to NG Holdings at some point. The district court noted that it "was not provided any legal documents that NG Holdings was, or is, a valid legal entity." Indeed, it appears that plaintiff may be the only member/manager of that LLC and that she may be operating the LLC as an alter ego. *See Timber Integrated Investments, LLC v. Welch*, ___ N.C. App. ___, ___, 737 S.E.2d 809, 817-18 (2013) (discussing alter ego in the context of piercing the corporate veil). It is telling that NG Holdings was not initially included as a plaintiff on the complaint but was added later. Thus, it is unclear who held title to the warehouse property at the time plaintiff filed her action and thereafter, so we will assume that plaintiff might have some reason to raise this issue.

denied, ___ N.C. ___, 740 S.E.2d 465 (2013); *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585-86, 347 S.E.2d 25, 30 (1986).

In deciding a motion to dismiss under Rule 12(b)(1), the trial court "may consider and weigh matters outside the pleadings." *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 491, 598 S.E.2d 667, 670 (2004) (citation omitted).

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted). "Courts will not entertain such cases because it is not the responsibility of courts to decide abstract propositions of law." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (citation and quotation marks omitted).

Here, satisfactions for both "notes" have been recorded and the deeds of trust have already been cancelled by Cynthia Reed, the paralegal who helped incorporate First Lending in Nevada and who is listed as President of First Lending. Ms. Reed was the only person anyone has been able to positively identify as affiliated with First Lending. Because of these recorded satisfactions and cancellations, the District Court has found that the properties are unencumbered.[7] Moreover, no promissory note was ever presented to either the District or Superior Court. Indeed, there was no evidence that any funds were exchanged or that this "transaction" was anything other than a sham.

Actually, there is no existing controversy about the validity of these deeds of trust. Yet another declaration that the deeds of trust are void and of no effect would not have "any practical effect on the existing controversy." *Roberts*, 344 N.C. at 398-99, 474 S.E.2d at 787. The trial court quite properly dismissed the plaintiff's complaint as moot.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

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7. Plaintiff's brief questions whether Ms. Reed had the authority to act on behalf of First Lending in cancelling the deeds of trust, though plaintiff herself seems to think that Ms. Reed is an adequate representative of First Lending, as she served her briefs and the record in this appeal on Ms. Reed as just such a representative.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 AUGUST 2013)

BELL & WATSON TELECOM CONSULTING GRP., INC. v. KNAUS No. 12-1036	Catawba (11CVS2328)	Reversed and Remanded
BRANCH BANKING & TRUST CO. v. PEACOCK FARM, INC. No. 12-1494	Moore (11CVS927)	Dismissed
COUNTY OF DURHAM EX REL. v. ROBERTS No. 12-1471	Durham (00CVD2860)	Reversed
DALY v. DALY No. 12-1453	Hertford (10CVD414)	Dismissed
DEBAUN v. KUSZAJ No. 12-1520	Durham (11CVS3999)	Affirmed
FERGUSON v. RICHARD CHILDRESS RACING ENTERS. No. 13-130	N.C. Industrial Commission (X26821)	Affirmed
IN RE D.C. No. 12-1431	Rowan (09JT2)	Affirmed
IN RE FORECLOSURE OF SHAW No. 12-1380	Wake (10SP2769)	Affirmed
IN RE S.R.H. No. 12-1363	Wilson (12JB18)	Affirmed in part, remanded in part
IN RE A.D. & B.L. No. 13-72	New Hanover (11JA231-232)	Affirmed
IN RE A.G.T. No. 13-320	Buncombe (11JA111)	Affirmed in part, Vacated in part and Remanded
IN RE A.W. & A.W. No. 13-311	Warren (12JA45-46)	Affirmed
IN RE J.R.L. No. 13-238	Brunswick (10JT135)	Affirmed
IN RE J.W. & K.W. No. 13-237	Columbus (09JT28-29)	Affirmed

IN RE M.A.W. No. 13-304	Mecklenburg (11J298)	Affirmed
IN RE Q.H. No. 13-188	Guilford (12JA87)	Reversed
IN RE R.A.M. & M.J.B. No. 13-271	Durham (07JT267-268)	Affirmed
IN THE MATTERS OF A.V. & M.V. No. 13-292	Mecklenburg (12JA478-479)	Reversed and Remanded
JACKSON v. CAPE FEAR TURF FARM, INC. No. 12-1347	Bladen (08CVD536)	Reversed and Remanded
LOCKERMAN v. S. RIVER ELEC. MEMBERSHIP CORP. No. 12-1450	Sampson (11CVS152)	Dismissed
LOCKHART v. TRI-STATE HOUS., LTD. No. 12-1418	Scotland (11CVS123)	Vacated and Remanded
PARKER v. SMITH No. 12-1552	Mecklenburg (12CVD7338)	Affirmed
PERRY v. HALL No. 12-1265	Durham (12CVS2000)	Dismissed
R.H. DONNELLEY INC. v. EMBARQ CORP. No. 13-119	Wake (12CVS6466)	Affirmed
RABUN CNTY. BANK v. EARNHARDT No. 13-93	Macon (12CVS397)	Affirmed
STATE v. CORROTHERS No. 12-1569	Guilford (10CRS96866-67) (11CRS23068)	No Error in Part; Vacated and Remanded in Part
STATE v. FRALEY No. 13-69	Forsyth (10CRS2876) (11CRS6166)	No Error
STATE v. FRAZIER No. 13-5	Onslow (11CRS57013) (11CRS57374)	Dismissed in Part; No error in part
STATE v. HOLLY No. 12-1557	Alamance (11CRS50216) (11CRS5236)	No Error

STATE v. LUNSFORD No. 13-94	Alamance (09CRS52393)	No Error
STATE v. MCGRIFF No. 13-7	Forsyth (10CRS23777) (10CRS61429)	No Error in Part; Vacated in Part and Remanded
STATE v. WILLIAMS No. 13-89	Mecklenburg (11CRS217702-03)	No Prejudicial Error
STATE v. ADAMS No. 12-1434	Halifax (11CRS50643-44)	No Prejudicial Error, in part, Vacated, in part, and Remanded for Resentencing
STATE v. ARMISTEAD No. 12-1315	Beaufort (10CRS490) (10CRS50147-48)	No Error
STATE v. BLOUNT No. 12-1465	Wayne (09CRS56916) (10CRS139)	No Error
STATE v. FRANCIS No. 12-1464	Durham (07CRS46771)	Dismissed in part; no error in part
STATE v. GOSNELL No. 12-1328	Caldwell (10CRS51636) (11CRS1560)	No Error
STATE v. GRICE No. 12-1448	Mecklenburg (10CRS229305-06) (10CRS229312-15)	No Error
STATE v. KARMO No. 12-1209	Mecklenburg (08CRS203980)	Vacated
STATE v. MASSEY No. 12-1329	Mecklenburg (09CRS076458)	No Error
STATE v. RANKINS No. 12-1444	Guilford (10CRS24821) (10CRS87287)	No Error
STATE v. RICHARDSON No. 12-1130	Halifax (10CRS53124)	Affirmed
STATE v. SMITH No. 12-1527	Person (10CRS51388-89)	No Error

STATE v. WALLER No. 12-1531	Durham (11CRS56021)	No Error
STATE v. WARRICK No. 12-1424	Wilson (11CRS3630-31) (11CRS50446) (11CRS52978-79)	Affirmed in part; dismissed in part
STATE v. WILLIAMS No. 12-995	Moore (10CRS50837)	No Error
TAFT v. DICKMAN No. 12-943	Polk (11CVS9)	Affirmed
WASHBURN v. WASHBURN No. 12-1535	Rutherford (10CVD766)	Affirmed
WASHBURN v. WASHBURN No. 12-1364	Onslow (11CVD43)	Vacated and Remanded

ESTATE OF HURST v. MOOREHEAD I, LLC

[228 N.C. App. 571 (2013)]

ESTATE OF TIMOTHY ALAN HURST, BY AND THROUGH CHRISTIAN P. CHERRY, AS COLLECTOR; JEFFERY WAYNE HENLEY A/K/A JEFFREY WAYNE HENLEY; AND BEVERLY HENLEY, PLAINTIFFS

v.

MOOREHEAD I, LLC; CRAMER MOUNTAIN DEVELOPMENT CO., LLC A/K/A CRAMER MOUNTAIN DEVELOPMENT LLC; PARK WEST PREMIER PROPERTIES, LLC; PARK WEST INVESTMENTS, INC.; PARK WEST-STONE, LLC; PARK WEST DEVELOPMENT COMPANY, INC.; COBBLESTONE BUILDERS, LLC; FRANK DESIMONE A/K/A FRANK DESIMONE; BRUCE B. BLACKMON, JR. A/K/A BRUCE BLACKMON A/K/A BRUCE B. BLACKMON; GREGORY A. MASCARO A/K/A GREG MASCARO, DEFENDANTS

No. COA12-1285

Filed 6 August 2013

1. Corporations—limited liability company—breach of contract—alter ego liability—piercing corporate veil

The trial court did not err by imposing alter ego liability against defendant Blackmon individually for breach of contract damages. Blackmon's arguments that the trial court's judgment improperly concluded and decreed that he was personally liable for the breach of contract damages were without merit.

2. Damages and Remedies—nominal damages—unfair and deceptive trade practices—fraud—punitive damages

The jury's findings and award of nominal damages were sufficient to support the trial court's judgment against both defendants Blackmon and Moorehead I for unfair and deceptive trade practices. The issues of fraud and punitive damages were separate and distinct claims from the issue of unfair and deceptive trade practices.

3. Judgments—scope of jury verdict—not improperly expanded

The trial court's judgment did not improperly expand the scope of the jury's verdict by holding defendant Blackmon personally liable for damages awarded against defendant Moorehead I, piercing the corporate veil, and decreeing that Blackmon and his other entities engaged in unfair and deceptive trade practices.

4. Unfair Trade Practices—individual liability—no fraud or punitive damages—jury's findings not inconsistent

The jury's finding that defendant Blackmon was individually liable for unfair and deceptive trade practices was not inconsistent with the jury's finding of no fraud and awarding of no punitive damages against Blackmon individually.

Appeal by defendants[1] from judgment entered 23 May 2011 and order entered 11 October 2011 by Judge Joseph N. Crosswhite in Cabarrus County Superior Court. Heard in the Court of Appeals 27 March 2013.

Mills Law PA, by William L. Mills, III, for Estate of Timothy Alan Hurst plaintiff appellee.

Law Offices of Dale S. Morrison, by Dale S. Morrison, for Jeffery Wayne Henley and Beverly Henley, plaintiff appellees.

Ruff, Bond, Cobb, Wade & Bethune, LLP, by Ronald L. Gibson, for Moorehead I, LLC; Park West Premier Properties, LLC; Park West Investments, Inc.; Park West Development Company; and Bruce B. Blackmon, Jr. a/k/a Bruce Blackmon a/k/a Bruce B. Blackmon, defendant appellants.

McCULLOUGH, Judge.

Moorehead I, LLC; Park West Premier Properties, LLC; Park West Investments, Inc.; Park West Development Company; and Bruce B. Blackmon, Jr. a/k/a Bruce Blackmon a/k/a Bruce B. Blackmon ("Blackmon," collectively "defendants") appeal from a judgment entered by the trial court after trial by jury. On appeal, defendants contend that (1) the jury's factual findings are inconsistent, (2) the trial court's judgment improperly expands the jury's verdict, and (3) the trial court's conclusions of law and judgment decrees are not supported by the jury's factual findings. After careful review, we affirm the trial court's judgment.

I. Background

The present case arises from a mixed-use real estate development project known as the Epic Project consisting of approximately 1271 acres assembled from various property owners in Cabarrus and Mecklenburg Counties. Timothy Alan Hurst ("Hurst") owned approximately 72.229 acres in Cabarrus County near the proposed project, and Jeffery Wayne Henley and his wife, Beverly Henley (the "Henleys"), owned approximately 3.476 acres adjoining Hurst's property (collectively, the "Hurst/

1. On 24 January 2013, this Court dismissed the appeal of defendants Cramer Mountain Development Co., LLC a/k/a Cramer Mountain Development, LLC; Park West-Stone, LLC; Cobblestone Builders, LLC; and Frank Desimone a/k/a Frank Desimone for failure to file a brief in this appeal. Defendant Gregory A. Mascaro a/k/a Greg Mascaro did not appear during the trial of the present case and did not appeal from the trial court's judgment. [R p 278].

Henley tract"). The Hurst/Henley tract was part of the approximately 1271 acres contemplated for the Epic Project.

On 28 June 2006, Hurst and the Henleys (collectively, "plaintiffs") entered into a Purchase and Sale Agreement (the "Purchase Agreement") to sell the Hurst/Henley tract to Cramer Mountain Development, LLC ("Cramer") for $4.7 million. Cramer is an entity owned by defendant Frank Desimone ("Desimone"). Pursuant to the terms of the Purchase Agreement, the closing of the purchase transaction was to take place on the earlier of the thirtieth day following the issuance of development permits to Cramer or 28 June 2007 – twelve months from the date of the Purchase Agreement. However, the Purchase Agreement provided that Cramer could accelerate the closing date upon ten days written notice.

On 12 March 2007, the Purchase Agreement was assigned from Cramer to Moorehead I, LLC ("Moorehead I"). The operating agreement of Moorehead I provided that the powers of the company were to be exercised by Blackmon as the sole member of the company. Moorehead I was incorporated on 2 March 2007.

Also on 12 March 2007, Desimone; defendant Gregory A. Mascaro ("Mascaro"), a licensed real estate broker and friend of the Henleys; and Leslie Danielle Harrison ("Harrison"), also a licensed real estate broker and notary public, met with plaintiffs at the Henleys' barn near their residence. During this meeting, Desimone, Mascaro, and Harrison procured signatures from plaintiffs on multiple documents, including a North Carolina Special Warranty Deed listing Hurst as grantor and Moorehead I as grantee and a North Carolina Special Warranty Deed listing the Henleys as grantor and Moorehead I as grantee. George Sistrunk ("Sistrunk"), the closing attorney for Moorehead I, prepared these documents. At this time, plaintiffs received payment in the amount of $200,000.00.

On the following day, 13 March 2007, Sistrunk closed on the Hurst/Henley tract for Moorehead I. Moorehead I executed a promissory note secured by a second priority deed of trust payable to plaintiffs for the balance of the purchase price, $4.5 million. The special warranty deeds signed by plaintiffs at the 12 March 2007 meeting were recorded in the office of the Cabarrus County Register of Deeds.

On the same date, Moorehead I obtained a $3.4 million loan from F&M Bank secured by a first priority deed of trust against the Hurst/Henley tract. This deed of trust was executed by Blackmon as Member Manager of Moorehead I and was also recorded in the Cabarrus County

Register of Deeds on 13 March 2007. Moorehead I eventually defaulted on its obligations to F&M Bank and to plaintiffs.

On 29 July 2008, plaintiffs filed a verified complaint alleging claims for breach of contract, fraud, unfair and deceptive trade practices, and punitive damages. In their complaint, plaintiffs alleged that Desimone, Mascaro, and Harrison made representations to plaintiffs at the 12 March 2007 meeting that the documents being signed were to facilitate the payment of a $200,000.00 advance. Plaintiffs alleged that Desimone, Mascaro, and Harrison made further representations to plaintiffs that delivery of the advance did not constitute a closing and that no closing of the purchase transaction was occurring at that time. Plaintiffs alleged that they were never provided with copies of the documents signed, despite making repeated demands for such documents. Plaintiffs alleged that following Hurst's death on 17 May 2007, plaintiffs learned that a closing had occurred on 13 March 2007, despite the representations that had been made. Plaintiffs further alleged that among the documents received by Hurst's estate following his death was the promissory note in the amount of $4.5 million executed by Blackmon on behalf of Moorehead I, as well as other documents that plaintiffs alleged had been altered since their signing on 12 March 2007. Plaintiffs alleged that they were defrauded into closing on the purchase transaction under terms different than those agreed to in the Purchase Agreement by the representations made at the 12 March 2007 meeting with Desimone, Mascaro, and Harrison on behalf of Blackmon and Moorehead I. Plaintiffs further alleged that Moorehead I was in breach of the $4.5 million promissory note. Plaintiffs alleged that Desimone, Mascaro, Harrison, and Blackmon exercised complete domination over the various entities involved in the transaction, including Cramer and Moorehead I, justifying a disregard of the corporate form.

A trial was held beginning 24 January 2011. On 23 February 2011, the jury returned a verdict containing multiple findings of fact addressing twelve issues. Based on the factual findings of the jury verdict, on 23 May 2011, the trial court entered judgment concluding, *inter alia*, that Blackmon is the alter ego of Moorehead I and awarding, *inter alia*, the amount of $4.9 million to plaintiffs from Moorehead I and Blackmon, jointly and severally, for breach of contract, and the amount of $1.00 to plaintiffs from Moorehead I, Blackmon, and other defendants, jointly and severally, for unfair and deceptive trade practices.

On 2 June 2011, Blackmon filed a motion for judgment notwithstanding the verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. The trial court entered an order denying Blackmon's

motion on 11 October 2011. Blackmon then entered written notice of appeal from the trial court's judgment and order on 9 November 2011.[2]

II. Standard of Review

Blackmon has raised no issues on appeal concerning the sufficiency of the evidence to support the jury's factual findings contained in the verdict, nor has Blackmon raised an issue on appeal addressing the trial court's denial of his motion for judgment notwithstanding the verdict. Rather, all of the arguments presented by Blackmon in this appeal address only the trial court's conclusions of law and resulting judgment decrees based upon the jury verdict. Therefore, we review each of Blackmon's arguments under a *de novo* standard of review. *See Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 101, 655 S.E.2d 362, 369 (2008).

III. Blackmon's Personal Liability for Breach of Contract; Piercing the Corporate Veil

[1] In his first argument on appeal, Blackmon contends that the trial court's decree awarding damages to plaintiffs for breach of contract against him individually is contrary to the jury's verdict and established law on the liability of corporations and limited liability companies. Blackmon contends that because the jury found no fraud nor awarded punitive damages against him individually, the trial court lacked the requisite findings of fact to hold him individually liable for Moorehead I's breach of the promissory note.

Further, in his fourth argument on appeal, Blackmon contends that the trial court's decree concluding that he is the alter ego of Moorehead I

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2. Under Rule 3 of the North Carolina Rules of Appellate Procedure, timely filing of a motion for judgment notwithstanding the verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b) tolls the period for filing and serving written notice of appeal in civil actions. N.C. R. App. P. 3(c)(3) (2013). "The full time for appeal commences to run and is to be computed from the entry of the order granting or denying the motion[] under Rule 50(b)[.]" *Middleton v. Middleton*, 98 N.C. App. 217, 220, 390 S.E.2d 453, 455 (1990).

Here, Blackmon filed a timely motion for judgment notwithstanding the verdict pursuant to Rule 50. However, this motion was filed by Blackmon alone, and not by the remaining defendants. Therefore, although the notice of appeal given on 9 November 2011 was on behalf of all defendants, the time for filing notice of appeal in this case was tolled during the pendency of the motion as to Blackmon only. The remaining defendants failed to file notice of appeal within 30 days from entry of the trial court's judgment. N.C. R. App. P. 3(c)(1). Because timely notice of appeal is jurisdictional, *see In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004), we dismiss the present appeal as to defendants Moorehead I, LLC; Park West Premier Properties, LLC; Park West Investments, Inc.; and Park West Development Company.

(in addition to certain other defendant entities), thereby imposing liability on him individually for breach of the promissory note, is similarly deficient. Blackmon contends that because the jury found no fraud nor awarded "actual damages" to plaintiffs, the trial court lacked the requisite findings of fact to satisfy two of the three required elements to pierce the corporate veil. Because both of these arguments address Blackmon's personal liability for the breach of contract damages awarded by the jury, we address these issues together.

Pursuant to the North Carolina Limited Liability Company Act:

> A person who is a member, manager, director, executive, or any combination thereof of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member, manager, director, or executive and does not become so by participating, in whatever capacity, in the management or control of the business. *A member, manager, director, or executive may, however, become personally liable by reason of that person's own acts or conduct.*

N.C. Gen. Stat. § 57C-3-30(a) (2011) (emphasis added). "[A]s its name implies, limited liability of the entity's owners, often referred to as 'members,' is a crucial characteristic of the [limited liability company] form, giving members the same limited liability as corporate shareholders." *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007). "[M]ere participation in the business affairs of a limited liability company by a member is insufficient, standing alone . . . , to hold the member independently liable for harm caused by the [limited liability company]." *Spaulding v. Honeywell Int'l, Inc.*, 184 N.C. App. 317, 322, 646 S.E.2d 645, 649 (2007).

Nonetheless, a member of a limited liability company may be held individually liable for the company's obligations if the member engages in individual conduct that subjects him to liability. N.C. Gen. Stat. § 57C-3-30(a). In addition, a member of a limited liability company, like shareholders and directors of corporations, may be held individually liable for the company's obligations through the doctrine of piercing the corporate veil:

> Although a properly formed and maintained business entity, like a limited liability company or corporation, may provide a shield or 'veil' of protection from personal liability for an individual member or officer, this protection is not absolute. The two most common methods of

> establishing personal liability in a business setting are 'piercing the corporate veil' and individual responsibility for torts, such as breach of fiduciary duty, negligence, fraud, and misrepresentation.

White v. Collins Bldg., Inc., 209 N.C. App. 48, 52, 704 S.E.2d 307, 310 (2011) (citation omitted).

"In North Carolina, what has been commonly referred to as the 'instrumentality rule,' forms the basis for disregarding the corporate entity or 'piercing the corporate veil.' " *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). "[T]he instrumentality rule allows for the corporate form to be disregarded if 'the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State[.]' " *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 440-41, 666 S.E.2d 107, 113-14 (2008) (second alteration in original) (quoting *Henderson v. Sec. Mortgage & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968)). "In that event, . . . 'the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person.' " *Id.* at 441, 666 S.E.2d at 114 (emphasis omitted) (quoting *Henderson*, 273 N.C. at 260, 160 S.E.2d at 44); *see also Statesville Stained Glass v. T.E. Lane Construction & Supply*, 110 N.C. App. 592, 596, 430 S.E.2d 437, 440 (1993) ("When a 'corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.' " (quoting *Henderson*, 273 N.C. at 260, 160 S.E.2d at 44)).

To support an attack on a separate corporate entity under the instrumentality rule, a party must satisfy three elements:

> "(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a

> statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."

Glenn, 313 N.C. at 455, 329 S.E.2d at 330 (quoting *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 9, 149 S.E.2d 570, 576 (1966)); *see also Cooper*, 362 N.C. at 441, 666 S.E.2d at 114. Factors that have been expressly or impliedly considered by our Courts in piercing the corporate veil include:

> 1. Inadequate capitalization ("thin incorporation"). . . .
>
> 2. Non-compliance with corporate formalities.
>
> 3. Complete domination and control of the corporation so that it has no independent identity.
>
> 4. Excessive fragmentation of a single enterprise into separate corporations.

Glenn, 313 N.C. at 455, 329 S.E.2d at 330-31 (citations omitted). In addition to these primary four factors, numerous other factors may be considered in evaluating liability under the instrumentality rule, including "non-payment of dividends, insolvency of the debtor corporation, siphoning of funds by the dominant shareholder, nonfunctioning of other officers or directors, [and] absence of corporate records." *Id.* at 458, 329 S.E.2d at 332.

> [T]he theory of liability under the instrumentality rule is an equitable doctrine. Its purpose is to place the burden of the loss upon the party who should be responsible. Focus is upon reality, not form, upon the operation of the corporation, and upon the defendant's relationship to that operation. It is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which, when taken together with an element of injustice or abuse of corporate privilege, suggest that the corporate entity attacked had "no separate mind, will or existence of its own" and was therefore the "mere instrumentality or tool" of the dominant corporation [or shareholder].

Id.

The trial court's instructions to the jury in the present case restated, in substance, the law respecting the instrumentality rule, as propounded

above, including all of the factors to be considered by the jury. The jury returned a verdict finding that, as defined under the instrumentality rule, Blackmon controlled Moorehead I (and certain other defendant entities) with respect to the breach of contract, fraud, and/or unfair and deceptive trade practices that damaged plaintiffs. Blackmon raises no argument on appeal concerning the propriety of the jury charge as given or the sufficiency of the evidence to support the jury's verdict. Indeed, plaintiffs presented evidence implicating multiple factors considered in evaluating liability under the instrumentality rule. Based on the jury's verdict, the trial court's judgment included the following decree:

> Defendant Bruce B. Blackmon, Jr. is the alter-ego of Defendants Moorehead I, LLC, ... All awards against these Defendant entities shall also be an award against Defendant Bruce B. Blackmon, Jr. in his individual capacity and all awards against Defendant Bruce B. Blackmon, Jr. shall be an award against these Defendant entities, jointly and severally.

Blackmon argues on appeal that because the jury failed to find him individually liable for fraud or to award actual damages for either fraud or unfair and deceptive trade practices against him individually, the jury's findings of fact fail to support the trial court's imposition of individual liability against him for the breach of contract damages awarded against Moorehead I. However, Blackmon's argument completely misapprehends the law respecting the instrumentality rule.

First, while a finding that an individual member of a limited liability company personally engaged in certain conduct, such as fraud or misrepresentation, is necessary to support the imposition of individual liability against that member under N.C. Gen. Stat. § 57C-3-30(a), a finding of actual fraud against an individual member is not required to support the imposition of alter ego liability under the instrumentality rule. Rather, the requisite element for piercing the corporate veil under the instrumentality rule requires a finding that the individual member used his control over the entity "to commit fraud *or wrong*, to perpetrate the violation of a statutory or other positive legal duty, *or a dishonest and unjust act in contravention of [the] plaintiffs' legal rights*[.]" *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330 (emphasis added) (internal quotation marks and citation omitted). A showing of actual fraud, in its legal sense, is not a necessary element for the court to pierce the corporate veil. Therefore, the jury's findings addressing fraud are immaterial to their findings addressing breach of contract and piercing the corporate veil.

Similarly, an award of actual damages for claims of fraud and/or unfair and deceptive trade practices is likewise inconsequential to imposing alter ego liability under the instrumentality rule for a breach of contract claim. The requisite element for piercing the corporate veil under the instrumentality rule requires a finding that the individual member's control over the entity and breach of duty "must proximately cause the injury or unjust loss complained of." *Id.* (internal quotation marks and citation omitted). The jury awarded plaintiffs $4.9 million in actual damages on their breach of contract claim. The fact that the jury awarded only nominal damages to plaintiffs on their claims for fraud and unfair and deceptive trade practices has no bearing on the trial court's ability to pierce the corporate veil and hold Blackmon liable for the breach of contract damages awarded by the jury against Moorehead I.

In the present case, the jury was properly instructed concerning the theory of piercing the corporate veil, and in light of these instructions and considering the evidence presented by plaintiffs, the jury returned a verdict finding that Blackmon controlled Moorehead I with respect to the transactions that damaged plaintiffs, as defined under the instrumentality rule. Accordingly, the trial court's judgment imposing alter ego liability against Blackmon for the breach of contract damages found by the jury in issue one of its verdict is proper. Blackmon's arguments that the trial court's judgment improperly concludes and decrees that he is personally liable for the breach of contract damages are without merit.

IV. Unfair and Deceptive Trade Practices

[2] In his second and third arguments on appeal, Blackmon addresses the trial court's conclusions and judgment decrees concerning plaintiffs' claim for unfair and deceptive trade practices. Blackmon first contends that the jury's finding of a breach of contract by Moorehead I is insufficient to support a conclusion of liability for unfair and deceptive trade practices. In addition, Blackmon contends that because the jury found no fraud and awarded no actual damages against him individually on any basis, the trial court lacked the requisite finding of fact that plaintiffs were injured by Blackmon to hold him individually liable for unfair and deceptive trade practices.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) 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." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001); *see also* N.C. Gen. Stat. § 75-1.1(a) (2011). "A practice is unfair if it is unethical or unscrupulous,

and it is deceptive if it has a tendency to deceive." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711. "Moreover, where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). "Good faith is not a defense to an alleged violation of N.C.G.S. § 75-1.1." *Id.*

> The determination of whether an act or practice is an unfair or deceptive practice that violates N.C.G.S. § 75-1.1 is a question of law for the court. Ordinarily, once the jury has determined the facts of a case, the court, based on the jury's findings, then determines, as a matter of law, whether the defendant engaged in unfair or deceptive practices in or affecting commerce. Furthermore, . . . it does not invade the province of the jury for this Court to determine as a matter of law on appeal that acts expressly found by the jury to have occurred and to have proximately caused damages are unfair or deceptive acts in or affecting commerce under N.C.G.S. § 75-1.1.

Id. (internal quotation marks and citations omitted).

In addressing plaintiffs' unfair and deceptive trade practices claim, the trial court instructed the jury as follows:

> The seventh issue reads: Did any defendants, . . . Bruce Blackmon, Moorehead I, . . . do at least one of the following:
>
> One: Make a false representation or concealment of a material fact regarding the events to Timothy Hurst and Jeffery Henley of $200,000 on March 12, 2007?
>
> Two: Alter, slip-sheet or otherwise modify documents executed on March 12, 2007, without the knowledge or consent of Timothy Hurst or the Henleys?
>
> Three: Make a false representation or concealment of a material fact regarding the 1031 tax-deferred exchange?
>
> Or, four: Agree to pay Timothy Hurst or Jeffery Henley 4.7 million dollars as described in the June 26, 2006, purchase and sale agreement or 4.5 million dollars as described in the March 13, 2007, promissory note, with no means or intention of carrying out that agreement?

On this issue the burden of proof is on the plaintiffs. This means that the plaintiffs must prove, by the greater weight of the evidence, that the Defendant . . . Bruce Blackmon, Moorehead I, . . . did at least one of the acts as contended by the plaintiffs.

In this case the plaintiffs contend, and the defendants deny, that the Defendants . . . Bruce Blackmon, Moorehead I, LLC, . . . did at least one of the acts described in one through four above.

Finally, as to this issue on which the plaintiffs have the burden of proof, if you find by the greater weight of the evidence that the defendants did at least one of the acts contended by the plaintiffs, then you would answer yes in the space beside each act so found. If, on the other hand, you fail to so find, then you answer no in the space provided.

The eighth issue reads: Was any defendant's conduct a proximate cause of the plaintiffs' injury? You will answer this issue only if you've found in the plaintiffs' favor on the seventh issue. On this issue, the burden of proof is on the plaintiff. This means that the plaintiffs must prove, by the greater weight of the evidence, two things:

First, that the plaintiffs have suffered an injury;

And, second, that the defendants' conduct was the proximate cause of the plaintiffs' injury. . . .

. . . .

[A]s to this issue on which the plaintiffs have the burden of proof, if you find, by the greater weight of the evidence, that the plaintiffs have suffered an injury and that the defendants' conduct proximately caused the plaintiffs' injury, then it would be your duty to answer this issue yes in favor of the plaintiffs. If, on the other hand, you fail to so find, then it would be your duty to answer this issue no in favor of the defendants.

The ninth issue reads: In what amount have the plaintiffs been injured? If you answer the seventh and eighth issue yes in favor of the plaintiffs, the plaintiffs are entitled to recover nominal damages even without proof of

> actual damages. Nominal damages consist of some trivial amount, such as one dollar, in recognition of the technical damage caused by the wrongful conduct of the defendants.

As to issues seven and eight, the jury answered "yes" as to both Blackmon and Moorehead I, thereby finding as fact that Blackmon individually had committed at least one of the acts described by the trial court and that such action proximately caused an injury to plaintiffs. The jury awarded nominal damages in the amount of $1.00 to plaintiffs on this issue. Based on the jury's findings of fact, the trial court's judgment contained the following paragraph:

> Judgment in the sum of $1.00 is awarded to Plaintiff Hurst Estate and Plaintiff Henleys for unfair or deceptive trade practices from Defendants . . . Bruce B. Blackmon, Jr., Moorehead I, LLC, . . . , jointly and severally, with interest to run at the legal rate.

Blackmon is correct that " 'actions for unfair or deceptive trade practices are distinct from actions for breach of contract . . . and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.' " *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006) (ellipsis in original) (quoting *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992)). In the present case, however, the jury's verdict for unfair and deceptive trade practices against Blackmon and Moorehead I clearly was not based on the jury's finding of a mere breach of contract by Moorehead I, as such an action was not part of the instructions given to the jury on this issue. Rather, the jury's verdict reveals that it found that both Blackmon and Moorehead I had individually committed one of the four acts described by the trial court in its instructions on this issue. Blackmon challenges neither the trial court's instructions to the jury, nor the sufficiency of the evidence to support the jury's verdict. Each of the four acts described by the trial court, all of which allege false representations or concealment of a material fact and/or establish a fraudulent scheme in procuring the conveyance of the Hurst/Henley tract in connection with the Epic Project, constitute unfair or deceptive acts in commerce in violation of N.C. Gen. Stat. § 75-1.1. *See, e.g.*, *Hardy v. Toler*, 288 N.C. 303, 310-11, 218 S.E.2d 342, 347 (1975) (false representations made by defendants to plaintiff in connection with sale of automobile constituted unfair or deceptive acts or practices in commerce); *Gress v. Rowboat Co.*, 190 N.C. App. 773, 777-78, 661 S.E.2d 278, 282-83 (2008) (facts showing that plaintiff induced defendants to sign a contract by making false

promises which plaintiff had no intention of keeping established fraudulent scheme in which plaintiff's false representations were sufficiently deceptive under N.C. Gen. Stat. § 75-1.1); *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 424-25, 344 S.E.2d 297, 300 (1986) (plaintiff's evidence showed defendant induced plaintiff to purchase automobile by promising to allow rescission of the contract by plaintiff, which promise defendant never intended to keep, thereby constituting violation of statutory prohibition against unfair and deceptive acts).

Furthermore, the fact that the jury neither found Blackmon individually liable for fraud nor awarded actual damages to plaintiffs is inconsequential. Fraud is a separate and distinct legal claim and is not a required element for an unfair and deceptive trade practices claim. Indeed, "[t]his Court has held that '*it is not necessary for the plaintiff to show fraud*, bad faith, deliberate or knowing acts of deception, or actual deception,' but 'plaintiff must . . . show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception.' " *Gress*, 190 N.C. App. at 776, 661 S.E.2d at 281 (emphasis added) (ellipsis in original) (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452-53, 279 S.E.2d 1, 7 (1981)); *see also Rosenthal v. Perkins*, 42 N.C. App. 449, 455, 257 S.E.2d 63, 67 (1979) ("We find no merit in this argument that fraud is a necessary element in the violation of the Unfair Trade Practices Act.").

In addition, an award of actual damages is not required to support a finding that plaintiffs were injured by the acts complained of. Rather, as the trial court instructed, the jury need only find that defendants' unfair or deceptive act or practice proximately caused an injury to plaintiffs. *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 462, 646 S.E.2d 418, 424 (2007) ("An unfair and deceptive trade practice claim requires plaintiffs to . . . establish they suffered *actual injury* as a proximate result of defendants' [unfair or deceptive act]." (emphasis added) (alteration in original) (internal quotation marks and citations omitted)). "The jury determines in what amount, if any, the complaining party is injured and whether the occurrence was the proximate cause of those injuries." *Ausley v. Bishop*, 133 N.C. App. 210, 217, 515 S.E.2d 72, 77 (1999). This Court has previously recognized that "[t]he measure of damages applicable to claims for . . . unfair and deceptive trade practices is broad and remedial[, and encompasses] the concept of awarding such damages as will restore the plaintiff to his, her, or its original condition." *Tradewinds Airlines v. C-S Aviation Svcs.*, ___ N.C. App. ___, ___, 733 S.E.2d 162, 169 (2012). Here, the jury awarded nominal damages to plaintiffs to compensate for the injuries found by the jury

to have proximately resulted from the various defendants' unfair or deceptive acts. The jury's findings and award of nominal damages are sufficient to support the trial court's judgment against both Blackmon and Moorehead I for unfair and deceptive trade practices. Blackmon's arguments on this issue are without merit.

V. Judgment Improperly Expanded Jury's Verdict

[3] In his fifth argument on appeal, Blackmon argues the trial court's judgment improperly expanded the jury's verdict. Blackmon's argument on this issue is wholly without merit. As Blackmon recognizes, the trial court's judgment did not expand the jury's damages award. Blackmon's sole contention is that the trial court's judgment expands the scope of the jury's verdict by holding him personally liable for damages awarded against Moorehead I, piercing the corporate veil, and decreeing that he and his other entities engaged in unfair and deceptive trade practices. As explained herein, the trial court's judgment with respect to each of these issues is properly supported by the jury's verdict and established law.

VI. Inconsistent Jury Verdict

[4] Blackmon's final argument on appeal is that the jury's verdict is inconsistent, and therefore, the trial court's judgment based thereon is invalid. Specifically, Blackmon argues that the jury's finding him individually liable for unfair and deceptive trade practices is inconsistent with the jury's finding of no fraud and awarding of no punitive damages against Blackmon individually. However, as we have noted above, the issues of fraud and punitive damages are separate and distinct claims from the issue of unfair and deceptive trade practices. The fact that the jury failed to find Blackmon individually liable for plaintiffs' fraud claim or to award punitive damages against him does not detract from the jury's finding that Blackmon individually engaged in a deceptive act or practice in violation of N.C. Gen. Stat. § 75-1.1.

Blackmon likewise argues that the jury's findings of no fraud and no liability for punitive damages against him individually are inconsistent with the jury's finding Moorehead I liable for fraud. Again, Blackmon's entire argument on this issue attempts to read each of plaintiffs' claims as interrelated and codependent. We reiterate that a finding of fraud is not a prerequisite to the jury's finding that Blackmon individually engaged in an unfair or deceptive act or that Blackmon was the alter ego of the corporations he controlled.

Contrary to Blackmon's assertions, we conclude the jury's verdict is entirely logical and consistent with the evidence presented by

plaintiffs in this case. First, the jury found that Moorehead I, a corporation under the complete control and domination of Blackmon, breached the promissory note it had made to plaintiffs, and plaintiffs were damaged thereby in the amount of $4.9 million. Accordingly, the trial court concluded and decreed that Blackmon was the alter ego of Moorehead I, and Blackmon should be held jointly and severally liable on the damages award for breach of contract with Moorehead I. Second, the jury found that Desimone and Mascaro made false representations to plaintiffs at the 12 March 2007 meeting at the Henleys' barn and that during that meeting, both Desimone and Mascaro were acting as agents on behalf of Moorehead I. Accordingly, the jury found Desimone, Mascaro, and Moorehead I liable for fraud and awarded nominal damages. Third, the jury found the fraudulent misrepresentations by Desimone and Mascaro to be particularly egregious and awarded punitive damages against those two individual defendants. Finally, the jury found that Blackmon engaged in one of the four acts described by the trial court, likely the issuance of the $4.5 million promissory note to plaintiffs with no intention or means of repaying the sum to them, which constituted an unfair or deceptive act, thereby causing injury to plaintiffs. The jury awarded at least nominal damages, recognizing the injury to plaintiffs. The jury's total damages award compensates plaintiffs for the loss complained of resulting from defendants' actions in this case. Blackmon's argument on this issue is entirely without merit.

VII. Conclusion

We hold the jury's factual findings in the present case are entirely logical and consistent, and the jury's verdict supports the trial court's conclusions of law and judgment decrees that Blackmon is the alter ego of Moorehead I and is therefore jointly and severally liable for the breach of contract damages awarded by the jury to plaintiffs against Moorehead I, and that both Moorehead I and Blackmon individually engaged in unfair or deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1. The trial court's judgment did not improperly expand the scope of the jury's verdict. Accordingly, we affirm the trial court's judgment.

Affirmed.

Judges BRYANT and HUNTER, JR. (Robert N.) concur.

GRICH v. MANTELCO, LLC

[228 N.C. App. 587 (2013)]

KENNETH GRICH, PLAINTIFF
v.
MANTELCO, LLC, AND UNIVERSAL INSURANCE COMPANY, DEFENDANTS

No. COA13-169

Filed 6 August 2013

Contracts—breach of contract—released from liability—failure to state a claim

The trial court did not err in a breach of contract and unfair and deceptive trade practices case by granting defendants' motion to dismiss for plaintiff's failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6). Plaintiff released defendants from all liability by signing the release and acknowledging receipt of payment.

Appeal by Kenneth Grich from order entered 31 October 2012 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2013.

The Duggan Law Firm, by Christopher M. Duggan, for plaintiff.

Burton, Sue & Anderson, LLP, by Gary K. Sue and Stephanie W. Anderson, for defendants.

ELMORE, Judge.

Kenneth Grich (plaintiff) brought a complaint and petition for declaratory judgment against defendant Mantelco, LLC and defendant Universal Insurance Company (collectively defendants), alleging that Universal Insurance breached an enforceable contract for release of liability and engaged in unfair or deceptive trade practices. The trial court granted defendants' motion to dismiss for plaintiff's failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) on 14 August 2012. The trial court denied plaintiff's motion for reconsideration on 13 December 2012. Plaintiff now appeals. After careful consideration, we affirm.

I. Background

In August 2011, Mantelco was hired to install a satellite dish at plaintiff's home. During installation, Mantelco employees broke a water line

causing significant property damage to the home, forcing plaintiff and his tenant to move out while repairs were completed. Plaintiff submitted the claims for damages to Universal Insurance, Mantelco's liability provider, for property damage, loss of rent, and for additional costs associated with being unable to reside in the residence from August to December 2011. Universal's insurance adjustor assessed the total damages at $27,707.00, while plaintiff's contractor assessed the damages at $29,689.00. The parties disputed the discrepancy in the building damage repair estimates. Before settling this dispute, however, Universal made three payments totaling $7,000.00 to plaintiff: 1) $2,500.00 for "advance payment for relocation out-of-pocket expenses" on 15 August 2011, 2) $3,000.00 for "advance payment for September rent installment and loss of rent for August and September on 7 September 2011, and 3) $1,500.00 for "payment for October rental/displacement fees" on 9 October 2011. Despite these payments, plaintiff continued to dispute Universal's assessment of building damage repair. After further negotiation between the parties, plaintiff retained counsel.

On 30 November 2011, plaintiff sent a demand letter to Universal, offering to resolve the matter for $38,020.00. In a letter dated 5 December 2011, Universal agreed to settle the issue for said amount provided plaintiff release it and Mantelco from any future claims. The proposal included the "Property Damage Release" (the Release), which stated, in relevant part:

> That the Undersigned, being of lawful age, for the sole consideration of THIRTY EIGHT-THOUSAND TWENTY DOLLARS AND 00/100 Dollars ($38,020.00) to the undersigned in hand paid, receipt whereof is hereby acknowledged, do/does hereby . . . release, acquit and forever discharge MANTELCO, LLC AND UNIVERSAL INSURANCE COMPANY . . . of and from any and all claims of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue . . . . The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this Release contains the entire agreement between the parties hereto, and that the terms of this Release are contractual and not a mere recital.

On 8 December 2011, before receiving a settlement check, plaintiff executed the Release and returned it to Universal. Accordingly,

Universal issued a check to plaintiff for $31,020.00, the total amount less the $7,000.00 already paid to plaintiff. Universal alleged that this payment constituted full satisfaction pursuant to the Release. Plaintiff disagreed. Accordingly, plaintiff brought suit for breach of contract and for unfair and deceptive trade practices on the basis that he was entitled to $38,020.00, in addition to the $7,000.00 already received. Plaintiff prayed for specific performance of the Release, payment for attorney's fees and expenses, treble damages, and any other relief deemed proper by the trial court. Defendants filed a timely motion to dismiss pursuant to Rule 12(b)(6), which was granted on 8 October 2012. Plaintiff filed a motion for reconsideration, which was denied by the trial court on 13 December 2012. Plaintiff now appeals to this Court.

II. Analysis

Plaintiff contends that the trial court erred in granting defendants' 12(b)(6) motion to dismiss. We disagree.

"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). "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).

> It is well-settled that a plaintiff's claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.

Woolard v. Davenport, 166 N.C. App. 129, 133, 601 S.E.2d 319, 322 (2004) (citation omitted).

"Since releases are contractual in nature, we apply the principles governing interpretation of contracts when construing a release." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 207, 652 S.E.2d 701, 709 (2007) (citation omitted). "To state a claim for breach of contract,

the complaint must allege that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach." *Claggett v. Wake Forest Univ.*, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997) (citations omitted). "When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Asheville Mall, Inc. v. F.W. Woolworth Co.*, 76 N.C. App. 130, 132, 331 S.E.2d 772, 773-74 (1985).

In the instant case, plaintiff's appeal is premised on an alleged unilateral mistake: he was unaware of defendants' "intention to offset the total pending claims" by the $7,000.00 already received. We note that "[a] unilateral mistake by a party to a contract, unaccompanied by fraud, imposition, undue influence or like circumstances of oppression is insufficient to avoid a contract." *Lowry v. Lowry*, 99 N.C. App. 246, 252, 393 S.E.2d 141, 144 (1990). Here, plaintiff included a copy of the Release along with the complaint, thus making the Release subject to defendants' motion to dismiss. *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004). It is undisputed that the Release served as a valid contract. Furthermore, the language contained therein is clear and unambiguous, and there is no evidence of misrepresentation or bad faith by defendants.

Plaintiff released defendants from all liability for the "sole consideration" of $38,020.00 "in hand paid, receipt whereof is hereby acknowledged." It is plaintiff's mistake that he signed a contract which clearly states "*in hand paid*" prior to receiving the funds. By signing the Release and acknowledging receipt of payment, plaintiff executed the agreement and thereby released defendants for all claims plaintiff "has/have or which may hereafter accrue[.]" The Release also states that it "contains the entire agreement between the parties[.]" Thus, the plain language of the Release abdicating defendants' liability includes the claim before us. As such, the trial court did not err in granting defendants' motion to dismiss because the complaint on its face reveals the absence of facts sufficient to make a valid claim.

Because we conclude that the trial court did not err in dismissing plaintiff's action, we decline to address plaintiff's second issue that defendants violated the Unfair Trade Practices Act; there is no evidence in the record to support a claim that defendants' engaged in an unfair or deceptive act.

II. Conclusion

In sum, the trial court did not err in granting defendants' 12(b)(6) motion to dismiss for plaintiff's failure to state a claim upon which relief could be granted. After careful consideration, we affirm.

Affirmed.

Chief Judge MARTIN and HUNTER, JR., Robert N., concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST FROM WESLEY W. MANNING, LAURA S. MANNING, HUSBAND AND WIFE, IN THE ORIGINAL AMOUNT OF $322,700.00 AND DATED SEPTEMBER 23, 2003 IN BOOK 3226, PAGE 112, UNION COUNTY REGISTRY, CURRENT OWNER(S): LAURA S. MANNING; TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA12-1247

Filed 6 August 2013

1. Deeds—deed of trust—foreclosure—valid debt—default

The trial court did not err in a foreclosure case by authorizing the foreclosure of the subject property. The clerk of superior court had no jurisdiction to enter an order requiring a satisfaction to be recorded as to the deed of trust on the property, a valid debt existed, and there was default thereupon.

2. Deeds—deed of trust—foreclosure—note holder

The trial court did not err in a foreclosure case authorizing the foreclosure of the subject property. There was competent evidence to show that the party seeking to foreclose on the property was the current holder of the original Note.

Appeal by respondent from order entered 3 May 2012 by Judge Theodore Royster, Jr. in Union County Superior Court. Heard in the Court of Appeals 11 April 2013.

HUTCHENS, SENTER, KELLAM, & PETTIT, P.A., By Hilton T. Hutchens, Jr. and Natasha M. Barone, for appellee.

RAYBURN COOPER & DURHAM, P.A., by Daniel J. Finegan and James B. Gatehouse, for appellant.

ELMORE, Judge.

Laura S. Manning and the Estate of Wesley Manning (respondents) appeal from an order authorizing Trustee Services of Carolina, LLC, as substitute trustee for Bank of America, N.A., to proceed with a foreclosure sale of certain real property. After much consideration, we affirm.

I. Background

On 15 September 2003, Wesley Manning executed a promissory note (the Note) for $322,700.00 payable to America's Wholesale Lender (AWL), a trademark name for Countrywide Home Loans, Inc. (Countrywide). He and his wife, Laura S. Manning executed a deed of trust to secure the Note; Laura Manning did not sign the Note. However, Laura Manning signed the deed of trust as a "borrower" and offered the residential property located at 1600 Tanglebriar Court in Union County as collateral. She was and is the sole owner of the Tanglebriar property. AWL perfected its lien as a first priority lien against the Tanglebriar property upon recordation.

On 20 March 2008, Wesley Manning (decedent) was killed in an accident. Laura Manning (now respondent) was appointed as executrix of his estate. On 15 July 2008, Countrywide served the Estate with a Statement of Claim regarding the outstanding debt owed under the Note. The record indicates that Bank of America later merged with and acquired Countrywide. As such, the Note was assigned to Bank of America Home Loans Servicing, LP (BAC). BAC later became Bank of America, National Association (BANA). BANA initiated this foreclosure proceeding as the alleged holder of the promissory note.

On 25 June 2010, the Estate filed a petition regarding outstanding liabilities of the Estate and a Notice of Hearing regarding that petition. In the certificate of service on the Notice of Hearing, the Estate served the law firm of Hutchens, Sneter & Britton, P.A. (HSB) with notice of the Estate proceeding on behalf of BANA. Respondents allege that HSB represented BANA's interest because (1) Countrywide's general counsel "gave explicit instruction" for the Estate to communicate with HSB regarding the Tanglebriar property, and (2) because HSB directly contacted the Estate on behalf of the lender (BAC at the time).

HSB admittedly represented BANA with respect to the foreclosure of certain Kure Beach property owned by decedent; however, HSB contends that this representation did not give the Estate any authority to designate HSB as counsel for BANA as to the Tanglebriar property.

In a letter addressed to the Estate, attorney Hutchens wrote on HSB's behalf: "At no time, including the present, did [] [HSB] represent Bank of America as to the Manning CLT Loan." The letter corroborated Mr. Hutchens testimony at the *de novo* hearing: "So I sent a letter back to him and said, again, I told you I don't represent Bank of America." Additionally, HSB contends that BANA never received notice of the Estate proceeding because HSB did not accept service of process on BANA's behalf. The issue of whether HSB represented BANA is a central dispute between the parties. BANA neither produced original documentation evidencing its claim prior to the entry of the final Estate Order nor was it represented at the Estate proceeding.

On 7 July 2010, the Clerk of Superior Court for Union County entered a final Estate Order, which provided in relevant part:

> 6. The Executrix shall not treat any claim made by Countrywide (or its successor, [BANA]) on Loan # 3959482 or otherwise as a valid and enforceable claim against the Estate due to the full payment and performance of the underlying debt under N.C.G.S. § 28A-19-16 which arises from the creditor's failure to properly preserve its claim, and under N.C.G.S. § 45-36.9 any related deed of trust on property not owned by the Estate that secures such loan shall be satisfied.

Accordingly, after April 2010, both the Estate and Laura Manning ceased payment on the Note and regarded any debt secured by the Tanglebriar property satisfied. BANA alleges that it did not receive notice of the final Estate Order, thus it did not appeal from said order. The record shows that on 8 October 2010, the Estate served the law firm of Shapiro & Ingle, LLP with its Request for Satisfaction pursuant to paragraph six in the Estate Order.

On 22 October 2010, BANA initiated foreclosure proceedings against the Tanglebriar property pursuant to the deed of trust in apparent response to the Estate's cessation of payment. At the 9 December 2011 foreclosure hearing, the clerk of court terminated BANA's foreclosure, finding that BANA failed to show a valid debt and default as required by N.C. Gen. Stat. § 45-21.16(d). In making said findings, the clerk relied on the Estate Order, specifically paragraph six. BANA appealed to superior court.

The matter came on for a *de novo* hearing on 18 August 2009 before the Honorable Judge Theodore Royster, Jr., in Union County Superior Court. During the hearing, BANA presented the trial court with a certified

copy of the Note, the deed of trust, and an affidavit attesting to the validity of respondents' indebtedness pursuant to the deed of trust. In an order filed 3 May 2012, Judge Royster reversed the clerk's 9 December 2011 order, finding: (1) a valid debt, (2) default, (3) proper notice of the foreclosure proceeding, and (4) a provision in the deed of trust authorizing BANA to foreclose on the property. Additionally, Judge Royster voided paragraph six of the Estate Order to the extent that it invalidated or extinguished BANA's lien on the Tanglebriar property. The trial court concluded as a matter of law that the requirements of N.C. Gen. Stat. § 45-21.16 had been satisfied, and it authorized the Substitute Trustee for BANA to proceed with the foreclosure. Respondents entered a timely notice of appeal.

II. Estate Order, Valid Debt and Default

[1] Respondents' principal argument on appeal is that the trial court erred in authorizing BANA's foreclosure on the Tanglebriar property. Respondents specifically assert that the trial court erred in (1) finding the existence of valid debt and (2) finding default thereupon. One of respondents' primary contentions is that the Estate Order effectively extinguished the debt owed under the Note and barred BANA's right to foreclose on the Tanglebriar property pursuant to the deed of trust. Accordingly, we will first address this argument.

"The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings. Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re Foreclosure of a Deed of Trust Executed by Hannia M. Adams & H. Clayton Adams*, 204 N.C. App. 318, 320-21, 693 S.E.2d 705, 708 (2010) (quotations and citations omitted). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *In re Bass*, ___ N.C. ___, ___, 738 S.E.2d 173, 175 (2013) (citing *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)).

A. Estate Order

In an estate proceeding, the clerk of superior court has "jurisdiction of the administration, settlement, and distribution of estates of decedents[.]" N.C. Gen. Stat. § 28A-2-1 (2011). In the instant appeal, both parties concede that the Tanglebriar property is not "property of the decedent's estate."

However, the parties dispute the effect of paragraph six in the Estate Order on BANA's right to foreclose on the Tanglebriar property. Respondent argues that the superior court "had no authority or ability to review or alter the terms of the Estate Order and its act in doing so constitutes reversible error."

BANA counters that the trial court had the authority to consider the effect of the Estate Order on the validity of the debt. BANA further argues that the trial court correctly concluded the Estate Order has no bearing on its right to foreclose because the clerk "had no jurisdiction over the property which was not part of the Estate and the Court erred in ordering that the Deed of Trust, which secures property outside the Estate, be cancelled." We agree.

Per N.C. Gen. Stat. § 45-21.16(d), certain elements must be established by the clerk of superior court before a mortgagee or trustee may proceed with a foreclosure by power of sale, including findings of a "(i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b)[.][1]" N.C. Gen. Stat. § 45-21.16(d) (2011). When a foreclosure action is appealed to the superior court, the trial court is limited to a de novo review of those same elements. N.C. Gen. Stat. § 45-21.16(d) (2011).

Here, in a 9 December 2011 order, the clerk of court terminated BANA's foreclosure after failing to find a valid debt and default thereupon. In so concluding, the clerk relied on the Estate Order, citing paragraph six verbatim. "A superior court judge hearing an appeal from the clerk of court is charged with making the same determinations as the clerk under section 45-21.16[.]" *In re Hudson*, 182 N.C. App. 499, 504, 642 S.E.2d 485, 489 (2007). Because the Estate Order served as the basis for the clerk's denial of BANA's foreclosure, the validity of the Estate Order was properly before the trial court for *de novo* review. *See also id.* at 503, 642 S.E.2d at 488 (holding that the trial court did not exceed its authority by examining the underlying validity of the loan documents in a foreclosure proceeding, because such an inquiry related to the finding of a "valid debt").

Moreover, the trial court did not err in voiding the portion of the Estate Order attempting to extinguish BANA's secured lien on the Tanglebriar property. "Where jurisdiction is statutory and the Legislature

1. We recognize that additional elements must be found per N.C. Gen. Stat. § 45-21.16(d).

. . . subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction. . . . If the court was without authority, its judgment is void[.]" *Allred v. Tucci*, 85 N.C. App. 138, 143, 354 S.E.2d 291, 295 (citations, quotation marks, and ellipses omitted), *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987). "A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quotation and citations omitted).

Although we express no opinion on the effect of the Estate Order as to the debt owed by decedent's estate in the event of a deficiency, as that issue is not before us, it is clear that the clerk of superior court had no jurisdiction to enter an order requiring a satisfaction to be recorded as to the deed of trust on the Tanglebriar property. That property was owned wholly by Mrs. Manning at the time she and her husband executed the deed of trust. It was never property of the estate. Ordering that a satisfaction be recorded as to that deed of trust was an act in excess of "jurisdiction of the administration, settlement, and distribution of [the] estate[] of decedent[] [.]" N.C. Gen. Stat. § 28A-2-1 (2011). Therefore, that portion of the Estate Order was void and of no effect in the foreclosure proceeding. *See Allred*, 85 N.C. App. at 143, 354 S.E.2d at 295. Accordingly, we affirm the trial court's decision to void paragraph six; the Estate Order has no bearing on this action.[2]

B. Valid Debt and Default

Again, respondents contend that the pivotal findings in the foreclosure hearing were the trial court's determination that there was a valid debt and default. Upon review, we find that the trial court had competent evidence on which to find the existence of a valid debt and default.

In *Carter v. Bost*, the plaintiff did not execute the promissory note and was never bound by its terms. 209 N.C. 830, 184 S.E. 817 (1936). However, the plaintiff executed a deed of trust whereby her land was offered as additional security for the debt. Our Supreme Court concluded that "the only cause of action created by [plaintiff], in the event of default in payment, was one to foreclose the deed of trust against her land and not one for judgment against her personally–an action *in rem*, not *in personam*." *Id.* at 831-32, 184 S.E. at 817. Similarly, respondent in the case *sub judice* designated herself as a "borrower" on the deed of

2. On appeal both parties argue the issue of whether BANA received proper notice of the Estate proceeding and of the resulting Estate Order. Given our conclusion above, we decline to address any additional arguments stemming from the Estate proceeding.

trust and offered the Tanglebriar property as additional security for the debt. By doing so, respondent specifically granted the lender "the right to foreclose and sell the Property" in the event of a default. While BANA is barred from seeking a default judgment against respondent personally, it may initiate an *in rem* action against the property. *See id.* As such, the trial court did not err in finding the existence of a valid debt as evidenced in the deed of trust.

We have previously held that the determination of whether a party is in default on a contract is a question of fact. *Lowman v. Huffman*, 15 N.C. App. 700, 704, 190 S.E.2d 700, 703 (1972). Here, respondents concede that payment on the Note ceased in May 2010. However, respondents assert that they were barred from making additional payments on the Note per paragraph six of the Estate Order. Again, this argument is unpersuasive as we cannot find that the Estate Order controls in the instant action. As respondents ceased making payments on a valid debt, we conclude that there is competent evidence of a default.

II. BANA as Note "holder"

[2] Respondent also challenges the first element of N.C. Gen. Stat. § 45-21.16(d) on the basis that BANA failed to produce any competent evidence to show that it was the current holder of the original Note or that it was the rightful successor-in-interest to AWL, Countrywide or BAC. We disagree.

Again, we review the superior court's order to determine only whether its findings are supported by competent evidence. However, "where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *In re Foreclosure of Real Prop. Under Deed of Trust from Brown*, 156 N.C. App. 477, 485, 577 S.E.2d 398, 403 (2003) (citation omitted). Additionally, we review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

In order to find that there is sufficient evidence that the party seeking to foreclose is the holder of a valid debt, we must find (1) competent evidence of a valid debt, and (2) that the party seeking to foreclose is the current holder of the Note. *See In re Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 709 (2010). As we concluded above that there is sufficient competent evidence of a valid debt, we need only to discern whether BANA is the current note holder. In the context of a power of sale foreclosure pursuant to N.C. Gen. Stat. §. 45-21.16, the term "holder" is defined as "[t]he person in possession of a negotiable instrument that

is payable either to bearer or to an identified person that is the person in possession." *In re Foreclosure of a Deed of Trust Executed by Hannia M. Adams & H. Clayton Adams*, 204 N.C. App. 318, 322, 693 S.E.2d 705, 709 (2010) (quoting N.C. Gen. Stat. § 25-1-201(b)(21) (2011)). Whether an entity is a "holder" has been held to be "a legal conclusion that is to be determined by a court of law on the basis of factual allegations." *In re Foreclosure by David A. Simpson, P.C.*, 211 N.C. App. 483, 495, 711 S.E.2d 165, 173 (2011).

In arguing that it provided competent evidence to support the trial court's finding that it was the current holder, BANA points to its production of the original Note, merger documents from the Secretary of State, and the Affidavit of Default executed by BANA representative, Stefanie J. Buchanan.

Respondents cite *In re Simpson*, *supra*, for the presumption that mere possession of the original note is insufficient to prove that an entity is the note holder. However, in *In re Simpson*, and cases with analogous holdings, the original notes were either (1) not drawn, issued, or indorsed to the party, to bearer, or in blank, or (2) the trial court neglected to make a finding in its order as to which party had possession of the note at the hearing. *Id.* at 491, 711 S.E.2d at 171; *see also Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983); *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637, (1977) (holding that the plaintiff was not the holder of the note under the UCC as the notes were not drawn, issued, or indorsed to her, to bearer, or in blank.). In the instant case, counsel for BANA presented to the trial court the original Note properly indorsed in blank to substantiate a chain of title. Accordingly, BANA's presentation of the original note serves as competent evidence to support the trial court's finding that it was the present holder.

Additionally, BANA offered copies of merger documents to evidence the merger of Countrywide Home Loan Servicing, Inc. into BAC Home Loans, Inc., now Bank of America, National Association (BANA). Under N.C. Gen. Stat. § 55-11-06(a)(2), "title to all real estate and other property owned by each merging corporation is vested in the surviving corporation without reversion or impairment." N.C. Gen. Stat. § 55-11-06(a)(2)(2011). On appeal, respondents neither dispute that a valid merger occurred between Countrywide and BANA nor do they specifically take issue with the validity of the merger documents offered by BANA. Accordingly, we conclude that the documents in the record sufficiently evidence the merger. As such, BANA, as the surviving corporation, has succeeded by operation of law to Countrywide's status as holder of the Note, thus allowing BANA to enforce the Note in its own name. *See*

Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980). The merger alone serves as competent evidence to support the trial court's finding that BANA is the Note holder.

Furthermore, we decline to address respondents' argument concerning the affidavit of default. Because respondents failed to object to the trial court's review of the affidavit at the hearing, they are prohibited from raising any objections to it for the first time on appeal. *See In re Foreclosure of Bigelow*, 185 N.C. App. 142, 147, 649 S.E.2d 10, 14 (2007) (holding 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 getter a better mount in the appellate courts.") (citations and quotations omitted). Finally, given our conclusion that the Estate Order has no legal effect in the instant case, we also decline to address respondents' final issue – that the trial court erred in permitting BANA to collaterally attack the Estate Order.

III. Conclusion

The trial court properly found that the pertinent parts of the Estate Order are void and have no legal effect on the instant action. Moreover, the trial court properly concluded that BANA presented sufficient evidence to establish all required elements of N.C. Gen. Stat. § 45-21.16. After much consideration, we affirm.

Affirmed.

Judges GEER and STROUD concur.

KELLY v. KELLY

[228 N.C. App. 600 (2013)]

REBECCA STEPHENS KELLY, PLAINTIFF
v.
REGINALD BROWN KELLY, DEFENDANT

No. COA12-1582

Filed 6 August 2013

Divorce—alimony—modification—no substantial change of circumstances

The trial court did not err by denying defendant's motion to modify alimony. The trial court's findings of fact were supported by the evidence and the findings supported the conclusion that there had been no substantial change of circumstances since the initial alimony order was entered.

Appeal by defendant from Order entered on or about 31 July 2012 by Judge William G. Stewart in District Court, Johnston County. Heard in the Court of Appeals 6 June 2013.

The Rosen Law Firm by Lisa M. Angel, for plaintiff-appellee.

Doster, Post, Silverman & Foushee, P.A., by Jonathan Silverman, for defendant-appellant.

STROUD, Judge.

Reginald Brown Kelly ("defendant") appeals from an order denying his motion to modify alimony. Defendant argues on appeal that several of the trial court's findings are not supported by the evidence and that the findings are insufficient to support the trial court's conclusion that there has been no substantial change of circumstances since the initial alimony order was entered. We affirm.

I. Background

On 9 December 2004, the trial court entered a consent order ("Alimony order") awarding defendant's ex-wife, Ms. Kelly ("plaintiff"), $12,000 per month in alimony. On 30 September 2011, defendant moved to modify his alimony obligation on the grounds that his ability to pay and his ex-wife's financial needs had substantially changed since entry of the alimony order. The trial court found no substantial change in circumstances and denied his motion. Defendant timely filed written notice of appeal.

II. Standard of Review

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Williamson v. Williamson, ___ N.C. App. ___, ___, 719 S.E.2d 625, 626 (2011) (citations and quotation marks omitted). An abuse of discretion has occurred if the decision is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted).

III. Sufficiency of the evidence to support the findings

Defendant challenges findings of fact 10, 11, and 18 as unsupported by the evidence.[1] We disagree.

The findings challenged by defendant are:

> 10. That Defendant's employment is the same [as] at the time of the Alimony Order, namely that he is still working full time with Kelly and West, PA and although the gross revenues [have] changed over time, those fluctuations in revenue occurred historically and were known to Defendant at the time he entered into the Alimony Order.
>
> 11[a]. That any decrease in Defendant's income has only been in the past two years and it has not kept him from his ability to maintain a reasonable standard of living.
>
> 11[b]. That Defendant has increased his living expenses and debts since the Alimony Order but the Court finds those to be voluntary decisions by Defendant to live beyond his income, specifically, Defendant purchased a new home since the separation, refinanced the mortgages on his residence, added a huge garage to his residence in

1. Defendant also purports to challenge finding of fact 8, concerning the lack of a decrease in plaintiff's expenses, though he admits that finding is supported by the evidence. His argument instead focuses on whether the trial court properly considered the required factors, an argument addressed below.

> 2007, and used an equity line to finance dock repair at his beach house.
>
> . . .
>
> 18. That Defendant's income has not decreased substantially since the Alimony Order.[2]

Each of these findings is supported by the evidence.

Findings No. 10 and 18 are probably the most important findings, as many of defendant's arguments are based upon the claim that his income has substantially decreased; his other arguments as to the general state of the economy, changes in the economics and competitiveness of law practices, and his worsened health are all simply reasons for the decline in income. If his income has not actually decreased substantially, these potential causes for a decrease in income become irrelevant. The 2004 alimony order recognizes that defendant's income has normally fluctuated. Thus, as to these pivotal findings, we note that

> a court should proceed with caution in determining whether to modify a decree for alimony on the ground of a change in the financial circumstances of the parties.
>
> Where the change in the circumstances is one that the trial court expected and probably made allowances for when entering the original decree, the change is not a ground for a modification of the decree. In accord with the view it is said that minor fluctuations in income are a common occurrence and the likelihood that they would occur must have been considered by the court when it entered a decree for alimony.
>
> The fact that the husband's salary or income has been reduced substantially does not automatically entitle him to a reduction in alimony or maintenance. If the husband is able to make the payments as originally ordered notwithstanding the reduction in his income, and the other facts of the case make it proper to continue the payments, the court may refuse to modify the decree.

Britt v. Britt, 49 N.C. App. 463, 472, 271 S.E.2d 921, 927 (1980) (citations and quotation marks omitted).

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2. The trial court labeled two findings as 11, so we will refer to these findings as "11a" and "11b."

The 2004 alimony order, based on the parties' mediated settlement agreement, contained detailed findings regarding defendant's employment as an attorney at the law firm he co-owned as well as his adjusted gross income for the years of 1998 to 2003 both from his law firm as well as from Lillington Rentals:

1998 – $304,375

1999 – $561,383

2000 – $247,290

2001 – $551,240

2002 – $382,270

2003 – $231,816

At the modification hearing, the evidence showed that defendant is still employed at the same firm, which still has the same number of attorneys, a "similar number" of non-lawyer emplyees, and the same areas of practice, with the addition of worker's compensation. He also still receives income from Lillington Rentals, a separate business entity owned by defendant and his law partner which owns the furniture and office equipment in the law office and receives rental income from the law firm. According to defendant's income tax returns, his net income (his adjusted gross income plus the yearly $144,000 in tax-deductible alimony) for the years of 2004 to 2011 was as follows:

2004 - $1,697,417

2005 - $659,867

2006 – $577,650

2007 - $797,889

2008 - $311,788[3]

2009 - $456,393

3. There is a discrepancy between the parties' 2008 tax returns as to the alimony paid. Plaintiff claimed that she received $144,000 in alimony, the normal amount, but defendant claimed to have paid $156,000. The trial court made no findings regarding how much defendant had paid in 2008. Thus we have based the 2008 income upon only the $144,000 per year required by the consent alimony order, but it would make no difference to our ruling if defendant actually did pay $156,000, and defendant has not raised any issue of overpayment on appeal.

2010 - $216,205

2011 - $224,769

The pattern of earnings for these years is quite similar to years prior to the alimony order, and the income is reduced only in the two most recent years. Overall, defendant's average annual income over the six years prior to the alimony order was $379,729, while defendant's average annual income based upon the years since entry of the order was $617,747. Even excluding the income for 2004, which was unusually high due to one case, defendant's average annual income since 2005 was $463,509, or $83,780 *more* than his average income during the time period prior to alimony order based upon the amounts as stated in the order.

As noted by *Britt*, income variations as shown by defendant are "a common occurrence" and the fact that they would occur was more than a "likelihood," as the alimony order shows that the income variations were "considered by the court when it entered a decree for alimony." *Britt*, 49 N.C. App. at 472, 271 S.E.2d at 927. The trial court's determination that defendant's income has not substantially decreased is supported by the evidence, despite the fact that his income for the two most recent years is lower, and is not an abuse of discretion.

Findings 11a and 11b are also supported by the evidence. The evidence showed that defendant has not only continued meeting his financial obligations but also is making substantial discretionary purchases and investments. Despite any changes in income, defendant has continued making monthly alimony payments in the full amount and generally on time. In the years since 2004, defendant and his current wife have gone on several vacations to Aruba, Hilton Head, and Charleston. In 2007, defendant spent $150,000 to build a three-car garage and purchased a boat for $34,000. He spent roughly $50,000 to repair the dock at his beach home in 2011 and was able to make the maximum contribution to his 401K over several years. He was also able to pay off his unsecured debt that existed at the time of the prior consent order with proceeds from a "land deal." Thus, even if defendant's expenses have increased, as the trial court found, the evidence also shows that these increases were voluntary. Each of the challenged findings is supported by the evidence.

IV. Failure to make more detailed findings of fact

Although defendant frames his next arguments as a challenge to the trial court's conclusion of law that defendant failed to demonstrate a substantial change of circumstances since the 2004 alimony order, his

arguments actually continue his contentions regarding the adequacy of the trial court's findings of fact. First, defendant argues that the trial court erred because it "fail[ed] to consider [or find sufficient facts regarding] the substantial decreases in [his] income, . . . the changed nature of his law practice, [and] the decreased income of this practice resulting from the recession . . . ." (original in all caps). As to these facts, defendant does not claim that there was not sufficient evidence to support the trial court's findings, but that the trial court "failed to consider" certain evidence which he contends must be addressed in the findings of fact.

To a large extent, defendant argues that the trial court's findings were not based upon his evidence or his interpretation of the evidence, and in this regard, his arguments fail, as this Court cannot substitute its judgment for that of the trial court in weighing the evidence. "When the trial judge is authorized to find the facts, his findings, if supported by competent evidence, will not be disturbed on appeal despite the existence of evidence which would sustain contrary findings." *Beall v. Beall*, 290 N.C. 669, 673, 228 S.E.2d 407, 409 (1976) (citations omitted).

Yet defendant also correctly notes that the trial court's findings must address all of the factors relevant to determination of the amount of alimony.

> As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay. . . . To determine whether a change of circumstances under G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under G.S. 50-16.5. That statute requires consideration of the estates, earnings, earning capacity, condition, accustomed standard of living of the parties and other facts of the particular case in setting the amount of alimony.

Rowe v. Rowe, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982).

In this instance, as defendant is seeking to modify the 2004 alimony order, the order must address any factors relevant to changes in circumstances since 2004 which are raised by the evidence. "The same factors used in making the initial alimony award should be used by the trial court when hearing a motion for modification. The overriding principle in cases determining the correctness of alimony is fairness to all parties." *Pierce v. Pierce*, 188 N.C. App. 488, 489-90, 655 S.E.2d 863, 864 (2008) (citations, quotations marks, and brackets omitted).

Although N.C. Gen. Stat. § 50-16.3A(b) sets forth 16 factors to be considered in the establishment of alimony, there is no need for the trial court to address each of these upon a motion for modification; the trial court needs to address only those that are relevant to the motion to modify. Defendant's motion to modify alleges three reasons for modification: (1) a reduction in income based upon the "recession" in the United States economy and increased competition from other law firms; (2) defendant's increase in age from 53 to 61, as a "contributing factor" in diminishing his earning capacity; and (3) the fact that plaintiff's need for alimony should be reduced unless she has been "financially imprudent and reckless" in her use of assets received based upon the parties' 2004 equitable distribution judgment, which was entered on the same date as the alimony order. Thus, the relevant statutory factors raised by defendant's motion to modify[4] in this case are:

> (2) The relative earnings and earning capacities of the spouses;
>
> (3) The ages and the physical, mental, and emotional conditions of the spouses;
>
> (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
>
> . . . .
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> . . . .
>
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.

N.C. Gen. Stat. § 50-16.3A (b) (2011).

In addressing these factors, the trial court need not recite all of the evidentiary facts but must find

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4. We do not mean to imply that defendant's motion actually cited any particular statutory provisions, but the factual allegations of the motion seem to fit under these provisions.

those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached.

. . . .

There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.

. . . .

Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.

In summary, while Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

. . . .

The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment-and the legal conclusions which underlie it-represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

Quick v. Quick, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657-58 (1982) (citations, quotation marks, and ellipses omitted).

Defendant faults the trial court's order for its brevity, stating:

> In the present case, the Court has entered a bare bones three (3) page order, with insufficient evidence to support the findings of fact and conclusions of law, to support its denial of Mr. Kelly's Motion to Modify Alimony. The Court, after hearing three days of testimony involving valuable assets, the finances of a law firm, staggering debt and reviewing extensive financial records made a mere eighteen findings of fact, only twelve of which related to the evidence offered at trial.

But brevity is not necessarily a bad thing; Cicero said that "[B]revity is the best recommendation of speech, not only in that of a senator, but too in that of an orator," or, we might add, in many instances, a judge. Marcus Tulius Cicero, *On the Laws: Book III*, *in* The Treatises of M.T. Cicero 479 (C.D. Yonge trans., 1878). The trial court found the ultimate facts which were raised by the defendant's motion to modify, and where the evidence supports these findings, that is sufficient. "The court is not required to find all facts supported by the evidence, but only sufficient material facts to support the judgment." *Medlin v. Medlin*, 64 N.C. App. 600, 603, 307 S.E.2d 591, 593 (1983) (citations omitted).

Defendant presented evidence that his firm experienced some changes since the original order for alimony, but detailed findings about those changes would be needed only to the extent that the changes have substantially reduced defendant's income and therefore his ability to pay.

Defendant argues that his practice, particularly in the areas of personal injury and real estate, has suffered due to changes in the United States' economy in general and to the increases in competition. Although we could probably take judicial notice that the United States economy in general has suffered in many ways since 2004, the actual numbers presented to the trial court in the income tax returns of the defendant and his law firm support the trial court's finding that defendant's income has fluctuated but not decreased substantially. Defendant may disagree with the trial court's finding that any decreases in the two most recent years in his income have not been "substantial" and that his business has not changed in a material way, but the trial court clearly considered the evidence, weighed its credibility, and made appropriate findings based on the evidence. This Court cannot substitute its judgment for that of the trial court in this situation.

Defendant next argues that "the trial court erred in its failure to identify" the nature and scope of the "other financial benefits" he receives from his law firm. Again, defendant does not claim that there was no evidence of "other financial benefits"—he simply argues that the trial court must list them. Specifically, the trial court made the following ultimate finding of fact:

> 14. That Defendant has financial benefits through his law firm partnership that might not be considered taxable income but affect his ability to maintain his standard of living.

The evidence as to the "other financial benefits" is quite simple. Defendant's own testimony was that his law firm purchased his 2009 Lexus and 2009 Suburban vehicles, pays for his car insurance, his cell phone, his car maintenance, and most of his gasoline expense, among other things. This evidence alone supports finding of fact 14 and there was no need for the trial court to list these benefits in detail.

Defendant also argues that the trial court erred because it "fail[ed] to consider [or find sufficient facts regarding] . . . the depletion of his separate estate . . . ." (original in all caps). However, the trial court explicitly addressed this alleged depletion and found it to be "voluntary":

> 13. Since the entry of the Alimony order Defendant has been able to add contributions to a 401(k) plan in his name in the amount of approximately $104,000.00, with $24,000 in the last year alone.
>
> . . .
>
> 15. Defendant was able to make $21,000 in improvements to his beach house in the past year, in addition [to] buying an aluminum boat and trailer with a cost of over $12,000.
>
> 16. Defendant was able to make a loan to his son in 2011 of close to $31,000.

Although defendant argues that his assets were more depleted than the trial court found and that many of his expenses were not voluntarily incurred, the trial court properly weighed the evidence and made its findings. The fact that the trial court did not agree with defendant's contentions is not a basis for reversal. Therefore, defendant's argument that the trial court failed to consider the depletion of his estate is without merit.

Defendant further argues that the trial court erred "in its failure to detail what [his] assets and debts are." (original in all-caps). The trial

court found that defendant's assets and debts "are similar to the assets and debts that existed at the time of the alimony order." Of course, to understand what the trial court found the defendant's assets and debts to be "similar to," we must know what the assets and debts in 2004 were. In this case, unlike many in which the prior order is a consent order, the alimony order and record do contain detailed information as to the parties' assets and debts in 2004, and defendant does not contend that the trial court must first make detailed findings as to the state of affairs in 2004 before determining if there has been a substantial change.

Defendant also does not claim that the finding that his assets and debts "are similar" to those in 2004 is not supported by the evidence, which does include vast amounts of detailed information as to his assets and debts in both 2004 and at the time of the hearing; he simply faults the trial court for not specifically listing his assets and debts in the order. We have reviewed the evidence as to defendant's assets and debts, and it supports the trial court's finding that his assets and debts are "similar" to those in 2004, and we shall not list them in detail in this opinion either. The law does not require a "recitation of the evidentiary and subsidiary facts" underlying a trial court's findings. *Moore*, 160 N.C. App. at 571, 587 S.E.2d at 75.

Given the detailed previous order, a more detailed account of defendant's debts and assets was not "determinative" or "essential" to the trial court's conclusion that no substantial change had occurred. *See Williamson v. Williamson*, 140 N.C. App. 362, 363-64, 536 S.E.2d 337, 338 (2000). The findings as discussed above adequately addressed the issues presented and permit meaningful appellate review.

Defendant next contends that the trial court "fail[ed] to consider" or find sufficient facts regarding his "increased age and declining health." (original in all caps). The 2004 alimony order included a finding that defendant had "high blood pressure, and inherited kidney problems." Defendant contends that he now also suffers from "depression, sleep withdrawal, [and] type II diabetes." He also correctly points out that he is eight years older than he was when the original alimony award was entered.[5]

The trial court found that Defendant is working full time. Defendant did not present evidence as to how his health problems affected his ability to work or his ability to pay the required alimony. Indeed, although

5. We note that plaintiff is also 8 years older, and that the trial court found that she was 71 at the time of the modification order.

defendant mentioned his health problems at the hearing, he did not relate his health to a reduction in his income. He acknowledged that he was already under treatment for high blood pressure and his kidney disease in 2004, and described his kidney medication as "Allopurinol for kidney stones. It's not a big deal." He acknowledged that he had had "depression issues for 20 years, 30 years, for a long time" but that he had not taken medication until more recently. But as noted above, the relevance of defendant's medical condition was his claim that it was contributing to his reduction in income; the trial court found that his income was not substantially reduced. It is true that worsening health may result in a decline in income, but it is not automatic. The defendant's income numbers, as noted above, support the trial court's findings that his income has not substantially decreased, and thus the trial court did not err in not making detailed findings as to defendant's health.

With regard to plaintiff's financial need, defendant argues that the trial court erred because it "fail[ed] to consider [or find sufficient facts regarding] . . . plaintiff's squandering of $1,000,000" and that it "fail[ed] to distinguish between reasonable necessary expenses . . . and frivolous debt incurred by plaintiff . . . ." (original in all caps). Defendant's argument focuses on his claim that plaintiff has an "exhorbitant, irrational and wasteful lifestyle" and is not so much that plaintiff's expenses have *actually* decreased since 2004, but that they *should have* decreased, if she had managed her financial affairs since 2004 in a way that he would consider appropriate and responsible. After examining the evidence, the trial court found that plaintiff's needs have "not decreased substantially," and also found that her "expenses have . . . increased." (emphasis added).

These findings are supported by the evidence and they show that the trial court properly considered plaintiff's expenses and financial needs and rejected defendant's contention that they had decreased substantially. Actually, plaintiff's financial affidavit[6] in 2004 indicated "total monthly expenditures" of $24,415.62, while her 2012 affidavit indicated "total monthly living expenses" of $25,648.43, so the evidence did show that plaintiff's expenses had increased, but not very much.

As defendant's ability to pay had not changed and the trial court was not considering an increase in defendant's alimony obligation based upon its finding that plaintiff's expenses have actually increased, there was no need for the trial court to make more detailed findings as to why plaintiff's expenses had failed to decrease. Defendant has not cited,

6. The 2004 alimony order incorporated plaintiff's affidavit by reference, although neither party admitted "the reasonableness of the other party's expenses."

nor have we found, any law that would affirmatively require plaintiff to reduce her living expenses over time, even if in 2004 she might have had the potential to do so by foregoing certain luxuries and making profitable investments. The evidence showed that her expenses had not decreased and the trial court did not abuse its discretion by making this finding.

Defendant also argues that the trial court erred "in its failure to detail what [plaintiff's] assets and debts are." (original in all caps). For the same reasons that a recitation of defendant's assets and debts was not necessary, a recitation of plaintiff's assets and debts also was not necessary. *See Moore*, 160 N.C. App. at 571, 587 S.E.2d at 75.

The trial court's findings address the relevant ultimate facts raised by defendant's motion to modify. The findings show that the trial court considered all relevant factors as to the alleged changes in circumstances since the 2004 alimony order. Therefore, defendant's arguments to the contrary are unavailing.

V. Conclusion of Law

Defendant argues throughout his brief that the trial court erred in concluding that there has been no substantial change of circumstances to warrant a modification of alimony.

> [I]t is apparent that not any change of circumstances will be sufficient to order modification of an alimony award; rather, the phrase is used as a term of art to mean a *substantial* change in conditions, upon which the moving party bears the burden of proving that the present award is either inadequate or unduly burdensome.

Britt, 49 N.C. App. at 470, 271 S.E.2d at 926 (citations omitted).

A change in circumstances sufficient to modify alimony "must bear upon the financial needs of the dependent spouse or the ability of the supporting spouse to pay, rather than post-marital conduct of either party." *Id.* at 470-71, 271 S.E.2d at 926 (citations and quotation marks omitted). In considering whether alimony should be modified, "[t]he present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change." *Id.* at 474, 271 S.E.2d at 928 (citations and quotation marks omitted).

Here, defendant failed to carry his burden of showing that relevant circumstances have substantially changed since the initial alimony award. "The[] facts [as found by the trial court] reveal that [defendant]

has both money and property, and, taken as a whole, do not support [a] conclusion that the alimony payments should be reduced." *Id.* at 471, 271 S.E.2d at 927. Additionally, the trial court found that plaintiff's needs have not substantially decreased. The evidence supports these findings and these findings support the trial court's conclusion that there has been no substantial change of circumstances. Further, the findings show that the trial court properly compared the present overall circumstances of the parties with the circumstances at the time of the initial alimony award. Therefore, we conclude that the trial court did not abuse its discretion is declining to modify the alimony award and affirm the order denying defendant's motion to modify.

VI. Conclusion

The trial court's findings are supported by the evidence. Those findings support the trial court's conclusion that defendant has failed to show that circumstances have substantially changed since the 2004 alimony order. Therefore, we affirm the trial court's order denying defendant's motion to modify alimony.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

OUTDOOR LIGHTING PERSPECTIVES FRANCHISING, INC., Plaintiff
v.
PATRICK HARDERS, OUTDOOR LIGHTING PERSPECTIVES OF NORTHERN VIRGINIA, INC., AND ENLIGHTENED LIGHTING, LLC, Defendants

No. COA12-1204

Filed 6 August 2013

Franchise—non-compete agreement—preliminary injunction

The trial court did not err by denying plaintiff's request for a preliminary injunction against defendants from having any involvement in an outdoor lighting business. Considering elements of the tests utilized in both the employee-employer and business sale context to determine the likelihood that plaintiff would prevail in the present litigation, the trial court correctly determined that plaintiff was unlikely to prevail in its attempt to obtain enforcement of the non-competition agreement contained in the franchise agreement.

Appeal by plaintiff from order entered 14 May 2012 by Judge James L. Gale in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 February 2013.

Gray, Plant, Mooty, Mooty & Bennett, P.A., by Michael R. Gray; Parker Poe Adams & Bernstein, LLP, by William L. Esser, IV, and Katie M. Iams, for Plaintiff.

Hagan Davis Mangum Barrett & Langley, PLLC, by Jason B. Buckland and D. Beth Langley, for Defendants.

ERVIN, Judge.

Plaintiff Outdoor Lighting Perspectives Franchising, Inc., appeals from an order entered by the trial court denying its request for the issuance of a preliminary injunction against Defendants Patrick Harders, Outdoor Lighting Perspectives of Northern Virginia, Inc. (OLP-NVA), and Enlightened Lighting, LLC, prohibiting Mr. Harders and Enlightened Lighting from having any involvement in an outdoor lighting business. On appeal, Plaintiff argues that the trial court erred by failing to enforce the non-competition agreement between itself, on the one hand, and Mr. Harders and OLP-NVA, on the other, in its entirety on the grounds that none of the covenant's provisions were overly broad or otherwise unenforceable. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

A. Substantive Facts

1. Plaintiff's Evidence

Plaintiff is a corporation which enters into franchise agreements authorizing franchisees to engage in the design, construction, and installation of residential and commercial outdoor lighting products. Mr. Harders began operating an OLP franchise, OLP-NVA, between July and October of 2001. Pursuant to the underlying franchise agreement, Mr. Harders had the right to operate an OLP franchise in an exclusive territory consisting of Arlington, Fairfax, Prince William, and Loudoun Counties in Virginia using the trademarked name of "Outdoor Lighting Perspectives®" for a five-year term. According to the franchise agreement, Mr. Harders and OLP-NVA were required to safeguard confidential OLP information and trade secrets during the term of the agreement.

The franchise agreement also required Mr. Harders and OLP-NVA to return all franchise materials to OLP upon the termination of the contract or the expiration of the franchise term and prohibited Mr. Harders and OLP-NVA from operating another outdoor lighting business within a specified area for a period of two years beginning on the date upon which the franchise agreement terminated or expired.

In the course of his work as an OLP franchisee, Mr. Harders received training and support services from OLP in the form of attendance at workshops, seminars, and conventions. In addition, Mr. Harders was provided with a manual that contained proprietary information deemed necessary to permit the proper operation of an OLP franchise. A number of the manuals given to Mr. Harders and OLP-NVA contained information concerning standardized "marketing, sales, operations, products and services." Although techniques concerning the installation of outdoor lighting are "relatively universal," the information that Plaintiff provided to Mr. Harders and OLP-NVA addressed all facets of the outdoor lighting business, including "organization, marketing and promotion, sales techniques, design techniques, pricing and estimating, maintenance, customer service, accounting, billing and collections." Finally, Plaintiff referred approximately nineteen projects to Mr. Harders and OLP-NVA during the term of the franchise agreement, which projects generated around $60,000 in income. After Mr. Harders and OLP-NVA operated this OLP franchise consistently with the terms of the franchise agreement throughout the initial five-year term, the parties renewed their agreement for a subsequent five-year term on 23 October 2006.

In 2008, Plaintiff was purchased by Outdoor Living Brands (OLB), an entity which owned two subsidiaries: Mosquito Squad® and Archadeck®. OLB had not been previously involved in the outdoor lighting business. During the acquisition process, OLB surveyed OLP franchise owners for the purpose of inquiring into their level of satisfaction with the franchise system. Mr. Harders offered exclusively positive comments in the course of responding to this survey.

In October 2011, Plaintiff contacted Mr. Harders for the purpose of informing him of the steps that needed to be taken in order to renew the franchise agreement. At that time, Mr. Harders informed Plaintiff that he had received a phone call from a customer informing him that the customer had been contacted by an individual representing himself to be the new owner of OLP-NVA who claimed to have been going through Mr. Harders' database for the purpose of introducing himself to all of Mr. Harders' existing customers. After receiving that information, Plaintiff assured Mr. Harders that the franchise had not been awarded to anyone

else and determined that no one had had access to Mr. Harders' database without first having received permission to do so from him. Even so, Mr. Harders and OLP-NVA allowed their franchise agreement with Plaintiff to expire on 23 October 2011, specifically informing Plaintiff two days later that they no longer had any interest in remaining affiliated with OLP.

In January of 2012, Corey Schroeder, Plaintiff's Vice President and Chief Financial Officer, read an article in *Loudoun Magazine* which indicated that Mr. Harders was operating an outdoor lighting business under the name of "Enlightened Landscape Lighting." A number of projects which Mr. Harders had completed while operating as an OLP franchise were displayed on the new business' website. As a result, counsel for Plaintiff sent a letter to Defendants' attorney dated 18 January 2012 stating that Plaintiff was aware that Mr. Harders was operating an outdoor lighting business within his former territory and giving Mr. Harders ten days to voluntarily comply with the post-expiration restrictions contained in the franchise agreement. In addition, Plaintiff requested that Mr. Harders cease attempting to supply other OLP franchisees with fixtures from China because of quality issues associated with the use of such fixtures and because Mr. Harders was not an approved supplier of such products. Plaintiff did not, however, attempt to totally exclude Mr. Harders from participating in the interior lighting business. Mr. Harders, however, refused to cease operating his outdoor lighting business and to deliver allegedly proprietary information in his possession, including his customer list, to Plaintiff.[1]

2. Defendants' Evidence

Mr. Harders, who had purchased an OLP franchise in 2001, served as president of OLP-NVA. As part of the process of operating an OLP franchise, Mr. Harders entered into a franchise agreement that was drafted by OLP on or about 23 October 2006. During the time in which he operated as an OLP franchisee, both OLP and OLP-NVA were in the business of providing low-voltage outdoor landscape lighting. However, neither entity was involved in providing "mercury vapor (moonlighting), high voltage outdoor landscape installations, and exterior attached home

1. According to Plaintiff, a number of other OLP franchisees were likely to surrender their franchises and begin operating outdoor lighting businesses in competition with Plaintiff in the event that the provisions of the franchise agreement were not enforced against Defendants. At least two potential purchasers of OLP franchises refused to acquire a franchise in the territory which had been assigned to Mr. Harder unless he was enjoined from continuing to operate his business due to the goodwill that he had created with customers while serving the territory as an OLP franchisee.

lighting using 120 volt fixtures and wiring (security lighting, entranceway lighting, outdoor lampposts)."

During the time in which Mr. Harders operated as an OLP franchisee, entities holding OLP franchises encountered numerous problems with OLP suppliers. Since OLB purchased Plaintiff in 2008, numerous franchises have closed and the OLP business model has been devalued. Among other things, Plaintiff failed to provide its franchisees with adequate support, feedback, and product innovation. Although the information provided to Mr. Harders and OLP-NVA by OLP was alleged to be proprietary, much of it was publicly available and common knowledge in the industry. Similarly, the training that Mr. Harders had received from Plaintiff was readily available without charge in many national home improvement stores.

In spite of the apparent decline in the value of an OLP franchise, Mr. Harders engaged in discussions aimed at the renewal of his franchise agreement in the summer of 2011. Although Mr. Harders had scheduled a meeting with OLP representatives to discuss the possible renewal of his franchise on 26 October 2011, an unidentified individual called at least one of Mr. Harders' customers on or about 20 October 2011 and asked about the status of the customer's outdoor lighting. During the ensuing conversation, the caller told the customer that Mr. Harders was no longer associated with OLP, that Mr. Harders no longer owned OLP-NVA, and that OLP-NVA was now under new ownership. Mr. Harders deemed these actions to constitute a premature termination of his franchise agreement.

At some unspecified point, Mr. Harders began operating Enlightened Lighting, in which he used training obtained from sources other than OLP to perform advanced installations that the training which he had received from OLP did not qualify him to perform. The physical address and telephone number for Enlightened Lighting differed from that of OLP-NVA, and Mr. Harders refrained from "actively solicit[ing]" former customers. Although the website that Mr. Harders created for Enlightened Lighting contained photographs of completed jobs, all of the projects depicted in these photographs had been finished after the expiration of the franchise agreement between Plaintiff and Mr. Harders. In addition, despite the fact that he admitted having retained certain manuals, records, and other information from OLP, Mr. Harders claimed to have kept nothing other than the documents needed to defend himself and his businesses in this action.

After Enlightened Lighting began operating, Plaintiff informed Mr. Harders that it would seek to enforce the post-expiration provisions of

the franchise agreement. Among other things, OLP specifically told Mr. Harders that serving as a wholesale supplier of outdoor lights would constitute a violation of the agreement. In March 2011, OLB informed Mr. Harders that, in the event that he opened a business installing interior, as compared to exterior, lights, OLP would invoke the provisions of the franchise agreement in an effort to prevent him from operating such a business.

B. Procedural History

On 5 March 2012, Plaintiff filed a complaint against Defendants seeking damages stemming from Defendants' failure to pay royalties and other fees, misappropriation of good will, and engaging in a civil conspiracy; injunctive relief stemming from Defendants' alleged noncompliance with the post-expiration restrictions contained in the franchise agreement; and rectification of Mr. Harders' failure to return certain manuals, customer lists and other items following the termination of the franchise agreement. On 6 March 2012, Plaintiff filed a motion seeking the issuance of a preliminary injunction requiring Plaintiff to return specific proprietary information, to cease misappropriating Plaintiff's good will, and, for a period of two years, to refrain from "engaging either directly or indirectly in any activity involving the marketing, selling, repairing, remodeling, enhancing, constructing, installing, or maintaining residential or commercial outdoor lighting products and services within the Defendants' former territory consisting of the counties of Arlington, Fairfax, Prince William, and Loudoun in the Commonwealth of Virginia or within the territory of any other OLP franchisee." In the course of subsequent proceedings, Mr. Schroeder executed an affidavit notifying Defendants that Plaintiff was exercising its contractual right to reduce the geographical scope of the post-expiration restrictions contained in the franchise agreement by eliminating the 100-mile zone around the territory in which Mr. Harders and OLP-NVA had operated as an OLP franchisee from the area in which Defendants should be prohibited from participating in the outdoor lighting business.

Although Plaintiff's motion for the issuance of a preliminary injunction was originally scheduled to be heard on 3 April 2012, Defendants filed a motion seeking to have this case designated as a mandatory complex business case pursuant to N.C. Gen. Stat. § 7A-45.4 on 27 March 2012. On 28 March 2012, Defendants' motion was granted. Subsequently, this case was assigned to the trial court.

On 12 April 2012, the trial court held a hearing for the purpose of considering the issues raised by Plaintiff's motion for the issuance of a

preliminary injunction. On 13 April 2012, Defendants filed an answer in which they denied the material allegations of Plaintiff's complaint and requested that the post-expiration restrictions in the franchise agreement be deemed invalid. On 14 May 2012, the trial court entered an order which prohibited Defendants from using, and requiring the return of, certain allegedly proprietary information, including customer-related information, manuals, and similar protected items. However, the trial court denied Plaintiff's request for the issuance of a preliminary injunction prohibiting the operation of Enlightened Lighting or any other outdoor lighting business. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

"A preliminary injunction is interlocutory in nature. As a result, issuance of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order 'escape appellate review before final judgment.' " *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (quoting *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913 (1980)) (citations omitted). "In reviewing the denial of a [request for the issuance of a] preliminary injunction, an appellate court is not bound by the trial court's findings of fact, but may weigh the evidence anew and enter its own findings of fact and conclusions of law; our review is *de novo*." *Kennedy v. Kennedy*, 160 N.C. App. 1, 8, 584 S.E.2d 328, 333, *appeal dismissed*, 357 N.C. 658, 590 S.E.2d 267 (2003). A reviewing court should uphold the issuance of a preliminary injunction "(1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)).

B. Likelihood of Success

[1] As a result of the fact that Defendants have not contended that Plaintiff would not be irreparably injured in the event that the issuance of the requested preliminary injunction were to be denied and the fact that Plaintiff would, in our opinion, be likely to establish the required irreparable injury if no such injunction were issued, we turn directly to

the issue of the likelihood that Plaintiff will succeed on the merits of its underlying claim. However, before explicitly discussing the enforceability of the relevant contractual provision, we must first address the level of scrutiny to which these contractual provisions should be subjected during the course of our analysis, a topic which the parties debated at length in their well-written and informative briefs.

1. Level of Scrutiny

In its brief, Plaintiff emphasizes the fact that the trial court referenced a number of cases arising from litigation over the validity of restrictions contained in an employment contract instead of relying exclusively on cases arising from the sale of a business.[2] In seeking the reversal of the trial court's order, Plaintiff urges us to adopt the standard generally utilized in cases arising from the sale of a business in evaluating the correctness of the trial court's order and contends that, in the event that we were to utilize the approach which it deems appropriate, the relevant contractual provisions would be deemed clearly enforceable. We do not find Plaintiff's argument persuasive.

According to well-established North Carolina law, non-competition agreements contained in an employment contract are "more closely scrutinized than" those contained in a contract for the sale of a business. *Keith v. Day*, 81 N.C. App. 185, 193, 343 S.E.2d 562, 567 (1986), *disc. review improvidently granted*, 320 N.C. 629, 359 S.E.2d 466 (1987). As the Supreme Court stated over half a century ago:

> A workman "who has nothing but his labor to sell and is in urgent need of selling that" may readily accede to an unreasonable restriction at the time of his employment without taking proper thought of the morrow, but a professional man who is the product of modern university or college education is supposed to have in his training an asset which should enable him adequately to guard his own interest, especially when dealing with an associate on equal terms.

Beam v. Rutledge, 217 N.C. 670, 673-74, 9 S.E.2d 476, 478 (1940). As a result, on the one hand, a non-competition agreement contained in an employment contract is enforceable if it is "(1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a legitimate

2. As an aside, we note that the trial court stated that the agreement at issue in this case should be invalidated under any of the standards presented for its consideration.

business interest of the employer." *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 122-23, 392 S.E.2d 446, 448, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 239 (1990) (citing *A.E.P. Indus.*, 308 N.C. at 402-03, 302 S.E.2d at 760). "The territory embraced by the restrictive covenant shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer." *Clyde Rudd & Assocs., Inc. v. Taylor*, 29 N.C. App. 679, 684, 225 S.E.2d 602, 605 (citing *Harwell Enterprises, Inc. v. Heim*, 276 N.C. 475, 478-79, 173 S.E.2d 316, 319 (1970)), *disc. review denied*, 290 N.C. 659, 228 S.E.2d 451 (1976). On the other hand:

> when one sells a trade or business and, as an incident of the sale, covenants not to engage in the same business in competition with the purchaser, the covenant is valid and enforceable (1) if it is reasonably necessary to protect the legitimate interest of the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest of the public.

Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 662-63, 158 S.E.2d 840, 843 (1968).

A number of prior decisions in this jurisdiction dealing with the enforceability of agreements in which one person agrees to refrain from competing with another have involved situations which do not fit neatly into either the employer-employee category or the business sale category. In such situations, the North Carolina appellate courts have engaged in a detailed analysis of the reasonableness of the restrictions to which the plaintiff seeks to have the defendant subjected rather than attempting to determine on which side of the line separating the employer-employee context from the sale of a business context the case in question falls. As a result, although Plaintiff has invited us to adopt a bright-line rule subjecting post-expiration non-competition agreements contained in a franchise agreement to the same level of scrutiny as is typically applied in cases arising from the sale of a business, we are not willing to accept Plaintiff's invitation. Instead, we believe that the present case involves a hybrid situation which does not fit neatly within either of the categories posited in Plaintiff's brief. *E.g. Beam*, 217 N.C. at, 671, 9 S.E.2d at 477 (analyzing issues arising from the dissolution of a professional partnership); *Keith*, 81 N.C. App. at 186, 343 S.E.2d at 563 (analyzing issues arising from a venture capitalist's purchase of a franchise); *Starkings Court Reporting Servs., Inc. v. Collins*, 67 N.C. App. 540, 541, 313 S.E.2d 614, 615 (1984) (analyzing issues arising from a restrictive covenant entered into by an independent contractor). In arriving at this conclusion, we note that the franchisor-franchisee situation differs from both the

employer-employee and the sale of business contexts. On the one hand, a franchisee who ends his relationship with the franchisor is, more likely than not, an individual possessing a skill set that makes him capable of earning a livelihood in a variety of different businesses. For that reason, such a person is not as likely to be as dependent upon his ability to perform a specific type of work in a specific area as is the case with the typical employee. On the other hand, unlike the situation which typically arises from the sale of an established business, in which the seller has spent years building up good will in a particular area, a franchisor is likely to receive the benefit of at least some of the good will which was built up by the franchisee and has the ability to sell at least some portion of that accumulated good will to a new franchisee. These practical differences between the typical employer-employee arrangement and the typical buyer-seller arrangement preclude us from concluding that the rules that typically govern either arrangement should be applied with unbending rigidity in this situation.

As a result, in light of this determination, we conclude that elements of the tests utilized in both the employee-employer and the business sale context are relevant in analyzing the likelihood that Plaintiff will prevail in the present litigation. Among the factors that have been deemed relevant in evaluating the validity of non-competition agreements entered into in the employment context are:

> (1) the area, or scope, of the restriction, (2) the area assigned to employee, (3) the area in which the employee actually worked or was subject to work, (4) the area in which the employer operated, (5) the nature of the business involved, and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Clyde Rudd & Assocs., Inc., 29 N.C. at 684, 225 S.E.2d at 605. After considering these factors, this Court invalidated a contractual provision that, "rather than attempting to prevent [the] plaintiff from competing for actuarial business, . . . appear[ed] to prevent plaintiff from working as a custodian for any 'entity' which provide[d] 'actuarial services.' " *Hartman v. W.H. Odell & Assocs., Inc.*, 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). Although the specific job description of the person sought to be restrained has been deemed less relevant when courts analyze a restriction placed on a business owner, we believe that the extent to which a particular contractual provision unreasonably impairs a former franchisee's ability to work in a related field or particular industry is relevant

to the reasonableness of a non-competition restriction arising from the termination of a franchise agreement.

Similarly, certain factors typically deemed relevant during the analysis of issues arising in the business sale context, while having little relevance in the employment context, have obvious bearing upon the proper resolution of disputes between franchisors and franchisees. For example, in the business sale context, North Carolina courts have frequently focused on issues relating to a business' good will. *See*, *e.g.*, *Jewel Box Stores Corp.*, 272 N.C. at 663, 158 S.E.2d at 843 (recognizing that a business owner "acquires a property right in the good will of his patrons and that this property is not marketable 'unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit and for a reasonable length of time' ") (quoting *Kramer v. Old*, 119 N.C. 1, 8, 25 S.E. 813, 813 (1896)). Unlike a former employee, a former franchisee is, in fact, likely to share the good will associated with the formerly franchised business as a result of the fact that the good will in question will have been generated by a combination of the efforts of the franchisor and the franchisee. As a result of the varying relevance of the factors typically deemed of utmost importance in the employer-employee and business sale contexts in the franchisor-franchisee context, we conclude that the ultimate issue which we must decide in resolving such disputes among franchisors and franchisees is the extent to which the non-competition provision contained in the franchise agreement is no more restrictive than is necessary to protect the legitimate interests of the franchisor, with the relevant factors to be considered in the making of this determination to include the reasonableness of the duration of the restriction, the reasonableness of the geographic scope of the restriction, and the extent to which the restriction is otherwise necessary to protect the legitimate interests of the franchisor. We will proceed to analyze the reasonableness of the restrictions at issue in this case in light of these criteria, utilizing those decisions addressing the specific issues under consideration in each portion of our analysis that we deem relevant without regard to the factual context from which those decisions arose.

2. Reasonableness of Restrictions

a. Geographic Scope

In its brief, Plaintiff argues that the geographic scope of the restriction at issue in this case is reasonable. We do not, however, find this argument persuasive.

"The party who seeks the enforcement of the covenant not to compete has the burden of proving that the covenant is reasonable." *Hartman*, 117 N.C. App. at 311, 450 S.E.2d at 916. "The reasonableness of a noncompetition covenant is a matter of law for the court to decide." *Beasley v. Banks*, 90 N.C. App. 458, 460, 368 S.E.2d 885, 886 (1988). "To carry its burden[,] [the party seeking enforcement] must prove that the covenant not to compete is reasonable as to both time and territory." *Hartman*, 117 N.C. App. at 311, 450 S.E.2d at 916. The reasonableness of a geographic restriction contained in a non-competition agreement does not depend exclusively on the size of the area in question, *e.g. Harwell Enterprises, Inc.*, 276 N.C. at 481, 173 S.E.2d at 320 (holding that, "to a company actually engaged in nation-wide activities, nation-wide protection would appear to be reasonable and proper"); *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 523, 257 S.E.2d 109, 115 (1979) (stating that, while an employer had no legitimate interest in preventing an employee "from competing with other Manpower franchisees in other cities or states . . . the [national] franchisor[] may have a legitimate right to prohibit its franchisees from competing with it or its affiliates throughout the country"); instead, the reasonableness of a geographic restriction depends upon where the business' "customers are located and [whether] the geographic scope of the covenant is necessary to maintain those customer relationships." *Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917.

The contractual language at issue here incorporates two separate geographical restraints, with the first prohibiting Mr. Harders from operating an outdoor lighting business within a 100-mile buffer surrounding the area in which OLP-NVA previously operated and the second prohibiting Mr. Harders from operating a particular type of business within the territory assigned to any of Plaintiff's franchisees or affiliates. More specifically, as originally written, section 14.2(b) of the franchise agreement provided that:

> Upon termination or expiration of the Initial Term or any Interim Period, or the transfer, sale or assignment of this Agreement by the Franchisee, neither the Franchisee, the operating manager or the Franchisee's owners will have any direct or indirect interest (i.e. through a relative) as a disclosed or beneficial owner, investor, partner, director, officer, employee, consultant, representative or agent, for two (2) years, in any Competitive Business within 100 miles of the Territory or any other franchisee's Franchisor's or Affiliates [sic] territory.

In apparent recognition of the problematic nature of the 100 mile buffer provision, Plaintiff filed an affidavit executed by Mr. Schroeder on 6 March 2012 indicating that it would not seek to enforce that portion of the non-competition agreement. The revised language created by Plaintiff's affidavit prohibited Mr. Harders from operating "any Competitive Business within the Territory or any other franchisee's Franchisor's or Affiliates[']territory."[3]

As this Court has previously stated, "[a] restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in maintaining his customers." *Manpower of Guilford Cnty., Inc.*, 42 N.C. App. at 527 S.E.2d at 115. Although Plaintiff argued before the trial court that the non-competition provision which it sought to enforce in this case "includes all of the prescribed territory and the territory of other OLP franchises . . . [and] is necessary to protect the goodwill associated with OLP's trademarks and to prevent Defendants from trading on the goodwill generated in the OLP® Marks in this area over the last ten years," the actual language of the provision in question sweeps more broadly than Plaintiff's argument suggests. The relevant contractual language, even as modified in Mr. Schroeder's affidavit, prohibits Defendants from engaging in the outdoor lighting business within the territory assigned to any of Plaintiff's affiliates. According to the franchise agreement, the term "Affiliate" "means any person or entity that controls, is controlled by, or is in common control with, the Franchisor." As we have already noted, Plaintiff has two affiliates that are engaged in lines of business totally unrelated to outdoor lighting. Although Plaintiff argues that we should not consider the existence of these non-lighting affiliates in our analysis on the grounds that the relevant contractual language should not be read to preclude Defendants from competing with affiliates that did not exist at the time of the 2006 agreement, such as Mosquito Squad® and Archadeck®, the relevant contractual language does not provide any basis for inferring the existence of such a temporal limitation. Instead, the applicable contractual provision appears to be equally applicable to all of Plaintiff's affiliates and franchises. As a result, given that the non-competition provision contained in the

3. In view of the fact that section 14.5 of the franchise agreement gave Plaintiff "the right to reduce the scope of [section 14.2] without the Franchisee's consent, at any time or times, effective immediately upon notice to the Franchisee," it appears, given the language of the agreement, that Plaintiff had the right to modify the non-competition provision in this manner and exercised this authority in an appropriate manner. However, we need not determine the effectiveness of this exercise in private "blue penciling" given that the geographic scope of the remaining geographic restriction upon Defendants' activities remains unreasonably broad even if the buffer zone provision is excluded from our consideration.

franchise agreement prohibits Defendant from operating an outdoor lighting business in areas in which neither Plaintiff nor its franchisees or affiliates are engaged in similar activities, we conclude that such a restriction is excessively broad given that Plaintiff has no legitimate reason for precluding Defendants from competing with franchisees or affiliates of Plaintiff which are not engaged in the outdoor lighting business.

b. Legitimate Business Interests

Secondly, Plaintiff contends that the non-competition provision contained in the franchise agreement did not preclude Defendants from engaging in an overly broad range of activities. According to Plaintiff, the trial court reached a contrary conclusion because it scrutinized the non-competition provision contained in the franchise agreement using the test appropriately utilized in the employer-employee context rather than that appropriately utilized in the business sale context and would have deemed the provision enforceable had it used the proper analytical framework in the course of making its decision. More specifically, Plaintiff argues that the trial court refused to enforce the non-competition provision at issue here because it "felt constrained to apply an extreme level of hypothetical analysis" even though courts should refrain from "dissect[ing] the language of [a] noncompete agreement to determine whether it could conceive of an interpretation that was over-broad" in non-employment contexts and should, instead, "ascertain the intentions of the parties and make a determination [as to] whether the defendant's conduct violates the terms of the applicable noncompete provision." We do not find this argument persuasive.

As a preliminary matter, Plaintiff argues that courts should focus on the intent underlying the non-competition agreement in question and refrain from giving any consideration to the plain language in which those agreements are couched in the event that a consideration of the agreement's literal language would extend the reach of the non-competition provision beyond permissible bounds. In seeking to persuade us of the merits of this position, Plaintiff relies on two Supreme Court decisions, neither of which support the position which it espouses. Plaintiff's reliance upon *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 333 S.E.2d 299 (1985), is misplaced given that those "defendants [did] not argue that the covenant as written [was] so broad in scope as to either interfere with the interests of the public or that it [was] not reasonably necessary to protect the legitimate interest of the purchaser" and argued instead that "under any reasonable interpretation of the covenant, [Defendant]'s acts did not rise to the level of a breach." 314 N.C. at 226, 333 S.E.2d at 304. Similarly, we are not persuaded by Plaintiff's

reliance on the Supreme Court's decision in *Beam*, which arose from a situation in which the defendant worked for the plaintiff, an ear, eye, nose, and throat specialist, and had entered into a non-competition agreement which prevented the defendant from practicing medicine within 100 miles of the town in which they practiced after dissolution of the partnership. *Beam*, 217 N.C. at 671, 9 S.E.2d at 477. According to Plaintiff, because "[n]owhere in the opinion is there any suggestion that the phrase 'the practice of the profession of medicine' was overbroad," we should infer that the Court approved the provision prohibiting the defendant from practicing medicine despite the specialized nature of the plaintiff's practice. Although the Supreme Court did uphold the enforceability of the non-competition agreement at issue in *Beam*, it did not specifically approve the language in question. *Id.* at 673-74, 9 S.E.2d at 478. Instead, the arguments advanced in *Beam* revolved around public policy considerations instead of a detailed analysis of the specific language contained in the non-competition agreement. As a result, we do not believe that it would be appropriate for us to read either of the decisions upon which Plaintiff relies as an invitation to ignore the language of the non-competition agreement contained in the franchise agreement[4] and will, for that reason, focus our attention on the language which the non-competition provision of the franchise agreement utilizes to define the scope of the activities from which Defendants are prohibited from engaging.

According to the Supreme Court:

> [T]he goal of [contract] construction is to arrive at the intent of the parties when the [contract] was issued. Where a [contract] defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect.

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4. Assuming that Plaintiff has, however, read *Beam* correctly, the facts at issue in that case are significantly different from the facts which we have before us here. We are loath to treat a case involving a dispute between physicians as analogous to a dispute between entities competing in the outdoor lighting business given the fact that physicians have the authority to practice medicine, rather than simply engage in a particular specialty, and given that the relationship between a physician and his or her patients is very different than the relationship between an outdoor lighting business and its customers. As a result, we cannot read *Beam* as enunciating a general rule requiring courts to focus on what the parties claim to have intended rather than the language in which their agreement is couched.

Singleton v. Haywood Elec. Membership Corp., 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003) (quoting *Gaston Cnty. Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563 (2000)) (alterations in original). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract," so that, "[i]f the language is clear and only one reasonable interpretation exists, the courts must enforce the contract as written." *Hodgin v. Brighton*, 196 N.C. App. 126, 129, 674 S.E.2d 444, 446 (2009) (citations and quotation marks omitted).

Section 14.2(b) of the franchise agreement specifically prohibits Defendants from having an involvement "for two (2) years, in any Competitive Business." The agreement defines "Competitive Business" as "any business operating in competition with an outdoor lighting business or any business similar to the Business [] as carried on from time to time during the Initial Term of this Agreement" and defines "Business" as "the business operations conducted or to be conducted by the Franchisee consisting of outdoor lighting design and automated lighting control equipment and installation services, using the Franchisor's System and in association therewith the Marks." As a result of the fact that the contractual language in question is couched in disjunctive terms, the non-competition agreement prohibits Defendants from both involvement in any business "operating in competition with an outdoor lighting business" and "any business similar to the Business" regardless of the extent to which either type of entity actually competes with Plaintiff. After carefully studying the record, we are unable to see how prohibiting Defendants from having any involvement in any business "operating in competition with an outdoor lighting business" or any business "similar" to the one Mr. Harders operated as an OLP franchisee is necessary to protect any of Plaintiff's legitimate business interests. On the contrary, we believe that the restriction in question goes well beyond the prohibition of activities that would put Defendants in competition with Plaintiff. For example, Mr. Harders would be prohibited from owning a franchise that sold and maintained indoor lighting or from obtaining employment at a major home improvement store that sold outdoor lighting supplies, equipment, or services as a small part of its business even if he had no direct involvement in that retailer's outdoor lighting operations.[5] We do not believe that our concerns about the scope of the restrictions upon Defendants' future activities result from an exercise

5. According to Mr. Harders' affidavit, Plaintiff informed him that he could not work for a wholesale supplier of outdoor lighting or open an indoor lighting business without violating the non-competition provisions of the franchise agreement.

in an "extreme level of hypothetical analysis;" instead, our concerns are derived directly from the literal language of the contract provision which Plaintiff is seeking to enforce. As a result, we conclude that the non-competition agreement at issue here would prevent Defendants from engaging in activities that have no tendency to adversely affect Plaintiff's legitimate business interests.

In *Hartman*, this Court considered a non-competition agreement that prevented an employee from owning any "entity providing actuarial services or any other services of the same nature as the service currently offered by the Corporation to the insurance industry and others or otherwise compete against the Corporation in the actuarial or consulting business" in "every city (whether or not [the] defendant did business there) in eight states for five or more years." 117 N.C. App. at 308, 314, 450 S.E.2d at 914-15, 918. In the course of holding that the agreement in question was unenforceable, we noted that the provision in question "purport[ed] to preclude the plaintiff from working with any actuarial business in North Carolina . . . even if the business by which he was engaged did not service any customers located in the eight states" and "prohibit[ed] plaintiff from working for any business that provides actuarial services, without reference to whether or not that business competes with defendant." *Id.* at 316-17, 450 S.E.2d at 919-20.[6] In like manner, we are unable to uphold the enforceability of the non-competition agreement given that, according to the plain language in which it is couched, it prohibits Defendants from engaging in lawful activities which do not impinge upon Plaintiff's legitimate business interests in any meaningful way. As a result, given that the geographic scope of the non-competition agreement at issue in this case is impermissibly broad and that the agreement prohibits Defendants from engaging in activities which do not involve an impermissible degree of competition with Plaintiff's legitimate business interests, we conclude that the trial court correctly determined that the Plaintiff had no likelihood of success on this particular claim on the merits and that Plaintiff's preliminary injunction motion should be denied.[7]

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6. Although Plaintiff urges us to "blue pencil" the non-competition agreement to the extent necessary to render it enforceable, it has not, with the exception of the 100-mile buffer provision discussed above, pointed to any specific provision which we should excise using any available "blue penciling" authority. In view of the fact that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," *Viar v. N.C. Dept. of Trans.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005), we decline to take Plaintiff up on its non-specific suggestion that we "blue pencil" any provision that we believe stands in the way of the enforcement of the non-competition provision contained in the franchise agreement.

7. Although Plaintiff has also argued that the duration of the restriction in question

III. Conclusion

Thus, for the reasons set forth above, we hold that the trial court correctly determined that Plaintiff was unlikely to prevail in its attempt to obtain enforcement of the non-competition agreement contained in the franchise agreement. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

RIGGINGS HOMEOWNERS, INC., PETITIONER
v.
COASTAL RESOURCES COMMISSION OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. COA12-1299

Filed 6 August 2013

1. Environmental Law—beach erosion—stability statement—mutual misunderstanding

The trial court did not err in a beach erosion case by holding the Coastal Resources Commission's statement that "erosion is stable" was prejudicial error. Any disagreement arose from mutual misunderstanding rather than disputed legal principles.

2. Environmental Law—beach erosion—variance factors—improper reliance on property owner rather than property

The trial court did not err in a beach erosion case by holding the Coastal Resources Commission improperly based its first variance factor determination on the property owner rather than the property.

3. Environmental Law—beach erosion—variance factors—hardships—unnecessary hardships

Any error based on the trial court's determination in a beach erosion case that "it is not possible to have hardships [under the

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was reasonable, we need not address this issue given that the non-competition agreement in question is unenforceable regardless of the reasonableness of the duration provision included in that agreement.

second and third variance factors] but not unnecessary hardships [under the first variance factor]" was non-prejudicial.

4. Environmental Law—beach erosion—variance factors—private property interest outweighed public interests

The trial court did not err in a beach erosion case by reversing the Commission's fourth variance factor determination in result. The Riggings' private property interest outweighed the public interests considered by the Commission.

5. Environmental Law—beach erosion—reasonable use of property—no factual findings required

The trial court did not err in a beach erosion case by deciding the Commission did not need to make factual findings regarding the reasonable use of the property.

6. Appeal and Error—appealability—ripeness

Although petitioner contended the Coastal Resource Commission's denial of its variance request constituted an impermissible taking, this issue was not ripe for review because there had not yet been a final variance decision.

7. Constitutional Law—separation of powers—constitutional delegation of legislative powers to administrative agency

The Coastal Resource Commission did not violate the separation of powers doctrine in a beach erosion case by allegedly acting in a quasi-legislative and quasi-judicial capacity. The Commission's creation under the Coastal Area Management Act was a constitutional delegation of legislative power. Further, since N.C.G.S. § 113A-120.1(a) explicitly contemplated the Commission's issuance of variances, judicial authority to rule on variance requests was "reasonably necessary" to accomplish the Commission's statutory purpose.

Judge BRYANT concurring in part and dissenting in part in separate opinion.

Appeal by respondent and cross-appeal by petitioner from order entered 1 June 2012 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 10 April 2013.

Shipman & Wright, L.L.P., by William G. Wright and Gary K. Shipman, for petitioner-appellee/cross-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Christine A. Goebel and Special Deputy Attorney General Marc Bernstein, for respondent-appellant/cross-appellee.

HUNTER, JR., Robert N., Judge.

The North Carolina Coastal Resources Commission (the "Commission") appeals a trial court order: (i) reversing the Commission's denial of a variance request; and (ii) remanding the case to the Commission for new hearing. Riggings Homeowners, Inc. cross-appeals, alleging: (i) the trial court erred in concluding the Commission did not need to make a "reasonable use" determination; (ii) the Commission's variance denial violated the takings doctrine; and (iii) the Commission's variance denial violated the separation of powers doctrine. Upon review, we affirm.

I. Facts & Procedural History

Riggings Homeowners, Inc. ("The Riggings") manages a homeowners' association (a North Carolina non-profit corporation) in Kure Beach. The Riggings operates forty-eight condo units located in four buildings facing the Atlantic Ocean. The condos were built in 1985.

Immediately south of The Riggings is Fort Fisher, a North Carolina state park. From July 1995 to January 1996, the State built a permanent stone revetment to protect Fort Fisher from erosion. Although the Coastal Area Management Act ("CAMA") generally does not allow permanent revetments, the Commission allowed this revetment[1] under the historic sites exception.

Immediately north of The Riggings is the Fort Fisher Coquina Outcrop Natural Area. Coquina rock formations provide a natural barrier against beach erosion. In 1926, the New Hanover County Board of County Commissioners allowed a government contractor to use the coquina rock to complete a section of U.S. Highway 421. The contractor removed a 50-100 foot strip of coquina rock near The Riggings. On 6 February 1982, the Fort Fisher Coquina Outcrop Natural Area was entered on the North Carolina Registry of Natural Heritage Areas.

These two state actions have made The Riggings' beachfront especially prone to erosion. First, the removal of the coquina rock in 1926

1. A "revetment" is "a facing of stone, concrete, fascines, or other material to sustain an embankment." *Webster's Third New International Dictionary* 1944 (1971). When used for coastal protection, revetments prevent sand erosion.

took away a natural barrier to erosion. Second, the construction of the stone revetment at Fort Fisher protected the beachfront there but at The Riggings' beachfront increased erosion rates. This combination of state action makes The Riggings' beachfront *sui generis*.

In 1985, Kure Beach's local CAMA officer issued a permit allowing The Riggings to place a sandbag revetment on its beachfront because the condos were "imminently threatened" by erosion.[2] On 3 December 1994, the Division of Coastal Management ("DCM")[3] issued CAMA General Permit No. 13355-D, authorizing repair of the 1985 sandbags and placement of new sandbags. Permit No. 13355-D allowed the sandbags to remain in place until 1 May 2000. After 1 May 2000, The Riggings was precluded from maintaining the sandbags without a variance.[4]

From 2000 to 2005, The Riggings applied for and received three variances to maintain the sandbags: (i) on 26 May 2000, the Commission granted a variance allowing the sandbags to remain in place until 26 May 2001; (ii) on 4 February 2002, the Commission granted another variance, allowing the sandbags to remain in place until 23 May 2003; (iii) on 9 May 2003, a new variance allowed the sandbags to remain in place until 9 May 2005. Meanwhile, The Riggings pursued several permanent erosion solutions.

One potential solution was beach renourishment. In 2000, the U.S. Army Corps of Engineers undertook the Carolina/Kure Beach Renourishment Project. This project covered 98% of Kure Beach, but stopped 1,500 feet short of The Riggings' beachfront. The Riggings was unsuccessful in efforts to convince the U.S. Army Corps of Engineers to extend the renourishment project to The Riggings' beachfront. In a 25 February 2000 letter to U.S. Representative Mike McIntyre, the U.S. Army Corps of Engineers explained that it could not extend the renourishment project to The Riggings' beachfront because the "[coquina] rock outcropping[s] [have] been declared a natural heritage area by the North Carolina Natural Heritage Program and burying them was not an acceptable alternative." A second Carolina/Kure Beach Renourishment Project in 2007 renourished 98% of Kure Beach, but again stopped 1,500 feet short of The Riggings' beachfront.

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2. 15A N.C.A.C. 7H.0308(a)(2)(b) allows temporary erosion control structures when buildings are "imminently threated" by being less than 20 feet from an erosion scarp.

3. In 1992, the DCM took responsibility for the issuance of CAMA permits.

4. 15A N.C.A.C. 7H.1705(a)(14) only allows "imminently threatened" buildings to seek one permit.

Concurrently, The Riggings explored rebuilding its condos across the street on the landward side of U.S. Highway 421. The Riggings contacted the North Carolina Division of Emergency Management ("NCDEM"), the Natural Heritage Trust Fund, and the DCM for financial assistance with this venture. It requested that the Town of Kure Beach assist by seeking FEMA grants to relocate these buildings.

In July 2004, the Town of Kure Beach received a FEMA pre-disaster grant for a $3,617,624 project to: (i) acquire The Riggings' beachfront real estate; and (ii) rebuild The Riggings on the landward side of U.S. Highway 421. FEMA agreed to provide $2,713,218 (75% of the costs), but required The Riggings' homeowners to contribute the remaining $904,406 (25% of the costs). This grant, by its terms, would expire on 30 June 2007.

By March 2005, The Riggings had hired architects, surveyors, and other contractors to finalize plans to relocate the buildings to U.S. Highway 421's landward side. On 25 April 2005, the Commission granted The Riggings another variance to allow the sandbags to remain in place "until the FEMA grant expires in June, 2007." The variance order also stated, "Petitioner shall be responsible for removal of the sandbags prior to expiration of the FEMA grant."

The Riggings approached its homeowners to discuss funding the remaining $904,406 for the project. On 1 May 2006, the President of The Riggings' homeowners' association notified the Mayor of Kure Beach that The Riggings' homeowners voted to reject the FEMA grant. The homeowners cited several reasons for this decision: (i) some homeowners could not contribute the required capital; (ii) the grant did not guarantee that future permitted uses for the oceanfront real estate would not change; and (iii) the holders of some homeowners' mortgages did not consent to the project.

As a result, on 17 May 2006 the Mayor of Kure Beach requested that NCDEM terminate the FEMA grant. On 20 June 2006 a NCDEM officer notified the DCM that the FEMA grant was terminated. On 10 July 2006, a DCM district manager notified The Riggings that it had 30 days to remove the sandbags.

However, The Riggings did not comply. On 15 August 2006, the DCM sent The Riggings a Notice of Violation, requiring removal of all sandbags. On 18 September 2006, the DCM sent The Riggings a Notice of Continuing Violation.

Meanwhile, on 22 August 2006, The Riggings applied for a new variance under N.C. Gen. Stat. § 113A-120.1 and 15A N.C.A.C. 7J.0700 while it

pursued a new beach renourishment project (the "Habitat Enhancement Project"). The relevant statute states that:

> (a) Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, the petitioner must show all of the following:
>
> (1) Unnecessary hardships would result from strict application of the rules, standards, or orders.
>
> (2) The hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.
>
> (3) The hardships did not result from actions taken by the petitioner.
>
> (4) The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice.

N.C. Gen. Stat. § 113A-120.1(a) (2011).

On 17 January 2008, the Commission heard the variance request. On 31 January 2008, the Commission entered an order denying the request because The Riggings did not prove: (i) that denial of a variance would result in "unreasonable hardship;" (ii) that any hardship "result[ed] from conditions peculiar to [its] property;" (iii) that any hardship was not the result of its actions; and (iv) that its request is "within the spirit, purpose, and intent of the Commission's rules."

On 7 March 2008, The Riggings timely filed a petition for judicial review in New Hanover County Superior Court. The trial court issued a writ of certiorari and heard the case during its 5 January 2009 Civil, Non-Jury Session. On 20 February 2009, the trial court: (i) reversed the Commission's denial of the variance; and (ii) remanded the case to the Commission to apply an "unnecessary hardships" standard instead of an "unreasonable hardship" standard.

On 29 April 2009, the Commission reheard the case. On 21 May 2009, it denied The Riggings' variance request under the "unnecessary hardships" standard. On 17 June 2009, The Riggings timely filed a petition for judicial review in New Hanover County Superior Court. The

trial court heard the case during its 12 March and 13 March 2012 Civil, Non-Jury Sessions.

On 1 June 2012, the trial court reversed the Commission's variance denial because it determined the Commission erred by: (i) concluding The Riggings did not demonstrate unnecessary hardship; and (ii) concluding the variance is not "consistent with the spirit, purpose, and intent of the rules." The trial court also determined: (i) the Commission did not need to make factual findings or legal conclusions as to the impact of the variance denial on The Riggings' ability to make reasonable use of its property; (ii) the Commission's actions did not violate the takings doctrine; and (iii) the Commission's actions did not violate the separation of powers doctrine.

On 27 June 2012, the Commission filed timely notice of appeal to this Court. On 29 June 2012, The Riggings filed timely notice of cross-appeal.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. §7A-27(b) (2011) and N.C. Gen. Stat. § 150B-52 (2011).

The Administrative Procedure Act provides the standard of review for agency decisions:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of

> the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51 (2011). Overall, "[a]n appellate court's review proceeds in two steps: (1) examining whether the trial court applied the correct standard of review and (2) whether the trial court's review was proper." *City of Rockingham v. N.C. Dept. of Env't and Natural Res., Div. of Water Quality*, __ N.C. App. __, __, 736 S.E.2d 764, 767 (2012). The proper standard of review depends on the particular issues presented on appeal.

To this effect, our Supreme Court clarifies that:

> these grounds for reversal or modification of an agency's final decision fall into two conceptual categories. The first four grounds for reversing or modifying an agency's decision—that the decision was "in violation of constitutional provisions," "in excess of the statutory authority or jurisdiction of the agency," "made upon unlawful procedure," or "affected by other error of law,"—may be characterized as "law-based" inquiries. The final two grounds—that the decision was "unsupported by substantial evidence . . . in view of the entire record" or "arbitrary or capricious," —may be characterized as "fact-based" inquiries.

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (alteration in original)(internal citation omitted).

"Thus, where the gravamen of an assigned error is that the agency violated subsections 150B–51(b)(1), (2), (3), or (4) of the APA, a court engages in *de novo* review." *Id.* at 659, 599 S.E.2d at 895. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission." *Greens of Pine Glen Ltd.*, 356 N.C. at 647, 576 S.E.2d at 319 (internal citations omitted).

On the other hand, when the issue is whether (i) an agency's factual findings are supported by substantial evidence; or (ii) whether an agency's decision is arbitrary and capricious, we apply the "whole record" test. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894. "When the trial court applies

the whole record test, . . . it may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Id.* at 660, 599 S.E.2d at 895 (quotation marks and citation omitted). "Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Watkins v. N.C. State Bd. of Dental Examiners*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). "Substantial evidence" is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B–2(8c) (2011).

Here, the trial court appropriately applied *de novo* review to the Commission's first variance factor determination. There, the only issue was whether The Riggings suffered "unnecessary hardships" as a matter of law. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 ("It is well settled that in cases appealed from administrative tribunals, [q]uestions of law receive *de novo* review." (alteration in original) (quotation marks and citation omitted)).

In its review of the Commission's fourth variance factor determination, the trial court noted that the Commission's order "comingles in the Conclusions of Law, many Findings of Fact that should not be included within the Conclusions of Law section." Consequently, in its fourth variance factor analysis the trial court appropriately applied: (i) the whole record test to determine whether the facts were supported by substantial evidence; and (ii) *de novo* review to the Commission's legal determinations under CAMA's statutory framework. On appeal, we apply the same standard of review.

III. Analysis

On appeal, the Commission argues the trial court erred by determining The Riggings satisfied the first and fourth statutory variance factors. On cross-appeal, The Riggings argues: (i) the trial court erred in concluding the Commission did not need to make a "reasonable use" determination; (ii) the Commission's actions violate the takings doctrine; and (iii) the Commission's actions violate the separation of powers doctrine. Upon review, we affirm.

A. Commission's Appeal

Preliminarily, we discuss the regulatory framework behind the instant case. The Commission's rules only allow "imminently threatened" buildings like The Riggings to seek one permit for temporary sandbag structures. *See* 15A N.C.A.C. 7H.1705(a)(14). After the permit's

expiration, "imminently threatened" buildings must seek a variance to maintain temporary sandbag structures. CAMA clarifies that:

> (a) Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, the petitioner must show all of the following:
>
> (1) Unnecessary hardships would result from strict application of the rules, standards, or orders.
>
> (2) The hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.
>
> (3) The hardships did not result from actions taken by the petitioner.
>
> (4) The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice.

N.C. Gen. Stat. § 113A-120.1 (2011).

In the instant case, The Riggings applied for a variance under N.C. Gen. Stat. § 113A-120.1. The Commission held The Riggings satisfied the second and third variance factors, but not the first or fourth factors. The trial court reversed the Commission's first and fourth variance factor determinations, and the Commission appealed. Upon review, we affirm the trial court's decision.

1. First Variance Factor

The Commission argues the trial court erred in its first variance factor determination by: (i) holding the Commission's statement that "erosion is stable" was prejudicial error; (ii) deciding the Commission improperly based its decision on the property-owner rather than the property; and (iii) misconstruing the phrase "unnecessary hardships." We find the Commission's arguments unpersuasive.

a. "Erosion is stable"

[1] The Commission first argues the trial court erred by holding the Commission's statement that "erosion is stable" was prejudicial error. We disagree.

In its 21 May 2009 order, the Commission stated that "initially after construction of the Ft. Fisher revetment erosion increased at [The Riggings'] property, but now erosion is stable." It based this conclusion on the stipulated fact that after the stone revetment's construction "the rate of erosion of the shoreline in front of The Riggings increased, but since then the rate of erosion has decreased."

In its 1 June 2012 order, the trial court determined the Commission's statement was prejudicial error. To support this holding, the trial court cited several stipulated facts indicating erosion still occurred. For instance, the trial court referenced Stipulated Fact No. 10, which stated "The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time." It also mentioned Stipulated Fact No. 18, which stated that "erosion of the shoreline in front of the Riggings increased [after the construction of the Fort Fisher revetment], but since then the rate of erosion has decreased."

Upon review, we believe any disagreement arises from mutual misunderstanding rather than disputed legal principles. Specifically, the Commission's statement referenced the rate of erosion. Under this interpretation, its statement is supported by the facts: the rate of erosion initially increased after the construction of the Fort Fisher revetment, but then stabilized. The trial court, on the other hand, interpreted the Commission's statement to imply erosion no longer occurs. It then cited competent evidence showing erosion still occurs.

Based on this analysis, we affirm the trial court's determination to the extent it reverses a statement that erosion no longer occurs.

b. Property-Owner vs. Property

[2] Next, the Commission argues the trial court erred by holding the Commission improperly based its first variance factor determination on the property-owner rather than the property. We disagree.

In its first variance factor analysis, the Commission may only consider its rules' effect on the petitioner's property, not the petitioner itself. *Williams v. N.C. Dep't of Env't and Natural Res.*, 144 N.C. App. 479, 548 S.E.2d 793 (2001). For instance, in *Williams* a landowner applied for a variance to build a "fast freezer" and storage unit on his property. *Id.* at 481–82, 548 S.E.2d at 795–96. However, the proposed project would have damaged adjacent wetlands. *Id.* at 488, 548 S.E.2d at 799. Moreover, the petitioner owned other properties where he could complete the project without potential wetlands damage. *Id.* In *Williams*, the Commission determined the petitioner did not prove "unnecessary hardships"

because "alternatives for sitting and design of the proposed facility exist that would reduce or eliminate the wetlands impacts of the project." *Id.* at 482, 548 S.E.2d at 796. The trial court reversed. *Id.*

On appeal, this Court affirmed the trial court. *Id.* at 485, 548 S.E.2d at 797–98. We elaborated that:

> [w]hether strict application of the Coastal Area Management Act, (hereinafter "CAMA"), places an "unnecessary hardship" on a parcel of property, depends upon the unique nature of the property; not the landowner. If "hardship" stemmed from the situation of the landowner, then those persons owning less land would have an easier time showing unnecessary hardship than those owning more than one parcel of land. Similarly situated persons would be treated differently, giving rise to equal protection of law issues.

Id. at 485, 548 S.E.2d at 797.

In the present case, the Commission appeals the trial court's reversal of its first variance factor determination. Specifically, it argues any hardship The Riggings suffers is necessary due to the Commission's prohibition of permanent erosion control structures. Based on *Williams*, we affirm the trial court's decision.

In its 21 May 2009 order, the Commission described how The Riggings had maintained the sandbags since 1985, over the course of a permit and four variances. Based on this length of time, the Commission then determined the sandbags had impermissibly become *de facto* permanent structures. Given this conclusion, the Commission ultimately decided any hardship The Riggings now suffered was necessary to uphold the regulatory prohibition of permanent erosion control structures. *See* N.C. Gen. Stat. § 113A-115.1(b) (2011); 15A N.C.A.C. 7M.0202(e).

However, the Commission improperly focused its analysis on the property-owner rather than the property. The Riggings' previous permit and variances are immaterial to the Commission's "unnecessary hardships" analysis. *See Williams*, 144 N.C. App. at 485, 548 S.E.2d at 797–98. As we held in *Williams*, "[i]f 'hardship' stemmed from the situation of the landowner" rather than the property itself, "[s]imilarly situated persons would be treated differently." *Id.* at 485, 548 S.E.2d at 797. For instance, under the Commission's logic someone who had not previously received variances but owned property identical to The Riggings' property would receive different treatment. Like in *Williams*, this would raise *prima facie* equal protection issues.

Consequently, we affirm the trial court's "unnecessary hardships" determination under *Williams*.

c. "Unnecessary" Hardships

[3] Next, the Commission argues the trial court erred by determining "it is not possible to have hardships [under the second and third variance factors] but not unnecessary hardships [under the first variance factor]." Upon review, we conclude any error was non-prejudicial.

In its 21 May 2009 order, the Commission determined The Riggings suffered "hardships" under the second and third variance factors, but not "unnecessary hardships" under the first variance factor. As discussed previously, the Commission based its "unnecessary hardships" determination on its prohibition against permanent erosion control structures. However, the trial court determined "it is not possible to have hardships but not unnecessary hardships."

On appeal to this Court, the Commission contends the trial court's determination would render the word "unnecessary" superfluous. Thus, the Commission argues the trial court erred in its interpretation of N.C. Gen. Stat. § 113A-120.1 (2011). *See HCA Crossroads Residential Ctrs. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990) ("Such statutory construction is not permitted, because a statute must be construed, if possible, to give meaning and effect to all of its provisions.").

Since we affirm the trial court's "unnecessary hardships" determination under *Williams*, any error the trial court committed by stating "it is not possible to have hardships but not unnecessary hardships" is non-prejudicial. *Rea v. Simowitz*, 226 N.C. 379, 383, 38 S.E.2d 194, 197 (1946) ("It is an established rule of appellate practice that the burden is on the appellant not only to show error but also to show that he was prejudiced."). Regardless of the trial court's statement, The Riggings suffered "unnecessary hardships."

Consequently, we decline to further address this argument.

2. Fourth Variance Factor

[4] The Commission next argues the trial court erred by holding The Riggings satisfied the fourth variance factor.[5] Specifically, The Riggings argues the trial court erred by: (i) failing to consider the Commission's

5. The fourth variance factor states, "The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice." N.C. Gen. Stat. § 113A-120.1(a)(4) (2011).

rules; and (ii) substituting its own judgment for that of the Commission. Since both arguments concern the same variance factor, we consider them together. Upon review, we affirm the result of the trial court's decision.

North Carolina's Constitution recognizes the importance of our state's coastal areas:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina . . . to preserve as a part of the common heritage of this State its . . . beaches . . . and places of beauty.

N.C. Const. art. XIV, § 5. Accordingly, in 1974 our General Assembly adopted The Coastal Area Management Act because "an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina." N.C. Gen. Stat. § 113A-102(a) (2011). CAMA has, *inter alia*, the following goal:

> (4) To establish policies, guidelines and standards for:
>
> a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to intensive use or development, as well as areas of significant natural value;
>
> b. The economic development of the coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments.

N.C. Gen. Stat. § 113A-102(b) (2011). Thus, CAMA seeks to balance public interests with private property interests. *See id.*

To accomplish its goals, CAMA established the North Carolina Coastal Resources Commission. N.C. Gen. Stat. § 113A-104 (2011). The Commission's rules recognize its role in balancing private property interests with competing public interests:

> It is hereby declared that the general welfare and public interest require that development along the ocean and estuarine shorelines be conducted in a manner that avoids loss of life, property and amenities. It is also declared that

> protection of the recreational use of the shorelines of the state is in the public interest. In order to accomplish these public purposes, the planning of future land uses, reasonable rules and public expenditures should be created or accomplished in a coordinated manner so as to minimize the likelihood of damage to private and public resources resulting from recognized coastal hazards.

15A N.C.A.C. 7M.0201.

One way CAMA protects our coasts is by prohibiting the construction of "permanent erosion control structure[s] in an ocean shoreline." N.C. Gen. Stat. § 113A-115.1(b) (2011). Additionally, CAMA prohibits "the construction of a temporary erosion control structure that consists of anything other than sandbags in an ocean shoreline." *Id.* CAMA authorizes the Commission to regulate temporary sandbag structures. *Id.*

The Commission adopted several administrative rules regulating temporary sandbag structures. *See* N.C. Gen. Stat. § 113A-115.1(b1) (2011). For instance,

> [t]emporary measures to counteract erosion, such as the use of sandbags and beach pushing, should be allowed, but only to the extent necessary to protect property for a short period of time until threatened structures may be relocated or until the effects of a short-term erosion event are reversed. In all cases, temporary stabilization measures must be compatible with public use and enjoyment of the beach.

15A N.C.A.C. 7M.0202(e); *see also* 15A N.C.A.C. 7H.1701, 15A N.C.A.C. 7H.1702. The Commission's rules further regulate temporary sandbag structures as to: (i) situation; (ii) location; and (iii) time. *See* 15A N.C.A.C. 7H.0308(a)(2).

In the present case, the Commission argues the trial court erred by determining The Riggings satisfied the fourth variance factor. We disagree.

In its 21 May 2009 order, the Commission engaged in the following fourth variance factor analysis:

> The proposed variance is inconsistent with the spirit purpose, and intent of the [Commission's] rules because sandbags are intended to be a temporary erosion control structure and this sandbag revetment has been in place for

> almost 24 years. . . . Additionally, the [Commission] concludes as a matter of law that the situation with the sandbag revetment protecting [The Riggings'] structures does not secure public safety and welfare. Depending on the variable nature of the beach profile sometimes the sandbags are buried and sometimes exposed, sometimes that public has to detour landward around the sandbags depending on the beach profile and the tide, and there has been at least one instance during this 24-year placement when holes in the sandbag revetment had to be filled with other sandbags. . . . Finally, allowing these sandbags to remain to protect [The Riggings'] structures over an even greater period of time will not preserve substantial justice because both the legislature and the [Commission's] intent for the use of sandbags is as a temporary erosion control structure.

The Commission based this determination on the "substantial evidence in the record." The trial court then reversed and remanded because it determined: (i) the Commission's fourth variance factor analysis is not supported by substantial evidence; and (ii) there is substantial evidence to grant the variance. The Commission now contends the trial court erred because The Riggings' variance request does not satisfy the fourth variance factor.

To better analyze the Commission's argument, we rely on several canons of statutory construction. First, our Supreme Court describes how:

> [w]here there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, *unless it appears that the legislature intended to make the general act controlling*[.]

McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (quotation marks and citation omitted)(emphasis added). Furthermore, "statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other." *In re Declaratory Ruling by N.C. Comm'r of Ins. Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App.

22, 27, 517 S.E.2d 134, 139 (1999). "Such statutes should be reconciled with each other when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 400, 269 S.E.2d 547, 561 (1980). Lastly, our Supreme Court expressly warns:

> an agency having authority to effectuate the policies of a particular statute may not effectuate such policies so singlemindedly that it wholly ignores other and equally important legislative objectives. This is especially true in the case of agencies which have both accusatorial and judgmental powers. The potential for unfairness and abuse is obvious in a situation in which an administrative officer is vested with broad rulemaking powers, determining the admissibility and weight of evidence in hearings and making the final determination on the merits of an action.

Id. at 409, 269 S.E.2d at 566.

In light of this discussion, we now analyze whether the requested variance satisfies the fourth variance factor.

CAMA establishes the Commission and expressly grants it the ability "to adopt rules to designate or protect areas of environmental concern, to govern the use of sandbags, or to govern the use of erosion control structures in estuarine shorelines." N.C. Gen. Stat. §§ 113A-104 and 113A-115.1(b1) (2011). Thus, the Commission clearly has the authority to make determinations regarding temporary sandbag structures. *See id.* However, we must analyze this statutory authority in the context of CAMA's other provisions. *See In re Declaratory Ruling*, 134 N.C. App. at 27, 517 S.E.2d at 139. To this effect, both CAMA and the Commission's own rules recognize a necessary balance between private property interests and competing public interests. *See* N.C. Gen. Stat. § 113A-102 (2011); 15A N.C.A.C. 7M.0201. Given this legislative intent, we recognize that the Commission's fourth variance factor analysis will inherently contemplate some form of balancing.

We acknowledge the logistical difficulties of balancing private property interests with competing public interests. Indeed,

> [i]t is important to reiterate that there can be no truly optimal environmental governance because resource management as well as public health and ecological protection involve to some degree measuring the unmeasurable and comparing the incomparable. Optimizing one set of virtues

> will often entail compromising on other values. Many environmental problems have at their core questions over which people do not—and need not—agree. At this level, the policy process is art, not science.

Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. Rev. 1495, 1519 (1999). However, administrative agencies like the Commission must engage in this type of balancing to promote fair governance:

> [T]he environmental policymaking process can be sharpened through improved governance. Indeed, a well-functioning regulatory system will generate information and analysis to inform decisionmakers, isolate the value judgments that must be made, highlight the assumptions on which decisions might turn, and tee up the critical political questions for decision in a fair and unbiased way. By reducing the zone of technical uncertainty, better decisionmaking structures and procedures narrow the range of policy disputes.

Id. Otherwise, without guidance as to "the assumptions on which [variance] decisions might turn," petitioners like The Riggings would be unable to make effective, informed variance requests.

Based on this discussion, we interpret the Commission's fourth variance factor analysis to implicitly balance The Riggings' private property interest with competing public interests. We construe the Commission's balancing analysis as follows.

First, the Commission recognized The Riggings' private property interest: The Riggings has been threatened by erosion since 1985 and uses the sandbags to protect its condos against this erosion. Next, the Commission balanced this private property interest with competing public interests.

For instance, the Commission considered how the sandbags may at some point impermissibly become *de facto* permanent structures. As a public policy determination, CAMA's regulatory framework expressly prohibits permanent structures. *See* N.C. Gen. Stat. § 113A-115.1(b) (2011); 15A N.C.A.C. 7M.0202(e). Furthermore, the Commission referenced aesthetic concerns because "sometimes the sandbags are . . . exposed." Lastly, the Commission described how "sometimes the public has to detour landward around the sandbags depending on the beach profile and the tide.

Still, the Commission conceded that "even at high tide the public can get around the sandbags by going between the sandbags and The Riggings buildings closest to the ocean." Additionally, the Commission noted that "[a] former member of the U.S. Army Corps of Engineers is on record as stating that [T]he Riggings sandbags have not had any deleterious effect on surrounding property nor have they come into contact with the Atlantic Ocean except during major storm events."

Given the Commission's decision to deny the variance, it is clear the Commission's order balanced these issues in favor of public interests. Since the trial court reversed the Commission, the trial court inherently balanced the competing interests differently. As a question of law, we review these balancing determinations *de novo*.[6] *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 895. Upon review, we conclude The Riggings' private property interest outweighs the public interests considered by the Commission.

Here, The Riggings has a substantial private property interest. If the sandbags are removed, the condos face potential destruction from erosion. We now weigh this private property interest against the public interests considered by the Commission: (i) CAMA's prohibition of permanent erosion control structures; (ii) aesthetic concerns; and (iii) public beach access.

First, although CAMA's framework prohibits permanent structures, the sandbags have not yet become de facto permanent structures. We do not dispute the importance of CAMA's prohibition against permanent erosion control structures. *See Pamlico Marine Co. v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986) ("[A]n administrative agency's interpretation of its own regulation is to be given due deference by the courts unless it is plainly erroneous or inconsistent with the regulation."). However, in its latest variance petition, The Riggings proposed a new beach renourishment solution, the Habitat Enhancement Project. If this solution is successful, The Riggings

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6. In her dissent, Judge Bryant contends both this Court and the trial court should have applied the whole record test, not *de novo* review, to examine the Commission's fourth variance factor determination. However, we do not dispute the Commission's factual determinations. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 ("It is well settled that in cases appealed from administrative tribunals, . . . fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." (alteration in original)(quotation marks and citation omitted)). Instead, we analyze as a matter of law whether the Commission appropriately balanced competing policy concerns under CAMA's statutory framework. *See* N.C. Gen. Stat. § 150B-51(b)(2) and (4) (2011) Consequently, we apply *de novo* review. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

would no longer need the sandbags. When The Riggings still seeks alternative erosion solutions, the Commission's prohibition of permanent structures does not outweigh The Riggings' private property interest.

Second, we acknowledge the intrinsic natural beauty of our state's coasts. See N.C. Const. art. XIV, § 5. However, this aesthetic importance does not override all competing interests. With 98% of Kure Beach renourished, the public has ample opportunity to enjoy nearby beaches. The public's interest in enjoying the aesthetics of The Riggings' beachfront does not outweigh The Riggings' private property interest.

Lastly, we consider the public's interest in beach access. Here, although the public may have to walk around the sandbags, the sandbags do not completely prohibit beach access. Indeed, "even at high tide, the public can get around the sandbags by going between the sandbags and The Riggings buildings closest to the ocean." Furthermore, the Fort Fisher stone revetment blocks the public from proceeding beyond The Riggings' beachfront. Thus, the public's need to pass through The Riggings' beachfront is minimal.

In sum, we believe The Riggings' substantial private property interest outweighs the competing public interests considered by the Commission. Consequently, we affirm the trial court's reversal of the Commission's fourth variance factor determination in result.

B. Petitioner's Cross-Appeal

On cross-appeal, The Riggings argues: (i) the trial court erred in concluding the Commission did not need to make factual findings regarding reasonable use of the property; (ii) the Commission's actions violate the takings doctrine; and (iii) the Commission's actions violate the separation of powers doctrine. Upon review, we affirm.

1. Reasonable Use

[5] The Riggings first argues the trial court erred by deciding the Commission did not need to make factual findings regarding the reasonable use of the property. We disagree.

The Riggings primarily relies on *Williams* for this argument. In *Williams*, the petitioner appealed the Commission's denial of his variance request. 144 N.C. App. at 481, 548 S.E.2d at 795. There, we determined the Commission erred in its first variance factor analysis because it failed to "make findings of fact and conclusions of law as to the impact of the act on the landowner's ability to make a reasonable use of his property." *Id.* at 487, 548 S.E.2d at 798.

However, in *Williams* we applied an older version of N.C. Gen. Stat. § 113A-120.1 that stated:

> Any person may petition the Commission for a variance granting permission to use his land in a manner otherwise prohibited by rules, standards, or limitations prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. *When it finds* that (i) practical difficulties or unnecessary hardships would result from strict application of the guidelines, rules, standards or other restrictions applicable to the property [and makes other specific findings, a variance may be granted.]

N.C. Gen. Stat. § 113A-120.1 (1989) (emphasis added). Shortly after we decided *Williams*, our General Assembly amended N.C. Gen. Stat. § 113A-120.1 to state:

> Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, *the petitioner must show* all of the following: (1) Unnecessary hardships would result from strict application of the rules, standards, or orders.

N.C. Gen. Stat. § 113A-120.1(a) (2011) (emphasis added). This amendment shifted the burden of proving the four variance factors to petitioners. Consequently, now the Commission does not need to make a "reasonable use" determination before denying a variance request.

The Riggings also erroneously relies on *Elkins v. City of Greensboro, Bd. of Adjustment*, 2005 WL 2429808 (N.C. Ct. App. 4 Oct. 2005), and *Robertson v. Zoning Bd. of Adjustment for Charlotte*, 167 N.C. App. 531, 605 S.E.2d 723 (2004).

In *Elkins*, the petitioner appealed the denial of a zoning variance to build a church parking lot. 2005 WL at *1. There, we reversed and remanded because the zoning board did not make a "reasonable use" determination. *Id.* at *4. However, *Elkins* is inapplicable to the instant case for two reasons. First, since *Elkins* is an unpublished case, it "is not controlling legal authority." *Cary Creek Ltd. P'ship v. Town of Cary*, 203 N.C. App. 99, 106, 690 S.E.2d 549, 554 (2010) (quotation marks and citation omitted); s*ee also* N.C. R. App. P. 30(e)(3). Second, the regulation at issue in *Elkins*, Greensboro Ordinance § 30-9-6.10(D), provided that

"The Board may [grant a variance] *if it finds* that: (a) If the applicant complies with the provisions of this Ordinance, he can make no reasonable use of his property." 2005 WL at *2 (emphasis added). There, unlike in the instant case, the zoning board was required to make a "reasonable use" determination.

In *Robertson*, the petitioner appealed a city zoning board's denial of his variance request. 167 N.C. App. at 531, 605 S.E.2d at 724. There, the petitioner erroneously relied on *Williams* to argue the zoning board did not need to make an "unnecessary hardships" determination. *Id.* at 538, 605 S.E.2d at 728. On appeal, this Court cited *Williams* to support its holding that the zoning board had to make an "unnecessary hardships" determination. *Id.* Since the *Robertson* court did not cite *Williams* for its "reasonable use" proposition, *Robertson* is not applicable here.

Consequently, *Williams*, *Elkins*, and *Robertson* do not support The Riggings' argument. The trial court did not err in determining the Commission did not need to make a "reasonable use" determination.

2. Takings Doctrine

[6] Next, The Riggings contends the Commission's denial of its variance request constitutes an impermissible taking. Upon review, we determine this issue is not ripe for review.

In North Carolina, "land-use challenges are not ripe for review until there has been a final decision about what uses of the property will be permitted." *Messer v. Town of Chapel Hill*, 125 N.C. App. 57, 61, 479 S.E.2d 221, 223, *vacated on other grounds*, 346 N.C. 259, 485 S.E.2d 269 (1997). For takings claims,

> [t]his rule is compelled by the very nature of the inquiry required by the Just Compensation Clause, because the factors applied in deciding a takings claim simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id. (quotation marks and citation omitted).

In the present case, we have affirmed the trial court's decision to reverse and remand. As such, The Riggings' takings claim is not ripe because there has not yet been a final variance decision. *See Cary Creek Ltd. P'ship*, 203 N.C. App. at 102, 690 S.E.2d at 552; *Cardwell v. Smith*, 92 N.C. App. 505, 508, 374 S.E.2d 625, 627 (1988) ("As of the date of the case *sub judice* being filed on appeal, the Zoning Board had not complied

with this Court's mandate . . . . To answer [a question of ripeness], it is necessary to have a final determination of the validity of the special use permit originally granted.").

Consequently, since there has not yet been a final variance decision, the trial court did not err by determining The Riggings' takings claim is not yet ripe.

3. Separation of Powers Doctrine

[7] Lastly, The Riggings argues the Commission violated the separation of powers doctrine because it acted in a quasi-legislative and quasi-judicial capacity. We disagree.

In North Carolina, it is well-established that our legislature may delegate rule-making power to administrative agencies as long as it provides sufficient guiding standards. *See Adams v. N.C. Dep't of Natural & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978). In *Adams*, our Supreme Court explicitly determined the Commission's creation under CAMA is a constitutional delegation of legislative power. *See id.* at 702, 249 S.E.2d at 413. Similarly, in *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), our Supreme Court determined Article IV, § 3 of our state's Constitution allows an administrative agency to take on discretionary judicial authority when "reasonably necessary to accomplish the agency's purposes." *Id.* at 379, 379 S.E.2d at 34.

Given the clear precedent of *Adams* and *Civil Penalty*, we determine The Riggings' separation of powers argument is without merit. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) ("[The Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (quotation marks and citation omitted) (second and third alterations in original)). First, *Adams* already determines the Commission's creation under CAMA is a constitutional delegation of legislative power. *See Adams*, 295 N.C. at 702, 249 S.E.2d at 413. Second, since N.C. Gen. Stat. § 113A-120.1(a) explicitly contemplates the Commission's issuance of variances, we believe it is self-evident that judicial authority to rule on variance requests is "reasonably necessary" to accomplish the Commission's statutory purpose.

Therefore, we hold the trial court did not err in determining the Commission's actions did not violate the separation of powers doctrine.

IV. Conclusion

With a rock revetment to the south, and depleted coquina formations to the north, The Riggings truly is caught between a rock and a hard

place. In this scenario, we must balance The Riggings' private property interest with competing public interests to determine whether a variance is consistent with the "spirit, purpose, and intent" of CAMA's framework. Without a variance, The Riggings' condos will likely be destroyed by erosion. We believe this private property interest outweighs competing public interests. Consequently, the trial court's decision is

AFFIRMED.

Judge McCULLOUGH concurs.

BRYANT, Judge, concurring in part, dissenting in part.

The majority opinion reviews and affirms the order of the trial court reversing and remanding the denial of a variance to the North Carolina Coastal Resources Commission ("CRC") for a new hearing. In so doing the majority determines that the trial court applied the correct standard of review to the issues before it, and that the trial court's review of these issues was properly conducted. While I believe the trial court applied the correct standard of review and did so properly as to the first issue we review on appeal, I do not believe the trial court properly applied the correct standard of review to the second issue. Therefore, I concur in the portion of the majority opinion affirming the trial court's review and determination as to the first variance factor. However, I must dissent from the portion of the majority opinion affirming the trial court's analysis and ruling as to the fourth variance factor.

In the portion of its order regarding "The Issues for Appeal," the trial court set out the standard of review it used for each issue as follows:

> (I) Whether the CRC erred in its Conclusion of Law 3(b) that the Petition did not demonstrate that strict application of 15A NCAC 7H.1705 (a)(7) would result in an unnecessary hardship to the Riggings Property per N.C. Gen. Stat. 113A-120.1(a)(1). *On this issue the Court used the de novo review standard.*
>
> (II) Whether the CRC erred in its Conclusion of Law 6 that the Petitioners did not meet the fourth requirement of a variance request that the granting of the variance is consistent with the spirit, purpose and intent of the rules, standards, or order; will secure public safety and welfare; will preserve substantial justice per N.C. Gen. Stat. 113A-120.1(a)(4); and that the decision of the CRC is

> supported by substantial evidence. *On this issue the Court used the Whole Record review standard on the issues of substantial evidence and de novo standard on the other issues.*

(emphasis added).

As to Issue I, I agree that the trial court used the correct standard of review – de novo. However, as to Issue II, the trial court stated that it would use both whole record review and de novo review in analyzing the fourth variance factor. Based on the trial court's analysis, almost all of which related to stipulated findings of fact from the Commission's order as well as the trial court's independent findings of fact, it appears the trial court used the whole record test exclusively. Notwithstanding the trial court's statement that it would use both de novo and whole record review in analyzing the requirements of the fourth variance, I see nothing to indicate the trial court used anything other than whole record review. And, while I think the whole record review is the correct standard to use, I do not think the trial court used it correctly.

Under whole record review the trial court must examine the whole record to determine whether there is substantial evidence to support the agency's decision. *ACT-UP Triangle v. Commission for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation omitted). Unlike de novo review, under whole record review the trial court is not allowed to substitute its judgment for that of the agency. *Meza v. Div. of Soc. Servs. & Div. of Med. Assistance of the N.C. HHS*, 364 N.C. 61, 69-70, 692 S.E.2d 96, 102 (2010). Even if, as here, the trial court could have reached a different result de novo, it "may not substitute its judgment for the agency's as between two conflicting views[.]" *Id.*

Because it appears the trial court improperly substituted its own judgment on whole record review, I believe the decision was reached under a misapprehension of the correct standard of review. Further, a correct application of a whole record review to the facts of this case could result in a determination that there exists substantial evidence to justify upholding the agency decision.

Therefore, I would reverse and remand to the trial court to properly apply the correct standard of review.

STATE OF NORTH CAROLINA
v.
JEFFERY JAMES BARRETT

No. COA12-1530

Filed 6 August 2013

1. Evidence—prior statements—corroboration—minor inconsistencies

The trial court did not commit plain error in an indecent liberties with a child case by admitting prior statements made by the victim for corroboration. The prior statements generally tracked her trial testimony, all of the challenges were to minor inconsistencies, and slight variances went to the weight of the evidence.

2. Evidence—prior crimes or bad acts—defendant's date of birth from prior unrelated arrest

The trial court did not commit prejudicial error in an indecent liberties with a child case by admitting into evidence law enforcement's record of defendant's date of birth as a result of prior unrelated arrests. There was no reasonable possibility that had the challenged testimony by a detective not been admitted, the jury would have reached a different result

3. Probation and Parole—special conditions of probation form—clerical error—reportable conviction involving sexual abuse of minor

There was no indication the trial court committed a clerical error in its written judgment precluding defendant from residing with his minor children in an indecent liberties with a child case. However, the case was remanded for correction of a clerical error on the special conditions of probation form where the trial court failed to mark the box indicating that a reportable conviction involved the sexual abuse of a minor.

Appeal by defendant from judgment entered 22 August 2012 by Judge Anna M. Wagoner in Union County Superior Court. Heard in the Court of Appeals 22 April 2013.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for the State.

Andrew L. Farris for defendant-appellant.

BRYANT, Judge.

Where the victim's pre-trial statements were admitted to corroborate her trial testimony and generally tracked her trial testimony, we find no error. Where the fact that law enforcement had a record of defendant's date of birth as a result of prior unrelated arrests was admitted into evidence, we find no prejudicial error. Where there is no indication the trial court committed a clerical error in its written judgment precluding defendant from residing with his minor children, we overrule defendant's argument. However, we remand for correction of a clerical error on the special conditions of probation form where the trial court failed to mark the box indicating that a reportable conviction involved the sexual abuse of a minor.

On 3 December 2009, defendant Jeffery James Barrett was arrested and subsequently indicted on charges of taking indecent liberties with a child and giving fortified wine to a person under twenty-one years of age. A trial commenced in Union County Superior Court during the session beginning 20 August 2012, the Honorable Anna M. Wagoner, Judge presiding.

At trial, the State presented evidence which showed that on 21 August 2009, the victim, a fifteen year old girl named Lucy[1], was living with her adoptive mother and two older foster brothers in Wingate, N.C. One of the foster brothers was defendant Jeffery Barrett, who was thirty-nine years old.

On 21 August 2009, defendant invited Lucy to watch a ballgame at Walter Bickett Stadium in Monroe, N.C. When they arrived at the ballpark around 9:30 p.m., the game had ended. Defendant then drove to a gas station/convenience store and purchased an apple-flavored drink that he shared with Lucy. Lucy testified the beverage tasted like alcohol and made her feel "[w]oozy." Defendant then drove Lucy to Dickerson Park, an area with which Lucy was unfamiliar. At the park, defendant told Lucy "I want to show you something." Defendant lowered the back of Lucy's car seat and started to kiss her neck. Defendant repeated "I want to show you something[.]" Lucy testified that when she asked what it was, defendant touched her breast and rubbed her vagina, through her clothing. Lucy testified that she asked him to stop more than two times, but defendant continued. Defendant then told Lucy he wanted to lick her, at which point Lucy pushed defendant off of her and ran from the car, out of the park. Lucy ran until she came to a police station,

1. A pseudonym has been used to protect the identity of the victim.

which she found locked, then continued running until she came to a convenience store.

A store clerk, Estella Segura, testified that she was working at the Sunoco gas station on Franklin Street in Monroe during the evening of 21 August 2009. She identified Lucy as the young woman who came into the store that evening.

> A. She came in -- I guess she was running because she came in fast through the door. She was shaky, she was kind of like -- looked like she was crying.
>
> Q. Did she seem upset?
>
> A. Yes.
>
> Q. Did she talk to you?
>
> A. Not too much. She just -- what she said -- she just told me what -- what she -- what happened . . . .
>
> . . .
>
> She said her brother had tried to rape her.

Segura called the police. Detective Katherine Hower with the Monroe Police Department received a call from the police communications center reporting a possible rape shortly before midnight. Det. Hower responded to the call, and spoke with Lucy at the convenience store and then again at the police station. Detective Hower testified to the events that occurred that night as they were related to her by Lucy.

Detective Shannon Huntley, an officer in the Monroe Police Department who was assigned to the juvenile investigations unit, also interviewed Lucy and testified to statements Lucy made during the interview. Det. Huntley related that Lucy was enrolled in a school curriculum for exceptionally challenged children – "children who either are handicapped or have cognitive disabilities or typically are lower functioning individuals." Det. Huntley testified that on 21 August 2009, Lucy was fifteen years old and defendant was thirty-nine years old.

Following the presentation of the State's evidence, the trial court granted defendant's motion to dismiss the charge of giving fortified wine to a person less than twenty-one years old. Defendant did not present any evidence. Following the close of all the evidence, the jury returned a verdict of guilty on the charge of taking indecent liberties with a child. The trial court entered judgment in accordance with the jury verdict and sentenced defendant to an active term of seventeen to twenty-one

months. The trial court then suspended the sentence and placed defendant on supervised probation for a period of thirty months, including special conditions. Defendant appeals.

On appeal, defendant raises the following issues: (I) whether the trial court committed plain error by admitting prior statements made by Lucy for corroboration; (II) whether defendant was prejudiced by the admission of a reference to his prior unrelated arrests; and (III) whether a clerical error was made on defendant's judgment and commitment order.

I

[1] First, defendant argues the trial court committed plain error by admitting prior statements made by the victim for corroboration where they directly contradicted trial testimony, added significant new evidence, and were offered for the truth of the matter asserted. We disagree.

Standard of Review

At trial, the prosecutor for the State questioned store clerk Estelle Segura, Det. Hower, and Det. Huntley each about statements Lucy made on the night of 21 August 2009 or during the ensuing investigation. Defendant objected to each question as calling for a hearsay response. The trial court overruled each objection, allowing the witness to testify for purposes of providing corroboration. Following the testimony, defendant failed to object and move to strike the testimony on the basis of inconsistent or contrary testimony that failed to corroborate Lucy's trial testimony.

Now, on appeal, defendant argues that the testimony admitted for purposes of corroboration directly contradicts Lucy's trial testimony, adds significant new evidence, and was offered for the truth of the matter asserted. Because this argument against the admission of trial testimony was not presented before the trial court, we review it only for plain error.

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error

> has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citation and quotations omitted) (original emphasis).

Analysis

"Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Williams*, 363 N.C. 689, 703, 686 S.E.2d. 493, 503 (2009) (citation and quotations omitted). "To this end, trial judges in this state generally have wide discretion in admitting evidence which they determine to be helpful to a jury appraisal of credibility." *State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 446 (1984) (citation omitted). "It is well established that a witness' prior consistent statements may be admitted to corroborate the witness' sworn trial testimony but prior statements admitted for corroborative purposes may not be used as substantive evidence." *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000). "If the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." *Williams*, 363 N.C. at 704, 686 S.E.2d at 503 (citation and brackets omitted).

"Our prior statements are disapproved to the extent that they indicate additional or 'new' information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence." *State v. Locklear*, 172 N.C. App. 249, 256, 616 S.E.2d 334, 339 (2005) (quoting *State v. Ramey*, 318 N.C. 457, 468–69, 349 S.E.2d 566, 573–74 (1986)). Our North Carolina Supreme Court has held that allowing admission of prior statements that vary from witness testimony is not error if the two accounts "generally tracked [each other] and [were] not contrary to or inconsistent with [each other]." *Williams*, 363 N.C. at 704, 686 S.E.2d at 503.

Defendant cites *State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988); *Stills*, 310 N.C. 410, 312 S.E.2d 433; and *State v. Fowler*, 270 N.C. 468, 155 S.E.2d 83 (1967), as cases where the admission of a witness's out of court statements held inconsistent with a witness's trial testimony resulted in prejudicial error compelling a new trial.

In *Burton*, the defendant claimed that he shot two men in the defense of another who was being beaten while pinned to the ground. 322 N.C. 447, 368 S.E.2d 630. At trial, the State's witness testified that one of the defendant's victims was positioned on top of a man, trying to strike that man in the face when the defendant fired his gun. *Id.* at 449, 368 S.E.2d at 631. The State also admitted over objection following a voir dire an audio recording of the witness's statement to police made shortly after the shooting. In his statement to police, the witness reported that the defendant's victim was "flat down on his back" when he was shot. *Id.* at 449, 368 S.E.2d at 632. The Court reasoned that the witness's recorded police statement contradicted rather than corroborated his trial testimony, and moreover, the defendant was prejudiced by the error of admission as his only defense was that he acted in the defense of another. *Id.* at 451, 368 S.E.2d at 632-33.

In *Stills*, the defendant was charged with taking indecent liberties with a minor and first-degree sexual offense. 310 N.C. 410, 312 S.E.2d 443. Two witnesses testified against the defendant on the basis of first-hand observation. The State also called six witnesses to give corroborating testimony. Over objection, some "corroborating" witnesses testified to out-of-court statements made by other corroborating witnesses: in other words they were allowed "to corroborate, the corroboration." *Id.* at 413, 312 S.E.2d at 445. The Court held that the trial court committed prejudicial error in admitting "corroborative" testimony that not only did not corroborate but in some instances contradicted the substantive testimony and introduced new evidence. *Id.* at 416, 312 S.E.2d at 447. The Court reasoned that while corroborating testimony could be corroborated, introducing hearsay statements "three or four times removed from the original declarant under the guise of corroborating the corroborative witness [was] unacceptable." *Id.*

In *Fowler*, the defendant was convicted of first-degree murder and sentenced to death. 270 N.C. 468, 155 S.E.2d 83. At trial, one witness testified to observing the defendant shoot a police officer following a scuffle for the officer's gun. The State also called another officer who took the witness's statement after the shooting. *Id.* at 470, 155 S.E.2d at 85. The testimony of the officer-witness admitted for the purpose of corroboration, indicated that the defendant pointed the gun at the officer and told the officer that "he was sorry but he had to do this." *Id.* The Supreme Court reasoned that the officer witness's testimony expressed "deliberation and a pre-fixed purpose to kill" which not only did not corroborate, but contradicted the other witness's trial testimony. The Court determined that the erroneous admission of this out of court statement

may have been the difference between a sentence of life in prison and the death penalty, and therefore, the defendant was granted a new trial. *Id.* at 471, 155 S.E.2d at 86-87.

Here, defendant challenges as non-corroborative certain testimony by Det. Hower and Det. Huntley, each of whom related statements Lucy made to that officer during the police investigation.

Lucy testified that after she and defendant left the baseball field at Walter Bickett Stadium, defendant drove to a convenience store.

> A. Well, after he took me to the ballgame and everybody was leaving, then he drove to the store.
>
> Q. Okay, to -- when you say a store, is it like a gas station store?
>
> A. A convenience store.

Det. Hower interviewed Lucy the night of 21 August 2009. At trial, Det. Hower gave the following testimony regarding what Lucy had stated to her on that night.

> When they arrived at the ballgame, it was apparent that it was over; everybody was coming out of the ballgame. So he promised her that he'd take her to the next ballgame. At that time she stated that they rode around and he stopped at two different stores. They stopped at Morgan Mill Shell and at Five Points, which is close to the vicinity of where she was at at that time when I picked her up. She said he went into the store and purchased beer and something that tasted like apple juice.

Det. Huntley testified that Lucy stated to her that "[t]he ballgame was over. After the ballgame, they had ridden around and stopped at several convenience stores." Although the testimony of Det. Hower was more expansive, we do not find the testimony of Det. Hower or Det. Huntley to be contrary to Lucy's trial testimony.

Defendant also challenges whether Det. Huntley's testimony describing the park corroborates Lucy's testimony. Lucy described the park defendant drove her to as follows:

> Q. Can you describe the park to us?
>
> A. No, I can't.
>
> Q. Okay. Was it -- did it have houses around it?

A. No.

Q. Did it have any other type of building?

A. No.

Q. Do you remember if it had a swing set or any type of play set?

A. Yeah.

Q. What did it have?

A. It had a swing set.

Q. Do you remember, was it dark?

A. Yes, it was dark.

Q Could you see house lights or building lights around it?

A. Yes.

Q. Okay. So there was some type of building that you could at least see the lights [of] the park?

A. Yeah.

Q. Okay. Do you remember, was it heavy with trees? I mean was it pretty foresty [sic] or was it more like a yard?

A. It was more like a yard.

Q. Okay. Do you remember anything else from the park -- bridge; any type of bridge or?

A. No.

Det. Hower testified that in her interview with Lucy, Lucy described the park defendant took her to after the convenience store.

> [S]he was a little unsure of the park, so I had [Lucy] describe the park to me. [Lucy] described the park as being -- having a ball field, it had picnic tables, it had a fence, but then it had a gate with buses. She also described it having a small bridge that you could walk over. Now, since I work that area, I knew that that sounded like Dickerson Park.

While Det. Hower's testimony provided additional facts in describing the park, including the existence of a bridge which Lucy did not remember

during her trial testimony, Det. Hower's testimony was not contrary to or inconsistent with Lucy's trial testimony.

Defendant also challenges what he argues is an inconsistency between Lucy's testimony regarding defendant's position in the car at the time of the assault and the testimony of Det. Huntley. Lucy testified that she sat on a swing at the park and then told defendant she was ready to go home. She asked if she could drive.

Q. . . . So after he agreed to let you drive, you got back in the car?

A. Yes.

Q. And where were you sitting?

A. In the driver's seat.

Q. Okay. And where was the defendant?

A. In the passenger seat.

Q. Okay. And what happened at that point, once you got in the car?

A. He let the seat back.

Q. Okay. The -- you mean like where your back is?

A. Yeah.

Q. So you kind of laid down a bit more?

A. Yes.

Q. Okay. And you said he started kissing on your neck?

A. Yes.

Det. Huntley testified as follows regarding Lucy's statement: "She said that they had went to the park, and then had proceeded to say [sic] that he told her that she could drive. And she got into the passenger seat. He reached over, laid the seat down . . . ."

Despite the inconsistency between Lucy's testimony and Det. Huntley's testimony as to which seat Lucy occupied in the vehicle, Det. Huntley's testimony regarding the sequence of events occurring in the vehicle generally tracked Lucy's trial testimony and was not contrary to nor inconsistent in any significant way with Lucy's testimony.

Defendant further argues that there was an inconsistency between Lucy's testimony and Det. Huntley's corroborating testimony regarding whether defendant was intoxicated.

> Q. Okay. [Lucy], that night when the defendant picked you up at your house, do you know, had he been drinking?
>
> A. Yes.
>
> . . .
>
> Q. And was he acting in a way that indicated to you that he was drunk based upon your prior experiences with him?
>
> A. No.
>
> Q. No, he didn't.
>
> A. No.
>
> Q. So how do you know he was drunk?
>
> A. Because I could smell it on his breath.

Det. Huntley testified, as follows: "And she also said that in addition to what Detective Hower had written in her report, she had stated that Mr. Barrett – she thought in her opinion that Mr. Barrett was under the influence of alcohol or that he was drunk."

We have reviewed all of defendant's challenges to the testimony of the corroborating witnesses and find that all of the challenges are to minor inconsistencies. *See State v. Quarg*, 334 N.C. 92, 431 S.E.2d 1 (1993) (finding inconsistences and contradictions between trial testimony and testimony admitted for purposes of corroboration to be minor and insignificant, not prejudicial). These inconsistences are far removed from those found to be the basis for prejudicial error in *Burton*, *Stills*, and *Fowler*. Further, as we have noted in *Williams*, "slight variations . . . affect only the credibility of the evidence which is always for the jury." *Williams*, 363 N.C. at 704, 686 S.E.2d at 503 (citation omitted). Defendant's arguments are overruled.

II

[2] Defendant next argues that testimony by a witness for the State referring to defendant's previous arrests served only to show a propensity for criminal conduct and thus was a violation of Rule 404(b). Defendant further contends that based on his previous argument – that the State's

case-in-chief was comprised of inconsistent testimony – there is a reasonable possibility the jury would have reached a different verdict had the testimony regarding defendant's prior arrests not been improperly admitted. We disagree.

Defendant argues that the testimony admitted into evidence against him violated Rule 404(b) of our Rules of Evidence and was "[i]mproperly admitted evidence of prior bad acts [and] is inherently prejudicial." *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011) (stating in part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.").

Citing *State v. Davis*, ___ N.C. App. ___, 731 S.E.2d 236 (2012), and *State v. Gray*, ___ N.C. App. ___, 709 S.E.2d 477 (2011), as cases where this Court has held that there existed a reasonable possibility of a different verdict had improperly admitted evidence been excluded at trial, defendant asserts that as in Gray, Lucy's "testimony was inconsistent internally and as presented over time through statements the child made to others who testified at trial." Defendant argues that testimony given by Det. Huntley indicating that he had prior arrests "bolstered the State's hearsay evidence over [Lucy's] actual testimony and, consequently, there is a reasonable possibility that the jury would have reached a different verdict had it not been improperly admitted."

We note for the record that the challenged evidence was not admitted as 404(b) evidence, but offered as proof of defendant's age. Defendant was charged with taking indecent liberties with a child in violation of the General Statutes, section 14-202.1. Among other elements, the State had to prove that defendant was "16 years of age or more and at least five years older than the child in question[.]" N.C. Gen. Stat. § 14-202.1 (2011). In attempting to establish defendant's age, the following exchange took place between the prosecutor and Det. Huntley:

> Q. Okay. And what did you know his date of birth to be?
>
> [Defense counsel]: Objection, Your Honor; hearsay, no foundation.
>
> THE COURT: I'll sustain –
>
> Q. Okay, what if – you said you obtained a warrant for the defendant's arrest. What if anything happened next?
>
> A. The warrant went into the police system and it wasn't until later that Mr. Barrett was arrested for the offense.

Q. Okay. How did you get the defendant's information?

A. Mr. Barrett was already in the police system.

Q. Okay.

A. From prior arrests.

Q. Okay. And what was the date of birth –

[Defense counsel]: I'd ask that be stricken, Your Honor.

THE COURT: Overruled.

Q. What – based upon the information that you gathered from the defendant, what was the date of birth that you discovered in his information?

A. January 1st of 1970.

Q. How old was Mr. Barrett on August 21st, 2009?

A. Thirty-nine.

Q. How old was [Lucy]?

A. Fifteen.

Q. That's twenty-four years older; is that correct?

A. Yes, ma'am.

Even presuming that the admission of Det. Huntley's testimony indicating that the Monroe Police Department had a record of defendant's date of birth "[f]rom prior arrests" could be considered 404(b) evidence, it was clearly admissible to show a fact other than defendant's character. *See e.g.*, *State v. Weaver*, 318 N.C. 400, 348 S.E.2d 791 (1986). Further, we also find unpersuasive defendant's argument that there is a reasonable possibility the jury's guilty verdict on the charge of taking indecent liberties with Lucy would have been affected had the testimony been struck from the jury's consideration. There was no indication given of the nature of defendant's acts which resulted in arrest and no indication defendant had been convicted. Moreover, the detail shared by Lucy in her testimony describing the assault by defendant, along with the testimony given by Segura, Det. Hower, and Det. Huntley, was sufficient to prove the elements of the offense. Therefore, we do not find a reasonable possibility that, had the challenged testimony by Det. Huntley not been admitted, the jury would have reached a different result. Accordingly, defendant's argument is overruled.

III

[3] Next, defendant argues the trial court made a clerical error that creates a conflict between the trial court's oral ruling and its written judgment. Defendant contends that the trial court's ruling announced in open court allowed him to reside with his minor children while the written judgment specifies that defendant "not reside in a household with . . . any minor child." We disagree.

Following the announcement of the jury verdict finding defendant guilty of taking indecent liberties with a child, the trial court sentenced defendant to an active term of seventeen to twenty-one months. The trial court then suspended defendant's sentence and placed him on supervised probation for a period of thirty months. We note that the crime of taking indecent liberties with a minor, as defined by N.C.G.S. § 14-202.1, is a sexually violent offense pursuant to N.C. Gen. Stat. § 14-208.6(5) (2011) and thus a "reportable conviction" pursuant to section 14-208.6(4).

Pursuant to North Carolina General Statutes, section 15A-1343, "Conditions of probation,"

> a defendant who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, must:
>
> . . .
>
> (4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.
>
> (5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the minor child's best interest to allow the probationer to reside in the same household with a minor child.

N.C. Gen. Stat. § 15A-1343(b2) (2011) (entitled "Special Conditions of Probation for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor").

In announcing the provisions of defendant's probation, the trial court questioned defendant about his children:

THE COURT: He is to abide by all the rules and regulations of the sex offender control program -- how old are your children?

MR. BARRETT: Twenty-one, eighteen, seventeen, thirteen, seven, and six.

THE COURT: Does the State contend he should have no contact with the children under the age of eighteen unless –

. . .

THE COURT: It appears that he is Static 99 -- form has been conformed and that he's found to be a low risk for reoffending. Anything further as to that?

MS. SULLIVAN: No, Your Honor.

THE COURT: Yes, sir.

MR. STERMER: Yes, because of that, Your Honor, we would ask that he be allowed to have contact -- under the statute, as I understand, he can't have contact with any minor under eighteen years of age. We'd ask that the Court make the only exception for his children.

THE COURT: You have any argument with that?

MS. SULLIVAN: No, Your Honor, I'll leave it to your discretion.

. . .

THE COURT: Okay. And I will modify -- note that he is the father -- you have eight children in all?

JEFFERY JAMES BARRETT: Six.

THE COURT: Six children?

JEFFERY JAMES BARRETT: Yes, ma'am.

THE COURT: Four that are under the age of eighteen; is that correct?

. . .

THE COURT: Four children under the age of eighteen with whom he resides; is that correct? Do you live with them?

MR. STERMER: Two of them.

> JEFFERY JAMES BARRETT: Two of them.
>
> THE COURT: That the Court will modify the special conditions for sex offenders to allow him to have contact with his four natural children.

In the judgment entered, the trial court found that defendant was convicted of a reportable conviction as defined by G.S. § 14-208.6(4) and pursuant to G.S. § 15A-1343(b2) (Conditions for probation) must "[n]ot reside in a household with any minor child." [R. 39]. But, in its judgment under the heading "Special Conditions of Probation – G.S. 15A-1343(b1), 143B-704(c)," the trial court "allow[ed] contact with [defendant's] natural children[.]"

To the extent that defendant contends the trial court ordered that he be allowed to reside with his minor children, we find no support for this in the record and therefore, overrule the argument.

In response to defendant's argument, the State contends that the trial court made a clerical error in selecting physical or mental abuse, as opposed to sexual abuse, on the judgment form Mandatory Special Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. We note that on the first page of the judgment form suspending defendant's felony sentence and imposing probation, the trial court checked box number 8, finding that defendant's offense involved both the physical or mental abuse and the sexual abuse of a minor. On the judgment form mandating special conditions for sex offenders, the trial court selected only the box indicating defendant's offense involved the physical or mental abuse of a minor, and failed to also select the box indicating the offense involved the sexual abuse of a minor. Therefore, we remand this matter for correction of a clerical error, failing to check the box on the Mandatory Special Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor form indicating that defendant's offense involved the sexual abuse of a minor, in accordance with the trial court's findings on page one of the judgment. *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) ("A clerical error is '[a]n error resulting from a minor mistake . . . in writing or copying something on the record, and not from judicial reasoning or determination." (citation omitted)).

No error at trial; remanded for correction of clerical error.

Chief Judge MARTIN and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
ADAM DERBYSHIRE

No. COA12-1382

Filed 6 August 2013

Search and Seizure—vehicular stop—reasonable suspicion—weaving within lane

The trial court erred in a driving while impaired case by denying defendant's motion to suppress evidence seized during the stop of defendant's vehicle. The police officer did not have the reasonable and articulable suspicion necessary to justify the stop of defendant's vehicle based solely on the fact that defendant weaved only once, causing the right side of his tires to cross the dividing line in his direction of travel.

Appeal by Defendant from order entered 2 June 2011 by Judge Howard E. Manning, Jr., and judgment entered 1 June 2012 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 23 April 2013.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

Currin & Currin, by George B. Currin, for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

This case arises from the 8 November 2006 arrest of Adam Derbyshire ("Defendant") on the charge of driving while impaired. The case has appeared before this Court once before, and, in a 2010 unpublished opinion, we described its procedural history as follows:

> On 8 November 2006, Defendant was arrested and charged with driving while impaired. On 30 June 2008 Defendant was convicted of that offense in Wake County District Court and entered notice of appeal to Wake County Superior Court for a trial *de novo*. On 25 February 2009, Defendant filed a [m]otion to [s]uppress [e]vidence in Wake County Superior Court, alleging that no reasonable

> and articulable suspicion existed to justify the stop of his vehicle.
>
> . . . .
>
> Defendant's motion to suppress was denied on 19 June 2009 by the Honorable Ronald L. Stephens. On 10 July 2009, Defendant pled guilty to the offense of driving while impaired in Wake County Superior Court. Defendant reserved his right to appeal the denial of his motion to suppress. Upon his guilty plea, the Honorable Abraham P. Jones sentenced Defendant to Level 5 punishment for driving while impaired[] and imposed a suspended sentence of sixty (60) days imprisonment and twelve (12) months unsupervised probation.

State v. Derbyshire, 207 N.C. App. 749, 701 S.E.2d 404 (2010) (unpublished disposition), available at 2010 WL 4290202 at *1. On appeal in that case, Defendant argued that the trial court erred by failing to make written findings of fact to support its denial of his motion to suppress. *Id.* We agreed and remanded the case to the Wake County Superior Court for further proceedings consistent with our opinion. *Id.* at *3.

A new evidentiary hearing was held on 31 May 2011. Thereafter, the trial court, the Honorable Howard E. Manning, Jr., presiding, denied Defendant's motion to suppress by written order entered 2 June 2011. In that order, the court made the following findings of fact and conclusions of law:

> . . . . The [c]ourt, having heard evidence and arguments of counsel, *finds the facts* to be as follows:
>
> 1. On Wednesday, 8 November 2006, Sergeant T.D. Turner [("Sgt. Turner")] was employed by the City of Raleigh as a police officer. She had been employed by the [City] for fifteen years prior to the date of this offense.
>
> 2. At or around 10:05[] that evening, Sgt. Turner first came into contact with []Defendant[,] who was driving northbound on Glenwood Avenue[.]
>
> 3. Sgt. Turner's attention was . . . drawn to []Defendant's vehicle when she observed what she believed to be []Defendant operating his vehicle with the high beam headlights activated.

4. Sgt. Turner testified that as is customary among motorists, she flashed her own high beam headlights roughly three times to inform []Defendant to dim his headlights.

5. She further testified that []Defendant did not appear to acknowledge this message and that[,] in addition, she observed that []Defendant had a blank stare when she passed him.

6. Sgt. Turner then made a three point turn and began to follow []Defendant's vehicle after which point she observed []Defendant's vehicle weave in and out of his traffic lane, with the right tires crossing the dividing lane line.

7. Based on Sgt. Turner's observations of []Defendant and his operation of his vehicle, she then activated her blue lights to initiate a traffic stop of []Defendant's vehicle.

8. []Defendant then testified and offered a conflicting account of the events that occurred that evening[.]

9. Defendant stated that he had been at dinner . . . at Vin Restaurant off of Glenwood Avenue prior to the traffic stop[.] He also testified that he had a roughly two hour long dinner, []during which he . . . drank a martini and half a bottle of wine.

10. Defendant indicated that he did not have his high beam headlights activated and also did not see Sgt. Turner[] signaling for him to turn them off. . . .

Based on the foregoing *findings of fact*, the [c]ourt *concludes as a matter of law that*:

1. []Defendant gave a materially conflicting version of the facts . . . .

2. Sgt. Turner's version corroborates the fact that []Defendant had been coming from Vin Restaurant when the event took place. Acknowledging the conflicts of these two versions, the [c]ourt finds Sgt. Turner's testimony to be credible.

3. The [c]ourt finds that Sgt. Turner reasonably believed []Defendant's high beam headlights to have been activated, that she signaled three times for []Defendant to turn

> them down, that she then followed Defendant's vehicle at which point she observed []Defendant fail[] to maintain lane control.
>
> Based upon the totality of the circumstances on this occasion, there was a sufficient basis upon which to form an articulable suspicion of impaired driving in the mind of a reasonable and cautious officer.

Defendant entered a plea of guilty on 1 June 2012, the Honorable William R. Pittman presiding. Defendant specifically reserved his right to appeal the trial court's denial of his motion to suppress. He gave notice of appeal in open court that same day.

Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Even if evidence is conflicting, the trial judge is in the best position to resolve the conflict." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation marks omitted). "Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision[.]" *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619–20. "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Discussion

On appeal, Defendant contends that: (1) the trial court's findings of fact are not adequate to support its conclusions of law; (2) the trial court's findings of fact and third conclusion of law are not supported by competent evidence; (3) Sgt. Turner did not have a reasonable and articulable suspicion necessary to justify the stop of Defendant's vehicle; and (4) the trial court's conclusion that there was sufficient evidence "upon which to form an articulable suspicion of impaired driving in the mind of a reasonable and cautious officer" is legally inadequate to support the denial of his motion to suppress and does not reflect a correct application of legal principles. We agree with Defendant's third argument and reverse the trial court's denial of his motion to suppress on

those grounds. Because our determination on that issue is dispositive, we need not address Defendant's remaining arguments.

I. The Parties' Testimony

[1] At the hearing, Sgt. Turner testified as follows to her reasons for stopping Defendant:

> Q. . . . [O]n November 8th, 2006, approximately 10:05 p.m. did you come in contact with []Defendant?
>
> A. Yes, sir, I did.
>
> . . . .
>
> Q. And where did you come in contact with []Defendant?
>
> A. Along the Glenwood south corridor. I was heading southbound on Glenwood when I encountered [] Defendant coming northbound on Glenwood Avenue [in Raleigh].
>
> . . . .
>
> Q. And what drew your attention to []Defendant?
>
> A. Initially, my attention was drawn to []Defendant because of what I thought was his high beam lights were on. They were very, very bright and as we approached each other, I flashed my high beam lights at him three times and in an attempt to get him to dim his high beams and when that didn't occur, we began to meet almost as if to pass and I looked over at him and I observed a blank stare. He was very wide eyed and that's an indication of a potential for an impaired driver.
>
> . . . .
>
> Q. . . . . And now back to your encounter with []Defendant, what happened after you made that three point turn?
>
> A. I fell in directly behind []Defendant and began to follow him northbound on Glenwood Avenue.
>
> Q. Did you make any observations of []Defendant's vehicle when you began to follow him?
>
> A. I did. As he proceeded northbound I observed him weave from left to right in his designated lane of travel.

And as we crossed over . . . Peace Street . . . , I decided to activate my emergency equipment to investigate the potential that he might be an impaired driver.

Q. And so the only — how many times did you see []Defendant weave from left to right?

A. I saw him weave left to right at least once. And as soon as we crossed over Peace Street I activated my blue lights.

Q. And was the weaving entirely within his lane of travel or did he ever —

A. I believe he went into the right-hand travel lane one time.

. . . .

Q. How far over in the right travel lane did []Defendant cross?

A. I don't believe I had that indicated in my notes, just that it was the right side of his tires crossed over.[1]

. . . .

Q. Could you basically just sum up for the Court what . . . made you decide to activate your blue lights.

A. The training that I've received over the years has taught me that there are certain indicators and having bright lights on your vehicle or no lights at all is sometimes an indicator, coupled with other behavior like the blank stare that I observed. When I turned around and followed him, he failed to maintain his travel lane. So he weaved from left to right in his travel lane without maintaining the lane. And then when I observed the right side of his vehicle cross over into the right-hand lane, I felt like I had enough . . . at that point to stop him and investigate my suspicions.

Q. Okay. And — now, the Judge just mentioned in this right travel lane that there are cars parked. Were there cars parked that night in that right lane?

---

1. The right side of Defendant's tires did not cross the line separating his lane of traffic from oncoming traffic. Rather, the tires crossed the line separating those two lanes of traffic headed in the same direction. At no point did Defendant cross the center line or the solid white line on the outer edge of the road.

> A. Yes, sir, I believe there were. There's usually cars parked there all the time.
>
> . . . .

Sgt. Turner continued on cross-examination:

> A. I remember []Defendant told me that . . . kind vehicle [sic] he drove that the lights were unusually bright.
>
> Q. Well, he was driving a 2004 Land Rover automobile[,] correct?
>
> A. Yes, sir.
>
> Q. And that's some sort of SUV that sits high off the ground[,] correct?
>
> A. Yes, sir. He was explaining to me [that] it had some sort of different bulbs and that's why they appeared bright.

Lastly, Defendant took the stand in his own defense and testified to the following:

> A. . . . . My lights were on the automatic mode which they are always on. So the lights go on when the windshield senses rain or if it starts to get dark out.
>
> . . . .
>
> Q. Were your lights on high beam at any time?
>
> A. They were not, and actually when [Sgt.] Turner pulled me over I asked her why did you pull me over . . . she said ["]your high beams were on["] and I then flipped my high beams on to show [that] they were not on and when you engage the high beams in my car a purple light in the middle of the dash illuminates and it's very easy to understand that your high beams are on.
>
> . . . .
>
> A. . . . [My headlights] are halogen lights and they can . . . — it's kind of a clear brightness. It's just a different brightness from a . . . normal light.

The State presented no evidence that the stop occurred in an area of high alcohol consumption or that Sgt. Turner considered such a fact as a part of her decision to stop Defendant.

II. Legal Background

"Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 137–38, 726 S.E.2d 824, 827 (2012) (citations and certain quotation marks omitted). A traffic stop is considered a seizure and has been "historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, []20 L. Ed. 2d 889 (1968). Therefore, reasonable suspicion is the necessary standard for traffic stops." *Id.* Reasonable suspicion exists when "the totality of the circumstances — the whole picture" — supports the inference that a crime has been or is about to be committed. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 440 (2008) (citations and quotation marks omitted). This standard is "less demanding . . . than probable cause and requires a showing considerably less than preponderance of the evidence." *Id.* at 414, 665 S.E.2d at 439 (citation and quotation marks omitted). "The standard is satisfied by some minimal level of objective justification," but requires that the stop be based on "specific and articulable facts, as well as . . . rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* (citations and quotation marks omitted). It is often described as "more than [a] . . . hunch." *Id.* at 424, 665 S.E.2d at 445 (Bradley, J., dissenting) (citation and quotation marks omitted).

On a number of occasions, this Court has determined that an officer has the reasonable suspicion necessary to justify an investigatory stop after observing an individual's car weaving in the presence of certain other factors. This has been referred to by legal scholars as the "weaving plus" doctrine. *See, e.g.*, Jeff Welty, *Weaving and Reasonable Suspicion*, North Carolina Criminal Law — UNC School of Government Blog (19 June 2012), http://nccriminallaw.sog.unc.edu/?p=3677. In *State v. Watson*, 122 N.C. App. 596, 472 S.E.2d 28 (1996), we determined that reasonable suspicion sufficient to justify a stop was present at approximately 2:30 "[one morning] on a road near a nightclub" when the defendant was "driving on the center line and weaving back and forth within his lane for 15 seconds." *Id.* at 598–99, 472 S.E.2d at 29–30. Eight years later, in *State v. Jacobs*, 162 N.C. App. 251, 590 S.E.2d 437 (2004), we upheld the trial court's denial of the defendant's motion to suppress when an officer had observed the defendant's vehicle "slowly weaving within its lane of travel touching the designated lane markers on each side" for three quarters of a mile at 1:43 on a Thursday morning "in an area near bars." *Id.* at 255, 590 S.E.2d at 440–41. We noted in *Jacobs* that the facts were nearly "indistinguishable from *Watson* in that, although

[the] defendant's weaving within his lane was not a crime, that conduct combined with the unusual hour and the location was sufficient to raise a reasonable suspicion of impaired driving." *Id.* (citations omitted).

Without these "plus" factors, we have — until recently — failed to conclude that a reasonable and articulable suspicion sufficient to justify a stop exists in "weaving only" circumstances. In *State v. Fields*, 195 N.C. App. 740, 673 S.E.2d 765, *disc. review denied*, 363 N.C. 376, 679 S.E.2d 390 (2009) [hereinafter *Fields 2009*], for example, the defendant was pulled over at approximately 4:00 on a Thursday afternoon after the officer observed his 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. Noting that there must be "additional specific articulable facts" beyond mere weaving in order for there to be reasonable suspicion — *e.g.*, driving at an unusual hour or in an area with drinking establishments — we reversed the trial court's order denying the defendant's motion to suppress. *Id.* at 744, 673 S.E.2d at 768. Just two months later, in *State v. Peele*, 196 N.C. App. 668, 675 S.E.2d 682, *disc. review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009), we applied a similar line of reasoning. There the defendant was pulled over at approximately 7:50 on a Saturday evening after the officer — who was responding to a dispatch alerting him to "a possible careless and reckless, D.W.I." — observed the defendant's car "weave into the center, bump the dotted line, and then fade to the other side and bump the fog line,[2] and then pretty much go back into the middle of the lane." *Id.* at 668, 671, 675 S.E.2d at 682–83. Noting that the defendant was not driving late at night and that there was no evidence that he was close to any bars, we reversed the trial court's order denying the defendant's motion to suppress. *Id.* at 674, 675 S.E.2d at 687 ("In short, all we have is a tip with no indicia of reliability, no corroboration, and conduct falling within the broad range of what can be described as normal driving behavior.") (citations and brackets omitted).

Three years later, however, in an opinion from March of 2012, we indicated that weaving only can be sufficient to arouse a reasonable suspicion of criminal activity when it is particularly erratic and dangerous to other drivers. Distinguishing *Fields 2009* and *Peele*, we determined that the officer had a reasonable suspicion sufficient to justify a stop of the defendant's vehicle when he described the defendant's car as "like a ball bouncing in a small room." *State v. Fields*, __ N.C. App. __, __,

2. The "fog line" is the solid white line on the outer edge of the road. Unless the driver crosses over the center line, into oncoming traffic, the fog line is always to the right of the driver's vehicle.

723 S.E.2d 777, 779 (2012) [hereinafter *Fields 2012*]. Characterizing the defendant's driving as "so erratic that . . . other drivers — in heavy traffic — [were forced to take] evasive maneuvers to avoid [the] defendant's car," we affirmed the trial court's denial of the defendant's motion to suppress. *Id.*; *see also State v. Simmons*, 205 N.C. App. 509, 525, 698 S.E.2d 95, 106 (2010) (determining that the officer had reasonable suspicion sufficient to initiate a stop when the defendant was "not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road").

Most recently, in June of 2012, our Supreme Court held that a state trooper had a reasonable and articulable suspicion sufficient to initiate a traffic stop when the defendant was "weaving constantly and continuously [within her own lane] over the course of three-quarters of a mile" and did so at 11:00 on a Friday night. *Otto*, 366 N.C. at 138, 726 S.E.2d at 828 (quotation marks omitted). In so holding, the Supreme Court distinguished the weaving plus cases described above primarily on grounds that the defendant in *Otto* "was weaving constantly and continuously over the course of three-quarters of a mile." *Id.* (quotation marks omitted). The Court also noted that the late hour — "11:00 p.m. on a Friday night [sic]" — contributed to the reasonableness of the officer's suspicion. *Id.*

III. Analysis

In its order, the trial court recited testimony from the hearing, made findings of fact based on that testimony, and — based on those findings — concluded that Sgt. Turner had a reasonable and articulable suspicion of criminal activity when she stopped Defendant. The trial court did not correctly separate its findings of fact from its recitations of testimony and conclusions of law. This is not fatal to the trial court's order, however, and it is within our discretion to "reclassify" the trial court's findings and conclusions to assist in our review. *See N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) ("[C]lassification of an item within the order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.").

Relevant to our discussion, the trial court included the following statement in its "find[ings of] fact": "[Sgt. Turner] . . . testified that . . . she observed that []Defendant had a blank stare when she passed him." Though the court correctly made certain findings of fact in that section of its order — e.g., that it was "[a]t or around 10:05[] that evening" — its mere recitation of testimony as to Defendant's blank stare is not sufficient to constitute a valid finding of fact. *See Lane v. American Nat'l*

Can Co., 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) ("[F]indings of fact must be more than a mere summarization or recitation of the evidence and the [court] must resolve the conflicting testimony.") (citations omitted), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). Therefore, our review is limited to those facts found by the trial court and the conclusions reached in reliance on those facts, not the testimony recited by the trial court in its order. *See generally N.C. State Bar*, 189 N.C. App. at 88, 658 S.E.2d at 499 ("[A]ny determination requiring the exercise of judgment or the application of legal principles is . . . classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is . . . classified a finding of fact.") (citations omitted).

In its "conclu[sion of] law" section, the trial court stated that its denial of Defendant's motion to suppress was based on "the totality of the circumstances on this occasion" — specifically, Sgt. Turner's belief that Defendant's high beam headlights had been activated, "[the fact] that [Sgt. Turner] signaled three times for the Defendant to turn them down," and the fact that Defendant "failed to maintain lane control." Accordingly, we find that the totality of the circumstances in this case present one instance of weaving, in which the right side of Defendant's tires crossed into the right-hand lane,[3] as well as two conceivable "plus" factors — the fact that Defendant was driving at 10:05 on a Wednesday evening[4] and the fact that Sgt. Turner believed Defendant's bright lights were on before she initiated the stop.[5]

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3. Sgt. Turner's testimony is unclear and could reasonably be interpreted to suggest that Defendant's tires crossed the dividing line either as a part of his weaving or *after* the weaving. In its sixth finding of fact, however, the trial court resolved the apparent ambiguity by finding that Sgt. Turner "observed []Defendant's vehicle weave in and out of his traffic lane, *with the right tires crossing the dividing lane line*." Thus, despite the seeming ambiguity in Sgt. Turner's testimony, the trial court found that the crossing occurred in concert with — not in addition to — Defendant's solitary "weave," and we are bound by that determination. *See Williams*, 362 N.C. at 632, 669 S.E.2d at 294; *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619–20.

4. As discussed in section *II*, the time of night is a common factor to be considered on the issue of whether an officer had the necessary reasonable suspicion to justify a traffic stop.

5. Unlike its statement that Sgt. Turner *testified* to observing Defendant's blank stare, the trial court explicitly found that Sgt. Turner believed Defendant's bright lights were on. Because a court's comments regarding the testimony presented at a hearing is separate from its findings based on that testimony, we include Sgt. Turner's belief regarding the bright lights in our analysis and exclude any belief she may have had regarding Defendant's facial expression.

In *Otto*, the Supreme Court relied primarily on the defendant's "weaving constantly and continuously over the course of three-quarters of a mile" to find that the trooper had a reasonable suspicion of the commission of a crime. *Otto*, 366 N.C. at 138, 726 S.E.2d at 828. The fact that it was approximately 11:00 p.m. on a Friday also contributed to that conclusion, but was not dispositive.[6] *See id.* Here, the facts that Defendant was driving at 10:05 on a Wednesday evening and that Sgt. Turner believed Defendant's bright lights were on are not sufficiently uncommon to constitute valid "plus" factors. The difference between 10:05 on a Wednesday and 11:00 p.m. on a Friday is slight, but not insubstantial. It is utterly ordinary for an individual to be driving on the road at 10:05 on a Wednesday evening and, without something more unusual, this factor cannot help to establish a suspicion of criminal activity in the mind of a reasonable, cautious officer. In addition, we note that many vehicles on the road today use the same sort of headlights that Defendant had — "very, very bright" halogen headlights. An increase in the likelihood that an individual may be subjected to a *Terry* stop merely because that person owns a car that "sits high off the ground" or that was built with brighter headlights, as in this case, would constitute an irrational inference of criminal activity, which we decline to adopt here. Accordingly, the fact that Defendant was driving on a Wednesday evening at 10:05 in a vehicle which had "different," brighter lights merely constitutes "conduct falling within the broad range of what can be described as normal driving behavior" and, therefore, cannot be considered in a reasonable officer's determination to initiate a *Terry* stop. *See Peele*, 196 N.C. App. at 674, 675 S.E.2d at 687 (citations and quotation marks omitted).

Therefore, our decision is limited to whether Sgt. Turner could have developed a reasonable suspicion that Defendant was in the process of committing a crime when he weaved only once, causing the right side of his tires to cross the dividing line in his direction of travel. Because one instance of weaving is neither (1) erratic and dangerous nor (2) constant and continuous under *Fields 2012* and *Otto*, respectively, we conclude that this case is governed by our prior decisions in *Fields 2009* and *Peele*. Therefore, we hold that Sgt. Turner lacked a reasonable and articulable suspicion of the commission of a crime and, thus, that the trial court erred in denying Defendant's motion to suppress. For that

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6. In his concurring opinion, joined by Justice Jackson, Justice Newby stated that he believed the "defendant's constant and continuous weaving standing alone [was] sufficient to support [a conclusion of reasonable, articulable suspicion]." *Otto*, 366 N.C. at 138, 726 S.E.2d at 828.

reason, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges MCGEE and HUNTER, JR., ROBERT N., concur.

STATE OF NORTH CAROLINA
v.
RALPH EUGENE FRADY

No. COA12-1375

Filed 6 August 2013

Sexual Offenses—first-degree sexual offense with a child—expert testimony—impermissible opinion regarding victim's credibility

The trial court erred in a child sexual abuse case by admitting expert testimony that the child victim's disclosure that she had been sexually abused was consistent with sexual abuse. Without physical evidence, the expert testimony that sexual abuse had occurred was an impermissible opinion regarding the victim's credibility. Because the victim's credibility was central to the outcome of the case, the admission of the evidence was prejudicial.

Appeal by defendant from judgment entered 27 April 2012 by Judge Sharon T. Barrett in Transylvania County Superior Court. Heard in the Court of Appeals 9 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General Angenette Stephenson, for the State.

Mark Montgomery for defendant.

ELMORE, Judge.

Ralph Eugene Frady (defendant) was found guilty of first degree sexual offense with a child and of one count of taking indecent liberties with a child. On 27 April 2012, the trial court sentenced defendant as a prior record level I to a minimum of 192 and a maximum of 240 months

imprisonment. From this conviction and sentence, defendant appeals. After careful consideration, we order a new trial.

I. Background

At trial, the State presented the following evidence: On 31 July 2010, defendant, a Terminix technician, went to Diane Moore's residence to fix a toilet in the basement. Moore had a contract for pest control through Terminix, and defendant had been assigned to Moore's residence for approximately two years. Defendant had previously helped Moore with odd jobs during his free time and often did not charge for his services. Moore is the maternal great-grandmother of the alleged victim in the case, Debbie,[1] who was six-years old at the time of the alleged offense. Debbie resides with Moore and knows her as her mother.

When defendant arrived, Moore let him in and followed him to the basement. As he walked down the stairs, defendant asked "[w]here is my little girl?" Moore told him, and then she saw defendant head to her bedroom where Debbie was watching television and playing Nintendo. Debbie was wearing a nightgown and no underwear. Debbie testified that defendant came into the room and played in her "private spot" with his tongue and hands. She threw her Nintendo remote at him to get him to stop. Debbie also alleged that defendant had tickled her "private spot" with his fingers and tongue on one prior occasion.

Debbie went into the kitchen where her mother was drying her hands and told her about the incident. At that time, defendant was in the basement. Moore immediately confronted defendant, asking, "[w]hy would you do that to my baby?" Defendant responded, "I didn't do nothing. I didn't do nothing."

On 1 August 2010, Detective Steve Woodson and Sergeant Dan Harris with the Brevard Police Department interviewed Debbie and Moore. Detective Woodson testified that Debbie accused defendant of doing something with his mouth to her private area; she showed him by taking her tongue and flicking it against her lips.

Debbie went to Mission Hospital for a physical examination on 11 August 2011. Before the examination, Christine Nicholson, a social worker at Mission Children's Hospital, conducted a forensic interview with Debbie. The video of Debbie's interview was played for the jury as Nicholson testified. During the interview, Nicholson presented Debbie with a diagram showing a prepubescent female, and she circled the

1. A pseudonym has been used to protect the identity of the child.

vaginal area on the drawing to indicate where defendant had touched her. The maltreatment team at Mission Hospital reviewed the interview.

Dr. Cindy Brown, the medical director of a child abuse valuation program at Mission Hospital, participated on the maltreatment team but did not personally examine or interview Debbie. Prior to trial, defense counsel made a motion in limine to exclude Dr. Brown's testimony. Dr. Brown did not testify in the State's case-in-chief; however, after the defense rested, the State called her as a rebuttal witness on the basis that the defense's evidence put the victim's credibility at issue. It is a portion of Dr. Brown's testimony that is the subject of this appeal.

Defendant testified at trial, alleging that Debbie asked him to watch television with him, and, when he declined, she threw her Nintendo controller at him. Defendant left the room and went to the basement to fix the toilet. The defense called several character witnesses, including members of defendant's church, his employer, and his ex-wife; each testified to defendant's truthfulness and integrity. Defendant now appeals.

II. Analysis

Defendant contends that the trial court erred in admitting a portion of Dr. Brown's testimony as it impermissibly spoke to Debbie's credibility. We agree. The issue before us stems from the following testimony offered by Dr. Brown on rebuttal:

> Q. Did you form an opinion as to whether [Debbie's] disclosure was consistent with sexual abuse?
>
> DEFENDANT: Objection. Move to strike. Motion for retrial.
>
> THE COURT: Overruled. Overruled. Overruled.
>
> A. Yes.
>
> Q. And what was your opinion?
>
> A. Our report reads that her disclosure is consistent with sexual abuse.
>
> Q. And what did you base your opinion on?
>
> A. The consistency of her statements over time, the fact that she could give sensory details of the event which include describing being made wet and the tickling sensation. . . . [a]nd her knowledge of the sexual act that is beyond her developmental level.

We first note that defendant preserved this issue for appellate review. Here, the trial court requested the State to forecast the evidence it intended to present if Dr. Brown testified. The State informed the trial court that it intended to ask Dr. Brown if Debbie's disclosure was consistent with sexual abuse. Defendant did not object during the forecast but did object to the testimony now complained of *at the time it was offered* and timely made a motion to strike and motion for retrial.[2] The objection was overruled and the motions were denied. We hold that the grounds for the objection were apparent from the context. *See* N.C.R. App. P. 10(a) (preserving an issue for appellate review requires a party to "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.").

It is well settled 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) (citation omitted). "However, those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). "With 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." *Dixon*, 150 N.C. App. at 52, 563 S.E.2d at 598 (citations omitted).

In order for an expert medical witness to render an opinion that a child has, in fact, been sexually abused, the State must establish a proper foundation, i.e. physical evidence consistent with sexual abuse. *Id.* Without physical evidence, expert testimony that sexual abuse has occurred is an impermissible opinion regarding the victim's credibility. *Id.*

Here, Dr. Brown stated that Debbie's "disclosure" was "consistent with sexual abuse." The alleged "disclosure" was Debbie's description of the abuse. The State argues that the contested portion of Dr. Brown's testimony is admissible "because it could help the jury understand the behavior patterns of sexually abused children." We do not agree. While Dr. Brown did not diagnose Debbie as having been sexually abused,

2. Defense counsel made a motion for retrial. We conclude that defense counsel's intent was to make a motion for mistrial.

she essentially expressed her opinion that Debbie is credible. We see no appreciable difference between this statement and a statement that Debbie is believable. The testimony neither addressed the characteristics of sexually abused children nor spoke to whether Debbie exhibited symptoms consistent with those characteristics. *See Id.*

Furthermore, Dr. Brown based her opinion solely on "the consistency of Debbie's statements over time," the fact that she could provide sensory details, and because her knowledge of the sexual act was beyond her developmental level. This may have been a sufficient foundation to support an opinion as to whether Debbie exhibited symptoms or characteristics of victims of child sexual abuse; however, it was insufficient for the admission of Dr. Brown's judgment that Debbie is believable. Additionally, the record contains no physical evidence indicating that Debbie was sexually abused, and Dr. Brown never personally examined or interviewed her; she merely reviewed the forensic interview and the case file. As such, Dr. Brown was not in a position to know whether Debbie's statements remained consistent over time. Therefore, the contested testimony amounted only to an impermissible opinion regarding the victim's credibility, and the trial court erred in admitting it. *See State v. Oliver*, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533 (1987) (citation omitted) ("[O]ur courts have held expert testimony inadmissible if the expert testifies that the prosecuting child-witness in a trial for sexual abuse is believable, or to the effect that the prosecuting child-witness is not lying about the alleged sexual assault.").

We must next discern whether the trial court's error was prejudicial. A prejudicial error occurs "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." N.C. Gen. Stat. § 15A-1443 (2011). Here, defendant argues that the State "obviously chose to present Dr. Brown during rebuttal for dramatic effect, insuring that she would be the last witness the jury would hear before it began its deliberations. It is probable that this strategy had its intended effect." We agree.

The State's only direct evidence of defendant's guilt in the case *sub judice* was Debbie's testimony. There was no medical evidence indicating that Debbie had been sexually abused, there was no evidence that Debbie exhibited intense emotional trauma after the incident, and no testimony was offered regarding whether her behavior following the alleged sexual abuse was consistent with victims of sexual abuse. Essentially, the jury was left to weigh Debbie's credibility against defendant's credibility,

making Debbie's credibility central to the outcome. Because Dr. Brown's rebuttal testimony spoke directly to Debbie's credibility, it had a probable impact on the outcome of the trial.

III. Conclusion

In sum, we conclude that the trial court committed prejudicial error in admitting the contested testimony as it spoke directly to Debbie's credibility. Accordingly, we grant defendant a new trial. As defendant's remaining issues may not arise in a new trial, we decline to address them.

New trial.

Judges GEER and DILLON concur.

STATE OF NORTH CAROLINA
v.
MATTHEW BRYANT MARTIN

No. COA12-1574

Filed 6 August 2013

Confessions and Incriminating Statements—post-Miranda confession—involuntary—Siler presumption

The trial court erred in a second-degree rape case by partially denying defendant's motion to suppress. Defendant's pre-*Miranda* confession was obtained under circumstances rendering it involuntary. Furthermore, the Court of Appeals imputed the same prior influence to the post-*Miranda* confession because the State failed to overcome the presumption set forth in *State v. Siler*, 292 N.C. 543.

Appeal by defendant from judgment entered 5 July 2012 by Judge Mark E. Powell in Polk County Superior Court. Heard in the Court of Appeals 4 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Jon H. Hunt and Benjamin Dowling-Sendor, for defendant.

ELMORE, Judge.

On 5 July 2012, Matthew Bryant Martin (defendant) pled guilty to attempted second-degree rape and was sentenced to 44 to 62 months imprisonment. In his plea, defendant reserved his right to appeal the trial court's partial denial of his motion to suppress. After careful consideration, we order a new trial.

I. BACKGROUND

Defendant met the victim (T.H.) online through the internet website www.myyearbook.com. On 14 November 2011, defendant, T.H., and a friend went to McDonald's and a video game store. Upon returning to T.H's residence, T.H.'s friend left, and defendant and T.H. went to her bedroom and watched videos on the computer until T.H. fell asleep. Defendant slept on the floor of T.H.'s room that evening. The following morning, defendant got into T.H.'s bed, where she was asleep on her stomach, pulled down her shorts and underwear, and had sexual intercourse with her. T.H. did not wake during this incident. Instead, she awoke after defendant was dressed. T.H. and her friend took defendant home.

Later that same day, several of T.H.'s friends assaulted defendant after learning that he had intercourse with her. They punched him, kicked him, and beat him with a metal wrench. Defendant reported the assault to the Polk County Sheriff's Office. When the police began investigating the assault, T.H. told them of the alleged rape. As a result, defendant was arrested on 15 November 2011 for an unrelated probation violation; his use of www.myyearbook.com violated the terms of his probation for a prior conviction of misdemeanor sexual battery. At the time of this arrest, defendant was twenty-one years old.

On 8 December 2011, while in custody for the probation violation, Captain Randall Hodge of the Polk County Sheriff's Office took defendant out of his cell to interrogate him regarding the alleged rape. Captain Hodge led defendant into an interrogation room; his arms and legs were cuffed and shackled, and he was not told that he was free to leave. Captain Hodge informed defendant that T.H. "took a polygraph and she passed." In fact, T.H. had done neither. Additionally, Captain Hodge said that defendant could "help himself" and "to make things easier for you at this point . . . we can maybe compromise or work something out with a -- a plea arrangement or anything like that[.]" Defendant confessed to having sexual intercourse with T.H. while she was asleep. After the confession, Captain Hodge stated: "What I want to do, just to cover our bases as much as I can, I can't promise you no deals with the DA. . . .

The only thing I can tell the District Attorney is you cooperated with me. Okay? But I'm going to go ahead and read you your Miranda rights. You are not under arrest at this point." Captain Hodge removed defendant's restraints and read him his *Miranda* rights. Defendant waived his rights and agreed to speak with Captain Hodge further about the incident.

Thereafter, Captain Hodge continued with the second part of the interrogation: "Let me . . . I'm going to recap[.]" Defendant confessed once more, telling Captain Hodge that he pulled T.H.'s shorts down to her knees and "inserted my penis in her vagina." To defendant's knowledge, T.H. did not wake during the intercourse.

Defendant's counsel moved to suppress all statements made by defendant during the 8 December 2011 interrogation. Judge Powell entered an order partially granting defendant's motion, concluding that any statement made by defendant to Captain Hodge prior to defendant being advised of his Miranda rights was suppressed. Thus, the trial court deemed defendant's post-Miranda testimony admissible. Defendant now appeals.

II. ANALYSIS

[1] Defendant argues that the trial court erred in denying his motion to suppress on the basis that his confession was involuntary. Defendant specifically contends that he was interrogated in a two-stage process whereby Captain Hodge persuaded defendant to confess prior to having been Mirandized, thus rendering his first confession involuntary. As such, Captain Hodge then delivered the Miranda warnings and had defendant repeat his confession, which, defendant asserts, was also involuntary given the circumstances. We agree.

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, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

"The determination of whether a defendant's statements are voluntary and admissible is a question of law and is fully reviewable on appeal." *State v. Maniego*, 163 N.C. App. 676, 682, 594 S.E.2d 242, 246 (2004) (quotation and citation omitted). "The voluntariness of a confession is determined by the totality of the circumstances." *State v. Gainey*,

355 N.C. 73, 84, 558 S.E.2d 463, 471 (2002) (quotation and citation omitted). The requisite factors in the totality of the circumstances inquiry include: 1) whether the defendant was in custody at the time of the interrogation; 2) whether the defendant's *Miranda* rights were honored; 3) whether the interrogating officer made misrepresentations or deceived the defendant; 4) the interrogation's length; 5) whether the officer made promises to the defendant to induce the confession; 6) whether the defendant was held incommunicado; 7) the presence of physical threats or violence; 8) the defendant's familiarity with the criminal justice system; and 9) the mental condition of the defendant. *See State v. Cortes-Serrano*, 195 N.C. App. 644, 655, 673 S.E.2d 756, 763 (2009). However, "[t]he presence or absence of one or more of these factors is not determinative". *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992) (citation omitted).

> [W]here a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence. The burden is upon the State to overcome this presumption by clear and convincing evidence.

State v. Siler, 292 N.C. 543, 551, 234 S.E.2d 733, 739 (1977) (quotation and citation omitted). "This rule which predates the *Miranda* decision arises out of a concern that where the first confession is procured through promises or threats rendering it involuntary as a matter of law, these influences may continue to operate on the free will of the defendant in subsequent confessions. *Id.*

In the case *sub judice*, defendant does not specifically challenge the trial court's findings of fact; instead he argues that given the totality of the circumstances, his confession was involuntary. The trial court found that "the statements made by the Defendant both before and after his Miranda rights being advised were not involuntary[.]" We disagree. Furthermore, we conclude that the presumption set forth in *Siler* is applicable here. As such, the circumstances and tactics that Officer Hodge employed to induce defendant's first confession shall be imputed to defendant's post-Miranda confession.

In considering the totality of the circumstances, we first note that defendant was under arrest for violating his probation when Captain Hodge questioned him. Defendant was moved from his cell to an interrogation room; his arms and legs were cuffed and shackled, and

"[a]ny reasonable person would not feel free to leave the room." Thus, the trial court's finding that defendant was in custody is supported by competent evidence.

Second, Captain Hodge made misrepresentations and/or deceptive statements to defendant. He began defendant's interrogation with a deceptive statement, telling defendant that T.H. "took a polygraph and she passed," when she had done neither. Officer Hodge then asked, "do you want to tell me what happened that night now, now that I know[?]" This statement is misleading because it implied that Captain Hodge had irrefutable evidence against defendant.

Third, Captain Hodge made promises to the defendant to induce the confession. An officer's promises are considered improper inducement, if he "promise[s] relief from the criminal charge to which the confession relates, and [does] not merely provide the defendant with a collateral advantage." *Gainey*, 355 N.C. at 84, 558 S.E.2d at 471. "[A] suggestion of hope created by statements of law enforcement officers that they will talk to the District Attorney regarding a suspect's cooperation where there is no indication that preferential treatment might be given in exchange for cooperation does not render inculpatory statements involuntary." *State v. Bordeaux*, 207 N.C. App. 645, 654, 701 S.E.2d 272, 278 (2010). However, if a confession was the product of improperly induced hope or fear, it is involuntary. *See Gainey*, 355 N.C. at 84, 558 S.E.2d at 471.

Here, Officer Hodge told defendant, "we can maybe compromise or work something out with a -- a plea arrangement or anything like that[.]" This statement suggests that Captain Hodge was in a position to negotiate a plea bargain on defendant's behalf, which was a false promise. Additionally, Captain Hodge's offer of a possible plea arrangement is a promise of relief from a criminal charge--it is not an offer of mere collateral advantage. Moreover, after Captain Hodge mentioned a possible plea arrangement, defendant stated, "[t]hat would be wonderful. I mean, if I can do that, I mean, I have a plan to where I have a -- my girlfriend that I can go down to Georgia, Gainesville, Georgia." Given defendant's reaction, we conclude that his confession was the product of improperly induced hope or fear. *See Gainey*, *supra*.

Lastly, we find that defendant's impaired mental condition may have contributed to the involuntariness of his confession. Defendant suffers from bipolar disorder, Tourette's Syndrome, ADHD, night terrors, and an anxiety disorder. As such, he takes at least three prescription medications daily. Defendant's mother testified that defendant's behavior on

the day of the interrogation led her to suspect that he was not receiving proper doses of his medication, and blood work confirmed that the level of one of his medications (Depakote) was below the normal range.

Given the totality of the circumstances: 1) defendant was in custody, 2) Captain Hodge made deceitful statements during the interrogation, 3) Captain Hodge made promises to defendant that improperly induced hope or fear, and 4) defendant may have had an impaired mental condition during questioning, we conclude that defendant's pre-Miranda confession was obtained under circumstances rendering it involuntary. Furthermore, we impute the same prior influence to the post-Miranda confession because the State failed to overcome the presumption set forth in *State v. Siler*, *supra*. Accordingly, we conclude that both the pre-Miranda and post-Miranda confessions were involuntarily made; the trial court erred in denying defendant's motion to suppress in its entirety. After careful consideration, we order a new trial.

New trial.

Chief Judge MARTIN and HUNTER, JR., Robert N., concur.

STATE OF NORTH CAROLINA
v.
JOSHUA K. OLIPHANT AND DERRICK L. HAMILTON, DEFENDANTS

No. COA12-1219

Filed 6 August 2013

1. Robbery—with a dangerous weapon—jury instructions—referring to defendants collectively—no plain error

The trial court did not commit plain error in its introductory remarks and throughout much of the charge to the jury in a robbery with a dangerous weapon case by referring to defendant Oliphant and defendant Hamilton collectively as "defendants" and, thereby, suggesting that the jury should convict the defendants collectively. Assuming, without deciding, that the trial court erred by failing to give a separate mandate or separate instruction clarifying that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant, the error was not so fundamental that it had a probable impact on the jury.

2. Robbery—with a dangerous weapon—conspiracy—sufficient evidence

The trial court did not err by denying defendants' individual motions to dismiss the charge of conspiracy to commit robbery with a dangerous weapon. There was sufficient evidence to show the existence of a mutual, implied understanding between defendants to commit the crime of armed robbery.

3. Evidence—witness examination—probation report—no personal knowledge

The trial court did not err in a robbery with a dangerous weapon case by not allowing defendant to examine the victim concerning the contents of a probation violation report that she had not previously seen.

Appeal by defendants from judgments entered 23 April 2012 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Stuart M. (Jeb) Saunders, for the State versus Joshua Kareem Oliphant.

Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State versus Derrick Lorenzo Hamilton.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant Oliphant.

James N. Freeman, Jr., for defendant-appellant Hamilton.

BRYANT, Judge.

Even assuming the trial court committed instructional error, upon review of the entire record, we cannot conclude that the alleged instructional error had a probable impact on the jury's decision to convict both defendants and, therefore, find no plain error. Where there was sufficient evidence to support the submission of the charge of conspiracy to commit robbery with a dangerous weapon to the jury as to each defendant, the trial court did not err in denying defendants' individual motions to dismiss. And, where the trial court refused to allow the examination of the victim regarding a probation violation report she had not seen, we find no error.

On 27 June 2011 just after 1:00 a.m., Tiawauna Threatt – the victim – had just left a friend's house and was walking along Hildebrand Street near its intersection with Beatty's Ford Road in Mecklenburg County. As she talked on her cell phone, the victim was approached from behind by two males. One of the men – "the light-skinned [one] with wide frame glasses" – pulled out a black revolver, pointed it at her, and demanded her pocketbook, which she handed over. The second man – "dark-skinned" and wearing a "doo rag" – reached for her cell phone, which she gave to him. The victim then ran towards Beatty's Ford Road where she waived down a Charlotte-Mecklenburg police officer who was on patrol. She gave a statement and a physical description of each of the men. Within twenty minutes and five blocks of the location of the robbery, law enforcement officers detained defendants Joshua Oliphant and Derrick Hamilton who matched the descriptions given by the victim. The officers presented defendants to the victim as part of a "show-up" identification; the victim identified both defendants as the men who had just robbed her.

Also, soon after the victim's descriptions of the two men were broadcast to other law enforcement officers in the vicinity, a vehicle was found abandoned at the end of Hildebrand Street, less than a quarter of a mile from the place of the robbery. The vehicle was parked in the traffic lane; its lights were on; its engine was running; and its driver side door was open. The vehicle was registered to defendant Oliphant, and defendant Oliphant's wallet along with mail addressed to him was found on the vehicle's front seat.

Arrest warrants were issued and served immediately on defendants Oliphant and Hamilton charging each with robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Defendants were each indicted shortly thereafter on charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon.

A jury trial was commenced during the 16 April 2012 Criminal Session of Mecklenburg County Superior Court, the Honorable W. Robert Bell, Judge presiding. Following the presentation of evidence, the jury returned verdicts of guilty as to each defendant on the charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. As to defendant Oliphant, who had attained a prior felony record level of five, the trial court entered a consolidated judgment in accordance with the jury verdicts and imposed an active term of 111 to 146 months. As to defendant Hamilton, who had attained

a prior felony record level of four, the trial court imposed an active term of 97 to 129 months. Defendants appeal.

On appeal, defendants Oliphant and Hamilton raise the following issues: (I) whether the trial court's instructions to the jury encouraged a determination of defendants' guilt collectively rather than individually; and (II) whether the trial court erred in failing to dismiss the conspiracy charges. Defendant Hamilton separately raises an issue (III) as to whether the trial court erred in not allowing him to question a witness regarding a probation violation.

I

[1] Neither defendant Oliphant nor defendant Hamilton objected to the trial court's instructions to the jury. At the completion of the charge to the jury the trial court asked the following question:

> THE COURT: Outside the presence of the jury, are there any requests for additions, changes corrections given by the State?
>
> [The State]: None from the State, Your Honor.
>
> THE COURT: Defendant, [defense counsel for Oliphant]?
>
> [Defense counsel for Oliphant]: Not for [defendant Oliphant], Your Honor.
>
> THE COURT: For [defendant Hamilton]?
>
> [Defense counsel for Hamilton]: Nothing for [defendant Hamilton], Judge.

Now, on appeal, defendants Oliphant and Hamilton assert that the trial court committed plain error in its instructions to the jury because its instructions permitted the jury to think that it should determine defendants' guilt collectively rather than individually. We disagree.

Plain Error Review

> The plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to

> a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citation, quotations, and brackets omitted).

> The adoption of the 'plain error' rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate [N.C. R. App. P. 10(a)(2),[1, 2]] which is not the intent or purpose of the 'plain error' rule.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citing *United States v. Ostendorff*, 371 F.2d 729 (4th Cir. 1967)). "The purpose of Rule [10(a)(2)] is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial." *State v. Collins*, 334 N.C. 54, 66, 431 S.E.2d 188, 195 (1993) (citation omitted).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). "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.* (citations and quotation marks omitted); *compare State v. Ballard*, 193 N.C. App. 551, 668 S.E.2d 78 (2008) (where the defendant objected to the jury instructions and on appeal had the burden to establish that "in light of the entire charge" the jury was misled).

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1. Rule 10 of the Rules of Appellate Procedure, which was originally referenced in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 378 (1983), as Rule 10(b)(2), addresses the preservation of challenges to the trial courts jury instructions for purposes of appellate review is currently contained in Rule 10(a)(2) (2013).

2. N.C. R. App. P. 10 (a)(2). "*Jury Instructions*. A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury."

When the plain error rule is applied, it "is to be applied cautiously and only in the exceptional case[.] [In fact,] the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted); *accord Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.").

Here, the trial court gave the following instructions:

> The defendants have entered pleas of not guilty. The fact that they have been charged is not evidence of guilt. Under our system of justice, when a defendant pleads not guilty, he is not required to prove his innocence, but he is presumed to be innocent. This presumption remains with the defendant throughout the trial until the jury selected to hear the case is convinced from the both the facts and the law beyond a reasonable doubt of the guilt of the defendant.
>
> . . .
>
> The defendants in this case have not testified. The law gives the defendants this privilege. This same law assures the defendants that their decision not to testify creates no presumption against them. Therefore, the silence of the defendants is not to influence your decision in any way.
>
> . . .
>
> The defendants have been charged with robbery with a firearm, which is the taking and carrying away the personal of [sic] property of another from [sic] person or in her presence without her consent by endangering or threatening that person's life with a firearm; the taker knowing that he is not entitled to take the property and intending to deprive another of its use permanently. The instructions are identical for both defendants.
>
> . . .
>
> For you to find the defendant guilty of this offense, the State must prove seven things beyond a reasonable doubt:
>
> First, that the defendant took property from the person of another or in her presence.

Second, that the defendant carried away the property.

Third, that the person did not voluntarily consent to the taking and carrying away of the property.

Fourth, that the defendant knew that he was not entitled to take the property.

Fifth, that at the time of taking, the defendant intended to deprive that person of its use permanently.

Sixth, that the defendant had a firearm in his possession at the time that he obtained the property, or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that said instrument was what the defendant's conduct represented it to be.

Seventh, that the defendant obtained the property by endangering or threatening the life of that person with the firearm.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with another person, had in his possession a firearm and took and carried away property from the person or in the presence of a person without her voluntarily [sic] consent by endangering or threatening her life with the use or threatened use of a firearm, the defendant knowing that he was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to render a verdict of guilty.

. . .

The defendants have also been charged with felonious conspiracy with each other to commit robbery with a firearm. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.

First, that Joshua Oliphant and Derrick Hamilton entered into an agreement.

Second, that the agreement was to commit robbery with a firearm.

. . .

> Third, that Joshua Oliphant and Derrick Hamilton intended that the agreement be carried out at the time that it was made.
>
> . . .
>
> If you do not so find or if you have reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

When requested by the trial court to point out any "additions, changes, corrections" to the instructions just given, neither defendant Oliphant nor defendant Hamilton objected to the instructions as given or noted any reason for the trial court to make changes to the jury instructions.

Defendants now assert that in the trial court's introductory remarks and throughout much of the charge to the jury, the court referred to defendant Oliphant and defendant Hamilton collectively as "defendants" and, thereby, suggested that the jury *should* convict the defendants collectively. We do not believe that any error found in the trial court's instructions rises to the level of plain error.

Our courts have indicated that when more than one defendant is tried jointly on the same charge, the jury is to determine the guilt or innocence of each defendant without regard to the guilt or innocence of the codefendant. *See State v. Lockamy*, 31 N.C. App. 713, 230 S.E.2d 565 (1976). "This Court has repeatedly held that, when two or more defendants are jointly tried for the same offense, a charge which is susceptible to the construction that the jury *should* convict all if it finds one guilty is reversible error." *Id.* at 716, 230 S.E.2d at 567 (emphasis added). However, it is not necessary to give wholly separate instructions as to each defendant when the charges and the evidence as to each defendant are identical, provided that "the trial judge [] give[s] either a separate final mandate as to each defendant or otherwise clearly instruct[s] the jury that the guilt or innocence of one defendant is not dependent upon the guilt of innocence of a codefendant." *Id.* at 716, 230 S.E.2d at 568.

Defendants cite *Lockamy*, among other cases, in urging this Court to find plain error in the jury instructions as given by the trial court in this case. In *Lockamy*, our Court granted the defendants a new trial when it found the jury instructions were susceptible to the interpretation that the jury must find either or both defendants guilty or both defendants not guilty. 31 N.C. App. 713, 230 S.E.2d 565. *Compare State v. Tomblin*,

276 N.C. 273, 171 S.E.2d 901 (1970) (although portions of the jury instructions were susceptible to the interpretation that all of the defendants should be found guilty upon a determination that any one committed the charged acts, taken as a whole the instructions did not mislead the jury and represented a fair and accurate presentation of the law).

In *Tomblin*, the defendant excepted to the instructions in a trial involving three codefendants, asserting that error was committed by the trial court in its instructions to the jury, on the grounds that the instructions were subject to a construction that the jury should convict all of the defendants even if only one was guilty. The trial court's instruction to the *Tomblin* jury included the following: "Now, I want to make it clear — and crystal clear — that you're trying each of these defendants — that while we are trying them together each are charged separately — and you are trying them separately." *Id.* at 277, 171 S.E.2d at 904. The challenged portion of the jury instructions relating to the charge of rape reads as follows:

> 'Now, members of the jury, on the charge of rape, the court charges you that if you are satisfied from the evidence and beyond a reasonable doubt that either one or all of these defendants had carnal knowledge, had sexual intercourse, forcibly and against the will of [the victim] on this occasion, that is, if either of these or all of these had carnal knowledge of [the victim] without her consent and against her will . . . it would be your duty to return a verdict of guilty of rape as charged in the bill of indictment . . . . (Exception No. 14)

Id. at 275, 171 S.E.2d at 902. The Court acknowledged that standing alone, the "ambiguity could not be condoned"; however, it went on to reason that when considered in the context of the jury charge as a whole, the trial court's instructions provided a fair and correct presentation of the law and thus, no grounds for reversal. *Id.* at 276-77, 171 S.E.2d at 903-04. The *Tomblin* Court also considered a challenge to the following jury charge regarding kidnapping:

> 'Now, members of the jury, as to the charge of kidnapping the court charges you that if you are satisfied from the evidence and beyond a reasonable doubt that these defendants, either of them, one of them, two of them, or three of them, considering each man's case individually and separately, that he, or they, unlawfully and wilfully took and carried away this girl, [the victim], by force and against

> her will, then the court charges you that he or they would be guilty of kidnapping.
>
> '* * *
>
> 'So, the court charges you as to this matter of kidnapping that if you are satisfied from the evidence and beyond a reasonable doubt that these defendants, either of them or one of them, or two of them, or all three, unlawfully and wilfully—and it is against the law to kidnap a person—that is, if they deliberately and with a purpose put [the victim] in fear of her life or in fear of great bodily harm, and in this matter forced her to go to these places, then the court charges you that it would be equivalent to actual force and that it would be your duty to return a verdict of guilty of kidnapping as charged in the bill of indictment as to the defendant, or the defendants.'

Id. at 275-76, 171 S.E.2d at 902-03. The Court noted that while the kidnapping charge "does not reflect the clarity of thought and conciseness of statement which is desirable in a judicial mandate to the jury[,]" the Court did not think the jury was confused by the instruction. *Id.* at 276, 171 S.E.2d at 903 (quotations omitted).

In the instant case, we review and analyze defendant's challenge to the trial court's instructions for plain error, a difficult and demanding burden for defendants to meet. *See Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (reversing this Court when it applied a lesser burden to the defendant on plain error review, one that only required the defendant to show "that such error was likely, in light of the entire charge, to mislead the jury," and clarifying that on plain error review "a defendant must establish prejudice – that, after examination of the entire record, the error had a probable impact on the jury's finding that defendant was guilty").

Here, the trial court referred to defendants Oliphant and Hamilton jointly during the jury charge when observing that both defendants entered pleas of not guilty and that neither defendant chose to present evidence. At the outset of its instruction on charges of robbery with a firearm and felonious conspiracy to commit robbery with a firearm, the trial court stated that "[t]he instructions are identical for both defendants." Following this, the trial court's instruction referenced an individual defendant: "If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with another person . . . ."

We are aware of defendants' argument that these instructions were erroneous as the trial court failed to give a separate mandate as to each defendant or a separate instruction clarifying "that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant." *Lockamy*, 31 N.C. App. at 716, 230 S.E.2d at 568. However, assuming, without deciding, that the trial court erred by failing to give a separate mandate or separate instruction, per *Lockamy*, we are unable to conclude that the error was fundamental, that it had a probable impact on the jury. *See Lawrence*, 365 N.C. at 516-17, 723 S.E.2d at 333. Neither can we say it is one that affects the "fairness, integrity or public reputation of judicial proceedings[.]" *Id.* In reaching this conclusion, we examine the entire record as required for plain error review.

We note that the crux of the defense revolved around misidentification as opposed to assertions that one defendant was guilty and another was not. Given the evidence before the jury, there is no reasonable probability that the outcome would have been different had the jury been explicitly instructed in accordance with *Lockamy*.

The victim of the robbery faced the men who robbed her at gunpoint of her purse and cellphone, as they were standing within arm's reach of her in a well-lit area. She immediately flagged down a police officer and gave a description of the two men who had just robbed her. Two men meeting the description given were detained shortly thereafter, identified in a show-up by the victim, and again identified in court. Defendant Oliphant's car was found a short distance from the location of the robbery, in the street with the driver's door open, the lights on, and the engine running.

There was substantial evidence before the trial court of the guilt of each defendant. We are not persuaded that the strength of the evidence as to each defendant varied or that there is any likelihood that the jury would have found one defendant guilty while acquitting the other. Therefore, even if we assume *arguendo* that the trial court's jury charge was susceptible to the construction that the jury should convict both defendants if they found that either defendant committed the offense, defendant Oliphant and defendant Hamilton have failed to establish that based on a review of the entire record, the instructional error had a probable impact on the jury's finding that each defendant was guilty. Accordingly, this argument is overruled.

II

[2] Defendant Oliphant and defendant Hamilton argue that the trial court erred by denying their individual motions to dismiss the charge of

conspiracy to commit robbery with a dangerous weapon. Specifically, defendants contend that the evidence failed to establish an agreement prior to the commission of the robbery and an agreement to use a firearm. We disagree.

> In ruling on a motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Rouse, 198 N.C. App. 378, 381, 679 S.E.2d 520, 523 (2009) (citation and quotations omitted). "If, viewed in the light most favorable to the State, the evidence is such that a jury could reasonably infer that defendant is guilty, the motion must be denied." *State v. Woodard*, ___ N.C. App. ___, ___, 709 S.E.2d 430, 434 (2011) (citation omitted). "We review the denial of a motion to dismiss for insufficient evidence *de novo*." *Id.*

> A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. This evidence may be circumstantial or inferred from the defendant's behavior.

State v. Shelly, 176 N.C. App. 575, 586, 627 S.E.2d 287, 296 (2006) (citations and quotations omitted). "[N]o overt act is necessary to complete the crime of conspiracy." *State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975). "Direct proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence." *State v. Clark*, 137 N.C. App. 90, 95, 527 S.E.2d 319, 322 (2000) (citation omitted).

During the State's case-in-chief, the victim's written statement to police was admitted into evidence. In her statement, given within twenty minutes of the robbery, the victim related the following details about the robbery.

> I was on Hilderbrand when they came up behind me. Two black males. The one with the gun was light skinned with wide frame glasses on. . . . The second suspect had on all black and a doo-rag on. He was dark skinned. . . . when

> they approached me the light skinned guy pulled the gun out which was a small black revolver and said let me get that. The light skinned guy pointed the gun at me and then I gave my pocket book to the dark skinned guy. The light skinned guy then told me to give him my phone.

Later that evening during a show-up, and again at trial, the victim identified defendants Oliphant and Hamilton as the men who approached her that evening. The victim identified defendant Oliphant as the person who held the gun and asked her for her purse. "The other guy reached for the cell phone." The victim identified "[t]he other guy" as defendant Hamilton.

The evidence in this case shows that the victim was approached from behind by both defendants as she walked alone at approximately one o'clock a.m. One defendant held the gun while the other defendant reached for her cellphone. The circumstances here (not dissimilar from those present in many conspiracy cases) do not show the existence of an express agreement between defendants. Indeed such is not required. However, what is shown by the behavior of both defendants is a mutual implied understanding that they would together approach the victim, and with the aid of a firearm, relieve her of her possessions – here, a pocketbook and cellphone.

We hold that, when taken in the light most favorable to the State, the record contains sufficient evidence to show the existence of a mutual, implied understanding between defendants Oliphant and Hamilton to commit the crime of armed robbery. *See id.* Therefore, the trial court did not err in denying defendant Oliphant and defendant Hamilton's individual motions to dismiss. *See Woodard*, ___ N.C. App. at ___, 709 S.E.2d at 434. Accordingly, this argument is overruled.

III

[3] Defendant Hamilton argues that the trial court erred in not allowing defendant Oliphant to examine the victim regarding her probation violation. Specifically, defendant Hamilton argues that exploration of the victim's probation violation was relevant to the victim's credibility. We disagree.

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2011). Further "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for

the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C.G.S. § 8C-1, Rule 611(a). "[T]he range of relevant cross-examination is very broad, but it is subject to the discretionary powers of the trial judge to keep it within reasonable bounds. The trial court's rulings as to cross-examination will not be held in error absent a showing that the verdict was improperly influenced thereby." *State v. Cook*, 195 N.C. App. 230, 234, 672 S.E.2d 25, 28 (2009) (citations and quotations omitted).

Here, the victim gave the following testimony on cross-examination by defendant Oliphant.

> Q. You are in custody currently on a probation violation?
>
> A. That's correct.
>
> Q. You have a court date coming up on that probation violation; is that right?
>
> A. Yes.
>
> Q. I believe [the prosecutor] asked you yesterday why you had a probation violation.
>
> . . .
>
> Q. You told him that you had knee surgery or something?
>
> A. Yes.
>
> Q. That that is why you had the probation violation?
>
> A. That is not why I -- it was as a result of me missing my appointments.
>
> . . .
>
> Q. . . . Isn't it true that that is not the only violation?
>
> . . .
>
> Q. Did you get a copy of the violation report?
>
> A. No, I do not.
>
> . . .
>
> Q. Do you know whether or not it could have been dated February 10?
>
> A. No. I have never seen it.

[Defense Counsel]: May I approach the witness, Your Honor?

THE COURT: You may.

[Prosecutor]: Your Honor, may counsel approach?

THE COURT: Yes, sir.
(Whereupon, a bench conference was held off the record.)

THE COURT:
I think you were going to show her that document.

[Defense Counsel]: Yes, sir, I was. Thank you.

BY [Defense Counsel]:
Q. Just to make sure. Have you seen that document?

A. No. I have never seen this. This is the first time I have seen it.

Q. Do you know what it is?

A. The violation report. I have never seen it before.

Q. Do you recognize [the probation officer]'s signature?

MR. LINDAHL: Objection.

THE COURT: Overruled.

THE WITNESS: I don't recognize her signature, but that is it definitely my probation officer.

BY [Defense Counsel]:

Q. . . . [Y]our probation officer, said your violation was for not making your appointments?

[Prosecutor]: Objection.

THE COURT: Sustained.

BY [Defense Counsel]:
Q. Did you make the appointments with your probation officer in October of 2011?

A. I made one in October of 2011. I was involved in a car accident.

Q. Excuse me?

A. I was involved in a car accident. It was hard for me to get around.

Q. Did you make your appointments with her in November of 2011?

A. Not all of them.

. . .

Q. Did you make your appointments with your probation officer in December of 2011?

[Prosecutor]: Your Honor, I will object

THE COURT: Sustained.

BY [Defense Counsel]:
Q. Those had nothing to do with your knee, did they?

A. Yes, they did.

Q. Did you make your meetings with AA and NA?

[Prosecutor]: Objection.

THE COURT: Sustained. Don't ask any other questions about this violation report.

[Defense Counsel]: Yes, sir.

THE COURT: Ladies and gentlemen of the jury, you are to disregard the last question asked by the defense attorney in your deliberations.

Outside the presence of the jury, the trial court stated for the record that it denied defense counsel an opportunity to further examine the victim regarding the probation violation report filed against her because the victim testified that she had not seen the violation report.

Defendant Hamilton argues on appeal that the victim's testimony regarding the basis for her probation violation when compared to the violations included on the probation violation report filed against her was relevant to the victim's credibility. Further, defendant Hamilton contends that the fact that the provisions of the victim's probation required her to attend AA – Alcoholics Anonymous – and NA – Narcotics Anonymous – coupled with the fact that the victim was walking outside at 1:30 a.m. was a sufficient basis to examine her as to whether she was intoxicated when she filed her police report.

We hold that the trial court's ruling preventing the examination of the victim concerning the contents of a probation violation report that she had not previously seen was not an abuse of discretion. *See* N.C. Evid. R. 602 (2011) ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that [s]he has personal knowledge of the matter."). Furthermore, we fail to discern any prejudice to defendant Hamilton from the trial court's ruling. The officer who took the victim's statement that evening testified that she appeared upset, but there was no testimony that she appeared to be intoxicated. And, the victim testified she had not been drinking. Accordingly, defendant Hamilton's argument is overruled.

No error.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
WILLIAM HERBERT PENNELL, IV

No. COA12-1269

Filed 6 August 2013

1. Probation and Parole—revocation—appeal—properly before Court—jurisdictional challenge

Defendant's appeal from the trial court's order revoking his probation and activating his original sentence was properly before the Court of Appeals even though defendant did not object to the conditions of his suspended sentence at the time judgment was initially entered. N.C.G.S. § 15A-1347, and the greater weight of the precedent of our Supreme Court, allow appeal from revocation of probation to be based solely upon a challenge, either direct or collateral, to the trial court's jurisdiction.

2. Probation and Parole—revocation—jurisdiction—underlying indictment fatally defective

The trial court lacked jurisdiction to revoke defendant's probation for his conviction of larceny after breaking or entering where the underlying indictment was fatally defective. Because the trial court lacked jurisdiction to activate the sentence imposed pursuant

to that indictment, activation of that sentence was also a nullity and the trial court's order was vacated.

3. Probation and Parole—revocation—clerical error

The trial court erred by revoking defendant's probation for "larceny after breaking or entering" a second time in 10 CRS 57417, instead of revoking for "breaking or entering" in 10 CRS 57417. The matter was remanded to the trial court to fix the clerical error.

Judge GEER concurs in part and concurs in the result only in part by separate opinion.

Appeal by Defendant from judgments entered 5 June 2012 by Judge Christopher W. Bragg in Superior Court, Iredell County. Heard in the Court of Appeals 12 March 2013.

Attorney General Roy Cooper, by Assistant Attorney General Deborah M. Greene, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for Defendant.

McGEE, Judge.

William Herbert Pennell, IV (Defendant) was indicted on 2 November 2009 for one count of breaking or entering and one count of larceny after breaking or entering in 09 CRS 53255, for offenses that occurred on 12 February 2009; and one count of felony possession of cocaine in 09 CRS 53992, for an offense that occurred on 23 May 2009. On that same day, Defendant waived indictment on an information alleging one count of breaking or entering and one count of larceny after breaking or entering in 10 CRS 57417, for offenses that occurred on 22 August 2010. Defendant pleaded guilty on 2 December 2010 to those five charges in return for a negotiated plea agreement suspending the sentences and placing Defendant on supervised probation for thirty-six months.[1]

Defendant's probation officer filed violation reports dated 16 June 2011, 18 August 2011, and 3 February 2012, alleging that Defendant had violated the terms of his probation. The 18 August 2011 violation reports alleged that Defendant had cut off his electronic monitoring device and

1. Defendant was placed on probation before the General Assembly's major overhaul of probation law, enacted through The Justice Reinvestment Act of 2011, went into effect.

had "left his place of residence during curfew hours on 08/17/2011 and did not return." For those violations, Defendant's probation for the larceny after breaking or entering in 10 CRS 57417 was revoked, and his sentence of eight to ten months in prison was activated on 13 October 2011. Defendant served this sentence. The 3 February 2012 violation reports alleged that Defendant had not completed any of his community service requirements, had been charged with resisting a public officer, and had been convicted of three counts of felony breaking or entering for incidents that occurred in July and August of 2011 (just before Defendant's sentence in 10 CRS 57417 was activated). Defendant admitted to those violations, and the trial court activated four of Defendant's sentences. Defendant appeals.

I.

The issues on appeal are: (1) whether the trial court lacked jurisdiction to revoke Defendant's probation for his conviction of larceny after breaking or entering in 09 CRS 53255 and (2) whether the trial court erred in revoking Defendant's probation for "larceny after breaking or entering" a second time in 10 CRS 57417, instead of revoking for "breaking or entering" in 10 CRS 57417.

II.

We must first decide whether this appeal is properly before this Court. There seems to be considerable confusion in the opinions of our appellate courts concerning what matters may be appealed following a probation revocation hearing when, as in this case, Defendant did not object to the conditions of his suspended sentence at the time judgment was initially entered.

Though the law concerning appeal from revocation of probation is often contradictory, we believe N.C. Gen Stat. § 15A-1347, and the greater weight of the precedent of our Supreme Court, allows appeal from revocation of probation to be based solely upon a challenge, either direct or collateral, to the trial court's jurisdiction.

"Appellate jurisdiction in criminal appeals by a defendant and grounds for appeal in criminal cases are set forth in N.C. Gen. Stat. § 15A–1442 and N.C. Gen. Stat. § 15A–1444. '[A] defendant's right to appeal in a criminal proceeding is purely a creation of state statute.' " *State v. Singleton*, 201 N.C. App. 620, 623, 689 S.E.2d 562, 564 (2010) (citation omitted).

> Our General Assembly "within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." "Where jurisdiction is statutory and the

> Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction."

In re T.R.P., 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citations omitted). Our General Assembly has granted defendants a right of appeal when suspended sentences are activated: "When a superior court judge, as a result of a finding of a violation of probation, activates a sentence . . . the defendant may appeal under G.S. 7A-27." N.C. Gen. Stat. § 15A-1347 (2011). N.C. Gen. Stat. § 7A-27 states in relevant part: "From any final judgment of a superior court . . . appeal lies of right to the Court of Appeals." N.C. Gen. Stat.§ 7A-27(b) (2011).

The General Assembly first codified the authority to suspend a defendant's sentence in 1937. *In re Greene*, 297 N.C. 305, 310, 255 S.E.2d 142, 145 (1979). Our Supreme Court heard appeals from probation revocations both before and after the 1937 enactments. However, the General Assembly did not specifically grant any right of appeal from the activation of a suspended sentence until 1951. N.C. Gen. Stat. § 15-200.1 (1953) (repealed). In N.C.G.S. § 15-200.1, a right to appeal from "a court inferior to the superior court" to the superior court was granted for a *de novo* hearing, "but only upon the issue of whether or not there has been a violation of the terms of the suspended sentence[.]" *Id.* No right of appeal to the Supreme Court was therein granted, though our Supreme Court continued to hear appeals from revocations of probation. *See, e.g.*, *State v. Robinson*, 248 N.C. 282, 103 S.E.2d 376 (1958). N.C.G.S. § 15-200.1 was amended in 1963, adding, *inter alia*, that a *de novo* appeal from a lower court to the superior court "shall be determined by a judge without a jury, but only upon the issue of whether or not there has been a violation of the terms of probation or of the suspended sentence." N.C. Gen. Stat. § 15-200.1 (1965) (repealed).

In 1977, N.C.G.S. § 15-200.1 was repealed and replaced by N.C. Gen. Stat. § 15A-1347. N.C. Gen. Stat. § 15-200.1 (1978) (repealed); N.C. Gen. Stat. § 15A-1347 (1978); *Greene*, 297 N.C. at 310, 255 S.E.2d at 145. N.C.G.S. § 15A-1347 provided for a full *de novo* hearing on appeal from the district court to the superior court. In addition, for the first time, the General Assembly introduced a specific statutory right of appeal from the superior court to the appellate courts of North Carolina: "When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27." N.C.G.S. § 15A-1347 (1978).

This remains the language in the current version of the statute. *See* N.C. Gen. Stat. § 15A-1347 (2011).

N.C. Gen. Stat. § 7A-27 was enacted by our General Assembly in 1967, the same year the Court of Appeals was created. *See State v. Henry*, 1 N.C. App. 409, 410, 161 S.E.2d 622, 622 (1968). N.C.G.S. § 7A-27(e) states: "From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals." N.C. Gen. Stat. § 7A-27(e) (2011). N.C.G.S. § 7A-27(b) states in relevant part: "From any final judgment of a superior court . . . appeal lies of right to the Court of Appeals." N.C.G.S. § 7A-27(b).

Our Supreme Court heard appeals from the activation of suspended sentences well before a statute specifically allowing for appeal had been enacted. *See*, *e.g.*, *State v. Pelley*, 221 N.C. 487, 20 S.E.2d 850 (1942); *State v. Smith*, 196 N.C. 438, 146 S.E. 73 (1929); *State v. Tripp*, 168 N.C. 150, 83 S.E. 630 (1914). In *Tripp*, the defendant argued three issues on appeal after his suspended sentence had been activated:

> 1. That defendant was entitled to a hearing *de novo*, as to the original issue of guilt or innocence.
>
> 2. That the judge should hear evidence on the questions presented to the recorder's court at time sentence was imposed as to the behavior of defendant, and pass upon same.
>
> 3 That the Legislature could not confer upon the recorder's court jurisdiction of the offense.

Id. at 152, 83 S.E. at 631. Our Supreme Court, in addressing the issue of whether the recorder's court (acting something like the district court today) had jurisdiction to impose, and then suspend, the original sentence, held that it did. *Id.* at 150, 83 S.E. at 633. It also held that the superior court correctly dismissed the defendant's attempted appeal on the bases that the superior court did not have jurisdiction to hear the matter *de novo* on the defendant's original guilt or innocence, or to hear the matter as to whether the recorder's court was correct in activating the suspended sentence. *Id.* at 156, 83 S.E. at 632-33. This was because no right of appeal had "been provided by the statute, and there [was] nothing in the record to challenge the validity or propriety of the sentence[.]" *Id.* at 154, 83 S.E. at 632. For these reasons, the superior court order dismissing the defendant's appeal from the recorder's court was affirmed. *Id.* at 156, 83 S.E. at 633. It is important to note that our Supreme Court in *Tripp* heard and decided the defendant's collateral attack on the

jurisdiction of the trial court to impose sentence in the first instance. This is one of the same jurisdictional issues involved in the present case.

As discussed above, N.C.G.S. § 15A-1347 places no specific limitations on a defendant's right to appeal from a final judgment activating a previously suspended sentence. *State v. Cloer*, 197 N.C. App. 716, 719, 678 S.E.2d 399, 401-02 (2009). However, other case law pre-dating the 1977 adoption of N.C.G.S. § 15A-1347 purports to place certain limitations on what may be appealed following a probation revocation hearing. Our Supreme Court appears to have first imposed limitations on appeal from the activation of sentence following an alleged violation of a condition of the suspension of that sentence in *State v. Miller*, 225 N.C. 213, 34 S.E.2d 143 (1945), which stated:

> [An] order suspending the imposition or execution of sentence on condition is favorable to the defendant in that it postpones punishment and gives him an opportunity to escape it altogether. When he sits by as the order is entered and does not then appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not be heard thereafter to complain that his conviction was not in accord with due process of law.
>
> He is relegated to his right to contest the imposition of judgment or the execution of sentence, as the case may be, for that there is no evidence to support a finding that the conditions imposed have been breached, *S. v. Johnson*, 169 N.C., 311, 84 S.E., 767, or the conditions are unreasonable and unenforceable, or are for an unreasonable length of time. *S. v. Shepherd*, 187 N.C., 609, 122 S.E., 467.

Id. at 215-16, 34 S.E.2d at 145 (some citations omitted). *Miller* was cited by our Supreme Court in *State v. Caudle*, which held:

> A defendant, having consented, expressly or by implication, to the suspension, upon specified conditions, *of an otherwise valid sentence to imprisonment*, may not thereafter attack the validity of an order putting such sentence into effect, entered after due notice and hearing, except: (1) On the ground that there is no evidence to support a finding of a breach of the conditions of suspension; or (2) on the ground that the condition which he has broken is invalid because it is unreasonable or is imposed

> for an unreasonable length of time. *State v. Cole*, 241 N.C. 576, 86 S.E.2d 203 [(1955)]; *State v. Smith*, 233 N.C. 68, 62 S.E.2d 495 [(1950)]; *State v. Miller*, 225 N.C 213, 34 S.E.2d 143 [(1945)].

State v. Caudle, 276 N.C. 550, 553, 173 S.E.2d 778, 781 (1970) (emphasis added).

Our Supreme Court has, however, addressed issues not specifically permitted by *Miller* and *Caudle* (hereinafter *Caudle* issues) on appeals from revocation of probation both before and after *Miller* and *Caudle* were filed. For example, before *Miller*, our Supreme Court addressed: whether a defendant's probationary sentence was tolled while the defendant was a fugitive, and whether the original judgment in the case was in the alternative, or included both a fine and other conditions of probation, *Pelley*, 221 N.C. 487, 496-97, 20 S.E.2d 850, 856; and whether the underlying indictment was fatally defective, *State v. Ray*, 212 N.C. 748, 750, 194 S.E.2d 472, 474 (1938); *Tripp*, 168 N.C. at 150, 83 S.E. at 633.

Following *Caudle*, our Supreme Court addressed appeals from revocation of probation concerning: whether the trial court lacked jurisdiction to hold revocation hearing in a certain county and, if not, whether statute determining where probation revocation hearing could take place violated the United States Constitution, *State v. Braswell*, 283 N.C. 332, 335, 196 S.E.2d 185, 186-87 (1973); the amount of credit for time served applied after probation has been revoked, *State v. Farris*, 336 N.C. 552, 553, 444 S.E.2d 182, 183 (1994); whether N.C. Gen. Stat. § 15A–1347 vested jurisdiction for appeal from district court probation revocation in superior court or Court of Appeals, *State v. Hooper*, 358 N.C. 122, 122-24, 591 S.E.2d 514, 514-16 (2004); and whether the trial court had jurisdiction to revoke probation after the probationary period had ended, *State v. Bryant*, 361 N.C. 100, 105, 637 S.E.2d 532, 536 (2006) ("we can reach no conclusion other than that the trial court lacked subject matter jurisdiction to revoke defendant's probation due to its failure and inability to make the statutorily mandated finding of fact").

This Court has also addressed on many occasions issues not specifically covered by *Miller* or *Caudle*, *see, e.g.*: whether the trial court lacked jurisdiction to amend its order after notice of appeal had been filed with this Court and whether the trial court erred by denying the defendant's request to continue, *State v. Dixon*, 139 N.C. App. 332, 337, 533 S.E.2d 297, 301 (2000); whether jurisdiction lay in superior court or Court of Appeals, whether the defendant should have received credit for time served, and whether it was proper for the trial court to consolidate

the defendant's sentences when activating defendant's sentences, *State v. Hooper*, 158 N.C. App. 654, 656, 658-59, 582 S.E.2d 331, 332-34 (2003), *vacated*, 358 N.C. 122, 591 S.E.2d 514 (2004) (holding jurisdiction lay with superior court, not the Court of Appeals); whether the trial court abdicated its duty to exercise its discretion by allowing the victim to determine whether defendant's probation should be revoked, *State v. Arnold*, 169 N.C. App. 438, 441, 610 S.E.2d 396, 398 (2005); whether the trial court lacked jurisdiction to activate a suspended sentence in a violation hearing held after probation had ended, *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007); whether, after the trial court had elected to modify the defendant's probation, the trial court had jurisdiction to revoke probation for violations that occurred prior to the modification, and whether defendant was advised of the conditions of his probation, *State v. Bridges*, 189 N.C. App. 524, 526, 658 S.E.2d 527, 528 (2008); whether the court lacked jurisdiction after the probationary period had ended, *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) ("Defendant's sole argument on appeal is that the trial court lacked subject matter jurisdiction to revoke his probation."); and whether the defendant had proper notice of the probation hearing pursuant to N.C.G.S. § 15A–1345(e), *State v. Hubbard*, 198 N.C. App. 154, 157-58, 678 S.E.2d 390, 393 (2009).

The above list of citations to opinions of our appellate courts that have decided non-*Caudle* issues in appeals from probation revocation hearings challenges the notion that *Caudle* was intended as an absolute limitation on what issues could be appealed following revocation of probation. As further example, in *State v. Neeley*, 57 N.C. App. 211, 290 S.E.2d 727, rev'd, 307 N.C. 247, 297 S.E.2d 389 (1982), this Court dismissed the defendant's appeal for the following reasons:

> Defendant first argues that there was nothing in the record of his guilty plea to show whether defendant was indigent, whether he was represented by counsel or whether he made a knowing and intelligent waiver of counsel. . . . . This case is controlled by *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971). Here as in *Noles*, the defendant tries to attack collaterally the validity of the original judgment where his sentence was suspended, in an appeal from the revocation of that suspension. "When appealing from an order activating a suspended sentence, inquiries are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken

> is invalid because it is unreasonable or is imposed for an unreasonable length of time." *State v. Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410 (1971); *State v. Caudle*, 276 N.C. 550, 173 S.E.2d 778 (1970).

Id. at 212, 290 S.E.2d at 727. Our Supreme Court reversed the opinion of this Court, stating:

> Defendant's petition for discretionary review presents two questions for review by this Court. The first question to be considered concerns the resolution of a conflict between the Court of Appeals' opinion in this case and its opinion in *State v. Black*, 51 N.C. App. 687, 277 S.E.2d 584 (1981). That conflict concerns a determination of the proper procedure for raising a constitutional claim of right to counsel at a trial where the defendant received a suspended prison sentence in a case where the defendant does not challenge the sentence until the suspension is revoked and an active sentence imposed. We believe the sounder position is to follow the Black decision which allows the defendant to raise his right to counsel claim after the prison sentence has become active.

State v. Neeley, 307 N.C. 247, 249, 297 S.E.2d 389, 391 (1982) (citation omitted). In *Neely*, our Supreme Court held that this Court, in *State v. Black*, 51 N.C. App. 687, 277 S.E.2d 584 (1981), "correctly determined that the defendant properly appealed from the activation of his prison term and the denial of his Sixth Amendment right to counsel during his original trial." *Neely*, 307 N.C. at 249-50, 297 S.E.2d at 391.

This Court, in *State v. Mauck*, 204 N.C. App. 583, 584-85, 694 S.E.2d 481, 483 (2010), has more recently and specifically addressed the issue currently before us — whether we can decide if the trial court had jurisdiction to enter an order revoking a defendant's probation and activating his sentence. This Court addressed the defendant's argument that, because there was insufficient evidence showing that the matter was heard in the correct county, "the trial court in Buncombe County did not have jurisdiction to revoke his probation under N.C. Gen. Stat. § 15A–1344(a)." *Id.* at 585, 694 S.E.2d at 483.

The Court also addressed this issue in *State v. Hall*, 160 N.C. App. 593, 586 S.E.2d 561 (2003), holding:

> Under *State v. Camp*, 299 N.C. 524, 528, 263 S.E.2d 592, 594-95 (1980), to revoke a defendant's probation after the

> period of probation has expired, the trial court must find "that the State had 'made reasonable effort . . . to conduct the hearing earlier.' " (citing N.C. Gen. Stat. § 15A-1344(f)). In this case, although defendant's probation period ended on 17 May 2002, the trial court conducted a hearing on 19 August 2002-after the expiration of defendant's period of probation and suspension. Because the record shows that the trial court did not make any findings (nor is there evidence in the record to support such findings) that the State made reasonable effort to conduct the hearing earlier, we are compelled by *State v. Camp* to hold that "jurisdiction was lost by the lapse of time and the court had no power to enter a revocation judgment against defendant." *Id.* Accordingly, as in *Camp*, the judgment appealed from is arrested and defendant is discharged.

Id. at 593-94, 586 S.E.2d at 561 (footnotes omitted). We cited *Hall* in *State v. Bryant* when this Court held that "the trial court lacked jurisdiction to conduct the revocation hearing. The trial court's judgment that defendant violated the conditions of her probation for the conviction of obtaining property by false pretenses is arrested and the order activating her sentence is vacated." *State v. Bryant*, 176 N.C. App. 190, 625 S.E.2d 916, 2006 WL 389639 (unpublished opinion), *aff'd*, 361 N.C. 100, 636 S.E.2d 532 (2006). Our Supreme Court affirmed our decision in *Bryant*, stating:

> In *State v. Camp*, this Court considered similar issues and applied N.C.G.S. § 15A–1344(f) to the facts of that case. 299 N.C. 524, 263 S.E.2d 592 (1980). After noting the defendant appeared before the superior court approximately twenty-three times for a revocation hearing, although the hearing was always continued and a revocation hearing was never conducted, our Court held, *inter alia*: "Moreover, [the trial court] did not find, as indeed [it] could not, that the State had 'made reasonable effort . . . to conduct the hearing earlier,' " *id.* at 528, 263 S.E.2d at 595. Because the probationary period had expired and there was no requisite finding of fact by the trial court, "jurisdiction was lost by the lapse of time and the court had no power to enter a revocation judgment." Like *Camp*, the trial court in the instant case was without jurisdiction to revoke defendant's probation and to activate defendant's sentence because it failed to make findings sufficient to satisfy the requirements of the statute.

Bryant, 361 N.C. at 103-04, 637 S.E.2d at 535 (some citations omitted). This Court cited Bryant in reaching the same conclusion in *Reinhardt*:

> " 'When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.' " Applying the holdings of prior case law and the binding precedent of Bryant, the subsequent revocation of defendant's probation and activation of his suspended sentence was in error because the trial court was without jurisdiction.

Reinhardt, 183 N.C. App. at 294, 644 S.E.2d at 28 (citations omitted); accord *State v. Colman*, __ N.C. App. __, 722 S.E.2d 14, 2012 WL 538938 (2012) (unpublished); *State v. Black*, 197 N.C. App. 373, 677 S.E.2d 199 (2009); *State v. High*, 183 N.C. App. 443, 645 S.E.2d 394 (2007); *State v. Surratt*, 177 N.C. App. 551, 629 S.E.2d 341 (2006); *State v. Burns*, 171 N.C. App. 759, 615 S.E.2d 347 (2005).

This Court, in *Reinhardt*, explained why we should address the defendant's sole argument that the trial court lacked jurisdiction to revoke his probation, stating:

> A trial court must have subject matter jurisdiction over a case in order to act in that case. In this case, defendant did not raise the issue of subject matter jurisdiction before the trial court. However, a defendant may properly raise this issue at any time, even for the first time on appeal.

Reinhardt, 183 N.C. App. at 292, 644 S.E.2d at 27 (citations omitted).[2]

This Court, in unpublished opinions, has applied the above jurisdictional analysis to situations where, like in the case before us, the defendant challenged jurisdiction based upon an allegedly fatal defective indictment or information:

> Defendant . . . contends that the trial court lacked subject matter jurisdiction because the indictment was fatally defective[.] . . .

---

2. We are aware of the following footnote in *State v. Absher*: "While it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division." *State v. Absher*, 329 N.C. 264, 265 n. 1, 404 S.E.2d 848, 849 n. 1 (1991). *Absher* does not cite any authority for this proposition, and we note that our Supreme Court has addressed jurisdictional issues following probation revocation when there was no statutory right of appeal. *See, e.g.*, *Ray*, 212 N.C. at 748, 194 S.E. at 473-74.

> The State contends that Defendant's argument is an impermissible collateral attack on his underlying conviction, and that this Court's review is limited to "whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid[.]" *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971). . . .
>
> However, it is well-established that the trial court does not acquire subject-matter jurisdiction when an indictment is fatally defective, and a challenge to the sufficiency of an indictment may be asserted at any time, including for the first time on appeal. . . . . Accordingly, we find that this issue is properly before this Court.

State v. Shepard, 199 N.C. App. 756, 687 S.E.2d 540 (2009) (unpublished opinion) (some citations omitted).

> The sole issue on appeal is whether the trial court lacked jurisdiction to enter judgment upon an invalid information.
>
> The State argues this issue is not properly before this Court because on appeal the review of an order activating a suspended sentence is limited to two areas: (1) the factual and evidentiary basis for finding that a violation occurred; and (2) the validity of the condition that was violated. However, as with any challenge to subject matter jurisdiction, a challenge to the sufficiency of an indictment cannot be waived and may be asserted at any time, including for the first time on appeal. Thus, this matter is properly before us.

State v. Moore, 170 N.C. App. 197, 613 S.E.2d 531, 2005 WL 1018152 (2005) (unpublished opinion) (citation omitted); *see also State v. McMurrin*, 196 N.C. App. 178, 674 S.E.2d 480 (2009) (unpublished opinion).

Most importantly, our Supreme Court has addressed a defendant's argument, in an appeal from the revocation of a suspended sentence, that the indictment for the underlying sentence was defective. *Ray*, 212 N.C. 748, 194 S.E. 472. In *Ray*, our Supreme Court rejected the defendant's argument on the basis that he had pleaded guilty to, and been sentenced on, a different offense. *Id.* at 750, 194 S.E. at 473-74 ("The defendant's motion in arrest of judgment, on account of defect in the bill of indictment for embezzlement, cannot be sustained, since he was neither tried nor sentenced under that bill nor for that offense."). It is

important to note that, in *Miller*, the first opinion in which our Supreme Court included limiting language concerning appeal from activation of a suspended sentence, *Ray* is cited. *Miller*, 225 N.C. at 215, 34 S.E.2d at 145. It would appear our Supreme Court in *Miller* did not intend to limit jurisdictional challenges.

Notwithstanding this extensive history of our appellate courts addressing issues not covered in *Caudle*, *Caudle* and related opinions have been cited as precedent requiring dismissal of appeals from orders revoking probation and activating sentences. Two recent opinions from this Court have dismissed appeals that have attempted to challenge the jurisdiction of the trial court to revoke probation.

In S*tate v. Long*, the defendant argued on appeal from revocation of his probation that the underlying indictments upon which he was convicted were fatally defective. *State v. Long*, __ N.C. App. __, __, 725 S.E.2d 71, 72, *disc. review denied*, __ N.C. __, 726 S.E.2d 836 (2012). This Court in *Long* held:

> When appealing from an order activating a suspended sentence, "inquiries are permissible only to determine [(1)] whether there is evidence to support a finding of a breach of the conditions of the suspension, or [(2)] whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time." *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) (citing *State v. Caudle*, 276 N.C. 550, 553, 173 S.E.2d 778, 781 (1970)). " '[W]hile it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division *only if* and *when* the case is properly pending before the appellate division.' " *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (emphasis added) (quoting *State v. Absher*, 329 N.C. 264, 265 n. 1, 404 S.E.2d 848, 849 n. 1 (1991) (*per curiam*)). Thus, "[a] defendant on appeal from an order revoking probation may not challenge his adjudication of guilt," as "[q]uestioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is . . . an impermissible collateral attack." *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410.

Long, __ N.C. App. at __, 725 S.E.2d at 72 (some citations omitted).

Recently, in *State v. Hunnicutt*, __ N.C. App. __, __ S.E.2d __, 2013 WL 1296740 (2013), this Court relied on *Long*, holding that, on appeal from revocation of his probation, the defendant's jurisdictional challenge based upon allegedly fatally defective indictments constituted " 'an impermissible collateral attack.' *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971)." *Hunnicutt*, __ N.C. App. at __, __ S.E.2d at __, 2013 WL 1296740 at *3; *see also State v. Wiggins*, __ N.C. App. __, 708 S.E.2d 215, 2011 WL 378828 (2011) (unpublished) (holding the defendant could not challenge indictment for underlying conviction on appeal from revocation of probation and activation of sentence).

Noles is applied in both *Long* and *Hunnicutt* in a manner inconsistent with our Supreme Court precedent. In *Noles*, the defendant challenged the revocation of his probation based upon his contention that his guilty plea for the underlying judgment was not entered understandingly and voluntarily. *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410. This Court held that the defendant should have appealed the entry of his guilty plea when judgment was entered, and that attempting to challenge his guilty plea only after probation had been revoked and sentence activated constituted "an impermissible collateral attack." *Id.* at 678, 184 S.E.2d at 410. Our Supreme Court adopted this reasoning in *State v. Holmes*, 361 N.C. 410, 412, 646 S.E.2d 353, 354 (2007). In *Holmes*,

> [t]he sole question before [the Supreme Court was] whether defendant can attack the aggravated sentences imposed and suspended in the 11 March 2004 trial court judgments based on [*Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d. 403 (2004)] by appealing from the 9 March 2005 trial court order revoking his probation and activating his sentences.

Id. at 412, 646 S.E.2d at 355. Our Supreme Court stated:

> Although this Court has not addressed this specific issue, the Court of Appeals has done so on at least two occasions. Over thirty-five years ago, in *State v. Noles*, the defendant, while appealing the revocation of his probation, challenged aspects of his original conviction. The Court of Appeals held: "Questioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is, we believe, an impermissible collateral attack." More recently, in *State v. Rush*, 158 N.C. App. 738, 582 S.E.2d 37 (2003), the Court of Appeals found that by failing to appeal from the original judgment

> suspending her sentences, the defendant waived any challenge to that judgment and thus could not attack it in the appeal of a subsequent order activating her sentence.

Id. at 412-13, 646 S.E.2d at 355 (some citations omitted).

By "specific issue[,]" our Supreme Court meant a collateral attack on the underlying judgment on appeal from revocation of probation, as neither *Noles* nor *Rush* dealt with *Blakely* issues. Although our Supreme Court stated that it had never addressed "this specific issue," it did specifically *reject* the *Noles* collateral attack argument as a reason to dismiss a defendant's Sixth Amendment right to counsel argument in *Neeley*, as noted above. *Neeley*, 307 N.C. at 249, 297 S.E.2d at 391. As our Supreme Court in *Holmes* did not address *Neeley* in its analysis, we do not know how the Court distinguishes between a defendant's Sixth Amendment right to counsel argument, and a defendant's Sixth Amendment right to trial by jury argument, when applying the rule against collateral attack as enunciated in *Noles*.

Nonetheless, unlike in *Noles* and H*olmes*, the challenge in the present case, as in *Long* and *Hunnicutt*, is jurisdictional. A judgment imposed by a court without jurisdiction is void. *Stroupe v. Stroupe*, 301 N.C. 656, 661, 273 S.E.2d 434, 438 (1981).

> A void judgment is not a judgment at all, and it may always be treated as a nullity because it lacks an essential element of its formulation.
>
> In *Carter v. Rountree*, 109 N.C. 29, 32, 13 S.E. 716, 717 (1891), Chief Justice Merrimon aptly observed that
>
> > A void judgment is one that has merely semblance, without some essential element or elements, *as when the court purporting to render it has not jurisdiction.*
> >
> > A void judgment is without life or force, and the court will quash it on motion, or *ex mero motu.* Indeed, when it appears to be void, it may and will be ignored everywhere, and treated as a mere nullity.
>
> It follows, therefore, that in such instances, *collateral attack is a permissible manner of seeking relief.*

Stroupe, 301 N.C. at 661-62, 273 S.E.2d at 438 (some citations omitted) (final emphasis added); *see also State v. Sams*, 317 N.C. 230, 235, 345

S.E.2d 179, 182 (1986) ("An order is void *ab initio* only when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored."); *Carpenter v. Carpenter*, 244 N.C. 286, 290, 93 S.E.2d 617, 622 (1956) ("Unquestionably, when it appears on the face of the record that a court has no jurisdiction, either of the person or of the subject matter, any judgment it attempts to render is a nullity and so may be attacked by any person adversely affected thereby, at any time, collaterally or otherwise."); *see also Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) and cases cited.

We are constrained to apply long-standing Supreme Court precedent allowing collateral attack when lack of jurisdiction is alleged, and must disregard the portions of this Court's opinions that indicate a void judgment may not be attacked collaterally. *Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008) (citation and quotation marks omitted) ("Moreover, this Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions 'until otherwise ordered by . . . [our] Supreme Court.' "). Further, when an indictment is fatally defective, the actions of any court proceeding on that indictment are void for want of jurisdiction over the subject matter. *Carpenter*, 244 N.C. at 290, 93 S.E.2d at 622. In the present case, Defendant challenges the jurisdiction of the trial court to revoke probation and activate sentence based upon a void judgment. Defendant's appeal is not a collateral attack on the underlying conviction, but a direct attack on the jurisdiction of the trial court that entered the judgment and commitment upon revocation of probation.

Both our Supreme Court and this Court, in opinions pre-dating *Long* and *Hunnicutt*, have addressed issues concerning the jurisdiction of the trial court in appeals from probation revocation. *See, e.g.*, *Ray*, 212 N.C. at 748, 194 S.E. at 473-74; *Black*, 197 N.C. App. at 379, 677 S.E.2d at 203; *High*, 183 N.C. App. at 444, 645 S.E.2d at 395; *Reinhardt*, 183 N.C. App. at 292, 644 S.E.2d at 27 ("In his sole argument on appeal, defendant contends that the trial court lacked jurisdiction to revoke his probation and activate his suspended sentence on 21 April 2005. Based upon the clear language of the statute and binding case authority, we are compelled to agree."). We are bound by precedent of our Supreme Court and, because this Court may not overrule its own opinions, we are also bound by the earlier opinions of this Court that conflict with *Long* and *Hunnicutt*. *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 470, 621 S.E.2d 1, 7 (2005); *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We hold that Defendant may, on appeal from revocation

of probation, attack the jurisdiction of the trial court, either directly or collaterally.

A closer look at *Caudle*, and cases upon which it relies, supports this holding. First, the relevant language in *Caudle*, when read in full, only applies when the underlying sentence is "otherwise valid."

> A defendant, having consented, expressly or by implication, to the suspension, upon specified conditions, *of an otherwise valid sentence to imprisonment*, may not thereafter attack the validity of an order putting such sentence into effect, entered after due notice and hearing, except: (1) On the ground that there is no evidence to support a finding of a breach of the conditions of suspension; or (2) on the ground that the condition which he has broken is invalid because it is unreasonable or is imposed for an unreasonable length of time.

Caudle, 276 N.C. at 553, 173 S.E.2d at 781 (emphasis added). A sentence based upon a conviction supported by a fatally defective indictment is a nullity and, therefore, not a valid sentence. *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966). The language in *Caudle* itself does not exclude appeal in the present case.

Caudle cites to *State v. Cole*, 241 N.C. 576, 86 S.E.2d 203 (1955); *State v. Smith*, 233 N.C. 68, 62 S.E.2d 495 (1950); and *Miller*, 225 N.C 213, 34 S.E.2d 143 in support of this proposition. *Cole* cites *Smith* and *Miller*. *Cole*, 241 N.C. at 582, 86 S.E.2d at 207. *Smith* cites *Miller*; *State v. Shepherd*, 187 N.C. 609, 122 S.E. 467 (1924); and *State v. Johnson*, 169 N.C. 311, 84 S.E. 767 (1915). *Smith*, 233 N.C. at 70, 62 S.E.2d at 496. *Miller* cites *Shepherd* and *Johnson*, stating:

> When [a defendant] sits by as the order [suspending sentence and imposing conditions of probation] is entered and does not then appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not be heard thereafter to complain that his conviction was not in accord with due process of law. He is relegated to his right to contest the imposition of judgment or the execution of sentence, as the case may be, for that there is no evidence to support a finding that the conditions imposed have been breached, *State v. Johnson*, 169 N.C. 311, 84 S.E. 767, or the conditions are unreasonable and unenforceable, or are

> for an unreasonable length of time. *State v. Shepherd*, 187 N.C. 609, 122 S.E. 467.

Miller, 225 N.C. at 215-16, 34 S.E.2d at 145 (some citations omitted). In *Johnson*, the defendant "pleaded guilty to three bills of indictment charging her with retailing, and prayer for judgment was continued on condition of good behavior, and so ordered to be further continued from term to term for three years." *Johnson*, 169 N.C. at 311, 84 S.E. at 768. Upon a finding "that the defendant had been engaged in maintaining a bawdy-house in the town of Kinston[,]" the trial court activated the sentence. *Id.* Our Supreme Court affirmed the order, rejecting the defendant's argument that operating a "bawdy-house" could not support activation of her sentence because it was not the same behavior that led to the underlying judgment. *Id.*

In *Shepherd*, it was "the position of the defendant that the first condition of the suspended judgment, requiring him 'to abstain personally, entirely, from the use of intoxicating liquors,' [was] unreasonable and hence he should not [have been] held to answer for its violation." *Shepherd*, 187 N.C. at 611, 122 S.E. at 467. Our Supreme Court simply held that this condition was not unreasonable, as it was a specific, definite, and integral term of the agreement originally allowing the sentence to be suspended. *Id.* Neither *Johnson* nor *Shepherd* limit right of appeal from a probation revocation in any way.

Though, as discussed above, we do not believe we need to apply a *Caudle* analysis when addressing a jurisdictional claim on appeal from revocation of probation, a *Caudle* analysis, when applied, counsels addressing the merits of a jurisdictional argument. Appeal from revocation of probation is appropriate under *Caudle* and similar opinions when "(1) there is no evidence to support a finding that the conditions imposed have been breached, or (2) the conditions are unreasonable and unenforceable or for an unreasonable length of time." *State v. Smith*, 233 N.C. 68, 70, 62 S.E.2d 495, 496 (1950) (citations omitted). First, when the conditions imposed are void, common sense dictates that there cannot be evidence to support a finding that they have been breached. Second, void conditions are unenforceable and when conditions have been imposed for a sentence that is a nullity, they are also unreasonable. *See State v. Culp*, 30 N.C. App. 398, 400, 226 S.E.2d 841, 842 (1976) ("The special condition [of probation] . . . was beyond the power of the court to inflict and is void[.]"). If a condition of probation that is beyond the power of the trial court to impose is void, then, in the opinion of this Court, the reverse is true: a void condition is beyond the power of the trial court to impose. Finally, void conditions, imposed pursuant to a

void judgment, must necessarily be for an unreasonable length of time, no matter the duration.

Though the language of N.C.G.S. § 15A-1347 would seem to have expanded the right of appeal from revocation of probation, and thus superseded the framework and limitations articulated in *Miller* and *Caudle*, review of North Carolina appellate opinions suggests the enactment of N.C.G.S. § 15A-1347 did not alter the manner in which the appellate courts of this State address appeals from revocations of probation.

We hold that N.C.G.S. § 15A-1347, and the greater weight of the precedent of our Supreme Court, allow appeal from revocation of probation to be based solely upon a challenge, either direct or collateral, to the trial court's jurisdiction. The contradictions exhibited in the current law regarding appeal from revocation of probation are best addressed by either our Supreme Court or the General Assembly. Even if we assume, *arguendo*, that Defendant had no right to directly challenge jurisdiction in this appeal, we hold that, because there can exist no evidence to support violation of conditions of a probation that does not legally exist, and because any sentence imposed on a void judgment is unreasonable, *Miller*, *Caudle*, and related opinions do not serve to prevent Defendant's appeal in this case.

III.

Defendant also argues that the underlying indictment for his conviction of larceny after breaking or entering in 09 CRS 53255 was fatally defective. The " 'essential elements of larceny are that [the] defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property.' " *State v. Justice*, __ N.C. App. __, __, 723 S.E.2d 798, 801 (2012) (citation omitted). In *State v. Ingram*, 271 N.C. 538, 157 S.E.2d 119 (1967), our Supreme Court held, concerning the description of property:

> " 'The description in an indictment must be in the common and ordinary acceptation of property and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny and also to protect the defendant by pleading *autre fois convict* or *autre fois acquit* in the event of future prosecution for the offense, so that there may be no doubt of its identity; and the evidence must substantially correspond with the description in the indictment. . . . The description must still be in a plain and

> intelligible manner and must correspond to the different forms of existence in which the same article is found. In its raw or unmanufactured state it may be described by its ordinary name, but if it be worked up into some other forms, etc., when stolen, it must be described by the name by which it is generally known.' "

Id. at 542, 157 S.E.2d at 122-23 (citation omitted). *Ingram* goes on to say:

> The proof offered by the State showed that the personal property alleged to have been stolen and carried away consisted of eleven rings with a total value of approximately $878.00. The description of this property by the general and broadly comprehensive words, 'merchandise, chattels, money, valuable securities and other personal property' is not sufficient. The property was not described in the name generally applied to it in the trade, and in common language. Nor was the description sufficient to enable the jury to say that the article proved to be stolen is the same, or such that the defendant could avail himself of his conviction or acquittal as a bar to subsequent prosecutions for the same offense.

Id. at 543, 157 S.E.2d at 123-24. *See also Justice*, __ N.C. App. at __, 723 S.E.2d at 801 ("As in *Ingram*, the description 'merchandise' is too general to identify the property allegedly taken by [d]efendant. As such, the indictment is fatally defective, and deprives the superior court of subject matter jurisdiction over the case.").

In the case before us, Defendant was convicted of larceny based upon the following indictment in count II of 09 CRS 53255:

> And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did steal, take, and carry away various items of merchandise, the personal property of Computer Shop of Statesville, Inc., DBA Haven Skate Shop, having a value of more than $1,000.00 dollars, pursuant to the commission of the felonious breaking and entering described in count I above.

The term "merchandise" in the indictment in the present case does not describe the property alleged to have been taken any better than did the term "merchandise" in *Ingram* or *Justice*. The allegations that the

"merchandise" had a value of over $1,000.00, and that the "merchandise" was taken during a breaking or entering do not serve to clarify what was taken from Computer Shop of Statesville, Inc., DBA Haven Skate Shop, which may have sold computers, skates, skateboards, or other unknown items. This is in contrast to the indictment in 10 CRS 57417 in which Defendant was alleged to have taken "12 violins, 3 cellos, a viola, a USB flashdrive, an IBM laptop computer, a surround sound system, a classroom skeleton and weather ball, the personal property of Iredell/Statesville School System, such property having a value of $28,335 dollars[.]"

The indictment in count II of 09 CRS 53255 was fatally defective and, therefore, the trial court never obtained subject matter jurisdiction over that charge. *Justice*, __ N.C. App. at __, 723 S.E.2d at 801. Defendant's conviction for larceny, and the sentence, based upon the indictment in 09 CRS 53255, were a nullity. *McClure*, 267 N.C. at 215, 148 S.E.2d at 17-18 (holding that absent a valid indictment, any "trial or conviction are a nullity"). The trial court, having no jurisdiction to convict or sentence Defendant for this larceny charge, was equally without jurisdiction to revoke probation on a conviction that did not legally exist, or to activate a sentence never legally imposed. Because the trial court lacked jurisdiction to activate any sentence imposed pursuant to count II of the indictment in 09 CRS 53255, activation of that sentence is also a nullity. We vacate all actions of the trial court based upon count II of the indictment in 09 CRS 53255, and arrest the 5 June 2012 "Judgment and Commitment upon Revocation of Probation – Felony" for the 09 CRS 53255 larceny after breaking or entering.

IV.

[3] It is also clear that the trial court could not activate a sentence that Defendant had already served. Defendant had already served the active sentence imposed for larceny after breaking or entering in 10 CRS 57417 at the time the trial court erroneously entered judgment and commitment upon revocation of probation on that same charge on 5 June 2012.

Defendant states in his brief, and we agree, that:

> It is clear from the record the [the trial court] intended to revoke [Defendant's] probation for 10 CRS 57417 (breaking and entering), not 10 CRS 57417 (larceny after breaking and entering). The judgment and commitment upon revocation of probation for 10 CRS 57417 (larceny after breaking and entering) was the result of clerical error and must be vacated.

Defendant asks this Court to vacate that judgment and remand "to the trial court to correct clerical mistakes in the judgments."

We remand the judgment and commitment in 10 CRS 57417 for the trial court to correct its clerical error and make the judgment reflect that Defendant's probation in 10 CRS 57417 was revoked on the first count, breaking or entering. *See State v. Jarman*, 140 N.C. App. 198, 202-03, 535 S.E.2d 875, 878-79 (2000).

Defendant does not challenge the revocation of probation and activation of the sentences for his other convictions, and those are affirmed.

Affirmed in part; vacated and remanded in part; judgment arrested in 09 CRS 53255, larceny after breaking or entering.

Judge DAVIS concurs.

Judge GEER concurs in part and concurs in the result only in part by separate opinion

I concurred in *State v. Hunnicutt*, ___ N.C. App. ___, 740 S.E.2d 906 (2013), discussed by the majority opinion. It is, of course, well established that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Nevertheless, if an opinion of a panel is clearly inconsistent with earlier opinions of this Court or the Supreme Court, we are obligated to follow those earlier opinions.

I am persuaded by the majority opinion that *Hunnicutt* and *State v. Long*, ___ N.C. App. ___, 725 S.E.2d 71, *disc. review denied*, 366 N.C. 227, 726 S.E.2d 836 (2012), are inconsistent with prior opinions of the Supreme Court and this Court allowing collateral attacks on judgments that are void for lack of jurisdiction. Since, as the majority concludes, count II of the indictment in 09 CRS 53255 was fatally flawed and could not bestow jurisdiction on the trial court, the judgment imposed based on that indictment was void and subject to collateral attack. I, therefore, concur in the majority opinion's decision to vacate all actions of the trial court based upon count II of the indictment in 09 CRS 53255 and to arrest the 5 June 2012 judgment for the 09 CRS 53255 larceny after breaking and entering. I concur fully in section IV of the majority opinion.

STATE v. SUMMEY

[228 N.C. App. 730 (2013)]

STATE OF NORTH CAROLINA
v.
DARRELL WAYNE SUMMEY

No. COA12-1405

Filed 6 August 2013

1. Rape—statutory rape of child less than 13 years old—motion to dismiss—sufficiency of evidence—victim's age

The trial court did not err by failing to dismiss the charge of statutory rape of a child less than 13 years of age based on alleged insufficient evidence that the victim was less than 13 years old at the time of the crime. There was substantial evidence from which the jury could conclude that the victim was raped by defendant when she was 12 years old.

2. Rape—statutory rape of child less than 13 years old—court's impermissible opinion on contested element—prejudicial error

Defendant's conviction for the first-degree statutory rape of a child when she was less than 13 years old was reversed. The trial court impermissibly expressed an opinion concerning a contested element of the offense to be decided by the jury, that the victim was less than 13 years old at the time of the alleged statutory rape, and thereby prejudiced defendant. Defendant was entitled to a new trial on this charge.

3. Criminal Law—prosecuting witnesses referred to as victims—no impermissible expression of opinion

The trial court did not impermissibly express an opinion regarding the prosecuting witnesses in a multiple sexual offenses case by repeatedly referring to them as victims.

4. Jury—deliberations—continuation despite being deadlocked—no coerced verdict

The trial court did not err in a multiple sexual offenses case by allegedly coercing a unanimous verdict from the jury through its responses to the jury's questions about whether they had to continue deliberations despite appearing to be deadlocked. Considering the totality of circumstances, there was nothing in the record indicating that the trial court coerced a verdict.

5. Evidence—prior crimes or bad acts—domestic violence

Defendant failed to show any prejudice in a multiple sexual offenses case from the trial court's denial of his motion *in limine* regarding the evidence of defendant's prior acts of domestic violence.

Appeal by defendant from judgments entered 9 April 2012 by Judge Laura J. Bridges in Buncombe County Superior Court. Heard in the Court of Appeals 8 May 2013.

Attorney General Roy Cooper, *by Assistant Attorney General Jane Rankin Thompson*, *for the State.*

Appellate Defender Staples S. Hughes, *by Assistant Appellate Defender Daniel Shatz*, *for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant Darrell Wayne Summey appeals from judgments entered after a jury found him guilty of multiple sex crimes committed against two of his stepdaughters and guilty of possession of a firearm by a felon. Defendant contends the trial court erred: by denying his motion to dismiss the charge of first-degree statutory rape; by improperly expressing an opinion concerning an element of the statutory rape charge and by referring to the prosecuting witnesses as victims during the jury instructions; by improperly coercing a verdict from the jury; and by allowing the State to introduce evidence of prior acts of domestic violence committed by defendant. After careful review, we conclude the trial court improperly corroborated an element of the offense of statutory rape as to one of the alleged victims, and defendant is entitled to a new trial on that charge. We find no error as to defendant's remaining convictions.

Background

In April 2010, defendant lived with his wife Donna Summey ("Donna"). The couple had a nineteen year-old daughter, Rachel. Donna had three other daughters from her marriage to her first husband: Sarah, Jane, and Debbie.[1] Sarah was 20 years old, separated from her husband, and she and her two children were living with defendant and Donna.

On the morning of 20 April 2010, defendant began drinking alcohol, left the home, and returned around 12:30 a.m. the next morning.

1. Sarah, Jane, and Debbie are pseudonyms used to protect the identity of the victims.

Sarah had also been out during the day, but she returned home before defendant and went to sleep in a bedroom with her sons. Donna awoke later and heard Sarah saying, "Mom." Donna went into Sarah's bedroom where she found defendant lying on top of Sarah with his pants down. Sarah was crying, "No, Darrell, no." Defendant got off of Sarah, pulled up his pants, went to the living room, and passed out on the couch. As defendant slept, Donna called the police and stood over him with a butcher knife while waiting for the police to arrive. Sarah, meanwhile, left the home through a window and went to her sister's house. When the police arrived they arrested defendant and confiscated two guns that were in the home.

Detective David Shroat of the Buncombe County Sheriff's Department interviewed defendant at the jail. Defendant told the police that he came home drunk that night and asked Sarah to have sex with him. In her statement to the police, Sarah stated that she awoke to find defendant putting his penis inside of her while he was holding down one of her arms.

In September 2011, Detective Shroat interviewed Sarah, Jane, and Debbie, and each stated that they had been sexually abused by defendant when they were children. Sarah told the detective about two incidents of abuse which occurred when she was a child. Later at trial, Sarah testified that defendant "rubbed his private area" on hers when she was 12 years old, but did not penetrate her. Sarah also testified that after that incident defendant had vaginal intercourse with her.

When the abuse allegedly occurred, Sarah did not immediately tell anyone about it, but eventually she told her Debbie, her mother, and her grandmother. Sarah testified that she went to live with her father, Gerald Riddle, "a few months" after the alleged rape, "probably the summer of 2002." Sarah's father testified that Sarah came to live with him in the summer of 2004, a couple of weeks before he had a car accident in which he was seriously injured. Either Sarah or her father told the Department of Social Services about the alleged rape, at which point DSS became involved with the family. DSS interviewed Sarah about her allegations. At trial, Sarah testified that the interview with DSS occurred in 2002 or 2003. However, defendant's counsel showed Sarah a report from DSS about that interview, which stated that the interview occurred on 8 June 2004. When Sarah was asked about the discrepancy between her testimony and the DSS report, Sarah stated: "I thought it was in 2002. I guess it was 2003——I mean '4." Sarah was born on 23 October 1989, and she turned 13 on 23 October 2002.

Defendant was charged with the second-degree rape of Sarah and possession of a firearm by a felon arising from for the events on 30 April 2010. Additional charges against defendant relating to Sarah included first-degree statutory rape of a child less than 13 years of age and taking indecent liberties with a child on or about 2000 to 2001. As for crimes against Jane, defendant was charged with first-degree statutory sexual offense with a child less than 13 years of age and four counts of taking indecent liberties with a child on or about 1992 and 1993.

The jury returned guilty verdicts on all charges. Defendant was sentenced to consecutive sentences of 22-27 months for possession of a firearm by a felon; 127-162 months for the second-degree rape of Sarah; 31-38 months for indecent liberties with a child, Sarah, and 480-585 months imprisonment for the first-degree rape of Sarah; four sentences of three years imprisonment each for indecent liberties with a child, Jane; and life imprisonment for the first-degree sex offense against a child, Jane. Defendant appeals.

Discussion

I. Motion to Dismiss

[1] Defendant contends that the trial court erred in failing to dismiss the charge of statutory rape of a child less than 13 years of age as there was insufficient evidence that the alleged victim, Sarah, was less than 13 years old at the time of the alleged crime. We disagree.

We review 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). In doing so, we 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 defendant's being the perpetrator of such offense.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Substantial evidence 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). When considering defendant's 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), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Defendant contends that Sarah "corrected" or "retracted" her testimony that she was 12 years old when the alleged rape occurred. Sarah testified that she was interviewed by DSS several months after the rape. Initially, Sarah testified that the interview with DSS occurred in 2002 or 2003. But, when provided a copy of the DSS report from her interview, which stated that the interview occurred on 8 June 2004, she testified: "I thought it was in 2002. I guess it was 2003——I mean '4." Because Sarah was born on 23 October 1989, she turned 13 on 23 October 2002.

Defendant argues this testimony constituted an acknowledgment by Sarah that her earlier testimony that she was 12 years old at the time of the alleged rape was incorrect. Therefore, defendant contends, there was no substantial evidence that Sarah was less than 13 years old at the time of the alleged rape. Because the age of the victim is an essential element of the crime, defendant argues that the trial court should have granted his motion to dismiss the charge. *See State v. Mueller*, 184 N.C. App. 553, 573, 647 S.E.2d 440, 454 (2007) (concluding that, where the prosecuting witness "stated unequivocally" that she was 13 years old when the defendant began having sexual intercourse with her, the trial court erred in denying the defendant's motion to dismiss the charge of first-degree statutory rape for insufficient evidence that the alleged victim was less than 13 years of age at time of the rape).

The State contends that Sarah did not recant her testimony about her age. Rather, Sarah's testimony created a contradiction in the evidence regarding an issue of fact that the jury was to resolve.

> When a defendant moves to dismiss, "[o]nly evidence favorable to the State is considered and *contradictions*, *even in the State's evidence*, are for the jury and do not warrant a granting of the motion. When so considered, the motion should be denied when there is substantial evidence, direct, circumstantial or both from which the jury could find that the offense charged was committed and that the defendant perpetrated the offense . . . ."

State v. Register, 206 N.C. App. 629, 645, 698 S.E.2d 464, 475 (2010) (concluding a motion to dismiss was properly denied where the prosecuting witness provided conflicting testimony as to the dates of the alleged crimes) (citation omitted) (emphasis added).

We conclude that a reasonable interpretation of Sarah's testimony is that she was mistaken as to the date of the DSS interview, not the date of the alleged rape. Furthermore, the transcript reveals that Sarah did testify that she was 12 years old at the time defendant vaginally penetrated

her with his penis. Thus, there was substantial evidence from which the jury could conclude that Sarah was raped by defendant when she was 12 years old, so the trial court did not err in denying defendant's motion to dismiss. Defendant's argument is overruled.

II. Expression of Opinion by the Trial Court

A. Age of Victim

[2] Next, defendant argues that the trial court impermissibly expressed an opinion concerning a contested element of the offense that was to be decided by the jury and thereby prejudiced defendant. We agree.

During deliberations, the jury sent a note to the trial court in which it asked, "May we please have the date and age of [Sarah] when she was raped the first time regarding the first-degree rape?" The trial court called the jury into the courtroom and told the jurors that the information they sought was in Sarah's testimony and that it was their duty to recall that testimony from memory. Juror number 5 then immediately asked a second question: "[W]ould it be an accurate statement that the Court would not be able to charge him with that particular charge if it were not in corroboration with the age reference?" The trial court answered: "You're correct."

Defendant contends that the trial court's response to the juror's question improperly implied that the trial court had corroborated that Sarah's age satisfied the age element of the charge——that Sarah was less than 13 years of age at the time of the alleged rape. Although defendant did not object to the trial court's statement, we may still review the alleged error. *See State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.").

> It is well established by our case law and statutory enactments that it is improper for a trial judge to express in the presence of the jury his opinion upon any issue to be decided by the jury or to indicate *in any manner* his opinion as to the weight of the evidence or the credibility of any evidence properly before the jury.

State v. Blackstock, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985) (emphasis added) (citing N.C. Gen. Stat. § 15A-1222); N.C. Gen. Stat. § 15A-1232 (2011) (providing that when instructing the jury, "the judge shall not express an opinion as to whether or not a fact has been proved . . . ."). However, the burden to show prejudice rests with the defendant, and

every improper comment by the trial court does not warrant reversal. *Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248. Rather, "it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *Id.* As this Court has noted, trial judges "must be careful in what they say and do because a jury looks to the court for guidance and picks up *the slightest intimation* of an opinion." *State v. Jenkins*, 115 N.C. App. 520, 524-25, 445 S.E.2d 622, 624-25 (1994) (concluding that the trial judge's action in turning his back to the defendant and jury during the defendant's testimony could reasonably have allowed the jury to infer that the trial court did not believe the defendant to be credible and warranted a new trial) (citation and quotation marks omitted) (emphasis added).

Before deliberations began, the trial court instructed the jurors that they should not infer from "anything [the trial court had] done or said" that any fact had been proven. However, the trial court gave this instruction before the jurors interrupted their deliberations to ask if the trial court would tell the jurors what Sarah's age was at the time of the alleged first-degree statutory rape. Because the trial court did not deliver a similar curative instruction after answering the jurors' questions and before the jurors resumed their deliberations, we cannot assume the jurors would have ignored any intimation of opinion in the trial court's answer. *See State v. Little*, 56 N.C. App. 765, 770, 290 S.E.2d 393, 396 (1982) ("[W]hen the [trial judge's] remarks are brought to the trial judge's attention prior to the jurors' deliberations, and a curative instruction is given, it is assumed that the jurors understood and complied with such an instruction.") (internal citation omitted)).

The State also argues that the trial court's answer was not an expression of opinion or of fact that Sarah was less than 13 years old at the time of the alleged rape, but rather it was a statement of law—that charges brought against a defendant must allege facts that support the charge. However, we conclude the trial court's answer, when viewed in light of the juror's question, could reasonably be interpreted as an expression of an opinion on an issue of fact. The juror asked if it was true that the court could not charge defendant with the crime if the charge was not "in corroboration with the age reference." Black's Law Dictionary (9th ed. 2008), defines corroboration as: "Confirmation or support by additional evidence or authority." We find it reasonable to conclude that the trial court's answer implied that the defendant could not have been charged with statutory rape of a child less than 13 years of age had the

trial court not corroborated that Sarah was younger than the age of 13 at the time of the alleged rape.

The State further argues that the defendant cannot show that he was prejudiced by the trial court's answer because, immediately after receiving the answer, the jury returned to its deliberations and indicated that they were deadlocked only thirty minutes later. The transcript reveals, however, that the jury indicated it was deadlocked on only one of the multiple charges against defendant, without identifying the charge on which it was deadlocked. The State's suggestion that the jury was deadlocked on the charge of statutory rape is a matter of speculation. Furthermore, even if it was the charge of statutory rape on which the jury was deadlocked, the jury ultimately reached a unanimous verdict concerning the charge, and the trial court's answer could reasonably have contributed to that guilty verdict. Therefore, we conclude that the jury could reasonably have inferred that the trial court's answer to the juror's question intimated an opinion about a factual issue that was to be resolved by the jury, and this was a prejudicial error. Accordingly, we reverse defendant's conviction for the first-degree statutory rape of Sarah when she was less than 13 years old.

B. Trial Court's Use of "Victim"

[3] Defendant also argues that the trial court impermissibly expressed an opinion regarding the prosecuting witnesses by repeatedly referring to them as victims. We disagree.

In its jury instructions, the trial court made several references to "the victim, [Sarah]," "[Sarah], the victim," and "the victim [Jane]." Defendant argues that this amounted to an expression of opinion by the trial court that Sarah and Jane were in fact victims of the crimes with which defendant was charged.

As defendant failed to object to these alleged errors, our review is limited to a review for plain error. *State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994) (applying plain error analysis to the defendant's allegation that the trial court erred by referring to the prosecuting witness as the "victim" in the jury instruction); *State v. Surratt*, __ N.C. App. __, __, 721 S.E.2d 255, 256 (citing *McCarroll* and applying plain error review to the same alleged error), *disc. review denied*, __ N.C. __, 722 S.E.2d 600 (2012). To establish plain error, defendant must show that the trial court's error was so fundamental that, in light of the entire record, the error " 'had a probable impact' " on the jury's determination that defendant was guilty and " '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) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "In deciding whether a defect in the jury instruction constitutes 'plain error,' [we] must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005).

We conclude that given the context of the references about which defendant complains, it is clear that the trial court was not expressing an opinion. In each instance that defendant cites, the trial court prefaced the sentence with an instruction to the effect, "the State must prove beyond a reasonable doubt," as in the following:

> The defendant has been charged with first-degree rape of [Sarah]. *For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt.* First, that the defendant engaged in vaginal intercourse with [Sarah], the victim. . . . Second, that at the time of the acts alleged the victim, [Sarah], was a child under the age of thirteen years.
>
> . . .
>
> *If you find from the evidence beyond a reasonable doubt* that on or about the alleged date the defendant engaged in vaginal intercourse with the victim, [Sarah] . . . .
>
> . . .
>
> *For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt.* First, that the defendant engaged in vaginal intercourse with the victim, [Sarah].

It is clear from the context of these instructions that the trial court was not expressing an opinion that Sarah and Jane were in fact victims but rather was explaining to the jury what the State must prove beyond a reasonable doubt. *See State v. Young*, 324 N.C. 489, 498, 380 S.E.2d 94, 99 (1989) (concluding that "in the context of the instructions given" the trial court's comment that the defendant had "confessed" to the crime was not an expression of opinion where the comments were immediately followed by the instruction, " 'Now, *if you find* that the defendant made that confession . . . .' "). This case is distinguishable from the case cited by defendant, *State v. Castaneda*, 196 N.C. App. 109, 112, 674 S.E.2d 707, 710 (2009), in which we concluded that the trial court erred by stating: "I instruct you that the witness, Mr. Torres, *was an accomplice*[.]"

We find no error in the trial court's instructions, so defendant's argument is overruled.

III. Coercion of a Verdict

[4] Defendant next argues that the trial court erred by coercing a unanimous verdict from the jury through its responses to the jury's questions about whether they had to continue deliberations despite appearing to be deadlocked. We disagree.

During the jury deliberations, the jury reported three times that it was unable to reach a unanimous verdict as to one of the charges. First, the jury foreman stated: "We have reached a decision on all but one. There is an indivisible [sic]. Do we have to keep smacking our heads on the table until we come to a solid conclusion yay [sic] or nay?" The trial court replied, "Yes."

A juror then asked: "If that does not happen, can we render a verdict on the ones in which we have a solid decision and the other one would simply be, for a better word, a hung jury for just that one charge?" The trial court replied by instructing the jurors to go to lunch, continue deliberations, and "see if you cannot come to some kind of unanimous decision."

Again, after a couple of hours, the jury reported that they were deadlocked on one charge. The trial court then gave an instruction that the jurors should do all that they could to reach a unanimous decision but they should do so "without the surrender of conscientious convictions . . . no juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict." This instruction is substantially similar to the instruction set out in N.C. Gen. Stat. § 15A–1235(b) regarding the jurors' duty to deliberate, which is commonly referred to as an *Allen* instruction. *State v. Ross*, 207 N.C. App. 379, 387, 700 S.E.2d 412, 418 (2010) (citing *Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528 (1896)).

Less than an hour later, the jury gave a third indication that they were deadlocked: "there will be no unanimous decision on the final charge——verdict." The trial court replied by telling the jury: "The court's of the opinion that you've only been deliberating more than an hour, so if you'll go back and spend some more time. We can even come back tomorrow morning if necessary. But if you will, try your best to come to some kind of a decision." The jury then returned a unanimous verdict approximately forty-five minutes later. Defendant contends

the trial court's responses (and refusal to answer the question by the individual juror) resulted in a coerced verdict and requires reversal of his convictions.

"Article I, section 24 of the North Carolina Constitution prohibits a trial court from coercing a jury to return a verdict." *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496, *aff'd*, 356 N.C. 604, 572 S.E.2d 782 (2002).

> In determining whether a trial court's actions are coercive, an appellate court must look to the totality of the circumstances. Thus, the defendant is entitled to a new trial if the circumstances surrounding jury deliberations
>
> > might reasonably be construed by [a] member of the jury unwilling to find the defendant guilty as charged as coercive, *suggesting to him that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority* and concur in what is really a majority verdict rather than a unanimous verdict.

Id. (internal citation omitted).

The trial court provided the jury with an *Allen* instruction after the second time it indicated it was deadlocked. Defendant contends, however, that because the trial court did not give an *Allen* instruction when the jury first indicated that it was deadlocked, but instead told the jury that it must continue deliberations, the court violated the mandate of N.C. Gen. Stat. § 15A-1235(c). As the State points out, section 15A-1235(c) does not require the trial court to give an *Allen* instruction every time the jury indicates it is deadlocked. Rather, it provides that such instructions are discretionary:

> If it appears to the judge that the jury has been unable to agree, the judge *may require* the jury to continue its deliberations and *may give or repeat* the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

N.C. Gen. Stat. § 15A-1235(c) (emphasis added).

The State contends, and we agree, that the facts presented here are similar to the facts at issue in *Ross*, 207 N.C. App. at 389, 700 S.E.2d at

419. In *Ross*, this Court rejected the defendant's argument that the trial court coerced a verdict when it failed to give an *Allen* instruction following the jury's third indication that it was deadlocked. *Id.* The jury in *Ross* first told the trial court that it was deadlocked after two hours of deliberation. *Id.* at 384, 700 S.E.2d at 416. The jury was told to continue deliberating, but the trial court did not provide an *Allen* instruction. *Id.* After a couple of hours, the jury again indicated that it was deadlocked. *Id.* at 385, 700 S.E.2d at 417. The trial court then gave an *Allen* instruction to the jury and told the jurors to continue deliberating. *Id.* After receiving a third note indicating the jury was hung, the trial court told the jurors: "I got your note. I understand it. It's short, to the point. It's direct, but I don't accept it yet." *Id.* at 386, 700 S.E.2d at 417. Without giving another *Allen* instruction, the trial court again instructed the jury to resume deliberations. *Id.* Approximately thirty minutes later, the trial court asked the jury if it was making any progress and it indicated it was not. *Id.* Ten minutes later, the jury returned a unanimous verdict. *Id.*

Under the totality of the circumstances, this Court held that the trial court did not err by not giving an *Allen* instruction after the third indication that the jury was deadlocked:

> It is difficult to see how another *Allen* instruction approximately 45 minutes after the first would have been necessary or helpful to the jury or that it would have had any impact on the outcome of the case. Also, the trial court made no additional comments to the jury that an *Allen* instruction would be helpful in clarifying.

Id. at 389, 700 S.E.2d at 419.

Here, after the jury's second indication that it was deadlocked, the trial court gave the jury an *Allen* instruction and told the jury to resume deliberations. Also, as in *Ross*, there was a forty-five-minute interval until the next indication of an impasse, at which point the trial court did not give an *Allen* instruction before again sending the jury back into deliberations.

This case is distinguishable from *Dexter*, 151 N.C. App. at 434, 566 S.E.2d at 496, in which this Court concluded that the jury may have reasonably construed the circumstances surrounding its deliberations as coercive and required a new trial. While the trial court in *Dexter* did not give an *Allen* instruction after the jury's third indication that it was deadlocked, there were other factors that contributed to the potentially coercive circumstances. *Id.* The trial court did not directly address a juror's request to be temporarily excused from deliberations to attend

his wife's surgery before it instructed the jury to return to deliberations for the third time. *Id.* It was therefore possible that the juror felt pressured to reach a verdict in time to attend the surgery. *Id.* The trial court also communicated directly with two of the jurors outside the presence of the remaining members of the jury, creating the possibility that the two jurors inaccurately conveyed the trial court's comments to the remaining members of the jury, by indicating that a verdict was required before the jurors could leave. *Id.*

Here, the trial court did not communicate with less than all of the jurors. And, despite defendant's contention to the contrary, the trial court did answer the question from one of the jurors as to whether the jury could render verdicts on those charges on which they were unanimous even if there were other charges on which they were deadlocked. In response to this question, the trial court instructed the jury to "deliberate some more and *see if you cannot* come to some kind of unanimous decision." (Emphasis added.) We conclude this response was not coercive and is readily distinguishable from the trial court's failure to respond to the juror's question in *Dexter*.

The facts presented here are also distinguishable from those presented in *State v. Sutton*, 31 N.C. App. 697, 701, 230 S.E.2d 572, 574 (1976), in which we concluded the trial court's instruction was coercive and rushed the jury to reach a verdict where it instructed the jury to "take no more than five minutes to ascertain whether or not the verdict which you reported yesterday was unanimous." Here, rather than rushing the jury, the trial court informed the jurors that they could continue their deliberations the next morning, if necessary.

Considering the totality of the circumstances, we conclude that there is nothing in the record indicating that the trial court coerced a verdict from the jury, so defendant's argument is overruled.

IV. Motion in Limine

[5] Before trial, defendant filed a motion in limine seeking to exclude testimony by Donna that on one occasion defendant held a gun to her head all night and made Donna's daughters watch. The motion was denied. When the testimony was introduced at trial, defendant timely objected and the objection was overruled. On appeal, defendant argues that the trial court erred in denying the motion as the evidence was inadmissible under Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

As the State contends, defendant failed to preserve the issue for review because he failed to object to Donna's testimony regarding other

acts of domestic violence committed by defendant. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) ("[T]he defendant waived his right to raise on appeal his objection to the evidence. Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost."). Assuming *arguendo* that it was error to admit the testimony under Rule 404(b), the error was not prejudicial in light of Donna's testimony, admitted without objection, that defendant committed similar acts of domestic violence: "[*H*]*e would just terrorize us*. And I don't mean just a little. It was scary terrorizing. . . . [He t]hrew me over coffee tables and fractured my wrists, and the guns and getting his truck and trying to ram it through the trailer in the kids' room." (Emphasis added.) This testimony was substantially similar to the testimony that defendant sought to exclude by his motion in limine: that defendant terrorized Donna and her daughters. Because defendant failed to object to this similar testimony, he was not prejudiced by the trial court's admission of the testimony that was the subject of his motion in limine. *See State v. Eubanks*, 151 N.C. App. 499, 502, 565 S.E.2d 738, 741 (2002) (concluding that even if the trial court erred in admitting improper character evidence under Rule 404(b) the error was not prejudicial as the defendant "elicited substantively similar testimony" during his cross-examination of a witness). Defendant's argument is overruled.

Conclusion

We conclude that the trial court did not err in denying defendant's motion to dismiss the charge of first-degree statutory rape of a child less than 13 years of age, Sarah. The trial court did not coerce a verdict from the jury, and did not express an opinion that Sarah and Jane were in fact victims during the jury instructions. We conclude, however, that the trial court improperly expressed an opinion that Sarah was less than 13 years old at the time of the alleged statutory rape. Defendant has not shown any prejudice from the trial court's denial of his motion in limine regarding the evidence of defendant's prior acts of domestic violence. Defendant is entitled to a new trial on the charge of first-degree statutory rape of Sarah. We find no error with respect to the remaining convictions.

NO ERROR, in part, NEW TRIAL, in part.

Judges STROUD and ERVIN concur.

MICHAEL K. TINSLEY, EMPLOYEE, PLAINTIFF
v.
CITY OF CHARLOTTE, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA12-1543

Filed 6 August 2013

1. Workers' Compensation—attorney fees award—third-party action—limited to one third of the recovery

The North Carolina Industrial Commission did not exceed its authority in a workers' compensation case by limiting plaintiff's attorney's recovery of attorneys' fees to one-third of the settlement in the third-party case. N.C.G.S. § 97-10.2(f)(1)(b) provides that the attorney fee taken from the employee's share may not exceed one-third of the amount recovered, but it is not otherwise subject to the reasonableness requirement of N.C.G.S. § 97-90(c).

2. Workers' Compensation—attorney fees—rationally related to interest in compensating injured worker—constitutional

N.C.G.S. § 97-10.2(f)(1)(b), which limits the attorney fee taken from the employee's share of a third-party settlement when there is a concurrent worker's compensation action to one-third of the amount recovered, was not unconstitutional as applied in this case. The cap on attorneys' fees is rationally related to the legitimate government interest where there is an interest in compensating the injured worker.

Appeal by Attorney Curtis Osborne from the Opinion and Award of the Industrial Commission filed 22 October 2012. Heard in the Court of Appeals 10 April 2013.

The Sumwalt Law Firm, by Vernon Sumwalt, for Curtis Osborne, Esq., d/b/a Osborne Law Firm appellant.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for defendant appellee.

McCULLOUGH, Judge.

Attorney Curtis Osborne ("appellant") appeals from the Opinion and Award filed by the North Carolina Industrial Commission (the "Commission") on 22 October 2012 that limited his recovery of attorneys'

fees to one-third of the settlement in the third-party case. For the following reasons, we affirm.

I. Background

This appeal arises out of appellant's representation of Michael K. Tinsley ("plaintiff") in worker's compensation and third-party cases. The cases stem from a 1 December 2007 work-related automobile accident in which plaintiff was injured.

In the workers' compensation case, the City of Charlotte ("Charlotte"), plaintiff's employer, filed an admission of plaintiff's right to compensation with the Commission on 14 May 2008. Thereafter, on 6 March 2009, the Commission approved an award of permanent partial disability compensation to plaintiff totaling $16,839.12. The award provided for 24 weeks of compensation to plaintiff at a rate of $701.63 per week based on a 10% permanent partial disability rating to plaintiff's left shoulder.

The third-party case subsequently commenced with the filing of a complaint in Mecklenburg County Superior Court on 17 June 2009. In the complaint, plaintiff asserted that the individual driving the second vehicle was negligent and that the individual's employers were liable for the negligence under theories of respondeat superior and agency. Following the voluntary dismissal of one of the defendants on 8 February 2010, plaintiff filed a motion on 8 April 2010 to stay litigation in the third-party case and compel arbitration. The motion was granted on 19 April 2010. The ensuing arbitration in the third-party case resulted in the entry of an award of $137,500.00 in compensatory damages to plaintiff on 7 July 2010. Plaintiff, however, was only able to recover $100,000, the combined policy limit of the liability and underinsured motorist insurance carriers.

On 25 August 2010, plaintiff and Charlotte entered into an agreement "for final compromise settlement release and distribution of the third party settlement[.]" In the agreement, Charlotte agreed to accept "a net of $15,000.00 from the proceeds of the settlement" in the third-party case in full satisfaction of its $47,295.79 workers' compensation lien, waiving any further rights it had under N.C. Gen. Stat. § 97-10.2. Conversely, plaintiff "agree[d] to accept the aforesaid reduction in lien in full satisfaction of any and all claims, demands, suits, actions, or rights of action" against Charlotte arising as a result of the 1 December 2007 accident.

Tracy H. Weaver, Executive Secretary of the Commission, filed an order on 27 August 2010 approving the agreement and ordering distribution of the proceeds from the third-party case. The order provided the

following distribution: $15,000.00 to Charlotte in accordance with the agreement, $33,333.33 to appellant for attorneys' fees, and the remaining $51,666.67 to plaintiff. The Commission failed to designate funds for the reimbursement of costs.

On 2 September 2010, appellant submitted a motion for reconsideration of determination of attorneys' fees and costs to the Commission. Appellant sought an increase in fees to $38,000.00 and $8,950.29 to reimburse costs. Along with the motion, appellant submitted an affidavit and a copy of the fee agreement, whereby plaintiff and appellant agreed to a contingency fee of thirty-three and one-third percent (33-1/3%) of the gross recovery if litigation was not required and forty percent (40%) of the gross recovery if litigation was required.[1]

Secretary Weaver filed an order on 9 September 2010, modifying the previous distribution. The new order awarded $8,950.29 to appellant for the reimbursement of costs and reduced plaintiff's recovery by an equal amount. The new order did not, however, allocate additional funds to appellant for fees. As a result, appellant appealed the 9 September 2010 order to the deputy commissioner to determine whether N.C. Gen. Stat. § 97-10.2 was properly applied in distributing the proceeds from the third-party case -- specifically, whether the Commission had jurisdiction to apply N.C. Gen. Stat. § 97-10.2(f)(1)(b) as a cap on fees.

On 29 March 2011, Deputy Commissioner J. Brad Donovan filed an Opinion and Award, affirming Secretary Weaver's order. Appellant appealed the 29 March 2011 Opinion and Award to the Full Commission.

On 18 April 2011, appellant filed a motion to stay the appeal to the Full Commission pending a constitutional challenge to N.C. Gen. Stat. § 97-10.2(f)(1)(b) to be filed in superior court. Appellant then filed a declaratory judgment action in Mecklenburg County Superior Court on 16 June 2011. In the declaratory judgment action, appellant sought declarations that the cap on attorneys' fees at one-third of the amount recovered from a third-party in N.C. Gen. Stat. § 97-10.2(f)(1)(b) is unconstitutional and the Commission exceeded its jurisdiction by capping and approving the fees in the third-party case.

Subsequent to the filing of the declaratory judgment action, on 24 June 2011, appellant filed a second motion to stay the appeal of the 29 March 2011 Opinion and Award to the Full Commission. Moreover,

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1. In appellant's motion for reconsideration, appellant notes that he subsequently agreed to reduce his fee to thirty-eight percent (38%) of the gross recovery if litigation was required.

on 7 July 2011, appellant filed a motion with the Commission to certify questions of law to this Court pursuant to N.C. Gen. Stat. § 97-86. The questions of law requested certified were the same issues raised by appellant in the declaratory judgment action.

On 21 July 2011, an Order for the Full Commission was filed certifying the question of the constitutionality of N.C. Gen. Stat. § 97-10.2(f)(1)(b) to this Court for review. The order also removed the appeal of the 29 March 2011 Opinion and Award from the Full Commission hearing docket. Appellant filed notice of appeal to this Court on 29 July 2011.

As a result of the appeal to this Court, the parties stipulated to a dismissal without prejudice of the declaratory judgment action filed in Mecklenburg County Superior Court.

During the time the appeal was pending in this Court, plaintiff and appellant entered into an agreement to split the difference between the thirty-eight percent (38%) fee claimed by appellant and the thirty-three and one-third percent (33-1/3%) fee awarded by the Commission, the difference amounting to $4,666.67. Accordingly, appellant further reduced his fee to thirty-five and seven-tenths percent (35-7/10%) of the gross recovery. Upon disbursement of the $4,666.67 held in trust, of which plaintiff received a check for $2,300.00, plaintiff signed an agreement dated 2 February 2012, relinquishing any and all claims concerning the remaining funds.

Despite complete disbursement of the proceeds from the third-party case, the appeal to this Court came on for oral argument on 9 February 2012. Following oral arguments, however, the parties submitted a joint motion to dismiss the appeal and remand to the Commission for additional proceedings concerning non-constitutional issues that arose during the appeal. This Court granted the joint motion for dismissal and remanded the case to the Commission by order filed 7 March 2012.

The Full Commission reviewed the case on 1 August 2012. On 22 October 2012, the Opinion and Award for the Full Commission was filed affirming the 29 March 2011 Opinion and Award of Deputy Commissioner Donovan affirming the 9 September 2010 Order of Secretary Weaver. Appellant appealed the Full Commission's Opinion and Award to this Court on 5 November 2012.

II. Analysis

On appeal, appellant raises issues concerning the subject matter jurisdiction of the Commission and the constitutionality of N.C. Gen. Stat. § 97-10.2(f)(1)(b). Issues concerning the Commission's jurisdiction

and the constitutionality of a statute are questions of law subject to *de novo* review.

Subject Matter Jurisdiction

[1] The first issue on appeal is whether the Commission exceeded its subject matter jurisdiction by capping attorneys' fees from the third-party case at one-third of the gross recovery. We hold the Commission did not exceed its jurisdiction.

"The jurisdiction of the Industrial Commission is limited by statute." *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 369, 396 S.E.2d 626, 628 (1990). In this case, two sections of the Workers' Compensation Act, N.C. Gen. Stat. §§ 97-10.2(f)(1) and -90(c), are in apparent conflict.

In general, N.C. Gen. Stat. § 97-10.2 governs the rights of an injured employee and the employee's employer to enforce the liability of a third party by appropriate proceedings. N.C. Gen. Stat. § 97-10.2 (2011). When a recovery is "obtained by settlement with, judgment against, or otherwise from the third party[,]" and "the employer has filed a written admission of liability for [workers' compensation] benefits . . . , or . . . an award final in nature in favor of the employee has been entered by the . . . Commission," N.C. Gen. Stat. § 97-10.2(f)(1) provides that the amount recovered from the third party shall be disbursed:

> a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.
>
> b. *Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party.*
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
>
> d. Fourth to the payment of any amount remaining to the employee or his personal representative.

N.C. Gen. Stat. § 97-10.2(f)(1) (emphasis added).

On the other hand, N.C. Gen. Stat. § 97-90 governs the Commission's approval of fees. Subsection (c) of the statute specifically provides that the Commission shall determine the reasonableness of agreements for attorneys' fees under the Workers' Compensation Act and determine a reasonable fee if such an agreement is found to be unreasonable. N.C. Gen. Stat. § 97-90(c) (2011). Yet, "the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action." *Id.*

On appeal, appellant contends that N.C Gen. Stat. § 97-90(c) controls when it comes to the Commission's jurisdiction over attorneys' fees, whereas N.C. Gen. Stat. § 97-10.2(f)(1) simply directs the order of distribution. Appellant argues that "[a]lthough N.C. Gen. Stat. § 97-90(c) enables the Commission to approve fees, it does so only for fees in workers' compensation claims, not third-party actions." Therefore, based on the plain meaning of N.C. Gen. Stat. § 97-90(c), appellant contends the Commission lacks jurisdiction to apply N.C. Gen. Stat. § 97-10.2(f)(1)(b) as a cap on attorneys' fees in third-party cases. We disagree.

N.C. Gen. Stat. §§ 97-10.2(f)(1) and -90(c) are not so easily isolated. Appellant's argument ignores the second portion of N.C. Gen. Stat. § 97-10.2(f)(1)(b), which provides "except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party." Based on the reference to N.C. Gen. Stat. § 97-90 in N.C. Gen. Stat. § 97-10.2(f)(1)(b), it is evident that the General Assembly was aware of the jurisdictional limits of the Commission when it provided that "such fee . . . shall not exceed one third of the amount obtained or recovered of the third party." N.C. Gen. Stat. § 97-10.2(f)(1)(b).

> Statutes *in pari materia*, although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each . . . . Further, interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible.

Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 278, 576 S.E.2d 681, 686 (2003) (internal quotation marks and citations omitted).

Considering N.C. Gen. Stat. §§ 97-10.2(f)(1)(b) and -90(c) *in pari materia*, we arrive at the same conclusion as this Court did in *Hardy v. Brantley*, 87 N.C. App. 562, 361 S.E.2d 748 (1987), *rev'd in part on other grounds*, *appeal dismissed in part*, 322 N.C. 106, 366 S.E.2d 485 (1988) (for the reasons stated in the dissent).

As noted above, N.C. Gen. Stat. § 97-90(c) provides that the Commission has jurisdiction to determine the reasonableness of an agreement for attorneys' fees and, where there is no agreement, to determine a reasonable fee. Where the entirety of subsection (c) refers to reasonableness, we interpret the provision, "the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action[,]" to refer to a determination of reasonableness. Consequently, the cap on attorneys' fees at one-third of the recovery from a third-party in N.C. Gen. Stat § 97-10.2(f)(1)(b) does not conflict with N.C. Gen. Stat. § 97-90(c). Under N.C. Gen. Stat. § 97-10.2(f)(1)(b), the Commission need not undertake a determination of the reasonableness.

Accordingly, we construe N.C. Gen. Stat. § 97-10.2(f)(1)(b) to provide

> the attorney fee taken from the employee's share may not exceed one third of the amount recovered, but it is not otherwise subject to the reasonableness requirement of N.C. Gen. Stat. § 97-90(c); the attorney fee on the subrogation interest of the employer (or its carrier) is subject to the reasonableness requirement of N.C. Gen. Stat. § 97-90(c) and may not exceed one-third of the amount recovered from the third party.

Hardy, 87 N.C. App. at 567, 361 S.E.2d at 751.

Appellant contends that it is error to rely on this Court's decision in *Hardy* because the decision does not support the interpretation of N.C. Gen. Stat. § 97-10.2(f)(1)(b) as a cap on attorneys' fees for two reasons: (1) the majority opinion was reversed by the Supreme Court for the reasons stated in the dissent; and (2) the decision in *Hardy* did not address an agreement for attorneys' fees in excess of one-third of the recovery from a third-party. We recognize that both of appellant's assertions are accurate. Nevertheless, we find this Court's interpretation of N.C. Gen. Stat. §§ 97-10.2(f)(1)(b) and -90(c) in *Hardy* instructive and now adopt it as our own.[2]

Appellant additionally argues that the purpose of the one-third language in N.C. Gen. Stat. § 97-10.2(f)(1)(b) is to ensure adequate reimbursement of the employer's workers' compensation lien and to

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2. We note that the dissent in *Hardy* did not disagree with the interpretation of N.C. Gen. Stat. § 97-10.2(f)(1)(b) that we now adopt. Instead, the dissent took issue with the Court's conclusion that the Commission "had either the authority or duty to determine the 'reasonableness' of the fee involved." *Hardy*, 87 N.C. App. at 568-69, 361 S.E.2d at 752 (Phillips, dissenting).

regulate employee and employer contributions to attorneys' fees pursuant to N.C. Gen. Stat. § 97-10.2(f)(2).[3] As a result, appellant urges this Court to hold that, although the priority of distribution in N.C. Gen. Stat. § 97-10.2(f)(1) controls, the Commission cannot override a fee agreement in the third-party action when there is enough of a recovery to satisfy the workers' compensation lien. Therefore, where attorneys' fees under an agreement in a third-party case remain unpaid following the one-third distribution and full satisfaction of the workers' compensation lien, appellant asserts that the unpaid portion of attorneys' fees should be disbursed from the distribution to the employee in N.C. Gen. Stat. § 97-10.2(f)(1)(d). In support of his assertions, appellant provides mathematical examples and cites various provisions of N.C. Gen. Stat. § 97-10.2 to demonstrate that the one-third language was not intended to apply as a cap on attorneys' fees. We are not persuaded. Had the General Assembly intended the distribution scheme appellant urges this Court to adopt, it could have easily provided for it in the statute. As written, we find no such intent in N.C. Gen. Stat. § 97-10.2(f)(1).

Equal Protection

[2] The second issue on appeal is whether N.C. Gen. Stat. § 97-10.2(f)(1)(b) is unconstitutional as applied in this case. Appellant contends that the application of N.C. Gen. Stat. § 97-10.2(f)(1)(b) as a cap on attorneys' fees recoverable in a third-party case creates an equal protection issue between two classes of civil litigants, those with concurrent workers' compensation claims and those without.

As conceded by appellant, N.C. Gen. Stat. § 97-10.2(f)(1)(b) does not interfere with a fundamental right or single out a suspect class; thus, the lower tier of equal protection analysis requiring a rational basis applies in the present case. *See White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983) (discussing the two-tiered scheme of equal protection analysis). Under the rational basis standard, we look to see if the "classification bear[s] some rational relationship to a conceivable legitimate interest of government." *Id.* A governmental act is presumed valid when reviewed pursuant to the rational basis standard. *Id.* at 767, 304 S.E.2d at 204.

In this case, appellant contends that the government interest in capping attorneys' fees in N.C. Gen. Stat. § 97-10.2(f)(1)(b) is to provide

3. "The attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made." N.C. Gen. Stat. § 97-10.2(f)(2).

"adequate reimbursement of workers' compensation liens in third-party actions . . . [thereby] placing the ultimate cost of workplace injuries on the third parties who cause those injuries." Thus, appellant argues the cap on attorneys' fees in the present case serves no rational basis because Charlotte's workers' compensation lien has been fully satisfied.

We agree that reimbursing the employer's workers' compensation lien and passing the cost of workplace injuries to those third-parties responsible are legitimate government interests. Yet, they are not the exclusive interests.

As recognized by our Supreme Court, the interests behind the Workers' Compensation Act as a whole are twofold: (1) to compensate the injured worker for their loss of earning capacity; and (2) to insure employer's limited and determinate liability. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986); *see also Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). Thus, "[N.C. Gen. Stat. §] 97–10.2 and its statutory predecessors were designed to secure prompt, reasonable compensation for an employee and simultaneously to permit an employer who has settled with the employee to recover such amount from a third-party tort-feasor." *Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569.

Despite appellant's attempt to persuade us otherwise, it is axiomatic that increased attorneys' fees reduce the amount of compensation available from a third-party case to be distributed to an injured worker pursuant to N.C. Gen. Stat. § 97-10.2(f)(1). Therefore, the cap on attorneys' fees is rationally related to the legitimate government interest where there is an interest in compensating the injured worker. Accordingly, we hold N.C. Gen. Stat. § 97-10.2(f)(1)(b) constitutional as applied in the present case.

III. Conclusion

For the reasons discussed above, we affirm the Opinion and Award of the Full Commission.

Affirmed.

Judges BRYANT and HUNTER, JR. (Robert N.) concur.

WILLIAMS v. WILLIAMS

[228 N.C. App. 753 (2013)]

CLARENCE JONATHAN WILLIAMS, EDDIE MACK, JOYCE GRIFFIN, AND ODELL DAVIS, III, BY AND THROUGH HIS DULY APPOINTED GUARDIAN AD LITEM, ROBERT GRAY AUSTIN, III, PLAINTIFFS

v.

AMBER LAVONE WILLIAMS, INDIVIDUALLY, AMBER LAVONE WILLIAMS, IN HER REPRESENTATIVE CAPACITY AS ADMINISTRATOR OF THE ESTATE OF WILLIE JAMES INGRAM, DECEASED, AND LAKEYSHA MEDLIN DAVIS, DEFENDANTS

No. COA13-55

Filed 6 August 2013

Attorneys—conflict of interest—individual representation—representation as administratrix

The trial court did not err by disqualifying defendant's attorney from representing her in her individual capacity in the present civil action and in her capacity as administratrix in an estate proceeding. There was competent evidence to support the finding that counsel represented defendant in both capacities and that defendant's interests in her individual capacity were not aligned, but were, in fact, adverse to those of the estate proceeding.

Appeal by Defendant from order entered 25 September 2012 by Judge James W. Morgan in Union County Superior Court. Heard in the Court of Appeals 23 May 2013.

Strauch Fitzgerald & Green, P.C., by Andrew L. Fitzgerald and Hannah K. Albertson, and Hickmon & Perrin, PC, by James E. Hickmon, for Plaintiffs.

Harrington Law Firm, by James J. Harrington, for Defendant Amber Lavone Williams.

DILLON, Judge.

Amber Lavone Williams (Defendant)[1] is the administratrix of the Estate of William James Ingram (the Ingram Estate). The administration of the Ingram Estate is currently pending before the Clerk of Union County Superior Court (the Estate Proceeding).

1. Plaintiffs' complaint also asserted claims against a co-defendant, Lakeysha Medlin Davis, which are not relevant for purposes of this appeal.

The case *sub judice* is a civil action filed in Union County Superior Court by Plaintiffs – the heirs of the Ingram Estate –against Defendant both in her individual capacity and in her capacity as administratrix of the Ingram Estate, seeking damages and declaratory relief. Following a hearing on a motion to disqualify filed by Plaintiffs, the trial court entered an order disqualifying Larry E. Harrington, James J. Harrington, and the Harrington Law Firm (collectively, Harrington) from representing Defendant in her individual capacity in the present civil action and in the Estate Proceeding. For the following reasons, we affirm the trial court's order.

I. Factual & Procedural Background

On 22 March 2012, Willie James Ingram was admitted to a hospital in Salisbury, North Carolina, suffering from kidney failure, liver failure, congestive heart failure, and diabetes. According to Plaintiffs – who are Mr. Ingram's siblings – Mr. Ingram was heavily medicated and cognitively impaired from this point through the time of his death several weeks later.

On 14 April 2012, Defendant arrived at the hospital and declared that she was Mr. Ingram's daughter. Plaintiffs aver that they had no knowledge of Defendant's existence or of her relation to Mr. Ingram prior to this time.

On 18 April 2012, Defendant visited a branch of Branch Banking and Trust Company (BB&T) and requested that her name be added to Mr. Ingram's BB&T account, which contained approximately $200,000.00, as a co-owner with rights of survivorship. BB&T initially refused Defendant's request, but acquiesced when Defendant later returned with documents purportedly signed by Mr. Ingram, authorizing Defendant to be added to the account. Around this time, Defendant also retained counsel to prepare a durable power-of-attorney instrument. Mr. Ingram purportedly signed this instrument on 23 April 2012, effectively appointing Defendant as his attorney-in-fact.

Mr. Ingram died intestate on 28 April 2012. On 10 May 2012, Defendant was appointed administratrix of the Ingram Estate after representing to the Union County Clerk of Superior Court that she was Mr. Ingram's daughter and sole heir-at-law. Upon learning of Defendant's appointment, Plaintiffs petitioned the clerk of court in the Estate Proceeding to remove Defendant from her role as administratrix. By order entered 28 June 2012, the clerk of court determined that Defendant "is not [Mr. Ingram's] legitimate daughter, is not an heir of [Mr. Ingram], and is entitled to take nothing through [Mr. Ingram's]

Estate" and that Plaintiffs were Mr. Ingram's sole heirs. However, the clerk of court entered a separate order denying Plaintiffs' motion to remove Defendant as administratrix of the Ingram Estate.[2] Superior Court Judge Tanya Wallace affirmed the clerk of court's decision allowing Defendant to continue serving as administratrix of the Ingram Estate and remanded the matter to the clerk of court. As discussed further *infra*, the record reflects that Harrington has represented Defendant both in her individual capacity and in her role as administratrix at various times throughout the Estate Proceeding.

On 23 July 2012, Plaintiffs filed a complaint in Union County Superior Court asserting claims against Defendant both in her individual capacity and in her capacity as administratrix of the Ingram Estate. The complaint alleged, *inter alia*, that Defendant had committed fraud and breached fiduciary duties owed to Plaintiffs as heirs to the Ingram Estate "by intentionally commingling the Estate's assets with her own assets and converting Estate assets to her own use." On 7 August 2012, Harrington, on behalf of Defendant as administratrix of the Ingram Estate, filed a Rule 12(b)(6) motion to dismiss Plaintiffs' complaint and moved for a protective order.

On 15 August 2012, Plaintiffs moved to disqualify Harrington as counsel for Defendant in her capacity as administratrix, contending that "[i]t appears [Harrington] purport[s] to represent [Defendant] in both her individual capacity as well as in her capacity as Administrator of [the Ingram] Estate." Plaintiffs asserted that the nature of this representation created a conflict of interest between two current clients of Harrington – or between a current and former client, depending upon whether Harrington continued to represent the Ingram Estate through representation of Defendant in her capacity as administratrix.

Plaintiffs' motion to disqualify counsel came on for hearing in Union County Superior Court on 27 August 2012. At the hearing, Larry Harrington stated that (1) Harrington was representing Defendant only in her individual capacity; (2) Harrington was no longer representing Defendant in her capacity as administratrix; and (3) John T. Burns, who was present at the hearing, was assuming representation of Defendant in her capacity as administratrix of the Ingram Estate.

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2. The clerk of court determined that Defendant had "done a reasonably good job of administration" and that although Ingram had not acknowledged paternity in the legal sense, he had acknowledged Defendant in other ways, such as naming her his attorney in fact, adding her to his BB&T savings account, and designating her as a beneficiary of his life insurance policy.

On 25 September 2012, the trial court entered an order setting forth the following pertinent findings:

> 1. . . . [Harrington] presently represent[s] [Defendant] individually in [this] civil action.
>
> 2. . . . [Harrington] either now represents or has previously represented [Defendant] in her representative capacity as Administrator of the Estate of Willie James Ingram, deceased, and the Estate of Willie James Ingram.
>
> . . . .
>
> 5. . . . [Defendant's] individual interests are not aligned with and are in fact adverse to the interests of the [Ingram Estate] and those of the Plaintiffs/Heirs.
>
> 6. . . . [I]t appears to the Court that Rule 1.7 of the North Carolina Rules of Professional Conduct for attorneys . . . preclude [Harrington] from representing [Defendant] in both her individual capacity or in her capacity as Administrator of the [Ingram Estate] without the express consent of the Plaintiffs/Heirs.
>
> 7. . . . [Plaintiffs] object to [Defendant's] continued service as Administrator of the [Ingram Estate] and are unwilling to consent to [Harrington's] continued representation of [Defendant] in any capacity.

Based upon these findings, the trial court disqualified Harrington from further representation of Defendant in her individual capacity both in this action and in the Estate Proceeding. From this order, Defendant appeals.

II. Analysis

Preliminarily, we note the interlocutory nature of this appeal. However, our Supreme Court has held that an order *granting* a motion to disqualify counsel affects a substantial right and is thus immediately appealable. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 727, 392 S.E.2d 735, 737 (1990). We further note that although Plaintiffs' motion sought to disqualify Harrington from representing Defendant in her capacity *as administratrix*, the trial court's order makes no determination regarding Harrington's ability to represent Defendant in her capacity as administratrix. Rather, the trial court ordered that Harrington be disqualified as counsel for Defendant *in her individual capacity*. Therefore, the

scope of our review is limited to the issue of whether the trial court erred in disqualifying Harrington from representing Defendant in her individual capacity.

We review the trial court's decision to disqualify counsel for abuse of discretion. *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (citations omitted).

In the instant case, the trial court found as fact that Harrington represented Defendant both in her individual capacity and in her capacity as administratrix of the Ingram Estate. We believe that there is competent evidence in the record which supports this finding. For instance, regarding the Estate Proceeding, the record reveals that at the 21 June 2012 hearing on Plaintiffs' petition for removal, Larry Harrington admitted that Harrington had previously represented Defendant "individually and in her fiduciary capacity"; that on 17 July 2012, in response to a motion filed by Plaintiffs in the Estate Proceeding, Harrington filed an objection on behalf of Defendant in her capacity as administratrix; and that in an email correspondence dated 17 July 2012, James Harrington communicated the following to Plaintiffs' counsel: "Until you receive notice from us or a court determines otherwise, you can assume that we represent [Defendant] as Administrator of the Estate of Willie Ingram." Further, regarding the present action, the record reveals that Harrington has filed motions on behalf of Defendant in her capacity as administratrix of the Ingram Estate – for example, Defendant's motion to dismiss and Defendant's motion for a protective order, both of which were filed by Harrington on 9 August 2012 – and that at the hearing on Plaintiffs' motion to disqualify, Larry Harrington represented to the court that Harrington was still representing Defendant in her individual capacity. Consequently, this Court is bound by the trial court's finding that Harrington has represented Defendant in both capacities. *See Cornelius v. Helms*, 120 N.C. App. 172, 175, 461 S.E.2d 338, 339-40 (1995) (providing that "[w]hether an attorney-client relationship existed between plaintiffs and defendants is a question of fact for the trial court and 'our appellate courts are bound by the trial court's findings of facts where there is some evidence to support these findings, even though the evidence might sustain findings to the contrary' " (citation omitted)).

Moreover, the trial court determined that Defendant's interests in her individual capacity were not aligned, but were, in fact, adverse to

those of the Ingram Estate. Rule 1.9(a) of the North Carolina Revised Rules of Professional Conduct provides as follows:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Our review of Plaintiffs' complaint reveals that Plaintiffs' claims against Defendant support the finding that Defendant's interests (in her individual capacity) are materially adverse to those of the Ingram Estate – which Defendant represents in her capacity as administratrix – and the heirs (Plaintiffs) and creditors of the Ingram Estate. For instance, Plaintiffs allege that Defendant removed assets from the Ingram Estate "for the purpose of depriving those parties with legitimate interests in the [Ingram] Estate . . . of the beneficial use of [Mr. Ingram's] assets[,]" which places Defendant, individually, squarely at odds with Defendant as administratrix, a fiduciary vested with the duty of preserving the estate and acting in the best interests of the estate beneficiaries. *See generally* N.C. Gen. Stat. § 28A-13-3(a) (2011). Accordingly, we discern no abuse of discretion in the trial court's decision to disqualify Harrington from representing Defendant in her individual capacity under these circumstances.[3]

We note that our holding finds support in ethics opinions issued by the North Carolina State Bar, including N.C. St. B. Ethics Op. RPC 137 (Oct. 23, 1992) (providing that an attorney who has formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate), and N.C. St. B. Ethics Op. RPC 22 (Apr. 17, 1987) (providing that in the absence of consent from the heirs, a lawyer may not represent the administratrix officially and

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3. We note that the trial court's order proscribing Harrington's representation of Defendant in her individual capacity extends to the Estate Proceeding, which is currently pending before the clerk of court. We believe that the trial court acted within its "inherent authority" in so ruling. *See In re Northwestern Bonding Co.*, 16 N.C. App. 272, 275, 192 S.E.2d 33, 35 (1972) (providing that while "questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina State Bar[,]" our courts have "inherent authority to take disciplinary action against attorneys . . . based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from . . . acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice" and that this authority "*extends even to matters which are not pending in the particular court exercising the authority*" (emphasis added)).

personally where her interests in the two roles are in conflict). While we recognize that these opinions are not binding on this Court, they are nevertheless persuasive.

Defendant has abandoned her remaining arguments for failure to comply with Rule 28 of our Appellate Rules. See N.C. R. App. P. 28(b)(6) (2013) (providing that an appellant's argument "shall contain citations of the authorities upon which the appellant relies").

III. Conclusion

For the foregoing reasons, we affirm the trial court's order disqualifying counsel.

AFFIRMED.

Judges ELMORE and GEER concur.

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APPEAL AND ERROR—Continued

Interlocutory orders and appeals—sufficiency of service of process—contempt for willful failure to pay child support—Although defendant's challenge to the sufficiency of service of process in a child custody and support case was procedural and thus interlocutory in nature, the Court of Appeals held the matter was properly before it under *Willis*, 291 N.C. 19, and N.C.G.S. § 1-277(b). Absent its review, defendant risked extradition, imprisonment, or could otherwise be required to comply with the temporary child support order that he believed was erroneously entered. **Hamilton v. Johnson, 372.**

Interlocutory orders and appeals—venue—immediate appeal of right—Defendant had an immediate appeal of right from a venue determination because the right to venue established by statute is substantial. However, a decision regarding a motion to amend did not affect a substantial right. **LendingTree, LLC v. Anderson, 403.**

Interlocutory orders and appeals—venue—standard of review—A ruling on a motion to change venue will be reviewed on appeal for abuse of discretion. A *de novo* review is applied to whether a party waived an improper venue defense as a matter of law. **LendingTree, LLC v. Anderson, 403.**

Interlocutory orders and appeals—water level in canal—condemnation rule not applicable—An appeal from an order that defendants admitted was interlocutory was dismissed where defendants contended that their appeal was subject to immediate review under N.C. Dep't of Transp. v. Stagecoach Village, 360 N.C. 46. However, the principle adopted in Stagecoach Village is only applicable in condemnation cases and this case involved claims for breach of real covenant, nuisance, negligence, and injunctive relief rising from the water level in a canal. **Smith v. Lake Bay East, LLC, 72.**

Preservation of issues—argument not raised at trial—An argument on appeal concerning lack of consideration in a real estate transaction was overruled where lack of consideration was not raised at trial. **Trantham v. Michael L. Martin, Inc., 118.**

Preservation of issues—authority not cited—argument not sufficiently developed—Arguments on appeal for which authority was not cited and which were not sufficiently developed were overruled. **Trantham v. Michael L. Martin, Inc., 118.**

Preservation of issues—confinement in response to violation—no statutory right of appeal—failure to raise issue at revocation hearing—Defendant's appeal in a drugs case from the trial court's orders modifying the terms of his probation and imposing confinement in response to violation (CRV) for a period of 90 days was dismissed. Defendant did not have a statutory right to appeal from the trial court's imposition of CRV. Further, defendant waived the issue of the validity of the community service requirement since he failed to contest it at any point during the revocation hearing. **State v. Romero, 348.**

Preservation of issues—expert testimony—hearsay—failure to move to strike—failure to assert plain error—Defendant failed to preserve for appellate review the argument that the trial court erred in a statutory rape, statutory sex offense, and indecent liberties with a minor case by admitting into evidence statements made by the alleged victim to an expert witness about what the alleged victim's brother had said. Defense counsel made no motion to strike the testimony. Additionally, defendant failed to assert plain error on appeal. **State v. Gamez, 329.**

DAMAGES AND REMEDIES—Continued

Double recovery—corporate and individual defendant—remand for credit— An award for damages in an action for breach of contract and other claims arising from a real estate transaction was remanded where the trial court reduced the judgments against the corporate and individual defendants, but all of the causes of action sought to make plaintiffs whole for the interrelated wrongs of losing the farm and not being paid. Plaintiffs were entitled to but one recovery; on remand, the judgment should be modified such that the amount paid by the corporate defendants is credited toward the judgment against the individual defendant. **Trantham v. Michael L. Martin, Inc., 118.**

Nominal damages—unfair and deceptive trade practices—fraud—punitive damages—The jury's findings and award of nominal damages were sufficient to support the trial court's judgment against both defendants Blackmon and Moorehead I for unfair and deceptive trade practices. The issues of fraud and punitive damages were separate and distinct claims from the issue of unfair and deceptive trade practices. **Estate of Hurst v. Moorehead I, LLC, 571.**

DEEDS

Deed of trust—foreclosure—note holder—The trial court did not err in a foreclosure case authorizing the foreclosure of the subject property. There was competent evidence to show that the party seeking to foreclose on the property was the current holder of the original Note. **In re Foreclosure of Manning, 591.**

Deed of trust—foreclosure—valid debt—default—The trial court did not err in a foreclosure case by authorizing the foreclosure of the subject property. The clerk of superior court had no jurisdiction to enter an order requiring a satisfaction to be recorded as to the deed of trust on the property, a valid debt existed, and there was default thereupon. **In re Foreclosure of Manning, 591.**

Restrictive covenants—boat slips—A marina (GHYC) did not violate restrictive covenants by entering into 99 year leases for boat slips with non-property owners even though the marina was restricted to the owners of lots in the subdivision. There was an exception when lot owners did not take advantage of their rights to boat slips and, while the leases did not include language allowing the non-property owners to be displaced when property owners wanted a slip and none were available, there was no instance of that scenario having occurred. The mere length of the leases did not transform them into sales. **Warrender v. Gull Harbor Yacht Club, Inc., 520.**

Restrictive covenants—marina user fee—There was no genuine issue of material fact that a marina (GHYC) violated restrictive covenants when it denied access to lot owners until they paid a $200.00 annual user fee. Permitting GHYC to collect this user fee would defeat the purpose of a provision in the restrictions explicitly limiting the maximum amount of maintenance costs to be contributed by the lot owners. **Warrender v. Gull Harbor Yacht Club, Inc., 520.**

Restrictive covenants—marina—The trial court properly concluded that a marina (GHYC) was subject to restrictive covenants. The fact that the GHYA parcel was conveyed many years after the residential parcels did not alter the fact that the marina was included as part of the recorded map of that portion of the covenants specifically governing the use of the marina by lot owners. **Warrender v. Gull Harbor Yacht Club, Inc., 520.**

SEARCH AND SEIZURE—Continued

motion to suppress the evidence of the firearms that was discovered as a result of a protective sweep of his residence. Deputies had a reasonable suspicion that the residence may have harbored an individual posing a danger to the deputies where defendant took an unusually long time to answer the door at his residence, weapons were known to be inside the residence, and defendant's own actions led him to be arrested in the open doorway. **State v. Dial, 83.**

Traffic stop—tip—cup of beer in parking lot—The trial court erred in an impaired driving prosecution by denying defendant's motion to suppress evidence obtained in a traffic stop where the stop was based on a tip that there was a cup of beer in a vehicle parked at a gas station. A tip must be reliable in its assertion of illegality and, while possession of an open container of alcohol in a public vehicular area was once prohibited, N.C.G.S. § 20-138.7(a) was changed in 2000 to apply the prohibition only to highways or rights-of-way. Any mistake by the officer in his understanding of the law was not reasonable; moreover, the tip lacked sufficient indicia of reliability to provide a reasonable suspicion to stop defendant. **State v. Coleman, 76.**

Vehicular stop—reasonable suspicion—weaving within lane—The trial court erred in a driving while impaired case by denying defendant's motion to suppress evidence seized during the stop of defendant's vehicle. The police officer did not have the reasonable and articulable suspicion necessary to justify the stop of defendant's vehicle based solely on the fact that defendant weaved only once, causing the right side of his tires to cross the dividing line in his direction of travel. **State v. Derbyshire, 670.**

SENTENCING

Aggravating factor—same element supporting involuntary manslaughter charge—The trial court erred in an involuntary manslaughter case by using the aggravating factor under N.C.G.S. § 15A-1340.16(d)(8), knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, to sentence defendant in the aggravated range. The evidence used to support the aggravating factor was the same evidence used to support an element of the charge. The case was remanded for a sentencing hearing. **State v. Bacon, 432.**

Alternative felonies—larceny from the person—larceny of goods worth more than $1,000—The trial court erred by sentencing defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny since they are alternative ways to establish a Class H felony and judgment may only be entered for one larceny. However, either larceny conviction standing alone was sufficient to support defendant's status as an habitual felon. Further, the sentence imposed by the trial court was within the presumptive range for a single Class H felony larceny. **State v. Sheppard, 266.**

Greater sentence after retrial—conviction of more serious offense—The trial court did not err by imposing a higher sentence following a remand where defendant was found guilty of a more serious offense at the second trial. **State v. Wray, 504.**

Habitual felon—not cruel and unusual punishment—Defendant's enhanced sentence as a habitual felon did not constitute cruel and unusual punishment. **State v. Blackwell, 439.**

WORKERS' COMPENSATION—Continued

Failure to prosecute claim—dismissal—The Industrial Commission did not err by dismissing a six-year old workers' compensation claim with prejudice where plaintiffs claimed that the delays were reasonable because he did not have competent medical authority. Plaintiff failed to appear at hearings, failed to obtain competent medical authority, and failed to prosecute his claim. Defendants were prejudiced by spending considerable time and resources in defense of the claim, and there was no sanction short of dismissal that would suffice because defendants were entitled to a resolution of the case. **Lentz v. Phil's Toy Store, 416.**

Jurisdiction of Commission—occupational disease claim—six years old—no medical opinion—The Industrial Commission had jurisdiction over a six-year-old workers' compensation claim where plaintiff contended that his right to bring an occupational disease claim did not begin until he obtained a medical opinion that the disease was work-related. Obtaining the advice of a competent medical professional starts the two-year time frame in which a claim must be brought, but a claimant is not precluded from filing a claim prior to receiving competent medical advice. **Lentz v. Phil's Toy Store, 416.**

Suitable employment—post injury return to work—machine operator—The Industrial Commission did not err in a workers' compensation case by failing to recognize plaintiff's post injury return to work as a machine operator as suitable employment. Plaintiff could not perform all the tasks that the position required. **Church v. Bemis Mfg. Co., 23.**

Total disability—no evidence to apportion disability—The Industrial Commission did not err in a workers' compensation case by finding plaintiff totally disabled as a result of her compensable left shoulder injury. Defendants failed to challenge the Commission's determination that there was no evidence of record upon which to apportion plaintiff's disability. **Church v. Bemis Mfg. Co., 23.**